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**INSPECTOR-GENERAL
OF THE AUSTRALIAN DEFENCE FORCE
AFGHANISTAN INQUIRY REPORT**

**Part 1 – The Inquiry
Part 3 – Operational, organisation and
cultural issues**

Content Warning:

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<https://afghanistaninquiry.defence.gov.au/welfare-support>

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ISSN 2207-6050 (Print)
ISSN 2207-6069 (Online)

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This printed version of the IGADF Afghanistan Inquiry Report includes typographical corrections. It has been redacted for national security, privacy and legal reasons.

Requests and enquiries should be addressed to ig.adf@defence.gov.au or on 1800 688 042.

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INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE

IGADF/ [REDACTED]

General Angus Campbell AO DSC
Chief of the Defence Force
R2-G-CDF Suite
Russell Offices
CANBERRA ACT 2601

Dear General Campbell

IGADF AFGHANISTAN INQUIRY REPORT—TRANSMITTAL LETTER

1. On 6 November I gave you the IGADF Afghanistan Inquiry report in accordance with section 27(3) of the *Inspector-General of the Australian Defence Force Regulation 2016*. This letter finalises the inquiry.
2. In March 2016, when you were Chief of Army, you asked me to inquire into rumours of serious misconduct by Australia's Special Forces in Afghanistan. Some of the rumours potentially disclosed war crimes.
3. I appointed Major General the Honourable Paul Brereton AM RFD – an experienced and senior Army Reserve Infantry Officer and a Judge of the Supreme Court of New South Wales – as an Assistant IGADF and directed him to inquire into these matters. Following planned amendments to IGADF legislation, the then-Chief of the Defence Force directed an IGADF inquiry and the IGADF Afghanistan Inquiry continued on that basis.
4. The inquiry timeframe was originally into incidents rumoured to have occurred between 2006 to 2016. This was later extended by a year to cover the timeframe 2005 to 2016.
5. Major General Brereton is a judicial officer and conducted the inquiry independently in accordance with Division 4A of the IGADF Regulation. As required by that Division, I did not take part in the inquiry.
6. Major General Brereton gave his completed Inquiry Report to me on 29 October 2020. The Report is detailed and comprehensive. It has three parts:
 - a. *Part 1 – The Inquiry* which provides background and context
 - b. *Part 2 – Incidents and issues of interest* which details allegations of wrongdoing and whether they have been substantiated or not, and
 - c. *Part 3 – Strategic, operational, organisational and cultural issues* which considers systemic issues.

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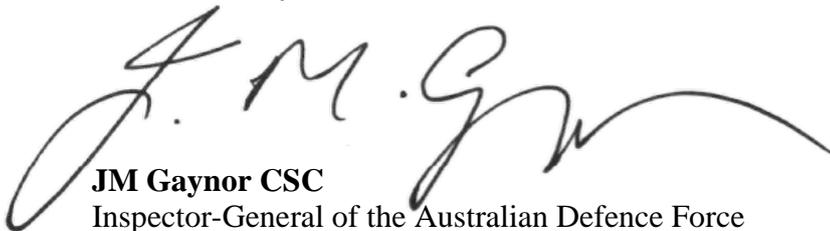
7. The nature and extent of the misconduct allegedly committed by ADF members on operations in Afghanistan is very confronting. The Report discloses allegations of 39 unlawful killings by or involving ADF members. The Report also discloses separate allegations that ADF members cruelly treated persons under their control. None of these alleged crimes was committed during the heat of battle. The alleged victims were non-combatants or no longer combatants.

8. Major General Brereton and his team reviewed over 20 000 documents and 25 000 images. They interviewed 423 witnesses. Where practicable, I have written to witnesses to inform them the inquiry is finished.

9. I wish to record my thanks and acknowledge the courage of the witnesses who assisted the inquiry. I also thank Major General Brereton and his Inquiry team for their efforts in what has been a significant and demanding task. I am also grateful for the support provided to Major General Brereton and the inquiry team by their families.

10. I thank you and the Secretary, and your predecessors, for your support to me and my office during the Inquiry.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J.M. Gaynor', with a long, sweeping horizontal flourish extending to the right.

JM Gaynor CSC
Inspector-General of the Australian Defence Force

10 November 2020

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**INSPECTOR-GENERAL
OF THE AUSTRALIAN DEFENCE FORCE**

REPORT

OF

INQUIRY

UNDER DIVISION 4A OF PART 4

OF THE

INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE

REGULATION 2016

INTO

**QUESTIONS OF UNLAWFUL CONDUCT
CONCERNING THE SPECIAL OPERATIONS TASK
GROUP IN AFGHANISTAN**

Part 1 – The Inquiry

**Part 3 – Operational, organisation and
cultural issues**

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Part 2 – Incidents and Issues of Interest

Volume 1

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OFFICE OF THE INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE

IGADF [REDACTED]

Mr James Gaynor, CSC

Inspector-General of the Australian Defence Force

Dear Mr Gaynor,

On 12 May 2016, under regulation 87(1)(b) of the *Defence (Inquiry) Regulations 1985*, you directed me, as an Assistant IGADF, to inquire into a matter concerning the military justice system raised in a referral from the Chief of Army to you, namely whether there is any substance to persistent rumours of criminal or unlawful conduct by, or concerning, the Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2007 to 2016. You authorised me to make recommendations resulting from my findings.

On 17 January 2017, following receipt by you of a direction dated 14 December 2016 from the Chief of the Defence Force to inquire into a matter concerning the Defence Force, namely whether there is any substance to persistent rumours of criminal or unlawful conduct by, or concerning, the SOTG deployments in Afghanistan during the period 2007 to 2016, and under s 10 of the *Inspector General of the Australian Defence Force Regulation 2016* (the IGADF Regulation), you directed me to assist you to inquire into that matter.

On 21 February 2017, you varied the terms of that direction so that the subject matter of the inquiry extends to SOTG deployments in Afghanistan during the period 2006 to 2016.

Since 13 October 2018, I have been conducting the inquiry under Division 4A of Part 4 of the IGADF Regulation, as an Assistant IGADF who is a judicial officer.

Having regard to the nature of the Inquiry contemplated by the Inquiry Directions, I am satisfied, for the purposes of s 28F(1)(a) of the Regulation that 'all information relevant to the inquiry that is practicable to obtain has been obtained'.

I therefore have the honour of presenting my report about the Inquiry, including my findings and recommendations, as contemplated by s 28F, for provision by you to the Chief of the Defence Force in conformity with s 28G(1) of the IGADF Regulation.

The Report is in three parts.

Part One provides background and context. The unclassified introduction and executive summary is intended to be capable of immediate public release, should the Chief of the Defence Force wish to do so. However, its annexures contain material the publication of which at this stage could compromise potential criminal proceedings, and for that reason ought not be publicly released until any such proceedings are finalised. Although the remainder of Part One is presently classified 'PROTECTED', much of it (other than the chapter dealing with the rules of engagement) could be declassified, and publicly released.

Part Two, in six volumes, is the main body of the Report, and examines the various incidents and issues which have been the subject of inquiry. It contains material the publication of which at this stage could compromise potential criminal proceedings, as well as security

classified information, and for that reason ought not be publicly released, at least until any such proceedings are finalised.

Part Three considers more systemic issues. It is presently classified 'PROTECTED'.

Because of the risk of compromise to potential criminal proceedings, and to protect the identity of witnesses, the Report is also subject to and accompanied by a non-disclosure direction under s 21(1) of the IGADF Regulation, prohibiting the public disclosure of the names or identifying information of those who have given evidence or information to the Inquiry, and of persons named in its findings and recommendations.

As you know, in order to ensure the independence of an inquiry by an Assistant IGADF who is a judicial officer, s 28G(2) has the effect that I may, if I think it appropriate to do so, inform various persons of my findings, and give them my report; and s 28H provides that if I do so I may, following consultation with the Chief of the Defence Force, publicly release all or part of the report (including a redacted version of the report).

You have informed me that you intend to notify persons affected by the Inquiry of my findings insofar as they are relevant to them. In those circumstances, and knowing that you will transmit my report to the Chief of the Defence Force, I do not presently intend to exercise any of those powers, although you will understand that, consistently with the independence which those provisions are intended to assure, I must reserve my right to do so.

Thank you for your support in the conduct of this unique inquiry. I have been given all the resources I have requested, and I do not believe that additional resources would have enhanced the quality of the result, nor shortened the timeframe: as the Report explains, the time taken has chiefly been a result of the need to create an environment in which some members of a closed and compartmentalised community have become willing to speak honestly to the Inquiry.

I would also like to record my appreciation of the understanding of the Chief Justice of New South Wales, and the President of the Court of Appeal, whose support has enabled me to devote much more time than was ever originally anticipated to this undertaking.

Finally, I have had the immense privilege of being supported by a diverse and dedicated team. They are identified in the staff list. Their work on a difficult task, which would inevitably be unpopular in some circles, has been in the best traditions of the Australian Defence Force.

Yours sincerely



The Hon PLG Brereton, AM, RFD

Major General

Assistant Inspector-General of the Australian Defence Force

29 October 2020



FINAL INQUIRY REPORT OCTOBER 2020
NON-PUBLICATION DIRECTION

References:

- A. *Defence Act 1903* (Cth), s 110C(1)(f).
- B. *Inspector General of the Australian Defence Force Regulation 2016* (Cth), s 21(1), s 28E and s 28F.
- C. Final Inquiry Report under Division 4A of Part 4 of the IGADF Regulation into Questions of Unlawful Conduct concerning the Special Operations Task Group in Afghanistan.

Introduction

1. The Chief of the Defence Force has, under reference A, directed the Inspector General of the Australian Defence Force ('the Inspector General ADF') to inquire into a matter concerning the Defence Force, namely whether there is any substance to rumours of criminal or unlawful conduct by or concerning Australian Defence Force Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2005 to 2016.
2. Reference B provides (by s 21(1)) that if the Inspector General ADF is satisfied that it is necessary to do so in the interests of the defence of the Commonwealth, or of fairness to a person who the Inspector General ADF considers may be affected by an inquiry, the Inspector General ADF may give a direction restricting the disclosure of information contained in oral evidence given during the inquiry, all or part of any document received during the course of the inquiry; and information contained in a report about the inquiry that is given to a person under section 27 (which, by s 27(1)(a)(i) includes a report given by an Assistant IGADF to the Inspector General ADF under s 28F).
3. A person commits an offence if the person contravenes such a direction, for which the applicable penalty is 10 penalty units.
4. I have been directed to conduct the Inquiry. Division 4A of the *Inspector-General of the Australian Defence Force Regulation 2016* ('the IGADF Regulation') applies to me as a judicial officer within the meaning of that Regulation, so that I may exercise the powers of the Inspector General ADF under s 21(1) of the Regulation referred in paragraph 2 above (see s 28E(a) of the Regulation).
5. Reference C is the Report of the Inquiry which I have now provided to the Inspector General ADF under and in compliance with s 28F of the Regulation ('the Report').

Direction

6. I am satisfied that it is in the interests of the defence of the Commonwealth, and of fairness to persons who may be affected by the Inquiry, to give the following direction restricting disclosure of information contained in the Report, within the meaning of s 21.

7. **I direct that there is to be no public disclosure of the names of, or anything which would tend to identify:**

- a. any person who has given evidence or information to the Inquiry who is referred to in Parts 2 or 3 of Reference C;
- b. any person mentioned in any finding or recommendation contained in the Report.



P. Brereton, AM, RFD
Major General
Assistant IGADF

29 October 2020

INQUIRY STAFF

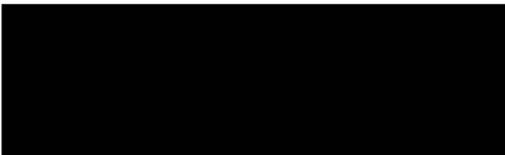
Inquiry Head – Assistant Inspector-General of the Australian Defence Force

Major General the Honourable Paul Brereton, AM, RFD

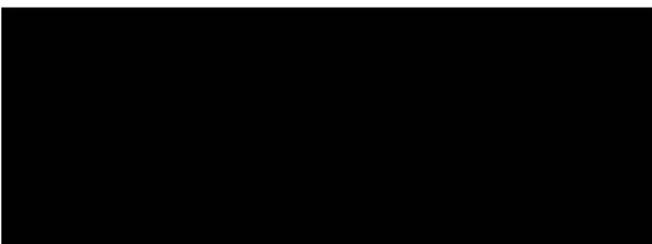
Inquiry Staff – Assistants Inspector-General of the Australian Defence Force



Inquiry Support Staff



Witness Liaison Staff



An annotated map of Uruzgan and surrounding provinces has been removed from this page for legal reasons

GLOSSARY OF ACRONYMS AND TERMS

The following acronyms, terms, expressions, and abbreviations are used either in this Report or in its annexures.

AAR	After action review
AC	Afghan civilian
A/C	Aircraft
ACM	Anti-coalition militia
ADF	Australian Defence Force
ADFS	ADF Investigative Service
AFG	Afghanistan
AFP	Australian Federal Police
AFS	Aerial fire support
AGO	Australian Geospatial-Intelligence Organisation
AIHRC	Afghan Independent Human Rights Commission
ALP	Afghan Local Police
Alpha	TP COMD
AM	Afghan male
AMC	Air Mission Commander
AME	Aero medical evacuation
ANA	Afghan National Army
ANDSF	Afghan National Defense and Security Forces
ANP	Afghan National Police
ANSF	Afghan National Security Force
AO	Area of operations
APU	Afghan partner unit
AR	Action review
AS	Australia or Australian
ASD	Australian Signals Directorate
ASF	Afghan Security Force
AT	Attack team: A combination of attack and/or scout RW A/C and FW CAS A/C operating together to locate and attack high priority targets and other targets of opportunity. (In AFG, usually 2 x AH64)
AWM	Australian War Memorial
AWT	Air weapons team
BDA	Battle damage assessment: The assessment of effects resulting from the application of military action, either lethal or nonlethal, against a military objective.
BDL	Bed down location
BIP	Blown in place
BN	Battalion
BPT	Be prepared to
Bravo	TP SGT
BSHO	Battlespace handover
BTW	Behind the wire: Troops and/or materiel located within the protective cordon of an established AS or CF base.
C2	Command and control: The process and means for the exercise of authority over, and lawful direction of, assigned forces by a designated commander.

C/S	Call sign: Any combination of characters or pronounceable words, which identifies a communications facility, a command, an authority, an activity, or a unit.
C & S	Cordon and search: In land operations, a security activity conducted to capture persons or seize things within a defined search area, consisting of an inner and an outer cordon, where the inner cordon contains the search area and the outer cordon screens or guards the inner cordon and the search force from external interference.
CA	Chief of Army
CAOC	Combined Air Operations Centre
CAS	Close air support: Air action by FW and/or RW A/C against hostile targets that are in close proximity to friendly forces and that requires detailed integration of each air mission with the fire and movement of those forces.
CASEVAC	Casualty evacuation
CCA	Close combat attack
CCP	Casualty collection point
CDE	Collateral damage estimation: The holistic process of determining the potential for collateral damage resulting from target engagement.
CDF	Chief of the Defence Force
CDO	Commando
CF	Coalition Force
Chalk	A load of troops and/or equipment embarked on one aircraft.
CHOPS	Chief of Operations
CIVCAS	Civilian casualty
CJOPS	Chief of Joint Operations
CJTF	Commander Joint Task Force
CO	Commanding Officer
COI (or Col)	Compound of interest
COIN	Counter insurgency: Those military, paramilitary, political, economic, psychological and civic actions taken to defeat insurgency.
COMD	Commander
COMISAF	Commander International Security Assistance Force
CONEX	Container used for training
CONOPS	Concept of operations: A clear and concise statement of the line of action chosen by a commander to accomplish the mission.
COY	Company
CP	Check point or control point
CQB	Close quarter battle: Techniques and procedures using armed force to engage a target in confined areas, usually at a range less than 25m.
CTU	Combined Team-Uruzgan
DA	Damage assessment: The determination of the effect of attacks on targets.
DA	Direct action – a short duration strike or other small-scale offensive by SF forces or special operations-capable units to seize, destroy, capture, recover, or inflict damage to achieve specific, well-defined and often time-sensitive results
DAGR	Defence advanced GPS receiver
Dasht	Generic term for any desert area within Afghanistan
DDO	Deliberate detention operation
DF	Direct fire: Fire directed at a target which is visible to the aimer.

DFDA	Defence Force Discipline Act 1982
Dishdash	A traditional form of men's clothing in Afghanistan.
DMT	Detainee Management Team
DOCEX	Document exploitation
DOW	Died of wounds
DPH	Direct participant in hostilities
Drake shooting	Weapons fire directed IVO an enemy location and without an aimed target, IOT suppress incoming fire.
DST	Deployment Support Team
DT	Dynamic targeting: The prosecution of targets identified too late, or not selected for action in time to be included in deliberate targeting – involves the coordinated application of strike assets fed by all-source intelligence to prosecute TST from a FCE.
DVA	Department of Veterans Affairs
ECCM	Electronic counter counter measures
ECH	Enhanced combat helmet
ECM	Electronic counter measures
EF	Enemy force or enemy fighter
EHAT	Explosive hazard awareness training
EKIA	Enemy killed in action
ENGR	Engineer
EOD	Explosive ordnance disposal
EOF	Escalation of force
EORD	Explosive ordnance
EvBO	Evidence-based operations: A shaping and/or targeting system based on the application of legal powers rather than lethal force.
EW	Electronic warfare
EWIA	Enemy wounded in action
EWS	Early warning system
FAM	Fighting age male
FATC	Fusion and targeting cell
FB	Fire base
FCE	Forward command element
FE-A	Force Element Alpha (SASR based)
FE-B	Force Element Bravo (CDO Regt based)
FEXT	Field exploitation team
FLOT	Forward line of own troops – A line which indicates the most forward positions of friendly forces in a military operation at a specific time.
FMP	Full mission profile: A document which defines all phases of the mission, including preliminary actions and preparation.
FOA	Freedom of action
FOB	Forward operating base
FOC	Full operational capability: The realisation of the capability state that ensures a capability system can be employed operationally.
FOM	Freedom of movement (or manoeuvre)
FMV	Full motion video
FUOPS	Future operations
GAF	Ground assault force
GBU	Guided Bomb Units
GFC	Ground force commander

GIRoA	Government of the Islamic Republic of Afghanistan
GPS	Global positioning system
GR	Grid reference
HA	Humanitarian assistance: Goods and services provided to meet the immediate needs of conflict-affected communities.
HAF	Helicopter assault force
HAZ	High activity zone
HOT	Helicopter(s) over target
HOTO	Handover-takeover: The formal process of handing command, leadership or other role/responsibility/duty from the departing incumbent to their successor.
HQ	Headquarters
HUMINT	Human Intelligence (source): A category of intelligence derived from information collected and provided by human sources.
HVT	High value target
IAW	In accordance with
ICOM	Integrated communications (a type of personal radio communication device)
ICRC	International Committee of the Red Cross
IDF	Indirect fire: Fire delivered at a target which cannot be seen by the aimer.
IED	Improvised explosive device
IGADF	Inspector-General of the Australian Defence Force
IHAT	Iraq Historic Allegations Team
IIR	Initial incident report
IMF	ISAF Military Forces
INS	Insurgent
INTREP	Intelligence report
IO	Inquiry Officer
IO	Information operations: The operational level planning and execution of integrated, coordinated and synchronised kinetic and non-kinetic actions against the capability, will and understanding of target systems and/or target audiences, particularly decision-making, while protecting our own.
IOI	Inquiry Officer Inquiry
IOT	In order to
IR	Incident report
IR	Initial reconnaissance
ISA	Initial screening area
ISAF	International Security Assistance Force
ISO	In support of
IVO	In vicinity of
JIAT	Joint incident assessment team
JOC	Joint Operations Command
JPEL	Joint Prioritised Effects List
JTAC	Joint Terminal Attack Controller
K/C	Kill/Capture
KIA	Killed in action
Kilo	TP Medic
KLE	Key leadership engagement (meeting with elders after raids)

LEGAD	Legal advisor
LEGALO	Legal Officer
Line of march	The sequence of individuals/patrols/sub-units and/or coalition forces while moving towards an objective.
LN	Local national
LNU	Last name unknown
LOAC	Law of Armed Conflict
LOC	Line of communication
LOE	Line of effort
LOO	Line of operation: A line linking decisive points to allow sequential progression towards an operational objective or the desired end state.
LOS	Line of sight
LSO	Low signature operation
LUP	Lying up point
MAP	Military appreciation process: A decision-making and planning tool applicable at all levels that can be used by a commander or at a higher level by a commander and their staff.
MBITR	Multi band inter/intra team radio
MEAO	Middle East area of operations
MEDEVAC	Medical evacuation
MG	Machine gun
MG	Medal of Gallantry
MINDEF	Minister for Defence
MNB-TK	Multinational Base - Tarin Kot
MO	Medical Officer
MOAG	Member of organised armed group
MOE	Measures of effectiveness: A criterion used to assess changes in system behaviour, capability, or operational environment that is tied to measuring the attainment of an end state, achievement of an objective or creation of an effect.
MP	Military Police
MPTL	Master Prioritised Target List
MRE	Mission rehearsal exercise
MRTF	Mentoring and Reconstruction Task Force
MSC	Military Strategic Commitments
MST	Mission specific training
MST	Manoeuvre support team
MUP	Marry up point/meeting up point
MWD	Military working dog
NATO	North Atlantic Treaty Organisation
NDS	National Directorate of Security
NFE	Night fighting equipment
NFI	No further information
NSTR	Nothing significant to report
NVG	Night vision goggles
NZDF	New Zealand Defence Force
OA	Operational analysis
OAS	Offensive air support
OBJ (or Obj)	Objective: A clearly defined and attainable goal for a military operation, for example seizing a terrain feature, neutralising an

	adversary's force or capability or achieving some other desired outcome that is essential to a commander's plan and towards which the operation is directed.
OC	Officer Commanding
OET	Operations evaluation team
OFOF	Orders for opening fire: A simple and unambiguous set of directions extracted from the ROE for ADF personnel on operations that are only applicable to small arms or other personal weapons.
OMD	Operational manning document: A document created for an activity detailing the requirements of all positions being created to conduct that activity and the details of all personnel filling those positions.
OMLT	Operational Mentor and Liaison Team
OOA	Out of area
OP	Observation post: A position from which military observations are made, or fire directed and adjusted, and which possesses appropriate communications. May be airborne.
OP	Operation: A series of tactical actions with a common unifying purpose, planned and conducted to achieve a strategic or campaign end state or objective within a given time and geographical area.
opcon	Operational control: The authority delegated to a commander to: <ul style="list-style-type: none"> a. Direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time or location; and b. Deploy units concerned, and to retain or assign tacon of those units It does not include authority to assign separate employment of components of the units concerned. It does not, of itself, include administrative or logistic control.
OPSO	Operations Officer
OPSUM	Operation summary
ORBAT	Order of battle: The identification, strength, command structure, and disposition of the personnel, units, and equipment of any military force.
OSE	Offensive support element
OSE	Operations support element
OTP-ICC	Office of the Prosecutor, International Criminal Court
OWP	Overwatch position
PAR	Post activity report
PC	Patrol Commander
PCD	Personal communications device
PCO	Public call office(s) – usually enabled via SATCOM, a communication system providing multiple handsets for public communications access (such installations were located in strategic INS strongholds to facilitate INS communications networks).
PH	Phase: A definitive stage of an operation or campaign during which a large portion of the forces and capabilities are involved in similar or mutually supporting activities for a common purpose.
PID	Positively identified
PMADF	Provost Marshal-ADF
PMV	Protected military vehicle
PoA	President of Afghanistan

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22

POI	Person of interest
POI	Point of impact
POO	Point of origin: The beginning point of a deployment, redeployment, or movement where forces or materiel are located.
POR	Post operations report
PPE	Personal protective equipment
PPRC	Provincial Police Response Company
PRC-U	Provincial Response Company-Uruzgan
PRT	Provincial Reconstruction Team
PSD	Protective security detachment
Ptl	Patrol: A detachment of ground, sea, or air forces sent out for the purpose of gathering information or carrying out a destructive, harassing, mopping up, or security mission.
PUC	Person under control or capture
QA	Quick Assessment
QAO	Quick Assessment Officer
QRF	Quick reaction force
R (or Rot)	Rotation
RAP	Regimental aid post
REGT	Regiment
RFI	Request for information
RFN	Rifleman
RIF	Reconnaissance in force
RIP	Relief in place
RMO	Regimental Medical Officer
ROA	Record of attainment
ROC	Record of conversation
ROCL	Relief out of country leave
ROE	Rules of engagement: CDF Directives issued to the ADF, in consultation with the Australian Government, which regulate the use of force and activities connected to the use of force. The document by which the CDF promulgates ROE is a ROE Authorisation.
ROI	Record of interview
ROZ	Restricted operating zone (usually in reference to airspace restrictions)
RPG	Rocket propelled grenade
RSM	Regimental Sergeant Major
RSO	Reception, Staging and Onforwarding
RSO&I	Reception, staging, onward movement and integration
RTF	Reconstruction Task Force
RW	Rotary wing
SAF	Small arms fire
SALTA	An abbreviated reporting format: S <u>i</u> tuation – enemy A <u>a</u> ction – enemy L <u>o</u> cation – in grid reference T <u>i</u> me – in Zulu A <u>a</u> ction – by friendly forces
SASR	Special Air Service Regiment
SATCOM	Satellite communications
SERCAT	Service category

OFFICIAL
(redacted for security, privacy and legal reasons)

SF	Special Forces
Shura	Meeting, usually with tribal/village elders
SI	Serious injury
SIGINT	Signals Intelligence: Intelligence derived from exploitation of the electromagnetic spectrum, comprising communications intelligence, electronic intelligence, and foreign instrumentation signals intelligence.
SITREP	Situation report
SME	Subject matter expert
SOCAUST	Special Operations Commander Australia
SOCCE	Special Operations Command and Control Element (aka SOCC)
SOCOMD	Special Operations Command
SOER	Special Operations Engineer Regiment
SOF	Special Operations Forces
SOHQ	Special Operations Headquarters
SOP	Standard operating procedure: Codified common practice based on collective experience which provides guidance without being prescriptive. Note: In AS usage SOP are used for guidance whereas NATO and US Joint use SOP which are prescriptive.
sortie	A body of troops making an attack; the flying of military A/C on a mission
SOTF	Special Operations Task Force
SOTF-SE	Special Operations Task Force–South East
SOTG	Special Operations Task Group
SPR	Special purpose reconnaissance
SQN	Squadron
Squirter	Insurgent runner - enemy leaving a target
SR	Special reconnaissance: Reconnaissance and surveillance actions conducted as a special operation in hostile, denied, or politically sensitive environments to collect or verify information of strategic or operational significance, employing military capabilities not normally found in conventional forces.
SR	Surveillance/Reconnaissance
SSE	Sensitive site exploitation
SSM	Squadron Sergeant Major
Storyboard	A concise one-page summary of a mission - usually including maps/graphics, the outcome, and any incidents of note.
tacon	Tactical control: The detailed and, usually, local direction and control of movements or manoeuvres necessary to accomplish missions or tasks assigned.
TAI	Target area of interest: A geographic point or area where key adversary capabilities are vulnerable to targeting by friendly forces.
TAC HQ	Tactical headquarters
TASKORD	Task order
TB	Taliban
TCAC	Task force command approved CONOPS
TEA	Target engagement authority
Terp	Interpreter
TF	Task Force
TF-U	Task Force-Uruzgan
TF 66	Alternative designation of SOTG, also TG633.11

TG	Task Group: The second highest level in a task organisation, a TG is a grouping of units under one commander subordinate to the TF Commander, formed for the purpose of carrying out specific functions.
tgt	Target
Throwdown	Weapon, communication device, or electronic evidence to deliberately place at the scene of an incident to support a narrative that the incident was justified and was within ROE and the LOAC. The use of a throwdown implies intent to deceive.
TIC	Troops in contact
TK	Tarin Kowt
TP	Troop
TPS	Tactical payment scheme
TQ	Tactical questioning: Basic questioning of a captured person conducted by the capturing unit. It is confined to gaining information of an immediate tactical value to the unit commander from captured persons who are already cooperative.
TROI	Transcript record of interview
TSE	Tactical site exploitation
TST	Time sensitive targeting
TTPs	Tactics, techniques and procedures
UNAMA	United Nations Assistance Mission Afghanistan
UO	Unconventional Operations
URZ	Uruzgan Province
USP	Universal self-loading pistol – generally used to refer to the magazine for the Heckler and Koch 9mm universal self-loading pistol.
UXO	Unexploded ordnance
VCP	Vehicle check point
VDOP	Vehicle drop off point
VP	Vulnerable point: A location or specified point susceptible to the placement of a mine, booby trap and/or IED by an adversary, enemy or hostile force.
VR	Visual reconnaissance: Reconnaissance conducted through direct observation by troops.
VRI	Very reliable intelligence
VSI	Very serious injury
VSP	Village Stability Platform
VSSA	Village Stability Staging Area - a temporary location used by Special Forces to estab a Village Stability Platform (VSP) to enhance village security, development and governance.
VVCS	Veterans and Veterans Families Counselling Service
WAK	Wakunish – SF QRF, part of the NDS and partner force to FE
WIA	Wounded in action
wpn	Weapon
WRA	Weapons release authority
W/D	Wheels down (A/C has landed)
W/U	Wheels up (A/C has departed)
XO	Executive Officer

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Chapter 1.01

INTRODUCTION AND EXECUTIVE SUMMARY

Introduction

1. Of all the armed conflicts in which Australia has been involved, the war in Afghanistan was the longest. The Special Forces component of Operation SLIPPER – the Australian Defence Force’s contribution to the North Atlantic Treaty Organisation’s International Security Assistance Force – was the Special Operations Task Group, principally drawn from the Special Air Service Regiment, which provided Force Element Alpha; 2nd Commando Regiment,¹ which provided Force Element Bravo; 1st Commando Regiment, which provided Force Element Charlie for some winter rotations and reinforcements for Force Element Bravo; and the Special Operations Engineer Regiment, which provided Force Element Echo.² Overwhelmingly, they performed skilfully, effectively and courageously. Because of their role, they formed a disproportionately high proportion of Australian Defence Force members killed or wounded in action in Afghanistan, and there is a long tail of consequential mental health issues which continue to emerge.

2. After Operation SLIPPER concluded in 2014, a number of issues emerged in Special Operations Command, including rumours that war crimes had been committed by some members of the Special Operations Task Group in Afghanistan. Independently, the then Special Operations Commander Australia commissioned a cultural review of the Command by a sociologist, to whom some insiders related those rumours, while saying that they had not personally witnessed anything. The Special Operations Commander Australia took his concerns, and the cultural review, to the then Chief of Army, now Chief of the Defence Force.

3. On 30 March 2016, Chief of Army wrote to the Inspector-General of the Australian Defence Force, requesting that the Inspector-General of the Australian Defence Force inquire into serious concerns regarding Special Operations Command, which were summarised as ‘unsubstantiated stories’ of possible crimes (illegal killings and inhumane and unlawful treatment of detainees) over a lengthy period of time in the course of the Special Operations Task Group deployments in Afghanistan; the cultural normalisation of deviance from professional standards within Special Operations Command, including intentional inaccuracy in operational reporting related to possible crimes; a culture of silence within Special Operations Command; the deliberate undermining, isolation and removal from Special Operations Command units of some individuals who tried to address this rumoured conduct and culture; and a systemic failure, including of commanders and legal officers at multiple levels within Special Operations Command, to report or investigate the stories as required by Defence policies. Chief of Army wrote that he believed that an Inspector-General of the Australian Defence Force ‘scoping inquiry’ would be the best means by which to gather and assess the information that is available, before determining the options for further action. He suggested that the normal course of suspending an inquiry, in part or whole, to refer any evidence of a criminal or disciplinary offence for Australian Federal Police or Australian Defence

¹ Formerly, 4th Battalion, the Royal Australian Regiment (Commando).

² Formerly, Incident Response Regiment.

Force Investigative Service investigation, might need to be foregone in order to break down the culture of silence.

4. The Inspector-General of the Australian Defence Force is an independent statutory office holder with powers similar to those of a Royal Commission. The Inspector-General of the Australian Defence Force appointed an Army Reserve Major-General, who is also a serving judge of the Supreme Court of New South Wales, to conduct an independent inquiry. Although the precise legal basis for the Inquiry has evolved with amendments to the enabling legislation, ultimately the Inquiry has been conducted under Division 4A of Part 4 of the *Inspector-General of the Australian Defence Force Regulation 2016*, that is to say an inquiry by an Assistant Inspector-General of the Australian Defence Force who is a judicial officer, which attracts additional measures to ensure the independence of the Inquiry.

5. The Inquiry Directions, which serve as its terms of reference, are at Annex A to this Chapter. Fundamentally, the task of the Inquiry was to ascertain whether there was substance to unspecified rumours and allegations of criminal, unlawful or inappropriate conduct, including possible breaches of the Law of Armed Conflict, by or involving elements of the Special Operations Task Group in Afghanistan over the period 2005 to 2016. The purpose was to inform options for further action. So it is the beginning of a process that in any individual case may or may not lead to a criminal investigation by the Australian Federal Police, a prosecution and a conviction following trial by jury, or to administrative action against serving Australian Defence Force members.

6. The short and sad answer to that question is that there is substance to those rumours. Because of the nature of this Inquiry, which is not a criminal trial, it cannot and does not find guilt in any individual case. In conformity with legal principle, the practices of commissions of inquiry, and the Inquiry Directions, its findings in any individual case are limited to whether there is 'credible information' of breaches of Law of Armed Conflict ('war crimes'). However, although in individual cases the Inquiry's findings are limited in that way, and although in any individual case it may well be that in a forum where different standards of proof and rules of evidence apply the matter may not be proved beyond reasonable doubt, when what the Inquiry has found is taken collectively, the answer to the question 'is there substance to rumours of war crimes by elements of the Special Operations Task Group' must sadly be 'yes, there is'.

Inquiry Report

7. The Inquiry's Report sets out the Inquiry's findings and recommendations, and the evidence and reasoning on which they are based, in conformity with the governing legislation, the Inquiry Directions, and relevant legal principles. The Report is in three parts.

8. Part One provides background and context. It explains the genesis of the Inquiry, and why it is important that it was conducted; the conduct of the Inquiry; the relevant legal framework and issues; and the rationale which the Inquiry has applied in determining what recommendations to make. It also explains the applicable Law of Armed Conflict and, in general terms, rules of engagement; the historical record of war crimes in Australian history; and the experience of other nations with investigations and inquiries of war crimes in Afghanistan.

9. Part Two (Volumes 1 to 6) is the main body of the Report. It commences with an explanation of the limited role in a scoping inquiry of this kind of the relative credibility of witnesses, and includes for that limited purpose a review of the credibility of certain key witnesses, and of submissions made

by some potentially affected persons relevant to credibility (Chapter 2.01). Chapters 2.02 to 2.58 examine in detail 57 incidents and issues of interest, setting out the relevant evidence, and the Inquiry's findings and recommendations in respect of each of them. To facilitate the separation and segregation of issues if required for future purposes, these chapters are designed to be able to be read on a stand-alone basis. For that reason, where the same individuals or elements are involved in multiple incidents, there is a degree of repetition and duplication in some chapters. Chapter 2.59 deals more briefly with another 12 incidents, inquiry into which was discontinued at a relatively early stage, because it soon appeared that there was insufficient substance to warrant further consideration. Chapter 2.60 deals with a further 10 incidents and issues which remain open, usually because they have been discovered at a relatively late stage; recommendations are made as to how they should be progressed.

10. Part Three considers more systemic issues: the strategic, operational, organisational and cultural issues which may have contributed to the creation of an environment in which this conduct could take place; why the mechanisms of the Australian Defence Force for inquiries and oversight failed to detect it; and the responsibility of commanders.

11. This unclassified introduction and executive summary is intended to be capable of immediate public release. However, its annexures, and other chapters of the Report – particularly those in Part Two – contain material the publication of which at this stage could compromise potential criminal proceedings, as well as security classified information. For the same reason, and to protect the identity of witnesses, the Report is also subject to a non-disclosure direction, prohibiting the public disclosure of the names or identifying information of those who have given evidence or information to the Inquiry, and of persons named in its findings and recommendations.

What the Inquiry has found

12. The Law of Armed Conflict and International Humanitarian Law prohibit as war crimes the murder and cruel treatment of non-combatants and persons who are *hors-de-combat* (that is, out-of-the fight because they have been seriously wounded, or have surrendered or been captured and are prisoners or 'persons under control'), in a non-international armed conflict, which the war in Afghanistan was. Those binding international law obligations are implemented in Australian criminal law and they applied to all Australian Defence Force members on Operation SLIPPER. Australian Defence Force members were and are extensively trained on this subject, and the Inquiry did not encounter a single witness who claimed to be under any misunderstanding as to what was prohibited. Uniformly, everyone understood that it was impermissible to use lethal force against a prisoner (or 'person under control'), or against a non-combatant.

13. The incidents the subject of inquiry, substantiated and unsubstantiated, are identified in the context of the timeline of Operation SLIPPER in the chronology at Annex B to this Chapter. A consolidated list of the Inquiry's findings and recommendations is at Annex C to this Chapter.

14. In 28 incidents the subject of detailed examination (and a further 11 which were discontinued), the Inquiry has found that rumours, allegations or suspicions of a breach of Law of Armed Conflict are **not substantiated**.

15. However, the Inquiry has found that there is **credible information** of 23 incidents in which one or more non-combatants or persons *hors-de-combat* were unlawfully killed by or at the direction of members of the Special Operations Task Group in circumstances which, if accepted by a jury, would

be the war crime of murder, and a further two incidents in which a non-combatant or person *hors-de-combat* was mistreated in circumstances which, if so accepted, would be the war crime of cruel treatment. Some of these incidents involved a single victim, and some multiple victims.

16. These incidents involved:

- a. a total of 39 individuals killed, and a further two cruelly treated; and
- b. a total of 25 current or former Australian Defence Force personnel who were perpetrators, either as principals or accessories, some of them on a single occasion and a few on multiple occasions.

17. None of these are incidents of disputable decisions made under pressure in the heat of battle. The cases in which it has been found that there is credible information of a war crime are ones in which it was or should have been plain that the person killed was a non-combatant, or *hors-de-combat*. While a few of these are cases of Afghan local nationals encountered during an operation who were on no reasonable view participating in hostilities, the vast majority are cases where the persons were killed when hors-de-combat because they had been captured and were persons under control, and as such were protected under international law, breach of which was a crime.

18. The Inquiry also found that there is **credible information** that some members of the Special Operations Task Group carried 'throwdowns' – foreign weapons or equipment, typically though not invariably easily concealable such as pistols, small hand held radios ('ICOMs'), weapon magazines and grenades – to be placed with the bodies of 'enemy killed in action' for the purposes of site exploitation photography, in order to portray that the person killed had been carrying the weapon or other military equipment when engaged and was a legitimate target. This practice probably originated for the less egregious though still dishonest purpose of avoiding scrutiny where a person who was legitimately engaged turned out not to be armed. But it evolved to be used for the purpose of concealing deliberate unlawful killings.

19. In [REDACTED] different Special Operations Task Group rotations, the Inquiry has found that there is credible information that junior soldiers were required by their patrol commanders to shoot a prisoner, in order to achieve the soldier's first kill, in a practice that was known as 'blooding'. This would happen after the target compound had been secured, and local nationals had been secured as 'persons under control'. Typically, the patrol commander would take a person under control and the junior member, who would then be directed to kill the person under control. 'Throwdowns' would be placed with the body, and a 'cover story' was created for the purposes of operational reporting and to deflect scrutiny. This was reinforced with a code of silence.

20. Almost all of the incidents in respect of which the Inquiry has found credible information of a breach of Law of Armed Conflict involve members of Force Element [REDACTED]. They occurred in 2009

[REDACTED] 2010 [REDACTED]

[REDACTED] 2012 [REDACTED]

[REDACTED] 2012 [REDACTED]

[REDACTED] and 2012-2013 [REDACTED].

21. As explained below, under 'What the Inquiry has recommended', the Inquiry has recommended that the Chief of the Defence Force refer 36 matters to the Australian Federal Police for criminal investigation. Those matters relate to 23 incidents and involve a total of 19 individuals.

What these findings mean: 'credible information'

22. The Inquiry Directions permit the Inquiry to make findings as to whether there are substantive accounts or credible information or allegations which, if accepted, could potentially lead to a criminal conviction or disciplinary finding against named persons or identified groups, but prohibit it from concluding that a criminal or disciplinary offence has been committed by any person. Consistently with the terms of reference and legal principles which define the Inquiry's jurisdiction, in respect of potential criminal conduct, the highest the Inquiry's findings rise in respect of potential criminal conduct of an individual is that there is *credible information* that a person has committed a certain identified war crime or disciplinary offence. This is not a finding of guilt, nor a finding (to any standard) that the crime has in fact been committed. A finding that there is 'credible information' of a matter – for example, that a particular person has committed a particular war crime – is not a finding, on balance of probability let alone to a higher standard, that the person has committed that crime. Generally, it is analogous to a finding that there are reasonable grounds for a supposition. That is consistent with the 'scoping' function of the Inquiry, as well as with the terms of paragraph 11 of the Inquiry Directions.

23. There can of course be credible information of a matter warranting further investigation, even if there is also credible information to the contrary. A finding that there is credible information of a matter is not a finding that the matter is proved, to any particular standard. It is entirely consistent with such a finding that ultimately there may not be admissible evidence to prove the matter, beyond reasonable doubt, in a court of law. The Inquiry is not a criminal trial. The Inquiry is not confined to evidence that would be admissible in a court of law, but can inform itself as it sees fit, and has done so, as is appropriate for an inquiry of this nature. Witnesses who have given evidence to the Inquiry under compulsion may not be willing to give it to prosecutorial authorities. Witnesses on whose evidence the Inquiry has relied have, while tested by the Inquiry, not been cross-examined by an opposing party. For all these reasons, as is common experience with commissions of inquiry, it does not follow from a finding in this Report that there is credible information of a war crime, that there will be a prosecution, let alone a conviction.

24. All that said, findings that there is 'credible information' of a war crime have not been lightly reached. Generally, the Inquiry has required eye-witness accounts, corroboration, persuasive circumstantial evidence, and/or strong similar fact evidence, for such a finding. More information about the extent and rigour of the process is provided below, under 'Aspects of the conduct of the Inquiry'.

Individual, command and collective responsibility

25. While it would have been much easier to report that it was poor command and leadership that was primarily to blame for the events disclosed in this Report, that would be a gross distortion. While, as will appear, commanders at troop, squadron and Special Operations Task Group level must bear some responsibility for the events that happened 'on their watch', the criminal behaviour of a few was commenced, committed, continued and concealed at the patrol commander level, that is, at corporal or sergeant level.

26. But for a small number of patrol commanders, and their protégées, it would not have been thought of, it would not have begun, it would not have continued, and it would have been discovered. It is overwhelmingly at that level that responsibility resides. Their motivation cannot be known with certainty, but it appears to include elements of an intention to 'clear' the battlefield of

people believed to be insurgents, regardless of Law of Armed Conflict; to 'blood' new members of the patrol and troop; and to outscore other patrols in the number of enemy killed in action achieved; superimposed on the personal psyche of the relevant patrol commander.

27. Subordinates complied for a number of reasons. *First*, to a junior Special Air Service Regiment trooper, the patrol commander is a 'demigod', and one who can make or break the career of a trooper, who is trained to obey and to implement their superior commander's intent. *Secondly*, to such a trooper, who has invested a great deal in gaining entry into Special Air Service Regiment, the prospect of being characterised as a 'lemon' and not doing what was expected of them was a terrible one, which could jeopardise everything for which they had worked. *Thirdly*, they were in a foreign environment, far from the influence of the norms of ordinary Australian society, where the incident could be compartmentalised as something that happened outside the wire to stay outside the wire. In that context, some individuals who would have believed themselves incapable of such behaviour were influenced to commit egregious crimes. It is clear to the Inquiry that at least some of them have regretted it, and have been struggling with the concomitant moral injury, ever since.

28. The Inquiry has found no evidence that there was knowledge of, or reckless indifference to, the commission of war crimes, on the part of commanders at troop/platoon, squadron/company or Task Group Headquarters level, let alone at higher levels such as Commander Joint Task Force 633, Joint Operations Command, or Australian Defence Headquarters. Nor is the Inquiry of the view that there was any failure at any of those levels to take reasonable and practical steps that would have prevented or detected the commission of war crimes. It is easy now, with the benefit of retrospectivity, to identify steps that could have been taken and things that could have been done. However, in judging the reasonableness of conduct at the time, it needs to be borne in mind that few would have imagined some of our elite soldiers would engage in the conduct that has been described; for that reason there would not have been a significant index of suspicion, rather the first natural response would have been disbelief. Secondly, the detailed superintendence and control of subordinates is inconsistent with the theory of mission command espoused by the Australian Army, whereby subordinates are empowered and entrusted to implement, in their own way, their superior commander's intent. That is all the more so in a Special Forces context where high levels of responsibility and independence are entrusted at relatively low levels, in particular to patrol commanders.

29. Moreover, an accumulation of practices, all of them apparently adopted for sound reasons and none inherently sinister, combined to ensure that troop commanders were not well-positioned – structurally or geographically – to discover anything that the patrol commanders did not want them to know. Information was closely held, within individual patrols. Even within a patrol, not every member would necessarily know of events. For sound tactical reasons, troop commanders were usually located remotely from the target compound, in an overwatch position, and did not have visibility of events on the objective.

30. By late 2012 to 2013 there was, at troop, and possibly up to squadron level, suspicion if not knowledge that throwdowns were carried, but for the purpose of avoiding questions being asked about apparently lawful engagements when it turned out that the person killed was not armed, as distinct from facilitating or concealing deliberate unlawful killings. While dishonest and discreditable, it was understood as a defensive mechanism to avoid questions being asked, rather than an aid for covering up war crimes. The more sinister use of throwdowns to conceal deliberate unlawful killings was not known to commanders.

31. However, the absence of knowledge or even suspicion that war crimes were being committed by some of their subordinates does not relieve commanders of all responsibility, as distinct from criminal responsibility, for the crimes of their subordinates. Commanders indirectly contributed to the criminal behaviour, in a number of ways, but in particular by accepting deviations from professional standards in respect of behaviour, by sanitising or embellishing reporting to avoid attracting questions, and by not challenging or interrogating accounts given by those on the ground.

32. Moreover, Special Operations Task Group troop, squadron and task group Commanders must bear moral command responsibility and accountability for what happened under their command and control. Command responsibility is both a legal and a moral concept. In the narrow sense, command responsibility is a legal doctrine by which commanders may be held legally responsible for the misdeeds of their subordinates. But the concept has a much wider scope. At its core is responsibility for the effects and outcomes delivered by the unit or formation under command. Commanders are both recognised and accountable for what happens 'on their watch', regardless of their personal knowledge, contribution or fault.

33. Commanders set the conditions in which their units may flourish or wither, including the culture which promotes, permits or prohibits certain behaviours. It is clear that there must have been within Special Operations Task Group a culture that at least permitted the behaviours described in this Report. However, that culture was not created or enabled in Special Operations Task Group, let alone by any individual Special Operations Task Group Commanding Officer. Because Special Operations Task Group was a task group drawn from multiple troop contributing units and multiple rotations, each Special Operations Task Group Commanding Officer acquired a mix of personnel with which he had typically had little prior influence or exposure. There was little opportunity for the Commanding Officer of any Special Operations Task Group rotation to create a Special Operations Task Group culture.

34. The position with the individual Force Elements was otherwise: each of the Special Air Service Regiment squadrons, and each of the 2nd Commando Regiment Company Groups, rotated in succession through Special Operations Task Group, many times. It was in their parent units and subunits that the cultures and attitudes that enabled misconduct were bred, and it is with the commanders of the domestic units who enabled that, rather than with the Special Operations Task Group commanders, that greater responsibility rests.

32. The evidence does not reveal a consistent pattern of misbehaviour in 2nd Commando Regiment or any of its sub-units, as it does in at least two Special Air Service Regiment squadrons. It cannot be excluded that that may be attributable to the Inquiry having less success in breaching the code of silence in 2nd Commando Regiment than in Special Air Service Regiment, but on the available evidence the Inquiry would attribute it to the closer resemblance of 2nd Commando Regiment to a conventional unit - in particular that its officers were not sidelined and disempowered, but very much remained in practical command of operations.

33. The position of the Special Air Service Regiment troop commanders calls for some sympathy. Their position was a difficult one. Invariably, they were on their first Special Operations Task Group deployment. They were in an environment in which the non-commissioned officers had achieved ascendancy, just as they had from their role as gatekeepers to Special Air Service Regiment selection, and their extended role when new officers were 'under training' and thus regularly subordinate to them. They were not well-mentored, but were rather left to swim or sink. Those who did try to wrestle back some control were ostracised, and often did not receive the support of

superior officers. In that context, given the arduous selection process and how hard it is to get there in the first place, it is to an extent understandable that some might not be prepared to risk that position at the time to try to stop what was seen as an organisationally routine practice such as throwdowns.

34. A substantial indirect responsibility falls upon those in Special Air Service Regiment who embraced or fostered the 'warrior culture' and the clique of non-commissioned officers who propagated it. Special Forces operators should pride themselves on being model professional soldiers, not on being 'warrior heroes.' Some domestic commanders of Special Air Service Regiment bear significant responsibility for contributing to the environment in which war crimes were committed, most notably those who embraced or fostered the 'warrior culture' and empowered, or did not restrain, the clique of non-commissioned officers who propagated it. That responsibility is to some extent shared by those who, in misconceived loyalty to their Regiment, or their mates, have not been prepared to 'call out' criminal conduct or, even to this day, decline to accept that it occurred in the face of incontrovertible evidence, or seek to offer obscure and unconvincing justifications and mitigations for it.

35. That responsibility and accountability does not extend to higher headquarters, including in particular Headquarters Joint Task Force 633 and Headquarters Joint Operations Command, because they did not have a sufficient degree of command and control to attract the principle of command responsibility, and within the constraints on their authority acted appropriately when relevant information and allegations came to their attention to ascertain the facts. First, Joint Task Force 633 was not positioned, organisationally or geographically, to influence and control Special Operations Task Group operations: its 'national command' function did not include operational command. While those who had operational command are rightly held responsible and accountable for the deeds of their subordinates, regardless of personal fault, the principle that informs that approach is that ultimately they command and control what happens under their command. Without operational command, Joint Task Force 633 did not have the degree of command and control over Special Operations Task Group on which the principle of command responsibility depends. Secondly, commanders and headquarters at Joint Task Force 633, Joint Operations Command and Australian Defence Force Headquarters appear to have responded appropriately and diligently when relevant information and allegations came to their attention, and to have made persistent and genuine endeavours to find the facts through quick assessments, following up with further queries, and inquiry officer inquiries. Their attempts were often frustrated by outright deceit by those who knew the truth, and, not infrequently, misguided resistance to inquiries and investigations by their superiors.

36. Just as commanders are recognised for the achievements of their units, and bear responsibility for their failures, so there is a collective recognition and commensurate responsibility on the part of all the members of a unit: they all share in its triumphs, and they all must share in responsibility for its shortcomings. That is because they are a team, in which each member bears some responsibility for holding the others to the standards and values of the Australian Defence Force and the Australian Army.

37. All that said, it was at the patrol commander level that the criminal behaviour was conceived, committed, continued, and concealed, and overwhelmingly at that level that responsibility resides.

38. The events discovered by this Inquiry occurred within the Australian Defence Force, by members of the Australian Defence Force, under the command of the Australian Defence Force. To

the extent that the protracted and repeated deployment of the relatively small pool of Special Forces personnel to Afghanistan was a contributing factor - and it should be recognised that the vast majority of Special Forces personnel did repeatedly deploy to Afghanistan without resorting to war crimes - it was not a risk to which any government, of any persuasion, was ever alerted. Ministers were briefed that the task was manageable. The responsibility lies in the Australian Defence Force, not with the government of the day.

Inquiries and oversight

39. The Australian Defence Force had in place a system of operational reporting and investigatory mechanisms including quick assessments, Australian Defence Force Investigative Service investigations, and inquiry officer inquiries, designed to provide command oversight and respond to allegations of unlawful conduct. However, these systems failed to detect breaches of Law of Armed Conflict that were identified during the course of the Inquiry. The failure of oversight mechanisms was contributed to by an accumulation of factors.

40. First, commanders trusted their subordinates: including to make responsible and difficult good faith decisions under rules of engagement; and to report accurately. Such trust is an important and inherent feature of command. However, an aura was attached to the operators who went 'outside-the-wire', and whose lives were in jeopardy. There was a perception - encouraged by them and accepted by others - that it was not for those 'inside-the-wire' to question the accounts and explanations provided by those operators. This was reinforced by a culture of secrecy and compartmentalisation in which information was kept and controlled within patrols, and outsiders did not pry into the affairs of other patrols. These matters combined to create a profound reticence to question, let alone challenge, any account given by an operator who was 'on the ground.' As a result, accounts provided by operators were taken at face value, and what might at least in retrospect be considered suspicious circumstances were not scrutinised. Even if suspicions were aroused in some, they were not only in no position to dispute reported facts, but there was a reticence to do so, as it was seen as disloyal to doubt the front line operators who were risking their lives.

41. Secondly, commanders were protective of their subordinates, including in respect of investigations and inquiries. Again, that is an inherent responsibility of command. However, the desire to protect subordinates from what was seen as over-enthusiastic scrutiny fuelled a 'war against higher command', in which reporting was manipulated so that incidents would not attract the interest or scrutiny of higher command. The staff officers did not know that they were concealing unlawful conduct, but they did proactively take steps to portray events in a way which would minimise the likelihood of attracting appropriate command scrutiny. This became so routine that operational reporting had a 'boilerplate' flavour, and was routinely embellished, and sometimes outright fabricated, although the authors of the reports did not necessarily know that to be so, because they were provided with false input. This extended to alternative reporting lines, such as intelligence reporting, which was carefully controlled. It also generated resistance to lawfully authorised investigations and inquiries.

42. Thirdly, there was a presumption, not founded in evidence, to discount local national complaints as insurgent propaganda or motivated by a desire for compensation. This presumption was inconsistent with the counter-insurgency effort, and resulted in a predisposition on the part of quick assessment officers to disbelieve complaints.

43. Fourthly, the liberal interpretation of when a 'squirter' (a local national observed to run from a compound of interest) could be taken to be 'directly participating in hostilities', coupled with an understanding of how to describe an engagement to satisfy reporting expectations, combined to contribute to the creation of a sense of impunity among operators.

44. Fifthly, consciously or unconsciously, quick assessment officers generally approached their task as being to collect evidence to refute a complaint, rather than to present a fair and balanced assessment of the evidence. They did not necessarily seek to question or independently confirm what they were told; and/or consider and weigh conflicting evidence, both external and internal, against what they were told and accepted on trust.

45. Sixthly, inquiry officers did not have the requisite index of suspicion, and lacked some of the forensic skills and experience to conduct a complex inquiry into what were, essentially, allegations of murder. Nonetheless, allowance needs to be made for the difficulty of the task when faced with witnesses who are motivated not to disclose the truth, whether by self-interest or by misplaced loyalty. This Inquiry does not doubt that, even with its much heightened index of suspicion, and an approach in which accounts have been robustly tested by forensic examination, it has not always elicited the truth, and that there are matters about which it has been successfully kept in the dark, if not deceived. However, inquiry officers would have had greater prospects of success if more suspicious, and better trained or experienced in investigatory and forensic techniques.

46. Seventhly, as a result, operational reporting, and the outcomes of quick assessments and inquiry officer inquiries, were accorded a level of confidence by higher command, which they did not in fact deserve.³

47. Many of those themes are founded in attitudes which are, in themselves, commendable: loyalty to the organisation, trust in subordinates, protection of subordinates, and maintenance of operational security. However, they have fostered less desirable features, namely avoidance of scrutiny, and thus accountability. It is critically important that it be understood that not all of these themes are, in themselves, bad or sinister. There are good reasons for many of them. Their importance and benefits should not be overlooked when addressing the problem to which they have contributed.

48. Operation summaries and other reports frequently did not truly and accurately report the facts of engagements, even where they were innocent and lawful, but were routinely embellished, often using 'boilerplate' language, in order proactively to demonstrate apparent compliance with rules of engagement, and to minimise the risk of attracting the interest of higher headquarters. This had upstream and downstream effects: upstream, higher headquarters received a misleading impression of operations, and downstream, operators and patrol commanders knew how to describe an incident in order to satisfy the perceived reporting requirements. This may be a manifestation of a wider propensity to be inclined to report what superior commanders are believed to want to hear. Integrity in reporting is fundamental for sound command decisions and operational oversight. The wider manifestation needs to be addressed in leadership training and ethical training, from the start of a military career and continuing throughout it. Its narrower application needs to

³ Quick assessments and inquiry officer inquiries are administrative inquiry processes, the first as its name suggests quick, and the second more deliberate, designed and intended to ascertain the facts of an incident, in order to inform command about what happened and provide the basis for decision-making by commanders.

be addressed through impressing accountability for integrity in reporting on operations and intelligence staff through duty statements and standing orders.

49. Legal officers contributed to the embellishment of operational reporting, so that it plainly demonstrated apparent compliance with rules of engagement. It is not suggested that this was done with an intention to mislead, as distinct from the expression in legal terms of what the legal officer understood to have happened, or more typically, indirectly, by explaining what needed to be stated in a report to demonstrate rules of engagement compliance.

50. The mandatory use of body-cameras by police in many parts of Australia has proved successful in confirming lawful actions, rebutting false complaints, and exposing misconduct, and is now widely accepted. Privately-owned helmet cameras were enthusiastically used in Afghanistan by some Special Operations Task Group members, which has albeit unintentionally resulted in the exposure of at least one apparent war crime. Use of official helmet cameras by Special Forces operators, perhaps more than any other single measure, would be a powerful assurance of the lawful and appropriate use of force on operations, as well as providing other benefits in terms of information collection, and mitigating the security risk associated with unofficial imagery.

51. While the complexities of coalition warfare, and the need for flexible command and control arrangements, are acknowledged, the devolution of operational command of Special Operations Task Group not only had the potential to result in the national interest and mission being overlooked or subordinated, but deprived national command of effective oversight of Special Operations Task Group operations. What is 'special' about Special Forces is the operations they conduct. If anything, the secretive nature of their operations makes effective oversight by National command all the more important. That they conduct 'special' operations does not mean that they should be excepted from ordinary command and oversight arrangements.

Aspects of the conduct of the Inquiry

52. The Inquiry has been conducted in private, because it relates to operational matters, because protected identities are involved, to protect the reputations of individuals who may be the subject of what turn out to be unsubstantiated rumours, to protect witnesses, and to protect lines of inquiry.

53. Broadly, the Inquiry involved the following four overlapping phases:

- *Familiarisation and socialisation*, in which the Inquiry informed itself about Special Operations Command, Special Operations Task Group and its operations in Afghanistan, and endeavoured to cultivate an environment in which witnesses would be prepared to speak frankly. The Inquiry also liaised with coalition partners in order to understand how similar issues had been dealt with, which informed its approach.
- *Identification of incidents and issues of interest*, in which the Inquiry sought to elicit the rumours in circulation and trace them to sources and specific incidents, through a variety of approaches.
- *Exploration of incidents and issues of interest*, in which the Inquiry used its information and evidence gathering powers to collect and analyse documentary and testimonial evidence.

- *Procedural fairness and finalisation of report*, in which the Inquiry analysed the evidence, contemplated what findings and recommendations might be made, issued procedural fairness notices to potentially affected persons, considered their responses, and finalised its report.

54. In the course of evidence and information gathering:

- 170 Requests for Information were issued (some requesting a single document, but most were far more extensive).
- In excess of 20 000 documents and 25 000 images were sourced and reviewed by the Inquiry.
- The Inquiry conducted in excess of 510 witness interviews, of 423 witnesses (a number of witnesses were interviewed more than once). Interviews ranged in length from less than an hour, to three days.

55. When established, the Inquiry was intentionally not given a specified timeframe in which to report. It was generally understood that it would take some considerable time, first to understand the complex and unique nature of Special Operations Task Group operations in Afghanistan, and then to gain the confidence and trust of members of an organisation that does not readily welcome engagement or scrutiny by outsiders, to the extent that they might be prepared to make disclosures. So it has proved.

56. The Inquiry has encountered enormous challenges in eliciting truthful disclosures in the closed, closely-bonded, and highly compartmentalised Special Forces community, in which loyalty to one's mates, immediate superiors and the unit are regarded as paramount, in which secrecy is at a premium, and in which those who 'leak' are anathema. The Inquiry frequently encountered 'resistance to interrogation' techniques, in which Special Forces operators are trained, deployed against it in the course of interviews, by witnesses who did not want to give a full and frank account.

57. In such an environment, it is hardly surprising that it has taken time, opportunity, and encouragement for the truth to emerge, and that it has not necessarily done so at the first opportunity or interview, or fully. It is often not the first, or even the second, interview at which the story, either full or in-part, emerges; it takes time for trust to be established, and for the discloser's conscience to prevail over any impediments.

Procedural fairness notices

58. The Inquiry provided notice to persons who might potentially be the subject of a specific adverse finding or recommendation that it was considering whether or not to make such potential findings and recommendations. However, the Inquiry did not give a formal notice of potential adverse findings when they were squarely based on admissions made by an apparently co-operative witness, and no adverse recommendation was under contemplation, including in particular where the use and derivative use immunities had the effect of practically precluding criminal or disciplinary action against that witness.

59. Submissions were received in response to most but not all of the notices, and were carefully considered. In a number of cases, potential findings notified were not made, or were modified, as a result of consideration of the whole of the evidence in the light of those submissions.

Witness welfare support

60. It was and is the duty of the Inquiry to inquire into the matters in its terms of reference, without fear or favour, affection or ill-will, so as to uncover the truth. That necessarily required the rigorous and comprehensive collection, evaluation and testing of all available evidence, which sometimes meant that robust examination of witnesses could not be avoided. Given the nature of the Special Forces community, in which the bulk of relevant witnesses reside, this was especially so in this Inquiry. It was also inevitable that, in discharging its duty, the Inquiry had to raise with witnesses events which occurred during their deployments and which may have been traumatic. In that respect, the position is little different from many trials, in which witnesses will have to revisit, and in a sense relive, incidents which have traumatised them.

61. From the outset, the Inquiry was conscious of the potential for its proceedings to have an impact on the mental health and well-being of witnesses, and others who may be affected or involved. It was not, and could not be, the function of the Inquiry to provide direct welfare support to persons who were called before it as witnesses, or were otherwise potentially affected by its proceedings. For the Inquiry to assume that function would have involved an impossible conflict with its duty to inquire impartially and without fear or favour. However, the Inquiry was conscious that many, including both serving personnel and former serving personnel, would not spontaneously or proactively reach out to the relevant sources for assistance, and for that reason, the Inquiry put in place a number of measures to inform witnesses and assist them and other affected persons to access appropriate support. The Inquiry's Witness Welfare Support program was unique for such an inquiry. Its establishment and implementation was the result of the recognition of the potential impact of the Inquiry and its proceedings on the welfare and well-being of current and former Service personnel, and their families, regardless of whether they are informants, witnesses summonsed, or persons potentially affected.

62. The Witness Welfare Support function will transition to Army after conclusion of the Inquiry, in order to ensure that those affected continue to have access to appropriate welfare support.

Use and derivative use immunities

63. Every witness who gave evidence to the Inquiry has the protections and immunities afforded by the Defence Act, s 124(2CA), and the Inspector-General of the Australian Defence Force Regulation, s 31 (prohibition against taking reprisals), s 32 (self-incrimination) and s 33 (protection from liability in civil proceedings). Those protections and immunities include *use* and *derivative use* immunity: under Defence Act s 124(2CA) and the Inspector-General of the Australian Defence Force Regulation s 32(2), any information given or document or thing produced by the witness, and giving the information or producing the document or thing, and any information document or thing obtained as a direct or indirect consequence of giving the information or producing the document or thing, are not admissible in evidence against the individual in any civil or criminal proceedings in any federal court or court of a State or Territory, or proceedings before a Service Tribunal, other than proceedings by way of a prosecution for giving false testimony.

64. The immunities operate in any relevant court or Service Tribunal in which proceedings may be brought, and regulate the admissibility of certain evidence in those proceedings. They do not directly constrain the Inquiry, the Inspector-General of the Australian Defence Force, or for that matter the Chief of the Defence Force, in the use or publication of the Inquiry's findings or evidence before it. However, there is potential for criminal proceedings to be compromised if immunised

evidence informs a prosecution. That is one reason why it is inappropriate for the evidence that has been obtained by the Inquiry to be published at this stage.

65. It is important to observe that the immunities preclude only the admission in evidence in court proceedings of information given to the Inquiry by a witness (and anything obtained as a direct or indirect consequence) *against that witness*. They do not preclude the admission in evidence in court proceedings of information given to the Inquiry by a witness (and anything obtained as a direct or indirect consequence) *against any other person* – including another person who was also an Inquiry witness.

66. The use and derivative use immunities have been of considerable importance and benefit to the Inquiry, as they have enabled witnesses to speak frankly when otherwise interests of self-protection would have inhibited them. Suggestions have been made that the derivative use immunity is too broad and should be modified, as otherwise it may inhibit prosecutions. Those suggestions overlook, first, that the immunities were provided by the legislature as a balance to the dispensation, in the Inspector-General of the Australian Defence Force inquiries, of the privilege against self-incrimination, in the interests of ascertaining the true facts. As the present Solicitor-General of the Commonwealth, Dr Stephen Donaghue QC, wrote in *Royal Commissions and Permanent Commissions of Inquiry*:⁴

[9.6] Legislation that abrogates the privilege against self-incrimination frequently protects witnesses who are compelled to give self-incriminatory evidence from the direct use of that evidence against the. This protection, or evidential immunity, helps maintain the balance between the government's need to abrogate the privilege in order to obtain information on the one hand, and the preservation of the values that underlie the privilege on the other. The existence of statutory evidential immunities is consistent with the suggestion made above that legislatures may abrogate the privilege for reasons other than a desire to obtain self-incriminatory evidence for use in criminal trials, for it suggests that they consider the acquisition of information to be important even while providing that the information cannot be used in subsequent criminal proceedings against the witness. The evidential immunities conferred by commission legislation vary substantially in the type of protection that they provide and in the manner in which that protection is invoked ...

[9.7] When validly claimed, the privilege against self-incrimination at common law enables a witness to refuse to provide evidence. This means not only that the witness's evidence is not available for use against the witness, but also that there are no answers or documents from which any further evidence can be derived for use against the witness ... Of the three main types of statutory evidential immunity, only one exactly reproduces this protection ...

There can be no objection to the abrogation of the privilege when a derivative use immunity has been granted, as such an immunity serves all of the functions that the privilege against self-incrimination is designed to serve. While the absence of the privilege means that witnesses may be compelled to speak, the privilege protects the right of witnesses not to incriminate themselves, not their right to remain silent. Use immunities, on the other hand, provide less extensive protection than the privilege at common law, to some extent allowing the purposes of the privilege to be undermined.

⁴ S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), pp206-207.

67. Secondly, without those immunities, it is unlikely that the culture of silence would have been breached, and that the conduct described in this Report would have been exposed, at least to the extent to which it has.

What the Inquiry has recommended, and why

68. As already mentioned, the Inquiry has recommended that the Chief of the Defence Force refer 36 matters to the Australian Federal Police for criminal investigation. Those matters relate to 23 incidents and involve a total of 19 individuals.

69. In considering whether to recommend referral of a matter for criminal investigation, the Inquiry has adopted as a threshold test the following question: *Is there is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge an identifiable individual with a criminal offence.* The Inquiry has also had some regard to the ultimate prospects of a conviction.

70. Because of the immunities, explained above, to which witnesses who give evidence to the Inquiry are entitled, which preclude the use of a person's evidence to the Inquiry, or anything discovered as a result, in proceedings *against that person*, there are some individuals who have been involved in misconduct who will not be amenable to prosecution. That is the necessary consequence of their having made protected disclosures to the Inquiry, without which the conduct described in this Report would not have been uncovered. Decisions therefore have to be made about which individuals should, and which should not or cannot be prosecuted. Ultimately, those are decisions for prosecuting authorities. However, the Inquiry's recommendations have taken this issue into account. Essentially, this involves prioritising a hierarchy of criminal responsibility, in order that those who bear greatest responsibility should be referred for criminal investigation, and potentially prosecution, in priority to those bearing less responsibility.

71. The Inquiry's approach is that those who have incited, directed, or procured their subordinates to commit war crimes should be referred for criminal investigation, in priority to their subordinates who may have 'pulled the trigger.' This is because in a uniformed, disciplined, armed force those in positions of authority bear special responsibilities, given their rank or command function, because their subordinates would not have become involved but for their instigation of it; and because what happened was entirely under their control, with their subordinates doing what they were directed to do.

72. Additional factors include the objective gravity of the incident (for example, if there are multiple victims); whether the conduct appears to have been premeditated, wanton or gratuitous; and whether the individual concerned is implicated in multiple incidents, particularly if those other incidents may provide tendency evidence.

73. The Inquiry has not recommended referral for criminal investigation where it appears that the use and derivative use immunities to be found in the *Defence Act 1903* and *the Inspector-General of the Australian Defence Force Regulation 2016* would deprive a prosecution of critical admissible evidence.

74. The Inquiry recommends that any criminal investigation and prosecution of a war crime should be undertaken by the Australian Federal Police and the Commonwealth Director of Public Prosecutions, with a view to prosecution in the civilian criminal courts, in trial by jury, rather than as a Service offence in a Service Tribunal.

75. The Inquiry has recommended that consideration be given to administrative action for some serving Australian Defence Force members, where there is credible information of misconduct which either does not meet the threshold for referral for criminal investigation, or is insufficiently grave for referral, but should have some consequence for the member. The administrative action process would require further procedural fairness.

76. Where there is credible information that an identified or identifiable Afghan national has been unlawfully killed, the Inquiry has recommended that Australia should now compensate the family of that person, without awaiting for establishment of criminal liability. This will be an important step in rehabilitating Australia's international reputation, in particular with Afghanistan, and it is simply the right thing to do.

77. Although many members of the Special Operations Task Group demonstrated great courage and commitment, and although it had considerable achievements, what is now known must disentitle the unit as a whole to eligibility for recognition for sustained outstanding service. It has to be said that what this Report discloses is disgraceful and a profound betrayal of the Australian Defence Force's professional standards and expectations. It is not meritorious. The Inquiry has recommended the revocation of the award of the Meritorious Unit Citation, as an effective demonstration of the collective responsibility and accountability of the Special Operations Task Group as a whole for those events.

78. In contrast, the cancellation of an individual award such as a distinguished service award impacts on the status and reputation of the individual concerned, could not be undertaken on a broad-brush collective basis, and would require procedural fairness in each individual case. However, it is difficult to see how any commander at the Special Operations Task Group, Squadron or Troop level, under whose command (or 'on whose watch') any substantiated incident referred to in this Report occurred, could in good conscience retain a distinguished service award in respect of that command. The Inquiry has recommended that distinguished service awards to commanders at troop, squadron and task group level in respect of Special Operations Task Group Rotations ■, ■, ■, ■ and ■ be reviewed. It has also made recommendations concerning some particular individual awards.

79. The Inquiry has made numerous recommendations to address strategic, operational, structural, training and cultural factors that appear to have contributed, although generally indirectly, to the incidents and issues referred to in this Report.

Conclusion - why this matters

80. History teaches that the failure to comprehensively deal with allegations and indicators of breaches of Law of Armed Conflict as they begin to emerge and circulate is corrosive - it gives spurious allegations life, and serious allegations a degree of impunity. The consequences of not addressing such allegations as and when they eventually arise are measured in decades. This Inquiry has been conducted pursuant to Chief of Army's request, and subsequently the Chief of the Defence Force's direction, to the Inspector-General of the Australian Defence Force to do so, and in conformity with Australia's obligation as a State Party to the Rome Statute of the International Criminal Court. By conducting this Inquiry, the Australian Defence Force has taken ownership of its own problem, as the rumours began to emerge.

81. Australia subscribes to, and holds itself out as adhering to, the Law of Armed Conflict, and International Humanitarian Law. When our enemies fail to so adhere, we hold them to account by such standards. In order to maintain our moral integrity and authority as a nation, which in turn gives us international credibility, strategic influence, and sustains our operational and tactical combat power, we must apply at least the same standards to our own military personnel. Moral authority is an element of combat power. If we do not hold ourselves, on the battlefield, to at least to the standards we expect of our adversaries, we deprive ourselves of that moral authority, and that element of our combat power. Painful as it may be for those involved, by conducting this Inquiry, and following the evidence wherever it went, Australia has sought to maintain our moral integrity and authority as a nation by investigating breaches of laws which apply to us and our enemies alike. It also ensures that the only courts current or former Australian Defence Force members may face are those established by the laws of Australia.

82. While the Inquiry is reporting now as it is satisfied under s 28F(1)(a) of the Inspector-General Australian Defence Force Regulation that 'all information relevant to the inquiry that is practicable to obtain has been obtained', the Inquiry does not doubt that it has failed to uncover everything that fell within its terms of reference. The Inquiry also does not doubt that, like some of the contemporaneous inquiries and investigations conducted during the Afghanistan era, there are probably cases in which it has been deceived. Reports, rumours and allegations of war crimes in Afghanistan will continue to emerge, following the release of the Inquiry's findings, and potentially for many years. Partly for that reason, the Inquiry has made recommendations for the establishment of processes to receive and assess such reports, using the Inquiry's evidence and experience. Amongst other things, it is important that people who have been traumatised by their exposure to such incidents have the opportunity to speak in a confidential setting about them. One of the more satisfying aspects of the Inquiry is that some witnesses have found that opportunity cathartic.

83. All but two of those who have worked on this Inquiry are, in one capacity or another, serving members of the Australian Defence Force, and every one of us is proud to be so. We embarked on this Inquiry with the hope that we would be able to report that the rumours of war crimes were without substance. None of us desired the outcome to which we have come. We are all diminished by it.

Annexes:

- A. Inquiry Directions
- B. Chronology
- C. Complete list of findings and recommendations

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AFGHANISTAN INQUIRY – TERMS OF REFERENCE

The Terms of Reference for the Inspector-General of the Australian Defence Force Afghanistan Inquiry (IGADF INQ17/16) comprise the following documents and are attached:

1. Appointment of Major General Brereton as Assistant IGADF to conduct IGADF Inquiry – INQ17/16, dated 12 May 2016¹
2. Chief of the Defence Force Minute to IGADF dated 14 December 2016² – Direction to IGADF as a result of amendments to the *Inspector-General of the Australian Defence Force Regulation 2016* to conduct an inquiry into concerns regard Special Operations Command (IGADF INQ17/16).
3. IGADF Direction dated 17 January 2017³ to MAJGEN Brereton pursuant to direction from the Chief of the Defence Force to inquire into whether there is any substance to persistent rumours of criminal or unlawful conduct by or concerning Special Operations Task Group deployments in Afghanistan during the period 2007 to 2016 (GADF INQ17/16).
4. Amendment No 1 to Directions to Assistants IGADF for IGADF INQ17/16 dated 24 March 2017,⁴ expansion of the timeframe to be considered by the Inquiry to 2005 to 2016.
5. CDF Minute to IGADF dated 5 April 2017,⁵ Amendment 1 to CDF Direction to IGADF. Confirmation of verbal advice to expand the timeframe to be consideration by INQ17/16 to 2005 to 2016
6. Amendment 2 to IGADF INQ17/16 Directions, dated 31 January 2020⁶ – Confirmation of oral directions to Assistants IGADF to the Inquiry, appointment of additional Assistants IGADF to help Major General Brereton conduct the Inquiry.
7. Amendment 3 to IGADF INQ17/16 Directions, dated 01 April 2020⁷ – Appointment of [REDACTED] as an Assistant IGADF to also help Major General Brereton conduct the Inquiry.

¹ IGADF [REDACTED]
² IGADF [REDACTED]
³ IGADF [REDACTED]
⁴ IGADF [REDACTED]
⁵ IGADF [REDACTED]
⁶ IGADF [REDACTED]
⁷ IGADF [REDACTED]

DIRECTION TO ASSISTANTS
INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE

IGADF INQ/17/16

To: MAJGEN The Honourable Paul Brereton AM, RFD

Introduction

1. Pursuant to section 110C of the *Defence Act 1903*, Regulation 87(1)(a) of the Defence (Inquiry) Regulations 1985, your appointment as an Assistant Inspector-General of the Australian Defence Force (IGADF), and all other available powers and authorities, I direct you to inquire into matters concerning the military justice system raised in a referral from the Chief of Army (CA), namely whether there is any substance to persistent rumours of criminal or unlawful conduct by, or concerning, Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2007 to 2016, and pursuant to Regulation 87(3) I authorise you to make recommendations resulting from your findings.

Background

2. On 09 March 2016, Special Operations Commander Australia (SOCAUST) wrote to CA regarding rumours concerning the culture and behaviour of or concerning Special Operations Command (SOCOMD), including second- or third-hand narratives relating to Special Operations Task Group deployments in Afghanistan during the period 2007 to 2016. These stories came to the attention of SOCAUST from a variety of sources. The rumours relate to the military justice system and include allegations of criminal, unlawful or inappropriate conduct including deviance from professional standards, existence of a culture of silence, the deliberate undermining of individuals, activities outside or contrary to those prescribed in the approved Rules of Engagement, and systemic failures by the SOCOMD chain of command.

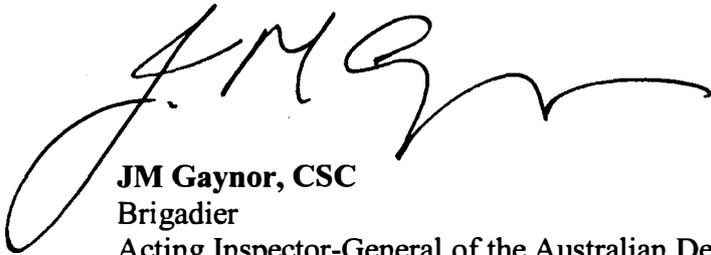
3. The rumours remain unsubstantiated and there is insufficient information to commence criminal or disciplinary investigations, or administrative inquiries. However, SOCAUST's exploration of the issues confirmed that knowledge of the rumours appeared widely known and circulated amongst Australian Special Forces personnel and possibly also personnel from Allied Forces. Accordingly, CA has requested that the IGADF conduct scoping and assessment as to whether these rumours can be substantiated by substantive accounts or credible information and if so, the potential depth and breadth of the circumstances. In addition, CA requested that IGADF consider a range of possible options as potential ways forward and / or to address any issues which are identified.

Inquiry terms

4. I intend to use evidence gathered and recommendations made by you to:
 - a. determine whether there is any likely substance to the rumours relating to SOTG deployments in Afghanistan; and
 - b. inform further action as required.
5. The Directions are enclosed.

The Inquiry process

6. **Documentation.** On delivering your report to the Acting IGADF, you are to provide the following documentation:
 - a. All transcripts, statements and records of conversation.
 - b. All flags referred to in the report.
7. **Findings.** Although you may consider whether there are substantive accounts or credible information or allegations which, if accepted, could potentially lead to a criminal conviction or a disciplinary finding against named persons or identified groups, you must not conclude that a criminal or disciplinary offence has been committed by any person.
8. **Witnesses and sources of evidence.** You are to advise me in writing if you are unable to obtain evidence from any person who you believe could give evidence relevant to the inquiry, including the reasons why you are unable to obtain the evidence from the person.
9. **Variation and guidance.** Any difficulties in complying with these Directions are to be raised with me at the first available opportunity. Deficiencies in, or suggested amendments to, these directions are also to be raised with me for consideration; particularly if they relate to matters which may compromise the overall purpose of the inquiry.
10. **Progress reports.** You are to provide the Director of Inquiries with a monthly report detailing your progress.
11. **Completion.** Once known, but as soon as practicable, you are to advise me of your anticipated completed date.



JM Gaynor, CSC
Brigadier
Acting Inspector-General of the Australian Defence Force

12 May 2016

Enclosure:

1. Directions to Assistants IGADF - IGADF INQ/17/16

ENCLOSURE 1 TO
IGADF INQ 17/16
12 MAY 2016

**DIRECTIONS TO ASSISTANTS
INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE**

IGADF INQ/17/16

Pursuant to section 110C of the Defence Act 1903, Regulation 87 of the Defence (Inquiry) Regulations 1985, your appointments as an Assistant Inspector-General of the Australian Defence Force (IGADF), and all other available powers and authorities:

I DIRECT MAJGEN The Honourable Paul Brereton AM, RFD, pursuant to Regulation 87(1)(a) to inquire into the following matters, and pursuant to Regulation 87(3) authorise him to make recommendations resulting from his findings; and

I DIRECT [REDACTED] pursuant to Regulation 87(1)(b) to help MAJGEN The Honourable Paul Brereton AM, RFD inquire into such matters:

AND I GIVE THE FOLLOWING DIRECTIONS:

DIRECTION 1

You are to undertake scoping and assessment in order to determine whether there are substantive accounts or credible information or allegations, relating to the military justice system, concerning criminal, unlawful or inappropriate conduct by, or involving, Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2007 to 2016 (the period), and, in particular, whether there are such accounts, information or allegations concerning:

- a. abuse or mistreatment of detainees;
- b. contravention of the *Defence Force Discipline Act* (Cth) including contravention of s 61 of that Act and Division 268 of the Criminal Code (Cth);
- c. any systemic, cultural or individual failure (including by commanders and legal officers within SOCOMD), to report or investigate such criminal, unlawful or inappropriate conduct as required by Defence policies, or to obstruct such investigations;
- d. any intentional inaccuracy in operational reporting concerning such criminal, unlawful or inappropriate conduct including as to the availability of evidence; and
- e. any deliberate undermining, isolation, obstruction or removal from SOCOMD units of persons who tried to report on or take remedial action concerning such criminal, unlawful or inappropriate conduct.

DIRECTION 2

You are to identify a range of options that may be available, or could be created, should you consider that further action be required, accompanied by your assessment of the likelihood of achieving closure through each option.

A handwritten signature in black ink, appearing to read 'JM Gaynor', with a long, sweeping horizontal stroke extending to the right.

JM Gaynor, CSC
Brigadier
Acting Inspector-General of the Australian Defence Force

12 May 2016



CHIEF OF THE DEFENCE FORCE

Minute

☆☆☆☆

CDF/OUT/2016/[REDACTED]

IGADF (BP25-4)

For information:

CA (R1-4-B002)

DGSSIM (R1-6-A114)

CHIEF OF DEFENCE FORCE DIRECTION TO INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE – CONCERNS REGARDING SPECIAL OPERATIONS COMMAND

References:

- A. OCA/OUT/2016/[REDACTED] *Referral of Serious Concerns regarding Special Operations Command (SOCOMD)* of 30 Mar 16
- B. Direction to Assistants Inspector-General of the Australian Defence Force, IGADF INQ/17/16 of 12 May 16
- C. OCA/OUT/2016/[REDACTED] of 21 Sep 16

Background

1. In March 2016, I understand that SOCAUST wrote to CA regarding rumours about the culture and behaviour of, or concerning, SOCOMD. This included second or third-hand narratives relating to SOTG deployments in Afghanistan during the period 2007 to 2016. In Reference A, CA requested you undertake a scoping inquiry in respect of those rumours and related matters. At Reference B, you issued Directions to Assistants IGADF to conduct a scoping inquiry into these matters. In Reference C, CA requested that you include in your inquiry specific allegations of possible crimes by SOTG personnel as reported by a former SOCOMD member.

Direction to IGADF

2. With recent amendments to the *Defence Act 1903*, and in particular the promulgation of the *Inspector-General of the Australian Defence Force Regulation 2016*, it is now appropriate that IAW s 110C(1)(f) of the *Defence Act 1903*, I direct you to conduct a scoping inquiry to determine whether there is any substance to rumours of criminal or unlawful conduct by, or concerning, SOTG deployments in Afghanistan during the period 2007 to 2016. This inquiry is to incorporate the scoping and assessment of the matters raised in References A and C, including but not limited to the allegations regarding:

- a. possible crimes (illegal killings, inhumane and unlawful treatment of detainees, or mistreatment of corpses);
- b. the cultural normalisation of deviance from professional standards within SOCOMD, including intentional inaccuracy in operational reporting related to possible crimes;
- c. a culture of silence within SOCOMD;

- d. the deliberate undermining, isolation, and removal from SOCOMD units of individuals who tried to address this rumoured conduct and culture; and
- e. a systemic failure, including by commanders and legal officers at multiple levels within SOCOMD, to report or investigate the stories as required by Defence policies.

3. It would be appropriate for this scoping inquiry to provide a range of possible options and potential ways forward and / or to address identified issues, as per Reference B, paragraph 3. Monthly updates on inquiry progress should continue to be provided to CA, and also now to me.

4. My POC for this matter within OCDF is DGSSIM, [REDACTED] who can be contacted by telephone on [REDACTED] or by email [REDACTED]



MD Binskin, AC
ACM
CDF

14 Dec 16

IGADF [REDACTED]

**DIRECTION TO ASSISTANT INSPECTOR-GENERAL
OF THE AUSTRALIAN DEFENCE FORCE**

IGADF INQ/17/16

To: MAJGEN The Honourable Paul Brereton AM, RFD

Introduction

1. By minute dated 14 December 2016, the Chief of the Defence Force has directed me to inquire into a matter concerning the Defence Force, namely, whether there is any substance to persistent rumours of criminal or unlawful conduct by, or concerning, Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2007 to 2016.

2. In accordance with section 110C(1)(f) of the *Defence Act 1903* and section 10 of the *Inspector-General of the Australian Defence Force Regulation 2016* ('the IGADF Regulation'), and pursuant to your appointment as an Assistant Inspector-General of the Australian Defence Force (IGADF), and all other available powers, I direct you to assist me to inquire into this matter. I also direct [REDACTED] to help you in your inquiry.

Background

3. On 09 March 2016, Special Operations Commander Australia (SOCAUST) wrote to Chief of Army (CA) regarding rumours concerning the culture and behaviour of or concerning Special Operations Command (SOCOMD), including second or third-hand narratives relating to SOTG deployments in Afghanistan during the period 2007 to 2016. These rumours came to the attention of SOCAUST from a variety of sources. The rumours include allegations of criminal, unlawful or inappropriate conduct including deviance from professional standards, existence of a culture of silence, the deliberate undermining of individuals, activities outside or contrary to those prescribed in the approved Rules of Engagement, and systemic failures by the SOCOMD chain of command.

4. The rumours remain unsubstantiated and there is insufficient information to commence criminal or disciplinary investigations, or administrative inquiries. However, SOCAUST's exploration of the issues confirmed that knowledge of the rumours appeared widely known and circulated amongst Australian Special Forces personnel and possibly also personnel from Allied Forces. Accordingly, CA requested on 30 March 2016 that the IGADF conduct scoping and assessment as to whether these rumours could be substantiated by substantive accounts or credible information and if so, the potential depth and breath of the circumstances. In addition, CA requested that IGADF consider a range of possible options as potential ways forward and / or to address any issues which were identified.

5. I agreed to the CA request and appointed a scoping inquiry on 12 May 2016.

6. On 14 December 2016, and with recent amendments to the *Defence Act 1903*, and in particular the promulgation of the IGADF Regulation, CDF directed me, in accordance with section 110C(1)(f) of the *Defence Act 1903*, to conduct a scoping inquiry to determine whether there is any substance to rumours of criminal or unlawful conduct by, or concerning, SOTG deployments in Afghanistan during the period 2007 to 2016.

Inquiry terms

7. I intend to use evidence gathered and recommendations made by you to:
 - a. determine whether there is any likely substance to the rumours relating to SOTG deployments in Afghanistan; and
 - b. inform further action as required.
8. The Directions are enclosed.

The Inquiry process

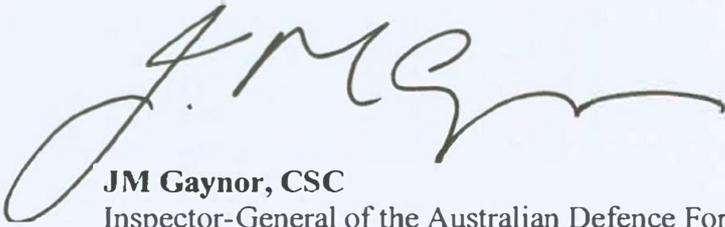
9. **Public or private.** Pursuant to Section 19 of the IGADF Regulation, I direct the inquiry to be conducted in private.
10. **Documentation.** On delivering your report to me, you are to provide the following documentation:
 - a. All transcripts, statements and records of conversation.
 - b. All flags referred to in the report.
11. **Findings.** Although you may consider whether there are substantive accounts or credible information or allegations which, if accepted, could potentially lead to a criminal conviction or a disciplinary finding against named persons or identified groups, you must not conclude that a criminal or disciplinary offence has been committed by any person.
12. **Recommendations.** Pursuant to section 10(4) of the IGADF Regulation, I authorise you to make recommendations arising from your findings.
13. **Witnesses and sources of evidence.** You are to advise me in writing if you are unable to obtain evidence from any person who you believe could give evidence relevant to the inquiry, including the reasons why you are unable to obtain the evidence from the person. Pursuant to section 24 of the IGADF Regulation, I authorise you, and any Assistants IGADF helping you, to exercise the powers of the IGADF under sections 22 and 23 of the Regulation.
14. **Variation and guidance.** Any difficulties in complying with these Directions are to be raised with me at the first available opportunity. Deficiencies in, or suggested amendments to, these directions are also to be raised with me for consideration; particularly if they relate to matters which may compromise the overall purpose of the inquiry.
15. **Progress reports.** You are to provide the Director of Inquiries with a monthly report detailing your progress.

OFFICIAL

(redacted for security, privacy and legal reasons)

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16. **Completion.** Once known, but as soon as practicable, you are to advise me of your anticipated completed date.



JM Gaynor, CSC
Inspector-General of the Australian Defence Force

17 January 2017

Enclosure:

1. Directions to Assistants IGADF - IGADF INQ/17/16

OFFICIAL

(redacted for security, privacy and legal reasons)

ENCLOSURE 1 TO
IGADF/ [REDACTED]
DATED 17 JAN 2017

DIRECTIONS TO ASSISTANTS
INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE

IGADF INQ/17/16

In accordance with section 110C(1)(f) of the *Defence Act 1903*, and pursuant to your appointments as an Assistant Inspector-General of the Australian Defence Force (IGADF), and all other available powers and authorities:

I DIRECT MAJGEN The Honourable Paul Brereton AM, RFD, pursuant to section 10 of the *Inspector-General of the Australian Defence Force Regulation 2016* ('the IGADF Regulation') to inquire into the following matters and authorise him to make recommendations resulting from his findings; and

I DIRECT [REDACTED] pursuant to section 10 of the IGADF Regulation to help MAJGEN The Honourable Paul Brereton AM, RFD to inquire into such matters:

AND I GIVE THE FOLLOWING DIRECTIONS:

DIRECTION 1

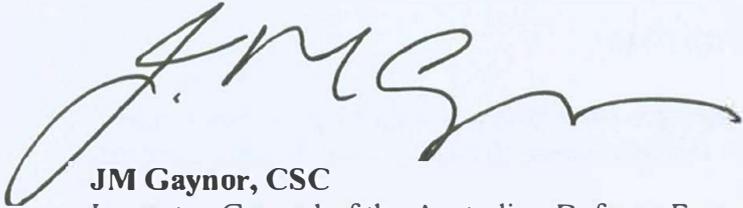
You are to undertake scoping and assessment in order to determine whether there are substantive accounts or credible information or allegations, relating to the military justice system, concerning criminal, unlawful or inappropriate conduct by, or involving, Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2007 to 2016 (the period), and, in particular, whether there are such accounts, information or allegations concerning:

- a. abuse or mistreatment of detainees;
- b. contravention of the *Defence Force Discipline Act* (Cth) including contravention of section 61 of that Act and Division 268 of the Criminal Code (Cth);
- c. any systemic, cultural or individual failure (including by commanders and legal officers within Special Operations Command (SOCOMD), to report or investigate such criminal, unlawful or inappropriate conduct as required by Defence policies, or to obstruct such investigations;
- d. any intentional inaccuracy in operational reporting concerning such criminal, unlawful or inappropriate conduct including as to the availability of evidence; and

- e. any deliberate undermining, isolation, obstruction or removal from SOCOMD units of persons who tried to report on or take remedial action concerning such criminal, unlawful or inappropriate conduct.

DIRECTION 2

You are to identify a range of options that may be available, or could be created, should you consider that further action be required, accompanied by your assessment of the likelihood of achieving closure through each option.



JM Gaynor, CSC
Inspector-General of the Australian Defence Force

17 January 2017

DIRECTIONS TO ASSISTANTS
INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE
AMENDMENT 1

IGADF INQ/17/16

1. Further to the addition of [REDACTED] to the Inquiry staff, I hereby amend the preamble to my inquiry directions issued on 17 January 2017 to include [REDACTED] in my directions to the Assistants IGADF:

I DIRECT [REDACTED]

[REDACTED] pursuant to Regulation 87(1)(b) to help MAJGEN The Honourable Paul Brereton AM, RFD inquire into such matters:

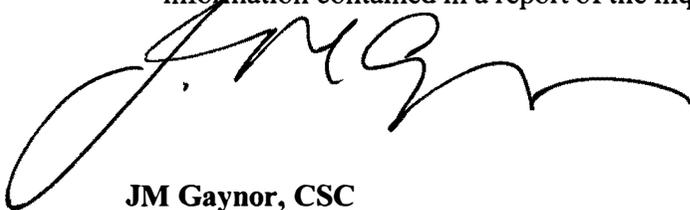
2. Further to the fact that information obtained to date indicates rumours of potential matters of interest in earlier Special Forces deployments to Afghanistan, I hereby amend Direction 1 of the inquiry directions issued on 17 January 2017 to extend the subject matter of the Inquiry to Special Forces Task Group (SFTG) and/or Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2005 to 2016:

DIRECTION 1

You are to undertake scoping and assessment in order to determine whether there are substantive accounts or credible information or allegations, relating to the military justice system, concerning criminal, unlawful or inappropriate conduct by, or involving, SFTG and/or SOTG deployments in Afghanistan during the period September 2005 to 2016 (the period), and, in particular, whether there are such accounts, information or allegations concerning:

3. Further to the provisions of Section 21 of the Inspector-General Australian Defence Force Regulation 2016, in the interests of the Defence of the Commonwealth and fairness to persons who may be affected by the inquiry:

I AUTHORISE MAJGEN The Honourable Paul Brereton AM, RFD to give directions under Sub-Section 21(1) restricting disclosure of information contained in oral evidence given during the inquiry (whether in public or in private), all or part of any document received by the inquiry, and any information contained in a report of the inquiry provided to a person under Section 27.



JM Gaynor, CSC
Inspector-General of the Australian Defence Force

24 March 2017



CHIEF OF THE DEFENCE FORCE

Minute

[REDACTED]
IGADF (BP25-4-106)

For information:

CA (R1-4-B002)
DGSSIM (R1-6-A114)

AMENDMENT 1 TO CHIEF OF DEFENCE FORCE DIRECTION TO INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE – CONCERNS REGARDING SPECIAL OPERATIONS COMMAND

Reference:

A. CDF minute CDF/OUT/2016/1005 dated 14 Dec 16

1. I confirm that, during our meeting on 15 March 2016, I verbally directed you to expand the time period under scoping inquiry further to reference A to address both Special Forces Task Group (SFTG) and Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2005 to 2016.

2. In all other respects, reference A remains extant. My POC in this matter remains DGSSIM, [REDACTED] who can be contacted on [REDACTED] or by email [REDACTED]@defence.gov.au.


MD Binskin, AC
ACM
CDF

Apr 17

IGADF/[REDACTED]

AMENDMENT 2 TO IGADF INQ/17/16 DIRECTIONS

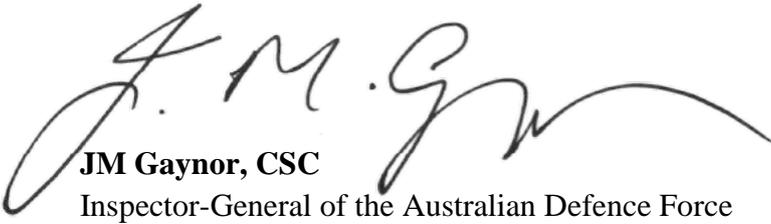
CONFIRMATION OF ORAL DIRECTIONS TO ASSISTANTS IGADF

References:

- A. IGADF/[REDACTED]—*Direction to Assistant Inspector-General of the Australian Defence Force—IGADF INQ/17/16 of 17 January 2017*
- B. IGADF/[REDACTED]—*Amendment 1 to Directions to Assistants Inspector-General of the Australian Defence Force—IGADF INQ/17/16 of 24 March 2017*

1. I confirm my oral directions to the following Assistants IGADF to help Major General The Honourable Paul Brereton AM, RFD in the Inquiry directed at references A and B:

- [REDACTED]


JM Gaynor, CSC
Inspector-General of the Australian Defence Force

31 January 2020

IGADF/[REDACTED]

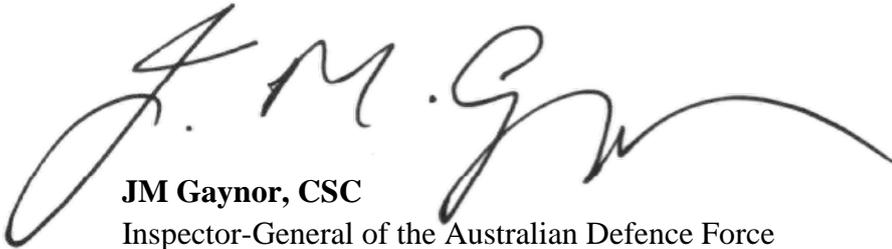
AMENDMENT 3 TO IGADF INQ 17/16 DIRECTIONS

CONFIRMATION OF ORAL DIRECTIONS TO ASSISTANTS IGADF

References:

- A. IGADF/[REDACTED] – Direction to Assistant Inspector-General of the Australian Defence Force - IGADF INQ/17/16 of 17 January 2017
- B. IGADF/[REDACTED] – Amendment 1 to Directions to Assistants Inspector-General of the Australian Defence Force - IGADF INQ/17/16 of 24 March 2017
- C. IGADF/[REDACTED] – Amendment 2 to Directions to Assistants Inspector-General of the Australian Defence Force - IGADF INQ/17/16 of 31 January 2020

In addition to those Assistants IGADF I have previously directed to help Major General The Honourable Paul Brereton, AM, RFD in the inquiry directed at references A, B and C, I confirm my oral direction to [REDACTED], an Assistant IGADF, also to help Major General Brereton.



JM Gaynor, CSC
Inspector-General of the Australian Defence Force

01 April 2020

CHRONOLOGY

Date	Occurrence	Chapter reference
[REDACTED] 2006	[REDACTED]	
[REDACTED] 06	[REDACTED] – Incident during conduct of [REDACTED] patrol, [REDACTED] in which [REDACTED] the patrol engage and kill an unarmed [REDACTED], possibly an insurgent spotter, [REDACTED]. The incident is <i>misreported</i> by the patrol as involving an armed anti-coalition militia [REDACTED].	2.02
[REDACTED] 06	[REDACTED] – <i>unsubstantiated</i> that a specified member unlawfully killed a wounded and unarmed local national during action at [REDACTED].	2.03
[REDACTED] 2007	[REDACTED]	
[REDACTED] 07	[REDACTED] – <i>unsubstantiated</i> assault and killing of unarmed local national [REDACTED].	2.04
[REDACTED] 07	[REDACTED] – <i>credible information</i> of murder [REDACTED] of an insurgent who was <i>hors-de-combat</i> (wounded and under control) by a specified member [REDACTED].	2.05
[REDACTED] 2007 [REDACTED] 2008	[REDACTED]	
[REDACTED] 07	<i>Unsubstantiated</i> cruel treatment (assault) of person under control by unspecified members [REDACTED].	2.59
[REDACTED] 08	<i>Unsubstantiated</i> mistreatment of persons under control [REDACTED].	2.59
[REDACTED] 2008 [REDACTED] 2009	[REDACTED]	
[REDACTED] 09	[REDACTED] - [REDACTED]. <i>Unsubstantiated</i> indiscriminate engagement of local nationals not positively identified by unspecified members [REDACTED].	2.06
[REDACTED] 09	[REDACTED] <i>Unsubstantiated</i> that [REDACTED] was not in accordance with applicable ROE [REDACTED].	2.07

█ 10	█ - unsubstantiated killing of unarmed local national during compound clearance █.	2.14
█ 10	█ – unsubstantiated that █ local nationals were unlawfully killed by █.	2.15
█ 10	█ Unsubstantiated that <i>hors-de-combat</i> insurgents were killed by unspecified members █.	2.59
█ 2010	█	
█ 10	Unsubstantiated that █ specified members unlawfully killed persons under control or non-combatants █.	2.16
█ 10	█ – unsubstantiated that engagement and killing of local national █ by member █ was other than lawful █.	2.17
█ 2010- 2011	█	
█ 11	█	
█ 11	█ – unsubstantiated that engagement and killing of █ by specified member was other than lawful █.	2.18
█ 2011	█	
█ 2011- 2012	█	
█ 12	█ – unsubstantiated that insurgent engaged and killed by specified member, with complicity of superior, was <i>hors-de-combat</i> , and that engagement and killing of was unlawful █.	2.19
█ 2012	█	
█ 12	█ – credible information of murder of █ non-combatants, █, by █ specified members █.	2.20

█ 12	█ – credible information of murder of non-combatant, █ by specified member █	2.21
█ 12	█ – credible information of murder of person under control by █ at instigation or with complicity of █ patrol commander, in █ and use of █ throwdown to conceal.	2.22
█ 12	█ – unsubstantiated that the wounding of █ Afghan █ on █ 2012 █ by a shot fired by specified member, was other than lawful █.	2.23
█ 12	█ – credible information of murder of local national who was surrendering by █ and use of █ throwdown to conceal █.	2.24
█ 12	█ - credible information of murder of █ when he was under control, by specified member, and use of █ throwdown to conceal. █.	2.25
█ 12	█ – credible information of murder of █ non-combatants, █ by or with complicity of a specified patrol commander, the █ by █ and the █ by or with complicity of █, and use of █ throwdowns.	2.26
█ 12	█ – credible information of murder of local national, █ by unidentified members of specified Troop █	2.27
█ 12	█ – credible information of cruel treatment (assault) of person under control by a specified member █.	2.28
█ 12	█ - credible information of suspected murder of unarmed local national who had surrendered by specified member, and use of █ throwdown to conceal. █	2.29
█ 12	█ – unsubstantiated that there was an unlawful killing of a █ local national who had surrendered █	2.30

<p>█ 12</p>	<p>█ – <i>unsubstantiated</i> that █ insurgents engaged █ by specified members was unlawful █.</p>	<p>2.31</p>
<p>█ 2012</p>	<p>█</p>	<p></p>
<p>█ 12</p>	<p>█ – <i>credible information</i> █</p>	<p>2.32</p>
<p>█ 12</p>	<p>█ – <i>credible information</i> █</p>	<p>2.33</p>
<p>█ 12</p>	<p>█ – <i>credible information</i> of murder (shooting) of person under control by specified member, with complicity of specified patrol commander █ and use █ throwdown to conceal █.</p>	<p>2.34</p>
<p>█ 12</p>	<p>█</p>	<p></p>
<p>█ 12</p>	<p>█</p>	<p></p>
<p>█ 12</p>	<p>█</p> <p>█ – <i>unsubstantiated</i> that when under control and in the course of tactical questioning, █ was subjected to unlawfully assault with rifle butt, genitalia threatened with knife, and waterboarding, by █ specified members. <i>Credible information</i> that a █</p> <p>█ <i>Unsubstantiated</i> that troop commander was aware that TQ exceeded permissible limits. █.</p> <p>█ – <i>credible information</i> of murder (shooting) of person under control by specified member, with complicity of specified patrol commander, and use of █ throwdown to conceal █.</p>	<p>2.35</p> <p>2.36</p>

<p>12</p>	<p>██████████ – <i>unsubstantiated</i> that engagement and killing of local national ██████████ by ██████████ specified ██████████ members was other than lawful. ██████████.</p>	<p>2.37</p>
<p>12</p>	<p>██████████</p> <p>██████████ – <i>credible information</i> of murder (shooting) of ██████████ non-combatants when under control by ██████████ specified members ██████████. <i>Unsubstantiated</i> that multiple other non-combatants, ██████████ were engaged and killed ██████████</p> <p>██████████ – <i>unsubstantiated</i> that person engaged by specified member ██████████ was unarmed ██████████.</p> <p>██████████ – <i>credible information</i> of cruel treatment ██████████ and murder of person under control, by ██████████ and use of ██████████ throwdown to conceal ██████████.</p>	<p>2.38</p> <p>2.39</p> <p>2.40</p>
<p>12</p>	<p>██████████ – <i>unsubstantiated</i> that ██████████ enemy were unlawfully engaged and killed ██████████ by specified ██████████ members. ██████████.</p>	<p>2.41</p>
<p>12</p>	<p>██████████</p> <p>██████████ – <i>credible information</i> of murder (shooting) of ██████████ persons under control ██████████ who had been separated from their weapons, by ██████████ specified members with complicity of specified patrol commander ██████████.</p> <p>██████████ – <i>credible information</i> of murder (shooting) of local national ██████████ by specified patrol commander, and use of ██████████ throwdown to conceal ██████████.</p> <p>██████████ – <i>unsubstantiated</i> that killing of ██████████ unarmed local nationals ██████████ by ██████████ specified members was not in lawful self-defence ██████████.</p>	<p>2.42</p>
<p>12</p>	<p>██████████:</p> <p>██████████ – <i>credible information</i> of murder of at least ██████████ and possibly ██████████ persons under control, who had been separated from their weapons, by ██████████ members ██████████ specified, ██████████ unspecified), with complicity of a superior, whose identity cannot be substantiated ██████████.</p> <p>██████████ – <i>Unsubstantiated</i> that ██████████ under control were unlawfully engaged and killed by specified patrol commander and member. ██████████.</p>	<p>2.43</p> <p>2.44</p>

█ 12	█ – credible information of murder of person under control by specified member, with complicity of specified patrol commander █ and use █ as throwdowns to conceal █.	2.45
█ 12	█ – credible information of murder of person under control, by █ with complicity of specified patrol commander █.	2.46
█ 12	█ – credible information of murder of █ persons under control, by specified members with complicity of specified patrol commander █, and use of █ throwdowns, and █ on bodies, to conceal █.	2.47
█ 12	█ – unsubstantiated that █.	2.59
█ 12	█ – unsubstantiated that insurgent engaged and killed by specified member at direction of specified patrol commander was <i>hors-de-combat</i> █.	2.48
█ 12	█ – credible information of murder of █ persons under control, by and with complicity of specified patrol commander and another member, and use of █ throwdowns to conceal █.	2.49
█ 2012 █ 2013	█	
█ 12	█ – credible information of murder of non-combatants █ by specified members █.	2.52
█ 13	█ – credible information of murder of non-combatant who was under control by specified member with complicity of patrol commander, █.	2.53
█ 13	█	
█ 13	Engagement █ of █ local nationals █ after misidentification and miscommunication █ compensation paid by █.	2.59

█ 13	█ <i>Unsubstantiated</i> that unarmed local national engaged and killed by specified member was not, or was not reasonably suspected of, participating in hostilities, █ █	2.54
█ 2013 █ 2014	█	
█ 13	█ – <i>unsubstantiated</i> that engagement and killing of person under control, █ was other than in lawful self-defence █ █	2.59
█ 13	█ – <i>unsubstantiated</i> that engagement and killing of █ local nationals █ by █ specified members was other than lawful, despite possible use █ throwdown █.	2.55

CONSOLIDATED FINDINGS AND RECOMMENDATIONS

The following is a consolidation of the Findings and Recommendations of the Inquiry set out in Parts 2 and 3 of this report.

Chapter 2.01 – CREDIBILITY OF WITNESSES

- Nil

Chapter 2.02 – [REDACTED] 2006 [REDACTED]

Findings

There is *credible information* that on [REDACTED] 2006 at [REDACTED], Afghanistan:

- [REDACTED] when members of [REDACTED], engaged and killed an unidentified male person who was unarmed. However, the possibility that the male person was directly participating in hostilities as a ‘spotter’, and/or that [REDACTED] genuinely believed him to be so, cannot be excluded.
- The engagement was wilfully misreported by [REDACTED] as an engagement with an armed insurgent, but it is not possible to conclude who was implicated in the misreporting.
- The misreporting infected the submission of a recommendation that [REDACTED] [REDACTED] is based on the false assumption that the anti-coalition militia engaged was armed.

Recommendation

- There is **not** a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with a war crime in respect of this matter. [REDACTED]

Chapter 2.03 – [REDACTED] 2006 [REDACTED]

Finding

- *It is not substantiated that [REDACTED] unlawfully killed a wounded unarmed local national at [REDACTED], [REDACTED], [REDACTED] 2006.*

Recommendation

- *The Inquiry does not recommend that any further action be taken in respect of this matter.*

Chapter 2.04 – [REDACTED] 2007 [REDACTED]

Findings

- *It is not substantiated that [REDACTED] unlawfully assaulted an unarmed local national at [REDACTED], [REDACTED], on [REDACTED] 2007.*
- *It is not substantiated that [REDACTED] unlawfully killed an unarmed local national at [REDACTED], [REDACTED], on [REDACTED] 2007.*

Recommendation

- *The Inquiry does not recommend that any further action be taken in respect of this matter.*

Chapter 2.05 – [REDACTED] 2007 [REDACTED]

Findings

There is **credible information** that on [REDACTED] 2007 at [REDACTED], [REDACTED]

- [REDACTED] unlawfully killed an unidentified insurgent who was hors de combat (having been seriously wounded in action and placed under control).
- [REDACTED] failed to exercise control properly over his subordinate [REDACTED] in that knowing that he was committing or about to commit the above offence, he failed to take all necessary and reasonable measures within his or her power to prevent or repress its commission or to submit the matter to the competent authorities for investigation and prosecution.
- Alternatively, [REDACTED] was an accessory to the unlawful killing, by failing to prevent it and assisting to conceal it, before and after the fact.

Recommendation

- *Difficulties of proof, [REDACTED], [REDACTED], mean that there are insufficient prospects of a criminal prosecution ultimately establishing a case beyond reasonable doubt against [REDACTED] to secure a conviction of [REDACTED] for the war crime of murder (Criminal Code (Cth) s 268.70), as to warrant referral of the matter for criminal investigation and prosecution. **The Inquiry recommends** no further action in this matter.*

Chapter 2.06 – [REDACTED] 2009 [REDACTED]

Finding

- *It is **not substantiated** [REDACTED] 2009 [REDACTED] members of Force Element [REDACTED] may have indiscriminately engaged local nationals who were not positively identified as participating in hostilities, and their livestock.*

Recommendation

- *The Inquiry does not recommend that any further action be taken in respect of this matter.*

Chapter 2.07 – [REDACTED] 2009 [REDACTED]

Finding

- *It is **not substantiated** that there was not a proper basis under defensive Rules of Engagement for [REDACTED] against a group of individuals [REDACTED] 2009 [REDACTED] Force Element [REDACTED] operations [REDACTED].*

Recommendation

- *The Inquiry does not recommend that any further action be taken in respect of this matter.*

Chapter 2.08 – [REDACTED] 2009 [REDACTED]

Finding

- *It is **not substantiated** that on [REDACTED] 2009, [REDACTED] numerous non-combatants killed [REDACTED].*

Recommendation

- *The Inquiry does not recommend that any further action be taken in respect of this matter.*

Chapter 2.09 – [REDACTED] 2009 [REDACTED]

Findings

There is *credible information* that:

- On [REDACTED] 2009, at [REDACTED] [REDACTED] wilfully and unlawfully caused the death of [REDACTED] male Afghan local national, [REDACTED] when he was hors de combat, being under the control of Australian forces, [REDACTED] [REDACTED], by shooting him.
- At the same time and place, [REDACTED] wilfully and unlawfully caused the death of [REDACTED] male Afghan local national, [REDACTED] when he was hors de combat, being under the control of Australian forces, [REDACTED], by shooting him.
- At the same time and place, [REDACTED] and [REDACTED] expressly or implicitly directed or encouraged [REDACTED] to kill the [REDACTED] male Afghan local national.
- At the same time and place, [REDACTED] failed to exercise control properly over his subordinates [REDACTED], in that knowing that was unlawfully killing the [REDACTED] male Afghan, or was about to do so, he failed to take all necessary and reasonable measures within his power to prevent it or to submit the matter to the competent authorities for investigation and prosecution.
- In or about [REDACTED] 2018, [REDACTED] fabricated an account of the events [REDACTED] and suborned [REDACTED] to give false evidence to the Inquiry.

Recommendations

- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with [REDACTED] the war crime of murder, and/or counselling, procuring or inciting the war crime of murder (Criminal Code (Cth) ss 11.2, 11.4 and 268.70), or on the basis of command responsibility (Criminal Code s 268.115). **The Inquiry recommends** that the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with [REDACTED] the war crime of murder, and/or counselling, procuring or inciting the war crime of murder (Criminal Code (Cth) ss 11.2, 11.4 and 268.70). **The Inquiry recommends** that the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- The information obtained that gives substance to what began as rumour was sourced in and derived from [REDACTED] disclosures to the Inquiry. Those disclosures were made in circumstances which attract use and derivative use immunity. The evidence which potentially incriminates [REDACTED] other than his own, was obtained as a result of his protected disclosure. In those circumstances, there would be insufficient evidence to charge [REDACTED] with the war crime of murder. [REDACTED] evidence is important to not only this but other potential prosecutions. **The Inquiry recommends** that [REDACTED] be granted immunity from prosecution should he agree to give evidence for the Crown in any relevant prosecution.

- *The Inquiry recommends that Australia should compensate the families of [REDACTED] [REDACTED] for their unlawful deaths.*

Chapter 2.10 – [REDACTED] 2010 [REDACTED]

Finding

There is *credible information* that:

- On [REDACTED] 2010, at [REDACTED], [REDACTED], [REDACTED], without justification, inflicted severe physical pain on [REDACTED] an Afghan male, by [REDACTED] causing him injury, when he was neither taking an active part in the hostilities nor was a member of an organised armed group.

Recommendation

- *There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the war crime of cruel treatment of [REDACTED] (Criminal Code (Cth) 268.72). The Inquiry recommends that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.*
- *The Inquiry recommends that Australia should compensate [REDACTED] for the assault.*

Chapter 2.11 – [REDACTED] 2010 [REDACTED]

Findings

- *It is not substantiated that the killing of an insurgent [REDACTED] in the course of the conduct of an ambush [REDACTED], [REDACTED] 012 was other than lawful.*
- *It is not substantiated that [REDACTED] was involved in [REDACTED], on this or any other occasion.*

Recommendation

- *The Inquiry does not recommend that any further action be taken in relation to this matter.*

Chapter 2.12 – [REDACTED] 2010 [REDACTED]

Findings

- *It is not substantiated* [REDACTED]
- *It is not substantiated* [REDACTED]

Recommendation

- *The Inquiry does not recommend that further action be taken in relation to these matters.*

Chapter 2.13 – [REDACTED] 2010 [REDACTED]

Findings

There is **credible information** that [REDACTED], [REDACTED] on [REDACTED] 2010, and subsequently:

- [REDACTED] wilfully and unlawfully killed of an Afghan male [REDACTED], when he was under control and unarmed and posing no threat, by shooting him.
- [REDACTED] placed a [REDACTED] with the body of [REDACTED] for the purposes of exposing sensitive site exploitation imagery which would falsely convey that [REDACTED] was being carried by [REDACTED] when engaged, in order to disguise that he was hors de combat and create the false appearance that he was a combatant and to deceive future inquiries.
- [REDACTED] deleted sensitive site exploitation photographs which had been taken by [REDACTED] which showed [REDACTED] and substituted or caused to be substituted in the official sensitive site exploitation record other photographs, which showed [REDACTED], in order to destroy evidence inconsistent with an innocent explanation of the death of [REDACTED].
- [REDACTED] wilfully and unlawfully killed, or attempted to kill, [REDACTED] Afghan male [REDACTED], when [REDACTED] under control and unarmed, and posing no threat, by shooting [REDACTED].
- [REDACTED] wilfully and unlawfully killed [REDACTED] Afghan male [REDACTED] when [REDACTED] under control and unarmed, and posing no threat, by shooting [REDACTED].
- [REDACTED] expressly or implicitly directed or encouraged [REDACTED] to kill the [REDACTED] Afghan male and [REDACTED] to kill [REDACTED] Afghan males.
- [REDACTED] placed, or caused to be placed, a [REDACTED], on the bodies of [REDACTED] respectively, for the purposes of exposing sensitive site exploitation imagery which would falsely convey [REDACTED] were being carried by the local nationals when engaged, in order to disguise that they were hors de combat and create the false appearance that they were combatants and to deceive future inquiries.

- [redacted] failed to exercise control properly over his subordinates [redacted] in that knowing that they were committing or about to unlawfully kill [redacted] male local nationals, he failed to take all necessary and reasonable measures within his power to prevent it or to submit the matter to the competent authorities for investigation and prosecution.
- [redacted] failed to exercise control properly over his subordinates [redacted] in that knowing that they were committing or about to unlawfully kill the [redacted] male local nationals, he failed to take all necessary and reasonable measures within his power to prevent it or to submit the matter to the competent authorities for investigation and prosecution.

Recommendations

- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [redacted] with [redacted] the war crime of murder, and/or counselling, procuring or inciting the war crime of murder (Criminal Code (Cth) ss 11.2, 11.4 and 268.70), or on the basis of command responsibility (Criminal Code s 268.115). **The Inquiry recommends** that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [redacted] with [redacted] the war crime of murder, and/or counselling, procuring or inciting the war crime of murder (Criminal Code (Cth) ss 11.2, 11.4 and 268.70), or on the basis of joint criminal enterprise. **The Inquiry recommends** that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [redacted] with [redacted] the war crime of murder (Criminal Code (Cth) s 268.70). **The Inquiry recommends** that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- The evidence implicating [redacted] is primarily sourced in his own disclosure to the Inquiry, in respect of which he is entitled to use and derivative use immunity. Without that evidence, there is no realistic prospect of a criminal investigation obtaining sufficient evidence to charge him with the war crime of murder or attempted murder. His evidence would be crucial to any prosecution of other participants, who bear a higher degree of responsibility. **The Inquiry recommends** that no action be taken in respect of [redacted] and that he be granted immunity from prosecution should he agree to give evidence for the Crown in any relevant prosecution.
- **The Inquiry recommends** that Australia should compensate the families of [redacted] [redacted] for their unlawful deaths.

Chapter 2.14 – [REDACTED] 2010 [REDACTED]

Finding

- It is **not substantiated** that it was [REDACTED] who, in the course of an operation on [REDACTED] 2010, engaged and killed [REDACTED].
- It is **not substantiated** that [REDACTED] was unlawfully killed when hors-de-combat, by [REDACTED] or any other member of [REDACTED].

Recommendation

- *The Inquiry does not recommend that any further action be taken in respect of this matter.*

Chapter 2.15 – [REDACTED] 2010 [REDACTED]

Finding

- It is **not substantiated** that in the course of an operation to [REDACTED] on [REDACTED] 2010 or [REDACTED] 2010, members of [REDACTED] unlawfully killed persons when under control.

Recommendation

- *The Inquiry does not recommend that any further action be taken in respect of this matter.*

Chapter 2.16 – [REDACTED] 2010 [REDACTED]

Finding

- It is **not substantiated** that during the initial weeks of Rotation [REDACTED] of the Special Operations Task Group (SOTG [REDACTED]) [REDACTED] and [REDACTED] who were members of Force Element [REDACTED] unlawfully killed non-combatants.

Recommendation

- *The Inquiry does not recommend that any further action be taken in respect of this matter.*

Chapter 2.17 – [REDACTED] 2010 [REDACTED]

Findings

- *It is **not substantiated** that the engagement of an Afghan male of 'military age' killed at [REDACTED], [REDACTED] on [REDACTED] 2010 was other than in lawful self-defence.*
- *Although the contemporaneous decision not to conduct a quick assessment into the circumstances of the engagement of the Afghan male at [REDACTED] on [REDACTED] 2010 was honest and reasonable, and the failure to correct the operational reporting was an unintentional oversight, with all the benefits of retrospectivity – not available [REDACTED] [REDACTED] at the time – it can be seen that a decision at the time to conduct a quick assessment, a report of a notifiable incident under Defence Instruction (General) Administration 45-2, and/or a correction to the operational reporting provided to Joint Task Force 633, would have avoided circumstances which left a question mark over the incident, led to future suspicion, left Defence unprepared for media inquiries and reports, and exposed [REDACTED] to ongoing inquiry processes.*

Recommendation

- ***The Inquiry does not recommend** that any further action be taken in respect of this matter.*
- ***Recommendations** concerning operational reporting are contained in Chapter 3.02 (Inquiries and Oversight).*

Chapter 2.18 – [REDACTED] 2011 [REDACTED]

Finding

- *It is **not substantiated** that the mission targeting [REDACTED] was other than duly authorised.*
- *It is **not substantiated** that the engagement and killing of [REDACTED] by [REDACTED] and [REDACTED] in [REDACTED] on [REDACTED] 2011 was other than lawful.*

Recommendation

- ***The Inquiry does not recommend** that any further action be taken in respect of this matter.*

Chapter 2.19 – [REDACTED] 2012 [REDACTED]

Finding

- It is **not substantiated** that [REDACTED] unlawfully killed an individual who was hors-de-combat in [REDACTED], on [REDACTED] 2012, on the direction of [REDACTED].

Recommendations

- **The Inquiry does not recommend** that any further action be taken in respect of this matter.

Chapter 2.20 – [REDACTED] 2012 [REDACTED]

Findings

There is **credible information** that on [REDACTED] 2012 at [REDACTED], [REDACTED]

- [REDACTED] wilfully and unlawfully killed [REDACTED] an Afghan male, who was unarmed, [REDACTED], and who was a person under control.
- [REDACTED] on [REDACTED] 2012 [REDACTED], photographed [REDACTED] and provided a false narrative that [REDACTED] was carrying them at the time he was killed, in order to deflect and mislead any inquiry into the circumstances of his death.
- [REDACTED] wilfully and unlawfully killed [REDACTED], an Afghan male who was a non-combatant and unarmed, and/or was hors de combat, being [REDACTED] under control.
- [REDACTED] placed [REDACTED] on the body of [REDACTED], for the purpose of SSE imagery, in order to misrepresent that he had it on his person at the time he was killed, to show he was not a non-combatant, and deflect and mislead any inquiry into the circumstances of his death.

Recommendations

- There is a realistic prospect of obtaining sufficient evidence to charge [REDACTED] with the murder of [REDACTED], [REDACTED], on [REDACTED] 2012, contrary to s 268.70 of the Criminal Code (War crime – murder). **The Inquiry recommends** that the Chief of Defence Force refer this matter to the Australian Federal Police for criminal investigation.
- **The Inquiry recommends** that Australia should compensate the family of [REDACTED] for his unlawful death.
- There is a realistic prospect of obtaining sufficient evidence to charge [REDACTED] with the murder of [REDACTED] at [REDACTED], [REDACTED] on [REDACTED] 2012, contrary to s 268.70 of the Criminal Code (War crime – murder). **The Inquiry recommends** that the Chief of Defence Force refer this matter to the Australian Federal Police for criminal investigation.

In any event, mitigating circumstances suggest he does not need referral for criminal investigation.

- role was the most minor, in taking sensitive site exploitation photographs. There is no realistic prospect of a criminal investigation obtaining sufficient admissible evidence to charge him as an accessory after the fact. The Inquiry recommends that no action be taken in respect of and that he be granted immunity from prosecution should he agree to give evidence for the Crown in any relevant prosecution.
- The Inquiry recommends that Australia should compensate the family of for his unlawful death.

Chapter 2.22 – 2012

Findings

There is credible information that on 2012 at and subsequently:

- An unidentified member of the Force Element, wilfully and unlawfully killed who was unarmed and a person under the control
- directed, urged or encouraged to do so.
- Alternatively, knew that about to commit the unlawful killing of and failed to exercise control properly over his subordinate, in that knowing that he was committing or about to commit the offence, he failed to take all necessary and reasonable measures within his power to prevent or repress its commission, or to submit the matter to competent authorities for investigation and prosecution.
- placed, or caused or allowed to be placed, on the body of, an, for the purpose of sensitive site exploitation photography, in order to fraudulently misrepresent that such weapon was being carried by him when engaged and that he was or was still a combatant, and to disguise that he was hors de combat, and create the false appearance, and to deflect or deceive future inquiries into the circumstances of his death.
- took the sensitive site exploitation photography, including the on the body of, in order to fraudulently misrepresent was being

carried by him when engaged and that he was or was still a combatant, and to disguise that he was hors de combat, and create the false appearance, and to deflect or deceive future inquiries into the circumstances of his death.

- [REDACTED] made a false operational report that [REDACTED] was an armed insurgent who tactically manoeuvred against the Force Element and who was then engaged and killed by [REDACTED] to fraudulently misrepresent that [REDACTED] was engaged legitimately and that he was a combatant, and to disguise that he was hors de combat, and to deflect or deceive future inquiries into the circumstances of his death.

Recommendations

- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the war crime of murder of [REDACTED] at [REDACTED] Uruzgan Province, on [REDACTED] 2012 (Criminal Code (Cth) ss 11.2, 11.4 and 268.70), or on the basis of command responsibility (Criminal Code s 268.115). **The Inquiry recommends** that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] as an accessory after the fact to the war crime of murder of [REDACTED] at [REDACTED] on [REDACTED] 2012 (Criminal Code (Cth) s 268.70 and Crimes Act 1914 (Cth) s 6). **The Inquiry recommends** that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- **The Inquiry recommends** that Australia should compensate the family of [REDACTED] for his unlawful death.

Chapter 2.23 – [REDACTED] 2012 [REDACTED]

Findings

- *It is **not substantiated** that the wounding of [REDACTED] Afghan [REDACTED], on [REDACTED] 2012 [REDACTED] by a shot fired by [REDACTED] was other than lawful.*

Recommendation

- *The Inquiry does not recommend that any further action be taken in respect of this matter.*

Chapter 2.24 – [REDACTED] 2012 [REDACTED]

Findings

*There is **credible information** that on [REDACTED] 2012 [REDACTED]*

- *[REDACTED] wilfully and unlawfully killed an unidentified Afghan male, who was unarmed, not participating in hostilities, not posing a threat, and in the course of surrendering.*
- *[REDACTED] caused or permitted to be placed, on the body of the deceased Afghan male, [REDACTED], for the purpose of sensitive site exploitation photography that was taken by [REDACTED] to fraudulently misrepresent that the Afghan male was carrying and using [REDACTED] when engaged and that he was a combatant, and to deflect or deceive future inquiries into the circumstances of his death.*
- *[REDACTED] took sensitive site exploitation photographs of the body of the deceased Afghan male with [REDACTED] which he knew had been placed there to fraudulently misrepresent that the Afghan male was carrying and using [REDACTED] when engaged and that he was a combatant, and to deflect or deceive future inquiries into the circumstances of his death.*
- *[REDACTED] made a false operational report that the surrendering Afghan male was an insurgent who tactically manoeuvred against the Force Element, and who was then engaged and killed and [REDACTED] recovered, to fraudulently misrepresent that the Afghan male was engaged legitimately and that he was a combatant, and to deflect or deceive future inquiries into the circumstances of his death.*

Recommendations

- *There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the war crime of murder of an unidentified Afghan male [REDACTED] 2012, (Criminal Code (Cth) ss 11.2, 11.4 and 268.70). **The Inquiry recommends** that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.*
- *There is insufficient prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] as an accessory after the fact to the war crime of murder of an unidentified Afghan male [REDACTED] 2012, (Criminal Code (Cth) s 268.70 and Crimes Act 1914 (Cth) s 6) to warrant referral of the matter to the Australian Federal Police for criminal investigation, as it cannot be established that*

█ actually knew that █ had engaged and killed the Afghan male in the course of surrendering. █

Chapter 2.25 – █ 2012 █

Findings

There is **credible information** that on █ 2012 █:

- █ wilfully and unlawfully killed █ when he was unarmed and a person under control.
- █ placed, or caused or allowed to be placed, on the body of █ an █ for the purpose of Sensitive Site Exploitation photography, in order to fraudulently misrepresent that █ was being carried by him when engaged and that he was or was still a combatant, and to disguise that he was hors de combat, and create the false appearance, and to deflect or deceive future inquiries into the circumstances of his death.
- █ made a false operational report that █ was an armed insurgent who tactically manoeuvred into a firing position to ambush the clearing Force Element and who was then engaged and killed, to fraudulently misrepresent that █ was engaged legitimately and that he was a combatant, and to disguise that he was hors de combat, and to deflect or deceive future inquiries into the circumstances of his death.

Recommendations

- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge █ with the war crime of murder █ 2012 (Criminal Code (Cth) ss 11.2, 11.4 and 268.70). **The Inquiry recommends** that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- **The Inquiry recommends** that Australia should compensate the family of █ for his unlawful death.

Chapter 2.26 – █ 2012 █

Findings

There is **credible information** that on █ 2012 █

- █ wilfully engaged and killed █ when he was unarmed and not directly participating in hostilities, and knew that or were reckless as to whether he was not directly participating in hostilities;

- Alternatively, [REDACTED] were committing or had committed the unlawful killing of [REDACTED] and failed to exercise control properly over their subordinates, in that they failed to take all necessary and reasonable measures within their power to prevent or repress its commission, or to submit the matter to competent authorities for investigation and prosecution;
- [REDACTED] knew that [REDACTED] were committing or had committed the unlawful killing of [REDACTED] and failed to exercise control properly over their subordinates, in that they failed to take all necessary and reasonable measures within their power to prevent or repress its commission, or to submit the matter to competent authorities for investigation and prosecution;
- [REDACTED] caused or allowed to be placed, on the body of [REDACTED] an [REDACTED] for the purpose of SSE photography, in order to fraudulently misrepresent that [REDACTED] were being carried by him when engaged and that he was or was still a combatant, and to disguise that he was hors de combat, and create the false appearance, and to deflect or deceive future inquiries into the circumstances of his death;
- [REDACTED] took the SSE photography of [REDACTED], including the [REDACTED], in order to fraudulently misrepresent that [REDACTED] were being carried by him when engaged and that he was or was still a combatant, and to disguise that he was hors de combat, and create the false appearance, and to deflect or deceive future inquiries into the circumstances of his death;
- [REDACTED] made a false operational report that [REDACTED] was an insurgent who was seen moving tactically with a weapon, and who was then engaged and killed, to fraudulently misrepresent that he was engaged legitimately and that he was a combatant, and to deflect or deceive future inquiries into the circumstances of his death.
- [REDACTED] was wilfully engaged and killed, when unarmed and not directly participating in hostilities, by [REDACTED] who knew that or were reckless as to whether he was not directly participating in hostilities.
- The circumstances of the engagement and death of [REDACTED] were misreported as a legitimate engagement, to fraudulently represent that he had been participating in hostilities when engaged and killed, and to deflect and deceive any future inquiry into the circumstances of his death. However, it is not possible on the currently available evidence to attribute responsibility for this reporting.
- [REDACTED], wilfully engaged and killed [REDACTED] when he was unarmed and not directly participating in hostilities, and knew that or were reckless as to whether he was not directly participating in hostilities;
- Alternatively, [REDACTED] and failed to exercise control properly over his subordinates, in that he failed to take all necessary and reasonable measures within his power to prevent or repress its commission, or to submit the matter to competent authorities for investigation and prosecution;

- [REDACTED] placed, or caused or allowed to be placed, on the body of [REDACTED] an [REDACTED], for the purpose of SSE photography, in order to fraudulently misrepresent that [REDACTED] was being carried by him when engaged and that he was a combatant, and to deflect or deceive future inquiries into the circumstances of his death;
- [REDACTED] took the SSE photographs, in order to fraudulently misrepresent that [REDACTED] was being carried by [REDACTED] when engaged and that he was a combatant, and to deflect or deceive future inquiries into the circumstances of his death;
- [REDACTED] made a false operational report that [REDACTED] was an armed insurgent who displayed hostile intent manoeuvring tactically against the FE in the green belt, and who was then engaged and killed, to fraudulently misrepresent that he was engaged legitimately and that he was a combatant, and to deflect or deceive future inquiries into the circumstances of his death.

Recommendations

- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the war crime of murder of [REDACTED] [REDACTED] 2012 (Criminal Code (Cth) s 268.70), or on the basis of command responsibility (Criminal Code s 268.115). **The Inquiry recommends** that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the war crime of murder of [REDACTED] [REDACTED] 2012 (Criminal Code (Cth) s 268.70), or on the basis of command responsibility (Criminal Code s 268.115), or as an accessory after the fact (Criminal Code (Cth) s 268.70 and Crimes Act 1914 (Cth) s 6). **The Inquiry recommends** that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- Although the evidence currently available to the Inquiry does not enable the person or persons responsible for the murder of [REDACTED] to be identified, there is a realistic prospect of a criminal investigation obtaining further evidence sufficient to charge an identified person with the war crime of murder of [REDACTED] [REDACTED] 2012. **The Inquiry recommends** that Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the war crime of murder of [REDACTED] [REDACTED] 2012 (Criminal Code (Cth) s 268.70), or on the basis of command responsibility (Criminal Code s 268.115). **The Inquiry recommends** that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- **The Inquiry recommends** that Australia should compensate the families of each of [REDACTED] [REDACTED] and [REDACTED] for their deaths.
- **The Inquiry recommends** that force preparation for future deployments include coverage of the responsibility of members for reporting breaches of the Law of Armed Conflict [REDACTED] [REDACTED].

Chapter 2.27 – [REDACTED] 2012 [REDACTED]

Findings

There is **credible information** that on [REDACTED] 2012, at a location about 12 to 15 kilometres southeast of [REDACTED]

- An unidentified Afghan male, [REDACTED] was wilfully engaged and killed when unarmed and not directly participating in hostilities, by unidentified elements of [REDACTED], who knew that he was not directly participating in hostilities when engaged and killed, or were reckless as to whether he was not directly participating in hostilities.
- The circumstances of the engagement and death of [REDACTED] were misreported as a legitimate engagement, to fraudulently misrepresent that he had been participating in hostilities when engaged and killed, and to deflect and deceive any future inquiry into the circumstances of his death. However, it is not possible on the currently available evidence to attribute responsibility for the false operational report.

Recommendation

- Although the evidence currently available to the Inquiry does not enable the person or persons responsible for the murder of the unidentified Afghan male to be identified, there is a realistic prospect of a criminal investigation obtaining further evidence sufficient to charge an identified person with the war crime of murder of the Afghan male at a location about 12 to 15 kilometres southeast of [REDACTED] on [REDACTED] 2012.
- **The Inquiry recommends** that the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation and prosecution.

Chapter 2.28 – [REDACTED] 2012 [REDACTED]

Findings

There is **credible information** that on [REDACTED] 2012 at [REDACTED]

- [REDACTED] inflicted severe physical pain or suffering upon on [REDACTED], when he was hors de combat, being a person under control, and was not posing any threat, [REDACTED]
- [REDACTED] knew of or was reckless as to the factual circumstances establishing that [REDACTED] was hors-de-combat;
- [REDACTED] made a false report to his [REDACTED], that [REDACTED] had attempted to grab his weapon and turn it against him, in order to fraudulently misrepresent that [REDACTED] had provoked the assault and was not hors de combat and that [REDACTED] was acting in reasonable self-defence and that the assault was justified, and to deflect or deceive future inquiries into the circumstances of [REDACTED]'s injury.

Recommendations

- There is a realistic prospect of obtaining sufficient evidence to charge [REDACTED] with the war crime of cruel treatment of [REDACTED] at [REDACTED] on [REDACTED] 2012 (Criminal Code, s 268.72) (War crime – cruel treatment). **The Inquiry recommends** that the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- **The Inquiry recommends** that Australia should compensate [REDACTED] for the assault.

Chapter 2.29 – [REDACTED] 2012 [REDACTED]

Findings

There is **credible information** that on [REDACTED] 2012 at [REDACTED] and subsequently:

- [REDACTED] unlawfully killed an Afghan male [REDACTED], who was not participating in hostilities, [REDACTED], and under control, and was posing no threat.
- [REDACTED] placed, or aided and abetted [REDACTED] to place, [REDACTED] carried by [REDACTED] on the body of [REDACTED] for the purpose of sensitive site exploitation photography, to misrepresent that [REDACTED] was carrying and using [REDACTED] when engaged, and to deflect or deceive future inquiries into the circumstances of his death.
- [REDACTED] carried [REDACTED] in his backpack [REDACTED] to the mission location, and provided [REDACTED] for use as a throwdown on the body of [REDACTED] for the purpose of sensitive site exploitation photography that was taken by [REDACTED], to misrepresent that [REDACTED] was carrying and using [REDACTED] when engaged, and to deflect or deceive any future inquiries into the circumstances of his death.
- [REDACTED] aided, abetted and/or was knowingly concerned in the unlawful killing of [REDACTED] by [REDACTED], in that he assisted [REDACTED] to obtain the approval of the [REDACTED] to kill [REDACTED].
- [REDACTED] knew that [REDACTED] was about to commit the unlawful killing of [REDACTED], and failed to exercise control properly over his subordinate [REDACTED], in that knowing that he was committing or about to commit the unlawful killing, he failed to take all necessary and reasonable measures within his power to prevent or repress its commission or to submit the matter to the competent authorities for investigation and prosecution.
- [REDACTED] gave false evidence to and sought to deceive the [REDACTED] Inquiry Officer Inquiry in [REDACTED], in that he gave a written statement of [REDACTED] to that Inquiry that included a number of untrue statements, and he falsely claimed that when he shot and killed the local national on [REDACTED] 2012 he acted in self-defence, and that there was no time to [REDACTED] neutralise the threat. Whereas in truth, he lied to the [REDACTED] Inquiry Officer Inquiry with the intent that the truth should not be discovered; and he knew at the time he shot and killed [REDACTED] and did not pose a threat to [REDACTED] or to any other members of the Force Element.

Recommendations

- *There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the war crime of the murder of [REDACTED] at [REDACTED], [REDACTED], [REDACTED] 2012 (Criminal Code (Cth) s 268.70). **The Inquiry recommends** that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.*
- *There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with aiding or abetting the war crime of murder of [REDACTED] at [REDACTED], [REDACTED], [REDACTED] 2012 (Criminal Code (Cth) ss 11.2, 11.4 and 268.70), and/or on the basis of command responsibility (Criminal Code s 268.115). **The Inquiry recommends** that Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.*
- *There is **not** a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] as an accessory after the fact to the war crime of murder of [REDACTED] by [REDACTED] at [REDACTED], [REDACTED] [REDACTED] 2012 (Criminal Code (Cth) s 268.70 and Crimes Act 1914 (Cth) s 6), as the evidence does not show that [REDACTED] was aware that [REDACTED] had been unlawfully engaged and killed when the throwdown was provided. [REDACTED]*
- ***The Inquiry recommends** that Australia should compensate the family of [REDACTED] for his death.*

Chapter 2.30 – [REDACTED] 2012 [REDACTED]

Finding

- *It is not substantiated that the engagement and killing of [REDACTED], an Afghan male [REDACTED] by [REDACTED] on [REDACTED] 2012 at [REDACTED] in the vicinity of [REDACTED] was other than lawful.*

Recommendation

- *The Inquiry does not recommend that any further action be taken in respect of this matter.*

Chapter 2.31 – [REDACTED] 2012 [REDACTED]

Finding

- *It is not substantiated that the killing of [REDACTED] ([REDACTED]), or anyone else, at the village of [REDACTED] on [REDACTED] 2012, was other than lawful.*

Recommendation

- *The Inquiry does not recommend that any further action be taken in respect of this matter.*

Chapter 2.32 – [REDACTED] 2012 [REDACTED]

Finding

There is credible information [REDACTED]

- [REDACTED]
- [REDACTED]

Recommendation

[REDACTED]

[REDACTED]

[Redacted]

- [Redacted]

Chapter 2.33 – [Redacted] 2012 [Redacted]

Findings

There is credible information [Redacted]
[Redacted]

- [Redacted]

[Redacted]

-

[Redacted]

-

[Redacted]

-

[Redacted]

Recommendations

[Redacted]

- [REDACTED]

[REDACTED]

- [REDACTED]

[REDACTED]

- [REDACTED]

[REDACTED]

- [REDACTED]

Chapter 2.34 – [REDACTED] 2012 [REDACTED]

Findings

There is **credible information** that on [REDACTED] 2012 at [REDACTED]

- [REDACTED] willfully and unlawfully engaged and killed an unidentified male Afghan local national who was unarmed and under control and thus hors de combat.
- [REDACTED] expressly or implicitly directed or encouraged [REDACTED] to kill the male Afghan local national.
- Alternatively, [REDACTED] failed to exercise control properly over [REDACTED], in that knowing that he was committing or about to unlawfully kill the male local national, he failed to take all necessary and reasonable measures within his power to prevent it or to submit the matter to the competent authorities for investigation and prosecution.
- [REDACTED] and/or [REDACTED], at the direction or with the knowledge and approval of [REDACTED], placed [REDACTED] on the body of the male local national, for the purposes of exposing photographs which would falsely convey that [REDACTED] was being carried/worn by the local national when engaged, in order to disguise that he was hors de combat and create the false appearance that he was a combatant.

Recommendations

- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the war crime of murder or the offence of the counselling, procuring or inciting the war crime of murder [contrary to the Criminal Code (Cth) ss 11.2, 11.4 and 268.70, or on the basis of command responsibility (under Criminal Code s 268.115)]. **The Inquiry recommends** that the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- The evidence of this incident was derived from [REDACTED]'s disclosures to the Inquiry, made in circumstances which attract use and derivative use immunity. Other than himself and [REDACTED], there is no other direct witness. There is no prospect of obtaining sufficient evidence admissible against [REDACTED] to charge him with the war crime of murder. [REDACTED]'s evidence is important to not only this but other potential prosecutions. **The Inquiry recommends that no action** be taken in respect of [REDACTED], and that he be granted immunity from prosecution should he agree to give evidence for the Crown in any relevant prosecution.

Chapter 2.35 – [REDACTED] 2012 [REDACTED]

Findings

- It is **not substantiated** that [REDACTED] was struck with an AK-47 in the course of tactical questioning, in an endeavour to extract information from him, rather than with [REDACTED]'s M4 in self-defence.
- It is **not substantiated** that a knife was held to [REDACTED]'s testicles.

Recommendations

- *There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the offence of murder and/or counselling, procuring or inciting the war crime of murder contrary to the Criminal Code (Cth) ss 11.2, 11.4 and s 268.70. **The Inquiry recommends** that the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation.*
- [REDACTED]
- *The evidence of this incident was derived from [REDACTED]'s disclosures to the Inquiry, made in circumstances which attract use and derivative use immunity. For that reason, there is no prospect of obtaining sufficient evidence admissible against [REDACTED] to charge him with the war crime of murder. The evidence of [REDACTED], who was under the command and influence of [REDACTED], is of great significance to this and other potential prosecutions. **The Inquiry recommends that** no action be taken in respect of [REDACTED], and that he be granted immunity from prosecution should he agree to give evidence for the Crown in any relevant prosecution.*

Chapter 2.37 – [REDACTED] 2012 [REDACTED]

Finding

- *It is **not substantiated** that the engagement of an Afghan youth killed by members of [REDACTED] on [REDACTED] 2012 at the [REDACTED] was unlawful.*

Recommendation

- ***The Inquiry does not recommend** that any further action be taken in respect of this matter.*

Chapter 2.38 – [REDACTED] 2012 [REDACTED]

Findings

*It is **not substantiated** that anyone other than [REDACTED] and [REDACTED] (including any woman or child) was killed at [REDACTED] on [REDACTED] 2012.*

*There is **credible information** that at [REDACTED] [REDACTED], on [REDACTED] 2012 in the vicinity of [REDACTED] Afghanistan:*

- *[REDACTED] and [REDACTED] were engaged and killed in [REDACTED] by [REDACTED] and [REDACTED].*
- *At the time they were engaged and killed, [REDACTED] and [REDACTED] were unarmed, under the control of [REDACTED] not participating in hostilities, and not posing any threat.*
- *[REDACTED] and [REDACTED] each knew that [REDACTED] and [REDACTED] were unarmed, under the control of [REDACTED] not participating in hostilities, and not posing any threat, or were recklessly indifferent as to whether this was the case.*

Recommendation

- *There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge each of [REDACTED] and [REDACTED] with [REDACTED] the war crime of murder, or of counselling, procuring or inciting the war crime of murder (Criminal Code (Cth) ss 11.2, 11.4 and 268.70), or on the basis of joint criminal enterprise. **The Inquiry recommends** that the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation.*
- ***The Inquiry recommends** that Australia should compensate the families of [REDACTED] and [REDACTED] for their unlawful deaths.*

Chapter 2.39 – [REDACTED] 2012 [REDACTED]

Finding

- It is **not substantiated** that [REDACTED] at [REDACTED] on [REDACTED], who was [REDACTED], was unlawfully engaged and killed. To the contrary, the evidence suggest that he was an armed insurgent.

Recommendation

- **The Inquiry does not recommend** that any further action be taken in respect of this matter.

Chapter 2.40 – [REDACTED] 2012 [REDACTED]

Findings

There is **credible information** that on [REDACTED] 2012 at [REDACTED]

- [REDACTED] inflicted severe physical and/or mental pain and/or suffering upon a male Afghan non-combatant, [REDACTED], who was under control and handcuffed, [REDACTED].
- [REDACTED] unlawfully killed a male Afghan non-combatant, [REDACTED], who was under control and handcuffed, [REDACTED] by shooting him.
- [REDACTED] expressly or implicitly directed his subordinate [REDACTED] to kill [REDACTED].
- Alternatively, [REDACTED] failed to exercise control properly over his subordinate [REDACTED], in that knowing that he was committing or about to unlawfully kill [REDACTED], he failed to take all necessary and reasonable measures within his power to prevent or repress its commission or to submit the matter to the competent authorities for investigation and prosecution.

Recommendations

- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the war crimes of cruel treatment (Criminal Code s 268.72) and murder, and/or counselling, procuring or inciting the war crime of murder (Criminal Code (Cth) ss 11.2, 11.4 and 268.70, or on the basis of command responsibility (Criminal Code s 268.115)). **The Inquiry recommends that** the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the war crime of murder (Criminal Code (Cth) s 268.70). **The Inquiry recommends that** the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation.

Chapter 2.41 – [REDACTED] 2012 [REDACTED]

Finding

- *It is **not substantiated** that members of [REDACTED] executed [REDACTED] PUCs, [REDACTED] whether at [REDACTED] on [REDACTED] 2012 or at any other place and time.*

Recommendation:

- ***The Inquiry does not recommend** that any further action be taken in respect of this matter.*

Chapter 2.42 – [REDACTED] 2012 [REDACTED]

Findings

There is **credible information** that on [REDACTED] 2012, at [REDACTED]

- [REDACTED] *unlawfully killed an unidentified male Afghan national ([REDACTED]), when he was a person under control and not participating in hostilities, by shooting him.*
- [REDACTED] *unlawfully killed [REDACTED] unidentified male Afghan national ([REDACTED]), when he was a person under control and not participating in hostilities, by shooting him.*
- [REDACTED] *expressly or implicitly directed or encouraged [REDACTED] to kill [REDACTED] male Afghan and [REDACTED] to kill [REDACTED] male Afghan.*
- *Alternatively, [REDACTED] failed to exercise control properly over [REDACTED] and [REDACTED] (who was under his operational control and direction), in that knowing that they were committing or about to unlawfully kill [REDACTED] male Afghans, he failed to take all necessary and reasonable measures within his power to prevent it or to submit the matter to the competent authorities for investigation and prosecution.*
- [REDACTED] *killed [REDACTED] unidentified male Afghan ([REDACTED]), who was unarmed, by shooting him, and there are reasonable grounds for suspecting that he did so unlawfully.*
- [REDACTED] and [REDACTED] *killed [REDACTED] unidentified male Afghan nationals ([REDACTED] and [REDACTED]), who were unarmed. Although the circumstances of engagement and its subsequent reporting are highly suspicious, the possibility that they were acting in reasonable self defence cannot be excluded.*

Recommendations

- *There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with [REDACTED] the war crime of murder (Criminal Code (Cth) s 268.70). **The Inquiry recommends** that the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation.*
- *There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with [REDACTED] the war crime of murder or the offence of the counselling, procuring or inciting the war crime of murder (Criminal Code (Cth) ss 11.2, 11.4 and 268.70), or on the basis of command responsibility (under Criminal Code s 268.115). **The***

Inquiry recommends that the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation.

- *Despite its suspicious circumstances, there is insufficient prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the murder of [REDACTED] to warrant its referral for criminal investigation and prosecution.*
- *The evidence of this incident was derived from [REDACTED]'s disclosures to the Inquiry, made in circumstances which attract use and derivative use immunity. There is no prospect of obtaining sufficient evidence admissible against [REDACTED] to charge him with the war crime of murder. [REDACTED]'s evidence is important to not only this but other potential prosecutions. **The Inquiry recommends** that no action be taken in respect of [REDACTED], and that [REDACTED] be granted immunity from prosecution should he agree to give evidence for the Crown in any relevant prosecution.*

Chapter 2.43 – [REDACTED] 2012 [REDACTED]

Findings

- *There is **credible information** that at some stage during Special Operations Task Group Rotation [REDACTED] or [REDACTED], [REDACTED] willfully and unlawfully caused the death of an unknown male Afghan, when he was hors de combat, being unarmed and under control, by shooting him, and that he did so at the direction of a superior. This may have been on [REDACTED] 2012 at [REDACTED]*
- *It is possible that, at the same time and place, [REDACTED] male Afghan, who was hors de combat, being unarmed and under control was also willfully and unlawfully killed. However, there is **insufficient credible information** to make a finding to that effect.*
- *There is **insufficient credible information** identifying the relevant superior to make a finding in that respect.*

Recommendation

- *While [REDACTED]'s account of [REDACTED]'s confession was the starting point, the only probative evidence incriminating [REDACTED] is his own to the Inquiry, in respect of which he is entitled to use and derivative use immunity. All other evidence was derived, directly or indirectly, from that evidence. For that reason, there is not a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the war crime of murder (Criminal Code (Cth) s 268.70). Therefore, **the Inquiry does not** recommend that the matter be referred for criminal investigation.*

Chapter 2.44 – [REDACTED] 2012 [REDACTED]

Finding

- *It is **not substantiated** that the engagement of two Afghan males killed by members of [REDACTED] on [REDACTED] 2012 at [REDACTED] 2012, was unlawful.*

Recommendation

- ***The Inquiry does not recommend** that any further action be taken in respect of this matter.*

Chapter 2.45 – [REDACTED] 2012 [REDACTED]

Findings

*There is **credible information** that on [REDACTED] 2012, at [REDACTED] [REDACTED]*

- *[REDACTED] unlawfully killed an unidentified Afghan male, when he was unarmed, under control and not participating in hostilities, and not posing a threat, by shooting him.*
- *[REDACTED] expressly or implicitly directed or encouraged [REDACTED] to kill the Afghan male.*
- *Alternatively, [REDACTED] failed to exercise control properly over [REDACTED], in that, knowing that [REDACTED] was or was about to unlawfully kill the Afghan male, he failed to take all necessary and reasonable measures within his power to prevent it or to submit the matter to the competent authorities for investigation and prosecution.*
- *[REDACTED], and/or [REDACTED] at the direction or with the knowledge and approval of [REDACTED], placed or caused to be placed [REDACTED] on the body of the Afghan male, so sensitive site exploitation photographs could be taken which would falsely convey that such equipment was being carried or worn by the person when engaged, in order to create the false appearance he was a combatant and disguise that he was hors de combat.*

Recommendations

- *There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the war crime of murder, and/or counselling, procuring or inciting the war crime of murder (Criminal Code (Cth) ss 11.2, 11.4 and 268.70, or on the basis of command responsibility (Criminal Code s 268.115)). **The Inquiry recommends** that the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation.*
- *There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the war crime of murder (Criminal Code (Cth) s 268.70). **The Inquiry recommends** that the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation. Notwithstanding, and although [REDACTED] has not made admissions to the Inquiry, he was the junior participant, and acted under the direction and influence of [REDACTED], and consideration should be given to granting him immunity from prosecution should he agree to give evidence for the Crown in any relevant prosecution.*

Chapter 2.46 – [REDACTED] 2012 [REDACTED]

Finding

There is *credible information* that on [REDACTED] 2012, at [REDACTED], [REDACTED]:

- A member of the [REDACTED] unlawfully killed an unidentified Afghan male who was under control and not posing any threat;
- [REDACTED] directed or urged the [REDACTED] to do so.

Recommendation

- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with [REDACTED] the war crime of murder, or counselling, procuring or inciting the war crime of murder (Criminal Code (Cth) ss 11.2, 11.4 and 268.70), or on the basis of command responsibility (Criminal Code s 268.115). **The Inquiry recommends** the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation.

Chapter 2.47 – [REDACTED] 2012 [REDACTED]

Findings

There is *credible information* that on [REDACTED] 2012, at [REDACTED], [REDACTED]:

- [REDACTED] unlawfully killed [REDACTED] Afghan male, when he was hors de combat and under control, by shooting him.
- [REDACTED] unlawfully killed [REDACTED] Afghan male, when he was hors de combat and under control, by shooting him.
- [REDACTED] expressly or implicitly directed or encouraged [REDACTED] to kill [REDACTED] Afghan male and [REDACTED] to kill [REDACTED] Afghan male.
- Alternatively, [REDACTED] failed to exercise control properly over [REDACTED] and [REDACTED], in that knowing that they were committing or about to unlawfully kill [REDACTED] male local nationals, he failed to take all necessary and reasonable measures within his power to prevent it or to submit the matter to the competent authorities for investigation and prosecution.
- [REDACTED] [REDACTED] the bodies of the local nationals, in order to destroy or conceal evidence of the manner of their deaths.
- [REDACTED] placed, or caused or authorised to be placed [REDACTED], for the purposes of exposing photographs, which would falsely convey that [REDACTED] was being carried/worn by the local nationals when engaged, in order to disguise that they were hors de combat and create the false appearance that they were combatants.

Recommendations

- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with [REDACTED] the war crime of murder, and/or counselling, procuring or

inciting the war crime of murder (Criminal Code (Cth) ss 11.2, 11.4 and 268.70), or on the basis of command responsibility (Criminal Code s 268.115)). **The Inquiry recommends** that the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation.

- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with [REDACTED] the war crime of murder (contrary to the Criminal Code (Cth) s 268.70, or on the basis of joint criminal enterprise). **The Inquiry recommends** that the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- In the absence of his own disclosure to the Inquiry, there would be insufficient evidence to charge [REDACTED] with the war crime of murder. Those disclosures were made in circumstances which attract use and derivative use immunity. [REDACTED] evidence would be of great importance to a prosecution. **The Inquiry recommends** that no action be taken against [REDACTED], and that [REDACTED] be granted immunity from prosecution should he agree to give evidence for the Crown in any relevant prosecution.

Chapter 2.48 – [REDACTED] 2012 [REDACTED]

Findings

There is **credible information** that on [REDACTED] 2012 at the village of [REDACTED]

- [REDACTED] engaged and killed an unknown male insurgent, who may have been wounded.
- [REDACTED] did so in accordance with a direction of [REDACTED], which may have been to engage if the insurgent moved, and
- the possibility that insurgent was still 'in-the-fight', or at least that it was reasonable for [REDACTED] and [REDACTED] to think that he was, cannot be excluded.

Recommendation

- The Inquiry **does not recommend** that any further action be taken in respect of this matter.

Chapter 2.49 – [REDACTED] 2012 [REDACTED]

Finding

There is *credible information* that on [REDACTED] 2012, at [REDACTED]

- [REDACTED] unlawfully killed [REDACTED] male Afghan, when he was unarmed and under the control of Australian forces, by shooting him.
- [REDACTED] unlawfully killed [REDACTED] male Afghan, when he was unarmed and under the control of Australian forces, by shooting him.
- [REDACTED] expressly or implicitly directed his subordinate [REDACTED] to kill [REDACTED] male Afghan.
- Alternatively, [REDACTED] failed to exercise control properly over his subordinate [REDACTED], in that knowing that he was committing or about to unlawfully kill [REDACTED] male Afghan, he failed to take all necessary and reasonable measures within his power to prevent it or to submit the matter to the competent authorities for investigation and prosecution.
- [REDACTED] and/or [REDACTED] and [REDACTED], at the direction or with the knowledge and approval of [REDACTED], placed or caused to be placed [REDACTED] on the bodies of the male Afghans, for the purposes of exposing photographs which would falsely convey that [REDACTED] was being carried/worn by them when engaged, in order to disguise that they were hors de combat and create the false appearance that they were combatants, and to deflect and deceive any future inquiry into the circumstance of their deaths.

Recommendation

- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with [REDACTED] the war crime of murder, and/or counselling, procuring or inciting the war crime of murder (contrary to the Criminal Code (Cth) ss 11.2, 11.4 and 268.70, or on the basis of command responsibility (under Criminal Code s 268.115)). **The Inquiry recommends** that the Chief of the Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- The essential evidence of this incident was derived from [REDACTED]'s disclosures to the Inquiry, made in circumstances which attract use and derivative use immunity. Other than himself and [REDACTED], there is no other direct witness. There is no prospect of obtaining sufficient evidence admissible against [REDACTED] to charge him with the war crime of murder. [REDACTED]'s evidence is important to not only this but other potential prosecutions. **The Inquiry recommends** that no action be taken in respect of [REDACTED], and that [REDACTED] be granted immunity from prosecution should he agree to give evidence for the Crown in any relevant prosecution.

Chapter 2.50 – [REDACTED] 2012 [REDACTED]

Finding

- [REDACTED]
- *There is **no credible information** that troop, squadron and task group commanders either knew or suspected that these things were happening, and that they did not fail to take reasonable steps which could have prevented or discovered them. However, what is described in this Chapter is possibly the most disgraceful episode in Australia's military history, and the commanders at troop, squadron and task group level bear moral command responsibility for what happened under their command, regardless of personal fault.*

Chapter 2.51 – [REDACTED]

Finding

- *On the available evidence, save for what is described in Chapter 2.43 [REDACTED], rumours concerning the killing of prisoners by members of [REDACTED], [REDACTED], in [REDACTED] of SOTG [REDACTED], are **not substantiated**.*

There are no recommendations for Chapter 2.51

Chapter 2.52 – [REDACTED] 2012 [REDACTED]

Findings

*There is **credible information** that on [REDACTED] 2012 at [REDACTED], [REDACTED]*

- *[REDACTED], and members of patrol [REDACTED] under the effective command and control of [REDACTED], wilfully engaged and killed [REDACTED] civilians [REDACTED] when they were unarmed and not directly participating in hostilities, and knew that or were reckless as to whether the [REDACTED] individuals were not directly participating in hostilities.*
- *[REDACTED] placed, or caused or allowed to be placed, at the location of the engagement at [REDACTED] for the purpose of sensitive site photography, in order to fraudulently misrepresent that [REDACTED] were being carried by the [REDACTED] individuals when engaged at the [REDACTED] location and that they were or were still combatants, and to disguise that they were hors de combat, and create the false appearance that they were engaged in hostilities, and to deflect or deceive future inquiries into the circumstances of their deaths.*

- [redacted] took the sensitive site exploitation photography of the [redacted], at the location of the [redacted] engagement, in order to fraudulently misrepresent that [redacted] were being carried by the [redacted] individuals when engaged at the [redacted] location and that they were or were still combatants, and to disguise that they were hors de combat, and create the false appearance that they were engaged in hostilities, and to deflect or deceive future inquiries into the circumstances of their deaths.
- [redacted] misreported the engagement of [redacted] as one of armed insurgents who were tactically manoeuvring and engaged his patrol [redacted], who were then engaged and killed, to fraudulently misrepresent that they were engaged legitimately and that they were combatants, and to deflect or deceive future inquiries into the circumstances of their deaths.
- [redacted] engaged and killed a [redacted] Afghan civilian [redacted] who was unarmed, not participating in hostilities, and was a person under control, but the possibility that he was acting in lawful self-defence in response to a perceived threat to a member of his patrol cannot be excluded.

Recommendations

- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [redacted] with [redacted] the war crime of murder [redacted] on [redacted] 2012 (Criminal Code (Cth) s 268.70), including on the basis of command responsibility (Criminal Code s 268.115) and/or joint criminal enterprise. **The Inquiry recommends** that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [redacted] with [redacted] the war crime of murder of [redacted] civilians [redacted] at [redacted] 2012 (Criminal Code (Cth) s 268.70), including on the basis of joint criminal enterprise. **The Inquiry recommends** that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [redacted] with [redacted] the war crime of murder of [redacted] civilians [redacted] at the [redacted] 2012 (Criminal Code (Cth) s 268.70), including on the basis of joint criminal enterprise. **The Inquiry recommends** that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- **The Inquiry recommends** that Australia compensate the families of those persons killed as [redacted] for their deaths ([redacted] civilians). The identities of these persons might be determined [redacted] 2012.
- **The Inquiry recommends** that Australia compensate [redacted]

Chapter 2.53 – [REDACTED] 2013 – [REDACTED]

Findings

There is *credible information* that:

- on [REDACTED] 2013 at [REDACTED] wilfully and unlawfully engaged and killed an Afghan male [REDACTED] when he was unarmed, under control and not engaged in hostilities, and placed or caused to be placed with his body as a throwdown for the purpose of SSE imagery, [REDACTED], in order to fraudulently represent that he was a combatant, and to conceal that he had been engaged when unarmed, and to deflect or deceive future inquiries into the circumstances of his death.
- [REDACTED] failed to exercise control properly over his subordinate [REDACTED], in that knowing that he was unlawfully killing the relevant male Afghan, or was about to do so, or had done so, he failed to take all necessary and reasonable measures within his power to prevent it, or to submit the matter to the competent authorities for investigation and prosecution, and was complicit in the subsequent misreporting of the events, in order to deflect or deceive future inquiries into the nature of the mission, and the circumstances of the engagement and death of [REDACTED].
- The [REDACTED] under the command of [REDACTED] created false or misleading post-operational reporting to conceal that [REDACTED] had been the focus of the mission, and to deflect any further inquiry into circumstances of the engagement and death of the [REDACTED]. However, it is not suggested that those in the [REDACTED] knew the true circumstances of his engagement and death.

Recommendations

- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the war crime of murder (Criminal Code (Cth) s 268.70). **The Inquiry recommends** that (a) the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- There is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge [REDACTED] with the war crime of murder (Criminal Code (Cth) ss 11.2, 11.4 and 268.70), or on the basis of command responsibility (Criminal Code s 268.115), or as an accessory after the fact to the war crime of murder (Criminal Code s 268.70 and Crimes Act 1914 (Cth) s 6). **The Inquiry recommends** that the Chief of Defence Force refer the matter to the Australian Federal Police for criminal investigation.
- **The Inquiry recommends** that Australia should compensate the family of [REDACTED] for his unlawful death.

Chapter 2.54 – [REDACTED] 2013 [REDACTED]

Finding

- *It is **not substantiated** that the engagement of an Afghan male by members of patrol [REDACTED] on [REDACTED] 2013 at [REDACTED], was unlawful.*

Recommendation

- *The Inquiry does not recommend that any further action be taken in respect of this matter.*

Chapter 2.55 – [REDACTED] 2013 [REDACTED]

Finding

- *It is **not substantiated** that the killing of the adult male, [REDACTED] [REDACTED] on [REDACTED] 2013 was unlawful.*
- *It is **not substantiated** that [REDACTED] photographed with the body of [REDACTED] was a 'throwdown'.*

Recommendation

- *The Inquiry does not recommend any further action in respect of this matter.*

Chapter 2.56 – [REDACTED]

Finding

- *It is **not substantiated** that while serving in [REDACTED] [REDACTED] engaged in any unlawful killing.*

Recommendation

- *The Inquiry recommends that no further action be taken in relation to this matter.*

Chapter 2.57 – [REDACTED]

Finding

- *It is **not substantiated** that while serving in [REDACTED] [REDACTED] engaged in any unlawful killing.*

Recommendation

- *The Inquiry recommends that no further action be taken in relation to this matter.*

Chapter 2.58 – AMMUNITION AND PROCUREMENT

Findings

a.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

c. *It is **not substantiated** that Australia breached its international obligations under Article 35 to Additional Protocol 1 of the Geneva Conventions 1949 by using grenades that contained chrysotile asbestos.*

d. *It is **not substantiated** that Australia breached its international obligations under Article 35 to Additional Protocol 1 of the Geneva Conventions 1949 by using grenades that were thermobaric and employed in an anti-personnel role.*

e.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

j. *There is **credible information** to conclude that SOTG personnel procured and used small arms ammunition and grenades, which were either not formally authorised by the chain of command or did not have technical approval for use. Specifically, there is evidence of:*

k. *the use of 9mm and 5.56mm hollow point ammunition [REDACTED]*

l. *the use of TSX 5.56mm (otherwise known as 5.56 optimised or brown tip) ammunition during SOTG Rotation [REDACTED];*

m. *the use of M855A1 5.56mm ammunition during SOTG Rotation [REDACTED] and Rotation [REDACTED]; and*

n. *the use of grenades that although approved for use by the chain of command, did not have technical approval for use, and for which Army accepted the associated risk.*

o. *There is **credible information** that, at times, SOTG personnel had little regard for complying with Australian Defence Force (ADF) orders pertaining to the procurement and use of small arms ammunition and grenades.*

Recommendations

- p. **The inquiry recommends** that the relevant ADF policies and procedures be reviewed to ensure new weapons and ammunition cannot be used operationally prior to receiving chain of command and technical approval (including notification of the relevant System Program Office), and being subject to Article 36 legal review.
- q. **The Inquiry recommends** that ADF personnel review force preparation training to ensure that Law of Armed Conflict (LOAC) training sufficiently and specifically addresses:
- why ADF personnel must comply with LOAC, and the potential consequences of not doing so;
 - why ammunition not authorised for use by the ADF is not to be procured or used, including from allies; and
 - the direct responsibility and liability of Commanders in ensuring compliance and that a signed acknowledgement be required as part of individual certification (and collective certification for Commanders) prior to deployment.

Chapter 2.59 – DISCONTINUED INCIDENTS AND ISSUES

Findings:

- a. *The prevalence of rumours of the use of dogs to inflict injuries on local nationals, including in the course of tactical questioning, is such that it is likely to have happened, though specific occasions have not been identified.*
- b. *The increasing propensity of the Special Operations Task Group (SOTG) to endeavour to conduct missions against targets in the absence of actionable intelligence was a significant manifestation of the excessive autonomy of the SOTG, its deviation from the national mission, and the lack of sufficient national oversight, arising from the complicated command and control arrangements by which the SOTG was under operational control of the International Security Assistance Force (Special Operations Force).*

Recommendations:

- **The Inquiry recommends** that clear doctrine be promulgated on the permissible use of military working dogs, in particular in the context of tactical questioning, and the training of military working dogs and military working dog handlers should emphasise the limitations on their use.
- **The Inquiry recommends** that, while the complexities of [REDACTED] warfare may not always make this possible, devolution of operational command of Australian contingents should be avoided. This recommendation supports other related recommendations made in Chapter 3.01.

Chapter 2.60 – UNFINISHED BUSINESS

Recommendations

- a. **The Inquiry recommends** that the [REDACTED] 2010 [REDACTED] incident be referred to the Inspector-General of the Australian Defence Force (IGADF) for further assessment under the legacy arrangements referred to below.
- b. **The Inquiry recommends** that the anonymous disclosure concerning the [REDACTED] 2012 [REDACTED] mission be referred to the IGADF for further assessment under the legacy arrangements referred to below.
- c. **The Inquiry recommends** that [REDACTED]'s disclosure concerning the abuse of lasers be referred to the IGADF for further assessment under the legacy arrangements referred to below.
- d. **The Inquiry recommends** that [REDACTED]'s disclosure of a potential civilian casualty (CIVCAS) incident be referred to the IGADF for further assessment under the legacy arrangements referred to below.
- e. **The Inquiry recommends** that [REDACTED]'s submission be referred to the Directorate of Army Health for the conduct of a review [REDACTED].
- f. **The Inquiry recommends** that IGADF give consideration to conducting a review of the adequacy of Inquiry Officers Inquiry [REDACTED].
- g. **The Inquiry recommends** that [REDACTED] disclosure of a potential CIVCAS incident be referred to the IGADF for further assessment under the legacy arrangements referred to below. [REDACTED].
- h. **The Inquiry does not recommend** that further action be taken at this stage to inquire into [REDACTED].
- i. **The Inquiry recommends** that the alleged killing of a person under control by a member or members of [REDACTED] in the course of a mission to [REDACTED] in [REDACTED] 2012 be referred to the IGADF for further assessment under the legacy arrangements referred to below. Such assessment should commence with the review of the Commander's Diaries (already held by the Inquiry) to identify [REDACTED] missions to [REDACTED] during the period [REDACTED] 2012, the obtaining and review of operational reporting for those missions (which is already held by the Inquiry for some of that period).
- j. **The Inquiry recommends** that the possible assault of a person under control by [REDACTED] at [REDACTED] on [REDACTED] 2012 be referred to the Australian Federal Police for assessment.
- k. **The Inquiry recommends** that an Afghanistan Inquiry Legacy Cell be established in the Office of the IGADF, with the function of receiving and conducting initial scoping of outstanding matters referred to in this chapter, and future disclosures and reports of misconduct in Afghanistan, in order to provide a forum for those who wish to make disclosures to be heard, and to triage disclosures for criminal or disciplinary investigation, other processes, or no further action. The Legacy Cell should have access to this Inquiry's evidence and processes,

and include, or at least have access to and consult, some personnel with experience from this Inquiry.

PART 3

Chapter 3.01 – OPERATIONAL, ORGANISATIONAL AND CULTURAL ISSUES

Recommendations

- **The Inquiry recommends** that in future, so far as practicable, Australia should retain operational command over its deployed forces, including Special Forces, rather than assigning them under command to other entities.
- **The Inquiry recommends** that Special Forces should not be treated as the default ‘force of first choice’ for expeditionary deployments, except for irregular and unconventional operations. While in conventional operations Special Forces will sometimes appropriately provide, or significantly contribute to, early rotations, the ‘handing off’ of responsibility to conventional forces, and the drawdown of Special Forces, should be a prime consideration.
- **The Inquiry recommends** that a professional review of appropriate dwell times between operational deployments be undertaken; that pending that review the 12-month policy be adhered to; and that the authority for waivers be escalated to a higher level.
- **The Inquiry recommends** that every member of SOCOMD should receive education on the causes of war crimes. This education to be delivered by SOCOMD soldiers themselves and reviewed by appropriate external (ie, non-SOCOMD) reviewers who can act as critical friends.
- **The Inquiry recommends** that members of the SOCOMD community should be recorded talking candidly, and on the record, about the ethical drift that took place over a period of time, how hard it was to resist the prevailing organisational culture, and the missed opportunities that could and should have been taken to address the failure that many appeared to recognise at the time but felt powerless to change.
- **The Inquiry recommends** that basic and continuation training should reinforce that not only is a member not required to obey an obviously unlawful order, but it is the member’s personal responsibility and legal duty to refuse to do so.
- **The Inquiry recommends** that both selection and continuation training should include practical ethical decision-making scenarios in which trainees are confronted in a realistic and high pressure setting with the requirement to make decisions in the context of incidents of the kind described in Part 2.
- **The Inquiry recommends** that the training of officers and non-commissioned officers emphasise that absolute integrity in operational and other reporting is both an ethical obligation and is fundamental for sound command decisions and operational oversight.
- **The Inquiry recommends** that the structure of SASR Troops include a second officer, of the rank of Lieutenant, as Executive Officer; and a troop/platoon sergeant, with the rank of Staff Sergeant, Colour Sergeant or equivalent. Consideration should be given to whether a similar approach should be adopted in the Commando Regiments.

- *The Inquiry recommends that it should be clearly promulgated and understood across SOCOMD that the acknowledged need for secrecy in respect of operational matters does not extend to criminal conduct, which there is an obligation to notify and report.*
- *The Inquiry recommends that members have access to an alternative (to their chain of command) reporting line to facilitate confidential reporting of concerns that they are reluctant to raise through the chain of command.*
- [REDACTED]
- *The Inquiry recommends that the careers of those serving members who have assisted in the exposure of misconduct, or are known to have acted with propriety and probity, be seen to prosper, and that they be promoted at the earliest opportunity. These particularly include, in SASR, [REDACTED], and [REDACTED]; and in 2nd Commando Regiment, [REDACTED].*
- *The Inquiry recommends that no adverse action be taken against [REDACTED] or [REDACTED].*

Chapter 3.02 – INQUIRIES AND OVERSIGHT

Findings

- *The failure of oversight mechanisms was contributed to by an accumulation of factors, many of which are founded in attitudes which are, in themselves, commendable: loyalty to the organisation, trust in subordinates, protection of subordinates, and maintenance of operational security. However, they have fostered less desirable features, namely avoidance of scrutiny, and thus accountability. It is critically important that it be understood that not all of these themes are, in themselves, bad or sinister. There are good reasons for many of them. Their importance and benefits should not be overlooked when addressing the problem to which they have contributed. In particular:*
 - *commanders trusted their subordinates: including to make responsible and difficult good faith decisions under ROE; and to report accurately. Such trust is an important and inherent feature of command. However, an aura was attached to the operators who went ‘outside-the-wire’, and whose lives were in jeopardy. There was a perception – encouraged by them and accepted by others – that it was not for those ‘inside-the-wire’ to question the accounts and explanations provided by those operators. This was reinforced by a culture of secrecy and compartmentalisation in which information was kept and controlled within patrols, and outsiders did not pry into the affairs of other patrols. These combined to create a profound reticence to question, let alone challenge, any account given by an operator who was ‘on the ground’. As a result, accounts provided by operators were taken at face value, and what might, at least in retrospect, be considered suspicious circumstances were not scrutinised. Even if suspicions were aroused in some, they were not only in no position to dispute reported facts, but there was a reticence to do so, as it was seen as disloyal to doubt the operators who were risking their lives.*

- *commanders were protective of their subordinates, including in respect of investigations and inquiries. Again, that is an inherent responsibility of command. However, the desire to protect subordinates from what was seen as over-enthusiastic scrutiny fuelled a 'war against higher command', in which reporting was manipulated so that incidents would not attract the interest or scrutiny of higher command. The staff officers did not know that they were concealing unlawful conduct, but they did proactively take steps to portray events in a way which would minimise the likelihood of attracting appropriate command scrutiny. This became so routine that operational reporting had a 'boilerplate' flavour, and was routinely embellished, and sometimes outright fabricated, although the authors of the reports did not necessarily know that to be so, because they were provided with false input. This extended to alternative reporting lines, such as intelligence reporting, which was carefully controlled. It also generated resistance to lawfully authorised investigations and inquiries.*
- *there was a presumption, not founded in evidence, to discount local national complaints as insurgent propaganda or motivated by compensation. This was inconsistent with the counter-insurgency effort, and resulted in a predisposition on the part of QA Officers to disbelieve complaints.*
- *the liberal interpretation of when a 'squirter'² could be taken to be 'directly participating in hostilities', coupled with an understanding of how to describe an engagement to satisfy reporting expectations, combined to contribute to the creation of a sense of impunity among operators.*
- *consciously or unconsciously, QA Officers generally approached their task as being to collect evidence to refute a complaint, rather than to present a fair and balanced assessment of the evidence. They did not necessarily seek to question or independently confirm what they were told; and/or consider and weigh conflicting evidence, both external and internal, against what they were told and accepted on trust.*
- *Inquiry Officers did not have the requisite index of suspicion, and lacked some of the forensic skills and experience to conduct a complex inquiry into what were, essentially, allegations of murder. Nonetheless, allowance needs to be made for the difficulty of the task when faced with witnesses who are motivated not to disclose the truth, whether by self-interest or by misplaced loyalty. This Inquiry does not doubt that, even with its much heightened index of suspicion, and an approach in which accounts have been robustly tested by forensic examination, it has not always elicited the truth, and that there are matters about which it has been successfully kept in the dark, if not deceived. However, Inquiry Officers would have had greater prospects of success if more suspicious, and better trained or experienced in investigatory and forensic techniques.*
- *as a result, operational reporting, and the outcomes of QAs and Inquiry Officer Inquiries (IOIs) were accorded a level of confidence by higher command, which they did not in fact deserve.*
- *Operation Summaries (OPSUMs) and other reports frequently did not truly and accurately report the facts of engagements, even where they were innocent and lawful, but were routinely embellished, often using boilerplate language, in order proactively to demonstrate apparent compliance with ROE, and to minimise the risk of attracting the interest of higher*

² A squirter is a local national seen running from a compound of interest.

headquarters. This had upstream and downstream effects: upstream, higher headquarters received a misleading impression of operations, and downstream, operators and patrol commanders knew how to describe an incident in order to satisfy the perceived reporting requirements. This may be a manifestation of a wider propensity to be inclined to report what superior commanders are believed to want to hear. Integrity in reporting is fundamental for sound command decisions and operational oversight. The wider manifestation needs to be addressed in leadership training and ethical training, from Royal Military College and continuing. Its narrower application needs to be addressed through impressing accountability for integrity in reporting on operations and intelligence staff through duty statements and standing orders, their .

- SOTG personnel and staff who had concerns or suspicions regarding were reticent to raise them, being deterred by the risk of being perceived to be disloyal, as much as by fear of professional or personal ostracism, or threats, bullying, or other retribution, from doing so. A deep-seated team or tribal culture led to the ostracism of members who might question the actions of other team members, which in hindsight facilitated actions against Army values and behaviours. Existing whistle-blower protections and redress of grievance processes were not adequate for members who were fearful of professional, social and physical retaliation to raise their concerns or 'blow the whistle' on unlawful actions.
- Commanders at all levels were failed by oversight mechanisms provided by QAs and IOIs. Australian Defence Force Investigative Service (ADFIS) investigations, though sometimes entirely appropriate, are a blunt instrument with which to confirm or allay suspicions of wrongdoing. One problem with the ad-hoc approach to inquiries was that Inquiry Officers, each conducting a separate individual inquiry, did not have the opportunity to see the emergence of patterns. A standing professional inquiry agency would be better positioned to do so. Any inquiry mechanism needs to have a substantial degree of independence, an index of suspicion, and the forensic skills, experience and techniques to question the veracity of evidence and to test it.
- A balance needs to be struck between the lawful rights of defence members, and the support of the investigation of criminal and disciplinary offences. Members of SOCOMD are in this respect in no different a position to any other defence member.
- The mandatory use of body-cameras by police has proved successful in confirming lawful actions, rebutting false complaints, and exposing misconduct, and is now widely accepted. Privately-owned helmet cameras were enthusiastically used in Afghanistan by some SOTG members, which has albeit unintentionally resulted in the exposure of at least one apparent war crime. Use of official helmet cameras by SF operators, perhaps more than any other single measure, would be a powerful assurance of the lawful and appropriate use of force on operations, as well as providing other benefits in terms of information collection, and mitigating the security risk associated with unofficial imagery.
- While the complexities of coalition warfare, and the need for flexible command and control arrangements, are acknowledged, the devolution of operational command to the extent that the national command has no real oversight of the conduct of SF operations not only has the potential to result in the national interest and mission being overlooked or subordinated, but deprives national command of oversight of those operations.

- *It is apparent that legal officers have contributed to the embellishment of operational reporting, so that it plainly demonstrated apparent compliance with ROE. It is not suggested that this was done with an intention to mislead, as distinct from to express in legal terms what the legal officer understood to have happened, or more typically indirectly by explaining what needed to be stated in a report to demonstrate compliance. The manner in which some legal officers interacted with ADFIS investigations tends to suggest that they perceived their role as being to act for SOTG or its members.*

Recommendations

- *The training of officers and non-commissioned officers (NCOs) should emphasise that absolute integrity in operational and other reporting is both an ethical obligation and is fundamental for sound command decisions and operational oversight.*
- *Standing orders for operations should state that commanders and staff are accountable to ensure that there is absolute integrity in operational reporting.*
- *Members should have access to an alternative safe reporting line, separate from their chain of command, to report or discuss concerns about suspected unlawful behaviour. Specialist legal, intelligence, medical, chaplaincy and other technical chains can provide one avenue for this. Whistle-blower protections to shield and support personnel who raise suspicions, including regarding potential breaches of the LOAC, should be reinforced and promulgated.*
- *An independent tri-service multi-disciplinary specialist operations inquiry cell be established, for the conduct of administrative inquiries into operational incidents. The cell should comprise personnel with a mix of expertise drawn from arms corps (to provide the requisite understanding of the battlespace and operations), lawyers (to provide the requisite forensic skills), investigators, and intelligence professionals, and be available as an independent resource for command in any military operation. Such a cell could reside in the Office of the Inspector-General of the ADF (IGADF), where it would have available the powers of compulsion available under the IGADF Regulation 2016 (with the associated protections).*
- *It should be clearly promulgated and understood across Special Operations Command (SOCOMD) that while a member is not under any legal obligation to submit to questioning by ADFIS, there is no impediment to agreeing to being questioned, and in particular that no obligation of secrecy prevents disclosure to or discussion with ADFIS of any criminal conduct. This recommendation supports the Inquiry's broader recommendation that it should be clearly promulgated and understood across SOCOMD that the acknowledged need for secrecy in respect of operational matters does not extend to criminal conduct, which there is an obligation to notify and report.*
- *The wearing and use of an appropriate helmet camera or body camera by Special Forces operators on operations should be mandated.*
- *Australia should retain operational command over its deployed Special Forces, so far as practicable in a coalition context, and minimise delegation of operational command to other nations or organisations.*
- *Duty statements for deployed legal officers should clearly articulate that ultimately their client is, and their professional duties are owed to, the Commonwealth, as distinct from the deployed*

force, its members or Commanding Officer; that that requires that they treat and deal with civilian complaints impartially, rather than as if acting in defence of the deployed force; and that there is no place for embellishment in connection with operational reporting.

Chapter 3.03 – COMMAND AND COLLECTIVE RESPONSIBILITY

Findings

- *The criminal behaviour described in this Report was conceived, committed, continued, and concealed at patrol commander level, and it is overwhelmingly at that level that responsibility resides.*
- *There is credible information that during SOTG Rotation [REDACTED], [REDACTED] believed that his troop was carrying throwdowns, at least for the purpose of fabricating incriminating evidence to justify the detention and prosecution of local nationals in respect of whom there would otherwise have been insufficient evidence, and took no step to prevent or prohibit that practice.*
- *There is no credible information that any troop/platoon, squadron/company or SOTG commander knew that, or was recklessly indifferent as to whether, subordinates were committing war crimes.*
- *There is no credible information of a failure by any troop/platoon, squadron/company or SOTG commander to take reasonable and practical steps that would have prevented or discovered the commission of the war crimes referred to in this Report.*
- *However, SOTG troop, squadron and task group Commanders bear moral command responsibility and accountability for what happened under their command and control.*
- *That responsibility and accountability does not extend to higher headquarters, including in particular HQ JTF 633 and HQ Joint Operations Command, who did not have a sufficient degree of command and control to attract the principle of command responsibility.*
- *Commanding Officers of SASR during the relevant period bear significant responsibility for contributing to the environment in which war crimes were committed, most notably those who embraced or fostered the ‘warrior culture’ and empowered, or did not restrain, the clique of NCOs who propagated it.*
- *That responsibility is to some extent shared by those who, in misconceived loyalty to their Regiment, or their mates, have not been prepared to ‘call out’ criminal conduct or, even to this day, decline to accept that it occurred in the face of incontrovertible evidence, or seek to offer obscure and unconvincing justifications and mitigations for it.*

Recommendations

- [REDACTED]

- **The Inquiry recommends** that the award of the Meritorious Unit Citation to SOTG (Task Force 66) be revoked.
- **The Inquiry recommends** that the award of decorations to those in command positions at troop, squadron and task group level during SOTG Rotations [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED] be reviewed.
- **The Inquiry recommends** that the award of decorations to those in command positions in SASR during the period 2008 to 2012 be reviewed.

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Chapter 1.02

GENESIS AND JUSTIFICATION

EXECUTIVE SUMMARY

This chapter explains the rationale for the Inquiry: why it originated, and why it is important that it was conducted.

After Operation SLIPPER concluded in 2014, a number of issues emerged in Special Operations Command, including rumours of war crimes circulating in the Special Forces community. The then Special Operations Commander Australia (SOCAUST) commissioned a cultural review of the Command, by Dr Samantha Crompvoets, a sociologist who reported that rumours of war crimes had been reported to her. SOCAUST took his concerns to the then Chief of Army (CA), who requested that the Inspector-General of the Australian Defence Force (IGADF) conduct a scoping inquiry to ascertain whether there was substance to the rumours.

The Inquiry has been conducted pursuant to CA's request, and subsequently the Chief of the Defence Force's direction, to the IGADF, and in conformity with Australia's obligation as a State Party to the Rome Statute of the International Criminal Court.

Australia subscribes to, and holds itself out as adhering to, the Law of Armed Conflict, and International Humanitarian Law. When our enemies fail to so adhere, we hold them to account by such standards. In order to maintain our moral integrity and authority as a nation, which in turn gives us international credibility, strategic influence, and sustains our operational and tactical combat power, we must apply at least the same standards to our own military personnel.

Thus, at a practical and a legal level, by conducting this Inquiry, and following the evidence wherever it went, Australia has sought to maintain its moral authority and to ensure that the only courts current or former Australian Defence Force members may face are those established by the laws of Australia.

GENESIS

The end of combat operations

1. Operation (OP) SLIPPER concluded in 2014, bringing to an end Australia's longest continuous military operation to date. It resulted in 41 Australian Defence Force (ADF) deaths, and many very serious physical and psychological injuries to ADF members, the impact of which will be felt by those veterans and their families for decades to come.
2. The Special Operations Task Group (SOTG), drawn predominantly from the Special Air Service Regiment (SASR) and 2nd Commando Regiment (2 Cdo Regt—formerly 4th Battalion, Royal Australian Regiment), but also from the Special Operations Engineer Regiment (formerly the Incident Response Regiment) and 1st Commando Regiment (1 Cdo Regt) (herein collectively referred to as Special

Forces), was in the frontline of OP SLIPPER, and bore the brunt of those deaths and injuries. Australian Special Forces deployed to Afghanistan in rotations of between four and six months at a time, and most undertook multiple deployments: six or more deployments for an individual was not uncommon. The Special Forces were 'the tip of the spear': they experienced most contacts with the enemy, and received most of the gallantry decorations. Both the SASR and 2 Cdo Regt received battle honours.

3. When OP SLIPPER ended, the nature, length and intensity of this period meant that those Special Forces members who continued to serve had to re-adjust to different working and living environments. Issues emerged, or continued, in respect of:

- a. re-integration of the Special Forces into Army and the ADF as a whole, after their relative autonomy during OP SLIPPER;
- b. long-standing rivalries between SASR and the commando regiments;
- c. lax practices and non-adherence to prescribed procedures during operations developed and became habitual, including for example maintaining proper registers of weapons, ammunition and vehicles; and
- d. there was more time for soldiers and their mates, who had suffered injuries and had developed psychological issues, to reflect upon their experiences in Afghanistan.

The emergence of rumours

4. From at least 2015 onwards, if not earlier, disturbing rumours of war crimes, and in particular of illegal killings and mistreatment of detainees, circulated. Morale was affected. The response of the Special Operations Commander Australia (SOCAUST) to these issues included imposing an operational pause in the Command, sending his Deputy to Campbell Barracks to ensure the SASR adhered to ADF Standard Operating Procedures (SOP), and in 2015, commissioning a study with the aim of providing a 'snapshot' of the integration of the special operations capability with other ADF units and Whole-of-Government capabilities. He appointed Dr Samantha Cromptvoets to conduct the study.¹ She interviewed, among others, many members of Special Operations Command (SOCOMD), and external stakeholders, and reviewed media articles and books concerning Australian Special Forces.

5. Dr Cromptvoets produced two principal documents:

- a. a seven-page report, entitled *Special Operations Command (SOCOMD) Culture and Interactions: Insights and reflection*, dated January 2016 (**January 2016 report**);² and

¹ Dr Samantha Cromptvoets is a sociologist and a Research Fellow at the College of Medicine, Biology and Environment at the Australian National University. Her research interests include military sociology and she has had a number of papers published on the topic of military culture and the wellbeing of Service personnel.

²Reference 1 - Cromptvoets, S. *Special Operations Command (SOCOMD) Culture and Interactions: Insights and reflection* of Jan 16. [REDACTED]

- b. a 45-page 'draft' report, entitled *Special Operations Command (SOCOMD) Culture and Interactions: Perceptions, reputation and risk*, dated February 2016 (**February 2016 report**).³

January 2016 report

6. Dr Cromptvoets describes her January 2016 report as 'reflections' on some of the data she gathered in the process of undertaking the study. She explained that, as she interviewed various people, including Special Forces 'insiders', both 'on the record' and 'off the record', she was sometimes told stories of 'war crimes'.⁴ She identified a number of 'deeply concerning norms' within Australian Special Forces, including: the shift from 'unacceptable behaviour' to war crimes; the glorifying of these crimes as being a 'good' soldier; 'competition killing' and 'blood lust'; the inhumane and unnecessary treatment of prisoners; and cover-ups of unlawful killings and other atrocities.

7. Dr Cromptvoets then listed specific scenarios that had been described to her in the course of conducting her inquiries. Specific matters to which she referred were:

- a. Body count competitions and the use of the Joint Priority Effects List (JPEL). Dr Cromptvoets said that she was given the impression that there had been a 'large number of illegal killings' that had been 'reverse engineered' using the JPEL. She described this as a 'sanctioned kill list'—a reference to a prioritised list of validated targets that may be prosecuted to achieve lethal or non-lethal effects. The implication was that names of people killed were added to the JPEL after they were killed.
- b. Direct participation in hostilities. Dr Cromptvoets was told that 'Direct participation in hostilities' was another tool used by Australian Special Forces to commit 'just about any atrocity that took their fancy'. One example of this related to 'squirters'—a reference to villagers running away when a force was inserted by helicopter. The scenario conveyed to Dr Cromptvoets was that Special Forces would open fire, killing many men (and sometimes women and children) as they ran away. She was told that Special Forces would then contrive a plausible excuse, such as the squirters 'were running away from us to their weapons caches'. These were, she was told, 'sanctioned massacres'.
- c. Clearance Operations. Dr Cromptvoets was told that, after squirters were '*dealt*' with, Special Forces would then cordon off a whole village, taking men and boys to guesthouses, which are typically on the edge of a village. There they would be tied up and tortured by Special Forces, sometimes for days. When the Special Forces left, the men and boys would be found dead: shot in the head or blindfolded and with throats slit.
- d. Cover-ups. A specific incident described to Dr Cromptvoets involved an incident where members from the 'SASR' were driving along a road and saw two 14-year-old boys whom they decided might be Taliban sympathisers. They stopped, searched the boys and slit their throats. The rest of the Troop then had to 'clean up the mess', which involved bagging the bodies and throwing them into a nearby river. Dr Cromptvoets says she was told this was not an isolated

³ Reference 2 - Cromptvoets, S. *Special Operations Command (SOCOMD) Culture and Interactions: Perceptions, Reputation and risk* of Feb 16. [REDACTED]

⁴ Cromptvoets, Jan 16 report, p3.

incident. In this context, Dr Cromptvoets says she was told that Special Forces soldiers were committing unsanctioned killing in order to 'get a name for themselves' and to join the 'in' group.

8. Dr Cromptvoets did not detail any specific incident. She does not identify any perpetrator or unit involved. Rather, she described the information she received as 'a whole lot of vague, nameless scenarios',⁵ in conversations which she characterised as 'off the record'.⁶

February 2016 report

9. In the February 2016 report, Dr Cromptvoets addressed topics such as the identity and role of Australian Special Forces, rivalry and antipathy between the SASR and 2 Cdo Regt, the 'culture of SOCOMD', and leadership and organisational change. While the report is essentially a cultural and organisational study, it alludes to illegal actions by Special Forces on operations. In the executive summary of her report, she wrote:

...a number of internal interviewees, while speaking highly of SOCOMD capability, provided unverifiable accounts of extremely serious breaches of accountability and trust. Some of these related to policy, process and governance failures ... Even more concerning were illusions [sic, allusions] to ... illegal application of violence on operations, disregard for human life and dignity, and the perception of a complete lack of accountability at times.⁷

10. She noted⁸ that stories in the media about Australian Special Forces have contained allegations of '*a lack of respect for human life and dignity, 'death squads', war crimes, cover-ups and botched investigations*'. She also quoted a Special Forces 'insider' as saying that some 'horrendous' things were 'kept under wraps'.⁹ Appendix 3 to her report contains examples of these media stories.¹⁰ Beyond these references, the February 2016 report does not expand on what these allusions were.

11. In an email to SOCAUST and (then) Chief of Army (CA—the present Chief of the Defence Force) of 22 February 2016,¹¹ Dr Cromptvoets further elaborated on the parameters of the information she had received. She explained that no one she spoke to admitted to being a perpetrator, and only one person described having witnessed events first-hand. The rest were relaying to her stories that were said to be 'common knowledge'. Dr Cromptvoets explained that no conversation regarding potentially illegal activity was tape-recorded. Dr Cromptvoets said that some of her informants were soldiers who would not meet with her, instead describing their experiences anonymously over the telephone. She said that the anonymous witnesses wanted to remain anonymous because of fear for their safety, fear for their family's safety, or concern about their career in the ADF.

12. In her email, Dr Cromptvoets returned to the topic of media articles, which she referred to in her January 2016 report as documenting 'many atrocities':

⁵ Cromptvoets, Jan 16 report, p7.

⁶ Cromptvoets, Jan 16 report, p1.

⁷ Cromptvoets, Feb 16 report, p4.

⁸ Cromptvoets, Feb 16 report, p20.

⁹ Cromptvoets, Feb 16 report, p27.

¹⁰ Cromptvoets, Feb 16 report, p41-5.

¹¹ Reference 3 - Enclosure 1B to CA Noting Brief to CDF of 30 Mar 16. [REDACTED]

The nature of the stories I was told have been described before, having emerged in numerous media stories over the last decade or so. Although not every particular incident is exposed in the Press. It seems however that just as soon as these stories emerge, they are gone. The overarching consideration is that when looked at as a whole there appears to be sufficient detail of the stories to be triangulated and authenticated.

Special Operations Commander Australia writes to the Chief of Army

13. Major General (MAJGEN) Jeffrey Sengelman, then SOCAUST, was so concerned about what he saw as the 'serious endemic problems' affecting SOCOMD which needed remediation that he put his command on an 'operational pause'. He also invited every member of SOCOMD to write to him personally, and advise him of any unacceptable behaviour they had witnessed or conducted within the Command. He gave an undertaking that, provided no criminal activity came to light, he would respect the confidence of those who had written to him. He said that, in total, he received 209 letters.¹² He advised the Inquiry that: 'no evidence of criminal behaviour was presented'. Respecting his undertaking of confidentiality, the Inquiry did not seek those letters, which he then destroyed.

14. On 09 March 2016, MAJGEN Sengelman sent a Minute to CA (as CDF then was).¹³ In it, SOCAUST explained that while he had received no direct evidence of illegality nor received any formal allegations, a range of stories and anecdotes had come to his attention which were deeply disturbing and implied criminal behaviour within SOCOMD. They covered a period of over a decade, and were closely associated with operations in Afghanistan.

Chief of Army requests a scoping inquiry

15. On 30 March 2016, CA wrote to the Inspector-General of the Australian Defence Force (IGADF), requesting that IGADF inquire into serious concerns regarding SOCOMD (the Request). The Request summarised the concerns as 'unsubstantiated stories' of possible crimes (illegal killings and inhumane and unlawful treatment of detainees) over a lengthy period of time in the course of SOTG deployments in Afghanistan; the cultural normalisation of deviance from professional standards within SOCOMD, including intentional inaccuracy in operational reporting related to possible crimes; a culture of silence within SOCOMD; the deliberate undermining, isolation and removal from SOCOMD units of some individuals who tried to address this rumoured conduct and culture; and a systemic failure, including commanders and legal officers at multiple levels within SOCOMD, to report or investigate the stories as required by Defence policies.

16. CA added that it was his professional judgment that there were many such 'stories' which were widely known, and believed to be 'essentially true' by those who told them. CA wrote that he believed that an IGADF 'scoping inquiry' would be the best means by which to gather and assess the information that is available before determining the options for further action. Furthermore, he suggested that the normal course of suspending an inquiry, in part or whole, to refer any evidence of a criminal or disciplinary offence for Australian Federal Police (AFP) or Australian Defence Force Investigative Service (ADFIS) investigation, might need to be foregone in order to break down the culture of silence.

¹² Reference 4 - Enclosure 1F to Noting Brief for CDF of 30 Mar 16 (*Commanding in Adversity – Modernising Special Operations Command*). [REDACTED]

¹³ Reference 5 - Minute SOCOMD to CA of 09 Mar 16. [REDACTED]

17. When established the Inquiry was intentionally not given a specified timeframe in which to report. It was generally understood that it would take some considerable time, first to understand the complex and unique nature of Special Forces operations in Afghanistan, and then to gain the confidence and trust of members of an organisation that does not readily welcome engagement or scrutiny by outsiders, to the extent that they might be prepared to make disclosures. So it has proved.

JUSTIFICATION

18. In one sense, it is not for the Inquiry, requested by CA (and later, as explained in subsequent chapters,¹⁴ directed by CDF), to explain the rationale which, as it understands it, informed the decision to have an inquiry into these matters. However, there have been critics who have aired not only doubts and misgivings but overt hostility to the establishment of the Inquiry. Moreover, the rationale for an inquiry necessarily informs its approach, and for that reason if no other, the Inquiry here explains its appreciation of why its establishment was proper, necessary and important.

19. Some of the public statements about the Inquiry question the justification for an inquiry based on rumours, and its impact on veterans and their families who, it is asserted, have given enough for their country and should not be harassed by an inquiry. While these concerns are understandable, there are many countervailing considerations, both legal and moral.

The legal justification for the Inquiry

20. From 01 September 2002, Australia has been a State Party to the Rome Statute, which established the International Criminal Court (ICC). [The consequence of a proper investigation of war crimes allegations by Australia for the jurisdiction of the ICC is referred to in subsequent chapters.¹⁵]

21. As all the individuals concerned were at the relevant time serving Defence members, they were at all relevant times (between 2005 and 2016) subject to military law, namely the *Defence Force Discipline Act 1982* (DFDA), including the extended operation given by s 61 of that Act to 'Territory Offences', and Division 268 of the *Criminal Code*, which proscribes a number of 'war crimes' in respect of a non-international armed conflict such as that in which the ADF was engaged in Afghanistan in that period.

22. First CA, and later, CDF determined that there should be an inquiry by IGADF, and they had clear legal authority to make that determination, initially under the *Defence (Inquiry) Regulations 1985*, and later under the *IGADF Regulation 2016*, and:

- a. inquiry witnesses, recipients of notices to produce documents or produce information were legally bound to comply with the Inquiry's demands, and
- b. persons and institutions affected by the Inquiry will be lawfully liable to such adverse comments, if any, as may be made.

¹⁴ See Chapter 1.04 (Legal Issues).

¹⁵ See Chapter 1.10 (The Applicable Law of Armed Conflict).

The moral justification for the Inquiry

23. However, it is the *moral* justification for the Inquiry that provides the most persuasive answer to the critics. The Inquiry is highly conscious of the challenges and ambiguities by which soldiers are inevitably confronted in counter-insurgency operations such as those in Afghanistan, including the impact on the physical and mental well-being of ADF members caused by repeated deployments in difficult and dangerous conditions.

24. As Dicey wrote:¹⁶

A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in bona fide obedience to the orders (say) of the commander-in-chief. Hence the position of a soldier is in theory and may be in practice a difficult one. He may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it.

25. However, while the legal duties imposed upon soldiers are not light, and the circumstances in which they have to be applied are difficult, there are well-established norms of International Humanitarian Law, including the Law of Armed Conflict (LOAC), which are universally accepted and uncontroversial, and which all Australian Service personnel are taught and should know. As was said by Windeyer J in *Marks v The Commonwealth*,¹⁷ in terms endorsed by Gummow, Hayne and Crennan JJ in *White v Director of Military Prosecutions*:¹⁸

The relationship of members of the armed Services to the Crown differs essentially from that of civil servants whose service is governed by the regulations of the Public Service. The members of the Forces are under a discipline that the others are not: they have duties and obligations more stern than theirs: and rights and privileges that they cannot claim.

26. Those norms are found in international humanitarian law, and in particular in the Rome Statute establishing the ICC. As the late Sir Ninian Stephen, former Australian High Court Judge and Governor-General, wrote in *War Crimes Trials and the Future*:¹⁹

International humanitarian law and the proscription of war crimes has a very long history. Their origins reach back to the Old Testament and classical times... In this century at least we have fallen sadly short of Elisha's answer, in 2 Kings 6, to the King of Israel who asked whether he should slay his prisoners of war and was told 'You shall not slay them. Would you slay those who you have taken captive with your sword and bow? Set bread and water before them that they may eat and drink and go to their master'.²⁰

¹⁶ Reference 6 - Dicey, Albert, *Study of the Law of Constitution* (MacMillan, 10th ed, 1959), 'Introduction'.

¹⁷ (1964) 111 CLR 549 at 573.

¹⁸ [2007] HCA 29 at [72].

¹⁹ The inaugural Geoffrey Sawyer Lecture (ANU Centre for International and Public Law, paper no 10, 1998).

²⁰ Sir Ninian then recited Henry Durant's reaction to the battle of Solferino, the founding of the International Committee of the Red Cross, and the ensuing Geneva Conventions in the 19th century and The Hague, Geneva and Genocide conventions of the 20th century, and the establishment of the two United Nations *ad hoc* tribunals for the former Yugoslavia (of which he became a judge) and Rwanda.

27. Extensive time and effort is taken before and during operations to make the rules of engagement comply with all relevant laws, and for them to be clear, and as simple as possible to apply in the heat of battle or other conflict.

28. The moral justification for this Inquiry may be succinctly stated as follows:

- a. Australia subscribes to, and holds itself out as adhering to LOAC and International Humanitarian Law.
- b. When our enemies fail to so adhere, we hold our enemies to account by such standards.
- c. In order to maintain our moral authority as a nation, which in turn gives us international credibility, strategic influence, and sustains our operational and tactical combat power, we must apply at least the same standards to our own military personnel.²¹

29. That application of the law will not come as a surprise to any member of the ADF. On the contrary, all Service members are properly trained in what LOAC requires.

30. Thus, at a practical and legal level, by conducting this Inquiry, and following the evidence wherever it went, Australia maintains its moral authority and (as explained in subsequent chapters in the context of the ICC²²) ensures that the only courts current or former ADF members will face—if there are charges to be faced – are those established by the laws of Australia.

31. Further, as a matter of:

- a. *Discipline*: it is also essential that such rumours be investigated, and then, if substantiated, that appropriate action be taken; and
- b. *Fairness*: affecting morale—to the extent that there is no substance to the rumours, the undoubted gallantry and sacrifice of SOTG units and their members deserve to remain unsullied and vindicated.

References:

1. Cromptvoets, S. *Special Operations Command (SOCOMD) Culture and Interactions: Insights and reflection* of January 2016. [REDACTED]
2. Cromptvoets, S. *Special Operations Command (SOCOMD) Culture and Interactions: Perceptions, reputation and risk* of February 2016. [REDACTED]
3. Enclosure 1B to CA Noting Brief to CDF of 30 March 2016. [REDACTED]
4. Enclosure 1F to Noting Brief for CDF of 30 March 2016 (*Commanding in Adversity – Modernising Special Operations Command*). [REDACTED]
5. Minute SOCOMD to CA of 09 March 2016. [REDACTED]
6. Dicey, Albert Venn, *Study of the Law of Constitution* (MacMillan, 10th ed, 1959).

²¹ As Barak P (Supreme Court of Israel, sitting as the High Court of Justice) wrote in *The Public Committee against Torture in Israel v. The State of Israel*, (2006) 53(4) PD 817, 845: “[it] is the fate of democracy, in whose eyes not all means are permitted, and to whom not all the methods used by her enemies are open. At times democracy fights with one hand tied behind her back. Despite that, democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance. At the end of the day, they strengthen her and her spirit, and allow her to overcome her difficulties.”

²² See Chapter 1.10 (The Applicable Law of Armed Conflict).

Chapter 1.03

THE CONDUCT OF THE INQUIRY

EXECUTIVE SUMMARY

This chapter outlines the course of the Inquiry and the manner in which it has been conducted.

Broadly, the Inquiry involved the following four overlapping phases:

- *Familiarisation and socialisation*, in which the Inquiry informed itself about Special Operations Command, the Special Operations Task Group and its operations in Afghanistan, and endeavoured to cultivate an environment in which witnesses would be prepared to speak frankly. The Inquiry also liaised with coalition partners in order to understand how similar issues had been dealt with, which informed its approach.
- *Identification of incidents and issues of interest*, in which the Inquiry sought to elicit the rumours in circulation and trace them to sources and specific incidents, through a variety of approaches.
- *Exploration of incidents and issues of interest*, in which the Inquiry used its information and evidence gathering powers to collect and analyse documentary and testimonial evidence.
- *Procedural fairness and finalisation of report*, in which the Inquiry analysed the evidence, contemplated what findings and recommendations might be made, issued procedural fairness notices to potentially affected persons, considered their responses, and finalised its report.

In the course of evidence and information gathering:

- 170 Requests for Information were issued (some requesting a single document, but most were far more extensive);
- in excess of 20 000 documents and 25 000 images were sourced and reviewed by the Inquiry; and
- the Inquiry conducted in excess of 510 witness interviews, of 423 witnesses (a number of witnesses were interviewed more than once). Interviews were both formal and informal, and ranged in length from less than an hour, to three days.

Having regard to the nature of this scoping Inquiry and the terms of the Inquiry Directions, the Inquiry is satisfied under s 28F(1)(a) of the *Inspector-General of the Australian Defence Force Regulation 2016* that 'all information relevant to the inquiry that is practicable to obtain has been obtained'. Where appropriate, potential findings and recommendations have been tested through the procedural fairness process.

Introduction

1. The task of the Inquiry was to ascertain whether there was substance to unspecified rumours and allegations of criminal, unlawful or inappropriate conduct, including possible breaches of the Law of Armed Conflict (LOAC) by or involving elements of Special Operations Task Group (SOTG) in Afghanistan over the period 2005 to 2016.
2. This has required the Inquiry to:
 - a. familiarise itself with Special Operations Command (SOCOMD), the SOTG, and its operations in Afghanistan;
 - b. discover the rumours (in the context of a Special Forces [SF] community which is of its nature secretive and reluctant to talk);
 - c. track those rumours to their sources;
 - d. obtain and examine documentary and testimonial evidence relevant to the rumoured conduct;
 - e. identify and explore specific incidents and issues of interest;
 - f. consider and analyse the evidence to determine whether and to what extent any 'rumour' has substance, and what response would be appropriate;
 - g. in conformity with the rules of procedural fairness, provide any person who may be adversely affected by a potential finding or recommendation with a reasonable opportunity to provide evidence and make submissions;
 - h. prepare a report for the Chief of the Defence Force (CDF), which:
 - (1) summarises and analyses the evidence pertaining to each incident and issue of interest, and draws a conclusion as to whether or not and to what extent there is evidence of a breach of LOAC, or other misconduct;
 - (2) where there is evidence of misconduct, make appropriate and nuanced recommendations, having regard to the available evidence and its strength, for consideration by CDF, as to what action should be taken address it;
 - (3) review the structural, operational, command and cultural environment in which these acts may have occurred and which may have enabled them, and make recommendations for consideration by CDF about potential reforms and measures to address them, in order to minimise any risk of recurrence; and
 - (4) record findings and recommendations as contemplated by *Inspector General of the Australian Defence Force Regulation 2016* (IGADF Regulation) s 28(2) and attach the accompanying documents required by s 28(3).

3. After constituting the initial Inquiry team, and receiving briefings from then Chief of Army (CA) and the Inspector-General of the Australian Defence Force (IGADF), the Inquiry team was provided with office accommodation at Defence Plaza Sydney and at Brindabella Park Offices in Canberra. Witnesses were later interviewed in person at these locations, and elsewhere as required. The Inquiry team was progressively expanded as additional incidents and issues of interest emerged.

Familiarisation and socialisation

4. If it was to have any prospect of scrutinising and analysing relevant evidence, it was essential for the Inquiry to gain an in-depth understanding of SOCOMD, SOTG and its operations in Afghanistan. Moreover, if it was to have any prospect of gaining sufficient trust of members of SOCOMD to elicit full and frank evidence from members of a community that is suspicious of outsiders, it was necessary to take steps to gain their confidence. Accordingly, and consistently with advice received from senior officers at the outset, the Inquiry took some time to gain a comprehensive understanding of SOCOMD, SOTG and its operations in Afghanistan, and to 'socialise' the Inquiry within SOCOMD so as to gain the confidence and trust of members, and assist in their understanding of the purpose, conduct and methodology of the Inquiry.

5. This commenced with detailed initial discussions with and briefings from senior commanders in SOCOMD, who provided an overview of its origins, structure and characteristics, and the composition and role of SOTG during Operation (OP) SLIPPER in Afghanistan. These were followed by unit visits to the Special Air Service Regiment, and 2nd Commando Regiment and the Special Operations Engineer Regiment. At those visits, the Inquiry received presentations on the history, role, organisation and ethos of the respective regiments, and the nature of their operations when deployed as part of SOTG in Afghanistan, and how their operations evolved during that period. These briefs also covered particular aspects of operations in which the Inquiry was developing an interest, including targeting and sensitive site exploitation. These visits also afforded an opportunity to speak with the respective Commanding Officers and Regimental Sergeants Major, and a sample group of unit members who had deployed on various SOTG Rotations, to introduce the Inquiry team and explain its purpose and approach, as well as to obtain preliminary evidence.

6. In order to encourage witnesses to come forward, the then Special Operations Commander Australia Major General Jeffery Sengelman wrote to all members of the Command, explaining the nature of the Inquiry and encouraging any individual who felt they had something to contribute to contact it.

7. The Inquiry briefed the SOCOMD Command Council, covering the moral imperative to inquire into the subject matter of the Inquiry, the consequences of doing so for any potential action by the International Criminal Court (ICC), and the terms of, and broad approach to be taken by, the Inquiry. In particular, it was emphasised that the Inquiry was just as concerned to dispel rumours and remove any cloud from reputations, as it was to find substance in any rumour.

Liaison with coalition partners

8. The Inquiry liaised with Coalition Partners in the United States of America (USA), the United Kingdom (UK) and Canada, and their SF commands. The purpose of this liaison was two-fold: first, procedurally, to inform the Inquiry as to how similar allegations or rumours of war crimes were

investigated and dealt with, so as to enable the Inquiry to design and mould its approach conscious of the difficulties that others had encountered and of techniques that had proved successful; and secondly, evidentially, to ascertain whether Coalition Partners who had conducted or were conducting investigations had encountered any evidence of war crimes by Australian SF. No misconduct by Australian SF was revealed by this liaison, but many lessons which informed the conduct of the Inquiry were extrapolated.

9. In the UK, discussions were held with judges who had conducted war crimes proceedings and other inquiries (such as the President of the Queen's Bench Division, Sir Brian Leveson) and the judge with oversight of the Iraq Historic Allegations Team (IHAT) (Sir George Legatt, now Lord Legatt JSC); the Director of Service Prosecutions, Mr Andrew Cayley CMG QC; the Metropolitan Police; the Inspector of Iraq Fatalities, retired judge Sir George Newman; representatives of the Ministry of Defence who explained the various inquiries, since concluded, into suspected war crimes in Afghanistan (OP NORTHMOOR), and Iraq (IHAT); as well as the Directorate of Special Forces and staff.

10. In April 2017, the Inquiry was briefed at Headquarters, Canadian SF Command, on the conduct of an inquiry into alleged misconduct of Canadian SF and lessons learned from those processes, as well as cultural issues. Also in April 2017, the Inquiry visited Headquarters, US Special Operations Command, Tampa, Florida, and was briefed by the Staff Judge Advocate on the USA approach and methods of conducting investigations into allegations of misconduct.

11. These visits provided valuable insights into how other countries are dealing with similar rumours or allegations, and significantly informed the Inquiry's approach and methodology.

Liaison with the Australian Federal Police

12. At an early stage, the Inquiry consulted with the Commissioner of the Australian Federal Police (AFP) to establish a mutually acceptable approach, and it was agreed that, at least as a general rule, the Inquiry would proceed to completion before referring any incident under inquiry to the AFP, which would be a matter for recommendation in the Inquiry Report, and decision by the CDF in accordance with the applicable legislation. The CDF, and the then Minister for Defence (MINDEF), were informed that this was the approach being adopted.

13. Since then, a number of exceptional matters have been referred to the AFP, by the CDF or MINDEF.

Identification of incidents and issues of interest

14. Because at the outset there was no specific allegation or incident, but only the notion that there were widespread but unspecified rumours afoot, it was necessary for the Inquiry first to discover what the rumours were (in the context of a SF community which is of its nature secretive and reluctant to talk to outsiders); and secondly to track those rumours to their sources, or to fix a place and time of the rumoured conduct, so as to identify witnesses who could substantiate or dispel them; before it could proceed to obtain and examine relevant documentary and testimonial evidence specifically relating to the incident.

15. The Inquiry adopted multiple approaches to achieving this.

Top down, bottom up, and sample testing

16. A simultaneous 'top down', 'bottom up' and 'sample testing' approach was taken.

17. A broad sample of former Joint Task Force Commanders, SOTG Commanding Officers, Executive Officers, Operations Officers, Chaplains, and Regimental Sergeants Major, covering a range of rotations, were interviewed and asked as to their knowledge, direct or indirect, of potential breaches of LOAC, or rumours thereof, with a view to eliciting specific incidents or issues of interest. Generally speaking, this process resulted in references to incidents which had already been the subject of contemporaneous investigations or inquiries, and denials of knowledge or suspicion of any war crimes.

18. Each SOCOMD unit was asked to provide a representative sample of members of diverse ranks across SOTG rotations for preliminary interviews, characterised as 'sample testing'. They were similarly asked as to their knowledge, direct or indirect, of potential breaches of LOAC, or rumours thereof. More specifically, the various scenarios mentioned in the Crompvoets Report¹ were described, and interviewees were asked whether they had any knowledge, or had heard of anything, to like effect. This is described more fully elsewhere,² and while it elicited a few rumours, the more striking feature was the widespread denial by most interviewees of any knowledge of any rumour of any war crime.

Documentary review

19. The Inquiry undertook an extensive review of primary material to gain broad awareness of the operational context of the SOTG deployments, including examination of relevant Defence records (including Inquiry Officer Inquiry reports), and open-source reporting by contemporary media and international and non-Government organisations (including the United Nations Assistance Mission in Afghanistan (UNAMA) and the International Committee of the Red Cross (ICRC).

Informants

20. A number of serving and former serving personnel contacted the Inquiry and provided information about matters, some of which were at least potentially breaches of LOAC. However, save for one instance, none provided direct evidence of a contravention.

21. The Inquiry engaged on a confidential basis with a number of informants, some internal to the Australian Defence Force (ADF) and some external, including some referred by senior officers, who provided valuable information and leads. Their identities, and communications with them, are the subject of a non-disclosure direction under s 21 of the *IGADF Regulation 2016*.

Public calls for information

22. During the second half of 2017 the Inquiry, by public advertisement, invited the public to provide relevant information. An Australia-wide IGADF media release announced a 'Public Call for Information' in national, metropolitan and regional newspapers on Saturday 02 September 2017.

¹ Reference 1 - Crompvoets, S. *Special Operations Command (SOCOMD) Culture and Interactions: Perceptions, Reputation and Risk* of Feb 16. [REDACTED]

² See Chapter 1.06 (Sample Testing).

This attracted significant media coverage of the Inquiry. At the same time, the Notice was promulgated via Departmental communications tools such as Service newspapers (with a live web-link to the Inquiry's dedicated email address and phone contacts), websites, ForceNet and a DEFGRAM. It was also posted on the Department of Veterans' Affairs website. The Notice was repeated in both mainstream and Service newspapers during October 2017.

23. According to the Australian Government media booking authority, the mainstream newspaper Notice potentially reached 3.9 million newspaper readers – approximately 16 per cent of the Australian population. The circulation of Service newspapers is 35 500 - with a 2014 Service News Readership survey reporting that almost all ADF respondents reported reading their Service specific newspaper.

24. A Dari translation of the Public Notice was placed in Australian-based Afghan publications early March 2018 so as to reach people who may have missed the mainstream Notice the previous year and who may pass on the information to friends and relatives in Afghanistan. *The Arman Monthly* (circulation 1500) is distributed in Melbourne only; *The Persian Herald* (circulation 10 000) is distributed in all capital cities except Darwin. Ethnic Liaison Officers from the Department of Home Affairs distributed the Notice via their networks and relevant websites.

25. Further media interest in the Inquiry was generated by the publication of journalist Chris Masters' book *No Front Line* in October 2017. Excerpts from the book were syndicated in Fairfax publications (*The Age*, *Sydney Morning Herald* and the *Good Weekend* magazine).

26. As a result of the Public Call for Information, phone calls and email contacts were made to the Inquiry, providing generic and specific information from which incidents and issues of interest were able to be identified.

Liaison with relevant agencies

27. Instead of an in-country call for information in Afghanistan, which would have faced at least significant logistical problems, the Inquiry sought to obtain key documents, complaints and leads from liaison with external bodies, including UNAMA, ICRC, the North Atlantic Treaty Organisation (NATO), and the Office of the Prosecutor, International Criminal Court (OTP-ICC).

United Nations Assistance Mission in Afghanistan

28. UNAMA provided a summary of all civilian casualties (CIVCAS) thought to involve the International Security Assistance Force (ISAF), of which those in Uruzgan Province were potentially, though not necessarily, associated with Australian forces. Although a civilian casualty incident is by no means necessarily a war crime, the table provided a useful starting point for identifying or correlating potential incidents of interest.

International Committee of the Red Cross

29. The ICRC provided valuable advice and insights, including in relation to interviewing Afghan witnesses, and generic information of some incidents. However, the Inquiry respected the ICRC's privilege of non-disclosure arising in Australian law from the *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013* ('the regulation'),

made under the authority of the *International Organisations (Privileges and Immunities) Act 1963*, which makes inviolable the ICRC's premises, archives and documents; confers 'immunity from any kind of legal process' upon the ICRC; confers immunity from suit and other legal process, including being called as a witness, upon the ICRC delegate, and³ provides that the confidentiality of ICRC reports, correspondence and other communications must be respected, and the contents of these reports, communications and other correspondence must not be divulged to persons or organisations other than the persons for whom they are intended; or used in the course of legal proceedings; without prior written authorisation from the ICRC.

North Atlantic Treaty Organisation

30. The Office of Legal Affairs at NATO Headquarters holds a repository of complaints, reports and investigations relating to ISAF during the period relevant to the Inquiry. Liaison with the Director of Legal Affairs and Director of Operations (Afghanistan) at NATO Headquarters to discuss the work of the inquiry laid the groundwork for a request for access to certain NATO/ISAF reports in relation to particular incidents of interest to the Inquiry.

Office of the Prosecutor, International Criminal Court

31. The Inquiry met with the Deputy Prosecutor, Mr James Stewart, in the Hague during May 2018, and subsequently made a written request for access to information and documents held by the ICC which referred to or evidenced a breach of LOAC by the ADF in Afghanistan.

32. The liaison between the Inquiry and the OTP-ICC served the purposes of furthering the Inquiry's considerations, by endeavouring to source any information that the OTP may have of relevance to the Inquiry's terms of reference; demonstrating to the OTP that the Inquiry is a rigorous and independent national investigation, which would meet the requirements of the complementarity principle and ensure that the ICC's jurisdiction remained dormant; and, consistent with the Inquiry's approaches to other coalition nations, ensuring that the Inquiry maintained its 'world's best practice' approach, including by gaining insights into means of sourcing evidence from witnesses in Afghanistan, which informed the Inquiry's decision to gather evidence in Kabul.

33. In response to the request for access to information and documents, the OTP responded that by operation of Rule 46 of the ICC's Rules of Evidence and Procedure, material provided to the OTP other than open source material could not be communicated to third parties. The OTP did refer the Inquiry to the open source material it held. Moreover, making the request was itself an important step to demonstrate Australia's intention to discharge its obligation to investigate potential war crimes by its nationals.

Exploration of Incidents and Issues of Interest

34. The specific incidents and issues of interest which emerged from these processes then informed the focus of information and evidence gathering. Further incidents and issues of interest continued to emerge, from informants and in the course of evidence gathering and analysis.

³ Reference 2 - *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013*, s 6(13).

35. In respect of some incidents and issues of interest, it appeared at a relatively early stage that there was insufficient substance to the matter to warrant taking it any further, or that there was insufficient reason to reopen a matter that had been the subject of earlier inquiry or investigation. Those are summarised in Chapter 2.59 (Discontinued Incidents and Issues).

36. Significant and important lines of inquiry continued to emerge as late as March 2020, when the Inquiry ceased to open new lines of inquiry in the interests of bringing the Inquiry to a conclusion. Further incidents and issues of interest have continued to emerge since, but have not been the subject of inquiry. Those incidents and issues which have not been the subject of inquiry, or only at an early stage of inquiry, are summarised in Chapter 2.60 (Incomplete issues and incidents).

37. The principal information and evidence gathering means employed were:

- a. notices for production under s 23 of the IGADF Regulation;
- b. requests for Information (RFIs); and
- c. hearings of evidence, through the interview of witnesses.

Section 23 Notices for production

38. As a CDF-directed inquiry, the Inquiry has powers similar to those of a Royal Commission to require 'any person' (not limited to present or former members of the ADF) who there is reason to believe has information or a document or thing relevant to the Inquiry, to give evidence and/or produce documents and information to the Inquiry.⁴ These powers were used extensively, to obtain information from individuals and agencies external as well as internal to Defence, including external media and telecommunications organisations, the Australian Geospatial-Intelligence Organisation (for imagery), and Joint Health Command (for medical records).

Requests for Information

39. However, it became apparent that by far the main repository of information which the Inquiry would require was the SOTG archive held by SOCOMD. In order to facilitate the sourcing of information held in that archive, and having regard to sensitivities with access to such material, a protocol was established with SOCOMD for the provision of documentation via requests for information (RFI) through SOCOMD's Disclosure Cell. RFIs were submitted by the Inquiry to the SOCOMD point of contact, who then searched the archive for the relevant documents, and transferred them to a 'drop-box' accessible to the Inquiry. At times, there were delays in the provision of the requested information, unsurprisingly given the number of digital files to be searched. At one point the Inquiry engaged a Reservist forensic IT specialist to support searching the SOTG archive, but the utility of this was inhibited by other unrelated security issues concerning the archive. SOCOMD provided significant support and assistance to the Inquiry in responding to RFIs as expeditiously as possible in the circumstances.

40. There were also requests for information to other repositories, such as the Office of the Chief of the Defence Force (for previous Inquiry Officer Inquiry reports), Headquarters Joint Operations

⁴ Reference 3 – *Inspector-General of the Australian Defence Force Regulation 2016*, s 23.

Command (for operational reporting), Military Strategic Commitments, and Provost-Marshall Australian Defence Force.

41. In all, 170 RFIs were issued (some requesting a single document, while most were far more extensive). As a result of the information gathering process, in excess of 20 000 documents and 25 000 images were sourced for review by the Inquiry.

Hearings

42. The Inquiry conducted in excess of 510 witness interviews, of 423 witnesses (a number of witnesses were interviewed more than once). Interviews were formal or informal, and ranged in length from less than an hour, to three days. Many important witnesses were interviewed more than once.

43. None of the evidence given to the Inquiry was given in public. The Inquiry was conducted in private, because it related to operational matters, because protected identities were involved, to protect the reputations of individuals who could be unfairly affected by what turn out to be unsubstantiated rumours and allegations, to protect witnesses, and to maintain the confidentiality and integrity of lines of inquiry.

44. In the earlier stages, interviews tended to be exploratory, in order to ascertain whether the witness had observed, or heard reports or rumours, of any potential breach of LOAC. Generally, informal interviews were conducted in the earlier stages of the Inquiry, in the context of a search for background and general information. As specific incidents and issues of interest emerged, interviews became more targeted and focussed on those incidents and issues. While some formal hearings were conducted at early stages, they became the default position when testimony relevant to particular incidents or issues of interest was sought.

45. For informal hearings, a record of conversation was prepared.

46. For formal hearings, which account for by far the greater proportion:

- a. witnesses were given a notice under s 23 of the IGADF Regulation compelling the witness to attend to give evidence;
- b. witnesses were given, in advance, written information about the rights and obligations of witnesses, including the protections afforded to witnesses by the *Defence Act 1903*, s 124(2CA) and IGADF Regulation s 32, and that they could have in attendance a lawyer (which if a Service lawyer, usually a reservist, was supplied at public expense) and a support person, although neither could interrupt the interview without the permission of the presiding Assistant IGADF;
- c. every witness was given, and signed, a privacy notice;
- d. at the beginning of every interview, witnesses were informed that they could not be given an absolute guarantee of the confidentiality of the interview, as there were circumstances in which other persons who may be affected by their evidence may be legally entitled to know what has been said, but that the Inquiry would endeavour to protect their privacy and confidentiality as far as reasonably and legally practicable;

- e. witnesses were reminded of the immunities and protections provided by the IGADF Regulation, and that this did not extend to giving false evidence, for which they could be prosecuted;
- f. it was foreshadowed that a non-disclosure direction would be given at the end of the interview;
- g. witnesses were given the opportunity to object to any of the Assistant IGADFs present being involved in the interview. There was no such objection that could not immediately be resolved;
- h. evidence was taken on oath or affirmation, and witnesses were informed that they could be prosecuted for giving false evidence;
- i. at the end of an interview, witnesses were given a non-disclosure direction, and in the case of serving members a lawful order to the same effect, and certain exceptions to it were explained (including that they were always at liberty to discuss the contents of the interview with a lawyer for the purpose of obtaining legal advice, and with a psychologist, chaplain or other professional counsellor, on a strictly confidential basis);
- j. witnesses were generally asked if there were any complaints as to the conduct of the interview, and none was ever made; and
- k. the hearing was sound-recorded, transcribed and placed in an IGADF Objective file.

47. The Inquiry endeavoured to interview witnesses at times and places convenient to the witnesses, where they would have access to their support network, and to minimise disruption to operations and training. Sometimes it took time to access some witnesses, because of the unavailability of some personnel due to operational deployment or attendance on courses or training exercises. The Inquiry endeavoured to be accommodating of these requirements where possible. In order to interview witnesses, the Inquiry also travelled to the USA, the UK, Papua New Guinea and Afghanistan, as well as extensively around Australia. Witnesses who were serving members of the respective Armed Forces of the USA, the UK, and the Netherlands were interviewed by arrangement through their respective Defence hierarchies. The restrictions on movement due to the COVID-19 pandemic in 2020 limited the Inquiry's ability to conduct some face-to-face interviews, but generally witnesses were then interviewed by video-teleconference calls.

48. The Inquiry was conscious of the potential impact on witnesses of being required to recall traumatic events. To mitigate this, the Inquiry:

- a. permitted witnesses to attend interviews with a support person as well as a lawyer;
- b. when issuing directions to witnesses not to discuss their evidence, nevertheless permitted discussion with chaplains, medical practitioners or counsellors, as well as lawyers;
- c. if a witness appeared distressed when interviewed or seemed vulnerable, immediately after the interview informed the relevant chain of command so that the parent unit could monitor their welfare; and

d. as discussed in greater detail in Chapter 1.07, established a Witness Welfare Support Programme.

Afghanistan

49. The Inquiry sat in Kabul in July 2019 in order to hear evidence from a number of Afghan nationals who could give evidence of relevance to the Inquiry. The Inquiry engaged a New Zealand lawyer who was a member of an international law firm with a practice in Kabul, and appointed her as an Assistant IGADF in order to assist with examination of witnesses. Interpreters were sourced through the ADF. The Inquiry was greatly assisted by the support of the Department of Foreign Affairs and Trade in arranging to sit in Kabul. The evidence gained as a result of the Kabul hearings proved of great importance to the Inquiry.

The emergence of truth

50. As had been envisaged from the outset, it took time to elicit the facts. It was often not until a second, third or even fourth interview that some witnesses progressed from stating that they had only 'heard rumours', to admitting that they were eyewitnesses to or even participants in war crimes. This is consistent with the experience of those who have dealt with 'whistle-blowers' in other contexts. An important part of encouraging frank answers was being able to point to the use and derivative use immunity provisions of the IGADF Regulation.

51. Although there were a couple of witnesses who provided important information at a relatively early stage (in or about May 2017), that information was indirect, in the sense that it was either hearsay, or interpretation and deduction from observed facts. It was not until June 2018 that significant direct evidence emerged, from a number of initially reluctant witnesses, of breaches of LOAC. And it was not until the last quarter of 2019 that there was a significantly greater flow of information. Most of the evidence of the more serious matters described in this report emerged between September 2019 and March 2020.

52. By March 2020, sufficient information to answer the terms of reference contained in the Inquiry Directions had been obtained. The Inquiry ceased to embark on new lines of inquiry, and focussed on concluding evidence gathering on those significant incidents and issues that remained open, and refining what findings and recommendations it might make.

Procedural Fairness and Finalisation of the Report

53. These activities necessarily proceeded concurrently. In the concluding stages, as the Inquiry analysed the evidence and considered what formal findings and recommendations might be made, procedural fairness notices were issued to those who might potentially be the subject of specific adverse findings and recommendations (except where an adverse finding was based on admissions made by an apparently co-operative witness and no adverse recommendation was under consideration). The legal aspects of this process are explained elsewhere.⁵

54. The Inquiry issued procedural fairness notices to 30 individuals, some in respect of one incident only, and others in respect of multiple incidents, up to 15. Where possible, notices were

⁵ See Chapter 1.04 (Legal issues).

served through a lawyer assisting a member. Arrangements were made for Defence Counsel Services to provide legal support to individuals upon request, including by way of Legal Assistance at Commonwealth Expense. Many recipients, or their lawyers, requested extensions of time to respond, which were usually granted.

55. In some cases, recipients of notices requested disclosure of additional information. The Inquiry considered such requests on a case by case basis, and they were accommodated when it was appropriate and reasonable to do so. In some cases, these requests resulted in extensive contentious correspondence, which was time consuming but required great care in order to ensure that the Inquiry was not exposed to legal challenge.

56. Following receipt of submissions in response to procedural fairness notices, careful consideration was given to them. That consideration is reflected in the relevant chapters in Part 2. In a number of cases, a potential finding and/or recommendation under consideration, referred to in a procedural fairness notice, has ultimately not been made.

Miscellaneous

Consultation

57. IGADF Regulation s 28D(1)(c) permits the Assistant IGADF to consult with any person in relation to the inquiry if it is thought appropriate to do so for the purposes of the inquiry. The Inquiry has from time to time consulted with the IGADF, particularly in respect of issues that might impact or reflect more broadly on the Office of the IGADF; and with CDF, particularly as to certain recommendations under consideration by the Inquiry in respect of organisational and cultural issues. Neither has endeavoured to direct or constrain the Inquiry in any way.

58. The Inquiry has also, directly and indirectly through the Office of IGADF, from time to time briefed the Minister, CDF and CA on its progress and significant developments, and the general nature and extent of incidents of interest (but not specific incidents or individuals under inquiry). A similar brief was also provided to the Shadow Minister and the Shadow Attorney General. An overview of the Inquiry's work has been provided in the Annual IGADF reports for 2018 and 2019, which were tabled in Parliament.

Breach of non-disclosure direction

59. In the course of the Inquiry, evidence came to light that suggested that a non-disclosure direction given by the Inquiry to a witness had been contravened. This was referred to Australian Defence Force Investigative Service (ADFI) for investigation, and then to the Director of Military Prosecution (DMP) for prosecution. A Defence Force Disciplinary Act (DFDA) prosecution was commenced. However, evidentiary difficulties, and legal complications, rendered it imprudent for the prosecution to proceed, and the matter was discontinued.

The defamation proceedings

60. In August 2018, Mr Ben Roberts-Smith commenced proceedings in the Federal Court of Australia against Fairfax Media Publications Pty Limited, The Age Company Pty Limited, The Federal Capital Press of Australia Pty Limited and certain journalists, complaining that articles published by

them conveyed a number of imputations concerning the conduct of Mr Roberts-Smith whilst serving in Afghanistan, including that he broke the moral and legal rules of military engagement and that he is therefore a criminal. The respondents have pleaded a defence of justification.

61. Initially, Mr Roberts-Smith sought an injunction preventing publication, and orders that the articles published online be removed, in part on the basis that they breached directions made by the Inquiry under s 21 of the IGADF Regulation, and in part because they revealed information confidential to the Commonwealth. That application, which was not joined in by the Commonwealth, was unsuccessful.

62. In seeking the injunction, Mr Roberts-Smith relied as evidence on notices issued by the Inquiry to him and correspondence between the Inquiry and his lawyers. He obtained interim non-publication orders over some such material. Subsequently, the Commonwealth sought and obtained orders in respect of some of the material. In *Roberts-Smith v Fairfax Media Publications Pty Ltd*,⁶ Bromwich J said:

[62] The conclusions I have reached as to redactions are as follows:

(1) The redactions agreed to by the Commonwealth, Mr Roberts-Smith and the respondents as to the redaction of Special Operations Command personnel identification, and opposed by the non-party news publishers insofar as they go beyond active SOC personnel, should be approved upon the ground that they are necessary to prevent prejudice to the interests of the Commonwealth in relation to national and international security.

(2) The redactions agreed to by the Commonwealth, Mr Roberts-Smith and the respondents as to the names of substantive witnesses at the Inquiry, and opposed by the non-party news publishers, should be made on the ground that they are necessary to prevent prejudice to the proper administration of justice insofar as that pertains to the Inquiry, but should not endure for more than two months after the delivery of the final Inquiry report to the Federal Government, except insofar as they are in the category of persons in the preceding subparagraph (1).

(3) The redactions agreed to by the Commonwealth, Mr Roberts-Smith and the respondents as to the redaction of contact details for three collateral witnesses, ostensibly opposed by the non-party news publishers, should be approved upon the ground that they are necessary to prevent prejudice to the proper administration of justice insofar as that pertains to the Inquiry, and for the future interest of the proper administration of justice in securing the cooperation of like witnesses to such an inquiry.

(4) The redactions sought by the Commonwealth and Mr Roberts-Smith as to the names of three collateral witnesses to the Inquiry, and opposed by the respondents (and ostensibly by the non-party news publishers), should not be granted. An insufficient case has been made for such a redaction to be necessary to prevent prejudice to the proper administration of justice.

(5) The redactions agreed to by the Commonwealth, Mr Roberts-Smith and the respondents as to a notice addressed to Mr Roberts-Smith under s 23(3) of the IGADF Regulation (the notice), identified in a copy marked in green and yellow by the Commonwealth and commencing at page 38 of Exhibit MOB-1, should only be partially granted as follows, upon the ground that they are necessary to prevent prejudice to the proper administration of justice insofar as that pertains to the Inquiry, but

⁶ Reference 4 - *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2018] FCA 1943.

should not endure for more than two months after the delivery of the final Inquiry report to the Federal Government:

(a) no redaction of the yellow-marked portions of the notice on page 38 of Exhibit MOBL-1, which identifies Mr Roberts-Smith as being a person who is the subject of a notice to provide information and produce documents, contrary to the position of the Commonwealth and the respondents, and at the end of the notice (page 42 of Exhibit MOBL-1), which sets out, amongst other things, when and how Mr Roberts-Smith was to comply with the notice;

(b) redaction in full of the green-marked portions of the notice, which set out the basis for the issue of the notice and the matters to which Mr Roberts-Smith was required to respond pursuant to the notice, contrary to the position taken by the respondent. This ruling is made upon the basis that this material goes beyond the question of complaint and in substance goes into aspects of the content of the Inquiry. Accordingly, the redaction is necessary to safeguard the interests of the administration of justice (in the Rogerson sense of the 'course of justice') while the Inquiry is continuing; and

(c) redaction of references in communications between Mr O'Brien and the Assistant IGADF that reveal the information in (b) above, but no further.

(6) The redactions sought by the Commonwealth and Mr Roberts-Smith as to communications between the Commonwealth or Mr Roberts-Smith and representatives of the respondents, being opposed by the non-party news publishers, going to the issue of Mr Roberts-Smith being or being likely to be a witness should be refused, as the fact of him being a witness is now public knowledge and it has not otherwise been established that this redaction is necessary to prevent prejudice to the proper administration of justice.

[63] The above redactions do not preclude a fresh non-publication order application being made, including an application to extend the duration of non-publication orders pertaining to the Inquiry beyond two months after the final Inquiry report has been delivered.

63. This Report elsewhere notes the significance of the finding that, at least for some purposes, the Inquiry is part of the 'proper administration' or 'course' of justice.

64. The defamation proceedings have been the subject of a notice bringing them under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) which provides a regime for protection of material which relates to protected SF identities and classified tactics, techniques and procedures, and gives the Commonwealth standing to protect such information in the proceedings.

65. The defamation proceedings have been set down for hearing in 2021,⁷ an earlier fixture for trial having been vacated.⁸

66. The respondents (the media interests) sought disclosure by Mr Roberts-Smith of material that included any notice of potential findings issued by the Inquiry to Mr Roberts-Smith. The IGADF claimed public interest immunity, including as to whether or not a Notice had been issued to Mr Roberts-Smith. While agreeing that there was a public interest in maintaining the confidentiality of the Inquiry's proceedings, Colvin J held that on balance it was outweighed by the interests of justice

⁷ *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 7)* [2020] FCA 1296.

⁸ *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 4)* [2020] FCA 614.

in the particular case, having regard also to protective mechanisms that could be put in place:⁹ His Honour ordered production, reasoning as follows:

[87] On the evidence as it presently stands, I would order the disclosure of the Contentious Documents. I would do so on the basis of the concession made by the respondents that the documents will need to be redacted to exclude material in order to protect the privilege against self-incrimination and on the basis that steps will need to be taken to ensure that the contents of the documents are otherwise protected by appropriate orders restricting the persons to whom their contents may be disclosed, subject to further order. I am not persuaded that there should be any different approach taken concerning any PAP Notice, if it exists.

[88] Before making final orders, I would afford to the IGADF an opportunity to put on a further confidential affidavit concerning any aspect of the contents of the Contentious Documents that should cause me to reach a different conclusion. I would receive that affidavit confidentially in accordance with the authorities and make final orders taking account of the contents of the affidavit.

[89] My reasons for concluding that the Contentious Documents should be provided on the basis that I have indicated are as follows.

[90] First, the subject matter of the alleged defamatory imputations is serious. The respondents seek to justify the imputations. Therefore, they concern serious claims by both parties. They are not matters that may be readily measured in monetary terms. Mr Roberts-Smith claims that his reputation has been impugned. The respondents maintain that they were justified in reporting to the public matters of considerable seriousness.

[91] Second, I am inclined to the view that it is not significant that the proceedings were commenced by Mr Roberts-Smith. Reasoning in that way may be said to lead to the view that the proceedings were invited by the publications made by the respondents. What may be said is that the matters in dispute are important to both parties. The subject matter is such that there is a public interest in ensuring that both parties have access to a process that affords them a fair hearing that, to the extent possible, incorporates access to the disclosure procedures usually available to parties involved in court proceedings, at least to the extent that information is material to the conduct of those proceedings.

[92] Third, on the available evidence, if the Contentious Documents include a PAP Notice, there is a real likelihood that they will contain information of considerable forensic importance for the conduct of the respondents' defence.

[93] Fourth, the information is in the hands of Mr Roberts-Smith. This is not an instance where a party to litigation seeks access to information in the hands of a third party and the consequence of upholding a claim to public interest immunity will fall equally in the sense that it will mean that the information is not available to either party. Further, some lawyers who act on behalf of Mr Roberts-Smith in the investigation also act for him in the conduct of the defamation proceedings. Therefore, if the public interest immunity claim is upheld, those lawyers will have access to the Contentious Documents whereas lawyers acting for the respondents will not.

[94] Fifth, the Inquiry has been conducted on the basis that the information in the Contentious Documents will be in the hands of Mr Roberts-Smith. This is not an instance where the party under investigation seeks access to documents in circumstances where the investigation is at a

⁹ *Roberts-Smith v Fairfax Media Publications Pty Limited (No 6)* [2020] FCA 1285.

stage where the effectiveness of the investigation is likely to be compromised and lines of inquiry closed if the information is provided to one of the parties to the court proceedings. Those with conduct of the Inquiry mean and intend Mr Roberts-Smith to have access to the Contentious Documents, including any PAP Notice. The respondents are not participants in the Inquiry and no concern has been raised for the effectiveness of the Inquiry if the content of the Contentious Documents are provided to the respondents in particular. The concern raised is the harm from disclosure to anyone other than in accordance with the directions that have been made, being an action that risks the private nature of the Inquiry.

[95] Sixth, it is conceded that steps should be taken to preserve the privilege against self-incrimination and the respondents do not seek the Contentious Documents to the extent that disclosure would compromise that protection.

[96] Seventh, the submission for the IGADF to the effect that the respondents must have had a proper basis for the plea of justification at the time they filed their defence is not persuasive. It is not a reason why the respondents should be denied access to other material information.

[97] Eighth, the submission was advanced for the IGADF that there may be instances where public interest immunity may mean that a party is unable to establish its case. So much may be accepted. However, instances where the balancing exercise will lead to the result that information that is materially relevant to a case of a kind where the subject-matter is of real significance for the party seeking disclosure being immune from production at common law may be expected to be confined to instances where there is a great risk of harm to the public interest if the information was disclosed. The risk here is the prospect that the assurances of confidentiality provided to those who are to be encouraged to co-operate and provide information to the Inquiry may be undermined. For reasons already given, a risk of that kind has been demonstrated. However, in circumstances where adequate steps are taken to maintain the confidentiality of the Contentious Documents and public interest immunity could be claimed before any such document (or the information obtained from the document) was admitted into evidence in the proceedings, that risk must be low. Further, it is a risk the significance of which must be assessed in the context of the prospect that part or all of the report of the Inquiry may be made public and that parties providing information may be called upon to give evidence in any future criminal proceedings. In other words, this is not an instance where those participating in the Inquiry could be given an assurance that information that they may provide to the Inquiry will be kept private in all circumstances.

[98] Ninth, it was submitted for the respondents that it was significant that Mr Roberts-Smith supported the application by the IGADF. Whether there is public interest immunity is not to be determined by reference to the position adopted by Mr Roberts-Smith. Whatever his private interests may be, the immunity exists to protect the public interest. At its highest, the position adopted by Mr Roberts-Smith may lend support to the conclusion that I have reached independently that there is likely to be information in the Contentious Documents that is material to the issues in the defamation proceedings.

[99] Tenth, there is always a risk of inadvertent disclosure of information the wider its dissemination. By reason of their subject matter, these proceedings are being conducted with detailed arrangements in place to protect the confidentiality of certain information disclosed in the proceedings, including the identity of particular individuals. There is no suggestion that there have been issues with complying with those arrangements which deal with information of equivalent or greater sensitivity to that which may be expected to be included in the Contentious

Documents. The existing arrangements may be extended to cover the Contentious Documents and the information within them.

[100] Balancing all the considerations, I am satisfied that, subject to any further confidential evidence the IGADF may adduce, that there should be production of the Contentious Documents on the basis I have indicated.

67. The precise terms of the redactions, restrictions and protections that might apply are yet to be worked out. So far as the Inquiry is concerned, critical considerations include the protection of the identity of those who have given evidence to the Inquiry, and avoiding any risk of compromising any criminal proceedings that might result from the Inquiry's recommendations.

Conclusion

68. Having regard to the nature of this scoping Inquiry and the terms of the Inquiry Directions, the Inquiry is satisfied under s 28F(1)(a) of the IGADF Regulation that 'all information relevant to the inquiry that is practicable to obtain has been obtained'. Where appropriate, potential findings and recommendations have been tested through the procedural fairness process.

References:

1. Cromptoets, S. *Special Operations Command (SOCOMD) Culture and Interactions: Perceptions, Reputation and Risk* of Feb 16 [REDACTED]
2. *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation* 2013.
3. *Inspector-General of the Australian Defence Force Regulation* 2016.
4. *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2018] FCA 1943.

Chapter 1.04

LEGAL ISSUES

EXECUTIVE SUMMARY

This chapter explains the legal principles which have informed the conduct of the Inquiry, and its approach to its task. In so doing, it also addresses various generic submissions made by or on behalf of potentially affected persons about the form of the Inquiry's findings and recommendations, and the procedural fairness process.

The Inquiry has been conducted under Division 4A of the *Inspector-General of the Australian Defence Force (IGADF) Regulation 2016*. That is to say, by an Assistant IGADF who is also a serving judge, so that additional measures to ensure the independence of the Inquiry are applicable.

This report sets out the Inquiry's findings and recommendations, and the evidence and reasoning on which they are based, in conformity with the governing legislation, the Inquiry Directions, and relevant legal principles.

The Inquiry Directions permit the Inquiry to make findings as to whether there are substantive accounts or credible information or allegations which, if accepted, could potentially lead to a criminal conviction or disciplinary finding against named persons or identified groups. It was plainly the intention of the appointing authority that the course of suspending an inquiry, in part or whole, to refer any evidence which potentially indicates criminal or disciplinary offences for investigation, not be routinely applied. No legal principle or convention required the Inquiry to do so.

Consistently with the terms of reference and legal principles which define the Inquiry's jurisdiction, in respect of potential criminal conduct, the highest the Inquiry's findings rise in respect of potential criminal conduct of an individual is that there is *credible information* that a person has committed a certain identified war crime or disciplinary offence. This is not a finding of guilt, nor a finding (to any standard) that the crime has in fact been committed. In that context, submissions that invoked the '*Briginshaw* standard of proof' [as explained in this chapter] were misconceived. The Inquiry has nonetheless had regard to the gravity and potential consequences of a finding even that there is 'credible information' of a crime, in considering whether or not to make such a finding.

The Inquiry is not confined to evidence that would be admissible in a court of law, but can inform itself as it sees fit, and has done so, as is appropriate for an inquiry of this nature.

Assuming that principles of procedural fairness are applicable, they involve affording a potentially affected person a reasonable opportunity to adduce evidence and make submissions against a potential adverse finding. This involves alerting a person entitled to be heard to the questions or 'critical issues' to be addressed, and ordinarily affording the party potentially affected 'the opportunity of ascertaining the relevant issues and to be informed of the nature and content of *adverse material*'. The Inquiry has done so, by providing notice to persons who might potentially be the subject of a specific adverse finding or recommendation that it was considering whether or not to make such potential findings and recommendations – except when a finding was squarely based

on admissions made by an apparently co-operative witness, and no adverse recommendation was under contemplation.

In the context of investigatory inquiries, the bias rule has a very limited scope, and has not been infringed here.

INTRODUCTION

1. This inquiry is authorised by, and operates within the limits of:
 - a. the *Defence Act 1903* (the Defence Act);¹
 - b. the *Inspector-General of the Australian Defence Force Regulation 2016* (the IGADF Regulation);² and
 - c. the various directions given by Chief of Defence (CDF) and IGADF, which serve as the Inquiry's terms of reference.
2. Those laws and authorities are to be construed in accordance with legal principle, as discussed below.
3. Contrary to some submissions received from potentially affected persons, the Administrative Inquiries Manual does not apply to this Inquiry.
4. This report sets out the Inquiry's findings and recommendations, and the evidence and reasoning on which they are based.

JURISDICTION

5. The IGADF is a statutory office established by Part VIII B of the Defence Act. The current IGADF, Mr James Gaynor CSC, was appointed by the Minister of Defence for a term of five years,³ which term may be renewed.⁴ His independence receives statutory support in that he may only be removed for cause, on one of a number of specified grounds;⁵ is protected from civil actions;⁶ and is not amenable to direction from any person or body as to the contents of any reports which he and his office may produce.

Independence

6. The IGADF may appoint Assistants IGADF.⁷ Eligibility for appointment includes 'a member of the Defence force of any rank',⁸ although no person is eligible to be so appointed in relation to an

¹ Reference 1 – *Defence Act 1903*.

² Reference 2 – *Inspector-General of the Australian Defence Force Regulation 2016* (the IGADF Regulation).

³ Defence Act s 110E.

⁴ s 110G.

⁵ s 110L.

⁶ s 110Q.

⁷ s 110P.

⁸ s 6(1).

inquiry that relates to that person's conduct or where they are likely to be required to give evidence or produce documents or things.⁹

7. Amendments to the IGADF Regulation, made in 2018, inserted Div 4A, which applies to an inquiry conducted by an Assistant IGADF who is also a serving judge of a State Court, as is the Assistant IGADF conducting this Inquiry, so as to reflect the constitutional principles discussed in *Wilson v Minister for Aboriginal and Torres Straits Islander Affairs*¹⁰ and, more recently, *Wainohu v State of New South Wales*.¹¹ Their consequence is that such an Assistant IGADF (that is, one who is a serving judge of a State Court), has the privileges and immunities of a High Court Judge, and once appointed, operates independently from the Inspector-General and is not subject to direction as to the procedure of the inquiry, nor the contents of the report, and is solely responsible for the content of the report. (Even before those amendments, the Inquiry was conducted in accordance with those precepts.)

8. The Inquiry's Report must set out the findings of the Assistant IGADF in relation to the Inquiry; and any recommendations that the Assistant IGADF thinks appropriate to make because of those findings.¹² Although the Report is provided to the Inspector-General, the Inspector-General must transmit that report to the CDF,¹³ and the Assistant IGADF may decide to release the report publicly following consultation with CDF. Further, the Assistant IGADF has power to amend the Inquiry Directions,¹⁴ but it has not been necessary to exercise that power.

Jurisdiction

9. Functions of the IGADF include, under the Defence Act, s110C(1):

(a) to inquire into or investigate matters concerning the military justice system;

...

(f) if directed by the Chief of the Defence Force to do so—to inquire into or investigate a matter concerning the Defence Force.

10. As has been explained above,¹⁵ the original Inquiry began with a request from the then Chief of Army (CA) to conduct a scoping inquiry in relation to persistent rumours of criminal, unlawful or inappropriate conduct by, or concerning, Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2007 to 2016 (although in practice until 2014, when Operation SLIPPER concluded).¹⁶ The IGADF acceded to that request, and issued the original Inquiry Directions to conduct 'scoping and assessment in order to determine whether there are substantive accounts or credible information or allegations, relating to the military justice system, concerning criminal, unlawful or inappropriate conduct'. At that stage, the Inquiry was one pursuant to s 110C(1)(a).

⁹ s 6(2), see also s 10(3).

¹⁰ Reference 3 – *Wilson v Minister for Aboriginal and Torres Straits Islander Affairs* (1996) 189 CLR 1.

¹¹ Reference 4 – *Wainohu v State of New South Wales* (2011) 243 CLR 181.

¹² IGADF Regulation s 28F(2).

¹³ IGADF Regulation s 28G(1).

¹⁴ IGADF Regulation s 28D(1).

¹⁵ See Chapter 1.02 (Genesis and Justification).

¹⁶ Subsequently, the relevant period was amended to commence from 2005.

11. Following the enactment in October 2016 of the Regulation, which conferred additional powers of compulsion, akin to those of a Royal Commission, on an IGADF inquiry directed by the CDF, the then CDF, Air Chief Marshal Mark Binskin AC, issued such a direction. The Inquiry thereafter was pursuant to s 110C(1)(f). In substance the direction, which was then incorporated into further directions to the Assistant IGADF, was to:

Conduct a scoping inquiry to determine whether there is any substance to rumours of criminal or unlawful conduct by, or concerning, SOTG deployments to Afghanistan from 2007 to 2016, including allegations of:

- Serious contraventions of the Defence Force Discipline Act (Cth), including s 61 of that Act and Division 268 of the Criminal Code (Cth);
- Cultural deviance from professional standards,
- A culture of silence,
- Systemic failure to report or investigate such matters;
- Undermining, isolation or removal of individuals who sought to address such conduct or culture;

To ‘consider whether there are substantive accounts or credible information or allegations which, if accepted, could potentially lead to a criminal conviction or a disciplinary finding against named persons or identified groups’ but ‘not [to] conclude that a criminal or disciplinary offence has been committed by any person’.

To make recommendations.

12. On 24 March 2017, the Inquiry Directions were amended to the period under inquiry to September 2005 to 2016.¹⁷

13. These Directions define the jurisdiction of the Inquiry, that is, its authority to inquire and report.

An inquiry into criminal conduct

14. It is not uncommon for Commissions of Inquiry to be concerned with potentially criminal conduct, and to make recommendations or referrals as a result, without suspending the inquiry in the meantime. However, there are legal and practical constraints on how a Commission of Inquiry should proceed in such circumstances.

15. First, there is a general principle that a commission of inquiry, when considering potential criminal liability, should ordinarily not make a finding that an offence has been committed, but confine its conclusions to whether there is any or sufficient evidence to warrant consideration of the prosecution of a specified person for a specified offence.¹⁸ Paragraph 11 of the Inquiry

¹⁷ Reference 5 – Amendment 1 to the Inquiry Directions, of 24 March 2017. [REDACTED]

¹⁸ Reference 6 – *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.

Directions, set out above, reflects that principle. The Inquiry's approach to such findings is elaborated below.

16. Secondly, where there is a potential criminal prosecution arising out of an inquiry's report, there is a practice of not publically releasing the relevant evidence in and findings of the inquiry, in order to avoid any potential prejudice to the criminal proceedings (as was done, for example, in connection with the proceedings against Cardinal Pell,¹⁹ where the relevant parts of the Royal Commission's report were suppressed until the criminal proceedings were completed). An illustration of the problems that can arise if this is not done is provided by *Obeid*,²⁰ where the criminal proceedings had to be adjourned for a lengthy period, and then proceeded by judge alone trial, to ameliorate possible prejudice from the publication of an adverse inquiry report.

17. Thirdly, that is all the more important where the inquiry has powers of compulsion, as this Inquiry has, which override the privilege against self-incrimination. Although it is clear that the possibility of criminal proceedings is no objection to the continuation of an IGADF inquiry, and that it does not affect the abrogation of the privilege against self-incrimination unless and until a charge is actually laid,²¹ principles that preclude the use in a criminal proceeding of evidence extracted from the accused under compulsion in an inquiry dictate that care must be taken not to prejudice potential criminal proceedings through their becoming infected by availability of information extracted from the accused under compulsion.

18. A number of potentially affected persons or their legal representatives made submissions, sometimes in strident terms, that the Inquiry improperly embarked on a criminal investigation, and ought to have terminated or suspended its inquiry and referred any evidence which potentially indicated a criminal offence for criminal investigation as soon as it came to light. Such submissions are misconceived, because of express terms of reference contained in the Inquiry Directions which required it to inquire into potential criminal conduct and authorised it to make findings that there was credible information or accounts of such conduct, because of the intention of the appointing authority that it would, generally, proceed to completion before recommending referrals of matters for criminal investigation, and because of well-established legal principles which permit an inquiry to make findings about criminal conduct but constrain the nature and use of those findings.

The Inquiry Directions

19. The following directions are of fundamental significance, namely to:

- a. *'conduct a scoping inquiry to determine whether there is any substance to rumours of criminal or unlawful conduct'*; and
- b. *'consider whether there are substantive accounts or credible information or allegations which, if accepted, could potentially lead to a criminal conviction or a disciplinary finding against*

¹⁹ Reference 7 – The unredacted version of the relevant parts of the Report of the Royal Commission into Institutional Responses to Child Sexual Abuse was tabled in the Senate on 12 May 2020. Hansard 12 May 2020 *Institutional Responses to Child Sexual Abuse – Royal Commission – Report of case study No. 35—Catholic Archdiocese of Melbourne, dated November 2017—Unredacted.*

²⁰ Reference 8 – See *R v Obeid (No 8)* 2016 NSWSC 388.

²¹ IGADF Regulation s 32(2).

named persons or identified groups but you must not conclude that a criminal or disciplinary offence has been committed by any person’.

20. At the outset, it will be noticed that the Inquiry Directions are not concerned with mere breaches of discipline, such as misuse of alcohol, or inappropriate personal relationships, but with serious contraventions of the Defence Force Discipline Act (Cth), including s 61 of that Act and Division 268 of the Criminal Code (Cth). As has been explained,²² Division 268 is the principal Australian location of the Law of Armed Conflict, and the Inquiry is concerned with potential breaches of the law of armed conflict, or colloquially, ‘war crimes’.

21. When, following the enactment of the IGADF Regulation, the Inquiry transitioned to a CDF-directed inquiry, the CDF Direction to IGADF provided:

I direct you to conduct a scoping inquiry to determine whether there is any substance to persistent rumours of criminal or unlawful conduct by, or concerning SOTG deployments to Afghanistan ... including but not limited to allegations regarding:

- a. possible crimes (illegal killings and inhumane and unlawful treatment of detainees, or mistreatment of corpses) over a lengthy period of time in the course of SOTG deployments in Afghanistan;
- b. the cultural normalisation of deviance from professional standard within SOCOMD, including intentional inaccuracy in operational reporting related to possible crimes;
- c. a culture of silence within SOCOMD;
- d. the deliberate undermining, isolation and removal from SOCOMD units of some individuals who tried to address this rumoured conduct and culture; and
- e. a systemic failure, including by commanders and legal officers at multiple levels within SOCOMD, to investigate the stories as required by Defence policies.

22. Thus it was recognised and intended from the outset that the Inquiry would be inquiring into potential criminal conduct; that it would be confronted with, and would need to break down, a culture of silence; and that it would not necessarily follow the ‘normal course’ of suspending the inquiry to refer any evidence which potentially indicates criminal or disciplinary offences for investigation. Conformably with this, the original Inquiry Directions of 12 May 2016 directed the Inquiry to inquire ‘whether there is any substance to persistent rumours of criminal or unlawful conduct by, or concerning’ SOTG deployments to Afghanistan. Those directions contained the following:

7. **Findings.** Although you may consider whether there are substantive accounts or credible information or allegations which, if accepted, could potentially lead to a criminal conviction or a disciplinary finding against named persons or identified groups, you must not conclude that a criminal or disciplinary offence has been committed by any person.

²² See Chapter 1.10 (The Law of Armed Conflict).

23. Similarly, paragraph 11 of the Inquiry Directions dated 17 January 2017, following the transition to a CDF-directed inquiry, provides:

11. **Findings.** Although you may consider whether there are substantive accounts or credible information or allegations which, if accepted, could potentially lead to a criminal conviction or a disciplinary finding against named persons or identified groups, you must not conclude that a criminal or disciplinary offence has been committed by any person.

24. The Inquiry Directions accordingly permit the Inquiry to make findings as to whether there are substantive accounts or credible information or allegations which, if accepted, could potentially lead to a criminal conviction or disciplinary finding against named persons or identified groups.

The intention of the appointing authority

25. It was plainly the intention of the appointing authority that the normal course of suspending an inquiry, in part or whole, to refer any evidence which potentially indicates criminal or disciplinary offences for investigation, not be routinely applied. This appears in the letter from the then CA and now CDF to IGADF²³ which initially requested the establishment of this Inquiry, which referred to ‘unsubstantiated stories’ of ‘possible crimes (illegal killings and inhumane and unlawful treatment of detainees) over a lengthy period of time in the course of SOTG deployments in Afghanistan’; ‘the cultured normalisation of deviance from professional standard within SOCOMD, including intentional inaccuracy in operational reporting related to possible crimes’; ‘a culture of silence within SOCOMD’; ‘the deliberate undermining, isolation and removal from SOCOMD units of some individuals who tried to address this rumoured conduct and culture’, and ‘a systemic failure, including by commanders and legal officers at multiple levels within SOCOMD, to investigate the stories as required by Defence policies’. The letter continued:

It is my professional judgment that there are many stories which are widely known, and believed to be essentially true by those who tell them. However, there is currently insufficient information to commence any criminal or disciplinary investigation without the very real risk that the silence reasserts itself and the full appreciation of the problem be obscured.

I believe an IGADF scoping inquiry is the best means by which to gather and assess the information that is available before determining the options for further action. The scoping inquiry might focus on identifying the depth and breadth of these matters and options to deal with them, in light of capability, institutional and accountability considerations. It is my view that appointing a suitably eminent person to conduct the scoping inquiry may assist in encouraging as much as compelling openness where a culture of silence has prevailed. *I believe that the normal course of suspending the scoping inquiry, in part or whole, to refer any evidence which potentially indicates criminal or disciplinary offences for investigation should be balanced against the need to break down the culture of silence.* I would also be greatly assisted if your inquiry report were to set out the range of existing or novel options that may be available, or could be created, should further action be required, with a view as to the likelihood of achieving closure through each of these options.

26. Conformably with this, at an early stage, the Inquiry consulted with the Commissioner of the Australian Federal Police (AFP) to establish a mutually acceptable approach, and it was agreed that,

²³ Reference 9 – Letter from the then Chief of Army and now Chief of Defence Force to IGADF of 30 Mar 16. [REDACTED]

at least as a general rule, the Inquiry would proceed to completion before referring any incident under inquiry to the AFP, which would be a matter for recommendation in the Inquiry Report, and decision by the CDF in accordance with the applicable legislation. The CDF, and the then Minister for Defence, were informed that this was the approach being adopted.

Limitations: credible information and criminal ‘findings’

27. While the Inquiry is to ‘consider whether there are substantive accounts or credible information or allegations which, if accepted, could potentially lead to a criminal conviction or a disciplinary finding against named persons or identified groups’, that is subject to the limitation that it is ‘not [to] conclude that a criminal or disciplinary offence has been committed by any person’. This limitation reflects the constitutional limitation that ‘Some functions of their nature pertain exclusively to judicial power. The determination and punishment of criminal guilt is one of them’.²⁴ However, determination and punishment of criminal guilt is not to be confused with determination ‘whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action’; as the High Court said in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*:²⁵

...it is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action. The decisions of this Court in *Attorney-General (Cth) v Alinta Ltd* and *Albarran v Companies Auditors and Liquidators Disciplinary Board* accept so much.

28. Even if the words of limitation²⁶ were not included, when construing the directions, the limitation would still be implied as part of the principle of legality: as Gageler J explained in *Today FM*:

[68] The common law principle of construction does operate to insist on the manifestation of unmistakable legislative intention for a statute to be interpreted as empowering an administrative body publicly to inquire into and determine whether or not a person has committed a criminal offence, but the trigger for the operation of the principle is more narrowly focussed. It is in part because of the potential for such an exercise of power adversely to affect the person's reputation; ‘the law proceeds on the basis that reputation itself is to be protected’.²⁷ It is also in part because of the risk that such an exercise of power can pose to established processes by which criminal liability and its punitive consequences are determined by a court.

[69] That more narrowly focussed application of the common law principle of construction is the enduring significance of *Balog v Independent Commission Against Corruption*.²⁸ This Court there determined, on close analysis of its empowering statute, that the Independent Commission Against Corruption was not entitled to include, in a report to be laid before each House of the Parliament of New South Wales of its investigation into alleged corrupt conduct, a finding that a person was guilty of a criminal offence. This Court added, however, that even if the statute

²⁴ Reference 10 – *Duncan v New South Wales; NuCoal Resources Limited v New South Wales; Cascade Coal Pty Limited v New South Wales* [2015] HCA 13 at [41].

²⁵ Reference 11 – *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7 (*Today FM*) at [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

²⁶ Not [to] conclude that a criminal or disciplinary offence has been committed by any person.

²⁷ Reference 12 – *Ainsworth v Criminal Justice Commission* 175 CLR 564 at 577.

²⁸ Reference 13 – *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.

admitted of a wider construction, 'then the narrower construction is nevertheless to be adopted upon the basis that where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred'.²⁹

29. A further limitation, to be found in the general law rather than the Directions, is that it is permissible to inquire into and express administrative (as opposed to judicial) conclusions concerning criminal guilt, provided only that the Inquiry does not involve a contempt of court.³⁰ As Gibbs CJ said in *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation* (BLF case):³¹

Although a commission of inquiry may lawfully be instituted and conducted into the guilt or innocence of individuals, the position will be different if its proceedings interfere with the course of justice and amount to a contempt of court. The very issue of the commission will be invalid if done with the purpose of interfering with the course of justice For example, if during the course of a commission's inquiries into allegations that a person had been guilty of criminal conduct, a criminal prosecution was commenced against that person based on those allegations, the continuance of the inquiry would, speaking generally, amount to a contempt of court; the proper course would be to ... adjourn the inquiry until the disposal of the criminal proceedings.

30. Difficult questions can arise concerning the extent to which public hearings of an inquiry can interfere with existing legal proceedings, especially criminal trials. These issues have been avoided in the case of this inquiry, because the entire inquiry, including all evidence taking, has been in private, principally so as to protect classified information (such as Special Forces' operating procedures, capacities, and protected identities),³² the reputations of individuals, the confidence of witnesses, and the lines of inquiry; and there have as yet been no criminal prosecutions. Moreover, the report will be provided only to the CDF. Its further publication, in whole or part, is at least primarily a matter for the CDF.³³ Further, as has been mentioned, it was agreed at an early stage with the Commissioner of the AFP that, at least as a general rule, the Inquiry would proceed to completion before recommending referring any incident under inquiry to the AFP.

31. This Report is intended to be provided to, and only to, the IGADF, in accordance with s 28F of the IGADF Regulation, to be provided by the IGADF, in accordance with s 28G(1) and s 27(3), to the CDF. Whether, when and to what extent the report is further disseminated or publicly released is primarily a matter for the CDF, under s 28(2). Although the Assistant IGADF has power to make public this report in whole or part, at least following consultation with CDF, there is no present intention of doing so. However, various parts of the Report, including in particular the Executive Summary, have been drafted at the unclassified level so that, for example, the Minister, on the recommendation of the CDF, might choose to table it in Parliament, having taken into account any then extant criminal prosecutions, civil proceedings, or investigations.

²⁹ *Balog* (1990) 169 CLR 625 at 635-636.

³⁰ See, eg Reference 14 – the Hon Mark Weinberg AO, *The Impact of Special Commissions of Inquiry/Crime Commissions on Criminal Trials* (2015) 12 *The Judicial Review* (TJR) 199.

³¹ Reference 15 – (1982) 152 CLR 25 at 53-4, consistently with earlier authority such as Reference 16 – *Clough v Leahy* (1904) 2 CLR 139 and Reference 17 – *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73.

³² Themselves founding non-publication orders in Reference 18 – *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2018] FCA 1943.

³³ IGADF Regulation s 28(2).

32. In connection with chapters that deal with incidents which may be the subject of criminal proceedings, it is recommended that they not be publically released pending the outcome of any such proceedings.

33. Further, in the interests of the defence of the Commonwealth and fairness to persons who might be affected by the Inquiry, this report is accompanied by a direction under s 21 of the IGADF Regulation limiting disclosure of the identities of the persons referred to in it.

34. Notwithstanding the jurisdictional limitations mentioned above, at least for some purposes, this inquiry is part of the 'course' or 'the administration of justice'. That is essentially because, although the Inquiry is not itself a judicial proceeding, it may in due course lead to criminal investigations and prosecutions. Thus, in *Roberts-Smith v Fairfax Media Publications Pty Ltd*,³⁴ the Commonwealth argued that given the role of this Inquiry and its potential to lead to future prosecutions 'any interference with the course of the Inquiry, or anything done to frustrate, impede or interfere with its integrity would, or would likely, amount to prejudicing the proper administration of justice' such as would found an order under s 37AG(1)(a) of the *Federal Court of Australia Act 1976* (Cth).³⁵ In the result, Bromwich J made non-publication orders based on prejudice to the administration of justice within the meaning of that provision '[62]...insofar as that pertains to the Inquiry, but [such orders] should not endure for more than two months after the delivery of the final Inquiry report to the Federal Government'.³⁶

The nature of the Inquiry's findings

35. As has been set out above, the Inquiry is directed to 'consider whether there are substantive accounts or credible information or allegations which, if accepted, could potentially lead to a criminal conviction or a disciplinary finding against named persons or identified groups', but not to 'conclude that a criminal or disciplinary offence has been committed by any person'. Conformably with that direction, this report does not contain findings of fact that a person has committed a war crime, but only whether there is credible information of a possible crime such as could warrant further investigation or action.

36. In light of the *Balog* principle and the Inquiry Directions, careful consideration has been given to the form in which the Inquiry's findings should be expressed. Initially, the formula that there was 'credible evidence' of a crime was considered, and was used in some procedural fairness notices. Submissions were made, by some potentially affected persons, that such a finding would be inappropriate, as it might imply that there was 'evidence' admissible under the rules of evidence. While, given that the Inquiry is not bound by the rules of evidence, that would seem unlikely, the Inquiry now prefers generally to express its findings in terms that there is 'credible information' that a specified crime or disciplinary offence may have been committed by a specified person. Such a finding responds directly to the terms of paragraph 11 of the Inquiry Directions, which provides that the Inquiry may consider 'whether there are substantive accounts or credible information or allegations which, if accepted, could potentially lead to a criminal conviction or a disciplinary finding

³⁴ [2018] FCA 1943. *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2018] FCA 1943 (6 December 2018).

³⁵ Which provides that the Court may make a suppression order or non-publication order on one or more of the several grounds, relevantly (a) the order is necessary to prevent prejudice to the proper administration of justice.

³⁶ See especially at [62](5)(b), where his Honour observed that 'the redaction is necessary to safeguard the interests of the administration of justice (in the *Rogerson* sense of the 'course of justice') while the Inquiry is continuing...'

against named persons or identified groups'. Use of the term 'information' rather than 'evidence' avoids any possibility of misapprehension that it refers to evidence admissible in a court of law, and emphasises the administrative function of the Inquiry, and that there are no findings of criminal or disciplinary guilt, and thus the limitation is being observed.

37. A potential finding that there is 'credible information' of a matter – for example, that a particular person has committed a particular war crime – is not a finding, on balance of probability let alone to a higher standard, that the person has committed that crime. There can of course be credible information of a matter warranting further investigation, even if there is also credible information to the contrary. A finding that there is credible information of a matter is not a finding that the matter is proved, to any particular standard. Generally, it is analogous to a finding that there are reasonable ground for a supposition. That is consistent with the 'scoping' function of the Inquiry, as well as with the terms of paragraph 11 of the Inquiry Directions. It is entirely consistent with such a finding that ultimately there may not be evidence to prove the matter, beyond reasonable doubt, in a court of law.

38. Submissions were made that the Inquiry had not considered or pursued alternative possibilities and hypotheses. While the Inquiry has given consideration to any alternative hypothesis that was advanced in submissions, it has not necessarily exhaustively investigated all of them. That is because the nature of its remit, and its findings, do not require the exclusion of all alternative hypotheses, before finding that there is 'credible information' of a matter. The existence of a rational alternative hypothesis is entirely consistent with the existence of credible information of a matter. Quite different considerations would apply in the context of proof beyond reasonable doubt in a criminal trial.

EVIDENCE AND PROCEDURE

39. The Inquiry is not bound by the rules of evidence.³⁷ It is not confined to evidence that would be admissible in a court of law, but can inform itself as it sees fit. That is all the more appropriate given the nature of the Inquiry's task and findings, in that this scoping inquiry is not making conclusive findings of fact in individual cases, but is the beginning of a process which may (or may not) lead to a police investigation, charges being laid, an accused being committed for trial, a trial by jury, and a verdict of guilty or not guilty. Essentially, the Inquiry is concerned to ascertain whether there is such information of a crime as could warrant further investigation or other action. Such a conclusion does not require that there be admissible evidence of the supposed crime, although – as explained in the next chapter (Rationale for Recommendations) – whether there is a prospect of obtaining admissible evidence informs consideration of whether further investigation should be recommended.

40. Many submissions invoked the principle stated by Dixon J in *Briginshaw v Briginshaw*,³⁸ that:

... an opinion that a state of facts exists may be held according to indefinite gradations of certainty ... reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the

³⁷ IGADF Regulation s 17(2).

³⁸ Reference 19 – Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336.

gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences ...

41. If those submissions were intended to mean that the Inquiry should not find that there is 'credible information' that a crime has been committed unless reasonably satisfied having regard to the gravity of the allegation that the crime has been committed, then they are misconceived. The Inquiry is not engaged in making findings, to any standard of proof, that a crime has been committed.

42. The Inquiry nonetheless appreciates that even a finding that there is credible information that a person has committed a war crime has the potential for significant reputational harm, and has not made such findings lightly. As will appear, the Inquiry has generally adopted the approach that unless there is a reasonable prospect of a criminal investigation obtaining sufficient evidence to charge a particular person with a specified crime, it has not made a finding that there is 'credible information' that the person has committed the crime. Not infrequently, this has meant that even though there may be information from a witness which on its own is *prima facie* credible, in the context of the whole of the information available to the Inquiry there is insufficient to warrant a finding that there is 'credible information'.

43. Some submissions received by the Inquiry suggested that, in the course of witness examinations, questions were asked which would not have been permissible in a court of law. What may be impermissible under the rules of evidence in a Court of Law does not mean that it is at all inappropriate in an investigative inquiry of this kind. First, that is obviously so, in the context of an inquiry to which the rules of evidence expressly do not apply, in which the subject matter of the Inquiry was 'rumours', and in which the ultimate findings are not conclusive findings of fact. Secondly, it is all the more so in the context of an investigative inquiry into suspicions of grave misconduct within a secretive and clandestine organisation in which there is a powerful code of silence. There is nothing inappropriate about leading questions, and questioning in the nature of cross-examination, to elicit the truth from witnesses who may be reluctant to disclose it: that approach is routinely taken in Royal Commissions, Corruption Commissions and other Commissions of Inquiry.

44. Some submissions were made that witnesses may have been influenced, improperly or otherwise, by the inducement of immunity from prosecution. That submission was misconceived. Every witness who gave evidence to the Inquiry has the protections and immunities afforded by the Defence Act, s 124(2CA), and IGADF Regulation, s 31 (Taking reprisals), s 32 (Self-incrimination) and s 33 (Protection from liability in civil proceedings). Those protections and immunities include *use* and *derivative use* immunity. Those immunities are explained below; however, they do not extend to giving false evidence to an inquiry, for which a witness can be prosecuted. Beyond that, the Inquiry has no power to grant an immunity from prosecution (though it can, and does make recommendations in that respect, any decision in that respect is ultimately a matter for the Commonwealth Director of Public Prosecutions). Nor is it aware of any immunity granted by any authority with power to do so.

45. Witnesses giving evidence before the Inquiry were routinely and appropriately, and sometimes repeatedly, reminded of the protections and immunities to which they are entitled, their

legal obligation to tell the truth, and their liability to prosecution for not telling the truth. This was done by way of a written notice of rights and obligations before the interview, orally at the outset of the interview, and where appropriate reinforced during the interview. This is not a court, but an investigative inquiry, which was required to endeavour to elicit information from a closed and secretive community in which there was a culture of silence. In any event, an exhortation to tell the truth, and pointing out the consequences of not doing so, are everyday occurrences in court rooms, as well as in inquiries, engaged in by judges, commissioners and advocates, and of course those acting for witnesses.

USE AND DERIVATIVE USE IMMUNITIES

46. Every witness who gave evidence to the Inquiry has the protections and immunities afforded by the Defence Act, s 124(2CA), and IGADF Regulation, s 31 (Taking reprisals), s 32 (Self-incrimination) and s 33 (Protection from liability in civil proceedings). Those protections and immunities include *use* and *derivative use* immunity: under Defence Act s 124(2CA) and IGADF Regulation s 32(2), any information given or document or thing produced by the witness, and giving the information or producing the document or thing, and any information document or thing obtained as a direct or indirect consequence of giving the information or producing the document or thing, are not admissible in evidence against the individual in any civil or criminal proceedings in any federal court or court of a State or Territory, or proceedings before a service tribunal, other than proceedings by way of a prosecution for giving false testimony.

47. The immunities operate in any relevant court or Service Tribunal in which proceedings may be brought, and regulate the admissibility of certain evidence in those proceedings. They do not directly constrain the Inquiry, the IGADF, or for that matter the CDF, in the use or publication of the Inquiry's findings or evidence before it. However, there is potential for criminal proceedings to be compromised if immunised evidence informs a prosecution.³⁹

48. It is important to observe that the immunities preclude only the admission in evidence in court proceedings of information given to the Inquiry by a witness (and anything obtained as a direct or indirect consequence) *against that witness*.⁴⁰ They do not preclude the admission in evidence in

³⁹Reference 20 – In *X7 v Australian Crime Commission* (2013) 248 CLR 92 (**X7**) and Reference 21 – *Lee v R* (2013) 251 CLR 196 (**Lee**), the High Court identified special considerations that apply in circumstances where a person has been compelled to provide information, including incriminating information provided in circumstances where the privilege against self-incrimination does not apply, and there is a prospect of such information being made available to prosecutors involved in a criminal prosecution of the person for conduct to which the incriminating information relates. It is a fundamental principle of the accusatorial criminal justice system that the prosecution must prove criminal charges beyond reasonable doubt and the accused cannot be compelled to assist the prosecution in this regard: *X7* at [101]-[102], [124], [159]; *Lee v R* at [32]-[33]. The notion of forensic disadvantage was also at the forefront of the decision in Reference 22 – *Strickland, Galloway, Hodges & Tucker v Commonwealth Director of Public Prosecutions* [2018] HCA 53 (**Strickland**). In *X7*, the concerns about the impact on the accusatorial process were premised on the fact that the examination had occurred post-charge. In *Strickland*, similar considerations were applied where the person was unlawfully subjected to a pre-charge compulsory examination conducted for an extraneous, unlawful purpose. In circumstances where a person has been compelled to provide self-incriminating information, such as in the course of a compulsory examination by the Australian Crime Commission, as it was in *X7* and in *Strickland*, making such information available to those responsible for the prosecution of that person fundamentally alters the accusatorial judicial process: see, *X7* at [124].

⁴⁰ And, it would seem, only in proceedings against the witness in which it is sought to impose criminal or civil liability on the witness: Reference 23 - *Feldman v Nationwide News Pty Ltd* [2020] NSWCA 260.

court proceedings of information given to the Inquiry by a witness (and anything obtained as a direct or indirect consequence) *against any other person* – including another person who was also an Inquiry witness. Thus, to use what will become a familiar example, if PTE X gives information to the Inquiry that he unlawfully killed a prisoner, and did so under the direction of CPL Z, the information given to the Inquiry by PTE X (and anything obtained as a direct or indirect consequence) is inadmissible in any prosecution of PTE X; but it is *not* inadmissible in any prosecution of CPL Z. This means that decisions will have to be made, ultimately by prosecuting authorities, as to whether X or Z should be prosecuted. As explained in the next chapter (Rationale for Recommendations), the Inquiry has taken this issue into account in considering recommendations for referral for criminal investigation, and for the granting of immunity from prosecution.

49. The use and derivative use immunities have been of considerable importance and benefit to the Inquiry, as they have enabled witnesses to speak frankly when otherwise interests of self-protection would have inhibited them. Suggestions have been made that the derivative use immunity is too broad and should be modified, as otherwise it may inhibit prosecutions. Those suggestions overlook, first, that the immunities were provided by the legislature as a balance to the dispensation, in IGADF inquiries, of the privilege against self-incrimination, in the interests of ascertaining the true facts. As the present Solicitor-General of the Commonwealth, Stephen Donaghue, wrote in *Royal Commissions and Permanent Commissions of Inquiry*:⁴¹

[9.6] Legislation that abrogates the privilege against self-incrimination frequently protects witnesses who are compelled to give self-incriminatory evidence from the direct use of that evidence against the. This protection, or evidential immunity, helps maintain the balance between the government's need to abrogate the privilege in order to obtain information on the one hand, and the preservation of the values that underlie the privilege on the other. The existence of statutory evidential immunities is consistent with the suggestion made above that legislatures may abrogate the privilege for reasons other than a desire to obtain self-incriminatory evidence for use in criminal trials, for it suggests that they consider the acquisition of information to be important even while providing that the information cannot be used in subsequent criminal proceedings against the witness. The evidential immunities conferred by commission legislation vary substantially in the type of protection that they provide and in the manner in which that protection is invoked ...

[9.7] When validly claimed, the privilege against self-incrimination at common law enables a witness to refuse to provide evidence. This means not only that the witness's evidence is not available for use against the witness, but also that there are no answers or documents from which any further evidence can be derived for use against the witness ... Of the three main types of statutory evidential immunity, only one exactly reproduces this protection ...

There can be no objection to the abrogation of the privilege when a derivative use immunity has been granted, as such an immunity serves all of the functions that the privilege against self-incrimination is designed to serve. While the absence of the privilege means that witnesses may be compelled to speak, the privilege protects the right of witnesses not to incriminate themselves, not their right to remain silent. Use immunities, on the other hand, provide less extensive protection than the privilege at common law, to some extent allowing the purposes of the privilege to be undermined.

⁴¹ Reference 24 – S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), pp206-207.

50. Secondly, without those immunities, it is unlikely that the culture of silence would have been breached, and that the conduct described in this report would have been exposed, at least to the extent to which it has.

PROCEDURAL FAIRNESS

51. Whether and to what extent there is a requirement to afford procedural fairness to a person who may be adversely affected by the report of an inquiry is determined by the legal and factual context. Here, the Inquiry is charged with determining whether there is any substance to rumours of criminal or unlawful conduct; whether there are substantive accounts or credible information or allegations which, if accepted, could potentially lead to a criminal conviction or disciplinary finding against named persons or identified group; and whether it should recommend that the recipient of the report, the CDF, refer particular matters to the AFP for criminal investigation, or institute administrative action. It is not a matter for the Inquiry to determine whether or not administrative action is taken, or particular matters are referred to the AFP, still less whether the AFP chooses to investigate them, or whether the CDPP chooses to lay criminal charges, let alone what a jury might make of such hypothetical charges. Such subsequent processes may themselves attract procedural fairness at various levels. Rather, this report is the very beginning of other potential processes.

52. That is relevant to the requirements of procedural fairness in the present context, as is demonstrated by the following passage in the judgment of Gibbs CJ in *National Companies and Securities Commission (NCSC) v News Corporation*:⁴²

Let it be assumed that as a result of the hearing the reputation of the respondents may in some way be affected. The question would then be what natural justice requires when a hearing, publicly announced but held in private, is held only for the purpose of investigation, the hearing being one in the course of which no issue can be determined, and as a result of which no right, interest or legitimate expectation can be affected, although the reputation of the respondents may be damaged. That question has to be answered in the light of a statutory framework which expressly recognizes the need for expedition and gives the Commission power to decide who may attend and who may intervene at the hearing. If the Commission were to accord to all the persons whose reputation might possibly be affected by the hearing a right to cross-examine the witnesses and call evidence as though they were in a court of law, the hearing might become so protracted as to render it practically futile. In these circumstances, with all respect, I find it quite impossible to say that the rules of natural justice require the Commission to proceed as though it were conducting a trial. It seems to me in no way unfair that, at a hearing of the kind which I have described, the respondents should not be entitled to cross-examine such witnesses as the Commission may call, or to call evidence of their own. If proceedings are subsequently brought in the Supreme Court against the respondents, they will, of course, be able to test by cross-examination the evidence adduced, and to call evidence themselves.

53. Although in circumstances of an inquiry conducted in private, reporting only (ultimately) to the CDF, and the contrary view is well arguable, the Inquiry has taken the view that a potentially affected person should be given an opportunity to make submissions as to why the Inquiry should not make particular findings and recommendations which were within its contemplation. This reflects the observations of the Judicial Committee of the Privy Council in *Mahon v Air New*

⁴² Reference 25 – *National Companies and Securities Commission v News Corporation Limited* (1984) 156 CLR at 313-314.

*Zealand*⁴³ that in the context of the making of a report by a Royal Commissioner which reflects adversely on some of the persons named in it, the rules of natural justice required that the Commissioner:

must listen fairly to any relevant evidence conflicting with the finding and any rational argument against it', and that this requires that 'any person ... who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, *might* have deterred him from making the finding even though it cannot be predicated that it would inevitably have had that result.

54. In *NCSC v News Corporation Limited*,⁴⁴ it was said (emphasis added) that '*there is no reason to think that the Commission will not give to the respondents adequate notice of any adverse conclusion which it has tentatively reached, or of any criticism which it tentatively proposes to make*'. The obligation to accord procedural fairness imports an obligation upon a decision-maker to alert a person entitled to be heard to the questions or 'critical issues' to be addressed.⁴⁵ The obligation is that of the person conducting the Inquiry, to afford an opportunity to address potential adverse findings which he or she might make.

Procedural fairness notices

55. In conformity with that view, the Inquiry provided notice to persons who might potentially be the subject of a specific adverse finding or recommendation that it was considering whether or not to make such potential findings and recommendations. However, the Inquiry did not give a formal notice of potential adverse findings when they were squarely based on admissions made by an apparently co-operative witness, and no adverse recommendation was under contemplation, including in particular where the use and derivative use immunities had the effect of practically precluding criminal or disciplinary action against that witness.

56. Each notice stated that it was providing:

The findings and recommendations which the Inquiry is considering whether or not to make, so far as they concern your client, together with a summary of the evidence relevant to each of them, is contained in the enclosed document ('Notice').

57. The purpose of a notice was, as contemplated by *Mahon v Air New Zealand*, to ensure that each potentially affected person was not '*left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value*'. The Notice set out the 'questions or critical issues to be addressed', so far as they were relevant to the recipient. The potential findings were stated at their highest, so that the recipient could address the full range of potential adverse findings. Each notice was accompanied by an extensive summary of the relevant evidence.

⁴³ Reference 26 – Judicial Committee of the Privy Council in *Mahon v Air New Zealand* [1984] AC 808 at 820-821.

⁴⁴ *National Companies and Securities Commission v News Corporation Limited* at 316.

⁴⁵Reference 27 – *Kioa v West* (1985) 159 CLR 550 at 587 per Mason J; Reference 28 – *Commissioner for the Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-591 per Northrop, Miles and French JJ; Reference 29 – *Summersford v Commissioner of Police* [2018] NSWCA 115 at [52] per Payne JA.

58. The process of inquiry is not an adversarial one. Some submissions referred to ‘allegations that have been put to our client’. However, the Inquiry was not formulating or putting allegations to anyone, but informing potentially affected persons of findings which it was considering whether or not to make, together with the relevant evidence, and inviting submissions about them. Many submissions proceeded on the assumption that the Notice contained proposed or provisional, rather than potential, findings, and assumed that they reflected reasoning that the Inquiry had already adopted. The incorrectness of that assumption, which ought not have been made given what was clearly explained in the letter covering each notice, will be apparent from the number of instances in which the Inquiry has ultimately not made a potential finding contained in a notice.

Disclosure

59. As to the relevant content of the applicable principles of procedural fairness, procedural fairness involves affording a potentially affected person a reasonable opportunity to adduce evidence and make submissions against a potential adverse finding. This involves alerting a person entitled to be heard to the questions or ‘critical issues’ to be addressed,⁴⁶ and ordinarily affording the party potentially affected ‘the opportunity of ascertaining the relevant issues and to be informed of the nature and content of *adverse material*’.⁴⁷

60. Each notice included an extensive summary of the relevant evidence which might support the potential finding, often including substantial extracts from the transcripts of interviews. Some notice recipients requested disclosure of further material. In dealing with those requests (some of which were nonetheless granted because of their modest scope and the nature of the information sought), the Inquiry has proceeded on the following principles.

61. Some potentially affected persons complained that matters raised in Notices had not been put to them orally in the course of their interviews. There were various reasons why that was sometimes the case. Usually, it was because the relevant issue came to the attention of the Inquiry only after the witness had been interviewed. Sometimes, the Inquiry refrained from confronting a witness with the evidence of another, where the evidence was incomplete, and it might turn out to be unnecessary to do so. On occasion, a person in respect of whom a potential referral for criminal investigation was under consideration was not compulsorily examined, in order to avoid any risk of enlivening use and derivative use immunities which might impede a prosecution. Regardless, the submission was misconceived. These are not adversarial proceedings; the Inquiry is not bound to put orally any potential adverse finding; due process, and more, has been afforded by providing an ample opportunity to deal with any potential adverse finding through the Procedural Fairness Notice process. Moreover, in such cases, the Notice usually contained an offer of a further interview if desired; with the exception of one recipient who had not previously been interviewed at all, no notice recipient took advantage of that offer.

62. *There is no obligation to disclose exculpatory material, or material which might counter or detract from a potential adverse finding.* Procedural fairness requires the person whose interest is apt to be affected to be put on notice of ‘*the nature and content of information*’ that the repository of power undertaking the inquiry might take into account as a reason for coming to a conclusion

⁴⁶ *Kioa v West* (1985) 159 CLR 550 at 587 per Mason J; Reference 30 - *Commissioner for the Australian Capital Territory— Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590-591 per Northrop, Miles and French JJ.

⁴⁷ *Summersford v Commissioner of Police* [2018] NSWCA 115 at [52].

adverse to the person'.⁴⁸ It does not require disclosure of information which the Inquiry might take into account as a reason for **not** coming to the adverse conclusion. While a duty to provide procedural fairness requires provision to a person affected of the material *adverse* to that person, this does not extend to exculpatory as distinct from adverse material, nor to all material that has substantive relevance to the matter.⁴⁹

63. The Inquiry has had regard to what was said by Brennan J in *Kioa v West* in the following passage (emphasis added):⁵⁰

*Nevertheless in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with **adverse** information that is credible, relevant and significant to the decision to be made. It is not sufficient for the repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it. Information of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with **the** information.*

64. Brennan J was referring to information **adverse** to the potentially affected person, and his Honour's observation was that **adverse** material that was credible, relevant and significant should not be withheld on the basis that it would be 'shut out of mind'. The Inquiry did not withhold any **adverse** material on that basis, or for that matter on any basis. It disclosed the substance of all **adverse** material that it believed was credible, relevant and significant, and more. His Honour was not referring to exculpatory material. In *McLachlan v Australian Securities and Investments Commission* (1999) 30 ACSR 418, an argument that ASIC ought to disclose all documents relating to the subject matter of the inquiry, and should not be permitted to 'quarantine' from disclosure material that was not adverse, or even potentially exculpatory, was rejected.⁵¹ In respect of the same passage in Brennan J's judgment, Kenny J (with whom O'Loughlin J and Mansfield J agreed), said:

His Honour was there speaking of information adverse to the interests of those concerned upon which the decision maker proposed to rely, believing it to be relevant, credible and significant. These passages do not support the appellants' submission that the rules of natural justice require them to have access to all material bearing on the subject matter of the hearing within the possession of ASIC (or in some way considered by officers of ASIC, although not by Mr Malinaric). There is, moreover, no support for the proposition for which the appellants contend in such cases as *Boucher v ASC* (1996) 71 FCR 122; 44 ALD 499; 22 ACSR 503; *Laycock v Forbes* (1997) 150 ALR 186; 25 ACSR 659; *Winter v ASC* (1995) 56 FCR 107; 16 ACSR 61.⁵² *The obligation is only to disclose **the substance** of the adverse material.* While a commission of inquiry

⁴⁸ Reference 31 – *BRF038 v The Republic of Nauru* [2017] HCA 44 at [58], with reference to the *Minister for Immigration and Border Protection v SZSSJ*.

⁴⁹ *Summersford v Commissioner of Police* [2018] NSWCA 115 at [86]-[87]; Reference 32 – *Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs* (2014) 220 FCR 202; [2014] FCA 25 at [149] (Kenny J), citing *Alphaone* at 590-591; Reference 33 - *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at 162 [32]; *Kioa v West* at 629; *Obeid v Ipp* [2016] NSWSC 1376; (2016) 338 ALR 234 at [170]-[175].

⁵⁰ (1985) 159 CLR 550 at 629.

⁵¹ Reference 34 – *McLachlan v Australian Securities and Investments Commission* (1999) 30 ACSR 418.

⁵² *McLachlan v Australian Securities and Investments Commission* (1999) 30 ACSR 418

must disclose material to persons who are adversely affected by it, disclosure of *the substance* of the adverse material is all that is required:⁵³

*This will often be all that is provided, in order to allow a commission to comply with the requirements of procedural fairness while avoiding any breach of confidentiality obligations, and to avoid damage to the public interest by revealing investigative techniques or other sensitive material.*⁵⁴

66. *There is no obligation to disclose reasoning and deliberative processes.* There is no requirement for disclosure of deliberative processes and reasoning.⁵⁵ In *Australian Capital Territory Revenue v Alphaone Pty Ltd* it was said (emphasis added) that a potentially affected person:

... is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. *Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.*⁵⁶

67. Against these principles, the Notices substantially exceeded the requirements of the law. They informed recipients of the critical issues, and of the nature and substance of the adverse material that might be taken into account in reaching an adverse conclusion. Indeed, in many aspects they provided detailed extracts from the transcript of interviews, and not only their substance and effect, which would have sufficed. In large part, they identified the sources of the adverse information, which they need not have done.

68. For those reasons, requests for full transcripts of the evidence of every witness who had given evidence relevant to the recipient (other than that of the notice recipient himself or herself, which was invariably provided), apparently founded on a desire to ascertain whether there was anything *exculpatory* in the transcripts, or which detracted from the adverse material, or other potentially *exculpatory* material, and how and in what circumstances the evidence was obtained, and the Inquiry's method of operation, rather than to be informed of the substance of the adverse material, were rejected. Likewise, requests for what amounted to 'further and better particulars', or elaboration of the basis on which a potentially adverse finding might be made, were generally declined, and the Inquiry did not generally provide its (tentative) reasoning and deliberations. Accordingly, complaints by some notice recipients that they were not provided with potentially

⁵³ Reference 35 – *Johns v ASC* (1993) 178 CLR 408 at 472; Reference 36 – *O'Rourke v Miller* (1985) 156 CLR 343 at 361; Reference 37 – *Clements v Bower* (1990) 2 ACSR 573 at 584; *Re Pergamon Press Ltd* [1971] 1 Ch 388 at 400; Reference 38 – *R v Gaming Board of Great Britain; Ex parte Benain and Khaida* [1970] 2 QB 417 at 430-1.

⁵⁴ S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry*, [8.6].

⁵⁵ Reference 39 – *Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 57; [2001] HCA 22 at [30]-[31] per Gleeson CJ and Hayne J; *SZBEL* at 166 per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ; *Summersford v Commissioner of Police* [2018] NSWCA 115 at [88].

⁵⁶ *Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591.

exculpatory material are misconceived. Of course, the position would be quite different in the context of a criminal prosecution.

Bias

69. In the context of investigatory inquiries, the bias rule has a limited scope.⁵⁷ Even if the potential findings had reached the status of ‘firm provisional conclusions’ (as distinct from potential findings and recommendations under consideration) – which they had not – there would be no case of apprehended bias. In *National Companies and Securities Commission v News Corporation Limited*,⁵⁸ Gibbs CJ said, in answer to criticism of the procedure by which the NCSC proposed to afford an opportunity to affected persons to be heard:

The learned judges who constituted the Full Court said that the right to call rebutting evidence and to make submissions after the Commission had formed its views in the absence of the accused fell well short of the rights ordinarily afforded to a person accused of a breach of the law. That is true, but it is of no present significance; in the first place there is in the true sense no accused, and secondly, the rules of natural justice do not require the Commission to treat the hearing as though it were a trial in a court of law. Their Honours went on to say that the procedure proposed by the Commission placed the respondents in the position of having to call evidence and make submissions in an endeavour to persuade the Commission to change its mind and reverse the conclusion arrived at on evidence which only the Commission had heard. They said: ‘Human experience teaches that such a course imposes a heavy burden. Minds which have reached conclusions, however tentative, may not be closed totally, but the task of prising them open will not be a light one’. Whether the course proposed would place a heavy burden on the respondents depends of course of the circumstances. However, as common judicial experience shows, minds may remain open and impartial although they have given consideration to a matter and reached tentative conclusions upon it (cf *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 554); and it will be enough in the present case if the respondents are given a fair opportunity to correct or contradict any relevant material prejudicial to them (cf *Board of Education v Rice* [1911] AC 179 at 182, and *Re Pergamon Press Ltd* [1971] Ch 388 at 399-400 and 407).

70. In *Clements v Bower*,⁵⁹ Neasey J, with whom Cox J agreed, said:

I referred earlier to ‘a strongly held provisional view’, and have said that in my opinion for investigators to hold such a view on an issue of fact in the investigation, as a result of considering relevant materials before they began to examine witnesses at a hearing, is not a breach of their duty to observe the rules of natural justice; which is to say, is not unfair to suspected persons whose conduct is being investigated. A strongly held provisional view is, I agree, stronger than a ‘tentative’ view or conclusion, if by ‘tentative conclusion’ is meant a provisional conclusion formed experimentally: see OED.

71. As his Honour proceeded to observe, ‘tentative conclusion’ was the terminology used by Gibbs CJ in *NCSC v Nationwide News*. The ‘potential findings’ referred to in the Notices were even less than tentative. As the covering letter to the Notices stated, it ‘contains potential, rather than

⁵⁷ Reference 40 – *Boys v ASC* (1998) 152 ALR 219 at 234-5; *Clements v Bower* (1990) 2 ACSR 573 at 582; *McLachlan v ASIC* (1999) 85 FCR 286.

⁵⁸ Reference 41 – *National Companies and Securities Commission v News Corporation Limited*, Gibbs CJ, (1984) 156 CLR 296 at 316.

⁵⁹ Reference 42 – *Clements v Bower*, Neasey J, (1990) 2 ACSR 573 at 583.

proposed, findings and recommendations. Any comments, observations, submissions or statements your client wishes to make ... will be given careful consideration'. The potential findings were stated in the Notice at their highest, so that the recipient could address the full range of potential adverse findings. As the covering letter and the Notice each emphasised, the Inquiry was considering *whether or not* to make the potential findings, and the possibility that there is *not* credible evidence of each matter was equally under consideration.

72. Inferences of bias were also raised, based on the supposed conduct of the examinations. As has been explained, in the context of an investigative inquiry, not constrained by the rules of evidence, into alleged serious wrongdoing in a closed and secretive community where many are reluctant fully and frankly to disclose the truth, robust questioning is sometimes necessary to test and elicit the truth. At most interviews, witnesses were accompanied by lawyers and support persons. Several of the standing support persons, who have attended many interviews, have mentioned to the Inquiry their observations of the fairness, albeit sometimes firmness, with which interviews have been conducted.

CONCLUSION

The Inquiry Directions permit the Inquiry to make findings as to whether there are substantive accounts or credible information or allegations which, if accepted, could potentially lead to a criminal conviction or disciplinary finding against named persons or identified groups. It was plainly the intention of the appointing authority that the course of suspending an inquiry, in part or whole, to refer any evidence which potentially indicates criminal or disciplinary offences for investigation, not be routinely applied. No legal principle or convention required the Inquiry to do so.

Consistently with the terms of reference and legal principles which define the Inquiry's jurisdiction, in respect of potential criminal conduct, the highest the Inquiry's findings rise in respect of potential criminal conduct of an individual is that there is *credible information* that a person has committed a certain identified war crime or disciplinary offence. This is not a finding of guilt, nor a finding (to any standard) that the crime has in fact been committed. In that context, submissions that invoked the '*Briginshaw* standard of proof' were misconceived. The Inquiry has nonetheless had regard to the gravity and potential consequences of a finding even that there is 'credible information' of a crime, in considering whether or not to make such a finding.

The Inquiry is not confined to evidence that would be admissible in a court of law, but can inform itself as it sees fit, and has done so, as is appropriate for an inquiry of this nature.

Assuming that principles of procedural fairness are applicable, they involve affording a potentially affected person a reasonable opportunity to adduce evidence and make submissions against a potential adverse finding. This involves alerting a person entitled to be heard to the questions or 'critical issues' to be addressed, and ordinarily affording the party potentially affected 'the opportunity of ascertaining the relevant issues and to be informed of the nature and content of *adverse* material'. The Inquiry has done so, by providing notice to persons who might potentially be the subject of a specific adverse finding or recommendation that it was considering whether or not to make such potential findings and recommendations – except when a finding was squarely based on admissions made by an apparently co-operative witness, and no adverse recommendation was under contemplation.

In the context of investigatory inquiries, the bias rule has a very limited scope, and has not been infringed here.

References:

1. *Defence Act 1903*.
2. *Inspector-General of the Australian Defence Force Regulation 2016*.
3. *Wilson v Minister for Aboriginal and Torres Straits Islander Affairs* (1996) 189 CLR 1.
4. *Wainohu v State of New South Wales* (2011) 243 CLR 181.
5. Amendment 1 to the Inquiry Directions, of 24 March 2017. [REDACTED]
6. *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.
7. *Hansard 12 May 2020* Institutional Responses to Child Sexual Abuse — Royal Commission — Report of case study No. 35—Catholic Archdiocese of Melbourne, dated November 2017—Unredacted. [Received 7 May 2020].
8. *R v Obeid (No 8)* 2016 NSWSC 388.
9. Letter from the then Chief of Army and now Chief of Defence Force to IGADF of 30 March 2016. [REDACTED]
10. *Duncan v New South Wales; NuCoal Resources Limited v New South Wales; Cascade Coal Pty Limited v New South Wales* [2015] HCA 13.
11. *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7.
12. *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (9 April 1992) 175 CLR 564.
13. *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.
14. Hon Mark Weinberg AO, *The Impact of Special Commissions of Inquiry/Crime Commissions on Criminal Trials* (2015) 12 *The Judicial Review* (TJR) 199.
15. *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation* (1982) 152 CLR 25.
16. *Clough v Leahy* (1904) 2 CLR 139.
17. *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73.
18. *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2018] FCA 1943.
19. *Briginshaw v Briginshaw* (1938) 60 CLR 336, per Dixon J.
20. *X7 v Australian Crime Commission* (2013) 248 CLR 92.
21. *Lee v R* (2013) 251 CLR 196.
22. *Strickland, Galloway, Hodges & Tucker v Commonwealth Director of Public Prosecutions* [2018] HCA 53; (2018) 361 ALR 23.
23. *Feldman v Nationwide News Pty Ltd* [2020] NSWCA 260
24. S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001).
25. *National Companies and Securities Commission v News Corporation Limited* (1984) 156 CLR 296.
26. *Mahon v Air New Zealand* [1984] AC 808.
27. *Kioa v West* (1985) 159 CLR 550.
28. *Commissioner for the Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576.
29. *Summersford v Commissioner of Police* [2018] NSWCA 115.
30. *Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576.

31. *BRF038 v The Republic of Nauru* [2017] HCA 44.
32. *Gondarra v Minister for Families, Housing, Community Services and Indigenous Affairs* (2014) 220 FCR 202; [2014] FCA 25.
33. *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152.
34. *McLachlan v Australian Securities and Investments Commission* (1999) 30 ACSR 418.
35. *Johns v ASC* (1993) 178 CLR 408.
36. *O'Rourke v Miller* (1985) 156 CLR 343.
37. *Clements v Bower* (1990) 2 ACSR 573.
38. *R v Gaming Board of Great Britain; Ex parte Benain and Khaida* [1970] 2 QB 417.
39. *Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 57; [2001] HCA 22.
40. *Boys v ASC* (1998) 152 ALR 219.
41. *National Companies and Securities Commission v News Corporation Limited*, Gibbs CJ.
42. *Clements v Bower*, Neasey J, (1990) 2 ACSR 573.

Chapter 1.05

RATIONALE FOR RECOMMENDATIONS

EXECUTIVE SUMMARY

This chapter explains the reasoning which has generally informed the recommendations within this report.

In considering whether to recommend referral of a matter for criminal investigation, the Inquiry has adopted as a threshold test the following question: *Is there is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge an identifiable individual with a criminal or disciplinary offence.* The Inquiry has also had some regard to the ultimate prospects of a conviction.

As to relative criminal responsibility and culpability, the Inquiry's approach is that those who have incited, directed, or procured their subordinates to commit war crimes should be referred for criminal investigation, in priority to their subordinates who may have 'pulled the trigger'. This is because in a uniformed, disciplined, armed force those in positions of authority bear special responsibilities, given their rank or command function.

Additional factors include the objective gravity of the incident (for example, if there are multiple victims); whether the conduct appears to have been premeditated, wanton or gratuitous; and whether the individual concerned is implicated in multiple incidents, particularly if those other incidents may provide tendency evidence.

The Inquiry has not recommended referral for criminal investigation where it appears that the use and derivative use immunities to be found in the *Defence Act 1903* and the *Inspector-General of the Australian Defence Force Regulation 2016* would deprive a prosecution of admissible evidence.

The Inquiry recommends that any criminal investigation and prosecution of a war crime should be undertaken by the Australian Federal Police and the Commonwealth Director of Public Prosecutions, with a view to prosecution in the civilian criminal courts, rather than as a service offence in a service tribunal.

Where the evidence of a subordinate is likely to be important in the prosecution of a superior, in order to secure the subordinate's testimony in a prosecution, and in circumstances where the use and derivative use immunities inhibit prosecution of the subordinate in any event, it is recommended that the subordinate be granted immunity from prosecution in return for giving prosecution evidence.

The Inquiry has recommended that consideration be given to administrative action for some serving members, where there is credible information of misconduct which either does not meet the threshold for referral for criminal investigation, or is insufficiently grave for referral, but should have some consequence for the member. The administrative action process would require further procedural fairness.

Where there is credible information that an identified or identifiable Afghan national has been unlawfully killed, the Inquiry has recommended that Australia should compensate the family of that person, without awaiting for establishment of criminal liability.

The Inquiry makes a number of recommendations to address strategic, operational, structural, training and cultural factors that appear to have contributed, although generally indirectly, to the incidents and issues referred to in this report. Such recommendations are usually that consideration be given to a course of action, as such consideration might result in the suggested course not being adopted, for some good reason of which the Inquiry might be unaware.

The Inquiry has made generic recommendations about two classes of decoration: the Meritorious Unit Citation awarded to Special Operations Task Group (SOTG) Task Force 66, and the Distinguished Service decorations awarded generally to those who commanded at various levels in SOTG and in the Special Operations Command units. It has also made specific recommendations concerning some particular awards. In the case of individual decorations, recommendations are expressed in terms that they be reviewed, leaving to the Chief of Defence Force the decision of how procedurally that review should best be undertaken.

INTRODUCTION

1. The Inquiry directions authorise the Inquiry to make recommendations and this report does so. Some are specific to particular incidents, issues and individuals (such as a recommendation that a particular matter be referred for criminal investigation); others are of broader application (such as those relating to cultural and organisational issues). The purpose of this chapter is to explain the general rationale for such recommendations. The basis for specific individual recommendations are to be found in the chapters dealing with particular incidents.
2. The classes of recommendation discussed include:
 - a. referrals for criminal investigation;
 - b. granting of immunities;
 - c. consideration of administrative action;
 - d. payment of compensation;
 - e. strategic, operational, organisational, and cultural reforms;
 - f. review of honours and awards.
3. Self-evidently, not all these recommendations are within the remit of Chief of Defence Force (CDF), but they may assist and inform the actions and decisions of others. For example, the granting of any immunity from prosecution would ultimately be a matter for the Commonwealth Director of Public Prosecutions (CDPP).

REFERRALS FOR CRIMINAL INVESTIGATION

4. It is commonplace for commissions of inquiry that discover apparently criminal conduct to make recommendations or referrals to criminal investigatory and prosecutorial authorities, such as the Australian Federal Police (AFP) and the CDPP. As has been explained in the Legal Issues chapter the Inquiry Directions include the requirement ‘to consider whether there are substantive accounts or credible information or allegations which, if accepted, could potentially lead to a criminal conviction or a disciplinary finding against named persons or identified groups’ subject to the exclusion ‘not [to] conclude that a criminal or disciplinary offence has been committed by any person.’ Then Chief of Army’s (CA) directions invited recommendations as to ‘the range of existing or novel options that may be available, or could be created, should further action be required, with a view as to the likelihood of achieving closure through each of these options’. Where there is credible information of a war crime, prosecution is not the only option. That said, Australia’s obligations as a state party to the Rome Treaty include the proper investigation and, where appropriate, prosecution of war crimes committed by its nationals. Moreover, the general expectation in Australia would be that those who commit crimes be held to account for them through prosecution.

A test for referral

5. In that context, it has been necessary for the Inquiry to develop an appropriate test to inform recommendations for further action, and in particular referral for criminal investigation. The decision of the High Court in *Balog* indicates that a commission of inquiry should generally refrain from making any observations or comments to the effect that there is a *prima facie* case against an individual, let alone commission of an offence, and this Inquiry does not do so.

6. The Inquiry has been assisted in this respect by United Kingdom jurisprudence. While the statutory structure there is different, a common factor is the obligation of the nation State, under Article 17 of the Rome Statute, to investigate and prosecute war crimes committed by its nationals. In May 2014, the Chief Prosecutor of the International Criminal Court announced a decision to re-open a preliminary examination into alleged war crimes committed by British soldiers in Iraq in the period 2003 to 2008. That decision put the United Kingdom – a State Party to the Rome Statute and long-standing supporter of the ICC – under scrutiny, in respect of its processes for investigating such allegations. Questions arose as to how the Iraq Historical Allegations Team (IHAT) and the Service Prosecution Authority (SPA) would discharge the United Kingdom’s obligation under Article 17, and in particular as to what was the appropriate test to discriminate between allegations that should be investigated, and those that should not. In *Al Saadoon and others v Secretary of State for Defence*, Leggatt J (as Lord Leggatt JSC then was) endorsed the test proposed by the Director of Service Prosecutions, Mr Andrew Cayley CMG QC, to be applied at the outset of each case, in these terms:¹

I therefore agree with the DSP that it is appropriate to ask at an early stage whether there is a realistic prospect of obtaining sufficient evidence to charge an identifiable individual with a service offence. If it is clear that the answer to this question is no, there can be no obligation on IHAT to make any further enquiries. In some cases where the answer is not immediately clear, it may well be possible to identify one or more limited investigative steps which, depending on their outcome, may lead to the conclusion that there is no realistic prospect of meeting the evidential sufficiency test. Examples of such steps might be carrying out a documentary search or interviewing the

¹Reference 1 - *Al Saadoon and others v Secretary of State for Defence*, Leggatt J [2016] EWHC 773 at [283].

complainant or a key witness. It goes without saying that it will be a matter for the judgment of the Director of IHAT in any particular case how the test formulated by the DSP is applied.

7. The test as stated by Leggatt J was, therefore: *Is there a realistic prospect of obtaining sufficient evidence to charge an identifiable individual with a service offence?* Adapted for the circumstances of this Inquiry, which is not confined to service offences, the Inquiry has adopted the following test: *Is there is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge an identifiable individual with a criminal or disciplinary offence.*

8. That test has a number of advantages.

9. First, it means that time and resources of investigatory and prosecutorial authorities will not be expended on cases where there is not a realistic prospect of a criminal investigation obtaining sufficient evidence to charge a person with an offence.

10. Secondly, it is broadly consistent with, and reflective of, the Inquiry Direction to ‘consider whether there are substantive accounts or credible information or allegations *which, if accepted, could potentially lead to a criminal conviction or a disciplinary finding against named persons*’.

11. Thirdly, and importantly, that test has evolved in the United Kingdom, in a context where the Office of the Prosecutor of the International Criminal Court has been monitoring the United Kingdom’s compliance with its obligations. It is therefore very likely that application of that test will discharge Australia’s international obligations, especially those under Rome Statute.

12. While the Inquiry has adopted this threshold test, it does not follow that if the test is satisfied there should *necessarily* be a referral for criminal investigation. The experience in other nations with war crimes prosecutions, discussed in Chapter 1.12 (War Crimes Investigations of Other Nations in Afghanistan), shows that prosecutions may encounter many pitfalls, even when the evidence is apparently clear. For that reason, the Inquiry has also had regard to the ultimate prospects of a conviction. That is essentially for the reason that a prosecutor would have regard to the ultimate prospects of success (as well as the public interest), as each are explained in the Prosecution Policy of the Commonwealth, in deciding whether to charge in the first place, coupled with the consideration that there is unfairness in exposing to the jeopardy of criminal prosecution a person who will ultimately be acquitted.

Hierarchy of relative criminal responsibility

13. It is an obvious general principle that those who bear the greatest criminal responsibility or culpability should be prosecuted in priority to those whose culpability is less. This principle is reflected in the Prosecution Principles of most if not all prosecuting authorities. It provides an important guide to the Inquiry in considering which matters to recommend for criminal investigation.

14. As will appear, there are a number of incidents which involve multiple participants, in a context where one (PTE X) may have unlawfully killed a non-combatant on the direction or with the approval of a superior (CPL Z). In such cases, the criminal liability of the subordinate who pulls the trigger is as a principal, while that of the superior, though by law often stated to be guilty of the same offence, is conventionally seen as an accessory. There are also cases in which the superior’s

potential criminal liability is on the basis of ‘command responsibility’, as explained in Chapter 1.10 (The Applicable Law of Armed Conflict).

15. In the civilian criminal law, the criminal responsibility and culpability of an accessory is, at least usually, viewed as lesser than that of the principal offender. However, the Inquiry considers, in the military context, that is not necessarily so. To the contrary, in a system in which subordinates are trained and expected to follow orders, and superiors know that they will, then – notwithstanding that the subordinate may know that the order is unlawful – it is the superior who bears the greater responsibility, and by a very substantial measure. While such a subordinate should have known better, the context is one of an environment where the patrol commander or team leader was responsible for the subordinate’s training and welfare, had the power to direct the subordinate, and had the power to ruin the subordinate’s career for non-compliance, especially on an operational deployment. It was plainly the duty of patrol commanders and team leaders to take care of their subordinates, and not to require them to commit criminal acts.

16. It is also fundamentally important to a disciplined military force that its commanders at all levels act in accordance with law in the application of lethal force. Failure to do so is incompatible with the national policy which they are supposed to be implementing, detracts from the moral authority which is a component of combat power (indeed, it is often seen as a ‘force multiplier’), and undermines Australia’s international standing and reputation. It also exposes subordinates to liability for war crimes, and to the psychological trauma and moral injury which so many of them manifest.

17. For those reasons, the Inquiry has taken the view that those who have incited, directed, or procured their subordinates to commit war crimes, should be referred for criminal investigation, in priority to their subordinates who may have pulled the trigger. That view recognises that in a uniformed, disciplined, armed force those in positions of authority bear special responsibilities, given their rank or command function.

18. Further factors influencing assessment of relative criminal responsibility and the Inquiry’s consideration of whether to recommend referral for criminal investigation include:

- a. The gravity of the incident: for example, if there are multiple victims;
- b. the extent to which conduct appears to have been premeditated, wanton or gratuitous; and
- c. Whether the individual concerned is implicated in multiple incidents, particularly if those other incidents may provide tendency evidence.

19. As has been foreshadowed, the operation of the use and derivative use immunities given to Inquiry witnesses by *Defence Act 1903* (Defence Act)² s 124(2CA) and *Inspector-General of the Australian Defence Force Regulation 2016* (IGADF Regulation)³ s 32 impact on these considerations, particularly where a subordinate has made protected disclosures to the Inquiry so that a prosecution of the subordinate would in any event be complicated, and where the case against the superior depends substantially on the subordinate’s evidence. Where information about a crime has been revealed *only* by a participant’s protected disclosure to the Inquiry, or as a direct or indirect

² Reference 2 – *Defence Act 1903*

³ Reference 3 – *Inspector-General of the Australian Defence Force Regulation 2016*

consequence of it, it will, in practice, be very difficult to prosecute that participant, as it will be at least arguable that everything known about the crime has been discovered as a direct or indirect consequence of the initial disclosure. While the full extent and operation of derivative use immunity has not yet been the subject of authoritative decision, those immunities, and the related question of prosecutorial duties of disclosure of material which may evidence breach of those immunities, now loom large in many criminal prosecutions.⁴ The Inquiry has not recommended referral for criminal investigation in cases where it appears that the immunities would deprive a prosecution of critical admissible evidence. Almost invariably, such cases are also associated with recommendations, discussed below, of a grant of immunity from prosecution.

Forum

20. The Inquiry has recommended that any criminal investigation and prosecution of a war crime should be undertaken by the AFP and CDPP, with a view to prosecution in the civilian criminal courts, rather than as service offences or in service tribunals. The reasons for this include that many of the suspected perpetrators are no longer serving and thus not amenable to Defence Force Discipline Act jurisdiction,⁵ that there are considerable overlaps in the conduct and individuals in question so that a single agency should be responsible for any criminal investigation, avoiding any potential problem with complementarity, and any arguable constitutional complication (for example, with the constitutional guarantee under s 80 of trial by jury).

Granting of immunities

21. The CDPP, who has the relevant authority to grant undertakings, including not to prosecute,⁶ has set out the general principles involved in a decision to grant such an undertaking in the Prosecution Policy of the Commonwealth, which in para 6.4 recognises the competing policy considerations as follows:

In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who participated in alleged offences in order to secure their evidence in the prosecution of others (for example, by granting them immunity from prosecution). However, it has long been recognised that in some cases granting an immunity from prosecution may be appropriate in the interests of justice.

22. While it is ultimately a matter for the CDPP, the Inquiry considers that the interests of justice and public policy in holding to account those in positions of authority in the Defence Force, who have caused their subordinates to commit crimes, makes these cases appropriate ones for such immunities. The evidence of such individuals is likely to be crucial in the prosecution of their superiors – which, for reasons that have been explained – should take priority, both because of the greater criminal responsibility of the superiors, and because of the greater national importance in holding the superiors to account, and showing that they are held to account.

23. The use and derivative use immunities provided under Defence Act s 124(2CA) and IGADF Regulation s 32 are not immunities from prosecution; they are immunities from the use in evidence

⁴ See, as example, Reference 4 – *Strickland v CDPP* [2018] HCA 53; Reference 5 – *CDPP v Kinghorn* [2020] NSWCCA 48 at [124ff].

⁵ At least, after 6 months after they ceased to be defence members: Reference 6 – *Defence Force Discipline Act 1982* s 96(6).

⁶ Under s 9 of the Reference 7 – *Director of Public Prosecutions Act 1983* (Cth).

in a prosecution of admissions made by the individual to the Inquiry (and anything obtained as a consequence). If, outside the Inquiry, the witness were to give the same information – to police, or to a prosecutor, or to a court in the course of giving evidence against another – then, in the absence of a grant of immunity, for example under s 9(6) of the CDPP Act, the giving of that information would not be caught by the use and derivative use immunity arising from this Inquiry, and the individual could be prosecuted based on that information.

24. In order to secure their testimony in such prosecutions, and in circumstances where, because of the use and derivative use immunities, prosecution of the subordinate would in any event be very difficult, it is recommended that the subordinate be granted immunity from prosecution should he agree to give evidence for the Crown in any relevant prosecution.

CONSIDERATION OF ADMINISTRATIVE ACTION

25. For some serving members, where referral for criminal investigation is not recommended, the Inquiry has recommended that consideration be given to administrative action in respect of the member. Theoretically, such action could range from termination, or for transfer out of the Special Forces, to a reprimand or a warning. Any such action would almost inevitably attract the requirements of procedural fairness, through a notice to show cause process.

26. Generally, the Inquiry has recommended that consideration be given to administrative action where there is credible information of misconduct which either does not meet the threshold for referral for criminal investigation, or is regarded as not so grave as to warrant such referral, but is such that, if established, should have some consequence for the member, and provide an appropriate 'message' to those still serving. In some exceptional cases, the Inquiry has specifically recommended that the action might be 'at the lower end of the scale', such as a formal letter of censure. Typically, those are cases where the conduct appears to be out of character, there is genuine remorse, and there are reasons to think that the member may be an agent for reform in the future.

27. The Inquiry has not made a recommendation for administrative action in respect of a member who is the subject of a recommendation for criminal investigation. It is open to Army to take administrative action, with the appropriate procedural fairness protocols, without awaiting the outcome of any criminal investigation or prosecution – although, in many contexts, it is often regarded as fair and appropriate to allow the criminal justice process to take its course.

28. The Inquiry has not sought to identify every instance of misconduct which has emerged in the course of the Inquiry which might warrant administrative action of some kind. The CDF may well on reviewing the contents of this report identify evidence or reports of further incidents or conduct which warrant administrative action of some kind, and there is no reason why such action could not be initiated, with the appropriate procedural fairness protocols, notwithstanding that there is no relevant specific recommendation in this report.

29. However, the Inquiry has generally not made recommendations for action based on the giving of false evidence to the Inquiry. This is for several reasons.

30. First, there are a number of cases in which a witness has initially given a version of events, then later – sometimes in the same interview, sometimes in a later interview – admitted that version was false. In those cases, the Inquiry has taken the view that it is more important that the truth

ultimately emerged, than that it was initially suppressed by the witness. Recognising (and in that way 'rewarding') the importance of the eventual disclosure of the truth will do more to encourage a culture of honesty than punishing its initial concealment.

31. Secondly, in cases where there are no admissions, proof that a witness has deliberately given false evidence is notoriously difficult. That is especially so where, as here, so much of the suspect evidence amounts to a denial of any recollection of events which it might be expected would be recalled, and there is an overlay of Post-traumatic Stress Disorder. While this report does from time to time express reservations about a witness' testimony, such expressions do not amount to a positive finding that the witness has deliberately given false evidence.

PAYMENT OF COMPENSATION

32. The chapters in Part 2 of this report refer to many instances in which Afghan nationals may have been unlawfully killed. Some of them were non-combatants, and not participating in hostilities. Others may have been combatants but were *hors de combat*, or 'out of the fight', having been captured and under control. In quite a number of cases, it has been possible to identify them. In still others it may yet be possible to do so.

33. Australia has long historical connections with Afghanistan. Australia's stated purpose in being in Afghanistan, and Uruzgan Province in particular, included improving the conditions of the Afghan people. Accounts received, directly and indirectly, by the Inquiry, testify instead to the fear and terror which villagers experienced in the context of a Special Operations Task Group (SOTG) raid. During Operation SLIPPER, payments of compensation were routinely made, under the Tactical Payment Scheme, for damage to the property of local nationals, and for the deaths of non-combatants.

34. If Afghans have been unlawfully killed by Australian soldiers ostensibly acting in the name and on behalf of Australia, then Australia should compensate their families. Doing so will contribute to the maintenance of goodwill between the nations, and do something to restore Australia's standing, both with the villagers concerned, and at the national level. But quite aside from that, it is simply the morally right thing to do.

35. The Inquiry does not consider that this should be contingent on establishing criminal liability. First, that may take a long time – several years – to resolve. Secondly, there may well be cases in which, though a non-combatant has been killed, a prosecution fails to establish the requisite *intent*. While acting on the basis of the Inquiry's findings of 'credible information' may result in some receiving compensation who should not, on balance that risk is justified by the overall benefits of taking this step to right the ledger.

36. The Inquiry has therefore recommended that in cases where it has found that there is credible information that an identified or identifiable Afghan national has been unlawfully killed, Australia should now compensate the family of that person.

STRATEGIC, OPERATIONAL, ORGANISATION AND CULTURAL REFORMS

37. The Inquiry makes a number of recommendations which are intended to address strategic, operational, structural, training and cultural factors that appear to have contributed, generally indirectly, to the incidents and issues referred to in this report. These recommendations are based on evidence received, often from numerous witnesses, including commanders at various levels, as well as expert advice, consultation, and the Inquiry's own professional judgment.

38. However, the Inquiry appreciates that it some recommendations are contestable or may be based on circumstances which have changed, or where there are policy or other matters of which the inquiry is unaware. Thus, such recommendations are not infrequently expressed in terms that consideration be given to a course of action, so that due consideration might result in the suggested course not being adopted.

REVIEW OF HONOURS AND AWARDS

39. The Inquiry has made generic recommendations about two classes of decoration: the Meritorious Unit Citation awarded to SOTG (Task Force 66), and the Distinguished Service decorations awarded generally to those who commanded at various levels in SOTG and in the Special Operations Command units. It has also made specific recommendations concerning some particular awards.

40. The cancellation of individual decorations affects status and reputation, and is likely to require procedural fairness in each individual case. That is not likely to be satisfied by cancelling all awards of a particular class for a particular period. The Meritorious Unit Citation is a collective award to a unit, not to individuals, and the same difficulties do not arise.

41. Accordingly, in the case of individual decorations, recommendations are expressed in terms that they be reviewed, leaving to CDF the determination of how procedurally that review should best be undertaken.

References:

1. *Al Saadoon and others v Secretary of State for Defence*, Leggatt J [2016] EWHC 773.
2. *Defence Act 1903*.
3. *Inspector-General of the Australian Defence Force Regulation 2016* .
4. *Strickland, Galloway, Hodges & Tucker v Commonwealth Director of Public Prosecutions* [2018] HCA 53.
5. *Commonwealth Director of Public Prosecutions v Kinghorn* [2020] NSWCCA 48.
6. *Defence Force Discipline Act 1982*.
7. *Director of Public Prosecutions Act 1983 (Cth)*.

Chapter 1.06

SAMPLE TESTING

INTRODUCTION

1. This chapter explains the sample testing methods used by the Inquiry.
2. At the commencement of the Inquiry, one of its chief tasks and challenges was to identify and elicit the relevant rumours in circulation, and then to endeavour to track them to a source. The Inquiry adopted a top-down, and a bottom-up, approach. Former Special Operations Task Group (SOTG) commanders, unit executives and other key appointments including Regimental Sergeant Majors were interviewed. Although this served to provide useful insights and perspectives, it was not necessarily representative of the wider Special Forces (SF) community who were likely to have been the genesis of, or to have heard, the rumours in circulation. The Inquiry therefore undertook a process of 'sample testing' across a broad audience, in an endeavour to build trust and cooperation in an environment that it is inherently suspicious of outsiders, and to elicit the rumours and potential sources.

FRAMEWORK

3. The sample testing framework addressed six issues about which members were asked, namely:
 - a. background and Afghanistan deployment history;
 - b. the level of awareness of the Inquiry, its purpose and associated personal views;
 - c. information as to any action that may have been taken by the unit chain of command to screen member participation and to influence and/or limit the information and perspectives to be provided to the Inquiry;
 - d. any first, second or third hand knowledge of any Law of Armed Conflict (LOAC) breaches, including whether there were any incidents or experiences during their deployments that may have left them feeling uncomfortable or uncertain from a LOAC perspective;
 - e. apprising each member of the rumours known to the Inquiry – initially and in particular those mentioned in the Cromptvoets report¹ – in order to test any awareness and to extrapolate additional information, including identifying any persons who may be able to further assist the Inquiry; and

¹ Cromptvoets, S. *Special Operations Command (SOCOMD) Culture and Interactions: Insights and reflection* of January 2016. [REDACTED] Cromptvoets, S. *Special Operations Command (SOCOMD) Culture and Interactions: Perceptions, reputation and risk* of February 2016. [REDACTED]

- f. SF culture, including the identification of differences between the respective units, with a view to determining how they could be best engaged and managed throughout the life of the Inquiry.

Target Audience

4. The Inquiry focused on the principal units within Special Operations Command, including 1st Commando Regiment (1 Cdo Regt), 2nd Commando Regiment (2 Cdo Regt), Special Air Service Regiment (SASR), Special Operations Engineer Regiment (SOER) and the then Special Forces Training Centre (SFTC). These units were assessed as providing a sufficient critical mass for the purposes of the sample testing. In particular, they comprised members who had deployed on all of the SOTG rotations. Moreover, many of their members had deployed on multiple rotations and had therefore performed varied roles and responsibilities in concert with different personnel and across diverse operations.
5. The identified sample group comprised members who were predominately between the ranks of private and captain at the time of their respective deployments. As these ranks regularly operated in the field and came into close contact with the enemy and the civilian population, they would have been best placed to have either observed, or to be aware of, any LOAC breaches that may have occurred.

IMPLEMENTATION

6. Sample testing was conducted during the period September 2016 to March 2017. The Inquiry permitted the units to identify the members to be sample tested. This approach was adopted as a means to build trust with the chain of command and to rely on their judgement to identify members who would readily engage with the Inquiry. The interviews were also conducted in isolation and at discreet venues with no involvement by other persons. The Inquiry did not provide any exit de-briefs and nor were any sought.
7. The interviews were facilitated through a relaxed, open and respectful approach in order to allay any member concerns and to seek their candid views and insights. However, as the Inquiry could not pre-determine what information may be furnished, each individual was appraised at the commencement of the interview of their rights and obligations as witnesses to the Inquiry. Members were also required to acknowledge in writing extant privacy safeguards and limitations.
8. Although the interview duration was typically one hour, no time limit was set. The Inquiry encouraged members not to rush their commentary, so as to ensure that they had applied fulsome consideration to the matters at hand; in addition to being afforded the opportunity to raise on occurrence. As the interviews were not taped, the Inquiry prepared records of conversation for ongoing reference purposes.
9. In total, 51 members were interviewed across the five units, as per Diagram 1.

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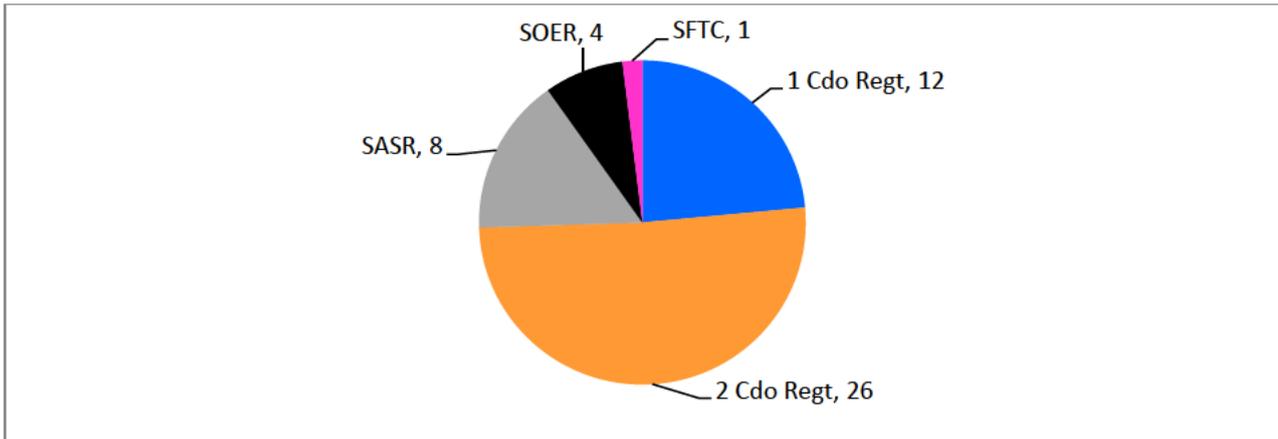


Diagram 1

10. Irrespective of the units endeavouring to support the sample testing, a range of factors impacted upon their ability to do so. These included training, deployment and other operational activities. Nonetheless, the number of members interviewed met sample testing requirements.

11. Although the activity focused on members between the ranks of private and captain at the time of deployment, some members had since progressed in rank. This outcome served to complement the sampling process in that many of the members had matured through added responsibility and training and were therefore able to apply a more circumspect and holistic outlook which had not necessarily been available to them during their respective deployments. The rank breakdown is as per Diagram 2.

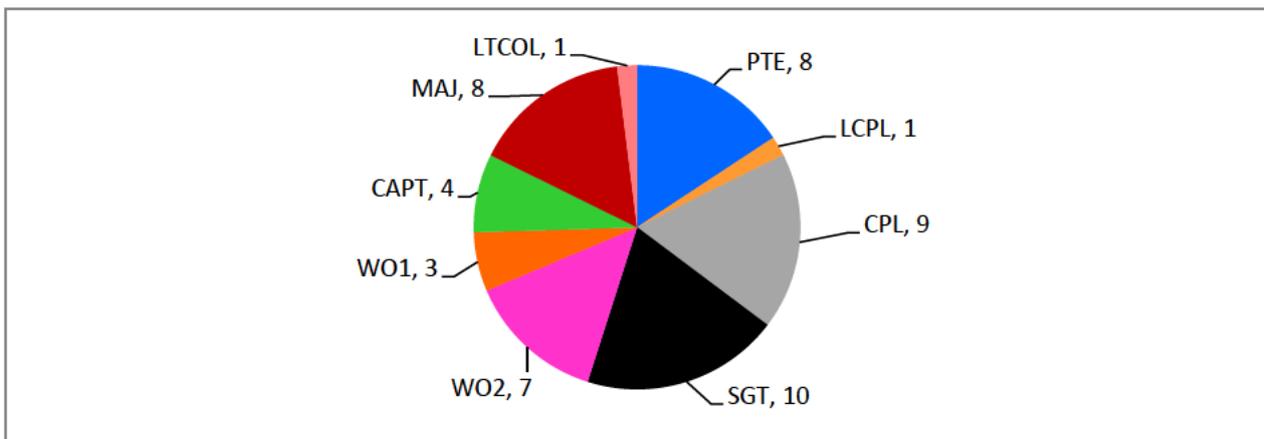


Diagram 2

Outcomes

12. None of the members sample tested had first-hand knowledge of any LOAC breaches. However, a number of members had heard second or third-hand rumours. Aside from one member, there was no recollection as to the sources of the allegations, other than to opine that they were born out of gossip, 'bar talk' and bravado. As a consequence, the overwhelming majority of members sampled viewed the rumours raised with scepticism and ultimately rejected their veracity. That said, a number of individuals were able to explain in some detail why they were dismissive of the rumours which included command and control, operating environment, threat level, tactics, training and other practical considerations.

13. Overall, the sample testing enabled the Inquiry to exclude a number of rumours that were unlikely to have substance, and to concentrate on the lines of inquiry that were later to emerge. Aside from trust and cooperation considerations, the testing also demonstrated that Defence was fully committed to addressing any LOAC breaches arising from SOTG operations in Afghanistan.

References:

1. Cromptvoets, S. Special Operations Command (SOCOMD) *Culture and Interactions: Insights and reflection* of January 2016. [REDACTED]; Cromptvoets, S. Special Operations Command (SOCOMD) *Culture and Interactions: Perceptions, reputation and risk* of February 2016. [REDACTED]

Chapter 1.07

WITNESS WELFARE SUPPORT PROGRAM

Introduction

1. This chapter outlines the arrangements established by the Inquiry for the welfare of witnesses and other persons involved in and affected by the Inquiry.

Context

2. Concern has been expressed in several quarters about the impact of proceedings of the Inquiry and any potential adverse findings on serving and former members of the Special Forces (SF), and their families.

3. The essential task of the Inquiry, conducted at the direction of the Chief of the Defence Force (CDF), has been to ascertain whether there is any substance to rumours and reports of breaches of the Law of Armed Conflict by elements of the Special Operations Task Group in Afghanistan between 2005 and 2016. It was and is the duty of the Inquiry to inquire into those matters, without fear or favour, affection or ill-will, so as to uncover the truth. That necessarily requires the rigorous and comprehensive collection, evaluation and testing of all available evidence, which sometimes means that robust examination of witnesses cannot be avoided. Given the nature of the SF community, in which the bulk of relevant witnesses reside, this is especially so in this Inquiry.

4. It is also inevitable that, in discharging its duty, the Inquiry has to raise with witnesses events which occurred during their deployments and which may have been traumatic. In that respect, the position is little different from many trials, in which witnesses will have to revisit, and in a sense relive, incidents which have traumatised them.

The Inquiry's approach

5. From the outset, the Inquiry has been conscious of the potential for its proceedings to have an impact on the mental health and well-being of witnesses, and others who may be affected or involved.

6. It is not, and could not be, the function of the Inquiry to provide direct welfare support to persons who are called before it as witnesses, or are otherwise potentially affected by its proceedings. For the Inquiry to assume that function would involve an impossible conflict with its duty to inquire impartially and without fear or favour. For serving personnel, provision of direct welfare support is the responsibility of Defence, through the chain of command, which provides or coordinates medical, psychological, welfare, pastoral and other support services as required. Former members are normally supported by Department of Veterans' Affairs (DVA) who provide access to support services including mental health, medical and in some cases legal support. Ex-Service Organisations, such as the Australian Special Air Service Association, the Commando

Association and the Returned Services League, also fulfil an important role in supporting former Australian Defence Force (ADF) members and their families.

7. However, the Inquiry was conscious that many, including both serving personnel and former serving personnel, would not spontaneously or proactively reach out to the relevant sources for assistance, and for that reason, the Inquiry put in place a number of measures to inform witnesses and assist them and other affected persons to access appropriate support.

Support in connection with Inquiry interviews

8. First, the Inquiry has conducted its proceedings so as to minimise the impact on witnesses and ensure they have access to appropriate legal and welfare support. All witnesses summoned to give evidence, whether current serving ADF members or not, were informed of their legal right, under the *Inspector-General of the Australian Defence Force Regulation 2016* (IGADF Regulation),¹ to be accompanied by a lawyer. While maintaining the necessary degree of separation and independence, the Inquiry assisted with coordinating legal support through Defence Legal if required, including Legal Assistance at Commonwealth Expense (LACE) for ex-serving members who requested it in connection with an appearance before the Inquiry. In addition to legal representation, and although witnesses are not legally entitled to a support person as a matter of right, the Inquiry invariably exercised its discretion to allow one to accompany a witness whenever requested, and witnesses were routinely advised that they may bring one. So far as practicable, interviews were conducted in locations and at times convenient to witnesses. Particularly in the case of potentially fragile or vulnerable witnesses, interviews were conducted where the witness' support network is readily available to them. Where requested, in the case of a fragile witness, the Inquiry has also permitted the witness's psychologist to be present.

9. Secondly, the Inquiry has routinely provided to witnesses, before an interview, not only information about their rights and obligations, but also the welfare support options available to them. A copy of the form used for that purpose is at Annex A to this chapter, and reference is made in particular to the box outlined in red on the last page. In addition, all witnesses were encouraged to seek support if they need it. The standard non-disclosure direction given at the conclusion of each interview included an exception, which is emphasised, that the witness may discuss the interview not only with a lawyer for the purpose of obtaining legal advice, but also with a psychiatrist, psychologist, padre, social worker or other professional counsellor, so long as the consultation is on a strictly confidential basis. If there was any sign or suspicion that a witness may have been distressed as a result of an interview, the Inquiry immediately notified the witness's chain of command (in the case of serving personnel), so that a check could be made on the witness' welfare. For persons (such as those no longer serving) for whom that was not possible, a member of the Inquiry team contacted the witness to check on their welfare and well-being.

Witness Liaison Officer

10. Thirdly, as the number of witnesses increased, a Witness Liaison Officer was added to the Inquiry team in September 2018 in order to expand the support for witnesses. This position was filled by an Army Reserve Warrant Officer Class 1, with a Special Air Service Regiment (SASR) background. For many, though not all interviews, he greeted and met the witness and any support persons before the interview, and spoke to them again at its conclusion. When he was not present,

¹ Reference 1 – *Inspector-General of the Australian Defence Force Regulation 2016*

at the end of an interview witnesses were provided with the contact details for the Witness Liaison Officer and an Inquiry team member and encouraged to make contact as required. In any event, the Witness Liaison Officer engaged the witness after interview to ascertain their immediate well-being, and provided an ongoing point-of-contact. [There were a few exceptions to this, in circumstances where the witness was legally represented and the lawyers requested that all communications be through them.] If the Witness Liaison Officer had any concerns as to the witness's welfare or wellbeing, immediate advice was provided to the Inquiry team for action. Further follow up was undertaken if appropriate or requested, according to the particular circumstances of the witness. Bearing in mind that the Inquiry could not itself act as a welfare delivery service, the action taken was ordinarily referral to an appropriate agency. In one exceptional case, the Inquiry facilitated access to an in-country psychiatrist for a former SF member who was currently domiciled overseas.

Expansion of Witness Support network

11. In early 2020, the witness support network was expanded with the engagement of additional Witness Liaison Officers, drawn from each of; the SASR, 1st Commando Regiment and 2nd Commando Regiment. These members were Reservists who were former permanent members and were selected because of their long connection with the respective units, the regard in which they were held locally, and their ability to relate to soldiers at all levels. They were not privy to the evidence before the Inquiry, and their function was to maintain contact with and monitor the welfare of witnesses from their respective units. They have liaised closely with the Welfare Cells established by the relevant Special Operations Command units and encourage witnesses (both serving and ex-serving) to reach out to these welfare cells.

Further communication to all witnesses

12. Recognising the need for ongoing proactive engagement with those who might be affected, including those no longer serving, in January 2020 the IGADF communicated with all Inquiry witnesses by an email which reaffirmed the various welfare support services available to them, both within and external to Defence.² The purpose of this was to ensure that, although witnesses had been provided with details of available welfare support services at the time of their interviews, they were given it a second time and continued to have it available. As was foreseen at the time, this produced a mixed reaction, and while there were many positive responses, there were some negative ones from witnesses who either did not wish to be reminded or were hostile to the Inquiry. Essentially this was a measure which would be criticised by some if taken, and by others if it were not; but on balance it was better to ensure that everyone had ready access to the relevant information should they need it, rather than to risk that they might not. These emails were then followed up with telephone calls or text messages from the Witness Liaison Officers, except in the case of those witnesses who had indicated that they did not wish to be contacted. Witnesses interviewed after the January 2020 email was sent were provided a copy of the January 2020 IGADF email.

Notices to Potentially Adversely Affected Persons

13. The prospect that the Inquiry's report will occasion distress to some who may be referred to in it cannot be completely avoided. That is inevitable given the task of the Inquiry, and it is probably

² Reference 2 – IGADF email 20 January 2020: Welfare support services for Inspector-General of the Australian Defence Force inquiries. [REDACTED]

so of any Inquiry. However, as explained elsewhere, potentially affected persons were afforded procedural fairness, through the provision of a notice setting out any potential adverse finding and recommendation, and a summary of the relevant evidence. That process was likely to be stressful for some if not all recipients. For that reason, arrangements were made with Defence Counsel Services for delivery of notices to be facilitated through a Reserve Legal Officer appointed to assist the member (unless the member otherwise requested). With the notice, recipients were provided a further reminder of the available welfare support services, and the availability of legal assistance through Defence Counsel Services, including LACE for persons who were no longer serving. For serving personnel, their chain of command was also notified of the issue (though not the content) of the notice, so that appropriate support measures would be in place if considered necessary or requested. For all recipients, attention was drawn to the availability and willingness of the relevant association – the SAS Association or the Commando Association – to provide assistance and support, and contact details as advised by the relevant association were included.

Conclusion

14. The Inquiry's Witness Welfare Support program was unique for such an inquiry. Its establishment and implementation was the result of the recognition of the potential impact of the Inquiry and its proceedings on the welfare and well-being of current and former service personnel, and their families, regardless of whether they are informants, witnesses summonsed, or persons potentially affected.

15. The Witness Welfare Support function will transition to Army after conclusion of the Inquiry, in order to ensure that those affected continue to have access to appropriate welfare support.

References:

1. *Inspector-General of the Australian Defence Force Regulation 2016*
2. IGADF email 20 January 2020: Welfare support services for Inspector-General of the Australian Defence Force inquiries. [REDACTED]

Annex to Chapter 1.07:

A. [REDACTED]

Chapter 1.08

WAR CRIMES IN AUSTRALIAN HISTORY

EXECUTIVE SUMMARY

This chapter provides context by reviewing historically the way in which Australia has approached the law of armed conflict, both in respect of adversaries and in respect of our own.

Australia has a proud record of adherence to and support for the Law of War/Law of Armed Conflict. Australia has been an overt and enthusiastic supporter of, and advocate for, most international treaties applicable to LOAC. Australia has been an ‘early adopter’ of international treaties regulating the laws of armed conflict, and espouses adherence to the laws and support for the institutions that monitor them.

Nonetheless, there are indications in the historical record—from the Boer War through to the Vietnam War—that some Australian service members have, and that other Australian service members may have, previously been involved in the killing of detainees, prisoners, persons *hors de combat*, and persons otherwise under the control of Australian forces. There are indications of disconnects between formal orders and policy, and local unit practices, in relation to operations involving contact with enemy forces and civilians in the area of operations. There are indications, predominantly from the Vietnam War, of the practice of using ‘throwdowns’ to retrospectively ‘justify’ or buttress the validity of some killings, and of an expansive approach to the identification of targetable individuals and the indicia of targetable conduct.

While Australia has traditionally been firm, but fair, in investigating and prosecuting the war crimes of our adversaries, we have generally been less proactive in dealing with reports or allegations of war crimes by Australian personnel.

There are indications in the record of incident non-reporting and obfuscation, with a view to avoiding more detailed inquiry or investigation. There are historical examples – the Surafend incident involving the 1st Australian Light Horse Brigade in Palestine in late 1918 is the clearest and most notable – of the ability of a closely-bonded unit to maintain a code of silence and rebuff attempts to obtain evidence, for very many years.

The failure to comprehensively deal with allegations and indicators as they begin to emerge and circulate is corrosive—it gives spurious allegations life, and serious allegations a degree of impunity. The consequences of not addressing such allegations as and when they eventually arise are measured in decades.

INTRODUCTION

1. This chapter describes Australia’s record in connection with the Law of Armed Conflict (LOAC). In doing so, it refers to the part Australia has played in the adoption and enforcement of principles of International Humanitarian Law.

2. It also refers to reports, allegations, or evidence suggestive of war crimes by Australians, or suggestive of Australian unwillingness or inability to report or investigate allegations; and whether disciplinary or criminal action was undertaken. It is not the purpose of this chapter to give credence to every allegation reported in it. Some of the reports are clearly supported by evidence. Other allegations are potentially the result of confusion with conduct or consequences that may have been mistaken, but were nonetheless permissible under the LOAC applicable to Australian forces at the time. Yet other allegations mentioned may well be, and will ever remain, impossible to conclusively finalise.

3. This chapter covers six conflicts in which Australian forces have been engaged, from 1900 until the First Gulf War (1990). Consideration of each of these is structured around three issues:

- a. identifying the LOAC-related instruments and source of offences that bound the Australian forces involved;
- b. Australian action in terms of holding adversaries to account against the applicable LOAC standards; and
- c. Australia's record in terms of holding Australian personnel to account against the applicable LOAC standards.

4. The Korean War, Malayan Emergency, and Confrontation with Indonesia are not discussed. This is, because there is less material in the public domain on any allegations arising from these conflicts, and because the key trend line is sufficiently well illustrated for the purposes of this report by the World War Two (WWII)—Confrontation—Vietnam—First Gulf War spectrum.¹

¹ Regarding the Confrontation, on 10 March 1965, two Indonesian Marines (Harun bin Said and Osman bin Haji Mohamed Ali) carried out a bombing of MacDonal House in Singapore. Three people were killed and 33 injured. The building housed, amongst other things, the Australian High Commission. Two of the injured were Barry O'Donnell and Zainal Kassim, both of whom worked in the Australian High Commission: Reference 1 - Joyce Lim, 'MacDonal House bombing survivor remembers attack', Straits Times, 17 February 2014 - <https://www.straitstimes.com/singapore/macdonald-house-bombing-survivor-remembers-attack>. The two Indonesian Marines were arrested within days and charged with offences including murder. Their claim to Prisoner of War status was ultimately rejected on the grounds that they had engaged in sabotage operations in civilian guise. They were convicted of murder, and sentenced to death. An appeal from the High Court of Singapore to the Federal Court of Malaysia was dismissed. The conviction was then appealed to the Privy Council, which dismissed the appeal, finding as follows:

As, if they were members of the Indonesian armed forces, in their Lordships' opinion, they forfeited their rights under the Convention by engaging in sabotage in civilian clothes, it is not necessary to consider whether they also forfeited them by breach of the laws and customs of war by their attack on a non-military building in which there were civilians. Having forfeited their rights, there was in their Lordships' view no room for the application of Article 5 of the Convention and, not being entitled to protection under the Convention, the appellants' conviction for murder committed by them when dressed as civilians and within the jurisdiction of Singapore cannot be invalidated. Reference 2 - *Bin Haji Mohamed Ali and Another v Public Prosecutor*, Appeal No. 20 of 1967 by special leave from a judgment (October 5, 1966) of the Federal Court of Malaysia Judicial Committee of the Privy Council (UK), 29 July 1968).

The two men were subsequently executed in Singapore in October 1968. There is no information as to any specific Australian connection with this war crimes trial, apart from the fact that the targeted building contained, amongst other things, the Australian High Commission and that some of the injured worked in the Australian High Commission.

5. The chapter concludes with a brief assessment of the historical themes of relevance to the specific subject matter of this inquiry.

Preliminary note on labelling offences

6. It is important to note at the outset that there is an enduring view that 'states have traditionally been reluctant to prosecute violations of international humanitarian law, whether based on their national law or on international criminal law'.² Furthermore, when states do prosecute such conduct, it can be the case that it will charge its own military members with 'ordinary' (e.g. *Defence Force Discipline Act 1982*) crimes, and not with the more specific war crimes charges.³ Often this is because military disciplinary codes do not include explicit war crimes offences. Thus the ability to deal with the conduct via military courts-martial is often hinged upon the jurisdiction available to such tribunals.

7. The International Committee of the Red Cross (ICRC) commentary on the *Army Act 1955* (United Kingdom [UK]) provides an illustration of this tendency, describing how that Act provided:

...for a range of military offences which may overlap with international humanitarian law obligations. Killing a prisoner of war outside the United Kingdom could, for instance, result in a British soldier being charged with murder under the act or with a crime against a specific international humanitarian law Act of Parliament...

There are two specific offences that might be considered to implement international humanitarian law obligations (although they are wider in scope): section 63 (offences against the civilian population), and section 30 (looting from persons killed, injured or captured in the course of hostilities).⁴

8. Some recent cases that reflect this enduring approach include *Re Civilian Casualty Court Martial* (2009)⁵ (death of civilians), which was charged as manslaughter by negligence, and the conviction recorded in the Canadian case of *R v Semrau* (2010)⁶ (killing a wounded fighter), which was for behaving in a disgraceful manner.

9. Conversely however, states have historically appeared less reluctant to label and prosecute the conduct of adversaries as war crimes. The 1914 UK *Manual of Military Law* did employ the term 'war crimes' as 'the technical expression for such an act of *enemy* soldiers and *enemy* civilians as

² Reference 3 - Philipp Kastner, 'Domestic War Crimes Trials: Only for Others - Bridging national and International Criminal Law' (2015) 39:1 *University of Western Australia Law Review* 29, pp 33-35.

³ See, for example, Reference 4 – Eva Buzo, 'Australia, the Rome Statute and the War Crimes Proceedings: Where are the Victims', *Opinio Juris*, 30 June 2020 - <https://opiniojuris.org/2020/06/30/australia-the-rome-statute-and-the-war-crimes-proceedings-where-are-the-victims/>.

⁴ Reference 5 - Army Act, 1955 - https://ihl-databases.icrc.org/__c1256b1f0053435b.nsf/e6ea7abc74de3fe041256486004ad09d/d518ef88f39a9af3c1256b9f002e04d3.

⁵ Reference 6 - Joshua Kelly, 'Re Civilian Casualty Court Material: Prosecuting Breaches of International Humanitarian Law Using the Australian Military Justice System' (2013) 37:2 *Melbourne University Law Review* 342.

⁶ Reference 7 - *R v Semrau* (2010) CM 4010.

may be visited by punishment or capture of offenders'.⁷ The *Manual of Military Law* then elaborated upon 'four different classes' of war crime:

- (i) Violations of the recognized rules of warfare by members of the armed forces.
- (ii) Illegitimate hostilities in arms committed by individuals who are not members of the armed forces.
- (iii) Espionage and war treason.
- (iv) Marauding.⁸

10. However, the focus of the commentary is clearly upon holding *enemy* personnel to account for 'war crimes'. For example, regarding category (i) – violations of the recognized rules of warfare by members of the armed forces – the *Manual of Military Law* observes of proscribed conduct such as 'refusal of quarter', 'maltreatment of dead bodies on the battlefield', 'ill-treatment of prisoners of war', 'pillage and purposeless destruction', and 'ill-treatment of inhabitants in occupied territories', that:

It is important, however, to note that members of the armed forces who commit such violations of the recognised rules of warfare as are ordered by their Government or by their commander are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to the other means of obtaining redress which are dealt within this chapter [such as reprisal].⁹

11. Conceptually therefore, for many states it is the enemy who commits war crimes—similar conduct by its own forces has often not been charged as a war crime, but rather as an offence against the applicable military disciplinary code. As will be observed in the section below regarding post-WWII Australian trials of Japanese accused, offences were explicitly characterised and charged as war crimes, not as 'ordinary' offences. However, until 1985 the offence provisions of the UK Army Act of 1881 were incorporated by reference in the Commonwealth *Defence Act 1903* and applied to the Australian Army on active service.

Second Anglo-Boer War, 1899 to 1902

What Law of Armed Conflict-related instruments and source of offences bound the Australian forces involved

12. More than 10 000 Australians fought in the Second Anglo-Boer War, either in formed Colonial and then Australian units, or as individuals serving in other units. Australian units were incorporated within British formations:

Australians served in contingents raised by the six colonies or, from 1901, by the new Australian Commonwealth. For a variety of reasons many Australians also joined British or South African

⁷ Reference 8 - *Manual of Military Law (6th Edition)* 1914, Ch XIV, para 441 (italics added).

⁸ *Manual of Military Law (6th Edition)* 1914, Ch XIV, para 442.

⁹ *Manual of Military Law (6th Edition)* 1914, Ch XIV, para 443.

colonial units in South Africa: some were already in South Africa when the war broke out; others either made their own way or joined local units after their enlistment in an Australian contingent ended. Recruiting was also done in Australia for units which already existed in South Africa, such as the Scottish Horse.¹⁰

13. Consequently, the legal arrangements covering the conduct of Australians were, in the main, those applicable to the British Army.

The British army treated these contingents as it treated all units of specially-raised troops which arrived in South Africa, whether from the settler colonies or from Britain: as irregular troops, to be kept in small formations and placed under experienced generals. Australian governments had no control over their contingents once they sailed for South Africa.¹¹

14. As noted, Australians participated in this war both prior and subsequent to federation. Thus, in the early stages of the war they were colonial subjects and units—Queenslanders, New South Welshmen, Victorians, Tasmanians, South Australians, and Western Australians.¹² Some colonies enacted legislation applying the Army Act 1881 (UK, the Army Act) to their contingents in South Africa, while others appear to have assumed the operation of the Army Act without passing their own legislation. In any event, s 177 of the Army Act provided, in part, that where a force raised in a colony was serving with part of Her Majesty's regular forces, the Army Act would apply unilaterally to the force to the extent that the colonial law had not made provision for its government and discipline.¹³

15. Even though the Commonwealth took control of State military forces from 1 March 1901, governance of the State contingents in South Africa continued on the same basis as before. Indeed, as the Commonwealth Parliament was yet to legislate with respect to Defence, State laws with respect to Defence continued to apply.¹⁴ This legislative vacuum in the Commonwealth domain with respect to Defence persisted for the first three years of federation, and had a surprising outcome during the Second Anglo-Boer War. When the Commonwealth sought to raise new contingents for service in South Africa following federation, it had no option but to invoke the provisions of the Army Act (UK) for the raising of those forces. This endowed the Commonwealth contingents with the legal character of the King's regular forces, not of the military forces of the Commonwealth.¹⁵

16. Strictly speaking, the Commonwealth contingents therefore formed part of the King's regular forces, albeit raised in Australia for the limited purpose of service in South Africa. However, for practical purposes all Australian contingents in South Africa, whether raised by the States or by the

¹⁰ Reference 9 - Australian War Memorial - <https://www.awm.gov.au/articles/atwar/boer>.

¹¹ Reference 10 – Craig Wilcox, *The Boer War: Australians and the war in South Africa, 1899–1902 – Research Guide*, National Archives of Australia, 2000, p 7 - <https://www.naa.gov.au/sites/default/files/2020-06/research-guide-the-boer-war.pdf>.

¹² Reference 11 - 'Military System in Australia Prior to Federation' - <https://www.abs.gov.au/AUSSTATS/abs@.nsf/featurearticlesbyReleaseDate/243CEECD96C6B7FACA2569DE0020331E?OpenDocument>.

¹³ Reference 12 - Bruce Oswald and Jim Waddell (eds., *Justice in Arms: Military Lawyers in the Australian Army's first hundred years* (2014), pp 4-5.

¹⁴ Bruce Oswald and Jim Waddell (eds., *Justice in Arms: Military Lawyers in the Australian Army's first hundred years* (2014), pp 2-3.

¹⁵ Bruce Oswald and Jim Waddell (eds.), *Justice in Arms: Military Lawyers in the Australian Army's first hundred years* (2014), p 8.

Commonwealth, were subject to the discipline of British military law embodied in the 1881 Army Act (UK).¹⁶

17. Other Australians joined British or mixed units directly, and some Australians served in Boer units. The precise nature of jurisdiction over each of these individuals was often opaque and differed even as between units.

18. The applicable law regarding war crimes at this time was ‘the customs of war’ as accepted by the UK. This law was distilled in Chapter XIV (‘Customs of War’) of the UK 1899 *Manual of Military Law (4th Edition)*. The sources of law cited in this chapter primarily tend to be classic treatises on the law of war and international law, with few references to formal instruments beyond the *Geneva Convention 1864*. Additionally, the 4th Edition was published in August 1899, and thus had been finalised prior to the 29 July 1899 signing, and 04 September 1900 entry into force, of the 1899 *Hague Conventions and Declarations*.¹⁷ The 1899 *Manual of Military Law* includes a set of ‘Customs of War Forms’ (primarily template notices formalising capitulation by the enemy in a variety of circumstances)¹⁸ and the text of the 1864 *Geneva Convention*.¹⁹

19. A range of acts which have been attributed to British forces during this conflict, including acts attributed to ‘irregular’ units, such as some Australian units and other irregular units with a significant Australian complement, including the Bushveldt Carbineers (BVC) would have clearly been considered contrary to the customs of war, in accordance with the 1899 *Manual of Military Law (4th Edition)*:

- a. ‘Poisoning of water or food as a mode of warfare is absolutely forbidden’ (paragraph 10);
- b. ‘The right of killing an armed man exists only so long as he resists; as soon as he submits he is entitled to be treated as a prisoner of war’ (paragraph 14);
- c. ‘The general population of the enemy’s country who form no part of the armed forces cannot justly be exposed so long as they abstain from acts of hostility, to any description of violence’ (paragraph 26).

20. Offences against the customs of war, however, were charged and prosecuted as ‘standard’ breaches of provisions of the Army Act (UK), although the ‘customs of war’ could provide contextual background to the details of the charge. Offences which were employable regarding breaches of the customs of war included:

- a. murder while on ‘active service’ as defined in s 189(1) (that is, ‘attached to or forming part of a force which is engaged in operations against the enemy’) via s 41(2) ‘offences punishable by ordinary law’ - ‘murder’;
- b. wilful damage to or destruction of property without orders (s 5(2));

¹⁶ Bruce Oswald and Jim Waddell (eds., *Justice in Arms: Military Lawyers in the Australian Army’s first hundred years* (2014, p 10.

¹⁷ Reference 13 - *Manual of Military Law (4th Edition)* (1899 UK, pp 285-302.

¹⁸ *Manual of Military Law (4th Edition)* (1899 UK, pp 881-885.

¹⁹ *Manual of Military Law (4th Edition)* (1899) UK, pp 886-891; the reference is to the 1864 *Convention for the amelioration of the wounded in time of war*.

- c. leaving one's post to go in search of plunder (s 6(1)(a)), or breaking into a house in search of plunder (s 6(1)(g));
- d. disobeying a lawful command (for example, not to shoot prisoners) (s 9(2));
- e. neglecting to obey general or garrison or other orders (including orders as to compliance with the customs of war) (s 11);
- f. disgraceful conduct (s 16); and
- g. conduct prejudicial to military discipline (s 40).

21. Lieutenants Morant and Handcock, for example, were convicted on several indictments of committing the offence of murder while on active service, rather than offences specifically designed to enumerate and prohibit the killing of prisoners or civilians contrary to the customs of war.

22. It is important, however, to observe that in 1901 there was considerable pragmatic uncertainty as to whether criminal responsibility, and the appropriateness of the label 'breach of the customs of war', attached to some acts that would today clearly be war crimes.²⁰ As at 1900, some of this conduct had not yet definitively emerged from the band of grey that obscured the line between permissibility and impermissibility regarding the customs of war. The British 'scorched earth' strategy, involving destroying or seizing Boer civilian property and crops, confiscation of Boer horses, cattle, and wagons, and evicting Boer civilians from their homes and farms is one example. This was an organised and formally sanctioned policy.²¹ Captain Ham of the Victorian Bushmen

²⁰ Reference 14 - *Criminal Code Act 1995* (Cth): '268.29 War crime—destruction and appropriation of property'.

(1) A person (the perpetrator) commits an offence if:

- (a) the perpetrator destroys or appropriates property; and
- (b) the destruction or appropriation is not justified by military necessity; and
- (c) the destruction or appropriation is extensive and carried out unlawfully and wantonly; and
- (d) the property is protected under one or more of the Geneva Conventions or under Protocol I to the Geneva Conventions; and
- (e) the perpetrator knows of, or is reckless as to, the factual circumstances that establish that the property is so protected; and
- (f) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 15 years.

(2) Strict liability applies to paragraph (1)(d)...

268.45 War crime—transfer of population

A person (the perpetrator) commits an offence if:

- (a) the perpetrator:
 - (i) authorises, organises or directs, or participates in the authorisation, organisation or direction of, or participates in, the transfer, directly or indirectly, of parts of the civilian population of the perpetrator's own country into territory that the country occupies; or
 - (ii) authorises, organises or directs, or participates in the authorisation, organisation or direction of, or participates in, the deportation or transfer of all or parts of the population of territory occupied by the perpetrator's own country within or outside that territory; and
- (b) the perpetrator's conduct takes place in the context of, and is associated with, an international armed conflict.

Penalty: Imprisonment for 17 years'.

²¹ Reference 15 - Peter Dennis et al, *Oxford Companion to Australian Military History* (1995), pp107-108; Reference 16 - 'Instructions to General Officers, 21 December 1900', in *The Times History of the War in South Africa: Vol V* (1907), pp 86-87.

Regiment (attached to British General Paget's force in the vicinity of Rustenburg), wrote in November 1900:

I had the unpleasant task deputed to me of turning the women and children out of their houses and generally destroying the property... I am not going to pass any judgment on the policy of devastating the country. I obey orders, and perhaps it is a wise plan.²²

23. The caption to a photograph in Wallace's book *The Australians at the Boer War* is as follows: 'An unpleasant task which the Australians reluctantly performed in the later stages of the war was the systematic destruction of Boer crops and houses'.²³ This was a task and a strategy that many Australians in fact objected to.²⁴ This policy—designed to undermine morale—in fact had the opposite effect on the Boers: 'Instead of weakening, they became only the more resolved to hold out, and this policy instead of shortening the war, prolonged it by a year or more'.²⁵ This was also the view expressed in *The Times History of the War in South Africa*:

In its primary object it failed absolutely... To the British the military consequences were disastrous. To the Boers the gain was twofold. On the shoulders of their enemy lay the heavy tasks of removal and maintenance, involving enormous expense and a grave hindrance to military operations, while they themselves, relieved of all responsibility for their women and children, were free to devote their energies with a clear conscience to the single aim of fighting.²⁶

24. The ambiguity attendant on the proscription or permission attaching to such policies was persistent. For example, Arndell Lewis, in his *Australian Military Law* (1936) stated that: 'Enemy property may be seized and confiscated wherever it may be found and any property may be destroyed in pursuit of a definite military object'.²⁷ The best that can be said is that this conduct hovered at the cusp of illegality, but was not at the time—given it was part of the campaign plan—considered to be clearly unlawful. As at 1914, the updated *Manual of Military Law* still affirmed that:

Private property must be respected; it may not be confiscated or pillaged, even if found in a town or place taken by assault ... the rule that private property must be respected has, however, exceptions necessitated by the exigencies of war. In the first instance, every operation, movement, or combat occasions damage to private property. Further, the right of an army to make use of and to requisition certain property is fully admitted. What is forbidden is such damage, destruction, improper seizure or taking of any property as is not required in the interests of the army, and as would, therefore, increase the sufferings of the population in war.²⁸

25. Yet, as the 1914 *Manual of Military Law* elsewhere notes, 'The custom of war permits as an act of reprisals the destruction of a house, by burning or otherwise, whose inmates, without

²² Reference 17 - R Wallace, *The Australians at the Boer War* (1976, p303.

²³ R Wallace, *The Australians at the Boer War* (1976, p352.

²⁴ R Wallace, *The Australians at the Boer War* (1976, p302.

²⁵ Reference 18 - Deneys Reitz, *Commando: A Boer Journal of the Boer War* (1929, pp148-149.

²⁶ 'Instructions to General Officers, 21 December 1900', in *The Times History of the War in South Africa: Vol V* (1907, pp 87-88.

²⁷ Reference 19 - Arndell Lewis, *Australian Military Law* (1936), p 208.

²⁸ *Manual of Military Law (6th Edition)* 1914, Ch XIV, para 407.

possessing the rights of combatants, have fired on the troops. Care must, however, be taken to limit the destruction to the property of the guilty'.²⁹

26. For what amounts to strategic reasons, consequently, implementation of the scorched earth and displacement policy was therefore not considered criminal to the extent that it could found individual or command responsibility. However, as noted below, incidences of similar conduct were led as evidence of criminality in the British trial for treason of an Australian – Arthur Lynch – who served in the Boer forces.

Australian action in terms of holding adversaries to account against the applicable Law of Armed Conflict standards

27. There were many reported incidences of breaches of the customs of war (which would today be classified as 'war crimes') on both sides of the conflict, including mistreatment and killing of prisoners and civilians. In terms of subsequent war crimes proceedings against adversaries, the British expressed a clear intention to hold a select group of Boer fighters to account against these standards. The *Peace Treaty of Vereeniging* (31 May 1902) specified at Article 4 that:

No proceedings civil or criminal will be taken against any of the Burghers so surrendering or so returning for any Acts in connection with the prosecution of the War. The benefit of this clause will not extend to certain Acts contrary to the usage of War which have been notified by the Commander in Chief to the Boer Generals, and which shall be tried by Court Martial immediately after the close of hostilities.³⁰

This clause had a specific provenance:

General SP du Toit of Wolmaransstad asked Botha to clarify the meaning of the clause, asking, 'May I know what acts are here referred to'. Botha then notified the meeting that Kitchener had communicated informally to him that the three persons concerned were: 'Mr van Aswegen [sic] for the shooting of Captain Mears [sic]; Mr Celliers for the shooting of Capt Boyle; and a certain Muller for the alleged murder of a certain Rademeyer in the district of Vrede. These three persons will have to stand their trial on the conclusion of peace' (Kestell and van Velden, 1912, p141). The names of van As and Miers are misspelled...

28. Shortly after the conclusion of the peace, Salmon van As was tried and executed, even though Botha had assured him that nothing would happen to him. Louis Slabbert, who was merely an accessory to van As's actions, was also prosecuted and sentenced to imprisonment with hard labour. There is no record of Josef Muller having been tried for the murder of John Rademan.³¹

29. There is no indication of any specific Australian involvement in the prosecutions of van As and Slabbert.

²⁹ *Manual of Military Law (6th Edition)* 1914, Ch XIV, para 414.

³⁰ Reference 20 - https://www.sahistory.org.za/sites/default/files/archive-files/peace_treaty_of_vereeniging.pdf.

³¹ Reference 21 - Robin Smith, 'Amnesty Denied: Salmon van As, Barend Celliers and Josef Muller' (2016) 17:1 *Military History Journal* (South African Military History Society) - <http://samilitaryhistory.org/vol171rs.html>.

Australia's record in terms of holding Australian personnel to account against the applicable Law of Armed Conflict standards

30. As noted, Australia did not act independently in the Second Anglo-Boer War, although most Australians, and all Australian units, were incorporated within British formations and under British command. There were several reported incidents involving significant levels of ill-discipline amongst these contingents, including in Capetown and on troopships.³² However, these are unrelated to breaches of the customs of war. By late 1901, however, Thomas Pakenham records that:

The guerrilla war was fast brutalising both adversaries. The worst scandals on the British side concerned colonial irregulars – Australians, Canadians and South Africans – whose official contingents, ironically, had won a reputation for gallantry in so many set-piece battles.³³

31. As Pakenham goes on to note, the 'most notorious case involved a special anti-commando unit, raised by Australians to fight in the wild northern Transvaal, and called the Bush Veldt Carbineers'.³⁴

The 'Breaker Morant' case

32. This controversy is well-known and requires no detailed description.³⁵ It is often referred to as Britain's first war crimes trial. Lieutenants Handcock, Morant, and Witton were convicted of (inter alia) what could today be classified as the war crime of killing civilians or prisoners.³⁶ The courts-martial were conducted in Pietersburg and Pretoria. It should be recalled that there were other accused also prosecuted in this set of courts-martial; however, only Handcock and Morant were executed. In relation to some of these killings, the accused did not dispute that they had killed certain prisoners, but rather argued they were following an order to take no prisoners, which was clearly in breach of the customs of war as elaborated in the British 1899 *Manual of Military Law*.

33. Regarding this set of courts-martial, the National Archives of Australia states the following:

The Commonwealth Government's ignorance of matters of life and death for its soldiers would again embarrass it when some officers of the BVC, a non-Australian irregular unit raised in South Africa, were tried and found guilty of murdering Boer prisoners, a German missionary and one of their own men. Harry 'Breaker' Morant, who had lived in Australia for ten years before the war and had achieved minor celebrity for his horsemanship and verse writing, and Peter Handcock, a Bathurst blacksmith, were executed by firing squad. Another Australian, George Witton, was sentenced to life imprisonment. Robert Lenehan, the Sydney lawyer who commanded the unit, was sent back to Australia in disgrace. There was a popular belief around

³² R Wallace, *The Australians at the Boer War* (1976, pp 351-355).

³³ Thomas Pakenham, *The Boer War* (1979 [1999 Folio reprint], p 671).

³⁴ Thomas Pakenham, *The Boer War* (1979 [1999 Folio reprint], p 671).

³⁵ Reference 23 - Craig Wilcox, *Australia's Boer War* (2002, pp 276-296, 334-336, 357-358; Reference 24 - LM Field, *The Forgotten War* (1979, pp 171-175; Reference 25 - Diane Heriot, 'Justice beyond law: clemency and the Royal Prerogative of Mercy', *Flag Post* (Australian Parliamentary Library, 18 September 2012 - https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2012/September/Justice_beyond_law_clemency_and_the_Royal_Prerogative_of_Mercy).

³⁶ Reference 26 - Hancock, Morant and Witton [Note: contains the telegram from Kitchener 6 April and the official translation of it], 1902, NAA: A6661, 665, pp 9, 12-13.

the British Empire that Morant and the others had been made scapegoats, that Hancock had only been following orders, and that Witton was innocent.³⁷

34. However, as Craig Wilcox argues in *Australia's Boer War* (2002):

Through accidents and twists of legal process, through a deal done with James Robertson, and possibly through deals done with Robert Cochrane and Alfred Taylor, two men had been executed for crimes that others had joined in committing and in most cases were like those being committed by perhaps hundreds of soldiers across South Africa. All the same, the crimes were real enough.³⁸

Other

35. Other Australians were also prosecuted for conduct against or in the face of the enemy during the Second Anglo-Boer War. Some of these related to mutiny. One example was the aftermath of the Wilmansrust ambush in June 1901, involving the 5th Victorian Mounted Rifles, under British command. In this case, death sentences on several Victorian troopers were passed but later commuted (and subsequently overturned) without Australian Government knowledge.³⁹ Other cases—such as that of Charles Cox's killing of Jan Dolley, led to acquittals.⁴⁰ Similarly, LM Field, writing in 1979, assessed that ultimately (and apart from the well-known issues surrounding the BVC and some incidents of ill-discipline):

there was very little that was seriously reprehensible about Australian behaviour...in South Africa. They were certainly no worse than other British troops, and their conduct was natural in the circumstances.⁴¹

36. However, there is little evidence of British military trials of other Australians for serious breaches of the customs of war (or what would by 1907 be called 'the law and usages of war', and today would be called 'war crimes'). An indicative 'Roll of Australians tried by Court-Martial in South Africa' (April to June 1901), provided in the wake of Australian government disquiet regarding courts-martial proceedings after the Wilmansrust incident, records 27 courts-martial proceedings. Of these, only two have possible links to conduct against the adversary or civilians—a conviction for 'shooting with intent to do grievous bodily harm', and another for 'assaulting a native'.⁴² However, the records of the cases are not readily available so it is impossible to ascertain the circumstances of each conviction.

37. There are other files in the National Archives of Australia that relate to conduct or allegations of conduct during the Second Anglo-Boer War that would today amount to war crimes offences,

³⁷ Reference 27 - <http://guides.naa.gov.au/boer-war/chapter5/index.aspx>.

³⁸ Craig Wilcox, *Australia's Boer War* (2002), p 296.

³⁹ Reference 28 - *Report by Major McKnight on the Wilmansrust Affair*, 1901, NAA: B168, 1901/3859; Reference 29 - NAA: B168, 1902/919; R Wallace, *The Australians at the Boer War* (1976), pp 329-333.

⁴⁰ Craig Wilcox, *Australia's Boer War* (2002), p 187.

⁴¹ LM Field, *The Forgotten War* (1979), p 181.

⁴² Reference 30 - Papers regarding members of 5th Victorian Contingent being sentenced [Courts martial] for insubordination in South Africa, 1901-1902, NAA: B168, 1902/919, pp 42-44, Serials 6 and 26.

such as the unlawful burning of Boer farms (civilian property).⁴³ Craig Wilcox notes, for example, that:

Local circumstances, and a wildness that had marked the Tasmanians since their contingent was formed, had also led them to kill a few of their enemies outside the codes of war that were accepted in parlours and pubs across the empire. Many other mounted units probably did the same.⁴⁴

38. However, as noted, the Australian-commanded (and comprised of approximately 40 per cent Australian complement) BVC were a particular source of allegations and reports. It should be recalled that, apart from Handcock, Morant, and Witton, other personnel from the BVC were also prosecuted at the Pietersburg courts-martial for offences that would today be classified as war crimes. It is equally important to recall, however, that one trigger for the inquiry into BVC conduct at Fort Edward in 1901, which led to the Pietersburg courts-martial, was a letter written by a BVC trooper who had been a Justice of the Peace in Western Australia prior to joining, and that the letter was signed by 14 other BVC troopers.

39. It does not appear that Australia subsequently prosecuted any Australians for conduct during the Second Anglo-Boer War—a logical consequence of the fact that these contingents were at the time under British command and subject to British military law, including the UK Army Act. However, one of the BVC officers implicated in the events in the vicinity of Fort Edward—Major Lenahan, who was not court-martialled but rather sent back to Australia, was placed on the retired list (against his wishes), and not permitted to re-join his regiment once back in Australia.⁴⁵

Colonel Lynch

40. Arthur Lynch was an Irish-Australian who was appointed a Colonel by President Botha.⁴⁶ He served in the Boer forces in 1900 (in the Boer's Second Irish Brigade) until it was disbanded in late 1900. He was later an advocate for the Boer cause in Ireland and the United States (US). Lynch was arrested for treason in the UK in June 1902, convicted in January 1903, and sentenced to death, which was then commuted to life imprisonment. He was released in 1904. However, part of the evidence led against Lynch at his trial related to destruction of civilian property in Natal.⁴⁷ That is, whilst British-commanded units were engaged in the same practice, there was nevertheless a sense of illegality attaching to the practice such that it was considered condemnatory of Boer conduct.

Conclusions

41. The following conclusions may be drawn from this assessment:

- a. As at 1900 to 1902, for British, and thus Australian, forces, the killing of prisoners was a breach of the customs of war.

⁴³ For example, Reference 31 - AWM3, 02/1520 - Records of Major General E. T. H. Hutton, General Officer Commanding the Military Forces of the Commonwealth of Australia: Correspondence regarding the conduct of Lt's Meham and Taylor and the burning of a Boer woman's house in Villiersdorp.

⁴⁴ Craig Wilcox, *Australia's Boer War* (2002), p 260.

⁴⁵ R Wallace, *The Australians at the Boer War* (1976), p376.

⁴⁶ Craig Wilcox, *Australia's Boer War* (2002), pp262-268.

⁴⁷ R Wallace, *The Australians at the Boer War* (1976), pp381-383.

- b. As at 1900 to 1902, a charge against an Australian service member for a 'war crime' was via the 'routine' offences (such as murder) in the Army Act (UK) or the *Naval Discipline Act 1866*, employing the 'active service' expansion of jurisdiction for courts-martial, and the *Manual of Military Law* for substantive detail as to criminalised incidents of conduct.
- c. There are strong indicia of instances of verbal orders which went against formal orders as to treatment of prisoners, and/or of non-reporting of contraventions of the customs of war. However this was quite dependant on unit culture and leadership.
- d. Some conduct which would today clearly be categorised as a war crime was, as at 1900 to 1902, considered to be of ambiguous criminality. Indeed, some examples of such conduct—primarily the scorched earth policy involving the burning of Boer farms, crops, and property, and the displacement of Boer civilians, were explicitly and formally sanctioned.

Boxer Rebellion, 1900 to 1901

What Law of Armed Conflict-related instruments and source of offences bound Australian forces involved

42. The Australian component of the multi-national force despatched to suppress the Boxer Rebellion was part of the British contingent of the force.

43. Australian colonies were keen to offer material support to Britain. With the bulk of forces engaged in South Africa, they looked to their naval contingents to provide a pool of professional, full-time crews, as well as reservist-volunteers, including many ex-naval men. The reservists were mustered into naval brigades, in which the training was geared towards coastal defence by sailors capable of ship handling and fighting as soldiers.⁴⁸

44. The Australian contributions were as follows. The British Government quickly accepted the offer of the South Australian cruiser Her Majesty's Colonial Ship Protector and Naval Contingents from New South Wales and Victoria, each of about 220 men. While each unit had a small cadre of regular personnel, the bulk were Naval Reservists who volunteered for full time service. Some of the men had prior service with the NSW Infantry unit that had served in the Sudan in 1885.⁴⁹

45. Consequently, the same scheme of subjection to British military law, as for Australian contingents attached to 'Her Majesty's regular British forces' during the Second Anglo-Boer War, also appears to have applied in this context. Suppression of the Boxer Rebellion also directly enlivened customs of war obligations around occupation:

The conflict in China coincided with a profound transformation in the law of occupation. The newly minted Convention with respect of the Laws and Customs of War on Land (Hague II, 1899), imposed obligations on commanders, including a general obligation to treat civilians with humanity and a responsibility to respect local law as they found it. But the obligation had not yet

⁴⁸ Reference 32 – Australian War Memorial - <https://www.awm.gov.au/articles/atwar/boxer>

⁴⁹ Reference 33 - Greg Swindon, 'Naval involvement in the Boxer Rebellion – 100th Anniversary' (2001) *Naval Historical Review* - <https://www.navyhistory.org.au/naval-involvement-in-the-boxer-rebellion-100th-anniversary/>.

been incorporated into any Western military manuals [for the British, the *Manual of Military Law* 1899], and the old standard afforded the commanders wide discretion over matters of justice...⁵⁰

Australian action in terms of holding adversaries to account against the applicable Law of Armed Conflict standards

46. There were a series of war crimes-related proceedings against Boxer leaders carried out under multi-national force governance during the suppression of the Boxer Rebellion.⁵¹ Additionally, the occupying force in Beijing established and appointed 'a Chinese criminal court of justice' to try cases against local nationals, including in relation to plundering, rape, and murder.⁵² The Australian contingent was allocated 'a portion of the city's [Beijing] British sector to administer', which included 'officers...appointed magistrates with jurisdiction over the Chinese'.⁵³ Australian officers and sailors were therefore directly involved in the administration of justice and the execution of sentences, including by firing squad, and later by decapitation (carried out by a Chinese executioner)⁵⁴: 'the Australian forces helped to restore civil order, which involved shooting (by firing squad) Chinese caught setting fire to buildings or committing other offences against European property or persons'.⁵⁵

Australia's record in terms of holding Australian personnel to account against the applicable Law of Armed Conflict standards

47. The subsequent occupation of Beijing (called by some historians, 'the sack of Peking'⁵⁶), 'was marked by wanton violence and looting, which lasted for several weeks with all occupying parties participating'.⁵⁷ There were many contemporaneous reports of multi-national force breaches of the customs of war, most particularly in regards to looting, but also in regards to rape and murder.⁵⁸ For example: 'Last night twenty Chinese were captured at the French Legation. Three were shot; but then the French corporal, saying it would not do to waste so many precious rounds, killed fifteen with his bayonet. Two were kept to be examined'.⁵⁹ The US commander in Beijing (Chaffee) had

⁵⁰ Reference 34 - Benjamin Brockman-Hawe, 'Accountability for 'Crimes Against the Laws of Humanity' in Boxer China: An Experiment with International Justice at Paoting-Fu' (2017) 38:2 *University of Pennsylvania Journal of international Law* 627, pp 627, 654-657.

⁵¹ Reference 35 - Richard O'Connor, *The Boxer Rebellion* (1973), pp 320-324.

⁵² Reference 36 - *Annual Reports of the War Department: Report of the Lieutenant-General Commanding the Army*, Part 4, 30 June 1900, 'Headquarters China Relief Expedition, General Orders, No.3, 11 January 1901, para IV; No.4, 13 January 1901, para IV.

⁵³ Reference 37 - Bob Nicholls, *Bluejackets and Boxers: Australia's naval expedition to the Boxer uprising* (1986), p 103.

⁵⁴ Bob Nicholls, *Bluejackets and Boxers: Australia's naval expedition to the Boxer uprising* (1986), pp 94-95, 106; pp103-105 records the view of Assistant Paymaster Wynne (writing dispatches to the Telegraph) as being that the experience of executions by beheading or firing squad was indicative that 'We are growing callous...'

⁵⁵ Greg Swindon, 'Naval involvement in the Boxer Rebellion – 100th Anniversary' (2001) *Naval Historical Review*.

⁵⁶ Richard O'Connor, *The Boxer Rebellion* (1973), pp 286-310.

⁵⁷ Reference 38 - Franz-Stefan Gady, 'When Americans ruled Beijing', *The Diplomat*, 04 Jun 2015 - <https://thediplomat.com/2015/06/when-americans-ruled-beijing/>.

⁵⁸ Reference 39 - Diana Preston, *The Boxer Rebellion: The Dramatic Story of China's War on Foreigners That Shook the World in the Summer of 1900* (2000), pp 284-295, 301-302; Reference 40 - George Lynch, *The War of The Civilisations* (1901), pp 140, 177-192, 194.

⁵⁹ Reference 41 - Leslie Merchant (ed) *The Siege of the Peking Legations - a diary: Lancelot Giles* (1970), p 148 (entry for Tuesday, 10 July 1900).

quickly 'ordered a ban on looting by US forces, but the ban was ineffectual'.⁶⁰ ...WAP Martin, a US eyewitness, observed that: '[Beijing] was not formally given up to pillage, but the commanders, though announcing their intention to forbid looting, appeared to be in no hurry to impose a check on the mingled wrath and cupidity of their men'.⁶¹ Other recorded conduct included:

A US diplomat, Herbert G Squiers, filled several railroad cars with loot. Assaults on civilians were also not uncommon. For example, Stephen Dwyer, a US Marine, forced his way into a Chinese home wielding a bludgeon to 'brutally assault and strike a Chinese child of tender years... driving it from its home and thereby hastening its death'. He then went on to rape the two women living in the house.

Dwyer was quickly court-martialed and sentenced to life in prison in the United States, but many others went unpunished. The international press called the weeks following the storming of Beijing a 'carnival of loot' and lamented that 'the great Christian nations of the world are being represented in China by robbing, rapine, [and] looting soldiery...'.⁶²

48. A US commander's report detailed the following:

For about three weeks following arrival of the relief column at Pekin[g] the condition in and about the city and along the line of communication was bad. Looting of the city, uncontrolled foraging in surrounding country, and seizure by soldiers of everything a Chinaman might have, as vegetables, eggs, chickens, sheep, cattle, etc; ...indiscriminate and generally unprovoked shooting of Chinese... It is safe to say that where one real Boxer has been killed since the capture of Pekin[g], 50 harmless coolies and laborers... including not a few women and children, have been slain... It was not, in my opinion, creditable for the United States troops to continue to wage hostilities in such a manner.⁶³

49. The indiscipline of the US troops in particular was contemporaneously and openly documented by US officers. The US force's Adjutant-General noted that:

During this [reporting] period of eight months and twenty-six days there has been an unusual number of trials by general, garrison, and summary courts-martial, covering a wide field of offences, from the most serious crimes incident to a state of war to the slightest infraction of the rules of ordinary camp and company routine.⁶⁴

50. A table records 271 general courts-martial trials in the period, with 239 convictions.⁶⁵ The official records of the US Expeditionary Force thus include a wide range of documentary evidence of what would today be labelled as war crimes, including rape, looting, burning civilian villages, and

⁶⁰ Reference 42 - Robert Leonhard, *The China Relief Expedition - Joint Coalition Warfare in China, Summer 1900*, p54 - <https://www.jhuapl.edu/Content/documents/China%20ReliefSm.pdfP54>.

⁶¹ Reference 43 - WAP Martin, *The Siege in Peking* (1900), pp 132-133.

⁶² Franz-Stefan Gady, 'When Americans ruled Beijing', *The Diplomat*, 04 Jun 2015 - citing Reference 44 - David Silbey, *The Boxer Rebellion and the Great Game in China: A History* (2013).

⁶³ *Annual Reports of the War Department: Report of the Lieutenant-General Commanding the Army, Part 4*, 30 June 1900, 'Headquarters China Relief Expedition, General Orders, pp 433-546 at p 447.

⁶⁴ *Annual Reports of the War Department: Report of the Lieutenant-General Commanding the Army, Part 4*, 30 June 1900, 'Headquarters China Relief Expedition, General Orders, p 511.

⁶⁵ *Annual Reports of the War Department: Report of the Lieutenant-General Commanding the Army, Part 4*, 30 June 1900, 'Headquarters China Relief Expedition, General Orders, p 511.

murder.⁶⁶ However, as noted previously, such offences were charged as ‘ordinary’ disciplinary code offences, not as ‘war crimes’.

51. Apart from the ubiquitous looting, there do not appear to be any particularised allegations and cases that relate specifically and uniquely to the Australian contingent.⁶⁷ Indeed, this contingent, under British command as part of the British imperial force, ultimately saw little combat action but was engaged in a variety of siege and occupation duties:

When the first Australian contingents, mostly from New South Wales and Victoria, sailed on 8 August 1900, troops from eight other nations were already engaged in China. On arrival they were quartered in Tientsin and immediately ordered to provide 300 men to help capture the Chinese forts at Pei Tang overlooking the inland rail route. They became part of a force made up of 8,000 troops from Russia, Germany, Austria, British India, and China serving under British officers. The Australians travelled apart from the main body of troops and by the time they arrived at Pei Tang the battle was already over.⁶⁸

52. Nevertheless, the Australian contingent was a component of the multi-national force that engaged in a range of prohibited conduct—primarily looting:

The next action involving the Australians (Victorian troops this time) was the siege of the Boxer fortress at Pao-ting Fu, where the Chinese government was believed to have sought refuge when Peking was taken by Western forces. The Victorians joined a force of 7,500 on the ten-day march to the fort, only to find the town had already surrendered; the closest enemy contact was guarding prisoners. The international column then marched back to Tientsin, leaving a trail of looted villages behind them.⁶⁹

Conclusions

53. In addition to the conclusions drawn from the assessment above regarding the contemporaneous Second Anglo-Boer War:

- a. There are strong indicia of instances of verbal orders which went against formal policy and general orders as to looting and pillage, and/or of non-reporting of contraventions of the customs of war. However this was quite dependent on force element culture and leadership.
- b. Some conduct which would today clearly be categorised as a war crime was, as at 1900 to 1901, considered by many (but not all) to be legally unobjectionable, albeit draconian—the employment of limited judicial proceedings to deliver death sentences being one such example.

⁶⁶ Reference 45 - *Annual Reports of the War Department: Report of the Lieutenant-General Commanding the Army*, Part 4, 30 June 1900, Reports of Military Operations in China, Report to the Adjutant-General, China Relief Expedition Report, by Major E Huggins, on ‘Burning of Chinese Villages, October 30, 1900’, pp439-440, including reports of courts-martial during the expedition, such as General Order No.29 (rape – pp521-523), No.5 (robbery of civilians and intimidation – pp529-532).

⁶⁷ Bob Nicholls, *Bluejackets and Boxers: Australia’s naval expedition to the Boxer uprising* (1986), p 112.

⁶⁸ Bob Nicholls, *Bluejackets and Boxers: Australia’s naval expedition to the Boxer uprising* (1986), p 112.

⁶⁹ Bob Nicholls, *Bluejackets and Boxers: Australia’s naval expedition to the Boxer uprising* (1986), p 112.

World War I

What Law of Armed Conflict-related instruments and source of offences bound Australian forces involved

Outline of general scheme of application of United Kingdom Army Act (and UK Naval Discipline Act) to Australian Forces relevant between World War I and the conclusion of the Vietnam War

54. The legal arrangements for discipline of Australian forces on active service between 1904 to 1985 were complex:

1.3 'During the 19th century, the system of military justice as it applied in the British Army and the Royal Navy was radically reformed with the implementation in 1847 of the Naval Discipline Act, and, in 1879, of the Army Discipline and Regulation Act'. These acts provided military personnel with a wider range of rights and aligned the laws of military discipline more closely with the societal standards of the day. It was an amended version of this British legislation that provided the basis for the system of military law introduced into the Australian Defence Force (ADF) in the early 20th century.

1.4 By 1985, the legislation underpinning discipline in the ADF comprised: 'three United Kingdom Acts; two of which had ceased to operate in the UK; four sets of United Kingdom rules or regulations, all of which had ceased to operate in the UK; three Australian Acts; and nine sets of regulations under the Australian Acts'.⁷⁰

55. Throughout this period, each of the Services in Australia was governed by its own disciplinary code, as was also the case in the UK. However in Australia, so far as the Army was concerned, the nature of that code had been complicated by a political compromise made during debate on the Defence Bill in the Commonwealth Parliament in 1903. The Bill had proposed that the Army Act (UK) should be applied to the Australian military forces at all times; that is, in both war and in peace. However, this proposal had enlivened opposition to the possibility of using Australian troops for Imperial, rather than for national, defence. So strong was opposition on this ground that the scheme had to yield, first, so that military service beyond Australia or its territories should not be compulsory; and second, so that the military forces should be subject to the Army Act only while on active service.⁷¹

56. This compromise fundamentally shaped military law in Australia for the next 80 years. Australian military forces would now be governed by two separate disciplinary codes, one for war and one for peace. In war (while on active service) Australian military forces would, under s 55 of the Defence Act (Cth), be subject to the Army Act (UK) to the extent that the UK Act was not inconsistent with the Defence Act or regulations made under it. In peace (while not on active

⁷⁰ Reference 46 - Joint Standing Committee on Foreign Affairs, Defence and Trade, Report on Military Justice in the Australian Defence Force (1999) -

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/jfadt/military/MJ_ch_1 the quotes are from the then in force *Joint Service Publication* (Australia) 201 Volume 1, p 1-1 (also known as the *Discipline Law Manual* Vol I).

⁷¹ Bruce Oswald and Jim Waddell (eds.), *Justice in Arms: Military Lawyers in the Australian Army's first hundred years* (2014), p 14.

service) Australian military forces would be governed by a modified disciplinary code and apparatus made by regulation.

57. The peacetime disciplinary code and apparatus was embodied in the *Regulations and Orders for the Military Forces of the Commonwealth* of 1904 (superseded by subsequent regulations in 1916 and again in 1927).⁷² The regulations differed from the Army Act (UK) and ameliorated its severity by limiting any period of imprisonment to a maximum of three months and by greatly extending the scope for imposing a pecuniary penalty, and capping any such penalty at £20. Unlike the Army Act (UK), the peacetime disciplinary code made no provision for trial for civil offences, which by default was left to the civil courts. However, in other respects the regulations substantially replicated the offence-creating provisions of the Army Act (UK).⁷³

58. Predictably, difficulties were experienced during World War I (WWI) in having to change, under the stress of war, from one disciplinary code that was familiar to another which was not. Valiant attempts were made between the wars to legislate for one single code of discipline for peace as well as for war, but to no avail. The ideal of a single disciplinary code was not realised until 1985, when a discipline code which was also common to each of the Services came into force.

59. The unfortunate dichotomy between discipline in war and in peace applied, although only initially, to Australian naval forces as well. Under the *Defence Act 1903* as made, the naval forces would in war (while on active service) be subject to the *Naval Discipline Act 1866* (UK). Although, in separate provision made for the Australian fleet by the *Naval Defence Act 1910*, the naval forces were made subject, at all times, to the *Naval Discipline Act 1866* (UK) and the King's Regulations and Admiralty Instructions for the time being in force, subject to the Commonwealth Act and to any modifications or adaptations made by Commonwealth regulation.

60. For the Army, the disciplinary apparatus which in time of war would apply, the Army Act (UK), was fine-tuned in the lead-up to and during WWI. The effect of these changes was generally to ameliorate the practical impediments inherent in a dual system of disciplinary codes, by expanding the circumstances in which the Army Act (UK) would apply to Australian military forces. In the first place, s 54A was inserted by the *Defence Act 1909* to apply the Army Act (UK) to the military forces when serving with Imperial forces outside Australia, and while travelling from and returning to Australia for the same purpose.

61. In April 1915, the Commonwealth's legal adviser, Robert Garran,⁷⁴ acknowledged the existence of doubts over whether s 55 (applying the Army Act (UK) to Australian military forces while on active service) had extra-territorial effect, on the basis that it did not demonstrate an intention to apply beyond the limits of the Commonwealth. It was important that these doubts be removed before the commencement of a series of trials of members of the Australian Naval and Military

⁷² The regulations of 1927 were published together with numerous orders in a single volume entitled *Australian Military Regulations and Orders* (AMR&O) which was a standard work of reference for the Army for many years: Bruce Oswald and Jim Waddell (eds.), *Justice in Arms: Military Lawyers in the Australian Army's first hundred years* (2014), p 60.

⁷³ Bruce Oswald and Jim Waddell (eds.), *Justice in Arms: Military Lawyers in the Australian Army's first hundred years* (2014), p 15.

⁷⁴ Secretary to the Attorney-General's Department and Solicitor-General.

Expeditionary Force arising from allegations of looting in German New Guinea, where s 54A was of no avail because the Expeditionary Force was not serving with Imperial Forces. Accordingly, s 55 was amended by the *Defence Act 1915* to provide expressly that it should have extra-territorial effect, back-dated to 01 August 1914.⁷⁵

62. 'Active service' was defined by the Defence Act very expansively as service in or with a force which was engaged in operations against the enemy, and included any naval or military service in time of war whether within or without the limits of the Commonwealth. As offences committed on active service could attract more severe punishment than the same offences committed in other circumstances, it was eventually felt that a distinction ought to be drawn between how the Army Act applied to personnel engaged in actual operations in the field *vis-à-vis* personnel serving in non-combatant roles at home. The solution, provided by the *Defence Act 1917*, was to introduce 'war service', instead of active service, as the new criterion for applying the Army Act; and to narrow the definition of active service.⁷⁶

63. 'War service' was defined to mean active service and any naval or military service in time of war or in a proclaimed period following a time of war. This amendment provided for uniform application of the Army Act to the military forces at home or abroad, but without invoking the more rigorous features of the Army Act such as 'field punishment' which applied on active service. As Arndell Lewis explained in 1937:

Even persons who are subject to military law as soldiers or otherwise are still subject to the general law of the land. A glance at the penal provisions of the AMR and O or AA [UK *Army Act 1881*] shows that ordinary crimes are not included and reference to the general law is necessary to discover many rights and duties of soldiers, not only towards civilians but also to their superiors and comrades. Military law is an addition to the general law of the land which is made applicable to a limited class of persons and actions. It does not substitute a different code.⁷⁷

64. In terms of understanding how a war crime charged as the 'ordinary' crime of murder (for example) might have been charged and dealt with under this scheme, an important technical feature was that, 'if by reason of war or other circumstances, it is not possible to bring a military offender before the law courts, courts martial must in a proper case, apply the rules of the ordinary criminal law'.⁷⁸ For example, in commentary upon s 41 the Army Act (concerning civil offences punishable by the ordinary law of England, including murder whilst on active service – s 41(2)), the *Manual of Military Law: Australian Edition 1941* specified (inter alia) the following caveats:⁷⁹

- a. The operation of s 41 is modified by AMR&O [Australian Military Regulations and Orders] paragraph 327(h) (by this point, the relevant AMR&O was that of 1927). This meant that the death penalty could not be given for a range of convictions under s 41 Army Act;

⁷⁵ Bruce Oswald and Jim Waddell (eds.), *Justice in Arms: Military Lawyers in the Australian Army's first hundred years* (2014), pp 17, 19.

⁷⁶ Bruce Oswald and Jim Waddell (eds.), *Justice in Arms: Military Lawyers in the Australian Army's first hundred years* (2012), p 23.

⁷⁷ Arndell Lewis, *Australian Military Law* (1936), p 119.

⁷⁸ Arndell Lewis, *Australian Military Law* (1936), p 120.

⁷⁹ Reference 47 - *Manual of Military Law: Australian Edition* (1941), pp 428-429 - the jurisdictional and policy rationale is set out in Chapter VII ('Offences Punishable by Ordinary Law'), pp 114-115.

- b. *Defence Act 1903* (Cth) s 106 was applicable: 'Where the punishment for any offence against the Army Act or the Naval Discipline Act is penal servitude the court may, in lieu of sentencing the offender to penal servitude, sentence him to imprisonment with or without hard labour for the same period as that for which he might have been sentenced to penal servitude or for any less period...';
- c. 'It should be noted that the accused can be charged under this section with a civil offence, wherever committed, provided that the offence would, if committed in England, be punishable by the law of England. Local laws and ordinances abroad are not part of the law of England. Consequently contraventions of their provisions cannot properly be laid as offences under this section'.

65. In essence, the effect of this complex scheme was that if an Australian serviceperson on active service / war service was to be charged with murder in a factual nexus that involved a breach of the laws and customs of war (such as killing a prisoner, or killing a wounded combatant who was *hors de combat*, or killing a civilian), the elements of, and detailed jurisprudence surrounding, the charged murder offence had to be as per the offence of murder in English law, not Australian law. For a (non-murder) example, specimen charge sheet No.99 (for a UK Army Act s 41 offence), as set out in the *Manual of Military Law: Australian Edition 1941*, was as follows:

No.99

Charge-Sheet

The accused, No. , Private , Battalion, is charged with having while being a soldier on war service, committed the following offence:-

Committing a civil offence, that is to say, housebreaking with intent to commit a felony contrary to Section 27(2) of the [UK] Larceny Act, 1916,

in that he, at Barracks, on , did break and enter the Quartermaster's Store of the Battalion, with intent to commit a felony therein.⁸⁰

Army Act (UK) s 41 offences against the ordinary law of England

66. As noted above, regarding war crimes specifically, of relevance for conflicts from WWI to Vietnam, the applicable Army Act s 41 offences punishable by ordinary law included (in various forms) provisions that permitted court-martial for civil offences such as murder, so long as it was in the context of war service. This outcome was resultant from, amongst other provisions, s 41(5) Army Act as at (for example) 1941 (and thus of relevance for WWII). This provision provided that an Australian service member on war service might be tried by court martial for 'any offence not before in this section particularly specified, which when committed in England is punishable by the law of England'. That is, when on war service (which included active service), certain general offences in

⁸⁰ *Manual of Military Law: Australian Edition* (1941), p 663.

English law could be applied in a 'war crimes' context, and these offences could be dealt with by court-martial (via s 41).⁸¹

Applicable Law of Armed Conflict-related instruments

67. By 1918, the following LOAC-related treaties were in force for Australia:⁸²
- a. 1868 St Petersburg Declaration renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grams Weight (into force for Colonies 1869, and Australia 1901 via UK);⁸³
 - b. 1899 Hague Declaration II Prohibiting the Use of Asphyxiating Gases (into force for Colonies 1899, into force for Australia 1907);⁸⁴
 - c. 1899 Hague Declaration III Prohibiting the use of Expanding Bullets (into force for Colonies 1899, into force for Australia 1907);⁸⁵
 - d. 1899 Hague II International Convention with respect to the Laws and Customs of War on Land (into force for Colonies 1899, into force for Australia via UK 1900);⁸⁶
 - e. 1899 Hague III International Convention for Adapting to Maritime Warfare the Principles of the Geneva Convention of 22 August 1864 (into force for Colonies 1899, into force for Australia via UK 1900);⁸⁷

⁸¹ Regarding WWI, the *Geneva Convention Act 1911 (Imp.)* was narrowly concerned with protection from abuse and misuse of the Red Cross emblem as per, most particularly, Article 27 of the 1906 Geneva Convention. The UK *Geneva Convention Act 1911* was extended to Australia by Order-in-Council, 11 February 1913. In respect of WWII, application of the Geneva Convention Act 1911 (Imp.) and its subsequent iterations directly to Australia was terminated in 1939 by s 3 of the *Geneva Convention Act 1939 (Cth)* - 'Termination of extension to Australia of Geneva Convention Act, 1911 (Imp.)'. The Imperial Act known as the Geneva Convention Act, 1911 shall cease to extend to the Commonwealth and to the Territories of Papua and Norfolk Island'. However – as with the UK 1911 Act - the 1939 *Geneva Convention Act (Cth)* was narrowly concerned with Article 28 of the 1929 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, concerned with suppressing abuse and misuse of the Red Cross emblem.

⁸² Shortened titles employed for ease of reference

⁸³ Reference 48 - 1868 St Petersburg Declaration renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grams Weight -

<https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/83FFA1E4ECCF9743CA256B840007D7B1>.

⁸⁴ Reference 49 - 1899 Hague Declaration II Prohibiting the Use of Asphyxiating Gases -

<https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/A46CB2CA733E9DA9CA256B86007B5239>.

⁸⁵ Reference 50 - 1899 Hague Declaration III Prohibiting the use of Expanding Bullets -

<https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/D8F499F8D195C8A8CA256B86007BDCC3>.

⁸⁶ Reference 51 - 1899 Hague II International Convention with respect to the Laws and Customs of War on Land -

<https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/931C3AEEBE3D7401CA256B86007A2266>.

⁸⁷ Reference 52 - 1899 Hague III International Convention for Adapting to Maritime Warfare the Principles of the Geneva Convention of 22 August 1864 -

<https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/090AAE39C028485CCA256B86007AB898>.

- f. International Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field 1906 (into force for Australia 1907);⁸⁸
- g. 1907 Hague International Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons (into force for Australia 1909);⁸⁹
- h. 1907 Hague III International Convention relative to the Opening of Hostilities (into force for Australia 1910);⁹⁰
- i. 1907 Hague IV International Convention concerning the Laws and Customs of War on Land (into force for Australia 1910);⁹¹
- j. 1907 Hague VI International Convention relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities (into force for Australia 1910);
- k. 1907 Hague VII International Convention relative to the Conversion of Merchant Ships into Warships (into force for Australia 1910);⁹²
- l. 1907 Hague VIII International Convention relative to the Laying of Automatic Submarine Contact Mines (into force for Australia 1910);⁹³
- m. 1907 Hague IX International Convention respecting Bombardments by Naval Forces in Time of War (into force for Australia 1910);⁹⁴ and
- n. 1907 Hague XI International Convention relative to Certain Restrictions on the Exercise of the Right of Capture in Maritime War (into force for Australia 1910).⁹⁵

United Kingdom, and consequently Australian, approach to ‘Laws and Usages of War’, and ‘war crimes’, during World War I

68. During WWI, the detailed content of the ‘Laws and Usages of War’ applicable to British, and - via the Army Act (UK) and other Imperial acts, as well as the Defence Act (Cth) and the AMR&O, to

⁸⁸ Reference 53 - International Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field 1906 -

<https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/2BA50DBB89FF5AF6CA256C9500146A6E>.

⁸⁹ Reference 54 - 1907 Hague International Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/C902FB8A34805F5BCA256C950018C114>.

⁹⁰ Reference 55 - 1907 Hague III International Convention relative to the Opening of Hostilities -

<https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/BF865EAD80F51119CA256BDB0004C7A5>.

⁹¹ Reference 56 - 1907 Hague IV International Convention concerning the Laws and Customs of War on Land -

<https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/87956593F7B0A195CA256C950018C10E>.

⁹² Reference 57 - 1907 Hague VII International Convention relative to the Conversion of Merchant Ships into Warships -

<https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/F879904E8271148ECA256C950018C110>.

⁹³ Reference 58 - 1907 Hague VIII International Convention relative to the Laying of Automatic Submarine Contact Mines -

<https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/E3C4975976448B54CA256C950018C111>.

⁹⁴ Reference 59 - 1907 Hague IX International Convention respecting Bombardments by Naval Forces in Time of War -

<https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/D6D3A38142DB5926CA256C950018C112>.

⁹⁵ Reference 60 - 1907 Hague XI International Convention relative to Certain Restrictions on the Exercise of the Right of Capture in Maritime War -

<https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/6DDBC9E9325C3B50CA256C950018C113>.

Australian forces, was found primarily in regulations and instruments outside the Army Act (UK) itself. The main reference source was the updated 1914 *Manual of Military Law (6th Edition)*—the 5th Edition had been promulgated in 1907. Chapter XIV ‘The laws and usages of war on land’, paragraph 4, listed ‘the existing written agreements which affect the military forces’ as at 1914 as being:⁹⁶

- a. 1868 St Petersburg Declaration renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grams Weight;
- b. 1899 Hague Declaration II Prohibiting the Use of Asphyxiating Gases, and 1899 Hague Declaration III Prohibiting the use of Expanding Bullets;
- c. International Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field 1906;
- d. 1907 Hague Conventions relating to the opening of hostilities, the laws and customs of war on land (and its substantial annex), the rights and duties of neutral powers and persons in war on land, and components of the 1907 Hague naval conventions; and
- e. 1907 Hague International Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons.⁹⁷

69. Unsurprisingly, this list is in essence the same as that applicable to Australia as enumerated at paragraph 67. Additionally, the 1914 UK *Manual of Military Law* notes that the 1907 Hague Convention with respect to the Laws and Customs of War on Land ‘does not pretend to provide a complete code, and cases beyond its scope therefore still remain the subject of customary rules and of usage’.⁹⁸

70. Thus identification of disciplinary and criminal offences regarding, inter alia, treatment of prisoners, sick, wounded, and dead, and that ‘the ordinary citizens of the contending States, who do not take up arms and who abstain from hostile acts, must be treated leniently, must not be injured in their lives or liberty, except for cause or after due trial, and must not as a rule be deprived of their private property’ (para 11) generally found their substantive detail in the relevant treaty – most particularly 1907 Hague IV and its Annex. That is, as noted above, the ‘war crimes’ context of offences was not generally specifically enumerated in UK legislation, but incorporated via reference to the treaties themselves, or – particularly in the case of customary rules and usages – as elaborated in the *Manual of Military Law* itself.

Australian action in terms of holding adversaries to account against the applicable Law of Armed Conflict standards

71. There was no official Australian involvement in the primary post-WWI war crimes prosecution processes against the defeated powers, as these war crimes trials were conducted domestically within Germany and Turkey:

⁹⁶ Shortened titles employed for ease of reference

⁹⁷ *Manual of Military Law (6th Edition)* 1914, Ch XIV, para 4.

⁹⁸ *Manual of Military Law (6th Edition)* 1914, Ch XIV, para 5.

- a. in 1921, the Weimar Republic conducted a limited series of trials against a small number of German servicemen in relation to acts against Allied forces and vessels; known as the Leipzig War Crimes Trials; and
- b. in 1919-1920, the Turkish government in the Allied occupied area based on European Turkey (that is, not the new Turkish Republic based in Ankara), conducted a series of trials against perpetrators 'responsible for the mass killing of the Armenians'; known as the Istanbul Special Court Martial.⁹⁹

Australia's record in terms of holding Australian personnel to account against those standards

72. There are some persistent allegations as to Australian conduct that may have amounted to war crimes, but which was not investigated or prosecuted at the time.

Allegations concerning the execution of German soldiers and New Guinean policemen at Bita Paka, 11 September 1914:

73. At the outbreak of WWI, an Australian Naval and Military force was despatched to capture German possessions in New Guinea.¹⁰⁰ On 11 September 1914, the Australian Naval and Military Expeditionary Force (AN&MEF) landed a shore party and proceeded to find and seize the wireless telegraphy station at Bita Paka.¹⁰¹ During the initial stages of the engagement, an injured German soldier was used to draw out other German forces, who were then surrounded and captured. Seaforth Mackenzie (the official historian of Australia in the Pacific theatre during WWI) notes of this incident:

In the employment of a prisoner in this manner, under a threat, a breach of the rules of war appears to have been unwittingly committed. This was more liable to happen, through ignorance, in the early days of the war than later, when the Australian military authorities had supplied officers with pamphlets defining the rules with regard to prisoners, etc....¹⁰²

74. The AN&MEF suffered six killed and four wounded, and official German casualties were listed as 31 killed, 11 wounded, and 75 captured.¹⁰³ There is no record in the official history of any of the captured then dying or being killed in Australian custody in suspicious circumstances. However, in 2014 the following allegations were reported:

⁹⁹ Reference 61 - Alan Kramer, 'The First Wave of International War Crimes Trials: Istanbul and Leipzig' (2006) 14:4 *European Review* pp 441-455.

¹⁰⁰ Reference 62 - Arthur Jose, *The Royal Australian Navy (1928), The Official History of Australia in the War of 1914-1918: Vol. IX*, pp 82-91; Reference 63 - Bruce Gaunson, *Fighting the Kaiserreich: Australia's Epic Within the Great War* (2018), Ch1; Reference 64 - Kevin Meade, *Heroes Before Gallipoli: Bita Paka and that One Day in September* (2005), chs 7-9.

¹⁰¹ Reference 65 - Seaforth Mackenzie, *The Australians at Rabaul: The capture and administration of the German possessions in the southern Pacific (1942), The Official History of Australia in the War of 1914-1918: Vol X*, p 53.

¹⁰² Seaforth Mackenzie, *The Australians at Rabaul: The capture and administration of the German possessions in the southern Pacific (1942), The Official History of Australia in the War of 1914-1918: Vol X*, p 55.

¹⁰³ Seaforth Mackenzie, *The Australians at Rabaul: The capture and administration of the German possessions in the southern Pacific (1942), The Official History of Australia in the War of 1914-1918: Vol X*, pp 73-74.

New claims have emerged about the execution of German and Papua New Guinean prisoners by Australian servicemen during Australia's first WWI battle, which occurred on this day 100 years ago.

Six Australians, one German soldier, and 30 Papua New Guinean policemen were officially listed as killed when the Australian Naval and Military Expeditionary Force landed near the town of Rabaul, in what was then German New Guinea on 11 September 1914...

For years, there have been rumours of executions by the Australians after the battle of Bita Paka, and now an old tape recording of a witness appears to confirm them.

The eye witness, an elder in the village of Kabakaul, said he saw the Australians come ashore, and he described the execution of two white men and a number of native police.

'Then a big man of war said 'fire' and they all died,' said the man identified on the tape as Bob, speaking in the Tok Pisin language. 'They shot all the men who were lined up on one side. Only one boy was alright, a young boy such as this, he ran away. So they all died and the trench they dug was full with dead bodies'.

The recording was made in the 1960s by a plantation owner Ian Purvis, who was living near Rabaul. His wife Irene found the tapes when she was sorting through boxes after Purvis died.¹⁰⁴

75. It is possible this allegation is an alternative version of the events surrounding the attempt by captured German Sergeant (SGT) Ritter to rally a group of captured New Guineans to fight and escape during an engagement with another trench-line of German and New Guinean forces which had fired on the Australian party. This incident resulted in SGT Ritter and 12 New Guineans being killed.¹⁰⁵

Looting allegations in German New Guinea

76. In 1914 to 1915, a number of trials by court martial took place in German New Guinea and at Victoria Barracks, Sydney, following allegations that members of the AN&MEF had looted the property of civilians in German New Guinea. The charges were not drafted by reference to the prohibition of pillage in the *Hague Regulations respecting the laws and customs of war on land*, but some of the behaviour alleged seems to equate to pillage. The relevance of this material lies both in the existence of the allegations and in the action taken by the military forces to prosecute those believed to be responsible. The incidents, and the subsequent trials, were a domestic political issue in Australia and statements were made in the Commonwealth Parliament. One of those statements was made in July 1915 by the Attorney General, Billy Hughes, before he became Prime Minister.¹⁰⁶

77. The looting allegations concerned five soldiers of the AN&MEF, who were court-martialled in German New Guinea (an occupied territory by that stage) on charges of robbery against German nationals. They were convicted, and sentenced to periods of imprisonment. Once back in Australia, these men alleged that their officers had engaged in much the same behaviour as they had, so a

¹⁰⁴ Reference 66 - Cathy Van Extel, 'Claims Australians executed prisoners in WWI engagement', *Radio National Breakfast* (ABC), 11 Sep 2014 - <https://www.abc.net.au/radionational/programs/breakfast/claims-of-australian-war-crimes-in-first-wwi-engagement/5734180>.

¹⁰⁵ Arthur Jose, *The Royal Australian Navy (1928), The Official History of Australia in the War of 1914-1918: Vol. IX*, p 89; Kevin Meade, *Heroes Before Gallipoli: Bitu Paka and that One Day in September* (2005), pp 56-58.

¹⁰⁶ Reference 67 - 'Rabaul Charges' in *Sydney Morning Herald*, Friday 23 July 1915, p 10.

Court of Inquiry sat for several weeks gathering evidence. A series of subsequent courts martial were then held at Victoria Barracks, Sydney. Those court-martialled in Sydney in the 'second wave' of trials were: One colonel, one captain, two lieutenants, and one Sergeant. The charges against four of these individuals were property offences arising from the capture of a German ship ('Komet') and entry to abandoned German premises. The majority of these individuals appear to have been military police. The charges against one of the lieutenants related to disobeying orders regarding the sale of stamps, such orders being intended to prevent the removal of large quantities of German stamps by souvenir hunters in the AN&MEF.

78. As appears from the statement made by Billy Hughes in Parliament in July 1915, the trials of the soldiers in German New Guinea were essentially sound (although technical defects in sentencing had to be corrected). However, some of the acquittals of officers in Sydney were regarded as unsatisfactory.

Palestine 1918 – the Surafend Incident

79. The Surafend incident in December 1918 involved New Zealand (NZ), Australian, and Scottish troops.¹⁰⁷ Sparked by the killing of a NZ trooper by an Arab thief, on 10 December 1918 approximately 200 Anzac and Scottish troops followed the murderer-thief to his village, killed many of the inhabitants, and burned the village. They then burned a neighbouring Bedouin encampment. Estimates as to the number of Arabs and Bedouin killed range from 20 to 137.¹⁰⁸

80. In the aftermath of the incident, already tense relations between the Anzac force and the British commander, Allenby, worsened:¹⁰⁹ 'General Headquarters demanded the men who had led the attack and had been guilty of the killing. The Anzacs stood firm; not a single individual could definitely be charged'.¹¹⁰ Allenby is reported to have mustered the entire Anzac mounted Division and addressed them, calling them murderers:¹¹¹ 'Allenby's outburst left the division sore but unpunished'.¹¹² A Board of Inquiry obtained no relevant evidence from any witness: 'It seems that members of the 1st Australian Light Horse Brigade kept their mouths shut because that is exactly what they were ordered to do by their beloved commander, ...'.¹¹³ Numerous witness gave similar accounts, denying knowledge of anything relevant; as Daley wrote having reviewed the transcripts: 'The loyalty and deception with which the Australians covered for one another and comprehensively blamed the New Zealanders is breath-taking and farcical', and 'the inquiry reeks of cover-up, so uniformly consistent are the statements'.¹¹⁴ Official reports obfuscated.¹¹⁵ No comprehensive disciplinary proceedings followed and no soldier was ultimately held responsible for any killing or

¹⁰⁷ Reference 68 - John Grainger, *The Battle for Syria, 1918-1920* (2013), pp 201-205.

¹⁰⁸ Reference 69 - Paul Daley, *Beersheba: A Journey Through Australia's Forgotten War* (2009), chs 22-27; Reference 70 - Henry Gullett, *The Australian Imperial Force in the Sinai and Palestine (1923), The Official History of Australia in the War of 1914-1918: Vol. VII*, pp 788-792.

¹⁰⁹ Reference 71 - Eric Andrews, *The Anzac Illusion: Anglo-Australian Relations During World War I* (1993), p 165.

¹¹⁰ Henry Gullett, *The Australian Imperial Force in the Sinai and Palestine (1923), The Official History of Australia in the War of 1914-1918: Vol. VII*, p 789.

¹¹¹ Paul Daley, *Beersheba: A Journey Through Australia's Forgotten War* (2009), pp 259, 263.

¹¹² Henry Gullett, *The Australian Imperial Force in the Sinai and Palestine (1923), The Official History of Australia in the War of 1914-1918: Vol. VII*, p 790.

¹¹³ Paul Daley, *Beersheba: A Journey Through Australia's Forgotten War* (2009), p 258.

¹¹⁴ Paul Daley, *Beersheba: A Journey Through Australia's Forgotten War* (2009), p 267.

¹¹⁵ Paul Daley, *Beersheba: A Journey Through Australia's Forgotten War* (2009), pp 266-267.

destruction perpetrated during the incident, although 'blood money' was paid.¹¹⁶ It is reported that in 1919 the 3rd Light Horse Regiment were told that: 'We will speak of this incident no more'.¹¹⁷

Killing of German prisoners of war on the Western Front

81. The killing of German soldiers *hors de combat*—either as wounded who had given up the fight or were no longer capable of fighting, or otherwise captured and made prisoners of war (POW), was widely alleged but little reported. Consequently, the sources of these reports tend to be either tangential or personal, rather than official. Tim Cook's 2006 study of Canadian killings of German PWs during WWI 'unearth[ed] dozens of accounts of Canadians executing surrendering Germans out of rage, vengeance or expediency'.¹¹⁸ His 2007 monograph *At the sharp end: Canadians fighting the Great War 1914-1916*, and its companion in 2008, *Shock troops: Canadians fighting the Great War 1917-1918*, recount a range of such incidents; some indicating official sanction of the policy, others indicating tolerance of the policy.¹¹⁹

82. Robert Graves, in his autobiography *Goodbye to all that* (1929) recounts that:

For true atrocities, meaning personal rather than military violations of the code of war, few opportunities occurred - except in the interval between the surrender of prisoners and their arrival (or non-arrival) at headquarters. Advantage was only too often taken of this opportunity. Nearly every instructor in the mess could quote specific instances of prisoners having been murdered on the way back. The commonest motives were, it seems, revenge for the death of friends or relatives, jealousy of the prisoner's trip to a comfortable prison camp in England, military enthusiasm, fear of being suddenly overpowered by the prisoners, or, more simply, impatience with the escorting job. In any of these cases the conductors would report on arrival at headquarters that a German shell had killed the prisoners; and no questions would be asked.¹²⁰

83. He continues, 'The troops that had the worst reputation for acts of violence against prisoners were the Canadians (and later the Australians)', although he is uncertain 'how far this reputation for atrocities was deserved'. He recounts one experience of meeting an Australian soldier, who told him that:

Well the biggest lark I had was at Morlancourt, when we took it the first time. There were a lot of Jerries in a cellar, and I said to 'em: 'Come out, you Camarades!' So out they came, a dozen of 'em, with their hands up. 'Turn out your pockets,' I told 'em. They turned 'em out. Watches and gold and stuff, all dinkum. Then I said: 'Now back to your cellar, you sons of bitches!' For I couldn't be bothered with 'em. When they were all safely down I threw half a dozen Mills bombs in after 'em. I'd got the stuff all right, and we weren't taking prisoners that day.¹²¹

Conclusions

¹¹⁶ Paul Daley, *Beersheba: A Journey Through Australia's Forgotten War* (2009), pp 300-302.

¹¹⁷ Paul Daley, *Beersheba: A Journey Through Australia's Forgotten War* (2009), p 277.

¹¹⁸ Reference 72 - Tristan Hopper, 'The forgotten ruthlessness of Canada's Great War soldiers', *National Post*, 12 November 2018 - <https://nationalpost.com/news/canada/the-forgotten-ferocity-of-canadas-soldiers-in-the-great-war>.

¹¹⁹ Reference 73 - Tim Cook, *At the Sharp End: Canadians Fighting the Great War 1914-1916* (2007), pp 127, 308, 451, 480; Reference 74 - Tim Cook, *Shock troops: Canadian's fighting the Great War 1917-1918* (2008), pp 139, 487.

¹²⁰ Reference 75 - Robert Graves, *Goodbye to all that* (1929) [Berghahn Books 1995 edition], p 168.

¹²¹ Robert Graves, *Goodbye to all that* (1929) [Berghahn Books 1995 edition], pp 168-169.

84. The following conclusions may be drawn from this assessment:
- a. Whilst killing wounded and prisoners was clearly accepted by 1914 to be a breach of the customs and laws of war, there is ample evidence of instances of the practice amongst (inter alia) Australian forces. This is not to say it was widespread; it is only to say that it occurred.
 - b. There is evidence of command acceptance of non-reporting or non-inquiry as to mistreatment or killing of prisoners. There is also some evidence that ‘take no prisoners’ appeared to be a command-sanctioned policy on some occasions. The justifications furnished for such conduct and orders vary widely; however preserving combat power for counter-attacks (noting that guarding and moving prisoners to the rear took significant resources) was often noted.
 - c. The Surafend incident indicated reluctance amongst command—for policy and political, as well as operational reasons, to hold Australian forces to account for breaches of the prohibition on killing civilians. It also demonstrated the ability of a closely-bonded unit to maintain a code of silence and rebuff attempts to elicit evidence.
 - d. The Rabaul looting cases, however, indicate a willingness to investigate and prosecute lesser (in this case, property) offences.

World War II

What Law of Armed Conflict-related instruments and source of offences bound Australian forces involved

85. Arndell Lewis, in 1936, wrote that:

To prevent damage to the national cause by the conduct of individuals...the British Empire imposes on its soldiers certain rules of conduct in war... A code of rules has been prescribed by authority. It does not matter to the soldier whence they are derived. They exist as national law the breach of which constitutes an offence and as such they must be learnt and observed.¹²²

86. As Lewis recorded, the long-standing British disciplinary distinction between service in wartime and other service was maintained for Australian forces after WWI:

The Australian Army [as at 1936] is governed in war time by a disciplinary code almost identical with that which applies to the Imperial Army and, in time of peace, the provisions of the Defence Act and Australian Military Regulations concerning discipline are an adaptation of the provisions then applying to the army in England.¹²³

87. By 1941, the *Australian Edition of Manual of Military Law 1941: Including Army Acts and Rules of Procedure as Modified and Adapted by the Defence Act 1903-1939 and the Australian Military Regulations* had also been promulgated.

88. In short, the same manner of charging conduct that amounted to a breach of the laws and customs of war as during WWI still pertained—that is, an English ‘ordinary law’ offence. Thus, for

¹²² Arndell Lewis, *Australian Military Law* (1936), pp 209-210.

¹²³ Arndell Lewis, *Australian Military Law* (1936), p 59.

example, in *Australian Military Law* (1936) Arndell Lewis noted that ‘The injury of a person, even an enemy combatant, otherwise than is allowed by the law of war is a crime (murder, assault, etc, as the case may be)’.¹²⁴

Some relevant legislation and treaties in effect during 1939 to 1945

89. In Australia, the *Geneva Convention Act 1938*¹²⁵ (later repealed 1st September 1959 and replaced by *Geneva Conventions Act 1959*) had come into effect and replaced application of the *Geneva Convention Act 1911* (Imp). However, this act was very narrow and designed to implement article 28 of the *Geneva Convention 1929* regarding misuse of the emblem (the primary offence-creating provision being s4 of the Act).

90. By 1945, Australia was party to the following additional LOAC-related treaties:¹²⁶

- a. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare 1925 (into force for Australia 1930);¹²⁷
- b. Convention relative to the Treatment of Prisoners of War 1929 (into force for Australia 1931);¹²⁸ and
- c. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field 1929 (into force for Australia 1931).¹²⁹

Australian action in terms of holding adversaries to account against the applicable Law of Armed Conflict standards

91. Australia was involved in prosecutions of Japanese war criminals at the international and Australian level. Other allies also conducted war crimes trials under their domestic jurisdictions.¹³⁰ An Australian judge—Justice William Webb of the High Court of Australia was the president of the International Military Tribunal for the Far East (IMTFE).¹³¹

¹²⁴ Arndell Lewis, *Australian Military Law* (1936), p 208.

¹²⁵ Reference 76 - *Geneva Convention Act 1938* - <https://www.legislation.gov.au/Details/C1938A00014>.

¹²⁶ Shortened titles employed for ease of reference

¹²⁷ Reference 77 - Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare 1925 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/022DBB0EB21B4BC9CA256C13001F07E3>.

¹²⁸ Reference 78 - Convention relative to the Treatment of Prisoners of War 1929 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/34561983E152ECF5CA256CC80023F7D4>.

¹²⁹ Reference 79 - Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field 1929 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/8F649242719AC381CA256CC8002369B8>.

¹³⁰ Reference 80 - Timothy Maga, ‘Away From Tokyo’: The Pacific Islands war crimes trials 1945-1949’ (2001) 36:1 *Journal of Pacific History* 3; Reference 81 - John Pritchard, ‘The Gift of Clemency following British War Crimes Trials in the Far East, 1946-1948’ (1996) 7:1 *Criminal Law Forum* 15; Reference 82 - Suzannah Linton, ‘Rediscovering the War Crimes Trials in Hong Kong, 1946-48’ (2012) 13 *Melbourne Journal of International Law* 284; Reference 83 - W L Cheah, ‘An Overview of the Singapore War Crimes Trials (1946-1948): Prosecuting Lower-Level Accused’ (2016) 34 *Singapore Law Review* 1.

¹³¹ See inter alia, Reference 84 - Adam Wakeling, *Stern Justice: The forgotten story of Australia, Japan and the Pacific war crimes trials* (2018), and the appendixes contained therein detailing the different levels of trials; Reference 85 -

Australian military court trials of Japanese accused

92. The Australian response to the trial of B and C class war criminals was to establish jurisdiction over these offenders and crimes.¹³² With the war's end many Japanese guards were charged with war crimes committed against prisoners and civilians. Hundreds of prisoners of war wrote statements describing what they had seen and endured. War crimes trials, in which Japanese guards were tried for acts of brutality, were held throughout south-east Asia. In Australian trials, 922 men were tried and 641 were found guilty. Of 148 sentenced to death, 137 were actually executed.¹³³

93. Across the Asia-Pacific, an extensive series of trials of B and C class war criminals under national jurisdictions occurred:

Between 1945 and 1951, 5,677 Japanese soldiers were prosecuted in the BC trials by seven countries – Australia, Nationalist China, France, the Netherlands, the United Kingdom and the United States, plus the newly independent Philippines. The prosecutions took place in 50 or so different courtrooms scattered throughout Southeast Asia, the Pacific and China, in Darwin and in Yokohama; the defendants included over 300 Korean and Taiwanese soldiers, who were treated as Japanese. Charges included murder, enslavement or ill-treatment of prisoners-of-war or local civilians; massacre; torture; and unlawful arrest, trial or execution. Sixteen percent of the total number of cases tried, involving 17% of defendants, were related to prisoner-of-war camps. These cases produced 27% of the guilty verdicts and 11% of the death sentences. Defendants were tried either individually or in groups; in one case in Maluku (the Moluccas), 93 defendants were jointly prosecuted for ill-treatment of Australian, Dutch and American prisoners-of-war. The Japanese military police were a particular target. According to a Japanese Ministry of Justice survey, 37% of those prosecuted belonged to the Kenpeitai; military police accounted for 36% of those convicted and 30% of those condemned to death. The great majority of defendants in the Class B and C trials were convicted. In total, 984 people were condemned to death, 475 to life sentences and 2,944 to other prison terms.¹³⁴

Consequently:

In the period 1945–51 Australian Military Courts convened in Morotai, Wewak, Labuan, Rabaul, Darwin, Singapore, Hong Kong and Manus Island heard 300 war crimes trials. By the end, 812 principally Japanese but also including Korean or Formosan (Taiwanese) alleged war criminals had been tried, some more than once, for a variety of war crimes committed against Allied civilians or military personnel, including ill-treatment, murder and massacre, cannibalism and other violations of the laws and usages of war.¹³⁵

Yuki Takatori, 'America's War Crimes Trial? Commonwealth Leadership at the International Military Tribunal for the Far East, 1946–48' (2007) 35:4 *The Journal of Imperial and Commonwealth History* 549.

¹³² Reference 86 - DC Sissons, *The Australia War Crimes Trials and Investigations (1942-51)*, <https://www.ocf.berkeley.edu/~changmin/documents/Sissons%20Final%20War%20Crimes%20Text%2018-3-06.pdf>.

¹³³ Reference 87 - 'Stolen Years: Australian prisoners of war' - <https://www.awm.gov.au/visit/exhibitions/stolenyears/ww2/japan/warcrimes>.

¹³⁴ Reference 88 - Sandra Wilson, 'After the Trials: Class B and C Japanese War Criminals and the Post-War World' (2011) 31:2 *Japanese Studies* 141, p 142.

¹³⁵ Reference 89 - Statistics as at 1953 - NAA: A1838, 3103/10/13/2 PART 6 <http://guides.naa.gov.au/jpn/chapter7/index.aspx>; Reference 90 – Asia Pacific Centre for Military Law - <http://www.apcml.org/research/australias-post-world-war-ii-war-crimes-trials/>; Reference 91 - Narrelle Morris, 'Unexpected Defeat: The Unsuccessful War Crimes Prosecution of Lt Gen Yamawaki Masataka and others at Manus

94. The table summary of Australian war crimes trials (of Japanese accused) after WWII in the *Oxford Companion to Australian Military History* (1995) sets out the following statistics:

Australian war crimes trials have come in for severe criticism, generally because of legal procedure rather than partiality or unfairness. Of 644 prisoners convicted (69.5 per cent of the total), 148 (23 per cent) were sentenced to death and executed, and 496 (77 per cent) were imprisoned. Thirty-nine prisoners were given life sentences; two were sentenced to 25 years; 152 to 11-24 years; 82 to 10 years; and 22 to less than 10 years.¹³⁶

95. The *War Crimes Act 1945* (Cth) s3 defined 'war crimes' as 'a violation of the laws and usages of war or any war crime within the meaning of the instrument of appointment' of the Australian War Crimes Board of Inquiry, appointed under the National Security (Inquiries) Regulations and the National Security (General) Regulations, on 03 September 1945 (the BOI then reporting in early 1946). This instrument of appointment set out a series of specific acts that came within the definition of 'war crimes'. However, the instrument was specific as to scope. At paragraph 1:

Whether any war crimes have been committed by any subjects of any State with which His Majesty has been engaged in war since the second day of September, One thousand nine hundred thirty-nine, against any persons who were resident in Australia prior to the commencement of any such war whether members of the Defence Force or not, or against any British subject or against any citizen of an allied nation.¹³⁷

96. War crimes were, consequently, acts committed by the enemy and against Australians and allies. The enemy perpetrated war crimes; Australians were the victims of war crimes. In 1953, convicted Japanese war criminals still in Australian custody were returned to Japan to serve the remainder of their sentences.¹³⁸

97. Australia's record in the conduct of these war crimes trials has not been without criticism. One Australian officer involved in trial defence stated at the time, for example, that:

The draftsman of the Australian War Crimes Act had little faith in the body of English law, nor in the provisions of the Australian Manual of Military Law when he drafted Section 9 and regulation of the War Crimes Act.¹³⁹

98. This, the officer continued, led to a range of procedural ills, including time wasted on irrelevant evidence that would not otherwise have been admissible. However, by and large, they were conducted with considerable fairness, in an environment and atmosphere where it would have been easy to be less than fair.

Island, 1950' (2013) 11:3 *Journal of International Criminal Justice* 591; Reference 92 - Georgina Fitzpatrick et al, *Australia's War Crimes Trials 1945-1951* (2016).

¹³⁶ Peter Dennis et al, *Oxford Companion to Australian Military History* (1995), pp 641-642.

¹³⁷ This report is attached to Reference 93 - *Review of material relating to the entry of suspected war criminals into Australia* (Parliamentary Paper No.90 of 1987) - <https://nla.gov.au/nla.obj-1663719208/view?partId=nla.obj-1665147205>; Reference 94 - James Thomson, 'Is it a Mess - The High Court and the War Crimes Case: External Affairs, Defense, Judicial Power and Australian Constitution' (1992) 22:1 *University of Western Australia Law Review* 197.

¹³⁸ Reference 95 - Dean Aszkielowicz, 'Repatriation and the Limits of Resolve: Japanese War Criminals in Australian Custody' (2011) 31:2 *Japanese Studies* 211.

¹³⁹ Reference 96 - George Dickinson, 'Japanese War Trials' (1952) 24:2 *The Australian Quarterly* 69.

International Military Tribunal Far East – the ‘Tokyo Trials’

99. Australia also participated in IMTFE, which prosecuted 28 defendants, of whom two died during trial, one was found unfit to stand trial, seven were sentenced to execution, 16 sentenced to life imprisonment, and two accused sentenced to lesser terms of imprisonment.¹⁴⁰

Australia’s record in terms of holding Australian personnel to account against the applicable Law of Armed Conflict standards

100. As with all previous conflicts, WWII also generated reports and allegations relating to, most significantly, Australian forces’ treatment of enemy wounded and captured. In the first case, the conduct was command sanctioned at the highest level, and was believed to have fallen on the right side of the border between harsh but necessary permissibility, and impermissibility. Indeed the justification for these components of conduct was specifically, explicitly, and formally recorded. However, other components of this conduct—certainly by current standards, and perhaps also by the standards at the time—crossed the line. The second case involves clear breaches of the laws and customs of war, and were recognised to be such at the time.

Battle of Bismarck Sea

101. The Battle of the Bismarck Sea, 02 to 05 March 1943, involved an aerial attack on a Japanese convoy.¹⁴¹ For the loss of a handful of aircraft, the Allied Air Forces had sunk 12 ships (all eight of the troop transports and four of the eight destroyers) and killed 3000 enemy soldiers. The operation dealt a significant blow to Japanese hopes of regaining the initiative in New Guinea and eliminated any possibility Australia might be invaded.¹⁴² As Gregory Gilbert records:

They had to prevent them from getting ashore and reinforcing their forces at Lae. Without thought of rescuing the shipwrecked Japanese sailors and soldiers, the Allies called for their destruction. Some of the Japanese were able to swim to motorized barges or launches, which remained afloat after the transports had sunk, and because these craft could be considered weapons with some military value, they were legitimate military targets. However, the majority of Japanese survivors were using lifeboats, rafts and debris to stay afloat, or just attempting to stay alive by floating or swimming. Rescue from the air was impossible, but even the efforts made to rescue Japanese from the water at night by USN PT boats, invariably resulted in Japanese swimming away from their potential rescuers.¹⁴³

¹⁴⁰ Peter Dennis et al, *Oxford Companion to Australian Military History* (1995), pp 642; Reference 97 - Gerry Simpson, ‘Revisiting the Tokyo War Crimes Trial’ (2009) 78:4 *Pacific Historical Review* 608; Reference 98 - Sung Yoon Cho, ‘The Tokyo War Crimes Trial’ (1967) 24:4 *The Quarterly Journal of the Library of Congress* 309.

¹⁴¹ Reference 99 - Douglas Gillison, *Royal Australian Air Force 1939-1942* (1962) (Australia in the War of 1939-1945: Series 3, Vol. I), pp 691-696.

¹⁴² Reference 100 - Alan Stephens, ‘The Battle of the Bismarck Sea March 1943’, 02 March 2017 - <http://centralblue.williamsfoundation.org.au/the-battle-of-the-bismarck-sea-alan-stephens/>; Reference 101 - Alan Stephens, ‘The Battle of the Bismarck Sea’ - <http://www.battleforaustralia.org.au/BABismarkSea.php> (Reproduced by courtesy of *Wings* the official journal of the RAAF Association); Reference 102 - Alan Stephens, ‘The Battle of the Bismarck Sea’ - <http://www.battleforaustralia.org.au/BABismarkSea.php>.

¹⁴³ Reference 103 - Gregory Gilbert, *The Battle of the Bismarck Sea, March 1943* (2013), p 61.

Consequently, the immediate aftermath of the battle involved extensive killing of survivors from the convoy, some of whom would have been properly classified as 'shipwrecked':

On the 5th, and for several days thereafter, there was the terrible yet essential finale: Beaufighters, Bostons and Mitchells swept to and fro over the waters of the Huon Gulf seeking out and destroying barges and rafts crowded with survivors from the sunken enemy ships. It was grim and bloody work for which the crews had little stomach. Some of the men in Beaufighter crews confessed to experiencing acute nausea. The realistic and grimly objective comment from one of their flight leaders was that every one of these troops was an enemy pledged to kill his opponents and so every one the Beaufighters' guns prevented from getting ashore was 'one Jap' less for the Army to kill.¹⁴⁴

102. As Alan Stephens additionally notes, 'and after fifteen months of Japanese brutality, the great immorality, it seemed to them, would have been to have ignored the rights of their 'soldiers'.¹⁴⁵ The official exculpatory rationale, as reported by Ken Wright, was as follows:

During 4 and 5 March, with the convoy destroyed, orders were issued for the aircrews to strafe survivors in the water, in lifeboats, on rafts and any rescue vessels that might appear. No survivor must be allowed to reach land to fight Allied troops. Once ashore those survivors who were still armed would fight.¹⁴⁶

103. Similarly, as reported by Lex McAulay: 'It now remained to sink whatever was left, and to kill as many as possible of the Japanese still in the water or small boats'.¹⁴⁷ Some of these attacks were undoubtedly legitimate – non-life raft vessels such as barges, and the personnel in them, still attempted to fire on Allied aircraft, for example.¹⁴⁸ 'Over the course of the day [05 March 1943] approximately 24 barges were attacked and 350 Japanese killed'.¹⁴⁹ Prima facie, however, the strafing of survivors in the water who had not attempted to continue the fight¹⁵⁰ was not in compliance with Article 16 of 1907 *Hague Convention X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention*, in relation to Japanese sick, wounded and shipwrecked.¹⁵¹

Execution of Japanese prisoners

104. There are persistent allegations as to Australian summary executions of Japanese PWs and wounded. One allegation concerned the bayoneting to death of five to seven Japanese wounded

¹⁴⁴ Douglas Gillison, *Royal Australian Air Force 1939-1942 (1962)* (Australia in the War of 1939-1945: Series 3, Vol. I), pp 694-695.

¹⁴⁵ Alan Stephens, 'The Battle of the Bismarck Sea' - <http://www.battleforaustralia.org.au/BABismarckSea.php> (Reproduced by courtesy of *Wings* the official journal of the RAAF Association).

¹⁴⁶ Reference 104 - Ken Wright, 'Battle of the Bismarck Sea; (December 2009) *Naval Historical Journal* - <https://www.navyhistory.org.au/battle-of-the-bismarck-sea/5/>.

¹⁴⁷ Reference 105 - Lex McAulay, *The Battle of the Bismarck Sea: 3 March 1943* (2008) p 135; Reference 106 - Alexander Gillespie, *A History of the Laws of War: Volume I – The Customs and Laws of War with Regards to Combatants and Captives* (2011), p 190.

¹⁴⁸ Lex McAulay, *The Battle of the Bismarck Sea: 3 March 1943* (2008), p 152.

¹⁴⁹ Gregory Gilbert, *The Battle of the Bismarck Sea, March 1943* (2013), p 66.

¹⁵⁰ Lex McAulay, *The Battle of the Bismarck Sea: 3 March 1943* (2008), p 144.

¹⁵¹ 'Art. 16. After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment..'

and prisoners. These POW had been captured by one platoon, then killed by the next platoon that came through the position.

Maj[or] Gen[eral] Paul Cullen, who received a Distinguished Service Order for his part in a number of Allied campaigns in the war, told an ABC programme in 2001 Australian soldiers bayoneted to death unarmed Japanese prisoners of war, which would be classed as war crimes under the rules of combat governing POWs, when he commanded the Australian [2/1st] Infantry Battalion during the New Guinea campaign.¹⁵²

105. This allegation concerned 2/1st Battalion at Gorari. Major General Cullen told the Australian Broadcasting Corporation reporter, Tony Stephens, that: 'I did not see the killings but they were reported to me later and I believe the report. I thought it was bad but we were already moving on to another battle'.¹⁵³ He continued:

You might say that's nothing compared to what the Japanese did to our POWs but, for that reason, I refused to give evidence to the War Crimes trial. It was understandable but I felt it was my battalion, my soldiers. I felt pretty guilty about that.¹⁵⁴

106. As Kevin Baker concludes, however, 'whatever the feelings of the Australian soldiers involved, the killing of prisoners in the aftermath of the battle of Gorari was a war crime'.¹⁵⁵ Such reports are not unique. Similarly, for example, Philip Dwyer recounts the following:

Take the 1943 diary entry of Eddie Stanton, an Australian posted to Goodenough Island off Papua New Guinea. 'Japanese are still being shot all over the place,' he wrote. 'The necessity for capturing them has ceased to worry anyone. From now on, Nippo survivors are just so much machine-gun practice. Too many of our soldiers are tied up guarding them.'¹⁵⁶

The War Crimes Act 1988 (Commonwealth)

107. Gideon Boas argues that:

The War Crimes Act remained a functional but dormant piece of legislation between 1951 and 1961 when Australia officially announced that it would 'close the chapter' on war crimes prosecutions. The circumstances in which this policy decision was taken surrounded a request from the Soviet Union for the extradition of a suspected war criminal which was rejected. The acting External Affairs Minister at the time, Sir Garfield Barwick, determined the sentiment in Australia to be consistent with the view that, whilst the community was outraged by such crimes, it was ostensibly time to move on. This sentiment is one that, with some exception in the 1980s and 1990s, still reverberates in Australia's contemporary attitude to war criminals.¹⁵⁷

¹⁵² Reference 107 - 'Australians killed Japanese POWs, ex-general claims', *Irish Times*, 24 April 2001 - <https://www.irishtimes.com/news/australians-killed-japanese-pows-ex-general-claims-1.304172>; Reference 108 - Kevin Baker, *Paul Cullen, Citizen and Soldier: The Life and Times of Major-General Paul Cullen* (2005), pp 145-146.

¹⁵³ Kevin Baker, *Paul Cullen, Citizen and Soldier: The Life and Times of Major-General Paul Cullen* (2005), p 145.

¹⁵⁴ Kevin Baker, *Paul Cullen, Citizen and Soldier: The Life and Times of Major-General Paul Cullen* (2005), p 146.

¹⁵⁵ Kevin Baker, *Paul Cullen, Citizen and Soldier: The Life and Times of Major-General Paul Cullen* (2005), p 146.

¹⁵⁶ Reference 109 - Philip Dwyer, 'Anzacs behaving badly: Scott McIntyre and contested history', *The Conversation*, 29 April 2015 - <http://theconversation.com/anzacs-behaving-badly-scott-mcintyre-and-contested-history-40955>.

¹⁵⁷ Reference 110 - Gideon Boas, 'War Crimes Prosecutions in Australia and other Common Law Countries: Some Observations' (2010) 21 *Criminal Law Forum* 313.

108. Konrad Kwiet records how:

In 1986...the war crimes debate resurfaced in Australia, reignited by a prominent investigative journalist for ABC, Mark Aarons. His radio series, *Nazis in Australia*, hit a raw nerve, attracting large audiences and considerable controversy.¹⁵⁸

109. The essence of the ultimately adopted scheme was as follows:

Under the 1988 Act, it is an indictable offence to have committed a war crime between 1 September 1939 and 8 May 1945. A new definition of 'war crime', replacing the 1945 concept, was also enacted. Three elements are involved. First, there must be a serious crime defined as an act which, if done in Australia, would have been, under Australian law, a specified offence, for example, murder, manslaughter, wounding or rape. Secondly, that serious crime must have been committed in specified circumstances such as during war hostilities or religious persecution in a country involved in war. Thirdly, war is confined to the war in Europe from 1 September 1939 to 8 May 1945. Finally, only an Australian citizen or resident can be charged with having committed a war crime.¹⁵⁹

110. The scope of the war crimes susceptible to this Act was therefore hemmed by the following conditions:

- a. The alleged war crime was committed in Europe during WWII;
- b. The alleged war crime was committed by a person who was on the adversary side at that time—that is, was fighting against Australia and the Allies; and
- c. The accused now has a relevant connection with Australia such that they were within the jurisdiction of the Act.

111. A key constitutional question as to the validity of the Act was dealt with by the High Court, which ultimately concluded the Act was constitutional. Regarding the scope of the Act, Chief Justice Mason stated that:

The primary and substantial concern of the [1988] Act is with war crimes committed outside Australia, in other words, with conduct on the part of persons outside Australia. Further, the primary and substantial concern of the [1988] Act is with war crimes committed in Europe during the Second World War. The person charged must be an Australian citizen or resident only at the time that he or she is charged. It follows that the [1988] Act makes criminal acts done by a person who, at the time of the commission of those acts, had no relevant connexion with Australia.¹⁶⁰

¹⁵⁸ Reference 111 - Konrad Kwiet, 'A Historian's View: The War Crimes Debate Down Under' (2010) 24:1 *Dapim: Studies on the Holocaust* 319, p 327.

¹⁵⁹ Reference 112 - James Thomson, 'Is It a Mess - The High Court and the War Crimes Case: External Affairs, Defence, Judicial Power and Australian Constitution' (1992) 22 *University of Western Australia Law Review* 197, pp 200-201.

¹⁶⁰ Reference 113 - *Polyukhovych v Commonwealth* (1991) 172 CLR 501, 526.

112. As Gillian Triggs observes, this approach was to some extent a last option, given the assessed difficulties of applying the *Immigration Act 1920* and the *Migration Act 1958* as mechanisms for deporting the accused.¹⁶¹

The three cases

113. In 1987, the Special Investigations Unit (SIU) was established in order to gather evidence on war crimes committed in Europe during WWII, where the alleged perpetrators were people now living in Australia. The SIU collected significant amounts of evidence, but only three cases proceeded beyond investigatory stages with a view to prosecution under the *War Crimes Act 1988* (Cth): Ivan Polyukhovych, Mikolay Berezovsky, and Heinrich Wagner.¹⁶² An investigation into Karlis Ozols, 'a Latvian SS officer and a chess champion of international stature, [who was alleged to have] served as a Lieutenant with the Arajs Kommando, Latvia's infamous killing squad' was abandoned in 1992.¹⁶³

114. The background to the *Polyukhovych* case was as follows:

First to be charged under the War Crimes Act was the seventy-five-year-old Ukrainian born Ivan Polyukhovych. He was a former gamekeeper, a forest warden accused of having participated in the liquidation of the small Jewish community of Serniki, a village situated in the Pripjet marshes.¹⁶⁴

115. The *Polyukhovych* prosecution resulted in an acquittal in May 1993 in the South Australian Supreme Court, 'due to lack of sufficient evidence to prosecute the case'.¹⁶⁵

116. In the *Berezovsky* case, the Magistrate dismissed the charges. The background and outcome of this case was as follows:

Seventy-eight-year-old Mikolay Berezovsky, a former Ukrainian policeman, was charged with the murder of one hundred and two Jews in the village of Gnivan. This case was 'dismissed by a magistrate due to contradictory evidence given by witnesses and historical experts'.¹⁶⁶

117. Finally, the Director of Public Prosecutions (DPP) did not proceed with the *Wagner* case. The background was that

...sixty-nine year-old Heinrich Wagner was declared unfit to appear in court. This ethnic German was accused of serving in the Ukrainian auxiliary police force. Deployed in the village of

¹⁶¹ Reference 114 - Gillian Triggs, 'Australia's War Crimes Trials: A Moral Necessity or Legal Minefield' (1987) 16 *Melbourne University Law Review* 382.

¹⁶² Peter Dennis et al, *Oxford Companion to Australian Military History* (1995), p 642.

¹⁶³ Konrad Kwiet, 'A Historian's View: The War Crimes Debate Down Under' (2010) 24:1 *Dapim: Studies on the Holocaust* 319, p 330.

¹⁶⁴ Konrad Kwiet, 'A Historian's View: The War Crimes Debate Down Under' (2010) 24:1 *Dapim: Studies on the Holocaust* 319, p 329.

¹⁶⁵ Reference 115 - <http://www.internationalcrimesdatabase.org/Case/1172>; Reference 116 - 'Jury acquits man of war crimes charges', 18 May 1993, <https://apnews.com/139ec9629b591b4108823a6511302637>.

¹⁶⁶ Konrad Kwiet, 'A Historian's View: The War Crimes Debate Down Under' (2010) 24:1 *Dapim: Studies on the Holocaust* 319, p 329.

Israelovska, he allegedly participated in the killing of one hundred and four Jews, including nineteen children...¹⁶⁷

118. The record of Australian prosecution of war crimes that took place in Europe during WWII, by accused who by the 1980s now resided in Australia, was not particularly successful. Boas and Chifflet conclude as follows:

The SIU conducted 841 investigations from which it identified 27 cases of suspected war criminals, but due to insufficient evidence these persons were not prosecuted. Ultimately the SIU referred four cases to the Commonwealth Director of Public Prosecutions ('CDPP'), of which the three matters of Ivan Polyukhovich [sic], Heinrich Wagner and Mikolay Berezovsky were prosecuted [although the DPP did not ultimately proceed with the Wagner case]. These post-1980 war crimes prosecutions were heavily criticised in the media, due to the combination of a failure to secure convictions and the \$30 million cost of the investigations and prosecutions. A clear obstacle was the unreliability or unavailability of eyewitness evidence in light of the time that had passed since the alleged events.¹⁶⁸

Conclusion

119. The following conclusions may be drawn from this assessment:

- a. Whilst there was significantly less ambivalence by 1939 to 1945 regarding the killing of prisoners, there were nevertheless credible reports of executions of Japanese prisoners and wounded. There was also some concomitant command non-reporting or inaction in the face of credible contemporaneous reports of this conduct.
- b. The operations against Japanese lifeboats and survivors in the water after the Battle of the Bismarck Sea illustrates one situation where strategic purpose was clearly accepted as trumping any ambiguity attaching to the legality of the conduct. However, the air war involved a wide range of other conduct, such as bombing of cities and civilian population centres, which was also officially sanctioned but which today would clearly constitute a war crime.
- c. Australia took an active and robust role in the prosecution of adversaries for war crimes offences. However, legislation to facilitate such prosecutions passed both in 1945 and in 1988 was explicitly tailored to exclude Australian conduct or allegations of war crimes by Australians from scope.

Vietnam War

What Law of Armed Conflict-related instruments and source of offences bound Australian forces involved

120. The general scheme of disciplinary regulation applicable to Australian forces on active service during WWII continued to apply to Australian forces during the Vietnam War – as set out in *The Defence Act 1903-1953 and regulations and Orders for the Australian Military Forces* (1955). One

¹⁶⁷ Konrad Kwiet, 'A Historian's View: The War Crimes Debate Down Under' (2010) 24:1 *Dapim: Studies on the Holocaust* 319, pp 329-330.

¹⁶⁸ Gideon Boas and Pascale Chifflet, 'Suspected war criminals in Australia: law and policy' (2016) 40 *Melbourne University Law Review* 46, p 54.

new development was that the incorporation of UK discipline codes by reference in the *Defence Act 1903* and the *Naval Defence Act 1910* had changed subtly.

121. Previously, the Defence Act had incorporated the Army Act (UK) ‘for the time being in force’. This meant any amendments to the Act made from time to time by the UK Parliament were incorporated by the Defence Act automatically, although they could be modified or made inapplicable in Australia by regulation. In the UK, the Army Act was due to be repealed on 1 January 1957, and if no action was taken in Australia, the new UK legislation would automatically apply in Australia. A bill containing a revised Army discipline code for Australia was believed, at the time, to be so close to being enacted that the effort required in Australia to implement a new UK discipline code for a short period of time would not be justified. Accordingly, the Defence Act was amended to apply the Army Act in force as at 29 October 1956, that is, before the *Army Act 1955* (UK) came into force. No-one at the time could possibly have foreseen that the UK Army Act of 1881 would continue to apply under Australian law for nearly 30 years after its repeal in the UK.¹⁶⁹

122. The *Naval Defence Act 1910* applied the Naval Discipline Act ‘for the time being in force’, and the Navy (whose needs were different from those of the Army) took no action to prevent the new *Naval Discipline Act 1957* (UK) from being applied to Australia. Finally, however, the Naval Defence Act was amended to apply the *Naval Discipline Act 1957* (UK) in force as at 6 November 1964.

123. Another new development was that the UK *Geneva Conventions Act 1957* now specifically enshrined ‘grave breaches’ of the Conventions as offences within British law.¹⁷⁰ This raises an issue

¹⁶⁹ Bruce Oswald and Jim Waddell (eds.), *Justice in Arms: Military Lawyers in the Australian Army’s first hundred years* (2014), p 246.

¹⁷⁰ *Geneva Conventions Act 1957* (UK), s1 – ‘Grave breaches of scheduled conventions

(1) Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions, that is to say—

(a) article 50 of the convention set out in the First Schedule to this Act [GCI Article 50 Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly];

(b) article 51 of the convention set out in the Second Schedule to this Act;

(c) article 130 of the convention set out in the Third Schedule to this Act; or

(d) article 147 of the convention set out in the Fourth Schedule to this Act,

shall be guilty of felony and on conviction thereof—

(i) in the case of such a grave breach as aforesaid involving the wilful killing of a person protected by the convention in question, shall be sentenced to imprisonment for life;

(ii) in the case of any other such grave breach as aforesaid, shall be liable to imprisonment for a term not exceeding fourteen years.

(2) In the case of an offence under this section committed outside the United Kingdom, a person may be proceeded against, indicted, tried and punished therefor in any place in the United Kingdom as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.

(3) Neither a court of quarter sessions nor, in Scotland, the sheriff shall have jurisdiction to try an offence under this section, and proceedings for such an offence shall not be instituted in England except by or on behalf of the Director of Public Prosecutions or in Northern Ireland without the consent of the Attorney General for Northern Ireland.

(4) If in proceedings under this section in respect of a grave breach of any of the scheduled conventions any question arises under article 2 of that convention (which relates to the circumstances in which the convention applies), that

regarding the application of s41 of the Army Act, and for that matter, the application of similar sections in the *Naval Discipline Act 1957* (UK) and the *Air Force Act 1917* (UK) which applied in Australia. Section 41 of the Army Act provided that a person subject to military law committed a civil offence triable by court martial where that offence, if committed in England, was punishable by the law of England, whether committed in England or elsewhere. The 'grave breach' offences introduced by the *Geneva Conventions Act 1957* (UK) appear to have come within that category.

124. While UK enactments affecting the Army Act subsequent to 29 October 1956 had no application to Australia, subsequent UK enactments creating or otherwise affecting civil offences continued to apply to charges brought against Australian personnel under s41 of the old Act. In Vietnam, for example, Australian servicemen were court-martialled on charges brought by reference to s41 under the *Road Traffic Act 1960* (UK).¹⁷¹

125. The issue therefore appears to be as follows:

- a. The original UK *Geneva Convention Act 1911* (Imp) was explicitly made inapplicable to Australia by s 3 of the *Geneva Convention Act 1938* (Cth);
- b. However, the UK *Geneva Conventions Act 1957* was a different Act, and specifically contained provision for 'grave breach' war crimes offences in British law;
- c. The Australian disciplinary scheme on war service still enabled the prosecution of offences which, if committed in England, were punishable by the law of England; and
- d. Consequently, it is possible that Australian service personnel on war service could thus have been charged with a UK *Geneva Conventions Act 1957* 'grave breach' offence via the operation of the UK Army Act. However, no such prosecution is known to have occurred.

126. In terms of international treaty obligations, by 1966, Australia was also party to the following additional LOAC related treaties:

- a. Convention on the Prevention and Punishment of the Crime of Genocide 1948 (into force for Australia 1951);¹⁷²
- b. Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 (into force for Australia 1959);¹⁷³

question shall be determined by the Secretary of State and a certificate purporting to set out any such determination and to be signed by or on behalf of the Secretary of State shall be received in evidence and be deemed to be so signed without further proof, unless the contrary is shown.

(5) The enactments relating to the trial by court-martial of persons who commit civil offences shall have effect for the purposes of the jurisdiction of courts-martial convened in the United Kingdom as if this section had not been passed'.

¹⁷¹ Bruce Oswald and Jim Waddell (eds.), *Justice in Arms: Military Lawyers in the Australian Army's first hundred years* (2014), p 319.

¹⁷² Reference 118 - Convention on the Prevention and Punishment of the Crime of Genocide 1948 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/337A7F546A6194F2CA256B6E0075FE12>.

¹⁷³ Reference 119 - Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 -

<https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/8112EAA6C9C366C0CA256BB80078DFB7>.

- c. Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949 (into force for Australia 1959);¹⁷⁴
- d. Geneva Convention III relative to the Treatment of Prisoners of War 1949 (into force for Australia 1959);¹⁷⁵
- e. Geneva Convention IV relative to the Protection of Civilian Persons in Time of War 1949 (into effect for Australia 1959).¹⁷⁶

Australian action in terms of holding adversaries to account against the applicable Law of Armed Conflict standards

127. Australia was not involved in war crimes trials of adversary forces from the Vietnam War.

Australia's record in terms of holding Australian personnel to account against the applicable Law of Armed Conflict standards

128. The Vietnam conflict has been a substantial and lingering source of rumour, allegation, and long-delayed investigation in relation to Australian conduct. More than 50 years after they are alleged to have taken place, there is little chance that any of these allegations will ever proceed beyond initial investigatory stage. The challenges implicit in heavy reliance on recollection, and the difficulties of evidence collection in relation to historical offences, when it relates to a foreign war half a century past, are naturally much exacerbated.

129. The scope of these allegations is also widely contested, and many are difficult to credit. One Vietnamese historian states that Australian troops were involved in 'savagely beatings, rapes, arbitrary arrests, beheadings, the plucking out of people's livers, the exposure of corpses for deterrent purposes, wanton shootings – these were common practices'.¹⁷⁷ Stuart Rintoul, in the preface to *Ashes of Vietnam: Australian Voices* (1987) asserts that Australians in Vietnam were guilty of acts of barbarity. He states that there were Australians whose morality was so eroded that they murdered villagers, raped women, tortured and killed wounded enemy soldiers and mutilated corpses.¹⁷⁸

130. Some of these allegations have identifiable bases and origins—for example, the mistreatment of the dead. Other allegations may have been generalised from a specific incident—for example,

¹⁷⁴ Reference 120 - Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/1857606C905BA8D2CA256BB8007A5740>.

¹⁷⁵ Reference 121 - Geneva Convention III relative to the Treatment of Prisoners of War 1949 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/F63F97B76BA80E5ECA256BB8007B1513>.

¹⁷⁶ Reference 122 - Geneva Convention IV relative to the Protection of Civilian Persons in Time of War 1949 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/7F7DFC7C488B14BDCA256BB8007B1303>.

¹⁷⁷ Reference 123 - Tran Quoc Trung, 'A page of history one should not take pride in', in Kenneth Maddock and Barry Wright (eds), *War: Australia and Vietnam* (1987), p 90.

¹⁷⁸ Reference 124 - Stuart Rintoul, *Ashes of Vietnam: Australian Voices* (1987), pxiv, and examples at pp.48 (mutilation of dead), 55 (mutilation of dead), 91, (mistreatment of bodies), 116 (killing wounded), 122 (killing civilians), 129 (killing wounded), 136 (planting evidence), 148 (rape), 155 (killing prisoners), 165 (running over dead and wounded in an APC), 170 (withholding medical attention from wounded), 172 (killing civilians), 176 (killing wounded, killing civilians).

that there was a single allegation of water torture (see below) is clear; that it was common practice is not.

131. The point for the purposes of this report, however, is that the persistent circulation of these allegations was generally accompanied by a subsidiary allegation as to failure to report, discouragement of reporting, and lack of investigation, which are cited as the reasons that the documentary record is scarce. Additionally, the failure to gather evidence at the time, when it would have been both fresh and more plentiful, has meant that subsequent investigations and inquiries have been hampered by the limited availability of contemporaneous documentary evidence, and the consequent challenge of heavy reliance on oral statement evidence based on long-distant recollection. It must also be acknowledged that recollection and memory can be faulty in terms of reconceptualising incidents that were tragic, but not unlawful, mistakes in the battlespace, into war crimes.

132. There is, consequently, a long history of allegations regarding Australian conduct in Vietnam, including recent referrals to the Australian Federal Police (AFP). These have generally been subsequent to the publication of biographies of participants in the war, or new histories of Australia's involvement in the war. In 2001, for example, responsibility for a reported 1968 incident (related by former Deputy Prime Minister Tim Fischer and quoted in his biography) was subsequently questioned:

Australian soldiers have been accused of committing a war crime during the Vietnam War. A retired New Zealand Major says Australians executed two Viet Cong prisoners in cold blood following a skirmish in 1968.

An account of the battle appears in the biography of former National Party Leader and Vietnam veteran Tim Fischer. But in Mr Fischer's book, the killings are attributed to New Zealand troops.

Well, that version is now being challenged by a witness named Major John Moller, who is the former President of the Vietnam Veterans' Association of New Zealand...

PETER LLOYD: John Moller's version of the killing is at odds with an account given by Australian helicopter pilot Peter Rogers, who says he was with Tim Fischer when they overheard the radio message. In Mr Fischer's book, 'The Boy from Booree Creek' that radio conversation is between a New Zealand SAS patrol and its headquarters. But John Moller says that is impossible.

JOHN MOLLER: Yeah, Rogers makes the assumption, because there was a Kiwi accent on the other end of the radio, that it was a New Zealand unit. But the fact is that it was quite common for New Zealand radio operators to be attached to Australian units in the form of artillery forward observation groups.

PETER LLOYD: So which unit do you say was involved in this?

JOHN MOLLER: It would have been one of the Australian infantry units.¹⁷⁹

133. Another recent example from 2013 relates to the publication in 2011 of Frank Walker's *Ghost Platoon*. As reported in the media at the time:

¹⁷⁹ Reference 125 - Peter Lloyd, 'Aussies accused of war crimes in Vietnam', *AM* (ABC), 26 June 2001 - <https://www.abc.net.au/am/stories/s319013.htm>.

The allegations, including claims Diggers dragged the headless corpses of Viet Cong behind armoured personnel carriers, have been the source of official cover-up claims for more than 40 years.

However, the AFP was finally asked to investigate after fresh evidence was unearthed in the National Archives by an author researching a book on the alleged incident in May 1969. Author Frank Walker welcomed the investigation into the allegations raised in his book *Ghost Platoon*.

‘I hope they get to the truth,’ he said. ‘Terrible things happen in war, and while I found nothing in my research to suggest this incident was a deliberate malicious attempt to kill civilians, it should be resolved one way or the other’.

‘The allegation that an Australian army unit fired on civilians, possibly killing a boy, has caused a bitter dispute inside the Vietnam veteran community. Some deny it happened, others argue there’s no point bringing it up so long after the war’.

‘However, I found military documents in the National Archives which state the unit did fire on civilians after the unit had been through a day of heavy fighting and conducting two ambushes on vastly superior enemy numbers’.

He said the documents also confirmed the troops ‘blew up enemy bodies rather than bury them and dragged the bodies of enemy soldiers ... into a Vietnamese village to serve as an example to the locals’.

A spokesman for the AFP confirmed that the Department of Defence had asked them to investigate conduct that was in contravention of the Geneva Convention.¹⁸⁰

134. The nature of the allegations and recollections that continue to vex Australia’s record during the Vietnam War generally coalesce around four types of proscribed conduct: killing civilians; mistreatment of enemy wounded and captured, and ‘revenge killings’; mistreatment of corpses; and use of ‘throwdowns’.

Killing civilians

135. In general, Australian forces went to great lengths to ensure civilians were clear of the battlefield prior to a planned engagement. Nevertheless, allegations of killing of civilians have circulated in the Australian press for some time. In 1985, a series of ABC reports raised allegations regarding Binh Ba in June 1969. That some civilians were killed is not generally denied; however the circumstances of their killing are debated. The ABC reported on a ‘massacre’. The Commanding Officer of 5th Battalion, Royal Australian Regiment at the time (by 1985, a Brigadier) strenuously rebutted this claim.¹⁸¹ Frank Frost also records the allegation of a ‘massacre’ of 27 civilians at Hoa Long in July 1970, which was in fact a well-reported ambush.¹⁸² Frank Walker records a claim by one

¹⁸⁰ Reference 126 - Matthew Benns, ‘Australian Federal Police may investigate claims Diggers committed atrocities during the Vietnam War. Atrocities allegedly committed by Australian soldiers during the Vietnam War referred to the Australian Federal Police’, *Daily Telegraph*, 29 Dec 2013 - <https://www.news.com.au/national/australian-federal-police-may-investigate-claims-diggers-committed-atrocities-during-the-vietnam-war/news-story/805921342a5e9a39143c34bdb871d074>.

¹⁸¹ Reference 127 - Frank Frost, *Australia’s War in Vietnam* (1987), pp 120-121.

¹⁸² Frank Frost, *Australia’s War in Vietnam* (1987), pp 135-137.

veteran that the killing of a woman and her baby was covered up by running 'over the bodies in the APC [Armoured Personnel Carrier] to obliterate trace of the atrocity'.¹⁸³ As Frank Walker notes, however, many of these allegations have sparked long-lived 'bitter battles' between and amongst veterans.

136. In their analysis of contacts reported by Australian forces in Vietnam 1966 to 1971, Bob Hall and Andrew Ross assessed five contacts (involving five civilian deaths and a further five wounded civilians) in which it appeared that 'ROE [rules of engagement] were forgotten or ignored'. Of these, three are perhaps apposite for present purposes:¹⁸⁴

The first involved an SAS patrol that saw two men chopping a log that lay across a track. Both were shot in the head and killed. A woman then appeared who was also shot dead. No weapons or equipment were found that could suggest a connection with the VC [Viet Cong]. The contact took place within 1.5 kilometres of a village on Route 15 at 0945 hours; that is to say, at a location and a time in which it might be expected that civilians could be encountered. However, the dead were identified as enemy because they hid each time a plane flew overhead. This hardly seems sufficient evidence upon which to draw a conclusion that would end the lives of three people. It should have been questioned more closely at the time. Civilians often hid from planes and helicopters, especially if they were in or near Free Fire Zones.¹⁸⁵

The second contact also involved an SAS patrol that contacted, during mid-morning, an adult carrying a bow and arrow and a child. The patrol scout saw the man clearly, realized he was not an enemy, and did not fire. But another member of the patrol opened fire shooting the man dead and wounding the child. It was possible, as was later claimed, that the man who fired had thought the bow and arrow was an automatic weapon. But since the scout had not fired, the second man's reaction may have been too hasty...¹⁸⁶

The fifth contact concerned an infantry patrol in harbour that opened fire on a small party of unarmed women who happened to walk by. The patrol was within 0.5 kilometres of nearby houses, so the presence of civilians was always possible. The patrol opened fire without checking to see if the women were armed. One woman was killed and two wounded. The patrol was immediately withdrawn from the field.¹⁸⁷

A similar report is that members of 6th Battalion, Royal Australian Regiment, on 13 December 1966, also killed three unarmed woodcutters who they 'thought to be VC as they hid whenever a plane went overhead'.¹⁸⁸ This is similar to the alleged SAS incident above (dated as October 1966). What is of note in respect of these two 'ducking woodcutters' incidents is that they potentially point to an expansive approach to the indicia of identification of hostile character, which is echoed to some

¹⁸³ Reference 128 - Frank Walker, *Ghost Platoon* (2011), p 175.

¹⁸⁴ Reference 129 - Robert Hall and Andrew Ross, 'Case Study: Confronting moral dilemmas in combat: Vietnam 1966-1971' (2010) 1 *Leadership and Ethics Papers* (Australian Defence College), pp 8-9.

¹⁸⁵ The sources cited by Hall and Ross are as follows: AWM95, item 2/6/10. Pdf p44, Sitrep; AWM95, 7/12/5.Pdf, 3SAS Squadron, October 1966 p64; AWM95, item 7/6/9.Pdf. p177; this incident is also discussed in Reference 130 - Terry Burstall, *Vietnam: The Australian Dilemma* (1993), p 102, and Reference 131 - Terry Burstall, *A Soldier Returns* (1990), p 179.

¹⁸⁶ The source cited for this incident is: Analysis of the Vietnam Contact Database, 1 SAS Squadron.

¹⁸⁷ The sources cited for this incident are: AWM95, item 7/7/53. Pdf. 7 RAR p. 65; AWM95, item 7/7/58. Pdf. P. 50, Contact Report.

¹⁸⁸ Terry Burstall, *A Soldier Returns* (1990), p 179.

extent in the issue of 'squirters' in Afghanistan. However, it is important to note that in Vietnam, it was widely accepted that 'short range, visibility obscured, risk of high enemy rate of fire' engagements clearly necessitated early engagement.¹⁸⁹ Other incidents, such as a drunken sentry at a checkpoint shooting at (but missing) a scooter, were 'serious offences and could have resulted in death or serious injury to innocent Vietnamese', but were dealt with by the disciplinary system.¹⁹⁰

Mistreatment of enemy wounded and captured, and 'revenge killings'

137. The general record of Australian conduct in Vietnam is good. In most cases, wounded enemy, no longer able to fight, would be captured, their wounds treated, and evacuation organised. Some soldiers went to extraordinary lengths, including risk to their own safety, to recover wounded enemy or to get civilians trapped in the middle of a fire-fight, to safety. Other soldiers described the risks taken by dustoff pilots to get their helicopters into small landing zones, sometimes in bad light or bad weather, to evacuate enemy wounded. Most soldiers sought to treat enemy wounded as they would like to have been treated themselves were the position reversed. However, on a few occasions, the reality fell short of this ideal.¹⁹¹

138. Disputes as to the more well-known allegations are long lived. For example, Frank Frost discounts the allegation raised by Ian Mackay (in his 1968 book *Australians in Vietnam*¹⁹²) that Australians shot wounded Viet Cong after the battle of Long Tan¹⁹³ and cites Lex McAulay's argument in rebuttal of this allegation.¹⁹⁴ Terry Burstall, however, remains adamant that this occurred, and cites (inter alia) a signal log in support.¹⁹⁵ From 8th Battalion, Royal Australian Regiment's (8 RAR) tour, Bob Hall records that¹⁹⁶:

In one case, a platoon commander said that a few days after a mine incident that had killed two members of his platoon, one of his soldiers had deliberately killed a wounded enemy and had hauled the body out of the jungle and dropped it at his feet, like a dog retrieving a stick.¹⁹⁷

Another 8 RAR soldier wrote that:

¹⁸⁹ Communication from Vietnam veteran.

¹⁹⁰ Reference 132 - Robert Hall, *Combat Battalion: The 8th Battalion in Vietnam* (2000), p 246 - in this case the soldier was charged with and convicted of drunkenness on duty and sentenced to 21 days detention.

¹⁹¹ Robert Hall and Andrew Ross, 'Case Study: Confronting moral dilemmas in combat: Vietnam 1966-1971' (2010) 1 *Leadership and Ethics Papers* (Australian Defence College), p 10.

¹⁹² Reference 133 - Ian Mackay, *Australians in Vietnam* (1968), p 200 - the author states that he was told this by an Australian soldier.

¹⁹³ Frank Frost, *Australia's War in Vietnam* (1987), p 83.

¹⁹⁴ Reference 134 - Lex McAulay, *The Battle of Long Tan* (1986), pp 158-159.

¹⁹⁵ Terry Burstall, *A Soldier Returns* (1990), p 54.

¹⁹⁶ Robert Hall and Andrew Ross, 'Case Study: Confronting moral dilemmas in combat: Vietnam 1966-1971' (2010) 1 *Leadership and Ethics Papers* (Australian Defence College), p 11.

¹⁹⁷ The source cited is Robert Hall, *Combat Battalion: The 8th Battalion in Vietnam* (2000), p 202. The note attached to the citation is as follows: 'It should be noted that many of the issues addressed in this article are not supported by documentary evidence. Matters reflecting dubious ethical behaviour such as those discussed here generally tend not to be recorded in official records. In writing *Combat Battalion*, Hall therefore relied on oral history, written correspondence or responses to questionnaires. He regarded incidents as having been confirmed if the incident was described by two or more independent references to them from his correspondents'.

When I came across the wounded nog I felt an intense hatred and feeling of getting even for the loss of mates killed and wounded in [the] previous mine incident. I opened up with my Armalite by deliberately aiming at his head as he looked at me, trying to crawl away. ... I then had, and still have, mixed feelings about whether I murdered that man or not.¹⁹⁸

139. Other incidents were reported and investigated, but nevertheless took on a life of their own in the media. Frank Frost, Terry Burstall, and Paul Ham recount the ‘so-called water torture incident’ (of a captured Viet Cong woman fighter), which took place in October 1966. This incident was not reported in the Australian press until 1968, when ‘the story of the ‘war crime’ took more column inches of newsprint than the Tet Offensive and Long Tan’.¹⁹⁹ However, as both Frost and Ham note, this incident was subject to swift inquiry and the responsible non-commissioned officer dealt with.

Dealing with the bodies of killed enemy

140. Allegations of interference with, looting, and arranging offensive photographs of, the bodies of killed enemy and civilians have likewise persisted.²⁰⁰ Frank Walker’s *Ghost Platoon* (2011) sets out several allegations relating to mistreatment of enemy bodies, including relating to the engagement at Thua Tich, and regarding towing bodies behind Armoured Personnel Carriers (APCs).²⁰¹ Hall and Ross write that:

The appropriate handling of the dead emerged as a particular issue in mid-1969 when a highly successful ambush on the 29th-30th May was followed by the battle of Binh Ba on the 6th-7th June. The ambush raised questions about the appropriate handling of the dead—at least one enemy body had been towed behind an APC. The battle of Binh Ba resulted in the mass burial, using a bulldozer, of over 40 VC/PAVN bodies in the village school yard. Both incidents raised concerns in Army Headquarters in Canberra.

It was decided that a new edition of *Unit Guide to the 1949 Geneva Convention for the Protection of War Victims (Modified for Australia)*, incorporating Articles 15, 16 and 17, would be produced for the guidance of troops. However, this would take some time. In the meantime, a letter was to be circulated outlining the requirements for the treatment of enemy dead. The letter stated that:

In general, the Conventions demand that the standards of dignity and reverence applied in handling the bodies of enemy dead, before and during burial, and in the recording of procedures followed, shall be the same as those required in the case of deceased PW.²⁰²

141. ‘Engineer burials’ (using explosives at the scene) are reported. However, as Hall has subsequently noted, on occasion the carriage of bodies in and on the APCs was also a result of local requests to transport the bodies for burial.²⁰³ Again, it is vital to remember that while some conduct is clearly characterisable as a war crime, other conduct that may at first glance appear unlawful can

¹⁹⁸ The source cited is Robert Hall, *Combat Battalion: The 8th Battalion in Vietnam* (2000), p 202.

¹⁹⁹ Reference 135 - Paul Ham, *Vietnam: The Australian War* (2007), pp 411-413; Frank Frost, *Australia’s War in Vietnam* (1987), pp 81-83; Terry Burstall, *Vietnam: The Australian Dilemma* (1993), pp 167-168.

²⁰⁰ Robert Hall and Andrew Ross, ‘Case Study: Confronting moral dilemmas in combat: Vietnam 1966-1971’ (2010) 1 *Leadership and Ethics Papers* (Australian Defence College).

²⁰¹ Frank Walker, *Ghost Platoon* (2011), pp 286-293.

²⁰² The source cited is: AWM98, item R670/1/10, Prisoners of War – General – Burial of VC and NVA Dead - Letter, Major General A.L. MacDonald, Adjutant-General, to AFV, 1 Aug 69.

²⁰³ Communication from Dr Hall.

in fact be the result of accident or legitimate request. Reports of looting the dead for jewellery and gold, and arranging the dead for disrespectful photographs, also exist.²⁰⁴

Use of 'throwdowns':²⁰⁵

142. Stuart Rintoul records one incident, recounted by a soldier as follows:

There was one occasion when we set up an ambush and we killed one man and one woman and discovered later they were unarmed. It was a genuine ambush. It was a free-fire zone and they knew if they were in that area at night they were going to be regarded as enemy. We found out later by questioning people in the local village that they were the parents of a Viet Cong guerrilla who was up in the hills and they were on their way up with baskets filled with fish and fruit and vegetables when they walked into our ambush.

When we discovered they were unarmed our platoon commander told us to put some grenades in the basket along with the fish and vegetables and we reported on the radio that they were carrying grenades. Nobody enjoyed lying about that, but as far as we were concerned they were the enemy.²⁰⁶

143. Hall and Ross have similarly observed how:

On clearing the battlefield and finding that they had killed persons who were not carrying weapons, 1ATF [1st Australian Task Force] soldiers sometimes 'fitted up' the corpses with M-26 grenades. On checking the 1ATF Vietnam Contact Database 1966-1971, four contacts can be found where one enemy was killed and curiously, in each case he was armed with a single M-26 grenade.²⁰⁷ In one of these, a query about the Lot number of a grenade supposedly 'found' with the 'enemy' body revealed that the grenade was from the same lot that had been issued to the battalion at the start of the operation.²⁰⁸

144. Another source of allegations regarding throwdowns from a participant, but provided in an academic context with corroborating accounts, was reported in 2014 by *The Daily Telegraph*:

Vietnam War Diggers killed civilian bamboo pickers in an ambush and were told they should have put enemy weapons on the bodies to make them look like Viet Cong combatants, the platoon's commander claims.²⁰⁹

²⁰⁴ Robert Hall and Andrew Ross, 'Case Study: Confronting moral dilemmas in combat: Vietnam 1966-1971' (2010) 1 *Leadership and Ethics Papers* (Australian Defence College), pp 14-15.

²⁰⁵ Throwdown refers to items placed in a location fraudulently, and is usually associated in this context with an enemy killed in action.

²⁰⁶ Stuart Rintoul, *Ashes of Vietnam: Australian Voices* (1987), p 136.

²⁰⁷ The source cited is: Analysis of the Vietnam Contact Database.

²⁰⁸ Robert Hall and Andrew Ross, 'Case Study: Confronting moral dilemmas in combat: Vietnam 1966-1971' (2010) 1 *Leadership and Ethics Papers* (Australian Defence College), p 9.

²⁰⁹ Reference 136 - Matthew Benns, 'Bombshell claims army covered up truth about Aussie massacre at Nui Dat in Vietnam in 1967', *Daily Telegraph*, 12 Oct 2014 - <https://www.dailytelegraph.com.au/news/nsw/bombshell-claims-army-covered-up-truth-about-aussie-massacre-at-nui-dat-in-vietnam-in-1967/news-story/3eacf164bb0fa42790fb66b138922834>; the journal article cited is Reference 137 - Ben Morris, 'The Diggers' wish: set the record straight' (2014) 36 *Oral History Association of Australia Journal* 72, pp 72-85.

145. This report is related to the publication of an article by Ben Morris, 'The Diggers' wish: set the record straight' in the *Oral History Association of Australia Journal*. This article recorded the following incident as having taken place on 23 October 1967:

Early [in the] morning, a group of civilians entered the ambush area.²¹⁰ One person in this group took a long object off his shoulder and waved it at the soldiers.²¹¹ The machine gunner opened fire, as he believed it was a weapon.

The firing lasted less than 30 seconds, and in that time the platoon's machine guns and rifles had killed four civilians and badly wounded a fifth who later died. There were another six wounded.²¹² The order to cease-fire was given when it became clear that the platoon had fired on unarmed persons, including women and children. The platoon returned to base.²¹³ Later we learned that the villagers had been looking for bamboo thus the incident became known as the 'Bamboo Pickers' ambush.

On the platoon's return to the Nui Dat Base, the Company Commander suggested to me that the platoon should have been carrying captured enemy weapons to place on dead bodies.²¹⁴ This would allow the battalion to claim these dead as enemy. The Australians had adopted the American system of rating an operation's success on the body count. It seemed that the Company Commander wanted the company's statistics enhanced.²¹⁵

Conclusion

146. There is a persistent and not insubstantial body of unresolved allegations regarding the commission of war crimes by Australian service personnel during the Vietnam War. Some of these have been referred to the AFP in the 50 years since the conflict, but there is a paucity of contemporaneous documentary evidence. Whether this was because of poor record-keeping and preservation, or due to an unstated policy of silence and non-reporting, is impossible to definitively assess at this point. Likely, both factors played a role. Additionally, it is likely that some of the allegations relate to actual incidents which were not considered to be of doubtful legality at the time, but which in recollections since may have been interpreted as 'war crimes'. The consequence, at any rate, has been the long-term and corrosive persistence of primarily oral reports and allegations circulated at some temporal distance from the alleged events.

²¹⁰ The source cited is: 2 RAR Commander's Diary, AWM 95-7-2-45 part 1, 1 ATF Rear Patrol Programme for the period 200800H to 260800H, dated 19 October 1967, Folio 26.

²¹¹ Sources cited are contemporaneous Australian newspaper reports of the incident.

²¹² The source cited is: EB Morris, Patrol Commander's Report dated 23 October 1967; The report is also quoted by Terry Burstall, *A Soldier Returns* (1990), p 180.

²¹³ The source cited is: 'This was in accordance with the Task Patrol Plan 200800H October 1967 to 260800H October 1967'.

²¹⁴ The source cited is an interview by Ben Morris, the author.

²¹⁵ Ben Morris, 'The Diggers' wish: set the record straight' (2014) 36 *Oral History Association of Australia Journal*, pp 72-85. This allegation caused some controversy at the time as the Company Commander concerned was Peter White, who had subsequently entered State and Federal politics and been Shadow Minister for Defence. He died in 2005, but when the allegations emerged in 2014, former Prime Minister John Howard asserted 'There was nothing about his behaviour to suggest he would have conducted himself in the manner alleged': Reference 138 - Matthew Benns, 'Peter White an officer and a gentleman, says his close friend John Howard', *Daily Telegraph*, 12 October 2014 -<https://www.dailytelegraph.com.au/news/nsw/peter-white-an-officer-and-a-gentleman-says-his-close-friend-john-howard/news-story/b86fd20f520e6ae1cad127cbcbe8b77a>.

147. The following conclusions may be drawn from this assessment:

- a. The failure to comprehensively deal with allegations and indicators as they begin to emerge and circulate is corrosive—it gives spurious allegations life, and serious allegations a degree of impunity. The consequences of not addressing such allegations as and when they eventually arise are measured in decades.
- b. Furthermore, there is some evidence of a culture of non-reporting, or of command non-inquiry, regarding some incidents that clearly raised prima facie allegations of war crimes, including killing of wounded and mutilation of bodies.
- c. There is some evidence of use of ‘throw downs’ to retrospectively ‘justify’ or buttress the validity of some killings.
- d. There is some evidence of the adoption of an expansive approach to identification of targetable individuals and the indicia of targetable conduct.

Iraq War I

What Law of Armed Conflict-related instruments and source of offences bound Australian forces involved

148. Iraq invaded Kuwait on 02 August 1990. The First Gulf War (1990 to 1991) saw Australian units engaged in the campaign to enforce subsequent United Nations sanctions against Iraq, and then to evict Iraqi forces from Kuwait.²¹⁶

149. Over 1800 Australian Defence personnel were deployed in the Gulf War from August 1990 to September 1991. The force comprised units from the Army, Navy and Royal Australian Air Force (RAAF). In addition, Army and RAAF provided personnel to Operation HABITAT.

150. The Australian contribution was primarily maritime, and involved (in two rotations) Her Majesty’s Australian Ship (HMAS) *Success*, HMAS *Adelaide*, HMAS *Darwin*, HMAS *Westralia*, HMAS *Brisbane*, and HMAS *Sydney*. However, other units and Services were also involved, including ‘a detachment from the Army’s 16th Air Defence Regiment, a Royal Australian Navy (RAN) Clearance Diving Team, RAAF photo-interpreters, Defence Intelligence Organisation personnel, and four medical teams’.²¹⁷ Additionally, some ADF members were third country deployed with UK and US force elements. Ultimately, ‘Although the ships and their crews were in danger from mines and possible air attack, Australia’s war was relatively uneventful and there were no casualties’.²¹⁸

²¹⁶ Reference 139 - Chris Oxenbould, ‘RAN participation in UN Sanctions and the war against Iraq’, in Frederick Kirkland (ed), *Operation Damask: The Gulf War Iraq – Kuwait 1990-1991* (1991), pp 93-107; Reference 140 - Gareth Evans, ‘The case for Australian participation’, in Murray Goot and Rodney Tiffen (eds), *Australia’s Gulf War* (1992), pp 7-25; Reference 141 - Ian Bickerton et al, *43 days: The Gulf War* (1991), ch 6.

²¹⁷ Reference 142 - Australian War Memorial - <https://www.awm.gov.au/articles/encyclopedia/gulf>.

²¹⁸ Reference 143 - Australian War Memorial - <https://www.awm.gov.au/articles/event/gulf>.

151. By 1991, Australia was party to the following additional LOAC related instruments or, in two cases, having signed the instruments was obliged to refrain from acts which would have defeated their object and purpose prior to ratifying them:²¹⁹

- a. Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (into force for Australia 1984);²²⁰
- b. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction 1972 (into force for Australia 1977);²²¹
- c. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (1980) ("CCW") (into effect for Australia 1984);
- d. Convention on Certain Conventional Weapons (CCW) Protocol on Non-Detectable Fragments (*Protocol 1*) 1980, CCW Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices 1980, and CCW Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons 1980 (all into effect for Australia 1984);²²²
- e. Protocol Additional I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977 (signed by Australia in 1978 but not ratified until after the conflict);²²³
- f. Protocol Additional II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 1977 (signed by Australia in 1978 but not ratified until after the conflict).²²⁴

152. As at 1990 to 1991, some relevant and applicable Australian legislation related to LOAC and the disciplinary system was:

²¹⁹ Reference 144 - Vienna Convention on the Law of Treaties 1969 - <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>, Article 18.

²²⁰ Reference 145 - Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/C464F105ECE4079FCA256B250014965F>.

²²¹ Reference 146 - Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction 1972 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/F8FFE109B6C9A58BCA256C13001F07E4>.

²²² Reference 147 - Convention on Certain Conventional Weapons (CCW) Protocol on Non-Detectable Fragments (*Protocol 1*) 1980, CCW Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices 1980, and CCW Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons 1980 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/0744FF32857B807DCA256C0200131DE5>.

²²³ Reference 148 - Protocol Additional I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/90F4C7F69200C13ACA256BB8007E022E>.

²²⁴ Reference 149 - Protocol Additional II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 1977 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/66EC45ED97D02D21CA256BB8007CE019>.

- a. *Defence Force Discipline Act 1982* (Cth), including the s 61 'window' into certain offences via applicable Australian Capital Territory and *Commonwealth* legislation. This scheme had replaced the UK Army Act, UK Naval Discipline Act and UK Air Force Act-dependent disciplinary schemes applicable from 1900 to 1985
- b. *Crimes Act 1914* (Cth) (as at 1991);²²⁵
- c. *Crimes (Biological Weapons) Act 1976* (as at 1980);²²⁶ and
- d. *Geneva Conventions Act 1957* (Cth), which was about to be amended by the *Geneva Conventions Amendment Act 1991*,²²⁷ which included the s 7 offence of 'grave breach of the Conventions'.²²⁸

Australian action in terms of holding adversaries to account against the applicable Law of Armed Conflict standards

153. There are reports of war crimes by Iraqi forces during the First Gulf War.²²⁹ Australia was not involved in any war crimes trials against Iraqi forces subsequent to the first Gulf War. However, Australia continued to play an ongoing role in subsequent sanctions enforcement against Iraq.

Australia's record in terms of holding Australian personnel to account against the applicable Law of Armed Conflict standards

154. There were no allegations or reports of war crimes involving Australian forces during the First Gulf War.

Conclusion

155. This assessment of war crimes in Australian history has reviewed the way in which Australia has historically approached the laws of armed conflict, both in respect of adversaries and in respect of our own. From this review, the following have emerged as key themes of relevance for this Inquiry:

²²⁵ Reference 150 - *Crimes Act 1914* (Cth) - <https://www.legislation.gov.au/Details/C2004C03157>.

²²⁶ Reference 151 - *Crimes (Biological Weapons) Act 1976* - <https://www.legislation.gov.au/Details/C2004C03112>.

²²⁷ Reference 152 - *Geneva Conventions Act 1957* (Cth), which at the time was about to be amended by the *Geneva Conventions Amendment Act 1991* - <https://www.legislation.gov.au/Details/C2004C04263>, commenced operation 28 March 1991.

²²⁸ *Geneva Conventions Act 1957*: 'Section 7(1) A person who, in Australia or elsewhere, commits, or aids, abets or procures the commission by another person of, a grave breach of any of the Conventions is guilty of an indictable offence.

(2) For the purposes of this section:

(a) a grave breach of the First Convention is a breach of that Convention involving an act referred to in Article 50 of that Convention committed against persons or property protected by that Convention;

(b) a grave breach of the Second Convention is a breach of that Convention involving an act referred to in Article 51 of that Convention committed against persons or property protected by that Convention;

(c) a grave breach of the Third Convention is a breach of that Convention involving an act referred to in Article 130 of that Convention committed against persons or property protected by that Convention; and

(d) a grave breach of the Fourth Convention is a breach of that Convention involving an act referred to in Article 147 of that Convention committed against persons or property protected by that Convention'.

²²⁹ Ian Bickerton et al, *43 days: The Gulf War* (1991), pp 76-77, 81.

- a. There are indications in this record—from the Boer War through to the Vietnam War—that some Australian service members have, and that other Australian service members may have, previously been involved in the killing of detainees, prisoners, persons *hors de combat*, and persons otherwise under the control of Australian forces.
- b. There are indications in this record of disconnects between formal orders and policy, and local unit practices, in relation to operation involving contact with enemy forces and civilians in the area of operations.
- c. There are indications in this record, predominantly from the Vietnam War, of the practice of using ‘throwdowns’ to retrospectively ‘justify’ or buttress the validity of some killings.
- d. There are some indications in this record, again predominantly from the Vietnam War, of an expansive approach to the identification of targetable individuals and the indicia of targetable conduct.
- e. There are indications in this record of incident non-reporting and obfuscation, with a view to avoiding more detailed inquiry or investigation.
- f. There are historical examples – the Surafend incident involving the 1st Australian Light Horse Brigade in Palestine in late 1918 is the clearest and most notable – of the ability of a closely-bonded unit to maintain a code of silence and rebuff attempts to obtain evidence, for very many years.
- g. The failure to comprehensively deal with allegations and indicators as they begin to emerge and circulate is corrosive—it gives spurious allegations life, and serious allegations a degree of impunity. The consequences of not addressing such allegations as and when they eventually arise are measured in decades.

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138. Matthew Bennis, 'Peter White an officer and a gentleman, says his close friend John Howard', *Daily Telegraph*, 12 October 2014 - <https://www.dailytelegraph.com.au/news/nsw/peter-white-an-officer-and-a-gentleman-says-his-close-friend-john-howard/news-story/b86fd20f520e6ae1cad127cbcbe8b77a>
139. Chris Oxenbould, 'RAN participation in UN Sanctions and the war against Iraq', in Frederick Kirkland (ed), *Operation Damask: The Gulf War Iraq – Kuwait 1990-1991* (1991), pp 93-107
140. Gareth Evans, 'The case for Australian participation', in Murray Goot and Rodney Tiffen (eds), *Australia's Gulf War* (1992), pp 7-25
141. Ian Bickerton et al, *43 days: The Gulf War* (1991)
142. Australian War Memorial - <https://www.awm.gov.au/articles/encyclopedia/gulf>
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144. Vienna Convention on the Law of Treaties 1969 - <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>
145. Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/C464F105ECE4079FCA256B250014965F>
146. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction 1972 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/F8FFE109B6C9A58BCA256C13001F07E4>
147. Convention on Certain Conventional Weapons (CCW) Protocol on Non-Detectable Fragments (*Protocol 1*) 1980, CCW Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices 1980, and CCW Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons 1980 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/0744FF32857B807DCA256C0200131DE5>
148. Protocol Additional I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977 - <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/AllDocIDs/90F4C7F69200C13ACA256BB8007E022E>
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150. *Crimes Act 1914* (Cth) - <https://www.legislation.gov.au/Details/C2004C03157>
151. *Crimes (Biological Weapons) Act 1976* - <https://www.legislation.gov.au/Details/C2004C03112>

152. *Geneva Conventions Act 1957* (Cth), which at the time was about to be amended by the *Geneva Conventions Amendment Act 1991* -
<https://www.legislation.gov.au/Details/C2004C04263>

Chapter 1.09

AFGHANISTAN, AUSTRALIA, AND THE SPECIAL OPERATIONS TASK GROUP

EXECUTIVE SUMMARY

This chapter outlines Australia's involvement in Afghanistan during the period 2001 to 2015¹; the composition and command status of the Special Operations Task Group (SOTG);² its role as it evolved over the period; its lines of operation; and its targeting procedure, including the Joint Prioritised Effects List (JPEL). It is not intended to provide a detailed account or analysis of these matters, but to provide the necessary background to assist contextualisation and understanding of the incidents and issues described in Part Two of this Report.

INTRODUCTION

1. On 20 December 2001, by United Nations Security Council (UNSC) Resolution 1386³ made under UN Charter Chapter VII, the UNSC declared that it:

1. Authorizes ... the establishment for 6 months of an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment;

2. Calls upon Member States to contribute personnel, equipment and other resources to the International Security Assistance Force, and invites those Member States to inform the leadership of the Force and the Secretary-General;

3. Authorizes the Member States participating in the International Security Assistance Force to take all necessary measures to fulfil its mandate.

2. The North Atlantic Treaty Organisation (NATO) force raised under Resolution 1386 was the International Security Assistance Force (ISAF). Initially, its main purpose was to train the Afghan National Security Forces (ANSF) and assist Afghanistan in rebuilding key government institutions, while engaged in operations against the Taliban, al Qaeda and factional warlords. In October 2003,

¹ See generally: Reference 1 – Nicole Brangwin, with assistance from Ann Rann, Science Technology, Australia's military involvement in Afghanistan since 2001: a chronology, available at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/1011/MilitaryInvolvementAfghanistan, available at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/1011/MilitaryInvolvementAfghanistan#_ftn10

² SOTG is employed as a collective term in this chapter to cover the initial three rotations of Special Forces Task Force, three rotations of Special Forces Task Group, and seventeen rotations of Special Operations Task Group.

³ Reference 2 – UNSCR Resolution 1386 The situation in Afghanistan, available at <http://unscr.com/en/resolutions/1386>

the UN Security Council adopted Resolution 1510⁴ which authorised the expansion of the ISAF mission throughout Afghanistan. As NATO summarises the position:⁵

NATO led the UN-mandated International Security Assistance Force (ISAF) from August 2003 to December 2014. ISAF's mission was to enable the Afghan authorities and build the capacity of the Afghan national security forces to provide effective security, so as to ensure that Afghanistan would never again be a safe haven for terrorists.

ISAF was NATO's longest and most challenging mission to date: at its height, the force was more than 130,000 strong with troops from 50 NATO and partner nations.

ISAF also contributed to reconstruction and development in Afghanistan through 28 multinational Provincial Reconstruction Teams.

The transition to Afghan lead for security started in 2011 and was completed in December 2014, when the ISAF operation ended and the Afghans assumed full responsibility for security of their country.

3. Australia was one of the NATO partner nations.

OPERATION SLIPPER

4. As has been explained elsewhere, the Australian Defence Force (ADF) contribution to ISAF was designated Operation SLIPPER, and occurred in three phases which were broadly 2001 to 2002, 2005 to 2006 and 2007 to 2014. ADF operations in Afghanistan after 2014 have been in the nature of military training and security for officials, and are designated Operation HIGHROAD.

5. The following table (Table 1.09.1), drawn from the 2010 Australian Parliamentary Library Report on 'Australia's military involvement in Afghanistan since 2001: a chronology',⁶ and updated to 2015, summarises the deployments of ADF Land Forces to Afghanistan during the period 2001 to 2015:

ADF element	Deployment timeframe
Special Forces Task Force (SFTF) / Special Forces Task Group (SFTG) / Special Operations Task Group (SOTG)	October 2001 – November 2002 (three rotations) August/September 2005 – September 2006 (three rotations) May 2007 – December 2013 (17 rotations)
CH-47 Chinook helicopter (Rotary Wing Group) (two aircraft)	July 2006 – September 2013 (seasonal rotations usually conducted between February/March to November - Final deployment RWG-8)
Reconstruction Task Force (RTF)	May 2006 – October 2008 (four rotations)

⁴ Reference 3 – UNSCR Resolution 1510 The situation in Afghanistan, available at <http://unscr.com/en/resolutions/1510>

⁵ Reference 4 – NATO and Afghanistan, available at https://www.nato.int/cps/en/natolive/topics_8189.htm website as at 09 October 2020

⁶ Nicole Brangwin, with assistance from Ann Rann, Science Technology, Australia's military involvement in Afghanistan since 2001

Mentoring and Reconstruction Task Force (MRTF)	October 2008 – February 2010 (two rotations, each eight months in length)
Mentoring Task Force (MTF) / Advisory Task Force (ATF)	February 2010 – November 2012 (Final MTF-5 replaced by ATF-1) ATF-1 and ATF-2 November 2012 - February 2014

Table 1.09.1: Summary of ADF Land Force Deployments to Afghanistan 2001 to 2015.

6. The following summary focusses on the Special Forces (SF) component.

First phase – 2001 to 2002

7. The first period of engagement for ADF force elements in Afghanistan was 2001 to 2002. This deployment followed the Al Qaeda attack on the United States (US) on 11 September 2001, Prime Minister Howard's 14 September 2001 invocation of Article IV of the ANZUS Treaty,⁷ and the Parliamentary Motion of support for the US on 17 September 2011 (which 'fully endorse[d] the commitment of the Australian Government to support within Australia's capabilities US-led action against those responsible for these tragic attacks').⁸ Sir Angus Houston, who was Chief of Air Force at the time, has observed that the initial deployment context was the 'US-led Operation Enduring Freedom, commencing on 07 October 2001, under the banner of the International Coalition Against Terrorism (ICAT) and [which] resulted in the initial defeat of the Taliban and al Qaeda in Afghanistan'.⁹

8. The Special Forces Task Force (SFTF), as it was then called, first deployed to Afghanistan on 22 October 2001.¹⁰ It comprised approximately 200 personnel. Although ISAF was established soon afterwards (on 20 December 2001, via UNSC Resolution 1386),¹¹ the ADF Special Forces contingent continued to operate within the US Operation Enduring Freedom construct. This first phase of Australian Special Forces deployments to Afghanistan concluded at the end of November 2002. The Defence Minister, Robert Hill, stated that this was because 'the focus of operations has moved towards supporting the reconstruction of Afghanistan, the particular skills of our Special Forces are in less demand. Most of the troops should be home before Christmas to celebrate the holiday season with their families'.¹²

⁷ Reference 5 – J Howard (Prime Minister), Application of ANZUS Treaty to terrorist attacks on the United States, media release, 14 September 2001, available at

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FYFY46%22>

⁸ Reference 6 – J Howard, 'Motion: United States of America: terrorist attacks', House of Representatives, Debates, 17 September 2001, p30739, available at

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2001-09-17%2F0004%22>

⁹ Reference 7 – Sir Angus Houston, Presentation to Operation Burnham Inquiry – Public Hearing, Wellington 4 April 2019.

¹⁰ Reference 8 – P Reith (Minister for Defence), Australia farewells Special Forces soldiers, media release, 22 October 2001, available at

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FVFPF56%22>

¹¹ Reference 9 – United Nations Security Council, Resolution 1386 (2001), [Situation in Afghanistan], 20 December 2001, available at <http://www.un.org/Docs/scres/2001/sc2001.htm>

¹² Reference 10 – R Hill (Minister for Defence), Australian Special Forces to return from Afghanistan, media release, 20 November 2002, available at

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F9NX76%22>

9. The role of the SFTF during this first phase was described as 'a vital contribution to destroying terrorist networks in Afghanistan and to providing a secure future as the nation rebuilds'.¹³

10. The withdrawal of the SFTF did not end ADF engagement in Afghanistan, however, and between 2002 and 2005, the ADF continued to deploy specialist personnel under UN and ISAF umbrellas, primarily in support of UN landmine clearance operations.

Second phase – 2005 to 2006

11. The second phase of ADF deployments to Afghanistan was announced on 13 July 2005, when the Prime Minister stated:

It's fair to say that the progress that's been made and the establishment of a legitimate Government in Afghanistan has come under increasing attack and pressure from the Taliban in particular and some elements of Al Qaeda. We have received, at a military level, requests from both the United States and others and also the Government of Afghanistan and we have therefore decided in order to support the efforts of others to support in turn the Government of Afghanistan to despatch a Special Forces Task Group which will comprise some 150 personnel, comprising SAS troops, Commandos and supporting elements. We would expect that group to be in place by September of this year. It will be deployed for a period of twelve months. It will have a security task which is very similar to the task that was undertaken by an SAS taskforce that went in 2001. It will operate in conjunction with forces of the United States. There will be a separate Australian national command, although the SAS Task Group will be under the operational control of United States forces.¹⁴

12. The Government also flagged the potential deployment of a Provincial Reconstruction Team from early-mid 2006, and the planned deployment of the first Reconstruction Task Force was subsequently announced on 13 June 2006.¹⁵ The main body deployed in September 2006.¹⁶ Additionally, an ADF Aviation Force Element of 110 personnel was deployed to Afghanistan on 13 March 2006.¹⁷

¹³ R Hill (Minister for Defence), Australian Special Forces to return from Afghanistan, media release, 20 November 2002.

¹⁴ Reference 11 – J Howard (Prime Minister), Troop deployment to Afghanistan, Telstra, Rau family, press conference transcript, 13 July 2005, available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F8QOG6%22>

¹⁵ Reference 12 – Defence Media Release: Commander of Reconstruction Task Force to Afghanistan Announced, available at https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/BT0X6/upload_binary/bt0x60.pdf;fileType=application%2Fpdf#search=%22media/pressrel/BT0X6%22

¹⁶ Reference 13 – Department of Defence, Aussie reconstruction task force on the ground, media release, 18 September 2006, available at https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/1AEW6/upload_binary/1aew61.pdf;fileType=application%2Fpdf#search=%22media/pressrel/1AEW6%22

¹⁷ Reference 14 – Brendan Nelson (Minister for Defence), Media Release, Defence minister Brendan Nelson Farewells Army Aviation Troops Bound for Afghanistan, available at https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/FT0X6/upload_binary/ft0x60.pdf;fileType=application%2Fpdf#search=%22media/pressrel/FT0X6%22

13. During this second phase of engagement in Afghanistan, which wound up in September 2006,¹⁸ there were three rotations of the SFTG, each comprising approximately 200 personnel. The primary mission of the SFTG during this phase was described as follows:

The Task Force will be employed in a variety of roles similar to those performed in 2001 including combat patrols of remote regions, reconnaissance and surveillance operations working closely with our Coalition partners.¹⁹

14. When this second phase of SFTG deployments was wound up, it was specifically recognised that the operational tempo, for the Special Air Service Regiment (SASR) in particular, had been very high: Air Chief Marshal Houston, then Chief of the Defence Force, noted during Senate Estimates in February 2007 that:

The SAS have come home. They needed a break. That is the first Christmas in five years that the regiment has had a break. They have now reconstituted and they are at home in Perth, and of course they continue to maintain a very high level of readiness for the standing tasks that they have upon them all the time.

Senator CHRIS EVANS—There is no current intention to send them back into Afghanistan?

Air Chief Marshal Houston—The government has not made any decisions about special forces.²⁰

Third phase – 2007 to 2014

15. The third phase of Special Forces deployments to Afghanistan was announced on 10 April 2007, alongside a significant overall increase in the Australian commitment of forces, including expansions and extensions in relation to existing commitments.²¹ For this phase, the SOTG was to operate under the ISAF umbrella rather than the US Operation ENDURING FREEDOM umbrella.²² The intended role of the SOTG in this third phase of deployment was initially described as follows:

...a Special Operations Task Group of about 300 personnel will shortly deploy to Oruzgan province for at least two years. It will operate in direct support of ISAF elements in Oruzgan. Its role will be to enhance provincial security by disrupting Taliban extremists' command and

¹⁸ Reference 15 – J Howard (Prime Minister), Address at the Special Forces Task Group welcome home ceremony and award presentation, speech, 26 November 2006, available at https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/4TKL6/upload_binary/4tkl64.pdf;fileType=application%2Fpdf#search=%22media/pressrel/4TKL6%22

¹⁹ Reference 16 – Robert Hill (Minister for Defence), Special Forces task group deploy to Afghanistan, media release, 24 August 2005, available at https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/783H6/upload_binary/783h61.pdf;fileType=application%2Fpdf#search=%22media/pressrel/783H6%22

²⁰ Reference 17 – Official Committee Hansard Senate, Senate Standing Committee on Foreign Affairs, Defence and Trade Wednesday, 14 February 2007 pp11-12.

²¹ Reference 18 – John Howard (Prime Minister), More troops for Afghanistan, media release, 10 April 2007, available at https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/YDQM6/upload_binary/ydqm61.pdf;fileType=application%2Fpdf#search=%22media/pressrel/YDQM6%22

²² 'The special forces are under the direct operational control of General McKiernan. We have the largest special operations task group available to Commander ISAF in Afghanistan'. Reference 19 – Official Committee Hansard Senate, Standing Committee on Foreign Affairs, Defence and Trade, Estimates (Additional Estimates) Wednesday, 25 February 2009, p34.

control and supply routes. These forces will operate under an Australian commander working within the ISAF framework.

The Task Group's activities will directly support the Australian Reconstruction Task Force, support the development of the Afghan national security forces and help reinforce the legitimacy of the Afghan Government with the local population.²³

16. The first rotation commenced in May 2007. Whilst some aspects of the SOTG role evolved over time during this third phase, it was relatively consistent in terms of prioritising force protection operations, as the following statements illustrate:

a. *May 2007:*

The role of the Special Operations Task Group is to enhance provincial security in Oruzgan and provide direct support to our RTF [Reconstruction Task Force]....

Last year we saw much higher levels of violence than we had seen the year before, and I guess that some people were anticipating a higher level of violence this time around. It is still very early in the summer in Afghanistan, but our force of special operations people has been deployed there to **enhance the force protection for the Reconstruction Task Force and, obviously, for the provincial reconstruction team that we work with.**

Simply put, beyond the provincial capital of Tarin Kowt and the Afghan development zone surrounding it, we see a lot of Taliban sanctuaries, particularly in the northern part of the province. Essentially, those sanctuaries enable Taliban operations into the southern part of Oruzgan and Tarin Kowt, where we are, but also into the provinces of Helmand and Kandahar—Helmand where the British are and Kandahar where the Canadians are. That is really the situation as it stands at the moment...

So, for reasons of operational security, I do not want to say any more than that **our special operations people will be doing operations that will make the Taliban extremely uncomfortable.**²⁴

b. *June 2008:*

Senator CORMANN—A view has been put to me in recent weeks that perhaps our special forces are increasingly getting involved in what is described as conventional warfare operations in Afghanistan. Could you comment on that, and related to that, have we made any assessment as to whether there are other parts of the Army that might be able to add to our capability in that regard?

Air Chief Marshal Houston—You might have been reading the Army Journal! We could use infantry in these circumstances but we have chosen to use special forces [sic], and the element that we use most of the time in these circumstances is our commandos. Commandos are very well equipped. They have very heavy firepower. They are, generally speaking, very experienced and very highly skilled soldiers and we are very comfortable with the job that they are doing. **They are ideally suited to doing disruption operations**

²³ Official Committee Hansard Senate, Standing Committee on Foreign Affairs, Defence and Trade, Estimates (Additional Estimates) Wednesday, 25 February 2009, p34.

²⁴ Reference 20 – Official Committee Hansard Senate, Standing Committee on Foreign Affairs, Defence and Trade, Estimates (Budget Estimates) Wednesday, 30 May 2007, pp10, 32-33.

against Taliban leaders and Taliban bomb makers. That is the sort of work that they train for and that is the sort of work that they are doing in Afghanistan. So, when you look at what might be available, they are probably the best element to use in the circumstances that we face in Afghanistan at the moment.²⁵

c. *February 2009:*

The Special Operations Task Group has had significant success. **Over the last 18 months, our special forces have conducted successful operations against senior Taliban leadership, resulting in the death of key Taliban insurgent planners and the capture of others. This has significantly degraded the Taliban's ability to conduct insurgency operations in the province. The resulting improvement in security conditions has allowed space for development and training activities to continue in Oruzgan...**

It is a very highly valued capability, which is used to disrupt the Taliban who operate in our province. I might add that they have been spectacularly successful in keeping the Taliban on the back foot. If we look over the last 18 months or so, we have accounted for 21 Taliban leaders, one way or another, and that has been a very effective strategy. **The Special Operations Task Group to enhance the force protection for the Australian and Dutch people who are out there doing the construction, the training, the mentoring and so on.** We now have Afghan national army units coming into the province.²⁶

d. *June 2009:*

Over the past six months the Special Operations Task Group have conducted nine major operations, which have **successfully disrupted Taliban activity in Oruzgan, putting the terrorists at a significant disadvantage and helping to extend stability and security in the province.** In fact, on May 24 a key Taliban insurgent commander, Mullah Qasim, was killed during a short battle between insurgents and the Special Operations Task Group supported Afghanistan National Security Forces. Additionally, separate Special Operations Task Group and Mentoring and Reconstruction Task Force patrols, in cooperation with their Afghan National Security Force partners, have discovered 20 caches of weapons.²⁷

e. *May 2010:*

Additionally, Australian Special Forces and their partners, the Provincial Police Reserve, have been **active in targeting Taliban insurgent networks in both Uruzgan and Kandahar.** Just a few weeks ago another three IED [improvised explosive device] facilitators were killed. Support was also provided to Gizab locals in April following a community-led uprising against the Taliban insurgents operating in their region. The SOTG has also been very active in conducting high-level shuras throughout Uruzgan Province, as well conducting civil affairs tasks such as providing medical clinics in remote communities.²⁸

²⁵ Reference 21 – Official Committee Hansard Senate, Standing Committee on Foreign Affairs, Defence and Trade, Estimates (Budget Estimates) Wednesday, 4 June 2008, p21.

²⁶ Reference 22 – Official Committee Hansard Senate, Standing Committee on Foreign Affairs, Defence and Trade, Estimates (Additional Estimates) Wednesday, 25 February 2009, pp7-8, 34.

²⁷ Reference 23 – Official Committee Hansard Senate, Foreign Affairs, Defence and Trade Legislation Committee, Estimates (Budget Estimates) Wednesday, 3 June 2009, p15.

²⁸ Reference 24 – Official Committee Hansard Senate, Foreign Affairs, Defence and Trade Legislation Committee, Estimates (Budget Estimates) Monday, 31 May 2010, p15.

f. *February 2011:*

Additionally, our special forces continue to make a highly valued contribution to the broader ISAF campaign across the south, **targeting and disrupting key insurgent networks in Oruzgan and neighbouring provinces in support of ISAF operations.** A recent significant disruption operation was undertaken in northern Oruzgan in December and January where Afghan National Police officers, supported by Australian Special Forces detained an individual believed to be a leading bomb maker and a close associate of the top insurgent commander in Oruzgan.²⁹

g. *May 2011:*

The work of our Special Forces complements our Mentoring Task Force. **Special Forces operations maintain pressure on Taliban leaders and facilitators in and around Oruzgan, thereby enhancing the security environment in which the MTF [Mentoring Task Force] and its ANA [Afghan National Army] colleagues operate.**³⁰

h. *February 2013:*

In the four months since my last operational update to this committee, we have continued to make tangible progress in the transition to the Afghan National Security Forces lead in Uruzgan province. The four infantry Kandaks we have mentored since 2008 are now conducting independent operations and have assumed the lead for security in their respective areas. As a consequence, the ADF's composition in Afghanistan has shifted from a mentoring task force of 680 personnel to a smaller 330-strong advisory task force. The last Australian force elements have redeployed from the patrol bases and forward operating bases in Uruzgan, and are now permanently based at Multinational Base-Tarin Kot.

While these activities highlight our ongoing progress they do not signal the end of our combat operations in Uruzgan. **Our Special Operations Task Group will continue to operate against the insurgency** and the advisory task force will also retain a combat-ready capability, but our main focus throughout 2013 will be on the 4th Brigade headquarters and the Provincial Operations Coordination Centre where the ADF will continue to advise and train the Afghan National Army's logistics, engineer and other combat support elements.³¹

i. *June 2013:*

Australia's Special Operations Task Group continues to conduct partnered operations in Uruzgan and surrounding areas to disrupt insurgent activities and their supply routes. We expect our Special Forces to maintain this workload throughout the remainder of 2013 to allow Afghan forces to coordinate and conduct operations with the coalition's assistance. **Over the next 18 months, the coalition will continue to shift its emphasis from fighting the insurgency to supporting the Afghan National Security Forces. As a**

²⁹ Reference 25 – Official Committee Hansard Senate, Foreign Affairs, Defence and Trade Legislation Committee, Estimates (Additional Estimates) Wednesday, 23 February 2011.

³⁰ Reference 26 – Official Committee Hansard Senate, Foreign Affairs, Defence and Trade Legislation Committee, Estimates Monday, 30 May 2011, p16.

³¹ Reference 27 – Official Committee Hansard Senate, Foreign Affairs, Defence and Trade Legislation Committee, Estimates Wednesday, 13 February 2013, p9.

result, the ADF's role and posture in Afghanistan will continue to evolve. At present, the ADF is operating from three main bases. In Kandahar, Australia's 205 core advisory team is providing training and mentoring assistance to the Afghan National Army. In Kabul, a small logistics training advisory team is working with our Afghan counterparts. The majority of our deployed personnel are based in Uruzgan, advising the Afghan National Army's 4th Brigade headquarters as well as training and assisting the service and combat support Kandaks in the operations coordination centre...

We still have a great deal of work ahead of us as we move towards the end of transition in Uruzgan. Government is yet to consider options for an Australian Special Forces mission beyond the end of 2013. Those deliberations are subject to Afghan, US and NATO decisions and announcements regarding the size and nature of their future missions.³²

17. By May 2012, the future role of the SOTG in Afghanistan, if any, was under active consideration:

There has also been a great deal of discussion about the role of Australian Special Forces after 2014. As the Prime Minister said, there may be a need for ongoing counterterrorism capability, and Australia is considering a Special Forces contribution under the right mandate. That said, the enormity of the challenges that face Afghanistan and coalition forces should not be understated.³³

18. As at June 2013, this assessment was ongoing:

We do not yet know whether there will be a request and the right mandate will be in place for our special forces. There is a fair bit still to flow under the bridge before we are able to make firm decisions beyond the end of 2014.³⁴

19. This third phase concluded when the SOTG was finally withdrawn from Afghanistan at the end of 2013.³⁵ However, a smaller contingent remained in Afghanistan beyond 2013 in a train, advise, and assist role, concurrently with a deployment of Special Forces back into Iraq:

October 2014: A modest Special Forces contingent is working with our ISAF partners to train, advise and assist the Afghan National Security Forces in the Headquarters General Command of Police Special Units...

Our special forces that are in the Middle East and are about to go into Iraq will participate in advise and assist operations. That is their game. What does that mean? Advise and assist could be working at the division-level, the brigade-level or the battalion-level in the headquarters to help those headquarters personnel be able to integrate joint fires—like air, mortar, artillery—

³² Reference 28 – Official Committee Hansard Senate, Foreign Affairs, Defence and Trade Legislation Committee, Estimates Monday, 3 June 2013, pp6-7.

³³ Reference 29 – Official Committee Hansard Senate, Foreign Affairs, Defence and Trade Legislation Committee, Estimates Monday, 28 May 2012, p12.

³⁴ Official Committee Hansard Senate, Foreign Affairs, Defence and Trade Legislation Committee, Estimates Monday, 3 June 2013, p59.

³⁵ Reference 30 – David Johnston (Defence Minister), Australian Defence Force completes mission in Uruzgan, media release, 16 December 2013 - <https://www.minister.defence.gov.au/minister/david-johnston/media-releases/australian-defence-force-completes-mission-uruzgan>

and intelligence, and coordinate all that together in a coherent plan to be executed when they go in to the field and start to counterattack and run counteroffensives against ISIL forces.³⁶

20. As is evident from these official statements as to the SOTG's role during the third phase, the priority for SOTG was consistently understood to be targeting the insurgency in order to provide force protection for ADF, ISAF, and eventually Afghan, forces and operations.

SPECIAL OPERATIONS TASK GROUP

Concept and origin

21. The concept of an Australian Special Forces/Operations Task Group was first conceived and employed in Iraq in 2002 to 2003.

In 2003 Australia joined the US led coalition that invaded Iraq. This deployment occurred in two parts – a deployment and preparation phase known as OPERATION BASTILLE and an offensive operations phase known as OPERATION FALCONER. Both phases included a Special Forces Task Group comprising troops from the Army's Special Air Services Regiment, the Commando Regiment and consequence management and helicopter contingents.³⁷

22. The Forward Command Element for the SFTG subsequently involved in the 2003 Iraq War arrived in theatre on 04 February 2003.³⁸ This SFTG was engaged in a range of operations in the Iraqi Western Desert area, including long range reconnaissance and countering weapons of mass destruction:

The Australian Special Forces Task Group which took part in operations in the Western Desert to prevent Iraq's use of its ballistic missiles was built around a Special Air Service (SAS) Squadron. It was supported by a reinforced Commando Platoon as a Quick Reaction Force and a Nuclear, Biological and Chemical Defence troop from the Incident Response Regiment.³⁹

23. In early post-2003 conflict assessments, the SFTF model was considered to have been successful. As one official lessons-learned publication observed, the multi-disciplinary nature of the SFTG gave it great operational flexibility:

The Special Forces Task Group played a significant role in rapidly achieving strategic objectives in Western Iraq using the SAS Squadron's highly successful reconnaissance and raids. Throughout the operation, three Australian CH-47 Chinooks transported vital stores and personnel. The Commando Platoon and Nuclear, Biological and Chemical Defence Troop helped with Sensitive Site Exploitation and Explosive Ordnance Disposal tasks at the Al Asad airbase.⁴⁰

³⁶ Reference 31 – Official Committee Hansard Senate, Foreign Affairs, Defence and Trade Legislation Committee, Estimates Wednesday, 22 October 2014, pp11, 70.

³⁷ Reference 32 – Visit to Australian Defence Forces deployed to Support the Rehabilitation of Iraq, Report of the Delegation 22 to 28 October 2005, Joint Standing Committee on Foreign Affairs, Defence and Trade, May 2006, para 2.2.

³⁸ Reference 33 – Albert Palazzo, The Australian Army and the War in Iraq 2002-2010, available at https://www.defence.gov.au/FOI/Docs/Disclosures/049_1617_Documents.pdf, p200.

³⁹ Reference 34 – The War in Iraq: ADF Operations in the Middle East 2003, available at <https://www.defence.gov.au/publications/lessons.pdf>, p21.

⁴⁰ The War in Iraq: ADF Operations in the Middle East 2003, available at <https://www.defence.gov.au/publications/lessons.pdf>, p26.

Special Operations Task Group Rotations

24. SOTG deployments to Afghanistan tended to be approximately four months in duration. SOTG rotations, unlike RTF/MRTF/MTF rotations, saw the same sub-units and personnel returning, time and time again, as frequently as annually.

25. As was explained during Senate Estimates in June 2008:

...Special Forces... maintain a very intense tempo of operations when they are deployed. We will stick to shorter term deployments for them, for the very obvious reason that, after a few months of doing what they do, it is imperative that we pull them out and give them a break because we need to maintain them at a very high level of preparedness for the sort of work that they are doing.⁴¹

26. However, this rotation cycle also inevitably meant that personnel were rotated back into theatre more quickly than was the norm. As was observed during Senate Estimates in May 2007:

In the vast majority of cases, if someone deploys inside the 12-month respite guideline they are volunteers. If they are not, we try to make arrangements to say, *'If you can do this one, we will give you more time off later,'* or something like that.

With that preamble, in Special Operations Command there are a number of people currently deployed inside the 12-month guideline. For East Timor it is about 20 per cent; for Afghanistan it is higher than that at about 40 per cent. These are volunteers and, in most cases, very enthusiastic volunteers. For those who are on a second tour in a specific theatre— and I am still talking about Special Operations Command—about 20 per cent are on a second tour of East Timor, and because Afghanistan is more topical, about 30 per cent are on their second tour. For Special Operations Command, because they do tend to be more specialised and because they are not so great in number, we are inside the respite period for a number of them.⁴²

27. The deployment pattern was structured around the Afghan fighting season, which traditionally begins in April as snow melts in the mountains and slows in November as winter sets in. Generally, there was a rotation from February to July, a rotation from July to November, and a winter rotation from November to February.

Composition

28. The composition of each SOTG rotation was structured around the following elements:

- a. FCE – Force Command Element. This was a battle group level headquarters, commanded by a lieutenant colonel;
- b. FE-A – Force Element Alpha, based on a SASR troop, or troop plus, with a squadron headquarters providing the Special Operations Command Control Element (SOCCE). FE-A was typically deployed during the [REDACTED];

⁴¹ Reference 35 – Official Committee Hansard Senate, Standing Committee on Foreign Affairs, Defence and Trade, Estimates (Budget Estimates) Wednesday, 4 June 2008, p101.

⁴² Reference 36 – Official Committee Hansard Senate, Standing Committee on Foreign Affairs, Defence and Trade, Estimates (Budget Estimates) Wednesday, 30 May 2007, p148.

- c. FE-B – Force Element Bravo, a Commando Company from 2nd Commando Regiment (2 Cdo Regt);
- d. FE-C – Force Element Charlie, a Commando Company drawn mainly from the Army Reserve 1st Commando Regiment (1 Cdo Regt), [REDACTED]
- e. FE-E – Force Element Echo, comprising Engineers, who supported FE-A and FE-B operations, conducting sensitive site exploitation, explosive ordnance disposal, bio-enrolment, and battle damage assessment, drawn from the Incident Response Regiment, later called the Special Operations Engineer Regiment; and
- f. Force Support Element – comprising medics, a Protected Mobility Vehicle (Bushmaster) Troop, and other enablers.

Designation

29. The ISAF designation for SOTG was Task Force 66, and SOTG was usually known and referred to by that designation in theatre.

Locations

30. The principal places in Afghanistan where SOTG and its predecessors were located were:
- a. During Phase 1, the SFTF Headquarters was located in Bagram, and the main body in Kandahar.
 - b. During Phase 2, the SFTG Headquarters was located in Bagram. The main body was located in Tarin Kowt, Uruzgan Province.
 - c. During Phase 3, the SOTG Headquarters was located in Kandahar until 2010, when it collocated with the main body in Tarin Kowt. The main body of SOTG was located in Camp Russell, Multinational Base - Tarin Kot.

Casualties

31. Between February 2002 and July 2014, 41 ADF members died on operations in Afghanistan. Of these, 21 were of the Special Forces: five members of SASR; 13 Commandos; and three members of the Engineer Regiments.⁴³

SOTG OPERATIONS

32. SOTG operations in Afghanistan evolved over the period and phases of the deployments. The early SFTG deployments involved vehicle and foot patrols and key leadership engagement, with few contacts. The initial SOTG rotations operated from vehicles, but while remaining key leadership engagement-focused, experienced more contacts, mostly at extended ranges.

⁴³ Reference 37 – Australian Defence Force Died on Operations in Afghanistan, available at <https://www.defence.gov.au/vale/docs/ROHasof5NOV2015.pdf>.

Rotary wing cycle

33. From 2010, rotary wing assets became increasingly available to support SOTG operations, and a pattern developed by which there would be alternating four day windows during which rotary wing assets would be available. As a result, a cycle was established of four days planning and target development (during which the Force Element remained positioned to conduct vehicle-mounted operations if necessary), followed by a four day 'rotary wing period' (during which operations were conducted). Concurrently, the nature of operations evolved to become targeting operations, focussed on targets on the Joint Prioritised Effects List (JPEL).⁴⁴ These operations were sometimes vehicle-mounted, but mostly rotary wing-enabled and supported by a range of intelligence, surveillance, reconnaissance and electronic warfare assets.

Lines of operation

34. In the later years, from 2010 onwards, SOTG conducted essentially five lines of operation:

- a. Counter-leadership operations (Operation TEVARA SIN);
- b. Disruption operations (Operation SARA TOFAN);
- c. Counter-nexus operations (Operation MAKHA NIWEL);
- d. Key leadership engagement liaison (Operation KHUDAY), and
- e. The mentoring function for the Provincial Police Response Company and the National Directorate of Security - Wakunish.

35. **Counter-leadership operations (Operation TEVARA SIN).** Operation TEVARA SIN was an enduring concept of operations (CONOPS) for SOTG counter leadership operations by FE [REDACTED] (and its partner force) and involved time sensitive targeting (TST) to prosecute JPEL targets, as further described below. This type of operation initially involved vehicle mounted operations, but evolved to become predominantly helicopter borne operations.

36. **Disruption operations (Operation SARA TOFAN).** Operation SARA TOFAN was an enduring CONOPS for SOTG disruption operations, to disrupt insurgent networks, conducted by FE [REDACTED] (and its partner force).

37. **Counter-nexus operations (Operation MAKHA NIWEL).** Operation MAKHA NIWEL was an enduring CONOPS for SOTG counter-nexus operations, targeting the drug industry due to its association with funding the insurgency, conducted by FE [REDACTED] working with the [REDACTED]
[REDACTED]

38. **Mentoring.** Mentoring of Afghan partner forces, which began in earnest in 2008 and became an increasingly significant component of the ADF's role in Afghanistan after 2010,⁴⁵ was ostensibly

⁴⁴ The JPEL and common processes were used by the Australian, [REDACTED] and [REDACTED] forces; Reference 38 - [REDACTED] TROI of [REDACTED] Q64, and Qs70 to 71. [REDACTED]

⁴⁵ Reference 39 – Official Committee Hansard Senate, Standing Committee on Foreign Affairs, Defence and Trade, Estimates (Additional Estimates) Wednesday, 25 February 2009, p8; Official Committee Hansard Senate, Foreign Affairs, Defence and Trade Legislation Committee, Estimates Wednesday, 13 February 2013, p9.

a main effort of SOTG operations.⁴⁶ In the October 2014 Senate Estimates, it was noted that ‘most of that special operations task group has had extensive experience in Afghanistan, where they were mentoring their own Afghan units that they were partnered with for the last few years’.⁴⁷ Operational reporting of missions often misleadingly described missions as being ‘led’ by the partner force, or that theirs were the first faces seen. The Inquiry found, however, that operational reporting tended to exaggerate the role of the partner force in missions. Although attitudes varied, the partner forces tended to be treated with reservation and suspicion, if not distrust, by many, particularly after the [REDACTED] incidents. They were excluded from planning and orders (lest they inform others). For the most part, they were relegated to a ‘second turn’ or ‘depth’ role.

Joint Prioritised Effects List

39. The JPEL has been described as:

a mechanism, a process, through which military commands and staff seek to prioritise their efforts and resources ... The process underpinning the JPEL sought to assign the right asset to the right target at the right time. It also sought to ensure that those persons or capabilities or targets [see below] presented on the JPEL were legitimate and lawful targets in accordance with all ROE and informed legal advice. This includes ensuring that this form of targeting did not violate the Law of Armed Conflict (LOAC).⁴⁸

40. A JPEL objective was targeted by a ‘kill or capture’ mission only when there was a very high degree of confidence in the current intelligence related to the location of the JPEL objective. A person of interest would be allocated a codename or ‘objective’ name to assist with identification for analysis. Information on that person would be collected and assessed, and only when the targeting criteria was satisfied would an ‘Objective’ (such as [REDACTED] or [REDACTED] be placed on the JPEL. At least, that is how the process was designed to operate. The successful capture or killing of a JPEL OBJ was called a ‘jackpot’.

41. Sir Angus Houston has described the rationale for the JPEL as follows:

In any military campaign or operation there are invariably more tasks and things to do than there are resources available. This is true whether it be human resources, financial, equipment or systems. Afghanistan was no exception in this regard and Commanders at all levels continually re-assessed priorities and their ability to complete tasks.⁴⁹

42. A key component of the JPEL, consequently, was the list of vetted and approved targets. *Australian Defence Doctrine Publication (ADDP) 3.14—Targeting* (updated 2009) defines a ‘target’ as:

an object of a particular action, for example a geographic area, a complex, an installation, a force, equipment, an individual, a group or a system, planned for capture, exploitation, neutralisation or destruction by military forces. Targets relate to military objectives at all levels;

⁴⁶ Official Committee Hansard Senate, Standing Committee on Foreign Affairs, Defence and Trade, Estimates (Additional Estimates) Wednesday, 25 February 2009, p34.

⁴⁷ Reference 40 – Official Committee Hansard Senate, Foreign Affairs, Defence and Trade Legislation Committee, Estimates Wednesday, 22 October 2014, p23.

⁴⁸ Sir Angus Houston, Presentation to Operation Burnham Inquiry – Public Hearing, Wellington 4 April 2019.

⁴⁹ Sir Angus Houston, Presentation to Operation Burnham Inquiry – Public Hearing, Wellington 4 April 2019.

strategic, operational and tactical. The importance of a target is dependent on how it relates to an adversary's critical vulnerabilities and how achieving a desired effect on the target will support achievement of the joint commander's objectives.⁵⁰

43. It is important to understand that the ISAF JPEL was:
- a. a whole-of-ISAF document, not an SOTG-generated targeting list;
 - b. a 'living' document, in that it was subject to constant updating and review as new intelligence and priorities emerged;
 - c. subject to formal processes managed at Headquarters ISAF level, which governed inclusion or elevation on the JPEL, to which SOTG contributed but was also subject; and
 - d. a key factor in the allocation of assets – such as aviation or ISR assets – to operations, including targeting⁵¹ operations.

Time Sensitive Targeting

44. TST missions were triggered by actionable intelligence of the location of a JPEL objective.

45. ISAF Special Operations Forces (SOF) Standard Operating Procedure 306, *Operational Management*, set out the requirements for both ISAF SOF and Government of the Islamic Republic of Afghanistan (GIROA) approval of generic standing CONOPS, as well as the approval process for TST operations undertaken against specific targets pursuant to those generic CONOPS.

46. Operation TEVARA SIN was an enduring CONOPS for SOTG counter-leadership operations in the context of ongoing operations involving FE [REDACTED] and its partner force. Within this enduring CONOPS each operation against a particular objective required specific approval before execution. There was a hierarchy of approvals required, depending on the 'level' of the operation. For example, night raids required higher-level approvals. On the other hand, an operation that did not target an individual, sometimes described as an 'armed reconnaissance (level 0)', did not require the specific approvals that were required for a TST mission.

⁵⁰ Reference 41 – Australian Defence Force Publication (ADDP) 3.14—Targeting, para 1.7.

⁵¹ (ADDP) 3.14—Targeting defines 'targeting' as follows: 'The purpose of targeting is to integrate and synchronise joint fires, the employment of lethal and non-lethal weapons, into joint operations to achieve the joint commander's mission, objectives and desired effects. Targeting is a process of selecting and prioritising targets and matching the appropriate effect taking account of operational requirements and capabilities. The targeting process selects targets, by evaluation of military objectives and legal implications and then tasks the lethal and/or non-lethal means by which action is taken against those targets to achieve the desired effects', available at https://www.defence.gov.au/foi/docs/disclosures/021_1112_Document_ADDP_3_14_Targeting.pdf, para 1.1.

CONCLUSION

48. The above provides the necessary background to assist contextualisation and understanding of the incidents and issues described in Part Two of this Report, in respect of Australia's involvement in Afghanistan during the relevant period; the composition and command status of the SOTG; its role as it evolved over the period; its lines of operation; and its targeting procedure. It is not intended to provide a detailed account or analysis of those matters.

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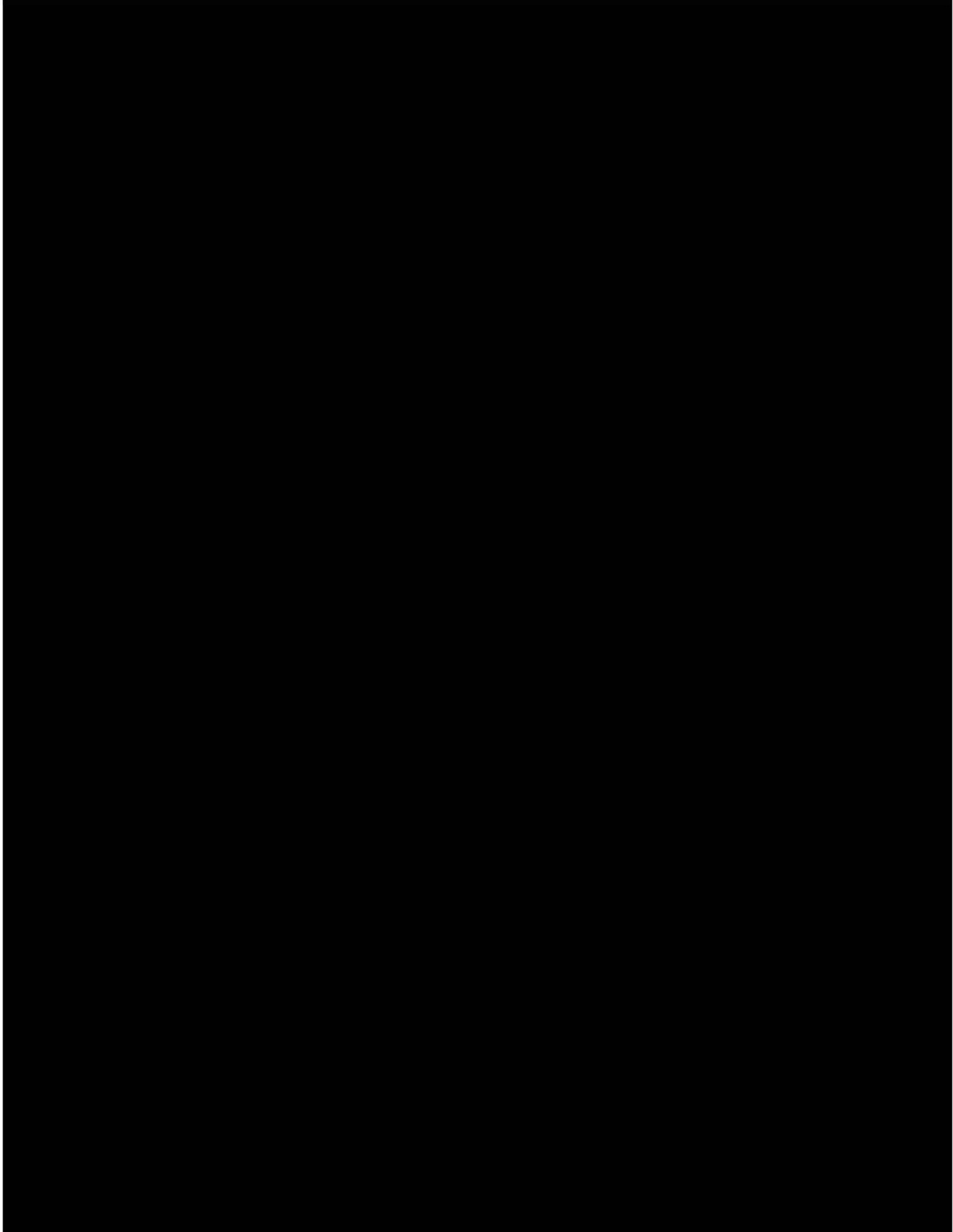
Annexes:

- A. Special Operations Task Group Rotations – Key Appointments
- B. Special Operations Task Group Rotational Statistics – Rotations 1 to 20 Australian Statistics

Annex B Reference:

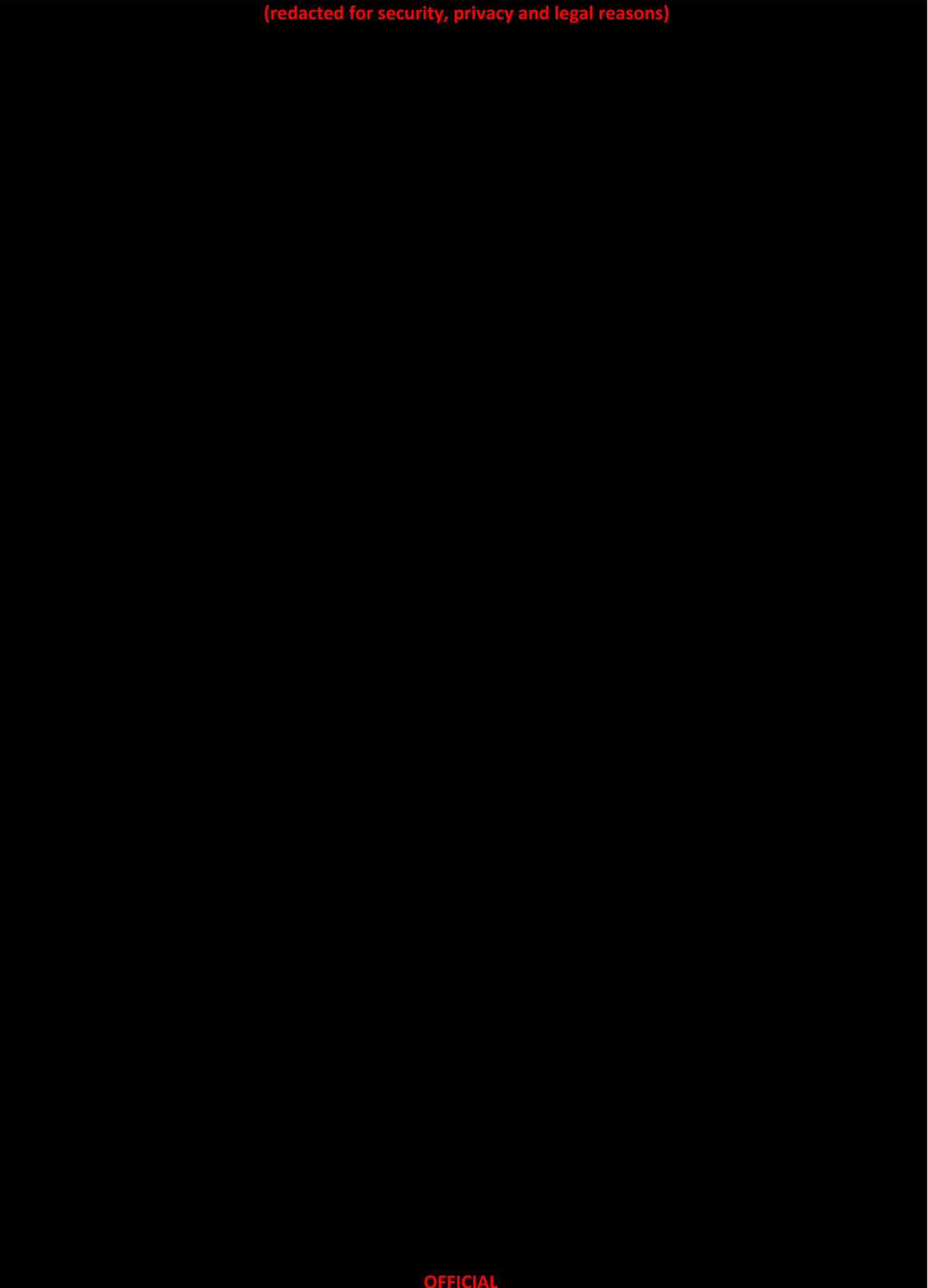
1. [REDACTED]

Special Operations Task Group Rotations - Key Appointments



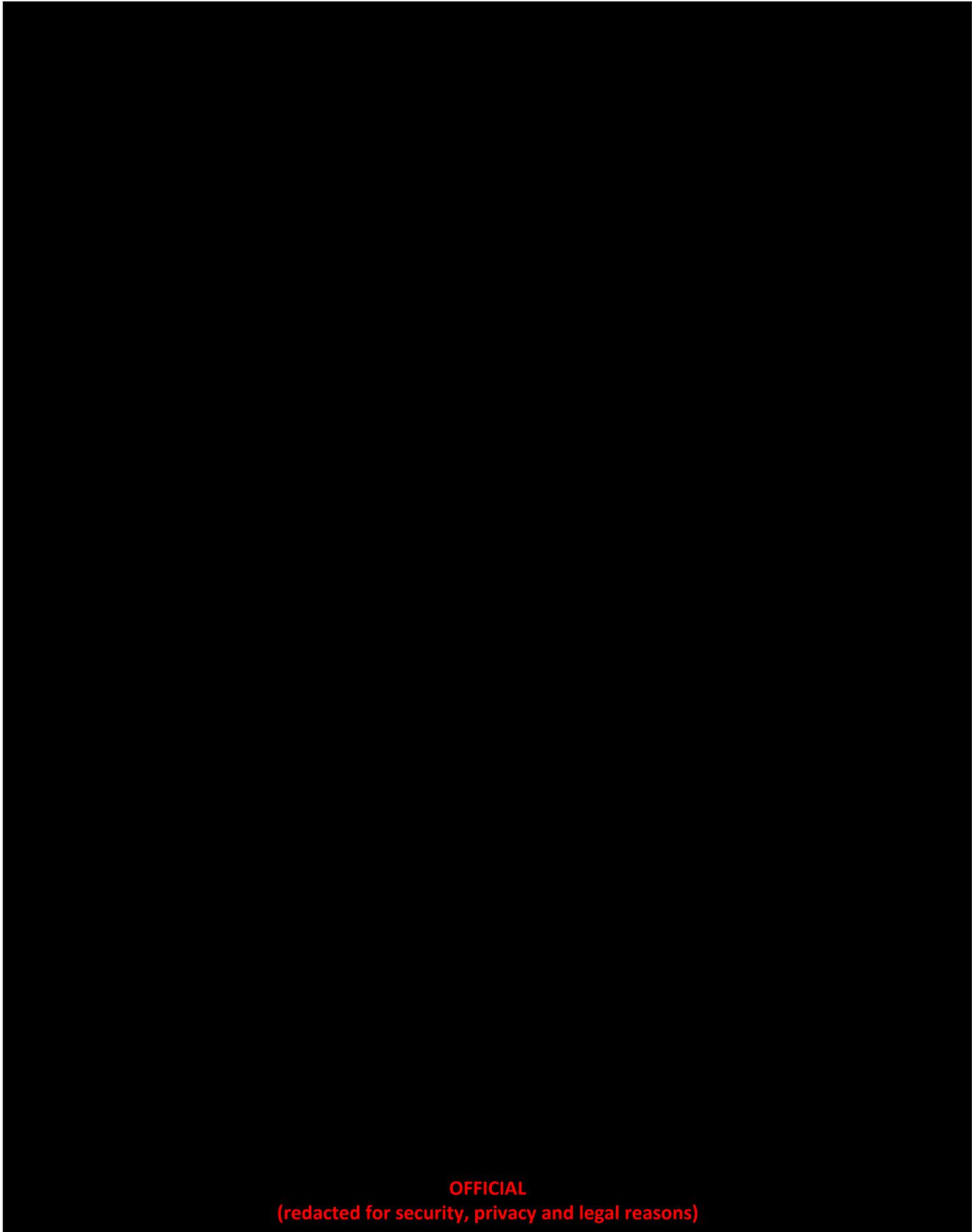
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Chapter 1.10

THE APPLICABLE LAW OF ARMED CONFLICT

EXECUTIVE SUMMARY

This chapter explains the relevant aspects of the law of armed conflict, their legal basis, criminal liability for their breach, and options for prosecution.

The Inquiry is not concerned with minor breaches of discipline, but with suspicions of war crimes, in the nature of unlawful killings and mistreatment of non-combatants or persons *hors de combat* ('out of the fight', and thus entitled to protection from attack), in contravention of the law of armed conflict.

For Australia, the relevant provisions are contained in Division 268 of (Commonwealth) *Criminal Code Act 1995* (Criminal Code).¹ Because the conflict in Afghanistan was 'an armed conflict that is not an international armed conflict', the most relevant offence provisions are s 268.70 (War crime – murder), and s 268.72 (War crime – cruel treatment).

Criminal liability extends under the Criminal Code to those who attempt to commit such offences (s 11.1); aid, abet, counsel or procure such offences (s 11.2); or are involved in a joint criminal enterprise (s 11.2A).

Those who assist in concealing an offence may be liable as an accessory after the fact, under (Commonwealth) *Crimes Act 1914*,² s 6.

Further, Criminal Code s 268.115 extends responsibility to commanders, by providing that military commanders and superiors are criminally responsible for offences committed by forces or subordinates under their effective command or authority and control, as a result of his or her failure to exercise control properly, where the commander or superior knew or was reckless that the forces or subordinates were or were about to commit the offences, and failed to take all necessary and reasonable measures to prevent or repress their commission, or to submit the matters to competent authorities for investigations and prosecution.

Such crimes could only be prosecuted in the name of and with the consent of the Attorney-General: s 268.121.

Under Article 17 of the *Rome Statute of the International Criminal Court* (Rome Statute),³ the International Criminal Court lacks jurisdiction unless a State party 'is unwilling or unable genuinely to

¹ Reference 1 - (Commonwealth) *Criminal Code Act 1995* (Criminal Code)

² Reference 2 - (Commonwealth) *Crimes Act 1914*

³ Reference 3 - *Rome Statute of the International Criminal Court 1998* [2002] ATS 15 (Rome Statute).

carry out the investigation or prosecution'. The conduct of this Inquiry, and a domestic prosecution, or a considered and bona fide decision by Australian prosecutors not to prosecute, denies the International Criminal Court jurisdiction.

For multiple reasons, the Inquiry recommends that any criminal investigation and prosecution of a war crime should be undertaken by the Australian Federal Police and the Commonwealth Director of Public Prosecutions, with a view to prosecution in the civilian criminal courts, rather than as a service offence or in a service tribunal.

Introduction

1. This Inquiry is not about what some might call breaches of discipline, such as misuse of alcohol, or inappropriate personal relationships. Its subject matter is rumours, suspicions and allegations of what are commonly known as 'war crimes', and in particular the killing or mistreatment of non-combatants, or persons *hors de combat* ('out of the fight', and thus entitled to protection from attack), in contravention of the law of armed conflict.

The Commonwealth Criminal Code Act 1995, Division 268

2. The relevant Law of Armed Conflict (LOAC) for Australia is principally to be found in Division 268 of the Commonwealth *Criminal Code Act 1995* (the Criminal Code), through which Australia, as a party to the *Rome Statute of the International Criminal Court 1998* (Rome Statute) which established the International Criminal Court (ICC), implemented that instrument in domestic legislation. Division 268 was incorporated into the Criminal Code through Schedule 1 of the *International Criminal Court (Consequential Amendments) Act 2002*.⁴ These amendments commenced on 26 September 2002,⁵ and accordingly were applicable throughout the period of relevance to the Inquiry.

3. The purpose of this amendment to the Criminal Code was to give effect to Australia's obligations under the Rome Statute,⁶ which Australia ratified on 07 January 2002.⁷ Professor Gillian Triggs—writing in 2003, shortly after Australia's ratification of the Rome Statute—observed that Parliament had considered a wide range of issues when assessing whether and how Australia would ratify the Rome Statute:⁸

In conformity with Australia's processes for treaty ratification, JSCOT [Joint Standing Committee on Treaties] reviewed the Rome Statute and implementing legislation, and considered their impact on Australian sovereignty, the legal system, current international obligations and the defence forces. It

⁴ Reference 4 - *International Criminal Court (Consequential Amendments) Act 2002* (An Act to amend the *Criminal Code Act 1995* and certain other Acts in consequence of the enactment of the International Criminal Court Act 2002, and for other purposes) - <https://www.legislation.gov.au/Details/C2004A00993>.

⁵ *International Criminal Court (Consequential Amendments) Act 2002*, s.2.

⁶ *Rome Statute*.

⁷ <http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/D30C586371409CE4CA256BA3000F6E84>; the National Interest Analysis for the Treaty is at <http://www.austlii.edu.au/au/other/dfat/nia/2000/24.html>.

⁸ Reference 5 - Gillian Triggs, 'Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law' (2003) 25 *Sydney Law Review* 507 at 517.

recommended that Australia should ratify the Rome Statute on the basis that the *Consequential Amendments Act* should not affect the primacy of Australia's right to exercise jurisdiction.

4. The then Attorney-General, Mr Daryl Robert Williams AM QC, stated, in his second reading speech for the *International Criminal Court Bill 2002* and the *International Criminal Court (Consequential Amendments) Bill 2002*, that:⁹

Australia's support of the International Criminal Court is based on the many checks and balances contained in the International Criminal Court statute. Its functions and role have been carefully articulated and its powers circumscribed to protect the sovereignty of the countries which support its establishment. However, these bills before us today provide safeguards additional to those in the International Criminal Court statute to ensure the primacy of Australia's right to exercise its jurisdiction over crimes in the International Criminal Court statute to protect our national interests. The *International Criminal Court Bill 2002* will establish procedures in our domestic law to fulfil Australia's obligations under the International Criminal Court statute. The offences inserted into the criminal code by the *International Criminal Court (Consequential Amendments) Bill 2002* will apply to all conduct, regardless of whether it occurs or its effects occur within or outside Australia. The offences apply to all persons regardless of nationality and apply equally to members of the Australian Defence Force.

5. The combined purposes of the *International Criminal Court Act 2002* and the *International Criminal Court (Consequential Amendments) Act 2002*, are thus succinctly expressed in s 3 of the *International Criminal Court Act 2002*:¹⁰

3 Principal object of Act

(1) The principal object of this Act is to facilitate compliance with Australia's obligations under the Statute.

(2) Accordingly, this Act does not affect the primacy of Australia's right to exercise its jurisdiction with respect to crimes within the jurisdiction of the ICC.

Note: The crimes within the jurisdiction of the ICC are set out as crimes in Australia in Division 268 of the Criminal Code.

6. The offences contained in Division 268 are thus a 'domestication' of the more generally expressed corresponding offences contained in the Rome Statute. Conformably with Rome Statute, Division 268, entitled 'Genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court' comprehends a number of categories of offence, as follows:

⁹ Reference 6 - House of Representatives, *International Criminal Court Bill 2002* and *International Criminal Court (Consequential Amendments) Bill 2002*: Second Reading Speech (Mr Williams), Tuesday, 25 June 2002, p.4368: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=International%20criminal%20court%20act%202002%20SearchCategory_Phase%3A%22house%20of%20representatives%22%20Decade%3A%222000s%22%20DataSet_Phase%3A%22hansard%22%20Year%3A%222002%22;rec=0;resCount=Default.

¹⁰ *International Criminal Court Act 2002*: <https://www.Legislation.Gov.Au/Details/C2016c00574>.

- a. Subdivision B - Genocide;
 - b. Subdivision C - Crimes against humanity;
 - c. Subdivision D - War crimes that are grave breaches of the Geneva Conventions and of Protocol I to the Geneva Conventions;
 - d. Subdivision E - Other serious war crimes that are committed in the course of an international armed conflict;
 - e. Subdivision F - War crimes that are serious violations of article 3 common to the Geneva Conventions and are committed in the course of an armed conflict that is not an international armed conflict;
 - f. Subdivision G - War crimes that are other serious violations of the laws and customs applicable in an armed conflict that is not an international armed conflict;
 - g. Subdivision H - War crimes that are grave breaches of Protocol I to the Geneva Conventions War crimes;
 - h. Subdivision J - Crimes against the administration of the justice of the International Criminal Court. Crimes against the administration of the justice of the ICC; and
 - i. Subdivision K—Miscellaneous contains a range of miscellaneous provisions including, relevantly liability for command responsibility, the defence of superior orders, and the requirement for the Attorney-General’s consent for a prosecution.
7. Of the above categories, only ‘war crimes’ is of direct relevance to this Inquiry. The potentially relevant offences are thus those within the subdivisions of Division 268 that deal with ‘war crimes’. It will be immediately apparent that war crimes committed in the course of an international armed conflict, and war crimes committed in the course of an armed conflict that is not an international armed conflict (NIAC), are dealt with separately in the Criminal Code, as they are in the Rome Statute.

Afghanistan - a non-international armed conflict

8. As explained elsewhere,¹¹ the Government of Australia deployed military forces to Afghanistan in support of North Atlantic Treaty Organisation (NATO)-led military operations in the global struggle against violent extremism, and in order to enhance international peace and security, since 2001. The period of relevance for this inquiry covers Operation SLIPPER, from 2005 to 2014.
9. The stated legal basis for Australia’s presence in Afghanistan, in support of NATO-led military operations in the global struggle against violent extremism, and in order to enhance international peace and security, has changed over time. The United States (US) treated the events of 11 September 2001

¹¹ See Chapter 1.09, Australia, Afghanistan and Special Operations Task Group.

as an armed attack upon it, which it said justified the invocation of both the inherent right of self-defence enshrined in Article 51 of the *Charter of the United Nations*¹² and, for the first time, Article IV of the *Australia, New Zealand, United States Security (ANZUS) Treaty*.¹³

10. The legal bases for Operation SLIPPER were the invitation to NATO by the Government of the Islamic Republic of Afghanistan (GIROA) and the series of United Nations (UN) Security Council Resolutions which provide a UN Charter Chapter VII mandate for the NATO-led security mission in Afghanistan, in particular Resolution 1386 in December 2001. The NATO force, raised pursuant to Resolution 1386, was the International Security Assistance Force (ISAF). Initially, its main purpose was to train the Afghan National Security Forces (ANSF) and assist Afghanistan in rebuilding key government institutions, while engaged in operations against the Taliban, al Qaeda and factional warlords. In October 2003, the UN Security Council adopted Resolution 1510, which authorised the expansion of the ISAF mission throughout Afghanistan.

11. The Government of Australia rightly considered the conflict in Afghanistan to be an armed conflict not of an international character; that is, a conflict between the sovereign Afghan Government on the one hand and insurgents, foreign fighters and remnants or supporters of the former Taliban regime on the other. Thus, Common Article 3 of the Geneva Conventions applies as a matter of legal obligation. In addition, certain provisions of the Geneva Conventions are applicable as a matter of customary international law. As established customary international law, Common Article 3 applied to all ISAF members, as was recognised by the US Supreme Court in 2005, in *Hamdan v Rumsfeld*:¹⁴

... there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a 'conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum,' certain provisions protecting '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by . . . detention'.

12. It follows that the applicable offences in Division 268 of the Criminal Code are those concerned with war crimes committed in the course of an armed conflict that is not an international armed conflict, and in particular those in Subdivisions F and G.

Extra-territorial jurisdiction

13. The NIAC offences under Division 268 of the Criminal Code are subject to what the Code calls extended geographical jurisdiction (Category D jurisdiction), which is the most extensive scheme of geographical jurisdiction available under the Code. Section 268.117 provides as follows:

¹² Reference 7 - *Charter of the United Nations*, <https://www.un.org/en/charter-united-nations/index.html>

¹³ Reference 8 - *Security Treaty between Australia, New Zealand and the United States of America (ANZUS)*, San Francisco, 1 September 1951, Entry into force generally: 29 April 1952, see https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/jfadt/usrelations/appendixb

¹⁴ Reference 9 - *Hamdan v Rumsfeld* 548 U.S. 557 (2006), <https://www.supremecourt.gov/opinions/05pdf/05-184.pdf>.

s 268.117 Geographical jurisdiction

(1) Section 15.4 (extended geographical jurisdiction—Category D) applies to genocide, crimes against humanity and war crimes.

14. Category D jurisdiction is defined as follows:

s 15.4 Extended geographical jurisdiction—category D

If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:

- (a) whether or not the conduct constituting the alleged offence occurs in Australia; and
- (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

15. Accordingly, war crimes committed by Australian Defence Force (ADF) members in the context of the NIAC in Afghanistan during the period 2006-2014 would be amenable to Division 268 jurisdiction.

Criminal liability

16. The NIAC war crimes offences contained in Division 268 are themselves a ‘domestication’ of the more generally expressed corresponding offences contained in Articles 8(2)(c) and (e) of the Rome Statute, and as such involve the application of Chapter 2 of the Criminal Code to the Rome Statute’s offences, and their associated elements of offences,¹⁵ so as to be coherent with the general scheme of Commonwealth criminal law.

17. Key relevant concepts in Chapter 2 of the Criminal Code are:¹⁶

- a. The stated purpose of Chapter 2 of the Criminal Code, which is entitled ‘General principles of criminal responsibility’, is the exhaustive codification of ‘the general principles of criminal responsibility under laws of the Commonwealth’. It applies to all offences against the Criminal Code.
- b. Part 2.2 deals with the elements of offences, and adopts the usual analytical division of criminal offences into the *actus reus* and the *mens rea*, or physical elements and fault elements. Division 3, which contains general provisions relating to the elements of an offence, provides, by s 3.1, that an offence consists of physical elements and fault elements. However, the law that creates the offence may provide that there is no fault element for one or more physical elements. The law that creates the offence may provide different fault elements for different physical elements.
- c. Physical elements are dealt with in Division 4. A physical element of an offence, as defined in s 4.1(1), may be conduct, or a result of conduct, or a circumstance in which conduct, or a result of

¹⁵ Reference 10 - *Elements of Crimes*, ICC, 2011: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD.../ElementsOfCrimesEng.pdf>.

¹⁶ As summarised by Reference 11 - French CJ, in *R v RK and LK* [2010] HCA 17 at [41]-[43].

conduct, occurs. Conduct is broadly defined, by s 4.1(2), to mean ‘an act, an omission to perform an act or a state of affairs’. To ‘engage in conduct’ means to ‘do an act’ or to ‘omit to perform an act’.

- d. Fault elements are dealt with in Division 5. A fault element for a particular physical element may be intention, knowledge, recklessness or negligence. A person is said to have intention with respect to conduct if they mean to engage in that conduct. A person has intention with respect to a circumstance if they believe that it exists or will exist. A person has intention with respect to a result if they mean to bring it about, or is aware that it will occur in the ordinary course of events. Knowledge of a circumstance or a result is defined in terms of awareness that the circumstance or result exists or will exist in the ordinary course of events.

The relevant International Armed Conflict offences in Division 268

18. Because the NIAC war crimes offences contained in Division 268 of the Criminal Code reflect the more generally-expressed corresponding offences contained in Articles 8(2)(c) and (e) of the Rome Statute, guidance is provided by authorities and learning on the corresponding provisions of the Rome Statute.

19. The Division 268 NIAC offence most relevant to this Inquiry is s 268.70 (War crime – murder).¹⁷ At all relevant times, s 268.70 provided:

268.70 War crime—murder

(1) A person (the perpetrator) commits an offence if:

(a) the perpetrator causes the death of one or more persons; and

(b) the person or persons are not taking an active part in the hostilities; and

(c) the perpetrator knows of, or is reckless as to, the factual circumstances establishing that the person or persons are not taking an active part in the hostilities; and

(d) the perpetrator’s conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

Penalty: Imprisonment for life.

(2) To avoid doubt, a reference in subsection (1) to a person or persons who are not taking an active part in the hostilities includes a reference to:

(a) a person or persons who are hors de combat; or

¹⁷ In its original form, noting that there have been amendments to Division 268 in 2016.

(b) civilians, medical personnel or religious personnel who are not taking an active part in the hostilities.

20. Essentially, this offence is concerned with the killing of a person who is not taking an active part in hostilities, with knowledge or reckless indifference as to whether the person is not taking an active part in hostilities. The relevant elements of the offence are:

- a. *Element a: 'causes the death of one or more persons'* is a physical element of conduct, attracting the default fault element of intention.¹⁸ In terms of an ADF operation, this element would thus be satisfied if the ADF member shot a person, and they meant to shoot that person.
- b. *Elements b and c: 'the person or persons are not taking an active part in the hostilities'* is a physical element of circumstance, for which the specifically provided fault element is, as per element c, that the ADF member *'knows of, or is reckless as to, the factual circumstances establishing that the person or persons are not taking an active part in the hostilities'*.¹⁹ The physical component, element b, thus first requires referral back to a concept not specifically defined in the Code ('taking an active part in hostilities', more frequently known as 'taking a direct part in hostilities' or 'DPH'). Indeed, any understanding of this term must logically reference its original source – the Law of Armed Conflict and, more particularly, how Australia has interpreted this concept.
- c. The fault element accompanying this physical element—element c, requires that the ADF member knew of, or was reckless as to, the factual circumstances establishing that the person killed was not taking an active part in the hostilities.²⁰ That is, an ADF member who, for example, shot the deceased person either *knew* (that is, was aware of factual circumstances that established that the deceased person was not taking an active part in hostilities),²¹ or was reckless (that is, was aware of a substantial risk that there were factual circumstances that might establish that the deceased person was not taking an active part in hostilities, and having regard to those circumstances as known to that ADF member, it was unjustifiable to take that risk of killing that

¹⁸ s 5.6(1) - If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element. Code s5.2 Intention (1) A person has intention with respect to conduct if he or she means to engage in that conduct.

¹⁹ s 5.6(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element. Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

²⁰ Code s 5.4 (Recklessness):

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and
(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element

²¹ Code s 5.3. A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

person on the basis that they were taking an active part in hostilities, without first checking the situation against those factual circumstances).²² Thus, in a situation where, for example, an ADF member did not employ standard processes to determine whether a person was indeed DPH (for example, through checking their status on the Joint Prioritised Effects List), then it is possible that they were reckless by not employing the established 'fact checking' process for determining the continuing (or otherwise) DPH status of the targeted person prior to carrying out a lethal targeting operation. If the ADF member further knew of other factors that cast doubt on the DPH status of the intended target, but nevertheless prosecuted that target with lethal effects, then the question as to whether knowledge could be proven might also arise. This has particular relevance in the context of the engagement of 'spotters' and 'squirters',²³ in circumstances where the only basis for engaging an unarmed person was that they were judged to be 'manoeuvring tactically against the Force Element' or 'to a position of advantage' or a hypothetical weapons cache.

- d. *Element d: 'the...conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict'* is a physical element of circumstance, for which the Criminal Code default fault element is recklessness. That the situation in Afghanistan was at the relevant time a NIAC was, as noted above, accepted by Australia. Regarding the accompanying fault element of recklessness, it is difficult to conceive of a situation in which an ADF member engaged in combat operations in Afghanistan was not aware that they were engaged in an armed conflict, and specifically, in a NIAC. Indeed, the rules of engagement were explicit on this point, and it was reemphasised at various training and briefing junctures during Special Operations Training Group (SOTG) deployments.

21. Also relevant is the offence of 'cruel treatment' under s 268.72, which provides as follows:

268.72 War crime—cruel treatment

(1) A person (the perpetrator) commits an offence if:

(a) the perpetrator inflicts severe physical or mental pain or suffering upon one or more persons; and

(b) the person or persons are neither taking an active part in the hostilities nor are members of an organised armed group; and

(c) the perpetrator knows of, or is reckless as to, the factual circumstances establishing that the person or persons are neither taking an active part in the hostilities nor are members of an organised armed group; and

(d) the perpetrator's conduct takes place in the context of, and is associated with, an armed conflict that is not an international armed conflict.

²² Code s 5.4(1) (1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

²³ A squirter is a local national seen running from a compound of interest.

Penalty: Imprisonment for 25 years.

(1A) Subsection (1) does not apply if:

(a) the infliction of the severe physical or mental pain or suffering on the person or persons occurs in the course of, or as a result of, an attack on a military objective; and

(b) at the time the attack was launched:

- (i) the perpetrator did not expect that the attack would result in the incidental death of, or injury to, civilians that would have been excessive in relation to the concrete and direct military advantage anticipated; and
- (ii) it was reasonable in all the circumstances that the perpetrator did not have such an expectation.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A). See subsection 13.3(3).

(2) To avoid doubt, a reference in subsection (1) to a person or persons who are not taking an active part in the hostilities includes a reference to:

(a) a person or persons who are hors de combat; or

(b) civilians, medical personnel or religious personnel who are not taking an active part in the hostilities.

(3) For the purposes of this section, the expression members of an organised armed group does not include members of an organised armed group who are hors de combat.

22. Essentially, this offence is concerned with the infliction of severe physical or mental pain or suffering on a person who is not taking an active part in hostilities, with knowledge or reckless indifference as to whether the person is not taking an active part in hostilities.

Extensions of liability – accessory liability

23. Certain extensions of liability are of great relevance to criminal responsibility for these offences in the context of this Inquiry. Division 268 offences are subject to two types of potential extensions of criminal responsibility.

24. First, Division 268 offences are subject to the general extensions of criminal responsibility to accessories stated in Chapter 2, which apply across the entirety of the scheme. These extensions include attempt,²⁴ complicity and common purpose,²⁵ commission by proxy,²⁶ and incitement.²⁷ In particular,

²⁴ Code s 11.1 Attempt.

²⁵ Code s 11.2 Complicity and common purpose.

²⁶ Code s 11.3 Commission by proxy.

²⁷ Code s 11.4 Incitement.

under s 11.2 (Complicity and common purpose), a person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly. Under s 11.2A (Joint commission), if one person and at least one other party enter into an agreement to commit an offence, and an offence is committed in accordance with the agreement, or in the course of carrying out the agreement, the person is taken to have committed the offence and is punishable accordingly. Under s 11.4 (Commission by proxy), a person who (a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and (b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it; is taken to have committed that offence and is punishable accordingly.

25. Further, in connection with the concealment or 'covering up' of criminal acts, liability as an accessory after the fact is also relevant. The (Cth) *Crimes Act 1914*, s 6 (Accessory after the fact), provides that any person who assists another person, who has, to their knowledge, committed any offence against a law of the Commonwealth, in order to enable them to escape punishment commits an offence, for which the penalty is imprisonment for two years.

26. Secondly, and of great significance, there is a Division 268-specific extension of criminal responsibility, generally known in LOAC as 'command responsibility':

268.115 Responsibility of commanders and other superiors

(1) The criminal responsibility imposed by this section is in addition to other grounds of criminal responsibility under the law in force in Australia for acts or omissions that are offences under this Division.

(2) A military commander or person effectively acting as a military commander is criminally responsible for offences under this Division committed by forces under his or her effective command and control, or effective authority and control, as the case may be, as a result of his or her failure to exercise control properly over those forces, where:

(a) the military commander or person either knew or, owing to the circumstances at the time, was reckless as to whether the forces were committing or about to commit such offences; and

(b) the military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(3) With respect to superior and subordinate relationships not described in subsection (2), a superior is criminally responsible for offences against this Division committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over those subordinates, where:

(a) the superior either knew, or consciously disregarded information that clearly indicated, that the subordinates were committing or about to commit such offences; and

(b) the offences concerned activities that were within the effective responsibility and control of the superior; and

(c) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

27. This provision reflects the principle that commanders, because of their positions of trust and authority (in particular their ability to control the behaviour of their subordinates) can be held responsible for the misdeeds of their subordinates. That concept has been around at least since 1439, when Charles VII of France decreed that officers were responsible for offences committed by members of their company. During the American Civil War, the *Lieber Code*²⁸ spoke (in Article 71) of the responsibility of commanders who 'ordered or encouraged attacks on disabled enemies'. More widespread recognition came with the Hague Conventions of 1899 and 1907,²⁹ which imposed duties on superior officers to exercise control of subordinates, and to ensure 'public order and safety' in occupied areas.

28. The modern doctrine of command responsibility was established by the War Crimes Tribunals which followed World War II. The Japanese General Yamashita was the first to be charged with liability based on omission, before a US Military Commission in 1945.³⁰ He had been the Japanese commander in the Philippines from October 1944. During his command there were a number of atrocities; including the rape of 500 civilians in Manila, and the killing of 25 000 civilians in Batangas Province.³¹ Yamashita was charged that he: 'unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes'. Yamashita was found guilty, and sentenced to death. His liability was founded on the principle that: '[where] there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops.'³²

29. In Europe, in the *High Command Case* (heard in Nuremberg in 1947-1948), a number of German officers, including Field Marshal Von Leeb, were charged in relation to the killing of civilians by their subordinates. It was held that to be guilty a commander must engage in personal dereliction 'where

²⁸ Reference 12 – *General Orders No. 100: Instructions for the Government of Armies of the United States in the Field* (The Lieber Code), https://avalon.law.yale.edu/19th_century/lieber.asp.

²⁹ Reference 13 – *Laws and Customs of War on Land* [Hague II] (1899) <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0247.pdf> and Reference 14 - *Laws and Customs of War on Land* [Hague IV] (1907) <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0631.pdf>.

³⁰ Reference 15 – *Trial of General Tomoyuki Yamashita*, 4 Law Reports of Trials of War Criminals, United Nations War Crimes Commission (1948) 1.

³¹ He was also the commander during the Malaya campaign, during which Australian prisoners were slaughtered at Parit Sulong by authority of the Divisional Commander, who was subsequently also charged.

³² *Trial of General Tomoyuki Yamashita* 4 Law Reports of Trials of War Criminals, United Nations War Crimes Commission (1948) 1 at 35.

the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part'.³³

30. In the *Hostage Case*³⁴ in 1949, senior German officers were charged with the murder and deportation of thousands of Greek, Yugoslavian, Norwegian and Albanian civilians. Hitler ordered Field Marshal List to suppress insurgents, and suggested that fifty to a hundred prisoners might be executed as a reprisal in respect of each German soldier killed. List forwarded the direction to his subordinates, and issued his own orders for the shooting of men who were suspected of having taken part in combat or having supported partisans. Although List claimed he knew nothing of the crimes, he was convicted and sentenced to life imprisonment, on the basis that he ought to have known of the crimes, and failed to take steps to prevent them.

31. The Australian Military Courts applied a similar approach. Major General Hirota, the General Officer Commanding supply depots in Rabaul, was charged with command responsibility for the ill-treatment of Indian and Chinese Prisoner of War (POWs), and Lieutenant General Masao Baba, the Corps commander in North Borneo, with command responsibility for the Sandakan-Ranau death marches. In each case, the wording of the charge was identical with that on which General Yamashita had been arraigned:

While a commander ... unlawfully disregarded and failed to discharge his duty as such Commander to control the conduct of the members of his command whereby they committed brutal atrocities and other high crimes

32. On the question of a commander's responsibility to prevent the commission of war crimes by subordinates, at the time there were two schools of thought among international lawyers. According to one view, the commander was responsible only when the commander '*ordered or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent ... violations of the laws or customs of war*'. According to the other school, responsibility went further, and included a duty to take steps to see whether offences were being committed. The Australian courts convicted each of the commanders. Baba was sentenced to death, and Hirota to seven years imprisonment. It appears the court subscribed to the latter doctrine. On review, the Judge Advocate General accepted the wide responsibility doctrine, reporting that: '*the laws and usages of war impose a responsibility upon commanding officers to take all possible measures to prevent violations of those laws by troops in their command*'. Some months later, the International Military Tribunal for the Far East arrived at a similar result, holding: '*An Army Commander must be at the same pains to ensure obedience to his orders in this respect as he would in respect of other orders he has issued on matters of the first importance*'.

³³ Reference 16 – *United States v Von Leeb (High Command Case)*, 11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 (1951) 462 543-544.

³⁴ Reference 17 – *US v List* 8 Law Reports of Trials of War Criminals (1949); Reference 18 – *The Hostage Case* 11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 757 (1950).

33. In 1977, the doctrine of command responsibility was recognised in the Additional Protocol No 1 to the Geneva Conventions.³⁵ Article 86(2) provides:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from ... responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

34. Article 87 requires commanders to 'prevent and, where necessary, to suppress and to report to competent authorities' any violations of the Conventions and of Additional Protocol 1.

35. Since 1998, the principle of command responsibility has been further codified in the Rome Statute, and is subject to the jurisdiction of the International Criminal Court, and in Division 268 of the (Cth) *Criminal Code*. Section 268.115 provides that military commanders and superiors are criminally responsible for offences committed by forces or subordinates under their effective command or authority and control, as a result of their failure to exercise control properly, where the commander or superior knew or was reckless that the forces or subordinates were or were about to commit the offences, and failed to take all necessary and reasonable measures to prevent or repress their commission, or to submit the matters to competent authorities for investigations and prosecution.

36. Essentially, there are three elements to establishing liability:³⁶

- a. The existence of a superior-subordinate relationship, involving actual control, whether direct or indirect;³⁷
- b. Knowledge of, or reckless indifference to, the actual or imminent commission of the offences; and
- c. Failure to act to prevent the crimes, which may be satisfied by failing to make proper inquiries, or to cause there to be a proper investigation after the event.³⁸

37. As to the first, while actual control is required, legal authority to command is not. Liability extends to a person *effectively acting* as a military commander, in respect of offences committed by forces under his or her *effective authority and control*. That is relevant, in particular, to the potential offences committed by [REDACTED]. As

³⁵ Reference 19 – Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

³⁶ See Reference 20 – *Failure to Halt, Prevent or Punish: the Doctrine for Command Responsibility for War Crimes*, Andrew Mitchel, Sydney Law Review Vol 22:381 (Sept 2000), p 384.

³⁷ See Reference 21 – ICC-01/05-01/08-3636-Red 08-06-2018 1/80 EC A Situation in the Central African Republic in the Case of The Prosecutor v. Jean-Pierre Bemba Gombo, 8 June 2018 https://www.icc-cpi.int/courtrecords/cr2018_02984.pdf [*Bemba Case* ICC 01/05-01/08].

³⁸ See Reference 22 – *Prosecutor v. Pavle Strugar (Trial Judgment)*, IT-01-42-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 31 January 2005, available at: <https://www.refworld.org/cases,ICTY,48ad42092.html> [accessed 16 October 2020] [*Prosecutor v Strugar* ICTY IT-01-42-T].

to the third, failure to cause there to be a proper investigation after the event attracts liability.³⁹ As appears from the above discussion of the authorities, and as will appear throughout this report, it is the second—the question of knowledge of, or reckless indifference to, the actual or imminent commission of the offences, that is often decisive.

Defences

38. Likewise, there are two categories of defences available to Criminal Code Division 268 offences. First, there are the Code-wide defences set out in Chapter 2—most relevantly those in Divisions 9 and 10, and in particular mistake of fact,⁴⁰ intervening conduct or event,⁴¹ sudden or extraordinary emergency,⁴² self-defence,⁴³ and lawful authority.⁴⁴

39. Of these, self-defence is the most potentially relevant. Under s 10.4, a person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence. A person carries out conduct in self-defence involving use of lethal force if and only if they believe the conduct is necessary to defend themselves or another person, or to prevent or terminate the unlawful imprisonment of himself or herself or another person, and the conduct is a reasonable response in the circumstances as he or she perceives them.

40. Additionally, there is also a Division 268-specific defence of ‘superior orders’:

268.116 Defence of superior orders

(1) The fact that genocide or a crime against humanity has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, does not relieve the person of criminal responsibility.

(2) Subject to subsection (3), the fact that a war crime has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, does not relieve the person of criminal responsibility.

(3) It is a defence to a war crime that:

(a) the war crime was committed by a person pursuant to an order of a Government or of a superior, whether military or civilian; and

(b) the person was under a legal obligation to obey the order; and

(c) the person did not know that the order was unlawful; and

³⁹ *Prosecutor v Strugar* ICTY IT-01-42-T.

⁴⁰ Code s 9.1 Mistake or ignorance of fact (fault elements other than negligence).

⁴¹ Code s 10.1 Intervening conduct or event

⁴² Code s 10.3 Sudden or extraordinary emergency

⁴³ Code s 10.4 Self-defence

⁴⁴ Code s 10.5 Lawful Authority

(d) the order was not manifestly unlawful.

Note: A defendant bears an evidential burden in establishing the elements in subsection (3). See subsection 13.3(3).

41. It is generally accepted, although not the subject of recent judicial decision in Australia, that any order to kill persons not taking an active part in hostilities, outside of the accepted bounds of LOAC,⁴⁵ is by definition a manifestly unlawful order.⁴⁶ In other jurisdictions, the killing of people who may at one stage have been DPH, but at the time of death were *hors de combat* due to injury, has been prosecuted as a serious criminal offence in grave contravention of LOAC, and of criminal and military law.⁴⁷

The role of the Attorney-General

42. A prosecution for an offence under the Criminal Code Division 268 may only be commenced with the Attorney-General's written consent, and must be prosecuted in their name:

268.121 Bringing proceedings under this Division

(1) Proceedings for an offence under this Division must not be commenced without the Attorney-General's written consent.

(2) An offence against this Division may only be prosecuted in the name of the Attorney-General.

(3) However, a person may be arrested, charged, remanded in custody, or released on bail, in connection with an offence under this Division before the necessary consent has been given.

The International Criminal Court – the principle of complementarity

43. The whole of the period under consideration by the Inquiry falls within the jurisdiction of the ICC. In the light of the decision of the Prosecutor of the ICC to open an investigation in respect of Afghanistan, it is important to observe that, under the principle of complementarity, the ICC *lacks*

⁴⁵ As to the adequacy of incorporation of the core Law of Armed proportionality principle into Code Division 268—see Reference 23 – Rob McLaughlin and Bruce Oswald, ““Wilful killing” during armed conflict: is there a defence of proportionality in Australia?” (2007) 18 *Criminal Law Forum* 1. Recent amendments to Division 268 have partially addressed this issue.

⁴⁶ The Rome Statute distinguishes between offences of genocide and crimes against humanity, and war crimes. The former are made—by definition—manifestly unlawful, thus rendering of the defence of superior orders unavailable. For war crimes, however, the requirement to deal with the question of the manifest illegality of the order remains a factor in determining the availability of the defence: *Rome Statute of the International Criminal Court* Article 33 – ‘Superior orders and prescription of law. For a detailed treatment of this issue see, inter alia: Reference 24 – Paola Gaeta, ‘The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law’ (1999) 10 *European journal of International Law* 172.

⁴⁷ For example, see Reference 25 – *R v Blackman* [2014] EWCA Crim 1029 per Ld Thomas of Cwmgiedd, at [67]; Reference 26 – *US v Maynulet* [2010] United States Court of Appeals for the Armed Forces (No. 09-0073/AR) per Baker J at 6-10 on the non-availability of the defence of mistake of law in this case - www.armfor.uscourts.gov/opinions/2009SepTerm/09-0073.pdf.

jurisdiction and the Australian Attorney-General is not to surrender, for example, a member of the ADF to the ICC's jurisdiction, until Australia has had the full opportunity to investigate or prosecute any alleged crimes. Article 17 of the Rome Statute states:

Article 17: Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

44. Australian civilian courts have jurisdiction under Division 268 of the Criminal Code in respect of prosecutions for war crimes that are serious violations of article 3 common to the Geneva Conventions committed in the course of an armed conflict that is not an international armed conflict, or other serious violations of the laws and customs applicable in such conflicts that amount to war crimes. As discussed below, at least in theory, such proceedings could also be brought as 'Territory offences' under the *Defence Force Discipline Act 1982* (DFDA). There is no legal impediment to Australian courts or military tribunals hearing such cases if they are to be brought.

45. Pursuant to Article 17 of the Rome Statute, the ICC will only exercise its jurisdiction if a State fails to genuinely investigate and prosecute a situation in which crimes against international humanitarian law have been committed.⁴⁸

46. This principle of complementarity is fundamental to the Rome Statute, and to Australia's ratification and domestication of that Convention. As was noted expressly in the *National Interest Analysis*:⁴⁹

The Statute emphasises that the Court will be complementary to national criminal jurisdictions, recognising that it is the duty first and foremost of every State to exercise its national criminal jurisdiction over those responsible for international crimes. The Court will operate where a national jurisdiction is unwilling or unable genuinely to carry out the investigation or prosecution of persons alleged to have committed crimes. It will be the Court which determines whether a national jurisdiction is unwilling or unable to deal genuinely with alleged crimes by way of investigation or prosecution (Article 17).

47. The Joint Standing Committee on Treaties Report No. 45: *The Statute of the International Criminal Court* (May 2002) was similarly robust regarding this principle. It noted that it underpinned the concerns expressed in a range of submissions relating to issues of 'sovereignty' and the capacity of the ICC to reach—uninvited, so to speak—into Australian legal processes.⁵⁰ At paragraph 3.16 of the Report, the Committee assessed that:

Under the principle of complementary national and international criminal jurisdictions (which is the cornerstone of the ICC Statute) [the Rome statute] will create an obligation upon States Parties to investigate and, where appropriate, prosecute allegations that their nationals have committed crimes within the jurisdiction of the ICC. The ICC will only prosecute as a court of last resort where the State is unwilling or genuinely unable to carry out the investigation or prosecution. Inability to prosecute presumably would mean that the judicial processes in a State Party have collapsed and are no longer functioning. The ICC could also prosecute where the domestic prosecution has been conducted in a manner clearly intended to shield an accused person from the ICC.

48. The Committee thus concluded that: '[T]he ICC Statute confirms the primacy of national jurisdictions and provides that the ICC can act only if the State is unable or unwilling to prosecute'.⁵¹

49. As added assurance in this respect, the *International Criminal Court Act 2002* contains additional procedural requirements that further entrench complementarity, particularly with respect to the

⁴⁸ Reference 27 – Cedric Ryngaert, 'Applying the Rome Statutes Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes by States Acting Under the Universality Principle' (2008) 19 *Criminal Law Forum* 153.

⁴⁹ Reference 28 – *National Interest Analysis* - <http://www.austlii.edu.au/au/other/dfat/nia/2000/24.html>.

⁵⁰ Reference 29 – Joint Standing Committee on Treaties Report No. 45: *The Statute of the International Criminal Court* (May 2002)

http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/icc/report.htm#fullreport.

⁵¹ At paragraph 3.17.

requirement for an Attorney-General's certificate prior to surrender to the ICC of a person within Australia's control:⁵²

22 Certificate by Attorney-General

The Attorney-General must not issue a notice under section 20 or 21 after receipt of a request for the arrest and surrender, or for the provisional arrest, of a person for a crime unless the Attorney-General has, in his or her absolute discretion, signed a certificate that it is appropriate to do so.

...

29 Certificate by Attorney-General

The Attorney-General must not issue a warrant for the surrender of a person for a crime unless the Attorney-General has, in his or her absolute discretion, signed a certificate that it is appropriate to do so.

50. There are further provisions that deal with situations such as requests from other ICC Member States, and situations where an ICC request for surrender of a person has been made, but an Australian process remains afoot:⁵³

55 Postponement where admissibility challenge

(1) This section applies if the ICC is considering an admissibility challenge under article 18 or 19 of the Statute in respect of a case to which a request for cooperation relates.

(2) If the ICC has not made an order under article 18 or 19 of the Statute allowing the Prosecutor to collect evidence to which the request relates, the Attorney-General may postpone the execution of the request until the ICC has made its determination on admissibility.

(3) If the ICC has made an order under article 18 or 19 of the Statute allowing the Prosecutor to collect evidence to which the request relates, the Attorney-General may not postpone the execution of the request under this section but must deal with it under this Part.

(4) If the ICC determines that the case to which the request relates is inadmissible, the request must be refused.

(5) If the ICC determines that the case to which the request relates is admissible, and there is no other ground for refusing or postponing the request, the request must continue to be dealt with under this Part.

51. The practical consequence of this scheme is that there will be no extradition to the ICC, unless Australia's Attorney-General considers that Australia 'is unwilling or unable genuinely to carry out the

⁵² *International Criminal Court Act 2002* - <https://www.legislation.gov.au/Details/C2016C00574>.

⁵³ *International Criminal Court Act 2002*.

investigation or prosecution’ under Article 17 of the Rome Statute. As Professor Gillian Triggs has observed:⁵⁴

In these ways, the implementing legislation makes it clear, not only that Australia has primacy of jurisdiction, but also that any decision to allow a prosecution will lie exclusively with the unimpeachable ‘political’ judgment of the Attorney-General ...

While these provisions appear to be valid under the Constitution, it remains open to the judgment of the ICC itself whether a State party ‘is unwilling or unable genuinely to carry out the investigation or prosecution’ under Article 17 of the *Rome Statute*. If a State were to be unwilling or unable to do so, the ICC may assert a secondary jurisdiction over the offences... however, the ICC may not be able to obtain physical control of the alleged perpetrator for a trial because, if they are present in Australia, the Attorney-General could refuse to surrender the accused under the new *International Criminal Court Act 2002* (ICC Act).

52. There remains some debate as to the way in which contested complementarity; that is, situations where the national jurisdiction claims an effective process is on foot or has been completed, but where the ICC may not agree with this assessment, will be dealt with by both national courts and the ICC.⁵⁵ The ICC Prosecutor is entitled to make their own assessment as to the adequacy of any national process cited as an admissibility bar to ICC jurisdiction. In discussing the manner by which a series of cases arising out of election-related communal violence in Kenya 2007-2008 came to be admissible before the ICC, Chandra Lekha Sriram and Stephen Brown observed that:⁵⁶

Considerations of complementarity and gravity should be examined together because each is a pillar of admissibility: under Article 53(1)(b) of the Rome Statute, in initiating a case the prosecutor must take into consideration whether the potential case is or would be admissible under Article 17, the provisions of which include complementarity and gravity. These considerations are also potentially intertwined because in situations where national proceedings are taking place, the ICC may need to examine closely whether the same conduct by the same person is being prosecuted by a national jurisdiction before deciding if it will take action.

53. One significant consequence of this Inquiry is that, notwithstanding the decision of the ICC to open an investigation into Afghanistan, SOTG conduct is unlikely become a matter for investigation or prosecution before the ICC. This is because Australia is committed, and has demonstrated through this Inquiry, its commitment to inquire into, investigate, and if appropriate prosecute any allegations that may be amenable to ICC jurisdiction (in the absence of appropriate responses by Australia). Therefore, under the principle of complementarity, so long as Australia can satisfy the ICC Office of the Prosecutor that it is making the requisite inquiries and taking appropriate consequential action, the jurisdiction of the ICC is not enlivened.

⁵⁴ Triggs, ‘Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law’ *Sydney Law Review* 507 at 531-532.

⁵⁵ See for example, Reference 30 – William Schabas, “‘Complementarity in Practice’: Some Uncomplimentary Thoughts’ (2008) 19 *Criminal Law Forum* 5.

⁵⁶ Reference 31 – Chandra Lekha Sriram and Stephen Brown, ‘Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact’ (2012) 12 *International Criminal Law Review* 219 at 227-228.

The Defence Force Discipline Act (Commonwealth) 1982

54. The DFDA applies to Defence members outside Australia.⁵⁷ There is no doubt the DFDA applies to conduct in the context of a NIAC in Afghanistan. In *Re Civilian Casualty Court Martial*,⁵⁸ the Chief Judge Advocate (CJA) found there was no doubt as to the application of the DFDA in precisely this context.

55. When the DFDA was debated and enacted in 1982, it was envisaged as a vehicle, should it ever be necessary, to prosecute war crimes either as Service offences, or via other legislation such as the *Geneva Conventions Act 1957*. Thus it has been observed that what:⁵⁹

...the Defence Force Discipline Bill Explanatory Memorandum reveals is that Parliament foresaw any potential breach of IHL [International Humanitarian Law] by an ADF member as open to being prosecuted under the DFDA if that conduct constituted an offence under the DFDA or the laws of Australia as they existed in 1982...

In adopting this view, the Explanatory Memorandum noted that, ordinarily, belligerents will try members of their own armed forces for possible violations of the laws of war using their own military offences, such as 'looting, murder, rape, assault, theft, [or] arson'.

56. However, there are potential difficulties with that course. Tim McCormack suggested that, with the ratification of the Rome Statute, use of DFDA service offences to prosecute Rome Statute war crimes committed by ADF members may in fact be inadequate for the purposes of complementarity:⁶⁰

If we do ratify the [Rome] statute and if we as a nation want to benefit from the complementarity formula as it is written into the statute, then we need to make sure that we have comprehensive legislation so that the Australian *Defence Force Discipline Act* would cover any act that is covered in the subject matter jurisdiction of the court, because then the Australian government can choose to exercise its primary jurisdictional right. Without that legislation—and the gaps really are in relation to the Geneva Conventions Act only covering international armed conflict and not non-international armed conflict; and the ADF has been involved in a number of internal armed conflict deployments—there is no provision for crimes against humanity in Australian domestic law.

57. Similarly, Jann Kleffner, writing in 2003, described why any policy of charging war crimes as a Service offence could be problematic:⁶¹

⁵⁷ Reference 32 – *Defence Force Discipline Act 1982*, s 9.

⁵⁸ Reference 33 – *Re Civilian Casualty Court Martial* (2011) 259 FLR 208, per Westwood CJA; for an academic analysis of this case see Reference 34 – Joshua Kelly, 'Re Civilian Casualty Court Martial: Prosecuting Breaches of International Humanitarian Law Using the Australian Military Justice System' (2013) 37:2 *Melbourne University Law Review* 342.

⁵⁹ Joshua Kelly, 'Re Civilian Casualty Court Martial: Prosecuting Breaches of International Humanitarian Law using the Australian Military Justice System' (2013) 37 *Melbourne University Law Review* 342 at 350-351.

⁶⁰ Reference 35 – Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Melbourne, 14th March 2001, 134 (Timothy McCormack) -

http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jsct/icc/hearings.htm.

⁶¹ Reference 36 – Jann Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86 at 95-97.

[The] 'ordinary crimes approach' raises the question whether the *ICC Statute* accepts prosecution for offences classified as 'ordinary' rather than as the specific international crimes within the ICC jurisdiction, in order to consider a national jurisdiction to satisfy the complementarity requirements...

[W]hen States opt for the 'ordinary-crimes approach, a number of issues are likely to arise, some of which may have a bearing on whether cases are declared admissible. First, it may be difficult to find a 'matching' ordinary crime for certain ICC crimes...

Secondly, the characterization of an ICC crime as an ordinary crime under domestic law will regularly entail that in determining the adequate sentence, recourse will be made to the sentencing framework for such an ordinary crime. Yet, the sentence must match the gravity of conduct constituting a crime that belongs to the 'most serious crimes of international concern'.

58. Citing an Australian case, he concluded that:⁶²

[W]hen the Australian High Court was faced with the application of a law that legislated in terms of serious domestic crimes [that] internationally are considered war crimes, it noted that there is a 'disconformity between the statutory offense purportedly created by [...] the Act and a war crime in international law'. [*Polyukhovich v Commonwealth of Australia* (1991) 172 CLR at 579.] As a consequence the Commonwealth of Australia was held not to have the power to legislate on the exercise of universal jurisdiction, since universal jurisdiction extends only to the crime in question as defined by international law. For crimes not defined in conformity with international law, the external affairs power to establish and exercise universal jurisdiction was held not to apply.

59. It is, therefore, at the very least arguable that prosecution as a Service offence (for example, s33A - assault occasioning actual bodily harm), of conduct that could come within the scope of a Criminal Code Division 268 offence (for example, 268.74 War crime - outrages upon personal dignity), could be problematic from the perspective of complementarity.

60. Use of the DFDA s 61 territory offences mechanism, with its direct linkage to the substantive offences in Division 268, might offer a safer course of action. The High Court has recently resolved any doubt as to the applicability of DFDA s 61(3) when, for the first time, a majority held that s 61(3) of the Act, in obliging Defence members to obey the law of the land, is, in all its applications, a valid exercise of the Defence power.⁶³

61. However, for various reasons, including that many of the suspected perpetrators are no longer serving and thus not amenable to DFDA jurisdiction,⁶⁴ and that there are considerable overlaps in the conduct and individuals in question so that a single agency should be responsible for any criminal investigation, as well as to avoid any potential problem with complementarity, and any arguable constitutional complication (for example, with the constitutional guarantee under s 80 of the Commonwealth Constitution of trial by jury), the Inquiry has recommended that any criminal

⁶²Jann Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86 at 95-97.

⁶³Reference 37 – *Private R v Brigadier Cowan* [2020] HCA 31.

⁶⁴At least, after six months after they ceased to be defence members: DFDA s 96(6).

investigation and prosecution of a war crime should be undertaken by the the Australian Federal Police and CDPP, with a view to prosecution in the civilian criminal courts, rather than as Service offences or in Service tribunals.

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Chapter 1.11

THE APPLICABLE RULES OF ENGAGEMENT

EXECUTIVE SUMMARY

This chapter identifies the key principles and concepts that informed the rules of engagement (ROE) that applied to the operations of the Special Operations Task Group (SOTG) in Afghanistan, and which were intended to ensure that there were no breaches of LOAC.

The chapter then considers whether there was any doubt or uncertainty on the part of SOTG members about the content of the ROE or about how the ROE applied to various factual scenarios they faced.

Some operators adopted an unduly liberal interpretation of the application of ROE to two frequently encountered situations – namely ‘spotters’ and ‘squirters’.¹ However, the Inquiry’s analysis of the incidents in Part 2 of this report is that where there is credible information that an Afghan male was killed by SOTG personnel when it was clear the person was unarmed and under control, and neither taking a direct part in hostilities nor posing a credible threat, there could have been no real doubt or confusion about the interpretation of applicable ROE. The Inquiry does not seek to second guess ‘split second’ decisions to use lethal force in the heat of battle.

INTRODUCTION

1. Rules of engagement (ROE) are Chief of Defence Force (CDF) directives issued to the Australian Defence Force (ADF), in consultation with the Australian Government, which regulate the use of force, and activities connected to the use of force. During the relevant period (2005 to 2014), in the broader Middle East Area of Operations (MEAO), there were several sets of ROE which applied to different tasks and geospatial sub-areas of the MEAO. For example, in January 2009 there were separate sets of ROE for force protection (generally relating to operations outside Afghanistan), conventional operations inside Afghanistan, and Special Operations Task Group (SOTG) operations inside Afghanistan. The number and scope of ROE applicable at any given time changed as ROE were merged, amended, and new ROE issued. These changes reflected the evolving environment, missions, and tasks over the long span of ADF operations in Afghanistan.

2. ROE are designed to be consistent with Australian domestic law and Australia’s obligations under international law. ROE cannot be inconsistent with the Law of Armed Conflict (LOAC), in the sense that ROE cannot authorise what LOAC prohibits; although ROE may impose additional restrictions. Accordingly, ADF members operating within the ROE are operating within LOAC.

3. For present purposes, the ROE have an additional relevance. As explained in the preceding chapter, one of the elements of the war crime of murder is that the perpetrator knew of, or was reckless as to, the factual circumstances establishing that the person killed was not taking an active part in the hostilities. If the ROE require certain steps to be taken before using lethal force to

¹ A squirter is a local national seen running from a compound of interest.

positively identify a target as hostile, then failure to take those steps may be relevant to establishing recklessness.

GENERAL PRINCIPLES INFORMING THE ROE

4. The first part of this chapter describes the following:
 - a. key general principles applicable to the ADF ROE under which SOTG operated in Afghanistan;
 - b. key definitions and concepts that informed the applicable ROE;
 - c. key indicia regarding the identification of enemy forces who were liable to lethal targeting in accordance with LOAC; and
 - d. a generalised description of some other key LOAC provisions of direct relevance to the subject matter of the Inquiry.
5. The Inquiry obtained overwhelming evidence that all SOTG members, including those non-Special Forces members assigned to the SOTG, were briefed on Australian ROE during their force preparation and as part of the process of reception, staging, onward movement, and integration (RSOI) on their arrival in the area of operations. This included the provision of ROE cards, to be carried as an aide-mémoire. However, the Inquiry found divergent views amongst some SOTG members on the application of ROE, particularly with respect to the identification of when 'squirters' and 'spotters' would pass the threshold for engagement, to the extent that in some cases their actions were incompatible with any reasonable interpretation. This is discussed below.

Key Australian Defence Force Rules of Engagement Principles

6. **Self-Defence.** The primary general legal principle applicable to the ROE under which the ADF – including the SOTG, which operated under International Security Assistance Force (ISAF) rather than ADF operational command, but still under ADF ROE - operated in Afghanistan is that *self-defence was available as a justification for use of force, including lethal force*. That is, in any situation within the area of operations, the legal justification of 'self-defence' or defence of others (including of mission-essential equipment) was available as a defence to any charge of unlawful killing or infliction of serious harm.
7. However, an understanding of how the legal defence of self-defence operates in a legal battlespace within which LOAC also applies, is complex. In essence, there were two justifications for use of lethal force available to ADF members in Afghanistan. The first was self-defence. This justification is found in *Australian domestic law* that applies to ADF members extra-territorially. This justification centres around a complex part-subjective and part-objective legal test that is chiefly concerned with evidence and indicia of the fear of imminent death or really serious injury to self or another, which is reasonably apprehended by the user of force, and the reasonableness and necessity of the force they used in response in that particular situation.
8. There is ongoing debate as to whether and how the justification of self-defence is available when dealing with enemy forces in operations, when LOAC says attack rules and targeting are the relevant legal paradigm governing use of force against the adversary (see below). This is a difficult and contentious area of law and has led to confusion as to which legal criteria/assessment paradigm

is or should be used in analysing an incident of use of force against the enemy. Some recent assessments have concluded that amongst United States combat forces, 80 per cent or more uses of force in combat operations were described as incidents of self-defence rather than as LOAC-permissible lethal targeting of enemy forces.²

9. The Inquiry has identified that in numerous SOTG operational summaries, Quick Assessments and Inquiry Officer Inquiry (IOI) reports, the justificatory narrative set out has employed or recorded both analytical paradigms. Whether this assists command execute its oversight responsibility is an important matter, but is beyond the scope of this Inquiry.

10. **LOAC.** The second legal justification for use of lethal force available to the ADF in Afghanistan was LOAC. This is the second general principle which underpins ROE: *LOAC is available as a justificatory scheme for use of force only under certain circumstances*. This justificatory scheme is sourced in the first instance from *international law*, and it is applicable to Australia because Australia has ratified or recognised that this law binds Australia and its agents, including the ADF.

11. That said, however, LOAC is also operationalised for the ADF through *Australian domestic law* (such as Division 268 of the *Criminal Code Act 1995 (Cth)*) and – as subsidiary instruments - ADF orders and instructions (such as ROE and Targeting Directives [TD]). The distinction between LOAC enshrined in legislation, and orders set out in the form of ROE and TDs, is one as to source of authority; it is not as to legal content, for ROE and TDs cannot exceed or go beyond what is permitted by law.

12. On this point, it is important to recall that sometimes ROE and TDs limit ADF actions and authorisations to a smaller subset of conduct – that is, they require the ADF to apply limits on use of force, for example, that are more stringent than the law requires. This may be done for operational or strategic ('policy') reasons. For example, whilst it may be permissible under LOAC to attack a particular religious building as a military objective in a given situation because it is being used as a base of operations by the adversary, ROE and TDs may restrain the ADF from attacking that particular type of target for other reasons (such as achieving a broader strategic outcome by not antagonising the local population by destroying their place of worship). Thus a breach of an ROE rule that limited conduct more tightly than the law required (but where the conduct was still within the permissible bounds of LOAC) is not a breach of LOAC; it is only a breach of orders.

13. It is vital to recognise, however, that LOAC is available as a justification for such use of lethal force (and indeed other less-than-lethal uses of force such as capture, search and seizure, and so on) only when the following conditions are met:

- a. there is an armed conflict occurring;
- b. Australia is a party to that armed conflict;

² Reference 1 – 'Symposium on Soldier Self-Defence and International Law', *Opinio Juris*, 24 April – 03 May 2019, available at <opiniojuris.org/2019/04/29/symposium-on-soldier-self-defence-and-international-law-highlighting-and-framing-the-issue%ef%bb%bf/>

- c. the ADF force element has been authorised to use the level of force employed – generally through ROE; and
- d. the use of force is compliant with LOAC – for example, LOAC does not permit the targeting of civilians, so any use of force that targets civilians would not be covered by the authorisations under LOAC, and any ROE that permitted targeting civilians would be unlawful.

14. In the case of Afghanistan, there was an armed conflict occurring (a non-international armed conflict) and Australia was a party to that armed conflict – that is, a combatant in that armed conflict with an identified enemy Australia (and others) was fighting against. Therefore, LOAC applied to ADF conduct as a matter of both international and Australian law.

15. However, LOAC applies to conduct within its scope, and this means that other conduct by ADF personnel in Afghanistan was governed not by LOAC, but rather by the self-defence rules noted above, which also applied in Afghanistan. The significance of this legal complexity can be illustrated by an example.

16. In Afghanistan, the Taliban’s military forces were one of the ADF’s designated enemy forces. This means that when an ADF member was on patrol, for example, and came across people who were targetable with lethal force because they were members of the enemy fighting force – Taliban fighters – they could be targeted on that basis. There was no need to resort to the legal justification of self-defence to justify killing that enemy fighter, because the applicable legal regime in relation to that situation was LOAC, and LOAC permits the ADF to seek out and kill such enemy forces.

17. However, on a different day, an ADF FE may have been deployed to assist ANSF to apprehend a ‘drug baron’ who was not a member of the Taliban, but simply a criminal. The reason for apprehending that individual or for carrying out an operation to shut down that drug baron’s facilities may still have been linked to the armed conflict – for example, the drug trade was in general financing Taliban operations. However the drug baron in question had no links to the Taliban or to the hostilities against the ADF. In this situation, the applicable elements of ADF ROE would not be those based in LOAC, because although the general context of the operation was an armed conflict, the person against whom the operation was directed was not an enemy fighter. In this case, that person – although clearly a criminal – is for LOAC purposes a ‘civilian’ who cannot be made the target of attack.

18. This means that the use of force rules applicable in this counter-drug baron operation would be those that relate to policing activities (not armed conflict), and the applicable law in relation to use of lethal force against the drug baron (if that became necessary) would be self-defence (not the LOAC authorisation to attack and kill enemy fighters as of right). This would mean that the ADF FE engaged on this apprehension operation would not be entitled to kill the drug baron on sight in accordance with LOAC, because that drug baron is not a person who can be targeted under LOAC. However, if in the process of attempting to apprehend the drug baron, that drug baron engaged the ADF FE, then an ADF member who reasonably believed that they had to use lethal force to stop that drug baron killing someone could do so; however, the justificatory scheme/legal regime against which that ADF member’s conduct would need to be assessed would be the law of self-defence.

Key definitions and concepts that informed the applicable Australian Defence Force Rules of Engagement

19. **In relation to the self-defence rules.** Self-defence draws on the legal definitions of ‘hostile act’ and ‘hostile intent’ as triggers for use of force – which are generally as follows:

Hostile Act. A hostile act is an armed attack or other deliberate use of force where there is a reasonable belief that loss of life or serious injury has either resulted or is likely to result. A hostile act may be observed or not, and may be an isolated incident or part of a planned campaign.

Hostile Intent. Hostile intent is the threat of the imminent use of force where there is a reasonable belief that loss of life or serious injury to persons is likely to result if the threat is carried out. Whether or not hostile intent is being demonstrated must be judged by the on-scene commander on the basis of both:

- (1) the threatening individual or unit's capability and preparedness to inflict imminent or immediate damage; and
- (2) the available evidence, including intelligence, which indicates an intention to conduct an imminent or immediate attack or deliberate use of force.

20. These definitions applied to use of force when the underlying justification or reason was self-defence or defence of others.

21. **In relation to LOAC rules.** LOAC set out general limitations on the use of lethal force in relation to the ‘enemy,’ and provides that (setting aside the presently theoretical issue of state military forces, as in this particular context, there were no enemy state military forces against which the ADF was fighting) such lethal force may only be used:

- (1) against persons who take an active or direct part in hostilities (DPH); and
- (2) against targetable members of organised armed groups (OAG).

22. LOAC further describes these two categories of targetable person against whom lethal force could be used in accordance with LOAC because they were enemy fighters. It acknowledges that there is no need to await the commission of a hostile act or demonstration of hostile intent before the ADF may apply lethal force to accomplish the mission against these two categories of people. These two categories of people were the designated hostile or enemy forces who could be attacked with lethal force because of their status and/or conduct. Because they were targetable in accordance with LOAC, there was no necessity for the indicia of self-defence to be present when using lethal force against these categories of people.

23. LOAC sets out separate tests for assessing the targetability of people in each of these two categories (DPH and OAG). Whilst there are some similarities, the tests differ as to content given that the indicia, emphasis, and consequences of each categorisation differ.

24. This distinction as to indicia and targetability criteria was necessary because under LOAC, the liability to targeting of each type of enemy fighter (DPH on one hand, OAG on the other) differs. In

short, civilians who are assessed as DPH are considered 'ad hoc' enemy whose connection or otherwise to an organised military force is unknown or merely suspected. Consequently, their liability to targeting is only within the 'bubble' of time bound by the lead up to their attack on ADF and friendly forces, during that attack, and for a period of time after that attack. Once the DPH has concluded, however, that person once again re-gains the protections that attend their underlying status as 'civilians' – including the protection from being made the target of an attack. By contrast, people who are considered under the OAG criteria are 'full-time' enemy OAG members. Consequently, they are targetable at all times unless and until they clearly dissociate themselves from the OAG and cease hostilities (or are out of the fight due to injuries, surrender, capture, or similar reasons in accordance with LOAC – see below). These indicia are described in general terms below.

Key indicia regarding the identification of enemy forces who were liable to lethal targeting in accordance with LOAC

25. **Set A indicia for DPH.** This test essentially focusses upon observable conduct aimed at causing harm to ADF, friendly forces, and local civilians. Conduct in this category could include, for example, attacking ADF FE with weapons, laying an improvised explosive device (IED), manoeuvring into an attacking or ambush position, manoeuvring to access a weapons cache, or departing from a position after an attack or after laying an IED.

26. **Set B indicia for DPH.** This test covers DPH that was indicated by intelligence and other sources. For example, this test could apply when intelligence indicated that an individual was planning an attack or operation against the ADF, friendly forces, or civilians, and this attack or operation was intended to cause harm to those targeted.

27. **Targeting members of an OAG.** The LOAC requirements for satisfaction of the OAG test are generally as follows:

- (1) Identify those OAGs that are taking part in the hostilities against the ADF and friendly forces. There are a range of factors and indicia that can be used to assist in this identification process.
- (2) Identify whether the proposed target is a member of one of those identified enemy OAGs. Again, there are a range of factors and indicia that can be used to ascertain the required connection between the individual proposed to be targeted, and the enemy OAG.
- (3) Confirm whether or not the identified OAG member proposed to be targeted is fulfilling a 'targetable role' in that enemy OAG – that is, undertaking a role in that enemy OAG that LOAC defines as a role, or conduct, that makes an individual targetable with lethal force. For example, planning, commanding, or taking part in OAG military operations are targetable roles. Being an OAG political spokesperson or propagandist who never takes part in planning or conducting or facilitating military operations may not be a targetable role.

A generalised description of some other key legal provisions of direct relevance to the subject matter of the Inquiry

28. **Treatment of detainees / persons under control / hors de combat.** LOAC requires that persons who are hors de combat – out of the fight – are not to be killed as if they were still enemy fighters engaged in hostilities. These people are either unable to continue the fight (for example through injury), or cannot continue the fight because they are under ADF control (for example, a restrained or detained person).

29. **Tactical questioning and use of force.** When questioning detained or captured people on the battlefield, these people are under ADF control and cannot be killed, unless in self-defence. Nor can they be assaulted or threatened with death, as they are not in a position to use force against the ADF. Tactical questioning is to be conducted without use of force beyond that required to appropriately restrain the individual and ensure the security of ADF and friendly forces.

APPLICATION OF THE ADF ROE BY SOTG

30. The remainder of this chapter makes some observations about the SOTG experience with the application of ROE. It addresses whether there was any reasonable doubt or uncertainty on the part of SOTG members about the content of ROE, or how ADF ROE applied to SOTG operations in Afghanistan.

Australian or International Security Assistance Force Rules of Engagement?

31. NATO issued combined ROE to ISAF troop contributing nations, however Operation (OP) SLIPPER ROE retained primacy for ADF Elements. In all instances, ADF OP SLIPPER ROE were at least as restrictive as ISAF ROE.

32. Over the course of hundreds of interviews conducted by the Inquiry with serving and former members who served with SOTG in Afghanistan, there was only minimal evidence of confusion on the part of personnel about what the applicable ROE were.

33. One member (of FE [redacted] on Rotation [redacted] in [redacted]) who arrived in theatre after the commencement of the Rotation, which meant he had his own ROE brief upon arrival, claimed that [redacted]

34. [redacted]

35. This witness gave evidence that [REDACTED] He gave this evidence (emphasis added):³

Q152. Okay. Just before I ask [witness's lawyer] if he's got anything to add, can I ask you this: did you think that the rules of engagement permitted what happened on the occasion we've been discussing about? A. [REDACTED]

Q153. Okay. So [REDACTED] ? A. [REDACTED]

36. The witness was asked [REDACTED]

37. In light of his evidence [REDACTED], other witnesses, including some of his fellow patrol members from Rotation [REDACTED] were asked [REDACTED]

38. [REDACTED] of SOTG members indicating that they were operating under ISAF ROE arose during the Inquiry Officer Inquiry conducted by [REDACTED] into the killing of a local national by [REDACTED] members of Force Element [REDACTED] at [REDACTED] on the night of [REDACTED]⁴ (considered in Chapter 2.36 – [REDACTED] and Chapter 3.02 - Inquiries and Oversight). Both individuals, when interviewed by [REDACTED], cited an ISAF ROE as the rule under which they decided to open fire, as opposed to Australian ROE. [REDACTED] dealt at length with that matter in his report, identifying that the two SOTG members were wrong in their understanding that they were operating under ISAF ROE and not Australian ROE, but ultimately concluding that the engagement still complied with Australian Rules of Engagement. [REDACTED]

³ Reference 2 – [REDACTED] TROI of [REDACTED]

⁴ Reference 3 – [REDACTED] Inquiry Officer Inquiry Report of [REDACTED] into incident on [REDACTED]

39. If there was any ambiguity in the minds of SOTG personnel about the primacy of Australian ROE (and the Inquiry does not consider it likely there was), the explanation may lie in the joint environment in which Australian forces operated, in particular the regular use of coalition assets [REDACTED] meant that Australian operators had to be conversant in ISAF ROE. The need to be conversant in both Australian and ISAF ROE is illustrated in the evidence of the SOTG

Legal Officer between [REDACTED] and [REDACTED] said in a statement provided to the Inquiry:⁵

In my role as legal officer, I would often be asked to review operational reporting before it was sent to either Australian or ISAF higher headquarters. The purpose of reviewing the reporting was to ensure that precise terminology was being used correctly. For example some terms used in both Australian and ISAF ROE had different meanings in each document. As SOTG had to report up both Australian and ISAF channels, I played a role in ensuring correct terminology was being used in reporting, to reflect which ROE was being referred to.

Application: ‘Squirters’ and ‘Spotters’

40. While the evidence before the Inquiry indicates that SOTG members were well-versed in the applicable ROE, there appears to have been a wide variation in how they were understood to apply to different factual scenarios.

41. Numerous witnesses were asked generic questions about the circumstances in which they could lawfully engage:

- a. A spotter;
- b. A squirter, defined as someone running from a compound of interest;
- c. A person under confinement; and
- d. A badly wounded insurgent who was *hors de combat*.

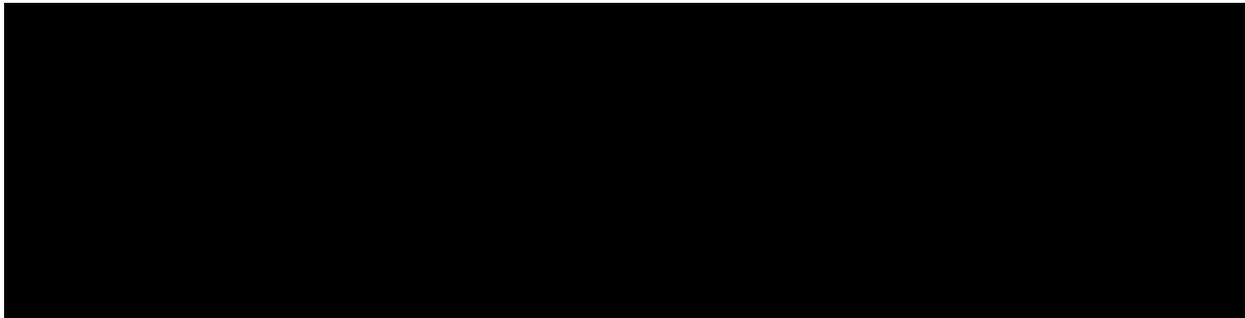
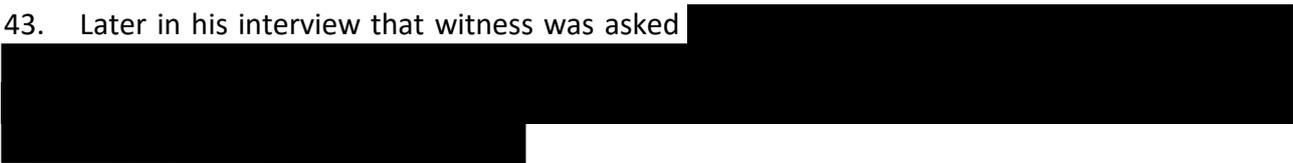
42. All witnesses said that [REDACTED] . But [REDACTED] this evidence was given by an FE-[REDACTED] member of SOTG [REDACTED]:⁶

[REDACTED]

⁵ Reference 4 – [REDACTED] statement, undated but provided to Inquiry on [REDACTED]
⁶ Reference 5 – [REDACTED] TROI [REDACTED]



43. Later in his interview that witness was asked



44. Differing answers, however, were given in respect of 'spotters' and 'squirters'.

45. In respect of 'spotters', some witnesses said that a 'spotter' could only be engaged if the person was seen holding a communication device, there was certain intelligence that confirmed the person was reporting on coalition forces and that they were facilitating the manoeuvre of hostile elements. Other witnesses said that it was enough that the person was holding a communication device and they were suspected of being hostile by, for example, ignoring calls to stop running. As will be seen in Part 2, there were many engagements (in both Rotation [REDACTED] and Rotation [REDACTED]) where the sensitive site exploitation photographs show the body of the killed local national with no more than a communication device. As will also be seen in Part 2, witnesses have admitted that such two-way radios (known as an 'ICOM' from the manufacturer of an Individual **COM**munication device) were planted on the bodies (known as 'throwdowns') in order to falsely portray that the engagement was of a spotter and therefore within ROE.

46. In respect of engaging 'squirters' (Afghan males running from a compound of interest) again there was wide variety in what elements were needed before the ROE permitted opening fire. Some witnesses said the person running could only be engaged if they were armed, some witnesses said there needed to be an assessment that the person was likely running to a cached weapon, others said there needed to be an assessment that the person was 'moving to a position of tactical advantage' or 'moving tactically' (but often the witness could not explain what this meant in practical terms), while other witnesses seemed to indicate that it was enough that a person was seen sprinting from a compound on an occasion where there was reliable intelligence of the presence of an Objective.

47. [REDACTED] was reflected in this evidence, given by a SOTG FE [REDACTED] patrol commander in the course of explaining [REDACTED]. He said:

[REDACTED]
7

48. In the same context another operator explained [REDACTED]

8

49. In only a few incidents where the Inquiry found there to be credible evidence that an Afghan male was killed by SOTG personnel when it was clear the person was unarmed did the SOTG member in question offer an explanation that the person killed was a squirter.⁹ However, as examples, those chapters include compelling accounts of other Australian personnel to the effect that [REDACTED]

[REDACTED].
[REDACTED] For completeness, it should be added that [REDACTED]

⁷ Reference 6 - [REDACTED] TROI of [REDACTED]

⁸ Reference 7 - [REDACTED] TROI of [REDACTED]

⁹ See [REDACTED]

[REDACTED]

50. The indefinite application of ROE to the 'spotter' and 'squitter' scenarios meant that a liberal view of the application of the ROE could be taken by some members of the SOTG. However the analysis of individual incidents considered in Part 2, and in Chapter 3.02 'Inquiries and Oversight' of this Report, does not involve any incident where it was found there was credible evidence that the SOTG member, acting in good faith, misapprehended the applicable ROE.

April 2013: Amplification of ROE by the Chief of Joint Operations

51. Chapter [REDACTED] deals with an incident on [REDACTED] at [REDACTED] which involved an engagement of an Afghan male [REDACTED]. A CIVCAS [civilian casualty] LOAC Violation Report was compiled by Task Force 66 and submitted to ISAF. That report mirrored the language in the Quick Assessment of this mission submitted to JOC.

52. As discussed in Chapter 3.02 (Inquiries and Oversight) Headquarters Joint Task Force (JTF) 633 was not satisfied with the language used in the Quick Assessment (QA) to describe the [REDACTED] engagement. Headquarters JTF 633 considered the QA and operational reporting did not adequately explain the term '*tactically manoeuvring*', nor explain the basis for statements that a local national's actions were '*consistent with that of an insurgent*' and '*consistent with insurgent TTPs*'. JTF 633 advised Chief of Joint Operations (CJOPS) that one of its concerns was (original emphasis):

These statements confuse the issue of whether the use of force was carried out on the sole basis of the LN's [local national] actions at the relevant time (directly relevant for direct participation in hostilities), as opposed to force used on the basis of his assessed status as an 'insurgent' (generally only partially relevant for direct participation in hostilities).

... these conclusions (that the LN was taking a direct part in hostilities) cannot be supported without knowing, in some detail, the facts which prevailed at the relevant time, and C/S [callsign] [REDACTED] belief about those facts.¹⁰

53. Accordingly, on [REDACTED], JTF 633 sent SOTG a detailed RFI [request for information], seeking amongst other things an explanation of what was meant by the various references to 'tactical manoeuvring', and the basis on which the alleged insurgent was engaged. This illustrates that higher command (JTF 633) was taking proper and diligent steps to ascertain the facts. As explained in Chapter 2.29, SOTG's written response to JTF 633 on [REDACTED] was less than helpful, provided no additional information, and took issue with the relevance of the information sought.¹¹

54. Higher headquarters were becoming increasingly dissatisfied with the opaque language in operational reporting. The Command Legal Officer in JOC from [REDACTED] to [REDACTED], gave evidence to the Inquiry that this incident and the incident on [REDACTED] (inquired into by [REDACTED], and discussed above) contributed to CDF on 29 April 2013 issuing an ROE Amplification order

¹⁰ Reference 8 – Decision Brief for CJOPS of [REDACTED] - DB for CJOPS – LOAC Violation Allegation [REDACTED].

¹¹ Decision Brief for CJOPS of [REDACTED]

to clarify the interpretation of the ROE for the determination of DPH¹² and CJOPS on 30 April 2013 issuing Directive 12/13 *Lethal Engagement of Civilians Directly Participating in Hostilities Under OP SLIPPER Rules of Engagement*.¹³ He said that the concern arising from these incidents was the lack of clarity in reporting about what exactly were the perceptions that led to the SOTG members forming the view that there was hostile intent. Also, he said, SOTG's frequent reference in operational reporting to 'insurgent TTPs' as forming the basis for use of force, needed to include the troopers' perception of the actual TTPs involved, and how they formed part of the decision-making to engage.¹⁴ He gave the example of squirters, saying *'The troops had to have more than simply witnessing the locals running away. They needed to provide more descriptors'*.¹⁵

55. Directive 12/13 did not supplant the OP SLIPPER ROE. Rather, it provided a common methodology against which the decision to engage a civilian might be examined. The Directive was focussed on 'spotters', or persons identified as providing tactical information to insurgents, and persons attempting to move to a position of tactical advantage before engaging FE and friendly forces. The Command Legal Officer explained that the concern that led to issuing of Directive 12/13 was not because of a suspicion that there had been unlawful killing by members, but because it was felt that there was a need to provide some guidance to command to assist in decision-making in the field and reporting.¹⁶

56. In Part 2 of this Report, the [REDACTED] incident (Chapter 2.29) and the [REDACTED] incident (Chapter 2.36) are considered in detail. In both instances, the Inquiry found there to be [REDACTED]
[REDACTED]. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

CONCLUSION

57. The Inquiry did not identify any widespread confusion or doubt on the part of SOTG personnel about the ROE. If there was any confusion or doubt, it was limited to a very few personnel.

58. As the Inquiry's analysis of the incidents in Part 2 of this report shows, any doubt or confusion about ROE played no part in those incidents where the Inquiry found there to be credible evidence that an Afghan male was killed by SOTG personnel when it was clear the person was unarmed, under control and posed no threat.

¹² Reference 9 – CDE ROEAUTH – OP SLIPPER RULES OF ENGAGEMENT SERIAL SEVEN – ROE AMP ORDER 2013-001 of 29 April 2013. [REDACTED]

¹³ Reference 10 – [REDACTED]
Rules of Engagem [REDACTED]

¹⁴ [REDACTED] ROC of [REDACTED]

¹⁵ [REDACTED] ROC of [REDACTED]

¹⁶ [REDACTED] ROC of [REDACTED]

59. In April 2013 the CDF issued an ROE Amplification order to clarify the interpretation of the ROE for the determination of DPH.¹⁷ CJOP's subsequent Directive 12/13, *Lethal Engagement of Civilians Directly Participating in Hostilities Under OP SLIPPER Rules of Engagement*¹⁸ was accurately described as an amplification of the ROE and was a sensible and useful command tool by requiring more descriptive language in operational reporting, and increasing the fidelity of command oversight of operations. Similar amplification directives, tailored to the area of operations and the evolving battlespace, would be a useful companion to ROE in future operations.

References:

1. 'Symposium on Soldier Self-Defence and International Law', *Opinio Juris*, 24 April – 03 May 2019, available at <opiniojuris.org/2019/04/29/symposium-on-soldier-self-defence-and-international-law-highlighting-and-framing-the-issue%ef%bb%bf/>
2. [REDACTED] TROI of [REDACTED]
3. [REDACTED] Inquiry Officer Inquiry Report of [REDACTED] into incident on [REDACTED].
4. [REDACTED] statement, undated but provided to Inquiry on [REDACTED]
5. [REDACTED] TROI [REDACTED]
6. [REDACTED] TROI of [REDACTED]
7. [REDACTED] TROI of [REDACTED]
8. Decision Brief for CJOPS of [REDACTED] - DB for CJOPS – LOAC Violation Allegation [REDACTED]
9. CDF ROEAUTH – OP SLIPPER RULES OF ENGAGEMENT SERIAL SEVEN – ROE AMP ORDER 2013-001 of 29 April 2013. [REDACTED]
10. Directive 12/13 Lethal Engagement of Civilians Directly Participating in Hostilities Under OP SLIPPER Rules of Engagement of [REDACTED]
11. [REDACTED] ROC of [REDACTED]

¹⁷ CDF ROEAUTH – OP SLIPPER RULES OF ENGAGEMENT SERIAL SEVEN – ROE AMP ORDER 2013-001 of 29 Apr 13. ¹⁸ CJOPS Directive 12/13 Lethal Engagement of Civilians Directly Participating in Hostilities Under OP SLIPPER Rules of Engagement of 30 Apr 13.

Chapter 1.12

WAR CRIMES INVESTIGATIONS OF OTHER NATIONS IN AFGHANISTAN

EXECUTIVE SUMMARY

This chapter summarises investigations and prosecutions by other International Security Assistance Force nations in respect of alleged war crimes during the Afghanistan conflict.

It demonstrates that other nations which may be supposed to have similar attitudes, culture and training to our own, have also had to deal with allegations of serious breaches of the law of armed conflict by their national personnel. Most of Australia's coalition partners in Afghanistan have had to deal with allegations of war crimes.

It also demonstrates that such investigations and prosecutions have encountered many pitfalls, both legal and popular. Even cases where the evidence is apparently strong and clear, investigations and prosecutions have met such obstacles. It is predictable that Australian prosecutions could encounter similar obstacles.

In particular, it can be anticipated that, in the light of the frequency of deployments, and conditions not dissimilar to those relied on in *Blackman*,¹ mental health defences including adjustment disorder will be invoked. Although it is doubtful that the statutory defence of 'diminished responsibility' is available in connection with the war crime of murder under (Commonwealth) *Criminal Code*, s 268.70, proof of matters which would otherwise provide a defence of 'diminished responsibility' would still be relevant to mitigation of penalty, and might be relevant to the exercise of prosecutorial discretion.

INTRODUCTION

1. Most of Australia's coalition partners in Afghanistan have had to deal with allegations of war crimes. This chapter summarises the experience in the United States of America (USA), Canada, New Zealand, the United Kingdom (UK), the Netherlands and Denmark, and the International Criminal Court (ICC).

United States of America

2. There have been a number of allegations of war crimes in respect of United States (US) personnel in Afghanistan. There is an important legal distinction of the position of the United States of America (USA) in respect of the law of armed conflict, because although it was originally a signatory to the Rome Statute of the International Criminal Court (the Rome Statute), it later withdrew its signature and now denies the ICC's jurisdiction. Indeed, in 2020 it has gone so far as to impose personal sanctions on the Office of the Prosecutor of the ICC, following the decision to open an investigation into Afghanistan. Nonetheless, as established customary international law,

¹ Reference 32 – *R v Blackman* [2017] EWCA Crim 190.

Common Article 3 applies to the USA as well as other nations, as was recognised by the Supreme Court of the United States in 2005 in *Hamdan v Rumsfeld*:²

... there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a 'conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum,' certain provisions protecting '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by . . . detention'.

Bagram

3. In December 2002, two unarmed Afghan civilians in US custody were killed at Bagram airbase. The cause of death was repeated physical assault by US military personnel while the civilians were in custody.³ A US Army Criminal Investigations Unit investigation into the deaths was completed in October 2004 and identified potential offences by 28 soldiers.⁴ A total of 15 soldiers faced prosecution for charges including assault, maltreatment of a detainee, dereliction of duty, making false statements, maiming and, in one instance, involuntary manslaughter.⁵ Six soldiers were convicted on charges including assault, maltreatment, making false statements and maiming. Sentences included a reduction in rank, a fine, a bad conduct discharge, and imprisonment.⁶

The Kill Team (Gibbs and Mortlock)

4. Between June 2009 and June 2010, at least three civilians were murdered in premeditated attacks by members of the 2nd Infantry Division.⁷ The soldiers collected parts of their victims' bodies as trophies and took photos with their corpses, which were later published in *Rolling Stone* magazine and the newspaper *Der Spiegel*.⁸ A whistleblower complaint in 2010 led to an investigation by US Army Criminal Investigations Unit, which resulted in 12 soldiers being charged and 11 convicted. Five soldiers were charged with murder, including Specialist Jeremy Mortlock, who pleaded guilty to three counts of premeditated murder in 'faked' combat and was sentenced to 24 years'

² Reference 1 – *Hamdan v Rumsfeld* Justice Stevens, joined by Souter, Ginsburg, and Breyer JJ. , <https://www.supremecourt.gov/opinions/05pdf/05-184.pdf>

³ Reference 2 – Army details scale of abuse in afghan jail: 2nd soldier charged in death of a detainee, 12 March 2005, *New York Times* <https://www.nytimes.com/2005/03/12/washington/army-details-scale-of-abuse-in-afghan-jail.html>

⁴ Reference 3 – Army completes investigations of death at Bagram and forward to respective commanders for action, US Army News Release 14 October 2004 https://web.archive.org/web/20071224110128/http://www4.army.mil/ocpa/read.php?story_id_key=6450

⁵ Reference 4 – Years after 2 afghans died, abuse case falters, 13 February 2006 *New York Times* <https://www.nytimes.com/2006/02/13/national/13bagram.html>

⁶ *ibid*; Reference 5 – Ohman, Mynda G. 'Integrating Title 18 war crimes into Title 10: a proposal to amend the Uniform Code of Military Justice' *Air Force Law Review*, vol. 57, Winter 2005

⁷ Reference 6 – Outlined in *United States v Gibbs* 2018 CCA Lexis 324

⁸ Reference 7 – Court sentences 'Kill Team' soldier to 24 years in prison, 24 March 2011, *Der Spiegel* <https://www.spiegel.de/international/world/murder-in-afghanistan-court-sentences-kill-team-soldier-to-24-years-in-prison-a-752918.html> The 'Kill Team': how US soldiers in Afghanistan murdered innocent civilians, 28 March 2011,

Reference 8 – *Rolling Stone* <https://www.rollingstone.com/politics/politics-news/the-kill-team-how-u-s-soldiers-in-afghanistan-murdered-innocent-civilians-169793/>

imprisonment,⁹ and S/SGT Calvin Gibbs who was convicted of three counts of premeditated murder and sentenced to life imprisonment.¹⁰

Gallagher

5. In 2010, US Special Operations Chief Petty Officer Edward Gallagher was investigated for shooting a young girl in Afghanistan, but cleared of any wrongdoing.¹¹ In 2019, Gallagher¹² was brought before a military court on charges of premeditated murder and attempted murder of an injured ISIS fighter his SEAL team had captured in Mosul, Iraq in 2018. He was acquitted of all charges, except 'wrongfully posing for an unofficial picture with a human casualty' in respect of taking a photo posing with the body of the victim.¹³ The Court ordered his demotion and four month's imprisonment. Gallagher, who had been in pre-trial confinement had already served more than 4 months, so he was released. President Trump reversed the demotion, prevented the Navy from removing Gallagher's Special Forces status (symbolised by his Trident pin), and directed the Secretary of the Navy to revoke Navy Achievement Medals given to members of the prosecution team that oversaw Gallagher's case.

Bales

6. In March 2012, US Staff Sergeant Robert Bales murdered 16 civilians and wounded six others in the course of a shooting spree in Panjwayi District of Afghanistan's Kandahar Province. Following an investigation by the US Army Criminal Investigations Unit, Bales was brought before a court-martial and in a plea bargain which avoided imposition of the death penalty, pleaded guilty to and was convicted of 16 charges of premeditated murder, six charges of attempted murder, violating a lawful general order, wrongfully using a controlled substance, assault with a dangerous weapon, assault with battery, wrongfully burning bodies, and four charges of intentional infliction of bodily harm. He was sentenced to a dishonourable discharge, confinement for life without the possibility of parole, forfeiture of all pay and allowances and reduction in rank.¹⁴

Lorance

7. In June 2012, while serving in Afghanistan's Kandahar Province, US Army 1st Lieutenant Clint Lorance ordered a member of his platoon to fire on three unarmed men who had approached the

⁹ Reference 9 – *United States v Morlock* 2014 WL 7227382 (A. Ct. Crim. App. April 30, 2014).

¹⁰ Reference 10 – *United States v Gibbs* 2018 CCA Lexis 324.

¹¹ Reference 11 – Uncovering a military culture split between loyalty and justice, 25 April 2019, New York Times <https://www.nytimes.com/2019/04/25/reader-center/navy-seal-war-crimes-investigation.html>

¹² **Note:** Due to the size and complexity of this Report, and *without intending the slightest disrespect to any individual mentioned in it*, the difficult decision has been made to use ranks only when initially identifying an individual, by their rank at the time of the relevant incident. Current rank at time of report publication is also referred to when an individual is introduced as a witness. This avoids the confusion that potentially arises from the concurrent historic and present day narrative throughout the report, and accords with common judicial practice in abbreviating names after first reference in judgments.

¹³ Reference 12 – After contentious trial, Navy SEAL Edward Gallagher found not guilty of the murder of an ISIS fighter, 02 July 2019, Time <https://time.com/5610116/navy-seal-edward-gallagher-isis-murder-trial/>

¹⁴ Reference 13 – *United States v Bales* ARMY 20130743 27 September 2017, U.S. Army Court of Criminal Appeals; Reference 14 – Soldier sentenced to life without parole for killing 16 Afghans, 24 August 2013, New York Times https://www.nytimes.com/2013/08/24/us/soldier-gets-life-without-parole-in-deaths-of-afghan-civilians.html?emc=edit_na_20130823&r=0

platoon on a motorcycle. Two of the men were killed, and a third injured. Lorange said that the three men had ignored the platoon's commands to stop and were seconds away from his troops, while others in his platoon gave testimony that the motorcycle was too far away to present a threat or indicate hostile intent.¹⁵ Lorange pleaded not guilty but was convicted by a court martial of murder, attempted murder, wrongfully communicating a threat, reckless endangerment, soliciting a false statement, and obstructing justice. He was sentenced to dismissal, confinement for 19 years and forfeiture of all pay and allowances.¹⁶ Although an administrative review and an appeal left the convictions undisturbed, in November 2019, Lorange was unconditionally pardoned by President Trump.¹⁷

CANADA

8. There have been a number of inquiries into allegations of abuse of detainees by Canadian Forces and transfer of detainees to Afghan forces with the knowledge that they were at risk of being tortured.¹⁸ These included a lawsuit by Amnesty International alleging violations of international law and the Canadian Charter of Rights and Freedoms, which the Federal Court dismissed,¹⁹ an investigation by the Military Police Complaints Commission and investigations by the Canadian House of Commons.²⁰ None of these have led to prosecution.

Semrau

9. In October 2008, while serving in Afghanistan's Helmand province, Canadian Captain Robert Semrau fired two shots at a severely wounded Taliban fighter on the battlefield in what was alleged to be an act of 'mercy killing'. In 2010, Semrau was tried by Court Martial on four charges including second-degree murder. The jury was not convinced that the shots had actually killed the victim, as his body was never found. Semrau was therefore acquitted of all charges except disgraceful conduct, for which he was sentenced to reduction in rank and dismissal.²¹

NEW ZEALAND

10. In October 2010, several civilians, including a three-year-old girl, were killed during New Zealand Special Air Service's *Operation Burnham* in Afghanistan's Tirgiran Valley. A further 15 villagers were wounded and 12 houses destroyed. No aid or assistance was provided by New Zealand Defence Force (NZDF) following the operation, and allegations of civilian casualties were

¹⁵ Reference 15 – *United States v. Lorange*, Army 20130679, 2017 WL 2819756 (A. Ct. Crim. App. June 27, 2017).

¹⁶ Reference 15 – *United States v. Lorange*, Army 20130679, 2017 WL 2819756 (A. Ct. Crim. App. June 27, 2017).

¹⁷ Reference 16 – Trump clears three service members in war crimes cases, 15 November 2019, New York Times <https://www.nytimes.com/2019/11/15/us/trump-pardons.html>

¹⁸ Reference 17 – Torture of afghan detainees: Canada's alleged complicity and the need for a public inquiry, September 2015, Canadian Centre for Policy Alternatives <https://www.rideauinstitute.ca/wp-content/uploads/2015/09/Afghan-Detainees-002.pdf>

¹⁹ Reference 18 – *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence, and Attorney General of Canada*, 2007 FC 1147 (November 5, 2007); Reference 19 – *Amnesty International Canada v. Canada (Chief of the Defence Staff)* (F.C.), 2008 FC 336, [2008] 4 F.C.R. 546, Canada: Federal Court (March 12, 2008).

²⁰ Reference 20 – 4 Parliament, House of Commons, Special Committee on the Canadian Mission in Afghanistan, Third Report, 40th Parl, 2nd Sess, No 17 (November 18, 2009).

²¹ Reference 21 – Canadian soldier sacked for shooting wounded Afghan, 05 October 2010, BBC News <https://www.bbc.com/news/world-us-canada-11478886>.

not investigated. In 2017, a book was published alleging that the NZDF had engaged in the attack as revenge for the death of a NZ soldier by a recent roadside and that there were no insurgents in the village at the time of the attack. A judicial inquiry into the facts of Operation Burnham was established in April 2018 and released its report in July 2020.²²

11. The inquiry, which was conducted by New Zealand Supreme Court judge Sir Terence Arnold and former NZ Prime Minister Sir Geoffrey Palmer, found that there was reliable intelligence that insurgents were present, and that the engagement was properly authorised by the rules of international law. However, the inquiry also found that NZDF became aware of civilian casualties days after the operation and failed to take appropriate steps to investigate, as well as misrepresented the situation to the NZ government and to the public. The inquiry also investigated the abuse of an Afghan detainee by NZDF forces in January 2011 and his transfer to Afghan national forces in circumstances where he faced a real risk of torture. The inquiry found that the detainee had subsequently been tortured by Afghan forces and New Zealand had breached its duty of non-refoulment. The inquiry made a number of recommendations, including the assessment by the Minister of Defence of NZDF operational and record-keeping structures, the establishment of an independent Inspector-General of Defence, and the development of effective detention policies and procedures.

12. The full findings and recommendations of the NZ Inquiry are set out in Annex A.

THE UNITED KINGDOM

13. The UK has extensive experience in investigating offshore war crimes allegations, but few successful prosecutions.

Background: Iraq

14. The UK's actions in the Second Gulf War which led to the removal of Sadaam Hussein led to a Coalition Provisional Authority comprising the USA and to a lesser extent the UK (but not Australia) as military occupying powers of Iraq. That military occupation generated 3000 complaints of breaches of law of armed conflict (LOAC), and consequential inquiries and judicial review, which provide important context and legal structure for complaints arising from ISAF operations in Afghanistan. The perception that some investigations were unjustified and unfair continues to have significance in the UK, including by reason of a current proposal to create a presumption against most prosecutions for war crimes, and a limitation period.

Colonel Tim Collins

15. Collins was Commanding Officer of the 1st Battalion, the Royal Irish Regiment. A seconded US soldier accused him of war crimes, namely a threat to pistol whip and then shoot Ayoub Yousif Naser, a former loyalist of the Sadaam Hussein regime. He was investigated by the RMP in 2003 but never told officially, as opposed to in the media, what he was being investigated for. He was exonerated, but not before he had resigned from the Army and successfully brought defamation

²² Reference 22 – Report of the Government Inquiry into Operation Burnham, July 2020
<https://operationburnham.inquiry.govt.nz/inquiry-report/#PDF>

proceedings against the *Sunday Express* and *Sunday Mirror* who alleged he had committed war crimes.

Baha Mousa

16. Baha Mousa was an Iraqi man who died while in British Army custody in Basra, Iraq in September 2003. Mousa's death was caused by lack of food and water, heat, exhaustion, fear, previous injuries and the hooding and stress positions used by British troops - and a final struggle with his guards. He was hooded for almost 24 hours during his 36 hours of custody by the 1st Battalion of the Queen's Lancashire Regiment and he suffered at least 93 injuries prior to his death. Seven British soldiers were charged in connection with the case. Six, including the Commanding Officer, Colonel Jorge Mendconca, were found not guilty. Corporal Donald Payne pleaded guilty to inhumane treatment of a prisoner, and was jailed for a year and dismissed from the Army.

17. There was subsequently an inquiry, conducted by a retired Lord Justice of Appeal, Sir William Gage. The key points emerge from the opening pages of *The Report of the Baha Mousa Inquiry*,²³ as follows:

1.1 At about 21.40hrs on 15 September 2003, Baha Mousa, an Iraqi citizen, stopped breathing. At the time he was in the centre room of the Temporary Detention Facility (the TDF) at BG Main (the Headquarters of 1 QLR Battlegroup) in Basra having been detained the previous day. He was removed to the Regimental Aid Post (RAP) where attempts were made to resuscitate him. However, those attempts failed and at 22.05hrs he was pronounced dead. A subsequent post mortem examination of his body found that he had sustained 93 different surface injuries. The death certificate, dated 22 September 2003, recorded the cause of death as 'cardiorespiratory arrest'.

1.2 But for Baha Mousa's death it is possible that the events with which this Inquiry has been concerned would never have seen the light of day. There was a subsequent Court Martial of seven men from 1 Queen's Lancashire Regiment (1 QLR) which occupied four months spread over the end of 2006 and the beginning of 2007. [I interpolate that, in the Court Martial in 2006, *seven soldiers including the Commanding Officer were charged, all were acquitted of all offences, which ranged from negligent performance of duty to common assault, manslaughter and perverting the course of justice, save that CPL Donald Payne pleaded guilty to the offence of inhumane treatment, was convicted and sentenced to dismissal from the army and 12 month's imprisonment.*] The Judge Advocate, Mr Justice McKinnon, made clear that some soldiers who had abused the Detainees had not been charged with offences '...because there is no evidence against them as a result of a more or less obvious closing of ranks'. It is at least possible that if Baha Mousa had survived and not died, the incident giving rise to his injuries would quickly have been forgotten or at least provided no more than a footnote in any history of the post-war occupation of Iraq by British forces.

1.3 As it was, his death set in motion a chain of events which led to Court Martial proceedings being instituted against the seven men from 1 QLR; civil proceedings for damages for injuries sustained by all of the men detained with Baha Mousa on 14 September 2003; successful judicial review proceedings instituted on behalf of relatives of Baha Mousa seeking a public inquiry into

²³ Reference 23 – *The Report of the Baha Mousa Inquiry*

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/279190/1452_i.pdf.

his death [In The Queen on the application of Mousa and Secretary of State for Defence [24] and finally, the setting up in August 2008 of this Public Inquiry under the Inquiries Act 2005.

18. The Chief of the General Staff accepted the Inquiry's recommendations and issued a Press Release, which, as it may assist those who have to manage communications of this report, is reproduced at Annex B.²⁵

Al-Sweady and the Battle of Danny Boy

19. In 2004 there was a three hour gun battle between UK soldiers and 100 Iraqi insurgents. There were allegations of murder, torture and mistreatment of prisoners. There was a demand for an inquiry. There were judicial review proceedings based Articles 2 and 3 of the *European Convention on Human Rights*: the former contains a 'right to life' and article 3 states 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

20. As Leggatt J (as Lord Leggatt SCJ then was) said in *Al-Saadoon v Secretary of State for Defence*:²⁶

21. ... the extent to which the Convention applied to the actions of UK armed forces in Iraq has been and remains controversial. The applicability of articles 2 and 3 to Iraqi civilians held in custody on British military bases was, however, first recognised by a Divisional Court on 14 December 2004 in *R (Al-Skeini) v Secretary of State for Defence* [2004] EWHC 2911 (Admin); [2007] QB 140.

22. Two public inquiries were subsequently established by the Secretary of State to investigate particular incidents. On 14 May 2008 the Secretary of State appointed a retired judge, Sir William Gage, to conduct an inquiry into the death of Baha Mousa, who was killed while in the custody of British forces on 14 September 2003, and the treatment of those detained with him. The three volume inquiry report including 73 recommendations was published on 8 September 2011.

23. A further investigation pursuant to articles 2 and 3 was sought by the relatives of Hamid Al-Sweady and others who were allegedly taken prisoner by British forces after a fire fight on 14 May 2004 and subsequently killed or mistreated. The need for such an investigation was eventually conceded by the Secretary of State for Defence in the course of proceedings in the Divisional Court in *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin).

21. The Al Sweady investigation by retired Lord Justice of Appeal Sir Thayne Forbes concluded in relation to the most serious allegations that they were 'wholly and entirely without merit or justification'.²⁷ However, the obligation to investigate led to the creation of the Iraq Historical Allegations Team (IHAT), and then (when it was held in 2013 that their investigations fell short of what Article 2 and 3 required), the Iraq Fatality Investigations (IFI) constituted by the late Sir George Newman, which was a type of inquest. According to the UK government website:²⁸

²⁴ Reference 24 – [2011] EWCA Civ 1334, allowing an appeal from the decision in *Ali Zaki Mousa and Others v Secretary Of State for Defence* [2013] EWHC 1412 (Admin).

²⁵ Reference 25 – 08 September 2011 Press Release, *Chief of the General Staff responds to Baha Mousa Inquiry Report*. <https://www.gov.uk/government/news/chief-of-the-general-staff-responds-to-baha-mousa-inquiry-report>

²⁶ Reference 26 – *Al-Saadoon v Secretary of State for Defence* [2015] EWHC 715 (Admin).

²⁷ Reference 27 – The Report of the Al Sweady Inquiry HC 818-1, [5.198].

²⁸ Reference 28 – <https://www.gov.uk/government/groups/iraq-historic-allegations-team-ihat>.

The Iraq Historic Allegations Team (IHAT) was an organisation set up to review and investigate allegations of abuse of Iraqi civilians by UK armed forces personnel in Iraq during the period of 2003 to July 2009.

The alleged offences ranged from murder to low-level violence from the start of the military campaign in Iraq, in March 2003, through the major combat operations of April 2003 and the following years spent maintaining security as part of the Multi-National Force and mentoring and training Iraqi security forces.

MOD funded the IHAT, consistent with its obligations to ensure that allegations were investigated in compliance with the European Convention of Human Rights (ECHR).

IHAT was independent of the military chain of command for the purposes of its investigations. Once an IHAT investigation was complete the findings were referred to the relevant authority: any cases identifying credible evidence of potential serious criminal acts were referred to the Director of Service Prosecutions, in accordance with the Armed Forces Act 2006.

Early in 2017, the Secretary of State for Defence announced IHAT would close on 30 June 2017 and the remaining investigations would be reintegrated back into the service police system.

...

Work completed

Around 3,400 allegations of unlawful killings and ill treatment were received by the IHAT, with the vast majority coming in the last few years.

The team worked hard to weed out claims where there was not a case to answer or it was considered not proportionate to conduct a full investigation – around 70 per cent of the allegations were sifted out and never reached full investigation as a result of this.

IHAT used a detailed investigative strategy looking at all of the claims to ensure that credible allegations of criminality were investigated.

...

Service Police Legacy Investigations (SPLI)²⁹

In early 2017, the Secretary of State for Defence announced that IHAT would close and any remaining Iraq legacy investigations would be reintegrated into the service police system. SPLI took over these remaining investigations at the beginning of July 2017'.

22. IHAT was closed by Ministerial decision on 30 June 2017. As to the IFI, according to the UK government website:³⁰

'The Iraq Fatality Investigations (IFI) is a form of judicial inquiry tasked with investigating the circumstances surrounding Iraqi deaths involving British forces on a case by case basis. It is chaired by the Inspector, Sir George Newman, a retired High Court judge.

²⁹ Reference 29 – <https://www.gov.uk/guidance/service-police-legacy-investigations>.

³⁰ Reference 30 – <https://www.gov.uk/government/collections/iraq-fatality-investigations>.

In January 2014, *Sir George Newman* was appointed by the Secretary of State for Defence to conduct such fatality investigations as the Ministry of Defence assigned to him from time to time with his consent. *Sir George's* appointment followed the High Court's ruling that a publicly accountable investigation into the specific and wider circumstances of death, with participation from the families of the deceased, was in certain cases required under Article 2 of the European Convention on Human Rights (ECHR). The IFI structure was adopted to properly satisfy the state's investigatory obligations without the duration and expense of a statutory public inquiry.

The IFI is not concerned with determining civil or criminal liability. Appropriate cases are referred by the Ministry of Defence only after it has been decided that there is no realistic prospect of a criminal conviction and all criminal investigations and review processes have been completed. At the start of each case, the Inspector requests undertakings from the Attorney General and the Prosecutor of the International Criminal Court (ICC) that witnesses will not be prosecuted on the basis of any self-incriminating evidence they provide to the IFI.

The IFI is entirely separate to the Service Prosecution Authority (SPA), the now-closed Iraq Historic Allegations Team (IHAT) and the Service Police Legacy Investigations (SPLI), although the evidence gathered in the course of previous investigations will be considered by the Inspector in the course of his inquiries.

At the end of each Investigation, the Inspector publishes a report in which he sets out his findings.

Afghanistan

23. The United Kingdom's main area of responsibility in Afghanistan was Helmand Province, which adjoins Uruzgan Province. In Helmand, the UK had 137 bases (including forward operating bases) with a maximum deployed strength of about 10 000 UK troops. Helmand was a volatile and dangerous province for International Security Assistance Force (ISAF) personnel. 456 UK soldiers lost their lives in the conflict.

24. Allegations of breaches of LOAC in Afghanistan were investigated under the auspices of Operation NORTHMOOR, by a company of the Royal Corps of Military Police. The allegations encompassed both conventional and Special Forces. On 11 July 2017, a MOD spokesperson said:³¹

'Our military served with great courage and professionalism and we proudly hold them to the highest standards. Where credible allegations are raised it is right they are effectively investigated by an independent police force like the Royal Military Police. They have found no evidence of criminal behaviour by the Armed Forces in Afghanistan, have discontinued over 90% of the 675 allegations made and less than 10 investigations now remain'.

25. It appears from media reports that it is unlikely that there will be any further Afghanistan-related prosecutions.

Blackman³²

26. On 15 September 2011 Alexander Blackman, then an Acting Colour Sergeant in the Royal Marines, fatally shot a badly wounded insurgent in Helmand Province, Afghanistan. Video evidence of the events showed that Blackman appeared to be acting in a rational manner before, during and

³¹ Reference 31 – <https://modmedia.blog.gov.uk/2017/07/11/defence-in-the-media-tuesday-11-july/>

³² Reference 32 – *R v Blackman* [2017] EWCA Crim 190.

after the killing. On 08 November 2013 Blackman was found guilty of murder by the court martial.³³ No psychiatric report had been obtained before the trial and no psychiatric evidence was called at trial. A psychiatric report obtained for the purposes of sentence concluded that the appellant may have been suffering from an undetected combat stress disorder which could be considered an extenuating factor in relation to punishment. The appellant was sentenced to life imprisonment with a minimum of 10 years to serve.

27. In 2014, an appeal against conviction to the Court Martial Appeal Court on grounds related to the status of the court martial system and the compatibility of its procedures with the European Convention on Human Rights was dismissed, but the Court allowed an appeal against sentence, reducing the minimum term to eight years.³⁴ In making this decision the Court was substantially influenced by the psychiatric report prepared for sentence at first instance, which evidenced the effect on the appellant of the nature of the conflict in Afghanistan, the nature of the command he exercised and the extreme nature of the stress he was under.

28. This was followed by a public and media campaign. In 2015, the Criminal Cases Review Commission referred the conviction and sentence to the Court of Appeal on the basis of voluminous further information, including a Ministry of Defence report on the incident.

29. The appeal was allowed. A unanimous court held that the totality of the present evidence could support a defence of diminished responsibility being left to the jury at first instance. As a result, the verdict was unsafe and the conviction for murder was quashed. A verdict of manslaughter by reason of diminished responsibility was substituted. This was possible because, as noted above, Blackman had been charged with murder under the general law of England; not with the war crime of murder under the Rome Statute, and English law, like Australian law, provides for a partial defence to murder of 'diminished responsibility' by reason of an abnormality of the mind, which if established reduces the offence to manslaughter.

30. In light of the ultimate outcome, and their potential application to the Australian context, some matters are worthy of further note.

31. ***Evidence in relation to the killing.*** In September 2011, Blackman was 37 years old and had been a regular soldier for over 13 years. He had served in Iraq in 2003 and again in 2004 and 2006. He was deployed to Afghanistan in 2007 for six months. In March 2011 he was deployed to Afghanistan a second time where he served until 12 October 2011. Blackman was the commander of CP Omar, an outlying base in Helmand province. On 15 September 2011 another base, CP Talaanda was attacked by insurgents using small arms fire.

32. One of the insurgents was fired on by a helicopter in an open field. A foot patrol of around eight marines, led by Blackman, was then sent out to carry out a battle damage assessment. Video evidence shows the patrol having found the insurgent still alive. The marines drag the insurgent to the side of the field, picking him up and dropping him several times. At Blackman's suggestion they move him out the sight of the helicopter. One of the marines suggests shooting the insurgent. Blackman responds that they should not shoot him in the head because it will be too obvious. One

³³ The charge was of murder under the general law of England; not of a war crime under the Rome Statute. This meant that the statutory partial defence, under the law of England, of 'diminished responsibility' by reason of an abnormality of the mind, which if established reduces the offence to manslaughter, was available. Australian law contains a similar statutory defence to the general law offence of murder.

³⁴ Reference 33 – *R v Blackman* [2015] 1 WLR 1900.

of the marines radios the helicopter to say that the insurgent is dead. Blackman asks where the helicopter is and on being told that it's gone away, immediately crouches down and aims his pistol at the centre of the insurgent's chest, fires once at point blank range and immediately stands back up. As the insurgent dies, Blackman can be heard saying '*It's nothing you wouldn't do to us. Obviously this doesn't go anywhere fellas. I've just broke the Geneva Convention*'.³⁵

33. **Psychiatric evidence.** In the ultimate appeal, three psychiatrists gave evidence that Blackman was suffering from an abnormality of mental functioning at the time of the killing, arising from an *adjustment disorder of moderate severity*.

34. An *adjustment disorder* is a recognised psychiatric condition, which is defined in the International Classification of Diseases, 10th edition (ICD-10), F43.2 as:³⁶

'A. Experience of an identifiable psycho-social stressor, not of an unusual or catastrophic type, within one month of the onset of symptoms'.

B. Symptoms or behavioural disturbance of types found in any of the affective disorders (except for delusions and hallucinations), any disorder in F4 (neurotic, stress related and somatoform disorders) and conduct disorders, so long as the criteria of an individual disorder are not fulfilled. Symptoms may be variable in both form and severity'.

35. The symptoms vary considerably and include depressed mood, anxiety, worry, a feeling of an inability to cope, plan ahead or continue in the present situation, with some degree of disability in performance of the daily routine. Some suffer very mild symptoms; in a few cases the symptoms can be very severe resulting in suicide or a heinous act. In most cases the disorder resolves within 6 months of the stressing circumstances having dissipated. The symptoms of an adjustment disorder can be masked and not apparent. Often an adjustment disorder is not apparent to the person suffering from it. A person with an adjustment disorder, as with other mental disorders, could plan and act with apparent rationality.

36. That said, 'adjustment disorder' is generally regarded by psychiatrists as a marginal and low-level diagnosis.³⁷

37. **Partial defence of diminished responsibility.** The partial defence to murder of 'diminished responsibility' by reason of an abnormality of the mind, if established, reduces the offence to manslaughter. It was therefore relevant to consider whether Blackman has established a defence of 'diminished responsibility', by reason of an abnormality of the mind.

38. The Court of Appeal considered evidence of Blackman's condition prior to deployment in Afghanistan which by all accounts revealed him to be an 'exemplary soldier'.³⁸ They then considered a number of conditions that, on the balance of probabilities, could establish a defence of diminished responsibility. These included:³⁹

³⁵ *R v Blackman* [2017] EWCA Crim 190 [17]-[22].

³⁶ *R v Blackman* [2017] EWCA Crim 190 [32].

³⁷ Reference 34 – [REDACTED] ROC of [REDACTED] [REDACTED]

³⁸ *R v Blackman* [2017] EWCA Crim 190 [88].

³⁹ *R v Blackman* [2017] EWCA Crim 190 [99].

- a. *Personal circumstances*, such as the death of his father shortly before his deployment in March 2011;
- b. *The support environment prior to and during deployment*, such as the lack of training in Trauma Risk Management, Blackman's loss of a junior officer in May 2011, the lack of visitation to CP Omar by the Padre and the fact of having to deal with trauma and stress through group support;
- c. *The conditions of deployment*, such as the daily external threat, the previous attempts on Blackman's life by insurgents and the undermanning of CP Omar which had led to overwork and sleep deprivation that diminished decision-making capacity. On the day of the killing, the attack on CP Talaanda created a heightened threat of attack which affected cognitive functioning and decision making. Further, finding the insurgent with a grenade may have increased arousal due to Blackman's experience of having recently been attacked with grenades.

39. The Court concluded that Blackman had developed a hatred for the Taliban and a desire for revenge.⁴⁰ Blackman's perception of a lack of support which threatened his unit's safety was considered by all the psychiatrists as having contributed to the mental state of the appellant, heightening his sense of responsibility.⁴¹ The serious nature of Blackman's condition was evidenced by accounts of his friends, family and military members regarding his changed mental state.⁴² The combination of the above stressors and his adjustment disorder had substantially impaired his ability to form a rational judgment. In this, the Court differentiated between the kind of rational thinking needed to plan certain movements, as Blackman did, and rational judgment about the need to adhere to standards and the moral compass set by HM Armed Forces and putting together the consequences for oneself and others of individual actions one is about to take. It was the latter form of rational judgment that Blackman's abnormality of mental functioning had impaired.⁴³ The Court accepted that the decision to kill was impulsive and driven by Blackman's adjustment disorder impairing his ability to exercise self-control.⁴⁴ As such, the requirements to substitute a verdict of manslaughter by reason of diminished responsibility were fulfilled.

40. As noted above, Blackman had been charged with murder under the general law of England; not with the war crime of murder under the Rome Statute. This was significant because, although it has not been tested, it is strongly arguable that the statutory defence of 'diminished responsibility' is not available in connection with the war crime of murder under the Rome Statute and (CTH) *Criminal Code* s 268.70, as distinct from murder under the general law. However, proof of matters which would otherwise provide a defence of 'diminished responsibility' would still be relevant to mitigation of penalty.

Current developments

41. As this report is finalised, there are developments in the UK, including a proposed Bill, introduced immediately following a House of Commons Defence Committee Report '*Drawing a Line*

⁴⁰ *R v Blackman* [2017] EWCA Crim 190 [109].

⁴¹ *R v Blackman* [2017] EWCA Crim 190 [101-103].

⁴² *R v Blackman* [2017] EWCA Crim 190 [105].

⁴³ *R v Blackman* [2017] EWCA Crim 190 [111].

⁴⁴ *R v Blackman* [2017] EWCA Crim 190 [112].

– *Protecting Veterans by a Statute of Limitations*.⁴⁵ The Bill –the *Overseas Operations (Service Personnel and Veterans) Bill* would set a time limit of five years for some prosecutions of serving or former members of the armed forces who were deployed on overseas operations, by way of a presumption against prosecution in all cases save for rape and other sexual offences, and by requiring (as does Australia) the consent of the Attorney-General to prosecute.

42. There is a large question as to whether such a law would meet the requirements of Article 17 of the Treaty of Rome.

NETHERLANDS

43. In 2007, while serving on an intelligence gathering mission in Kabul, Dutch Special Forces Patrol Commander Marco Kroon allegedly shot a man who he said had reached for a firearm. Kroon said the victim had captured and tortured him during a secret operation in the previous year. Kroon was a highly decorated and well-known soldier, having been publicly decorated for bravery in May 2009. Kroon only reported the incident to the Department of Defence in early 2017, having delayed the reporting to protect the lives of intelligence personnel. The Public Prosecutor found no proof the events had occurred and closed the investigation.⁴⁶

DENMARK

44. In June 2009, while serving in Afghanistan's Helmand province, Danish soldiers killed five insurgents after an exchange of fire. It was alleged that the insurgents were wounded and did not pose a credible threat at the time they were killed. The incident took place in the immediate aftermath of three Danish soldiers from a neighbouring camp dying in an IED incident. The events were captured on film, and released as part of a widely publicised documentary 'Armadillo'.⁴⁷ A subsequent Military Prosecution Service investigation cleared the soldiers of any wrongdoing.⁴⁸

THE INTERNATIONAL CRIMINAL COURT

45. Afghanistan deposited its instrument of accession to the Rome Statute on 10 February 2003, giving the ICC undoubted jurisdiction over crimes listed in the Statute committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards.⁴⁹

46. The Office of the Prosecutor launched a preliminary examination of the situation in Afghanistan in 2006 after the receipt of numerous communications about the situation under article

⁴⁵ Reference 35 – *'Drawing a Line – Protecting Veterans by a Statute of Limitations'*, HC 1224 (2019).

⁴⁶ Reference 36 – A war hero's tragic fall from grace, 28 June 2019, Holland Times
<https://www.hollandtimes.nl/articles/national/a-war-heros-tragic-fall-from-grace-marco-kroon/>

⁴⁷ Reference 37 – Armadillo: the Afghanistan war documentary that shocked Denmark, 4 June 2010, The Guardian
<https://www.theguardian.com/film/2010/jun/03/armadillo-danish-documentary-afghanistan>

⁴⁸ Reference 38 – Press release: completion of auditor survey in connection with statements in the film 'Armadillo', 15 December 2010, Office of the Military Prosecutor General.

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⁴⁹ Article 12 of the Reference 39 – *Rome Statute of the International Criminal Court (Rome Statute)* gives the ICC jurisdiction over crimes committed on the territory of a State Party irrespective of the nationality of the accused.

15 of the Rome Statute.⁵⁰ The preliminary examination focused on crimes against humanity and war crimes allegedly committed in the context of the armed conflict between pro-Government and anti-Government forces. It also examined the existence and genuineness of national proceedings in relation to these crimes.

47. On 20 November 2017, the Prosecutor requested authorization from Pre-Trial Judges to initiate an investigation into alleged war crimes and crimes against humanity committed on the territory of Afghanistan since 01 May 2003, as well as alleged crimes sufficiently linked to the armed conflict in Afghanistan committed in the territory of other States Parties to the Rome Statute since 01 July 2002.⁵¹ The Prosecutor's request stated that there was a reasonable basis to believe that crimes against humanity and war crimes related to the Afghanistan conflict had been committed in Afghanistan and on the territory of other State Parties to the Rome Statute by the Taliban and affiliated armed groups, the Afghan National Security Forces and members of the US armed forces and the Central Intelligence Agency (CIA).⁵² The Prosecutor also determined that there was an absence of relevant national proceedings against those who appeared to be the most responsible for these crimes. The Prosecutor examined allegations of other crimes committed by members of international armed forces but, as of 2017, had not yet reached a determination that there was reasonable basis to believe that crimes within the jurisdiction of the Court had occurred. Thus, allegations against Australian nationals did not form the basis of the Prosecutor's 20 November 2017 request for authorisation to commence an investigation, which observed that (other than in relation to the Taliban and affiliated armed groups, the Afghan National Security Forces and members of the US armed forces and the CIA) no determination had been reached that there was a reasonable basis to believe that crimes within the jurisdiction of the court had occurred, and no attendant assessment of complementarity and gravity had been made.⁵³

48. Between 07 December 2017 and 09 February 2018, the ICC Victims Participation and Reparations Section (VPRS) transmitted to the Pre-Trial Chamber a total of 699 victims' representations. On 20 February 2018, the VPRS transmitted to the Judges a final consolidated report on victims' representations, containing an overview of the victim representations process, as well as details and statistics of the transmitted representations.⁵⁴

49. On 12 April 2019 Pre-Trial Chamber II rejected the Prosecutor's request for authorization of an investigation.⁵⁵ It found that the odds of the investigation's success were low due to the passage of time and the lack of co-operation from Afghanistan and United States authorities. The Pre-Trial

⁵⁰ Reference 40 – Office of the Prosecutor, Report on Preliminary Examination Activities 13 December 2011 <https://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPreportonPreliminaryExaminations13December2011.pdf>

⁵¹ Reference 41 – Public redacted version of 'Request for authorisation of an investigation pursuant to article 15' 20 November 2017, ICC-02/17-7-Conf-Exp <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-7-Red>

⁵² Public redacted version of 'Request for authorisation of an investigation pursuant to article 15' 20 November 2017, ICC-02/17-7-Conf-Exp <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-7-Red>

⁵³ Public redacted version of 'Request for authorisation of an investigation pursuant to article 15' 20 November 2017, ICC-02/17-7-Conf-Exp <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-7-Red>, paras 253 and 260

⁵⁴ Reference 42 – Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 09 November 2017 <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-29>

⁵⁵ Decision Pursuant to Reference 43 – Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan ICC-02/17-33 12 April 2019 <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-33>

Chamber thus concluded that the commencement of an investigation would not be in the interests of justice.

50. The Prosecutor appealed against that decision. On 05 March 2020, the Appeals Chamber unanimously overturned the decision of the Pre-Trial Chamber and authorised the Prosecutor to commence an investigation.⁵⁶ It found that the Pre-Trial Chamber had erred in considering whether an investigation was in the interests of justice and should have addressed only whether there was a reasonable factual basis for the investigation to proceed. The Appeals Chamber noted that the preliminary examination had found evidence of relevant crimes and the Court had jurisdiction, giving the investigation basis to proceed.

51. The situation described in the Prosecutor's 20 November 2017 request – that other than in relation to the Taliban and affiliated armed groups, the Afghan National Security Forces and members of the US armed forces and the CIA, no determination had been reached that there was a reasonable basis to believe that crimes within the jurisdiction of the court had occurred, and no attendant assessment of complementarity and gravity had been made, does not appear to have changed, and it is understood that at this time, the investigation does not pertain to Australia. As explained elsewhere, the undertaking of this Inquiry would pose a significant obstacle to any such investigation by the ICC, on complementarity grounds.

CONCLUSION

52. Most of Australia's coalition partners in Afghanistan have had to deal with allegations of war crimes. Even where the evidence is apparently strong and clear, pitfalls have been encountered, both political and popular. It is predictable that Australian prosecutions could encounter similar obstacles.

53. In particular, it can be anticipated that, in the light of the frequency of deployments, and conditions not dissimilar to those relied on in *Blackman*, mental health defences including adjustment disorder will be invoked. Although it is doubtful that the statutory defence of 'diminished responsibility' is available in connection with the war crime of murder under (CTH) *Criminal Code*, s 268.70, proof of matters which would otherwise provide a defence of 'diminished responsibility' would still be relevant to mitigation of penalty, and might be relevant to the exercise of prosecutorial discretion.

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FINDINGS AND RECOMMENDATIONS OF NEW ZEALAND OPERATION BURNHAM INQUIRY

Clause 7.1.

The conduct of NZDF forces in Operation Burnham, including compliance with the applicable rules of engagement and international humanitarian law.

[7.1.1] The conduct of TF81 personnel throughout Operation Burnham was professional, although there may have been several miscalculations which resulted in damage to property. Contrary to the allegations in Hit & Run, TF81 personnel were not motivated by a desire for retaliation or revenge. We have concluded that all actions by TF81 personnel during the operation complied with the applicable rules of engagement and International Humanitarian Law.

Clause 7.2.

The assessment made by NZDF as to whether or not Afghan nationals in the area of Operation Burnham were taking direct part in hostilities or were otherwise legitimate targets.

[7.2.1] There was a proper basis for TF81's assessment at the beginning of the operation that there were people in the area who were taking direct part in hostilities. Men were observed removing weapons capable of bringing down aircraft from a house in Khak Khuday Dad and moving to high ground. Their actions were consistent with pre-operation intelligence indicating that there were armed insurgents in the villages. The targeting of these men was legitimate, as was the engagement by an NZSAS marksman, which targeted a man who was understood to have come from the same group.

[7.2.2] On the basis of the objective evidence (video footage, audio recordings and location information) there is a serious question as to whether the final engagement, which targeted a group of people who were climbing a hillside over a kilometre south of the main operational area, should have been cleared when it was. However, based on the Ground Force Commander's understanding at the time of what was occurring (as revealed in contemporary documentation), we consider that he gave clearance consistently with the requirements of the applicable rules of engagement and International Humanitarian Law.

Clause 7.3.

The conduct of NZDF forces in the return operation to Tirgiran Valley in October 2010.

[7.3.1] We have no concerns about the conduct of TF81 personnel during the return operation to the villages: Operation Nova. The evidence does not support the allegations in Hit & Run that the return operation was motivated by revenge or that the houses of the targets were destroyed.

Clause 7.4.

The NZDF's planning and justification/basis for the Operations, including the extent to which they were appropriately authorised through the relevant military chains of command, and whether there was any Ministerial authorisation of the Operations.

[7.4.1] Operations Burnham and Nova were not revenge raids. There were legitimate military justifications for them—there was reliable intelligence indicating there were insurgents in the villages who had been conducting attacks in Bamyán province where the NZPRT was located and were planning further attacks on the NZPRT and Afghan security forces.

[7.4.2] The operations were planned in accordance with standard operating procedures. Authorisation was obtained from the Chief of Defence Force (which was required because the operations were outside TF81's mandated area of operation) and through the ISAF chain of command (as the Chief of Defence Force had delegated operational control of TF81 to the Commander ISAF).

[7.4.3] The Minister of Defence and Prime Minister were informed of the intention to conduct Operation Burnham and did not object to it. They did not, and were not required to, provide formal authorisation for the operations.

Clause 7.5.

The extent of NZDF's knowledge of civilian casualties during and after Operation Burnham, and the content of written NZDF briefings to Ministers on this topic.

[7.5.1] NZDF personnel were not aware during the course of Operation Burnham that civilian casualties may have occurred. However, the possibility of civilian casualties became apparent to NZDF within a few days after the operation.

[7.5.2] NZDF misrepresented the situation to ministers in written briefings in December 2010, by overstating the Afghan Crisis Response Unit's role in Operation Burnham and stating that the allegations of civilian casualties had been investigated and found to be baseless when, in fact, the investigation had concluded that civilian casualties may have occurred.

[7.5.3] The erroneous briefings were based on an email sent by the Senior National Officer in Kabul to the Director of Special Operations, which misrepresented the findings of the ISAF Incident Assessment Team sent to investigate the allegations of civilian casualties. The Senior National Officer who sent the email appreciated soon after he sent it that he may have misrepresented the Incident Assessment Team's conclusion and failed to take adequate steps to correct the position. The advice in the email was accepted without question by the Senior National Officer's superior and others despite being contradicted by other information available to NZDF, including video footage, intelligence reporting and ISAF's own media releases.

[7.5.4] NZDF failed to adequately remedy its incorrect advice. In 2011 the Minister of Defence, Hon Dr Wayne Mapp, was informed orally by the Director of Special Operations that civilian casualties were possible, but in a way that minimised the significance of the Incident Assessment Team's findings. No written briefing was provided. In 2014 the Minister of Defence (then

Hon Dr Jonathan Coleman) received an inaccurate oral briefing in line with the December 2010 briefings. He discovered the true position only when his Military Secretary discovered the Incident Assessment Team Executive Summary in a safe at NZDF Headquarters.

Clause 7.6.

Public statements prepared and/or made by NZDF in relation to civilian casualties in connection with Operation Burnham.

[7.6.1] NZDF made a series of erroneous and misleading public statements about the possibility of civilian casualties on Operation Burnham from 2011 to 2017. On 20 April 2011 it issued an inaccurate media release, which said the Incident Assessment Team had concluded that the allegations of civilian casualties were ‘unfounded’. This position was repeated in subsequent public statements by NZDF and ministers in 2014, although the Prime Minister and the Minister acknowledged publicly that civilian casualties were possible after NZDF found the Incident Assessment Team’s report in a secure safe, essentially by chance. NZDF did not itself issue a public correction, however. Despite these events, NZDF’s initial public response when Hit & Run was launched in March 2017 was to repeat the false narrative and advise ministers accordingly—although it stated the correct position within a day or two.

[7.6.2] NZDF’s continued repetition of incorrect statements, both publicly and to ministers, resulted from the combined impact of frequent changes in key staff, failures to keep proper records and provide written briefings, and inadequate information storage and retrieval processes. These were not simply failures of organisational structure or systems; they were also failures of culture, particularly in relation to NZDF’s obligations to ministers.

Clause 7.7.

Steps taken by NZDF after Operation Burnham to review the conduct of the operation.

[7.7.1] NZDF failed to take appropriate steps after the operation to determine what happened. It did not conduct any effective investigation into the allegations of civilian casualties; nor did it appear to give any serious consideration to whether such an investigation was appropriate, despite clear ministerial concern about the allegations. NZDF relied on the Incident Assessment Team’s investigation, although it was aware this was only a preliminary assessment and not intended to replace a national investigation if appropriate. NZDF also had information that ISAF had ordered a further investigation following the Incident Assessment Team’s preliminary investigation, but did nothing effective to follow up on that.

Clause 7.8.

Whether NZDF’s transfer and/or transportation of suspected insurgent Qari Miraj to the Afghanistan National Directorate of Security in Kabul in January 2011 was proper, given (amongst other matters) the June 2010 decision in R (oao Maya Evans) v Secretary of State for Defence [2010] EWHC 1445.

[7.8.1] The transfer and transportation of Qari Miraj to the NDS in Kabul was improper in three respects.

[7.8.2] First, as Miraj was being placed in a vehicle for transportation, he was punched around the rib or stomach area by a member of TF81. Although rumours of the assault circulated within TF81 at the time, insufficient steps were taken to address the matter.

[7.8.3] Second, there were insufficient measures in place to protect Miraj against the risk of torture or mistreatment in detention. TF81 developed and led the operation to detain Miraj, had effective control over him for an hour or more and delivered him to the NDS. Accordingly, if there were substantial grounds to believe that he faced a real risk of torture, New Zealand had an obligation to ensure that he was not transferred into Afghan custody without sufficient protective arrangements being in place. Despite this, New Zealand's policy on detention meant he, like others detained on Afghan partnered operations, was treated as an Afghan detainee and did not benefit from the arrangements in place to protect New Zealand detainees (such as notification and monitoring obligations). We consider New Zealand breached its duty of non-refoulement and related obligations to prevent torture in relation to Miraj.

[7.8.4] Third, there was strong evidence that Miraj was tortured soon after he was placed into NDS custody, which New Zealand authorities became aware of a short while later. Despite this, senior leaders and ministers were not briefed; nor were any further steps taken to investigate, to express New Zealand's position on the use of torture, or to review its policy on detention.

Clause 7.9.

Separate from the Operations, whether the rules of engagement, or any version of them, authorised the predetermined and offensive use of lethal force against specified individuals (other than in the course of direct battle), and if so, whether this was or should have been apparent to (a) NZDF who approved the relevant version(s) and (b) responsible Ministers. In particular were there any written briefings to Ministers relevant to the scope of the rules of engagement on this point.

[7.9.1] The rules of engagement did authorise the predetermined and offensive use of lethal force against individuals on the JPEL. A person identified as a lethal target on the JPEL was treated as directly participating in hostilities for the duration of the listing.

[7.9.2] The fact that such force was permitted by the rules of engagement was apparent to NZDF, the Minister of Defence and the Prime Minister.

Clause 7.10.

Whether, and the extent to which, NZDF's interpretation or application of the rules of engagement, insofar as this involved such killings, changed over the course of the Afghanistan deployment.

[7.10.1] The rules of engagement were amended in December 2009, which in turn led to a change in the interpretation and application of the rules. Before the amendment, predetermined and offensive use of force would have been permitted only against members of specified insurgent groups. Following the amendment, the rules permitted the use of such force against any person or group who was directly participating in hostilities.

Recommendation 1

We recommend that the Minister of Defence take steps to satisfy him or herself that NZDF's (a) organisational structure and (b) record-keeping and retrieval processes are in accordance with international best practice and are sufficient to remove or reduce the possibility of organisational and administrative failings of the type identified in this report. To enable the Minister to do so, and to ensure public confidence in the outcome, we recommend the appointment of an expert review group comprising people from within and outside NZDF, including overseas military personnel with relevant expertise.

Recommendation 2 was in effect to establish an equivalent body to the IGADF

Recommendation 3

We recommend that a Defence Force Order be promulgated setting out how allegations of civilian casualties should be dealt with, both in-theatre and at New Zealand Defence Force Headquarters.

Recommendation 4

We recommend:

1. The Government should develop and promulgate effective detention policies and procedures (including for reporting to ministers) in relation to:
 - persons detained by New Zealand forces in operations they conduct overseas;
 - persons detained in overseas operations in which New Zealand forces are involved together with the forces of another country; and
 - the treatment of allegations that detainees in either of the first two categories have been tortured or mistreated in detention (including allegations that New Zealand personnel may have mistreated detainees).
 - The draft policies and procedures referred to should be made public, with an opportunity for public comment.
 - Training programmes should be developed to ensure that military, intelligence, diplomatic and other personnel understand the policies and the procedures and their responsibilities under them.
 - Once finalised, the detention policies and procedures should be reviewed periodically to ensure they remain effective.

**MEDIA RELEASE – UNITED KINGDOM CHIEF OF THE GENERAL STAFF GENERAL SIR PETER WALL,
GCB, CBE, DL**

Chief of the General Staff, General Sir Peter Wall, has responded to today's publication of Sir William Gage's report of his independent public inquiry into the circumstances surrounding the death of Baha Mousa in Iraq in 2003.⁵⁷

The report finds that a series of brutal acts by members of British forces led directly to the death of Baha Mousa; others were involved in assaulting him and his fellow detainees.

It also finds that others who could have intervened to prevent it failed to do so, and it reveals that there were inadequate doctrines and procedures in place for prisoner handling at the time.

General Wall said:

I would like to thank Sir William Gage for his thorough and challenging inquiry into the appalling circumstances surrounding the death of Mr Baha Mousa in British Army hands in Basra in September 2003, and for his comprehensive recommendations.

As its professional head, I will take the lead in implementing the specific recommendations relating to the Army as soon as possible, in accordance with the direction of the Secretary of State for Defence.

Indeed, as you would expect in light of events from eight years ago, since which we have been on operations continuously, many of the recommended changes are well advanced.

Sir William recognises this corrective action in the inquiry report.

What happened to Baha Mousa and his fellow detainees in 2003 was, in the words of the inquiry, grave and shameful.

The Army has apologised unreservedly to Baha Mousa's family and to the surviving victims for this shocking episode.

I would like to take this opportunity to repeat that apology today, in particular to Colonel Mousa, Baha Mousa's father, and to his family. Colonel Mousa has participated fully in this inquiry and he has conducted himself with great dignity throughout.

Both at home and on operations, the Army must act within the law. It must prepare for and conduct operations in accordance with our core ethos, and it must behave properly, particularly in demonstrating respect for others.

⁵⁷ 08 September 2011 Press Release, *Chief of the General Staff responds to Baha Mousa Inquiry Report*.

The nation places its trust in us and we expect our soldiers' conduct to reflect that trust, no matter how challenging the environment may be.

Our operational effectiveness depends on this, and we expect commanders at all levels to lead by example. We also expect our soldiers, no matter how junior, to understand the clear distinction between right and wrong in the heat of the moment.

This did not happen in the case of Baha Mousa and others at the temporary detention facility run by 1st Battalion The Queen's Lancashire Regiment in Basra in September 2003.

Although the challenges that soldiers faced in Iraq in 2003 were hostile and intense, there can be no excuse for the loss of discipline and lack of moral courage that occurred.

Since Baha Mousa's tragic death, the Army has sought to establish a full understanding of how and why this disgraceful event occurred.

It is clear from the inquiry report that we were ill-prepared in 2003 for the task of handling civilian detainees. The Army has made strenuous efforts since then to transform the way we train for and conduct detention operations.

Improvements have touched every aspect of detainee and prisoner handling and the report acknowledges the progress that has been made.

Managing the process of detention properly is now a mainstream military skill which requires mandatory education, specific permissions, and well-practised procedures.

Future operations will be designed around these imperatives, as they are in Afghanistan today. Above all we must operate a system for handling detainees that is firm, fair and transparent.

This step change in procedures means that I am confident that all soldiers deploying on operations today are fully trained in their legal responsibilities and can be in no doubt about the need to treat detainees humanely and with respect.

Had that been the case in Basra in 2003, Baha Mousa would not have died in British custody.

We demand a great deal of our soldiers who daily face threats on operations to protect Britain's safety and security. The vast majority of them demonstrate high standards of professionalism and behaviour in all that they do. This is the essence of the Army's reputation at home and abroad.

The shameful circumstances of Baha Mousa's death have cast a dark shadow on that reputation. This must not happen again.

Chapter 3.01

STRATEGIC, OPERATIONAL, ORGANISATIONAL AND CULTURAL FACTORS

EXECUTIVE SUMMARY

This chapter summarises the strategic, operational, organisational and cultural factors which may have contributed to the conduct described in Part 2. It draws on themes which have emerged in other chapters, and in the following chapters on Inquiries and Oversight, and Command and Collective Responsibility.

The fact that the conduct revealed in Part 2 took place, and was not discovered, and perhaps even more significantly that it has proven so difficult to uncover it in the course of this Inquiry, and that (as will appear) many are still in denial, is indicative of a culture that has departed from acceptable norms.

While many factors contributed to this, they include the dominance of a clique of non-commissioned officers (NCOs) who embraced the a 'warrior hero' culture; the notion that being designated 'special' justified exceptionalism from ordinary rules and oversight; the promotion of the wrong exemplars; the disempowerment of junior officers, both domestically and on operations; the prolonged use of a small pool of Special Forces personnel to conduct what became conventional operations in Afghanistan to the detriment of their role in irregular and unconventional operations, and to their psychological welfare; the lack of effective operational oversight due to the assignment of Special Operations Task Group (SOTG) under command International Security Assistance Force (ISAF) Special Operations Forces; the lack of mission clarity; and perceived dissatisfaction with policies that resulted in the release of captured insurgents; compounded by compartmentalisation of information and misguided loyalty that placed relationships and reputation above truth and morality.

While, because of the standard of their training and their professional skill levels, as well as their high degree of readiness and their flexibility, the Special Forces provide an attractive option for an initial deployment, it is a misuse of their capability to employ them on a long term basis to conduct what are essentially conventional military operations. Doing this on a protracted basis in Afghanistan detracted from their intended role in the conduct of irregular and unconventional operations, and contributed to a wavering moral compass, and to declining psychological health.

Educating personnel about the causes of war crimes, so that they understand how such crimes can come to be seen as almost required and therefore justified, is vital, as is providing them with the moral and ethical framework to resist.

The prevalence of embellished operational reporting is likely to be a manifestation of a wider propensity to be inclined to report what superior commanders are believed to want to hear. Integrity in reporting is fundamental for sound command decisions and operational oversight. The wider manifestation needs to be addressed in leadership training and ethical training, from the beginning of a military career and continuing throughout it.

The introduction of a second officer into a troop as Executive Officer (XO) would reinforce the officer influence, provide a sounding board for the other officer, and enable one officer to be 'on the ground' with another in an overwatch position. The troop sergeant, with equivalent rank to the patrol commanders, has limited authority over them. The Inquiry is attracted by the Special Boat Service model, in which the troop sergeant equivalent has the rank of Colour Sergeant – superior to the Sergeant patrol commanders, while still inferior to the Squadron Sergeant Major (SSM, Warrant Officer Class Two [WO2]). While the requirement is less obvious in the Commando Regiments, a similar approach could be adopted there.

Compartmentalisation of information and misguided loyalty has significantly contributed to the concealment of misconduct and the difficulty of uncovering it. It is recognised that the close-holding of information is a necessary feature of military units generally, and it is accentuated in the sphere of special operations. However, no obligation of secrecy attends criminal conduct, even if it occurs in an operational setting. To the contrary, there is an obligation to report it.

It is evident that fear of the consequences of reporting misconduct to the chain of command has deterred some from doing so. In most cases, this is fear for career prospects, although in some there has been fear of physical reprisals. In any event, experience shows that where a complaint or report is adverse to a member's chain of command, there are powerful practical constraints on making it. To enable members to feel safe and secure in reporting concerns about their chain of command, there needs to be an alternative reporting line, embedded at unit level, so that it is not remote and unfamiliar from those who may wish to resort to it, and so that doing so is not perceived as 'going outside the unit'. As a suggestion only, it might be based on the XO network.

Responses of members of the Special Air Service Regiment community [REDACTED] [REDACTED] provide a powerful illustration that there remains a widespread reluctance to acknowledge that there has been grave misconduct, and to call out misconduct by peers, and that despite the efforts of command to achieve reform, and despite the turnover of personnel in the Special Operations Command (SOCOMD) units since Afghanistan, there remain at influential levels Afghan veterans who present an ongoing obstacle to restoring a culture in which such conduct is regarded as wholly wrong. One critical step in achieving reform is the acceptance of ownership of the errors of the past, and the recognition and acceptance that there has been grave wrongdoing. As Professor Whetham observes, there is a fundamental difference between pulling a trigger and getting it wrong, and taking a prisoner and executing them in cold blood. Anyone who does not recognise this distinction, or is prepared to ignore it, does not deserve to belong in any professional military, let alone the ADF.

The implementation of cultural change in a military unit will be significantly facilitated by demonstrable support for those who are the agents of change. Too often, not only in the military, have the careers of whistle-blowers been adversely effected. Perhaps the single most effective indication that there is a commitment to cultural reform is the demonstration that those who have been instrumental in the exposure of misconduct, or are known to have acted with propriety and probity, are regarded as role models. It is crucial that their careers be seen to prosper. There are others whose conduct is such that they cannot be rewarded by promotion, but who, having made disclosures to the Inquiry in protected circumstances when they reasonably believed they would not be used against them, and whose evidence was ultimately of considerable assistance to the Inquiry, ought not fairly be the subject of adverse administrative action. Again, it will be an

important signal that they have not been disadvantaged for having ultimately assisted to uncover misconduct, even though implicating themselves.

Recommendations

- ***The Inquiry recommends*** that in future, so far as practicable, Australia should retain operational command over its deployed forces, including Special Forces, rather than assigning them under command to other entities.
- ***The Inquiry recommends*** that Special Forces should not be treated as the default 'force of first choice' for expeditionary deployments, except for irregular and unconventional operations. While in conventional operations Special Forces will sometimes appropriately provide, or significantly contribute to, early rotations, the 'handing off' of responsibility to conventional forces, and the drawdown of Special Forces, should be a prime consideration.
- ***The Inquiry recommends*** that a professional review of appropriate dwell times between operational deployments be undertaken; that pending that review the 12-month policy be adhered to; and that the authority for waivers be escalated to a higher level.
- ***The Inquiry recommends*** that every member of SOCOMD should receive education on the causes of war crimes. This education to be delivered by SOCOMD soldiers themselves and reviewed by appropriate external (ie, non-SOCOMD) reviewers who can act as critical friends.
- ***The Inquiry recommends*** that members of the SOCOMD community should be recorded talking candidly, and on the record, about the ethical drift that took place over a period of time, how hard it was to resist the prevailing organisational culture, and the missed opportunities that could and should have been taken to address the failure that many appeared to recognise at the time but felt powerless to change.
- ***The Inquiry recommends*** that basic and continuation training should reinforce that not only is a member not required to obey an obviously unlawful order, but it is the member's personal responsibility and legal duty to refuse to do so; and
- ***The Inquiry recommends*** that both selection and continuation training should include practical ethical decision-making scenarios in which trainees are confronted in a realistic and high pressure setting with the requirement to make decisions in the context of incidents of the kind described in Part 2.
- ***The Inquiry recommends*** that the training of officers and non-commissioned officers emphasise that absolute integrity in operational and other reporting is both an ethical obligation and is fundamental for sound command decisions and operational oversight.
- ***The Inquiry recommends*** that the structure of SASR Troops include a second officer, of the rank of Lieutenant, as Executive Officer; and a troop/platoon sergeant, with the rank of Staff Sergeant, Colour Sergeant or equivalent. Consideration should be given to whether a similar approach should be adopted in the Commando Regiments.

- *The Inquiry recommends that it should be clearly promulgated and understood across SOCOMD that the acknowledged need for secrecy in respect of operational matters does not extend to criminal conduct, which there is an obligation to notify and report.*
- *The Inquiry recommends that members have access to an alternative (to their chain of command) reporting line to facilitate confidential reporting of concerns that they are reluctant to raise through the chain of command.*
- [REDACTED]
- *The Inquiry recommends that the careers of those serving members who have assisted in the exposure of misconduct, or are known to have acted with propriety and probity, be seen to prosper, and that they be promoted at the earliest opportunity. These particularly include, in SASR, [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]; and in 2nd Commando Regiment, [REDACTED].*
- *The Inquiry recommends that [REDACTED] [REDACTED] [REDACTED] [REDACTED].*

INTRODUCTION

1. It is too simplistic to state that this chapter is about why and how the conduct described in Part 2 occurred. Deviant behaviour is often not able to be wholly explained by extraneous factors, because the personal psyche of the perpetrator is often a dominant consideration. Nonetheless it is important to identify, to the extent possible, albeit with the benefit of retrospectivity, factors the presence of which may have contributed to an environment in which that conduct could take place, and not be recognised. One reason why it is important is so that the risks are reduced for the future.
2. This chapter is supported by and draws on:
 - a. a discussion paper on Special Forces culture, developed by Inquiry staff; and
 - b. a report prepared by Professor David Whetham, Professor of Ethics and the Military Profession at King's College London, and Director of the King's Centre for Military Ethics, who was engaged by the Inquiry to provide an independent professional assessment, for which purpose he was appointed an Assistant Inspector-General to assist the Inquiry. His report is at Annex A to Chapter 3.03 Command and Collective Responsibility.

A CULTURAL DISCONNECT

3. Culture may be defined as ‘the sum total of ways of living built up by a group of humans, which is transmitted from one generation to another’,¹ or as the ‘customs and achievements of a particular civilisation or group’.² Culture functions to establish accepted bounds and decision points for behaviour. It provides social norms and boundaries for value-based decisions that affect the group, society, and in the instance of conduct in Afghanistan, international reputation and norms of behaviour. The resilience of a unit’s culture can be tested by the quality of decisions made in ambiguous or extreme situations. The behaviours and actions of individuals flow from, and directly influence and shape, the cultural health of an organisation or unit. If the cultural boundaries within a group shift and the norms accepted by society are transgressed, as occurred on some rotations and within some parts of the Special Operations Task Group (SOTG) in Afghanistan, there can be disturbing consequences.

4. The fact that the conduct revealed in Part 2 took place, and was not discovered, and perhaps even more significantly, that it has proven so difficult to uncover it in the course of this Inquiry, and that (as will appear) many are still in denial, is indicative of a culture that has departed from acceptable norms. In an article ‘It’s time for Australia’s SAS to stop its culture of cover-up and take accountability for possible war crimes’,³ Professor Philip Dwyer⁴ makes the point that unless fundamental changes are made to the culture of cover-up in the Special Forces, or the way these allegations are handled internally, the problem will persist.

Cultural influences

5. The cultural disconnect is the result of the combination of numerous factors. They include:
- a. The dominant influence of patrol commanders. To a junior Special Air Service Regiment (SASR) trooper, fresh from selection and reinforcement cycle, the patrol commander is a demigod, and one who can make or break a trooper’s career. They are trained to obey, and to implement their superior commander’s intent. To such a trooper, who has invested a great deal in gaining entry into SASR, the prospect of being characterised as a ‘lemon’ and not doing what was expected of them was an awful one, which could jeopardise everything for which they had worked.
 - b. The notion that they were ‘Special’ led to exceptionalism. ‘Special’ is fundamentally a descriptor of a particular class of operations – essentially, irregular and unconventional operations – though it has come to be associated with the specialist forces that conduct them. However, at least some took it as an excuse for exceptionalism – that is, that rules that apply to the remainder of the Australian Defence Force (ADF) or Australian Army do not apply to them. This led to a loss of humility and compassion, and an increasingly arrogant attitude (which at the macro level can be seen reflected in responses of SOTG to requests for information from Headquarters Joint Task Force (HQ JTF) 633 in connection with the [REDACTED] incident).

¹ Reference 1 - *The Macquarie Dictionary*, 1982. (ISBN 0 949757 00 4)

² Reference 2 - *Australian Pocket Oxford Dictionary*, 2014. (ISBN 978 0 19 552739 1)

³ Reference 3 - *The Conversation*, 24 July 2020.

⁴ Director of the Centre for the Study of Violence, School of Humanities and Social Science, University of Newcastle.

- c. Some, though by no means all, of the patrol commanders embraced the ‘warrior’ culture, and inevitably their subordinates followed. The tradition of SASR is one of quiet discrete professionalism. Special Forces operators should pride themselves on being model professional soldiers, not on being ‘warrior heroes’.
- d. The effect of this was compounded when those patrol commanders were in effect made exemplars.
- e. The officers who might have counter-balanced this were disempowered. This commenced from selection, where non-commissioned officers (NCOs) were effectively the gatekeepers. There is a perception in many quarters that officers were selected on the basis that they would be compliant. Junior officers were poorly supported. They were not well-mentored, but were rather left to swim or sink. Professor Whetham quotes evidence, received by the Inquiry, that:
[REDACTED]
[REDACTED]’. Those who did try to wrestle back some control were ostracised, and often did not receive the support of superior officers. Indeed, this was not confined to troop level: a squadron commander who insisted on proper standards (and during whose command of Force Element [REDACTED] [FE [REDACTED]] no relevant impropriety has emerged) was permitted to be nominated by NCOs as ‘Cock of the Year’. As Professor Whetham observes, the cost of not fitting in was high, in that for a junior officer, not being accepted by their soldiers could mean the end of a Special Forces career. As [REDACTED] said, [REDACTED]
[REDACTED]’. In that context, given the arduous selection process and how hard it is to get there in the first place, it is to an extent understandable that some might not be prepared to rock the boat.
- f. This was accentuated on operations in Afghanistan. Typically, the troop commanders were on their first SOTG deployment. Their patrol commanders were vastly more experienced. Of itself that is not unusual. However, in a carry-over from domestic counter-terrorism tactics, techniques, and procedures, the patrol commanders became the lead planners for operations. The operational control and influence of troop commanders was diminished, if not marginalised.

The operating environment

6. Superimposed on this was the effect of the operational experience in Afghanistan and repeated exposure to it. A number of influences in the operating environment may have contributed to a mindset in which some engaged in conduct that they would not otherwise have contemplated.

Catch and release, and the kill count

7. Some witnesses referred to [REDACTED]

[REDACTED] .⁵ Others suggested that [REDACTED] [REDACTED] [REDACTED]

⁵ Reference 4 - [REDACTED] TROI of [REDACTED], [REDACTED]

Moral compass

11. As was explained by a number of witnesses, both military and psychological, an individual's moral compass can shift under the influence of the environment. As one put it, each time you pull the trigger with a live target in the sights, it becomes easier.

12. Moreover, those serving on SOTG experienced:

- a. danger to self and mates;
- b. the loss or wounding of colleagues; and
- c. the intense bonding brought about by serving together in circumstances of hardship and danger and mutual reliance for safety and support.

13. All this occurred in a foreign and different environment, isolated from the norms of Australian society, and out of sight of those whose supervision or presence would ordinarily impose restraints on behaviour. Those are conditions which are fertile for a 'Lord of the Flies' syndrome to prosper, and there are strong signs of that afoot on Rotation [REDACTED], Rotation [REDACTED] and Rotation [REDACTED].

14. When soldiers are exposed to that environment repeatedly, over a decade, without lengthy dwell times between deployments, it is unsurprising that the moral compass of some may shift. It is no coincidence that it was in the later years of Operation (OP) SLIPPER – [REDACTED] in particular – that the problems reached their nadir.

Secrecy

15. The close-holding of information – frequently referred to as 'compartmentalisation' – is a necessary feature of military units generally, and it is accentuated in the sphere of special operations. The security of the nation and the lives of individuals can depend on it.

16. In this respect, [REDACTED] agreed that [REDACTED]

[REDACTED]

¹⁰

17. [REDACTED] gave this evidence about [REDACTED].¹¹

[REDACTED]: Q307. One could get the impression that [REDACTED]

? A. [REDACTED]

Q308. One could form the impression, [REDACTED]

¹⁰ Reference 10 - [REDACTED] TROI of [REDACTED], [REDACTED]

¹¹ Reference 11 - [REDACTED] TROI of [REDACTED]. [REDACTED]

? A.

18. The Inquiry is in no doubt that the understood obligation of secrecy has been used to support a code of silence. Operators are conscious that their security clearances are critical to their employability, and will not risk them. The organisational reaction to media reports is illustrative of the official reinforcement that the code of silence receives.

Loyalty

19. Alongside secrecy, loyalty provides the second pillar of the code of silence. Loyalty is, of course, a desirable and valued quality. But it has its limits. It is clear that there remain many who are not prepared to speak the truth, even under oath in a formal inquiry, because they do not wish to inculpate their mates, or affect the reputation of their regiment, or be seen as one who 'ratted'. There is nothing new about this: the Surafend incident in Palestine with the Light Horse in 1918 again provides a precedent. However, as the following section shows, this misguided loyalty poses a significant obstacle to achieving cultural reform

STRATEGIC AND OPERATIONAL FACTORS

Command and control

20. SOTG, though under the 'theatre command' of HQ JTF 633, was assigned under the operational command of ISAF Special Operations Forces (SOF). The practical effect of this was that SOTG responded to the operational tasking and requirements of ISAF SOF. While, via Headquarters Joint Operation Command (HQJOC), HQ JTF 633 and HQ JTF 633-A, Australia sought to exercise 'national command' over SOTG, Headquarters JTF 633 and JTF 633-A sat outside the operational command chain, and did not have effective oversight of or influence on day-to-day SOTG planning and operations.

21. [REDACTED], who was Chief of Joint Operations from [REDACTED] to [REDACTED] observed:¹²

... One of the commanding officers caused me some issues because I think ISAF SOF guys, because they're in that chain of command, were the third-largest SOTG in theatre, they were taking a fair bit of direction from them in prosecuting the special operations part of the campaign.

22. It is clear that, at least at times, HQ JTF 633 was perceived by SOTG as largely irrelevant and inconvenient, if not an impediment. As mentioned elsewhere, [REDACTED]

[REDACTED], Officer Commanding (OC) FE [REDACTED] for Rotation [REDACTED], described the [REDACTED]

23. This was in a context where Australia had two battlegroups in Tarin Kowt – SOTG, and the Reconstruction and Mentoring Reconstruction Task Forces (RTF/MRTF/MTF). Moreover, the operational concept was that SOTG was securing the battlespace for the RTF/MRTF/MTF. That

¹² Reference 12 - [REDACTED] TROI of [REDACTED], [REDACTED]

bespeaks the need for a coordinated command, not least so that the effects delivered by one do not conflict with or detract from the effects desired by the other.

24. The idea that Special Forces are a strategic asset that sit outside normal chains of command is well-entrenched. That they are a strategic asset is not questioned. However, since 1917 Australia has consistently espoused the position that it maintains command and control of its deployed Armed Forces, including when operating in a coalition context. One important reason for that is to ensure that their operations remain consistent with the national intent.

25. Had Australia established a one-star command in Tarin Kowt, that would have provided a coordinated command and control arrangement for SOTG and the RTF/MRTF/MTF. It would also have enabled Australia to exercise a degree of supervision of SOTG operations which could not be exercised by HQ JTF 633 across the Gulf.

26. This has been addressed in subsequent operations. [REDACTED], [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] 13

[REDACTED]

Q21. Okay. So you [REDACTED] - - - A. [REDACTED]
[REDACTED]

Q22. Whereas [REDACTED] ? A
[REDACTED]

27. Moreover, ISAF SOF, under the operational command of which the SOTG sat, were strongly influenced by a predominantly [REDACTED] ISAF SOF attitude and strategy which was focussed on killing or capturing insurgent leaders and disrupting insurgent lines of communications. Books and accounts covering Special Forces operations in Afghanistan and Iraq tended to foster a 'warrior-hero' culture, which may not suit the broader sweep of unconventional operations required of Australian Special Forces. It contributed to a warrior-hero culture of killing, and to a Special Forces cadre which forgot counter insurgency lessons of working with the local population.

28. This was manifest in accounts obtained by the Inquiry from villagers of their traumatic experiences when a raid occurred, which do not sit at all well with operator accounts that those who were not 'bad' would be passive or go on with their daily activities untroubled. The Inquiry has heard and read many accounts of Afghan nationals of their experiences of SOTG raids. It is plain that these were a terrifying experience for villagers, regardless of their affiliations. Such raids may sometimes have removed a Taliban leader or otherwise disrupted the insurgency in the short term, but many did not further the long-term counter-insurgency effort. Fundamental principles of counter-insurgency warfare were disregarded; in particular, local nationals were presumed to be hostile; and the winning of the hearts and minds of local nationals was not given priority.

¹³ Reference 13 - [REDACTED] TROI of [REDACTED], [REDACTED]

29. It should go without saying that clarity of the mission is critical, and that operations should be in furtherance of that mission. However, the Inquiry did not detect a consistent understanding among Special Forces operators of the SOTG mission: while commanders tended to refer to securing the battlespace for RTF/MRTF/MTF, many operators referred to demonstrating support for the [REDACTED] alliance.

30. While the complexities of coalition warfare, and the need for flexible command and control arrangements, are acknowledged, the devolution of operational command to the extent that the national command has no real oversight of the conduct of Special Forces operations not only has the potential to result in the national interest and mission being overlooked or subordinated, but deprives national command of oversight of those operations. What is 'special' about Special Forces is the operations they conduct. If anything, the secretive nature of their operations makes effective oversight by National command all the more important. That they conduct 'special' operations does not mean that they should be excepted from ordinary command and oversight arrangements.

31. *The Inquiry recommends that in future, so far as practicable, Australia should retain operational command over its deployed forces, including Special Forces, rather than assigning them under command to other entities.*

The misemployment of Special Forces

32. As operations in Afghanistan evolved, SOTG were, at least to a substantial degree, not conducting 'special operations', but missions that could have been conducted by properly-enabled and supported conventional forces. In particular, FE [REDACTED] was predominantly involved in kill/capture and disruption type missions, which were a form of cordon and search; while Force Element [REDACTED] (FE [REDACTED]) was predominantly engaged in company-strength attacks and clearances.

Strategic consequences

33. [REDACTED] observed that [REDACTED]
[REDACTED]
[REDACTED] He spoke of [REDACTED]:¹⁴

[REDACTED]

¹⁴ [REDACTED] TROI of [REDACTED].

34. This had further effects. [redacted] observed:¹⁵

[redacted]

35. Australia requires a more surgical and refined national Special Forces capability than that required for the more or less conventional operations into which SOTG operations in Afghanistan evolved. The sustained use of Special Forces to conduct what were in truth largely conventional operations meant that the limited pool of Special Forces personnel were required to deploy on multiple rotations, with little respite between deployments. It also denied conventional forces an opportunity to deploy and learn from the experience of operations for which they were trained and suited. While Government may have had an understandable preference for using Special Forces, because of their proved success in the past and the lower risk profile, it was the ADF's responsibility not simply to accede to that preference, but to provide fearless and firm advice that the protracted use of Special Forces to conduct what were not in truth 'special operations', but missions that could have been conducted by appropriately trained and enabled conventional forces, was imprudent, unwise, and potentially jeopardising the welfare of Special Forces personnel.

Psychological consequences

36. The consequences of this were not limited to the nature of the Special Forces capability. [redacted] identified [redacted]

[redacted].¹⁶

Could we have handed off a significant portion of what SOTG was doing to conventional forces at a much earlier stage? A. [redacted]

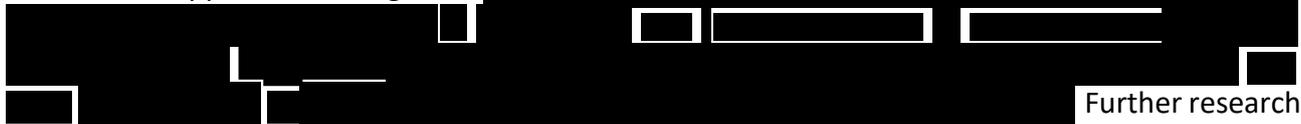
[redacted]

¹⁵ [redacted] TROI of [redacted]

¹⁶ Reference 14 - [redacted] TROI of [redacted]



37. Throughout the relevant period, it was ADF policy that there should be a 'dwell time' of at least 12 months between deployments for any individual member, although waivers could be obtained. This was supported by psychological research. In the high intensity of deployments during the decade 2004 to 2014, and not only in the Special Forces, waivers were frequently granted. In retrospect, this was unwise, at least for high intensity operations such as SOTG, and reduced the opportunity for the moral compass to reset. Again, the need for flexibility and the undesirability of an inflexible approach is recognised.



Further research to evaluate the sufficiency of that time should be undertaken, and until then the 12-month period should at least be maintained.

Conclusion

38. While, because of the standard of their training and their professional skill levels, as well as their high degree of readiness and their flexibility, the Special Forces provide an attractive option for an initial deployment, it is a misuse of their capability to employ them on a long term basis to conduct what are essentially conventional military operations. Doing this on a protracted basis in Afghanistan detracted from their intended role in the conduct of irregular and unconventional operations, and contributed to a wavering moral compass, and to declining psychological health.

39. *The Inquiry recommends that Special Forces should not be treated as the default 'force of first choice' for expeditionary deployments, except for irregular and unconventional operations. While in conventional operations Special Forces will sometimes appropriately provide, or significantly contribute to, early rotations, the 'handing off' of responsibility to conventional forces, and the drawdown of Special Forces, should be a prime consideration.*

40. *The Inquiry recommends that a professional review of appropriate dwell times between operational deployments be undertaken; that pending that review the 12-month policy be adhered to; and that the authority for waivers be escalated to a higher level.*

ORGANISATIONAL AND STRUCTURAL FACTORS

Selection and training

41. It is a striking and troubling feature of the incidents described in Part 2 that, although they must have known that what they were being told to do was unlawful, there is no evidence of any subordinate who was told or encouraged to commit an unlawful killing objecting, resisting or even questioning it. This bespeaks a deference to superiors so extreme that it overrides legality and morality. It may also reflect a 'Lord of the Flies' syndrome. It points to a need to reinforce that

obedience to the chain of command does not require or permit obedience to unlawful orders, and that it is a member's duty to refuse to implement obviously unlawful orders.

42. Professor Whetham has observed, in his *Recommendation 1 (Deliver education to all SOCOMD personnel on the causes of war crimes)*, that educating military personnel about the causes of war crimes so that they understand how such crimes can come to be seen as almost required and therefore justified, is vital, but not easy. He suggests that military ethics training should employ case studies drawn from military personnel 'from the same services and country as themselves', so that they understand that they too could become torturers or murderers – that the 'good guys' can also do bad things. He recommends that every member of SOCOMD should receive education on the causes of war crimes, to be delivered by SOCOMD soldiers themselves and reviewed by appropriate external (ie, non-SOCOMD) reviewers who can act as critical friends; and that members of the SOCOMD community should be recorded talking candidly, and on the record, about the ethical drift that took place over a period of time, how hard it was to resist the prevailing organisational culture and the missed opportunities that could and should have been taken to address the failures that so many people appeared to recognise at the time, but felt powerless to change. The Inquiry adopts these recommendations.

43. In particular, the Inquiry believes that in high stress situations, soldiers will default to their practical training experience, rather than to theory learnt in a classroom. They will respond as they have practised responding in exercises. This can be addressed by embedding in continuation training, as well as in the selection process, practical ethical decision-making scenarios, based on the types of incidents described in Part 2, in which trainees are under pressure to make unethical decisions.

44. ***The Inquiry recommends that:***

- *Every member of SOCOMD should receive education on the causes of war crimes. This education to be delivered by SOCOMD soldiers themselves and reviewed by appropriate external (ie, non-SOCOMD) reviewers who can act as critical friends.*
- *Members of the SOCOMD community should be recorded talking candidly, and on the record, about the ethical drift that took place over a period of time, how hard it was to resist the prevailing organisational culture, and the missed opportunities that could and should have been taken to address the failure that many appeared to recognise at the time but felt powerless to change.*
- *Basic and continuation training should reinforce that not only is a member not required to obey an obviously unlawful order, but it is the member's personal responsibility and legal duty to refuse to do so; and*
- *Both selection and continuation training should include practical ethical decision-making scenarios in which trainees are confronted in a realistic and high pressure setting with the requirement to make decisions in the context of incidents of the kind described in Part 2.*

Reporting

45. The Inquiry reviewed operational reporting extensively during the examination of incidents and issues of interest. It has become plain that Operation Summaries and other reports frequently

did not truly and accurately report the facts of engagements, even where they were innocent and lawful, but were routinely embellished, often using boilerplate language, in order to proactively demonstrate apparent compliance with ROE, and to minimise the risk of attracting the interest of higher headquarters. This had upstream and downstream effects: upstream, higher headquarters received a misleading impression of operations, and downstream, operators and patrol commanders knew how to describe an incident in order to satisfy the perceived reporting requirements.

46. This is likely to be a manifestation of a wider propensity to be inclined to report what superior commanders are believed to want to hear. Integrity in reporting is fundamental for sound command decisions and operational oversight. The wider manifestation needs to be addressed in leadership training and ethical training, from the beginning of a military career and continuing throughout it.

47. ***The Inquiry recommends** that the training of officers and non-commissioned officers (NCOs) emphasise that absolute integrity in operational and other reporting is both an ethical obligation and is fundamental for sound command decisions and operational oversight.*

Structural

48. Junior officers in SASR, at troop command level, were not well-served by mentoring and support, and were able to be sidelined by the dominant patrol commander clique. Operational factors contributed to this, enabling the troop commander to be dislocated for plausible reasons in an overwatch position. The empower of junior officers requires the support - previously lacking because of the 'rite of passage' and 'sink or swim philosophy' – of Commanding Officers and Squadron Officers Commanding, and of Warrant Officers.

49. The introduction of a second officer into a troop as Executive Officer (XO) would reinforce the officer influence, provide a sounding board, and enable one officer to be 'on the ground' with another in an overwatch position. The troop sergeant, with equivalent rank to the patrol commanders, has limited authority over them. The Inquiry has been attracted by the British Special Boat Service model, in which the troop sergeant equivalent has the rank of Colour Sergeant – superior to the sergeant patrol commanders, while still inferior to the Squadron Sergeant Major (SSM, Warrant Officer Class Two). While the requirement is less obvious in the Commando Regiments, a similar approach could be adopted there.

50. ***The Inquiry recommends** that the structure of SASR Troops include a second officer, of the rank of Lieutenant, as XO; and a troop/platoon sergeant, with the rank of Staff Sergeant, Colour Sergeant or equivalent. Consideration should be given to whether a similar approach should be adopted in the Commando Regiments.*

51. It is of course recognised that the close-holding of information is a necessary feature of military units generally, and it is accentuated in the sphere of special operations. However, no obligation of secrecy attends criminal conduct, even if it occurs in an operational setting. To the contrary, there is an obligation to report criminal conduct.

52. ***The Inquiry recommends** that it should be clearly promulgated and understood across SOCOMD that the acknowledged need for secrecy in respect of operational matters does not extend to criminal conduct, which there is an obligation to notify and report.*

53. It is evident that fear of the consequences of reporting misconduct to the chain of command has deterred some from doing so. In most cases this is fear for career prospects, although in some there has been fear of physical reprisals. In any event, experience shows that where a complaint or report is adverse to a member's chain of command, there are powerful practical constraints on making it. To enable members to feel safe and secure in reporting concerns about their chain of command, units need to have an alternative reporting line. Traditionally, this has been provided informally by the Chaplain and the Regimental Medical Officer, but a more clearly authorised formal and confidential system, to which members can report concerns without fear of retribution, is required to overcome the inherent constraints on reporting about the chain of command through the chain of command. This needs to be embedded at unit level, so that it is not remote and unfamiliar from those who may wish to resort to it, and so that doing so is not perceived as 'going outside the unit'. As a suggestion only, it might be based on the XO network.

54. *The Inquiry recommends that members have access to an alternative (to their chain of command) reporting line to facilitate confidential reporting of concerns that they are reluctant to raise through the chain of command.*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁷ [REDACTED].

¹⁸ Reference 15 - [REDACTED] TROI of [REDACTED]

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74. [REDACTED] responses of members of the SASR community [REDACTED] is a powerful illustration that there remains a widespread reluctance to acknowledge that there has been grave misconduct, and to call out misconduct by peers. It illustrates that, despite the efforts of command to achieve reform, and despite the turnover of personnel in the SOCOMD units since Afghanistan, there remain at influential levels Afghan veterans who present an ongoing obstacle to restoring a culture in which such conduct is regarded as wholly wrong. One critical step in achieving reform is the acceptance of ownership of the errors of the past, and the recognition and acceptance that there has been grave wrongdoing. As professor Whetham observes, there is a fundamental difference between pulling a trigger and getting it wrong, and taking a prisoner and executing them in cold blood, and anyone who does not recognise this distinction, or is prepared to ignore it, does not deserve to belong in any professional military, let alone the ADF.

75. [REDACTED]

76. Professor Whetham's second recommendation is to encourage alternative and dissenting narratives, encouraging military personnel to be able to construe alternative ways of understanding events and situations, in order to prevent a 'monolithic and flawed articulation of morality within military forces'. He observes that, as the power of the situation to undermine even the strongest of characters is well understood, preparing people for the environmental effects on their ethical perception and likely behaviour is vital. This should include routine critical reflections on the values and standards of the ADF and how these can and should be interpreted in different situations, as while the values and standards can and should be understood as universal within the ADF, the way that individual values will need to be interpreted will be different due to the context. 'Courage' is a value (or virtue) that is supposedly easy to understand, but what it looks like on a patrol in Uruzgan Province may be very different to the courage required by an administrator who wants to question the receipts submitted by a Commanding Officer, or a Chief of the Defence Force when faced with a questionable direction from a Prime Minister. He points out that military ethics must be considered as a core competency that needs to be updated and refreshed as part of professional development and specific training if it is to be maintained, and that it cannot be assumed that once a base level of understanding has been achieved, it can then be left alone. Exploring how one demonstrates courage in different circumstances is not something that should just happen in institutions during phase one training, but should be part of a normalised process of healthy ethics discussions taking place at all ranks and at all stages of military careers – it should just be a routine part of everyday activity. Even mentioning ethics changes peoples' awareness and behaviour. Therefore, the normalisation of the *right kinds* of routine ethical discussion is important. The Inquiry adopts this recommendation.

77. The implementation of cultural change in a military unit will be significantly facilitated by demonstrable support for those who are the agents of change. Too often, not only in the military,

have the careers of whistle-blowers been adversely effected. Perhaps the single most effective indication that there is a commitment to cultural reform is the demonstration that those who have been instrumental in the exposure of misconduct, or are known to have acted with propriety and probity, are regarded as role models. It is crucial that their careers be seen to prosper.

78. *The Inquiry recommends that the careers of those serving members who have assisted in the exposure of misconduct, or are known to have acted with propriety and probity, be seen to prosper, and that they be promoted at the earliest opportunity. These particularly include, in SASR, [REDACTED]*

[REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]; and in 2 Commando Regiment, [REDACTED].

79. There are others whose conduct cannot be rewarded by promotion, but who, having made disclosures to the Inquiry in protected circumstances when they reasonably believed they would not be used against them, and whose evidence was ultimately of considerable assistance to the Inquiry, ought not fairly be the subject of adverse administrative action. Again, it will be an important signal that they have not been disadvantaged for having ultimately assisted to uncover misconduct, even though self-implicating.

80. *The Inquiry recommends that [REDACTED] [REDACTED] [REDACTED] [REDACTED].*

CONCLUSION AND RECOMMENDATIONS

81. While, because of the standard of their training and their professional skill levels, as well as their high degree of readiness and their flexibility, the Special Forces provide an attractive option for an initial deployment, it is a misuse of their capability to employ them on a long term basis to conduct what are essentially conventional military operations. Doing this on a protracted basis in Afghanistan detracted from their intended role in the conduct of irregular and unconventional operations, and contributed to a wavering moral compass, and to declining psychological health.

82. Educating personnel about the causes of war crimes so that they understand how such crimes can come to be seen as almost required and therefore justified, is vital, as is providing them with the moral and ethical framework to resist.

83. The prevalence of embellished operational reporting is likely to be a manifestation of a wider propensity to be inclined to report what superior commanders are believed to want to hear. Integrity in reporting is fundamental for sound command decisions and operational oversight. The wider manifestation needs to be addressed in leadership training and ethical training, from the beginning of a military career and continuing throughout it.

84. The introduction of a second officer into a troop as XO would reinforce the officer influence, provide a sounding board for the other, and enable one officer to be 'on the ground' with another in an overwatch position. The troop sergeant, with equivalent rank to the patrol commanders, has limited authority over them. The Inquiry has been attracted by the Special Boat Service model, in which the troop sergeant equivalent has the rank of Colour Sergeant – superior to the Sergeant patrol commanders, while still inferior to the WO2 SSM. While the requirement is less obvious in the Commando Regiments, a similar approach could be adopted there.

85. Compartmentalisation of information and misguided loyalty has significantly contributed to the concealment of misconduct and the difficulty of uncovering it. It is of course recognised that the close-holding of information is a necessary feature of military units generally, and it is accentuated in the sphere of special operations. However, no obligation of secrecy attends criminal conduct, even if it occurs in an operational setting. To the contrary, there is an obligation to report criminal conduct.

86. It is evident that fear of the consequences of reporting misconduct to the chain of command has deterred some from doing so. In most cases this is fear for career prospects, although in some there has been fear of physical reprisals. In any event, experience shows that where a complaint or report is adverse to a member's chain of command, there are powerful practical constraints on making it. To enable members to feel safe and secure in reporting concerns about their chain of command, units need to have an alternative reporting line. This needs to be embedded at unit level, so that it is not remote and unfamiliar from those who may wish to resort to it, and so that doing so is not perceived as 'going outside the unit'. As a suggestion only, it might be based on the XO network.

87. Responses of members of the SASR community [REDACTED] provide a powerful illustration that there remains a widespread reluctance to acknowledge that there has been grave misconduct, and to call out misconduct by peers, and that despite the efforts of command to achieve reform, and despite the turnover of personnel in the SOCOMD units since Afghanistan, there remain at influential levels Afghan veterans who present an ongoing obstacle to restoring a culture in which such conduct is regarded as wholly wrong. One critical step in achieving reform is the acceptance of ownership of the errors of the past, and the recognition and acceptance that there has been grave wrongdoing. As Professor Whetham observes, there is a fundamental difference between pulling a trigger and getting it wrong, and taking a prisoner and executing them in cold blood, and anyone who does not recognise this distinction, or is prepared to ignore it, does not deserve to belong in any professional military, let alone the ADF.

88. The implementation of cultural change in a military unit will be significantly facilitated by demonstrable support for those who are the agents of change. Too often, not only in the military, have the careers of whistle-blowers been adversely effected. Perhaps the single most effective indication that there is a commitment to cultural reform is the demonstration that those who have been instrumental in the exposure of misconduct, or are known to have acted with propriety and probity, are regarded as role models. It is crucial that their careers be seen to prosper. There are others whose conduct is such that they cannot be rewarded by promotion, but who, having made disclosures to the Inquiry in protected circumstances when they reasonably believed they would not be used against them, and whose evidence was ultimately of considerable assistance to the Inquiry, ought not fairly be the subject of adverse administrative action. Again, it will be an important signal that they have not been disadvantaged for having ultimately assisted to uncover misconduct, even though self-implicating.

Recommendations

- *The Inquiry recommends that in future, so far as practicable, Australia should retain operational command over its deployed forces, including Special Forces, rather than assigning them under command to other entities.*

- **The Inquiry recommends** that Special Forces should not be treated as the default 'force of first choice' for expeditionary deployments, except for irregular and unconventional operations. While in conventional operations Special Forces will sometimes appropriately provide, or significantly contribute to, early rotations, the 'handing off' of responsibility to conventional forces, and the drawdown of Special Forces, should be a prime consideration.
- **The Inquiry recommends** that a professional review of appropriate dwell times between operational deployments be undertaken; that pending that review the 12-month policy be adhered to; and that the authority for waivers be escalated to a higher level.
- **The Inquiry recommends** that every member of SOCOMD should receive education on the causes of war crimes. This education to be delivered by SOCOMD soldiers themselves and reviewed by appropriate external (ie, non-SOCOMD) reviewers who can act as critical friends.
- **The Inquiry recommends** that members of the SOCMD community should be recorded talking candidly, and on the record, about the ethical drift that took place over a period of time, how hard it was to resist the prevailing organisational culture, and the missed opportunities that could and should have been taken to address the failure that many appeared to recognise at the time but felt powerless to change.
- **The Inquiry recommends** that basic and continuation training should reinforce that not only is a member not required to obey an obviously unlawful order, but it is the member's personal responsibility and legal duty to refuse to do so; and
- **The Inquiry recommends** that both selection and continuation training should include practical ethical decision-making scenarios in which trainees are confronted in a realistic and high pressure setting with the requirement to make decisions in the context of incidents of the kind described in Part 2.
- **The Inquiry recommends** that the training of officers and non-commissioned officers emphasise that absolute integrity in operational and other reporting is both an ethical obligation and is fundamental for sound command decisions and operational oversight.
- **The Inquiry recommends** that the structure of SASR Troops include a second officer, of the rank of Lieutenant, as Executive Officer; and a troop/platoon sergeant, with the rank of Staff Sergeant, Colour Sergeant or equivalent. Consideration should be given to whether a similar approach should be adopted in the Commando Regiments.
- **The Inquiry recommends** that it should be clearly promulgated and understood across SOCOMD that the acknowledged need for secrecy in respect of operational matters does not extend to criminal conduct, which there is an obligation to notify and report.
- **The Inquiry recommends** that members have access to an alternative (to their chain of command) reporting line to facilitate confidential reporting of concerns that they are reluctant to raise through the chain of command.



- *The Inquiry recommends that the careers of those serving members who have assisted in the exposure of misconduct, or are known to have acted with propriety and probity, be seen to prosper, and that they be promoted at the earliest opportunity. These particularly include, in SASR, [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]; and in 2 Cdo Regt, [REDACTED].*

- *The Inquiry recommends that [REDACTED] [REDACTED] [REDACTED].*

References:

1. The Macquarie Dictionary, 1982. (ISBN 0 949757 00 4)
2. Australian Pocket Oxford Dictionary, 2014. (ISBN 978 0 19 552739 1)
3. The Conversation, 24 July 2020.
4. [REDACTED] TROI of [REDACTED]. [REDACTED]
5. [REDACTED] TROI of [REDACTED], [REDACTED]
6. [REDACTED] TROI of [REDACTED], [REDACTED]
7. [REDACTED] TROI of [REDACTED]. [REDACTED]
8. [REDACTED] TROI of [REDACTED]. [REDACTED]
9. [REDACTED] TROI of [REDACTED]. [REDACTED]
10. [REDACTED] TROI of [REDACTED]. [REDACTED]
11. [REDACTED] TROI of [REDACTED]. [REDACTED]
12. [REDACTED] TROI of [REDACTED]. [REDACTED]
13. [REDACTED] TROI of [REDACTED]. [REDACTED]
14. [REDACTED] TROI of [REDACTED]. [REDACTED]
15. [REDACTED] TROI of [REDACTED]. [REDACTED]
16. [REDACTED] TROI [REDACTED]. [REDACTED]
17. [REDACTED] TROI [REDACTED]. [REDACTED]
18. [REDACTED] TROI [REDACTED]
19. [REDACTED] TROI of [REDACTED]
20. [REDACTED] TROI of [REDACTED]
21. [REDACTED] TROI of [REDACTED]
22. [REDACTED] TROI of [REDACTED]
23. [REDACTED] TROI of [REDACTED]

Chapter 3.02

INQUIRIES AND OVERSIGHT

Operational Reporting, Quick Assessments, Australian Defence Force Investigative Service Investigations, Inquiry Officer Inquiries and Responses to External Complaints

EXECUTIVE SUMMARY

The Australian Defence Force (ADF) had in place a system of operational reporting and investigatory mechanisms including quick assessments, ADF Investigative Service (ADFI) investigations, and Inquiry Officer Inquiries, designed to provide command oversight and respond to allegations of unlawful conduct. However, these systems failed to detect a number of breaches of the law of armed conflict (LOAC) that were identified during the course of the Inquiry. The evidence suggests a number of reasons for this.

First, operational reporting generally provided pro forma rather than reliable accounts of Special Operations Task Group (SOTG) engagements. Some examples, when reviewed by the Inquiry upon receiving further evidence, appeared contrived to obscure the facts of breaches of the LOAC as they were known to the participants. Those operational summaries routinely justified engagements which might otherwise appear questionable, and appeared more designed to rationalise actions and deflect higher criticism than to accurately report the facts. An officer described [REDACTED].¹ Another, being [REDACTED]

²

Secondly, boilerplate language such as an 'insurgent manoeuvring to a position of tactical advantage', was commonly used to describe engagements with unarmed persons so as to suggest action had occurred in accordance with rules of engagement (ROE) and to dissipate potential concerns of higher headquarters and or complaints by external organisations. Such language sometimes obscured the true facts of a killing, impeding appropriate review and response.

Thirdly, SOTG commanders, operations staff and Quick Assessment (QA) and Inquiry officers generally did not apply sufficient balance when considering evidence provided by external complainants. Rather, they generally discounted local complaints as insurgent propaganda or motivated by compensation.³ Likewise, complaints received from Government of the Islamic Republic of Afghanistan, representatives of the International Committee of the Red Cross, or the Afghan Independent Human Rights Commission were generally discounted. This failure reasonably

¹ Reference 1 - [REDACTED] TROI of [REDACTED]

² Reference 2 - [REDACTED] TROI of [REDACTED]

³ As examples, see [REDACTED] comments on Reference 3 - SOTG QA Allegations of LOAC Violation - [REDACTED] (Chap 2.29: [REDACTED]) or Reference 4 - SOTG [REDACTED] Quick Assessment Into the Intelligence Report of [REDACTED] Regarding an Insurgent Allegation that a Local National was Killed During a CF Operation date [REDACTED] (Chapter 2.52: [REDACTED])

to consider local concerns further fuelled local Afghan perceptions that their complaints were not dealt with fairly, and thus tended to alienate the local population⁴ and may have perversely supported the insurgency by running counter to the counter-insurgency objectives of the International Security Assistance Force (ISAF) mission and purpose of Australia's contribution to reconstruction efforts in Afghanistan.

Fourthly, SOTG did not welcome external scrutiny, particularly, but not only, by ADFIS. The pretext of operational security, and the claim of superior knowledge of the relevant battlespace, were routinely deployed in support of this resistance.

Fifthly, there were occasions when higher headquarters did not have complete confidence that information received from the field was accurate. At times, Headquarters (HQ) Joint Task Force 633 (JTF 633) was hesitant to accept operational reporting from the SOTG at face value.⁵ That hesitation was often justified, even when operational accounts were queried, as SOTG responses and oversight systems in place did not adequately provide an objective, unbiased means for commanders to confirm where the truth lay. In those circumstances, appropriate requests for further information were made, and inquiries instituted. However, such requests were met with claims by SOTG of superior knowledge of the relevant battlespace, and QAs, inquiries and investigative processes provided false reassurance, for the reasons next given. Ultimately, suspicions were overcome by a perceived obligation at all levels to trust and support subordinates, with operational reporting and other assurances that all was well.

Sixthly, QAs, inquiries and investigative processes failed provide the chain of command with the oversight needed to ensure that the use of force was not abused in contravention of the LOAC. When allegations of unlawful conduct arose and QAs and Inquiries were initiated they tended to be biased towards operational reports and operator accounts and lacked a forensic testing of that evidence with material from sensitive site exploration, operational chat records and other military information. Local national accounts were routinely discounted as insurgent propaganda or motivated by compensation. Insofar as QA officers were generally drawn from within the SOTG, they lacked independence. They were not necessarily curious enough to consider evidence which contradicted operator accounts and operational reporting. Inquiry officers while drawn from outside SOTG often lacked the right experience, access, support and resources to get to the core of what had happened. Officers generally assumed 'innocence', and their reports almost invariably exculpated force elements.

Seventhly, some SF operators felt immune from or had the arrogance to thwart external inquiry. As explained in other chapters, this was manifested in a range of unacceptable behaviours such as the use of throwdowns, false reporting, and actively conspiring to obstruct oversight by command and avoid scrutiny and possible disciplinary action by lying to QA and Inquiry Officers. Apart from amounting to at least a disciplinary offence, such behaviour ran counter to Australia's interests and the ISAF counter-insurgency mission in Afghanistan.

⁴ For example Reference 5 - [REDACTED] witness accounts [REDACTED] p7: [REDACTED] - *Not at that time, at that time the Government, Australian were, to who we should complain, our voice was not going to be heard... Then people come here to the Governor to complain, they brought complain letters, but their voice was not heard at all. Then we thought, when their voice wasn't heard, our voice is not going reach to place either.* [REDACTED]

⁵ Reference 6 - [REDACTED] of [REDACTED]

This chapter draws on case studies from the Inquiry where operational reporting was grossly inaccurate, and where oversight mechanisms demonstrably failed to provide Command with the facts behind incidents relevant to compliance with the law of armed conflict. Issues raised in a Provost-Marshall ADF submission to the Inquiry⁶ are also examined. The contribution of SOTG staff and reflections by senior command are also considered. Lessons from the sections are used to develop recommendations for command oversight and ensure confidence in Special Forces activities during future operations.

Findings

- *The failure of oversight mechanisms was contributed to by an accumulation of factors, many of which are founded in attitudes which are, in themselves, commendable: loyalty to the organisation, trust in subordinates, protection of subordinates, and maintenance of operational security. However, they have fostered less desirable features, namely avoidance of scrutiny, and thus accountability. It is critically important that it be understood that not all of these themes are, in themselves, bad or sinister. There are good reasons for many of them. Their importance and benefits should not be overlooked when addressing the problem to which they have contributed. In particular:*
 - *commanders trusted their subordinates: including to make responsible and difficult good faith decisions under ROE; and to report accurately. Such trust is an important and inherent feature of command. However, an aura was attached to the operators who went ‘outside-the-wire’, and whose lives were in jeopardy. There was a perception – encouraged by them and accepted by others – that it was not for those ‘inside-the-wire’ to question the accounts and explanations provided by those operators. This was reinforced by a culture of secrecy and compartmentalisation in which information was kept and controlled within patrols, and outsiders did not pry into the affairs of other patrols. These combined to create a profound reticence to question, let alone challenge, any account given by an operator who was ‘on the ground’. As a result, accounts provided by operators were taken at face value, and what might at least in retrospect be considered suspicious circumstances were not scrutinised. Even if suspicions were aroused in some, they were not only in no position to dispute reported facts, but there was a reticence to do so, as it was seen as disloyal to doubt the operators who were risking their lives.*
 - *commanders were protective of their subordinates, including in respect of investigations and inquiries. Again, that is an inherent responsibility of command. However, the desire to protect subordinates from what was seen as over-enthusiastic scrutiny fuelled a ‘war against higher command’, in which reporting was manipulated so that incidents would not attract the interest or scrutiny of higher command. The staff officers did not know that they were concealing unlawful conduct, but they did proactively take steps to portray events in a way which would minimise the likelihood of attracting appropriate command scrutiny. This became so routine that operational reporting had a ‘boilerplate’ flavour, and was routinely embellished, and sometimes outright fabricated, although the authors of the reports did not necessarily know that to be so, because they were provided*

⁶ Reference 7 - Provost Marshal Australian Defence Force (PMADF) Submission to the Inspector General Australian Defence Force Scoping Inquiry into the Conduct of Special Operations Command. [REDACTED]

with false input. This extended to alternative reporting lines, such as intelligence reporting, which was carefully controlled. It also generated resistance to lawfully authorised investigations and inquiries.

- *there was a presumption, not founded in evidence, to discount local national complaints as insurgent propaganda or motivated by compensation. This was inconsistent with the counter-insurgency effort, and resulted in a predisposition on the part of QA Officers to disbelieve complaints.*
- *the liberal interpretation of when a 'squirter'⁷ could be taken to be 'directly participating in hostilities', coupled with an understanding of how to describe an engagement to satisfy reporting expectations, combined to contribute to the creation of a sense of impunity among operators.*
- *consciously or unconsciously, QA Officers generally approached their task as being to collect evidence to refute a complaint, rather than to present a fair and balanced assessment of the evidence. They did not necessarily seek to question or independently confirm what they were told; and/or consider and weigh conflicting evidence, both external and internal, against what they were told and accepted on trust.*
- *Inquiry Officers did not have the requisite index of suspicion, and lacked some of the forensic skills and experience to conduct a complex inquiry into what were, essentially, allegations of murder. Nonetheless, allowance needs to be made for the difficulty of the task when faced with witnesses who are motivated not to disclose the truth, whether by self-interest or by misplaced loyalty. This Inquiry does not doubt that, even with its much heightened index of suspicion, and an approach in which accounts have been robustly tested by forensic examination, it has not always elicited the truth, and that there are matters about which it has been successfully kept in the dark, if not deceived. However, Inquiry Officers would have had greater prospects of success if more suspicious, and better trained or experienced in investigatory and forensic techniques.*
- *as a result, operational reporting, and the outcomes of QAs and Inquiry Officer Inquiries (IOIs) were accorded a level of confidence by higher command, which they did not in fact deserve.*
- *Operation Summaries (OPSUMs) and other reports frequently did not truly and accurately report the facts of engagements, even where they were innocent and lawful, but were routinely embellished, often using boilerplate language, in order proactively to demonstrate apparent compliance with ROE, and to minimise the risk of attracting the interest of higher headquarters. This had upstream and downstream effects: upstream, higher headquarters received a misleading impression of operations, and downstream, operators and patrol commanders knew how to describe an incident in order to satisfy the perceived reporting requirements. This may be a manifestation of a wider propensity to be inclined to report what superior commanders are believed to want to hear. Integrity in reporting is fundamental for sound command decisions and operational oversight. The wider manifestation needs to be addressed in leadership training and ethical training, from Royal Military College and*

⁷ A squirter is a local national seen running from a compound of interest.

continuing. Its narrower application needs to be addressed through impressing accountability for integrity in reporting on operations and intelligence staff through duty statements and standing orders, their .

- *SOTG personnel and staff who had concerns or suspicions regarding were reticent to raise them, being deterred by the risk of being perceived to be disloyal, as much as by fear of professional or personal ostracism, or threats, bullying, or other retribution, from doing so. A deep-seated team or tribal culture led to the ostracism of members who might question the actions of other team members, which in hindsight facilitated actions against Army values and behaviours. Existing whistle-blower protections and redress of grievance processes were not adequate for members who were fearful of professional, social and physical retaliation to raise their concerns or 'blow the whistle' on unlawful actions.*
- *Commanders at all levels were failed by oversight mechanisms provided by QAs and IOIs. Australian Defence Force Investigative Service (ADFIS) investigations, though sometimes entirely appropriate, are a blunt instrument with which to confirm or allay suspicions of wrongdoing. One problem with the ad-hoc approach to inquiries was that Inquiry Officers, each conducting a separate individual inquiry, did not have the opportunity to see the emergence of patterns. A standing professional inquiry agency would be better positioned to do so. Any inquiry mechanism needs to have a substantial degree of independence, an index of suspicion, and the forensic skills, experience and techniques to question the veracity of evidence and to test it.*
- *A balance needs to be struck between the lawful rights of defence members, and the support of the investigation of criminal and disciplinary offences. Members of SOCOMD are in this respect in no different a position to any other defence member.*
- *The mandatory use of body-cameras by police has proved successful in confirming lawful actions, rebutting false complaints, and exposing misconduct, and is now widely accepted. Privately-owned helmet cameras were enthusiastically used in Afghanistan by some SOTG members, which has albeit unintentionally resulted in the exposure of at least one apparent war crime. Use of official helmet cameras by SF operators, perhaps more than any other single measure, would be a powerful assurance of the lawful and appropriate use of force on operations, as well as providing other benefits in terms of information collection, and mitigating the security risk associated with unofficial imagery.*
- *While the complexities of coalition warfare, and the need for flexible command and control arrangements, are acknowledged, the devolution of operational command to the extent that the national command has no real oversight of the conduct of SF operations not only has the potential to result in the national interest and mission being overlooked or subordinated, but deprives national command of oversight of those operations.*
- *It is apparent that legal officers have contributed to the embellishment of operational reporting, so that it plainly demonstrated apparent compliance with ROE. It is not suggested that this was done with an intention to mislead, as distinct from to express in legal terms what the legal officer understood to have happened, or more typically indirectly by explaining what needed to be stated in a report to demonstrate compliance. The manner in which some legal*

officers interacted with ADFIS investigations tends to suggest that they perceived their role as being to act for SOTG or its members.

Recommendations

- *The training of officers and non-commissioned officers (NCOs) should emphasise that absolute integrity in operational and other reporting is both an ethical obligation and is fundamental for sound command decisions and operational oversight.*
- *Standing orders for operations should state that commanders and staff are accountable to ensure that there is absolute integrity in operational reporting.*
- *Members should have access to an alternative safe reporting line, separate from their chain of command, to report or discuss concerns about suspected unlawful behaviour. Specialist legal, intelligence, medical, chaplaincy and other technical chains can provide one avenue for this. Whistle-blower protections to shield and support personnel who raise suspicions, including regarding potential breaches of the LOAC, should be reinforced and promulgated.*
- *An independent tri-service multi-disciplinary specialist operations inquiry cell be established, for the conduct of administrative inquiries into operational incidents. The cell should comprise personnel with a mix of expertise drawn from arms corps (to provide the requisite understanding of the battlespace and operations), lawyers (to provide the requisite forensic skills), investigators, and intelligence professionals, and be available as an independent resource for command in any military operation. Such a cell could reside in the Office of the Inspector-General of the ADF (IGADF), where it would have available the powers of compulsion available under the IGADF Regulation 2016 (with the associated protections).*
- *It should be clearly promulgated and understood across Special Operations Command (SOCOMD) that while a member is not under any legal obligation to submit to questioning by ADFIS, there is no impediment to agreeing to being questioned, and in particular that no obligation of secrecy prevents disclosure to or discussion with ADFIS of any criminal conduct. This recommendation supports the Inquiry's broader recommendation that it should be clearly promulgated and understood across SOCOMD that the acknowledged need for secrecy in respect of operational matters does not extend to criminal conduct, which there is an obligation to notify and report.*
- *The wearing and use of an appropriate helmet camera or body camera by Special Forces operators on operations should be mandated.*
- *Australia should retain operational command over its deployed Special Forces, so far as practicable in a coalition context, and minimise delegation of operational command to other nations or organisations.*
- *Duty statements for deployed legal officers should clearly articulate that ultimately their client is, and their professional duties are owed to, the Commonwealth, as distinct from the deployed force, its members or Commanding Officer; that that requires that they treat and deal with civilian complaints impartially, rather than as if acting in defence of the deployed force; and that there is no place for embellishment in connection with operational reporting.*

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SECTION 4: CASE STUDY 4 [REDACTED] – PROVOST MARSHALL AUSTRALIAN DEFENCE FORCE SUBMISSION AND AUSTRALIAN DEFENCE FORCE INVESTIGATIVE SERVICE INVESTIGATIONS

Background

197. The Inquiry received a submission from PMADF on [REDACTED]. The PMADF submission included 18 annexes that identified instances where the PMADF believed SOCOMD may have shown a general and systematic resistance towards ADFIS' independent investigative process, and a general resistance to supporting CDF's investigative capability. It postulated that:

There appears to be a view within elements of SOCOMD that ADFIS investigators' purpose is to pursue a prosecution outcome or to apportion guilt. Whereas the true purpose of an investigation is to search for and collect facts that support the decision making, whether that be command or the Director of Military Prosecutions. In this vein ADFIS will collect both inculpatory and exculpatory evidence that is provided to the decision maker.¹⁴⁰

198. The submission contended that in their interactions with SOCOMD, ADFIS investigators had found the themes of:¹⁴¹

- obstruction of and interference with investigations, including by Legal Officers;
- the active concealment of evidence;
- Legal Officers being complicit in the concealment and/or fabrication of evidence; and
- Legal Officers conflicting themselves through representation of witnesses, persons of interest and suspects whilst still advising command.

Assessment of the Provost Marshall Australian Defence Force submission

199. The submission articulated a number of grievances about the actions of SOTG in Afghanistan and SOCOMD more broadly. In particular, PMADF complained about the manner in which SOTG supported various ADFIS investigations and responded to various requests for access to witnesses, evidence and incident scenes. The overall tenor of the PMADF submission was that SOTG was mostly adverse to ADFIS investigations, and this was manifested in obstruction of ADFIS's attempts to gather evidence, which in turn meant that ADFIS could not comprehensively investigate matters. This, so the submission went, meant not only that ADFIS's investigatory function was compromised, but so too was ADFIS's ability to clear the name of SOTG members wrongly accused of criminal acts.

200. The grievances about SOTG are variously directed at SOTG COs, Regimental Sergeant Majors (RSMs) and Legal Officers. They can be conveniently summarised as that:

- a. SOTG prevented, hampered and/or delayed ADFIS access to evidence and witnesses, in order to frustrate and/or defeat ADFIS investigations;

¹⁴⁰ PMADF Submission to the Inspector General Australian Defence Force Scoping Inquiry into the Conduct of Special Operations Command, [REDACTED]

¹⁴¹ PMADF Submission to the Inspector General Australian Defence Force Scoping Inquiry into the Conduct of Special Operations Command, [REDACTED]

- b. SOTG routinely (and, by inference, insincerely) assessed incident scenes as too dangerous for ADFIS to visit, with the consequence that ADFIS was not able to conduct any forensic scene examination, recover evidence or formally identify the deceased;
- c. SOTG conveniently cited 'legal advice' as the basis upon which soldiers decided to not engage with ADFIS;
- d. SOTG failed to force/encourage soldiers to submit to ADFIS questioning, in circumstances where ADFIS were merely trying to provide CDF with an independent account of what had occurred, with the consequence that soldiers were unable to have their actions vindicated;
- e. SOTG did not do enough to facilitate, or worse frustrated, ADFIS attempts to interview and obtain evidence from partner forces and interpreters; and
- f. ADFIS was not afforded assistance similar to that that obtained by IOI teams.

201. In short, the essence of PMADF's submission was that there was an institutional bias within SOTG, and more broadly within SOCOMD, against scrutiny by ADFIS.

Relevance to Inquiry Directions

202. The Inquiry Directions refer to information or allegations concerning criminal, unlawful or inappropriate conduct by, or involving, SOTG deployments in AFG during 2007 to 2016 and, in particular, any systemic, cultural or individual failure (including by commanders and legal officers within SOCOMD), to report or investigate such criminal, unlawful or inappropriate conduct as required by Defence policies, or to obstruct such investigations.

203. As the Inquiry's jurisdiction to consider 'systemic, cultural or individual failure...to report or investigate...or to obstruct' arises in respect of criminal behaviour by SOTG, the Inquiry has not examined each of the PMADF's complaints about obstruction (and so on) by members of SOCOMD: some are entirely unconnected with SOTG. The various individual matters referred to in the PMADF submission relate to investigations which occurred many years ago. Although some concerned SOTG operations in AFG, many are beyond the scope of the Inquiry.

204. The Inquiry has not sought to ascertain whether each of the PMADF's complaints can be substantiated. However, six of the matters raised in annexures to the PMADF submission concerned investigations into possible breaches of the LOAC by SOTG personnel in Afghanistan. These were reviewed by this Inquiry, to ascertain whether further inquiry into those matters was warranted.

██████ - Allegation of detainee abuse ████████

205. This investigation was into alleged mistreatment of detainees (PUCs) by FE ██████ at Patrol Base (PB) ██████. FE ██████ was alleged to have ██████ guarded by FE ██████ members and roughly treated by them. ADFIS complained that their inquiries were obstructed by the SOTG Legal Officer. They took their issues up with CO SOTG, ██████, and he intervened and there was said to be no further obvious obstruction from the legal officer. A CJOPS appointed IOI team arrived and also conducted an Inquiry, with assistance from ADFIS.

206. [REDACTED] of the PMADF submission, states, 'SOTG as a whole was both supportive of the INV and forthcoming with information. This included the patrol mbrs who were interviewed at length'. It may be inferred that ADFIS did not think there was reliable evidence sustaining any allegation of detainee abuse. [REDACTED] evidence to the Inquiry contradicts the assertion [REDACTED].¹⁴²

[REDACTED] – Shooting of a military aged male, allegedly in self-defence

207. This complaint refers to the [REDACTED] investigation into the shooting of a military aged male at [REDACTED] on [REDACTED],¹⁴³ which is considered in Chapter 2.17. The outcome of the investigation was that ADFIS expressed the view that the evidence of various witnesses interviewed during the course of the investigation corroborated the account given by the member ([REDACTED]), and that no disciplinary or administrative action was recommended against [REDACTED]. This investigation is further examined in later paragraphs of this chapter.

[REDACTED] - Alleged abuse of detainee

208. A military aged male detained by Force Element [REDACTED] during a clearance of a compound of interest in [REDACTED] claimed that FE-[REDACTED] members struck him multiple times to the face with the butt of a rifle. The matter was the subject of a QA by SOTG. According to Annex G of the PMADF submission, the QA found that only minimal force was used and made counter-allegations regarding the PUC. ADFIS claimed that various legal officers obstructed their investigation, particularly in relation to locating detainee records, and recommended a CDF Commission of Inquiry 'to gain the truth of the occurrence'. That recommendation does not appear to have been acted upon.

209. Given its apparently inconclusive status, the Inquiry considered re-opening this matter, but in the light of the greater gravity of other matters, and that [REDACTED], and that [REDACTED], and that disputed evidence over the alleged use of excessive force at the point of capture was unlikely ultimately to result in a conviction, it was not pursued further.

[REDACTED] – [REDACTED] - [REDACTED] engagement [REDACTED]

210. This matter involved the death of [REDACTED] local nationals when engaged by a [REDACTED]. This matter was also the subject of investigation by a Joint Incident Assessment Team (JIAT, raised by ISAF), and an IOI by [REDACTED], whose report was obtained by the Inquiry. [REDACTED] concluded, consistent with the findings of the JIAT, that the [REDACTED] two insurgents under observation of the SOTG members. [REDACTED]

¹⁴² Reference 55 – [REDACTED] TROI of [REDACTED]

¹⁴³ Reference 56 – [REDACTED] PMADF DSN-INV-ADF [REDACTED] Final Report in the Matter of Shooting Death of Detainee dated [REDACTED]

218. There are a number of observations that can be made about ADFIS's criticism of SOTG:

- a. First, the suggestion that SOTG should have made the soldier at the centre of the incident (callsign [REDACTED]) submit to ADFIS interrogation so that he could put the issue 'beyond reasonable doubt' is misconceived; it is a prosecutor who bears the onus of proving guilt beyond reasonable doubt.
- b. Secondly, the suggestion that the soldier should have been encouraged to be interviewed overlooks his right to silence.
- c. Thirdly, ADFIS's assertion that its aim was simply to allow the soldier to tell his side of the story is somewhat disingenuous, as it overlooks the fact that ADFIS investigators have a duty to apply forensic questioning techniques in interviews in order to test/challenge a suspect's version of events.
- d. Fourthly, ADFIS's view that SOTG should make all witnesses submit to ADFIS interviews overlooks the fact that ADF members have the right to decline to be interviewed by ADFIS.
- e. Fifthly, the suggestion that SOTG should disregard/discount safety and security concerns in order to facilitate ADFIS visits to 'crime' scenes is (in the absence of evidence of an ulterior motive) also misconceived.
- f. Finally, ADFIS's complaint that the IOI team were provided with access to witnesses while ADFIS was not overlooks the fact that ADF members are compellable witnesses to an Inquiry Officer's Inquiry but not compellable to answer questions by ADFIS.

219. On the other hand, there is little doubt that the command intention to have an investigation was, if not frustrated, at least inhibited. [REDACTED], who was at the time Commander JTF 633, gave this evidence:

[REDACTED]: Yes. [REDACTED]: And on what basis are those powers, and I was a key player about my commanders, do these powers that I have relate to the DFDA, and the requirement to establish a potential offence having occurred for the purposes of investigation. And the thing that almost proved (indistinct) of losing my command relationship with SOTG. So over three days I had to negotiate a particular access on the legal – of the killing of a detainee. And the recommendation at that point is the deployed commander should have the ability to investigate what I would call, and I'd defer to your legal knowledge here, Paul, but what I would call sort of coronial powers for the purposes of investigating to establish what occurred, without prejudice, so that good order and military discipline could be maintained. The only recourse we had was to establish a potential charge of illegal killing on which to base the authority for ADFIS to then conduct an investigation.

[REDACTED]: Yes. [REDACTED]: And as a result of that, the [REDACTED] – I know I'm jumping to a degree.

[REDACTED]: No, that's fine [REDACTED]: But as a result of that, the [REDACTED] was advising them not to let ADFIS in. And for a period of days I was negotiating with the CO to allow that to occur. You know, there was sort of tension and emotion and the culture of the SOTG around potentially their people being subject to military discipline for doing their job, and the sense of, not paranoia, but certainly it was a live issue, to the extent I could have either

sacked the CO or worked this through over time of including – increasingly ramping the pressure up on him to give him space to make the right decision, which he did. But very clearly of the understanding that should he not make that decision, I was just about to make a decision for him, and (a) let that decision be – but that would have fundamentally compromised the whole command relationship, and I was willing to do that for the purposes of investigating this. But certainly there was no way, shape or form that they could deny ADFIS access, and there was no arguments that this was his equipment, not the system’s equipment, and a whole range of things which were just really quite difficult as a commander to manage. And I think if I’d been a little younger and more rash, it would have ended in a much messier way that wouldn’t have worked. But we got there. But I wasn’t assisted by the tools that I had as a national commander to investigate. It created this very difficult environment. And that’s the single biggest thing that I would recommend out of all of this, is the ability for a deployed commander to investigate for the purposes of understanding what occurred, because of the nature of the trust of the coalition partners, the trust of the Australian public in the military, and the trust between the commander and subordinates. Because on the evening of the night where the information came through, effectively spent the best part of three hours with my chief of staff, legal officer, deputy and ops J3, sifting through the information that we had to fundamentally come to a decision, which sounds bizarre, saying, do we trust the information that we’re getting about this incident or not.

But sifting through that to say, because of the interactions I’d had with the SF community, do I trust what they’re telling me. And so it was a due diligence on the information. And then I came to the conclusion, yes, I did, and therefore we followed on backing them as if – but (a) there was doubt in my mind, (b) the nature of the information coming to me at the time was everything was at the end of cycles, and the plausibility of the story was of concern to me.

220. Ultimately, ADFIS concluded that they could not establish the full facts with confidence. This Inquiry reviewed this matter (see Chapter 2.59: Discontinued Incidents and Issues) and concluded that there is no evidence to support any suggestion that [REDACTED] [REDACTED] was other than [REDACTED]; to the contrary, the available evidence supports that [REDACTED] [REDACTED]

[REDACTED] - [REDACTED]

221. This incident involved the fatal shooting of [REDACTED] by members of SOTG during a planned operation at a compound in [REDACTED], [REDACTED]. According to the ADFIS brief, the facts were as follows. [REDACTED]

[REDACTED] Almost immediately after, an adult male, who was in close proximity, sat up from where he lay and aimed [REDACTED] and one of the SOTG members. Both SOTG members engaged the adult male, killing him. [REDACTED]

222. Photographs taken by SOTG members at the scene show [REDACTED] next to the body of the adult male. [REDACTED]

223. The ADFIS file shows that the focus of their investigation included the existence or otherwise of [REDACTED] [REDACTED]. Presumably, ADFIS were seeking evidence relevant to the questions of whether the SOTG members were entitled to engage the adult male [REDACTED]

224. ADFIS were clearly frustrated by what it perceived as a lack of cooperation on the part of SOTG and its partner fore, the Provincial Response Company - Uruzgan (PRC-U). ADFIS's complaints included:

- a. The assessment of the [REDACTED] that the scene was too dangerous meant that ADFIS was not able to conduct any forensic scene examination, recover evidence or formally identify the deceased;
- b. Attempts to obtain accounts from the soldiers responsible were unsuccessful – ADFIS complaining that this was due to 'SOTG Commanders and unit members apparently receiving legal advice not to engage with ADFIS';
- c. Attempts to obtain [REDACTED] from the Afghan partner force (PRC-U) were unsuccessful;
- d. requests to interview the interpreter and the members of the PRC-U force, were declined by Afghan authorities; and
- e. ADFIS was not afforded the assistance that an IOI team obtained.

225. There were only two decisions on the part of SOTG that made ADFIS's evidence-gathering task difficult: the decision of the [REDACTED] to deny ADFIS access to the scene, and the decision of SOTG members not to provide a statement to ADFIS. Both of these would appear to be justifiable. First, there is nothing to suggest that the [REDACTED] decision that a visit to the scene by ADFIS would be unsafe was unreasonable. Secondly, the SOTG members are within their rights to decline to submit themselves to ADFIS interviews, regardless of how frustrating that might be to ADFIS.

226. Although members of SOTG were within their rights to refuse to be interviewed, ADFIS was critical of SOTG and SOCOMD:

The posture taken by both SOCOMD and SOTG in relation to ADFIS investigating this incident directly prevented the CDF being provided with an impartial and transparent account of events, supported by forensic evidence. The ADF is now vulnerable to criticism from Government ... the soldiers involved have not been fully vindicated of their actions due to failings in obtaining corroborating evidence.

227. Implicit in this are three misplaced assumptions. The first is that SOTG/SOCOMD should disregard or discount safety concerns in order to facilitate ADFIS visits to 'crime' scenes. The second is that SOTG/SOCOMD should encourage their members to forego their legal rights and submit to ADFIS interviews. The third is that it is the role of ADFIS – a policing organisation – to provide the CDF with an impartial and transparent account of events, supported by forensic evidence. That confuses the role of a police investigation of a suspected crime with the role of an IOI.

228. As noted above, this matter was the subject of an IOI conducted by [REDACTED], whose report is in evidence before the Inquiry. The 30 plus photographs contained within the ADFIS file show the deceased male close to a weapon. [REDACTED]

229. Neither the ADFIS Investigation nor [REDACTED]'s report provided any basis to suspect that the [REDACTED] might have been contrary to the law of armed conflict.

However, the Inquiry received information that [REDACTED]. For this reason, the Inquiry reopened the matter, and it is considered in Chapter 2.55 ([REDACTED]).

CASE STUDY 4: [REDACTED] - SHOOTING OF A MILITARY AGED MALE, ALLEGEDLY IN SELF-DEFENCE

230. Chapter 2.17 ([REDACTED]) considered whether an Afghan male of 'Military Age' was unlawfully killed at [REDACTED] on [REDACTED], at a time when he was also [REDACTED] *hors de combat*. This Inquiry concluded that [REDACTED]

231. However, [REDACTED]

233. In [REDACTED] 2012, [REDACTED] claims concerning ADF operations in Afghanistan, including a *'failure to investigate the shooting of a prisoner [REDACTED]'*.¹⁴⁷ CJOPS appointed an officer to conduct a QA) into the claim. [REDACTED], who was the CO of SOTG Rotation [REDACTED], told the QAO that he believed that the claim correlated with an incident on [REDACTED], when [REDACTED], *'shot a male Afghani [sic]'*¹⁴⁸. The HQJOC QA found that [REDACTED] *'shot a suspected insurgent in self-defence during the conduct of a properly authorised mission and in accordance with extant ROE'*.¹⁴⁹ The ADFIS investigation known as [REDACTED] that followed found that *'as a result of protracted enquiries into this incident, there (was) sufficient evidence to*

¹⁴⁴ SITREP NO [REDACTED] covering period [REDACTED]
¹⁴⁵ Wyvern Transcripts for [REDACTED]; Operations log transcripts for the day recorded at [REDACTED].
¹⁴⁶ TF 66B OPSUM OP TEVARA SIN [REDACTED]
¹⁴⁷ Reference 57 – QA Brief for A/ CJOPS:SOTG Incident [REDACTED], OP TEVARA SIN [REDACTED] 2012.
¹⁴⁸ QA Brief for A/ CJOPS:SOTG Incident [REDACTED], OP TEVARA SIN [REDACTED].
¹⁴⁹ QA Brief for A/ CJOPS:SOTG Incident [REDACTED], OP TEVARA SIN [REDACTED]. QA prepared by [REDACTED]

support that [REDACTED]’ actions were lawful in the circumstances’.¹⁵⁰ However, ADFIS noted a number of limitations to the [REDACTED] investigation in the final and progress reports and other documentation. Amongst these limitations were that:

- operational reporting protocols and DI(G) ADMIN 45-2 – *The Reporting and Management of Notifiable Incidents*¹⁵¹ were not considered, as these were beyond the focus of the investigation on adherence by the SOTG to ADF detainee management policy;
- ADFIS was declined direct access to SOTG records;¹⁵²
- initial canvassing of potential witnesses was hampered by the [REDACTED] chain of Command,¹⁵³ and
- evidence requested from SOTG, such as handheld imagery of the scene, was unavailable.¹⁵⁴

234. Annex H to the PMADF submission identified obstruction by [REDACTED] as a major obstacle to the timely completion of the ADFIS [REDACTED] investigation into the incident at [REDACTED] on [REDACTED]. The apparent obstruction identified by the PMADF included withholding information, and/or restricting access to witnesses or persons of interest to investigators while legal officers held a conflicted position on the provision of legal advice. Such obstruction, if found, would be relevant to Inquiry Direction 1.c. which refers to ‘any systemic, cultural or individual failure (including by commanders and legal officers within SOCOMD), to report or investigate such criminal, unlawful or inappropriate conduct as required by Defence policies, or to obstruct such investigations’.

235. This case study briefly reviews the QA conducted by HQJOC that is covered in greater detail in Chapter 2.17, and examines the PMADF contention that the ADFIS [REDACTED] investigation into the incident at [REDACTED] was an illustration of a general and systematic resistance from SOCOMD towards ADFIS’ independent investigative process, and a general resistance to supporting CDF’s investigative capability.

The Headquarters Joint Operations Command Quick Assessment

236. The QA into the killing at [REDACTED] on [REDACTED] concluded:¹⁵⁵

31. The high degree of correlation between the established facts from the [REDACTED] incident

[REDACTED]

32. The facts and circumstances from all accounts are broadly consistent across the nature of the incident: that [REDACTED] shot a suspected insurgent in self-defence during the conduct of a properly authorised mission and in accordance with the extant ROE. The operational reporting

¹⁵⁰ Service Police Report into Shooting Death [REDACTED] dated [REDACTED]

¹⁵¹ [REDACTED] PMADF DSN-INV-ADF [REDACTED] Final Report in the Matter of Shooting Death [REDACTED]

¹⁵² [REDACTED] PMADF DSN-INV-ADF [REDACTED] Final Report in the Matter of Shooting Death [REDACTED]

¹⁵³ [REDACTED] PMADF DSN-INV-ADF [REDACTED] Final Report in the Matter of Shooting Death [REDACTED]

¹⁵⁴ [REDACTED] PMADF DSN-INV-ADF [REDACTED] Final Report in the Matter of Shooting Death [REDACTED]

¹⁵⁵ QA Brief for A/CJOPS: SOTG Incident [REDACTED], OP TEVARA SIN [REDACTED]

lacks sufficient detail to form a historical record of the event, and it is discrepant with regard to the incident taking place during the search rather than during movement after the actual tactical questioning session. The use of term [REDACTED] rather than the more descriptive [REDACTED] is not considered significant.

33. QAs were uppermost in the minds of all levels – not doing one was not an oversight. The decision not to undertake a QA is sound on the basis of this being a normal engagement of an armed threat in the course of a properly authorised mission and in accordance with the approved ROE. In hindsight a QA would have been useful to provide a full account of the incident while it was still fresh.

34. The decision not to raise a QA was consistent across SOTG and HQ JTF 633, and across the incidents in both [REDACTED] and [REDACTED]. Whether or not the incident of [REDACTED] constituted a notifiable incident hinges on whether the suspect was in the custody or effective control of the ADF. When this is the case, and when someone becomes a detainee appears open to interpretation. Whether deemed a notifiable incident or not, the appropriate action in the circumstances was to inform the chain of command, and when this was done, albeit with the shortcomings discussed earlier.

237. Thus, the death was not treated as a notifiable incident, the view being taken by TF 66 that the insurgent [REDACTED].¹⁵⁶ SOTG was trying to protect a soldier from further investigation in respect of what were reasonable and lawful actions on the part of the member in accordance with ROE, and to avoid yet another QA.

238. On 17 Aug 12 CJOPS, providing [REDACTED] (the HQJOC J06) as his point of contact, referred the incident to ADFIS as *'there (was) now a clear policy intent within JTF 633 to involve ADFIS whenever there is the death [REDACTED]'*.¹⁵⁷ CJOPS further noted his:

...present intention (was) to advise CDF that the matter should be closed and that public statements consistent with this closure should then be made. Nevertheless, were you of the view that there were reasons why I should not adopt this course of action, then I would necessarily reconsider my intended course of action.¹⁵⁸

239. A Critical Decision Brief for PMADF¹⁵⁹ was prepared within ADFIS in response to CJOPS' referral. Amongst other ADFIS concerns, this internal brief noted:

- The matter was never referred to ADFIS or ADFIS MEAO for assessment, and based on anecdotal evidence from ADFIS MEAO personnel deployed in [REDACTED], attempts to proactively seek additional information were denied.

¹⁵⁶ QA Brief for A/CJOPS: SOTG Incident [REDACTED], OP TEVARA SIN- [REDACTED] as put by QA officer and agreed by [REDACTED]. Reference 58 – Service Police Report into Shooting Death [REDACTED] dated [REDACTED]
[REDACTED]

¹⁵⁷ Reference 59 – HQJOC [REDACTED] Referral to ADFIS of Operational Incident Involving the Shooting Death [REDACTED] in Afghanistan on [REDACTED] by SOTG [REDACTED]

¹⁵⁸ Referral to ADFIS of Operational Incident Involving the Shooting Death [REDACTED] in Afghanistan on [REDACTED] by SOTG, [REDACTED]

¹⁵⁹ Reference 60 – Critical Decision Brief for PM-ADF: Shooting Death [REDACTED] in Afghanistan on [REDACTED] by an SOTG Member, [REDACTED]

244. The final [REDACTED] report drew on DOIL advice to say:

[REDACTED]
[REDACTED]
[REDACTED].¹⁶⁸

245. **Comment.** As discussed in Chapter 2.17, the Inquiry is of a view¹⁶⁹ that the real issue was the circumstances of the killing, and not whether the deceased man should be [REDACTED]. That is, was this a (criminal) s268.70 *Criminal Code* offence (war crime of murder in a non-international armed conflict) or an instance of (exculpatory) s 10.4 *Criminal Code* self-defence? [REDACTED], although it might have been relevant to whether the incident was a notifiable one.

246. The Interim ADFIS report for [REDACTED] dated [REDACTED] recorded:¹⁷⁰

8. Enquiries are currently being conducted to canvass all FE [REDACTED] members who may have been in the vicinity of the COI at the time of the incident. To-date 42 interviews have been conducted, resulting in only 9 FE [REDACTED] personnel having varying recollections of the incident. There are another 70 potential witnesses still to be located and interviewed.

9. It is also worthy of note that canvassing of potential witnesses has been hampered by HQ SOCOMD insistence that every person spoken to by ADFIS must have received legal advice beforehand. There appears to be a lack of credible evidence obtained to date and cooperation has been limited. Further avenues of enquiry are also concurrently being pursued with SOTG by ADFIS MEAO.

247. As has been noted, there is nothing inappropriate about seeing that members are properly legally advised before an ADFIS interview.

248. The final [REDACTED] report dated [REDACTED] noted:¹⁷¹

15. During the investigation of the one hundred and thirteen FE [REDACTED] members identified from the nominal roll, ADFIS traced and interviewed ninety-seven members. Sixteen members were unable to be located due to being discharged, not contactable and/or unable to be located. In total twenty-two relevant statements were recorded.

249. **Comment.** Only a limited number of FE [REDACTED] members could have been in the vicinity of the killing. It therefore may have been more efficient (and more effective with respect to liaison between the investigation team, [REDACTED]) if ADFIS had been able to narrow down the scope of its initial inquiries from 112 members of FE [REDACTED] and rather identify a reasonable and more focussed roll of potential witnesses to target. Such a roll could have been expanded or modified as links emerged during the course of the investigation. The insistence on interviewing all 112 members may not have been necessary, and rather likely added to frictions between the ADFIS team and [REDACTED] staff, and to frustrations on both sides.

¹⁶⁸ [REDACTED] FINAL REPORT [REDACTED].

¹⁶⁹ Reference 65 – Email: Review of legal advice re [REDACTED]. [REDACTED]

¹⁷⁰ Reference 66 – [REDACTED] Service Police Report Interim, [REDACTED]

¹⁷¹ [REDACTED] FINAL REPORT [REDACTED]

250. [REDACTED], an ADFIS investigator allocated to the [REDACTED] investigation, told the Inquiry his recollection that:¹⁷²

... the legal officers – there was at least one, possibly others, were just in my view unnecessarily making it difficult to achieve the investigative objectives we needed to get through in a timely manner. That job could've been done and dusted, knowing what we know now about the evidence, in about two to three months.

251. [REDACTED] noted one lawyer in particular as providing '*quite a bit of legal interference*'. [REDACTED] did not '*have an issue at all personally with members seeking legal advice or SOCOMD ensuring that its members were well-represented*' but recalled:

some issues with the lawyers on that one, just – yes, unnecessary grief, I think I would put it down to, in terms of forcing members to file through and do sort of a pre-interview interview with legal staff before they got to us.

252. [REDACTED] felt that the way members were treated with regards to getting legal advice was '*not congruent with a perception of it being a transparent process*' and thought that it undermined '*the integrity of some of these inquiries*'. He felt that '*lawyers making it difficult to track down all the witnesses and go(ing) through the process of interviewing them all ... caused significant delay*'.

253. [REDACTED] was asked about the reference in the ADFIS submission to the Inquiry to access to photographic evidence being denied, based on it 'no longer existing' at SOTG archives in Afghanistan. He did not recall an issue regarding access to imagery. However, his:

experience on these matters is it's fairly normal to struggle to recover any imagery or digital sort of material, particularly when we receive the referral two years after it occurred, and it just came down to, I think, the way that records were stored at the time and whatever filing system was used in the deployed environment.

254. Regarding the reference in the submission to lack of cooperation from both the [REDACTED] chain of command as well as legal officers, [REDACTED] could not:

recall any issues with the unit itself. I think it was just a case of when they became aware of the investigation, they did, you could argue, you know, the right thing and sought legal support from SOCOMD. And from there, it could've been a fairly straightforward process, however again, I think the particular legal advisors that were brought in or became involved just made it very difficult just for the investigation to get through in a timely manner.

255. [REDACTED], the Senior Investigating Officer (SIO) for the [REDACTED] investigation, provided a much stronger view of SOCOMD obstruction than that of [REDACTED]. [REDACTED] was provided with documentation from the [REDACTED] investigation including contemporaneous notes prior to the interview. Some excerpts from [REDACTED]'s evidence are below:¹⁷³

Q26. ... tell me what you know about [the [REDACTED]] investigation and the ADFIS submission to this inquiry. A. ... The specific submission in respect to [REDACTED] was because there was a feeling

¹⁷² Reference 67 – [REDACTED] TROI of [REDACTED]
¹⁷³ Reference 68 – [REDACTED] TROI of [REDACTED]

from the outset that there was a command and legal inexperience and obstruction with the ADFIS investigation...

Q31 ... A. ... it was quite clear from the outset that people that were on the nominal roll had been spoken to by the legal officer and some people who we would have expected ordinarily would have wanted to talk to us, chose not to. So we actually achieved very little, with the exception of trying to explain to [REDACTED] [REDACTED] that whilst [REDACTED] there in [REDACTED] view to protect and advance the rights of the witnesses, we were concerned that [REDACTED] was basically facilitating those witnesses to actually answer or not answer any of our questions. Bearing in mind we had excess of 100 people to interview, there were four of us, and we didn't think it was too much in 10 days to interview 25 or so people each. It became a bit of a brick wall. So what happened then on the following day – just referring to my policy book – I decided that we needed to raise these concerns with the CO of [REDACTED], and this was following on from the meeting with [REDACTED].

And I explained that, you know, we needed to have a discussion with the CO and seek his support in what we were trying to achieve because as far as SOCOMD was concerned, SOCOMD Headquarters ... were supportive of what ADFIS was trying to achieve because it had been a direction from the CDF to the PMADF. However, that clearly wasn't what I perceived it to be when we were actually in Holsworthy and we were trying to talk to people to explain that we weren't on a fishing trip, we were just legitimately trying to identify people who were in that compound when that shooting incident occurred.

Q33. If I could just break in briefly then? Now, in the ADFIS submission you mention the CO, the CO saying that - and I will just read it here, 'CO [REDACTED] voiced concerns that he didn't want another ADFIS inquisition as had happened on [REDACTED] or [REDACTED]'. So is that when you had that conversation with the CO? A. Yes. So that was on Friday [REDACTED] at 10 o'clock in the morning in the CO's office, and it was [REDACTED]. And I explained to him what we were doing, exactly what I explained to his XO, and I told him that we were there really to identify witnesses to this incident so that we could get evidence sufficient to justify [REDACTED]' actions as being, you know, self-defence. And he was concerned, and he actually raised [REDACTED] as his concern. He basically said he didn't want another ADFIS inquisition. [REDACTED] [REDACTED], which was the inquiry into [REDACTED] and the death of [REDACTED]. And I said, '*This has got nothing to do with [REDACTED] and it's got nothing to do with hunting people down as persons of interest. It's purely to identify witnesses so we can be clear, so we can have franks [sic] of what occurred when that shooting occurred*'.

So it was clear to me then from my conversation with [REDACTED] that he had concerns. Not concerning what SOCOMD was supportive of doing, he had concerns. So I arranged with him that day that I would organise a briefing for as many [REDACTED] Company personnel as possible so I could explain the process and seek their cooperation. And I said I was happy to involve the legal officer in the briefing, and he agreed that that could happen and he basically said arrange it through the XO, [REDACTED]. And that was looked at being done for Monday [REDACTED].

Now, on Monday [REDACTED] we did go into [REDACTED]. They had a conference room. We sat around the table. We gave everybody a briefing on what we were trying to achieve. However, we actually found that people were not interested in talking to us, and we were concerned that [REDACTED] was actually briefing potential witnesses what to say or advising them not to say anything, which considering we were canvassing witnesses and there's no information - we hadn't once briefed them about anybody else being a person of

interest – there was only one person of interest [this was ██████████] and he was posted to ██████████. ██████████. ██████████ So really it didn't make sense why these people - and more specifically ██████████ was adamant that she was going to speak to every potential witness before we had the opportunity to seek their cooperation and tell us what they remembered.

So that was the problem that we had. And that date, which was on the Monday ██████████ – now because of that I briefed the PMADF and said that we are not getting the cooperation despite

we've done unit level briefings to the CO, the XO, the ██████████ XO, the ██████████ Platoon commander and members of ██████████ Platoon. There appears to be a purposeful obstruction campaign and a total lack of willingness to assist. And our concern was if we don't get people who voluntarily wish to give us information we are going to end up with having not achieved anything, and it may well be that this might have to go back to the chain of command with a recommendation that they conduct an inquiry officer inquiry where all the members would be coerced. Because under the DFDA, which we were operating under, you can't coerce anyone to talk to you. But morally and ethically there's an expectation that if they were a witness to something and we are asking for their cooperation to tell us what they recall about a specific incident, specifically to prove that ██████████' actions were in self-defence, I couldn't believe that they were so reticent to actually assist.

So that was our, that was our concerns. So we actually had two names of people who had received legal advice, but we were told they were witnesses and they had received separate legal advice, ██████████ and ██████████, and they were basically told by their independent legal advisers, a ██████████ and a ██████████, not to talk to ADFIS. I then spoke to members of ██████████ Platoon and it was quite clear that what the lawyers were advising the witnesses was not effectively what the Headquarters SOCOMD was expecting, and indeed ██████████. It was an issue whereby were the lawyers acting in the interests of their clients, as in the witnesses, or were they also acting in the interests of command?

Q35. So looking at the action of those lawyers do you think that - well, is your sense that they were acting independently of the command, or why do you think they were providing advice?
A No, and I'll come on to this a bit later. So the SOCOMD senior command legal officer was ██████████, and I had a conversation with ██████████ about why, why are we having conflicting legal advice. You know, SOCOMD want ██████████ to assist with the inquiry, However, the command legal officer at SOCOMD was briefing the captain, ██████████, basically to advise the witnesses not to talk to the inquiry.

Q36. So you --- A. And I didn't understand ---

Q37. So you considered that was being done was from ██████████ and wasn't being initiated from ██████████ is that what you're saying? A. I think - yes, I think that ██████████ was in regular communication with ██████████ and they were comparing notes on how they were going to manage providing legal advice to each and every potential witness. Bearing in mind, and I reiterate, none of these people were suspects or persons of interest for having done any wrongdoing whatsoever.

So as a result of this conflict of conflicting legal advice I spoke to ██████████, who was the ██████████ Platoon commander at the time, and he was confused and he was wanting to see clarification because effectively his guys were getting confused as to whether they should help ADFIS or whether they should just not talk to us on legal advice. So what I did is on ██████████, and it's on page 8 of my policy book sir, I contacted ██████████ to specifically discuss the legal advice and to deconflict what was going on.

Q38. Right. A. Because my concern was that the poor communication through the legal officers and advising [REDACTED] members had caused significant delay and was actually confusing potential witnesses, okay. So I actually, I actually contacted him and as a result of the conversation he told me that he had actually been talking to [REDACTED] legal officer] ... So we've got [REDACTED] legal officer] representing his client's rights not to speak to us. He was advised not to comment and so the very first interview with [REDACTED] at [REDACTED] was interview a 'no on the comment' telephone advice of [REDACTED] legal officer].

[REDACTED] told me that he had been talking to [REDACTED] legal officer] who he knew was the officer that was representing [REDACTED], and they were talking about the ADFIS investigation. Now, straightaway that caused me concerns. I felt that that was unethical. I felt that you cannot have the commanding officer looking after the interests of command, separate lawyers allegedly looking after the interests of witnesses ... and they're all talking together and comparing notes as to what's going on with the ADFIS investigation.

So [REDACTED] attempted to assure me that it was SOCOMD's wishes to assist with the investigation, however I didn't see any evidence of that. None whatsoever. And it was clearly a fact - and I'm not blaming [REDACTED] [REDACTED] were being strung along. They were confused as to exactly what the level of cooperation was to be, and they were basically affording all their people access to the lawyers, who were basically saying that you don't have to talk to them so don't talk to them.

So as a result I made the decision that we would have to tread very carefully when communicating with any of the lawyers. We wouldn't disclose any of our investigation methodology because what we thought at the outset of the inquiry would be fairly straightforward and fairly simple was turning out to be what appeared very much as obstruction and an intent to disrupt what we were trying to achieve. And I will make the point, I totally understand under the DFDA, and I've been involved in investigations for over 30 years, that people have rights.

Q39. Certainly. A. And I make the point that not once in this inquiry were we anything but upfront and honest with everybody, and our intention was to canvas witnesses to obtain evidence to support what [REDACTED] had told the QA officer. This was never going to be trying to turn a self-defence incident into anything other than that. I mean, it was basically from the quick assessment it was clear that [REDACTED] was claiming self-defence. Had [REDACTED] spoken to - when we interviewed him and claimed self-defence that would have been the quickest method for us to then go and seek some corroboration and we would have had enough to finalise the inquiry at the early outset of the investigation. However, it turned into a problem, a big problem.

So as a result of my conversations with [REDACTED] and the general lack of assistance from [REDACTED] we decided to concentrate on the non-commando members who were on the nominal roll. So we decided to go to Duntroon and speak to two potential witnesses there. And we made arrangements to see these two individuals, both sergeants, and without SOCOMD involvement or indeed [REDACTED]

But what we found was we were able to eliminate one of them as a witness but he refused to sign a statement, saying that he needed 24 hours to actually obtain legal advice. And it was clear that they were - they had been spoken to. Somebody had spoken to them. Because we turned up unannounced. We made arrangements to see them through their RSM, who was not connected to the Special Forces community. And basically neither of them wanted to provide a signed statement. So that was more evidence that people had been talking to witnesses.

Q40. Right. A. So as a result we actually decided that we weren't going to go through any of the chain of command anymore and we were going to literally conduct telephone inquiries with everybody. We were going to track people down through telephones and basically keep a way of interview methodology away from the chain of command to prevent further interference. So then we set about a list of people that we needed to contact and those people were contacted, mostly in the main by telephone.

Now, because of this the investigation team was stood down from [REDACTED] on [REDACTED] because we were getting nowhere, and I briefed the [REDACTED] that we would come back after Easter and try again, but I had an expectation that there would be a little bit more cooperation. So really what we had then was us returning to Canberra. Our main focus was on establishing the facts surrounding the incident, reporting failures by command and that admin stuff, if warranted. But we weren't interested in the lack of reporting adherence to the DIs [Defence Instructions]. We were more interested in, if you like, obtaining enough factual information to clear [REDACTED] from any wrongdoing.

So by [REDACTED] we'd spoken to - sorry, yes we'd spoken to 53 people. We still had 60 to see from FE [REDACTED] and we had obtained 11 statement proformas. It was frustrating and we decided that we were going to concentrate on other inquiries in [REDACTED] and also did some inquiries out of the Middle East because there were some outstanding operational documentation that we believed existed because we were told it existed, however I'll talk about that shortly. So we didn't return to [REDACTED] until then [REDACTED]. So between [REDACTED] and [REDACTED] we concentrated on other inquiries which stayed away from [REDACTED]

So we returned to [REDACTED] with a view to canvassing the remaining members of Force Element [REDACTED]. And we decided that we weren't going to go to [REDACTED] we were going to make the witnesses come to us at the Joint Investigation Office because it was just - the environment was somewhat toxic and we just didn't want our presence in [REDACTED] to be an issue, and we were basically contacting people and asking them to come to us. So we were very fortunate in that we had dealings with the [REDACTED] of [REDACTED] Company, who was [REDACTED] [REDACTED]. Now, we made arrangements that we wanted to see them on a - started seeing

people on [REDACTED] When we contacted him he said that all of the [REDACTED] [REDACTED] members were on a day off because they'd been on [REDACTED] We were ready to go on the Monday morning. Lo and behold there's no one available.

256. The Inquiry interviewed [REDACTED] assigned to [REDACTED] and the then [REDACTED] [REDACTED], to cross-check the evidence provided by the PMADF submission, [REDACTED] records and the interviews with [REDACTED] and [REDACTED].

257. Asked for [REDACTED] observations about the relationship between ADFIS, SOCOMD and SOTG, in a context where relationships were 'not necessarily smooth', [REDACTED] told the Inquiry:¹⁷⁴

Q42. ... A. [REDACTED]

¹⁷⁴ Reference 69 - [REDACTED] TROI of [REDACTED]

Q43. I have spoken to legal officers more broadly and

A.

258. Some relevant excerpts from evidence given by [redacted] regarding [redacted] recollections of the conduct of [redacted] are below:

Q46. ... A.

Q67. Now, [redacted]

A.

Q68.

. A.

[REDACTED]

Q39. So [REDACTED] ? A. [REDACTED]
[REDACTED]

261. [REDACTED] was shown a copy of the PMADF submission and invited to comment on Annex H, which recorded him [REDACTED] voicing 'concerns that he didn't want another ADFIS inquisition as had happened on [REDACTED]), citing his mbrs reluctance to be interviewed':¹⁷⁶ He answered:

Q48. ... A. [REDACTED]
[REDACTED]

...

Q51. ... A. [REDACTED]
[REDACTED]

Q52. [REDACTED] . A. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

¹⁷⁶ PMADF Submission to the Inspector General Australian Defence Force Scoping Inquiry into the Conduct of Special Operations Command, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

262. [REDACTED] was interviewed by the Inquiry during its review of his killing, in lawful [REDACTED], of a local national at [REDACTED] who had been a person under control before engaging in hostilities. (see Chapter 2.17 - [REDACTED]). When asked for his recollections of the ADFIS investigation, [REDACTED] responded:¹⁷⁷

Q92. ... A. [REDACTED]

¹⁷⁷ Reference 71 – [REDACTED] TROI of [REDACTED]

264. **Assessment.** The evidence of [REDACTED] and [REDACTED] [REDACTED] while the approach taken by [REDACTED] and [REDACTED] was less than completely helpful, and perhaps their conduct was coloured by distrust engendered by their previous experiences of ADFIS, their actions fell short of overt obstruction. They were prepared to provide a measured amount of cooperation, while properly ensuring that potential witnesses were informed of their rights and obligations before they were approached by the investigation.

265. On the side of ADFIS, the approach taken by the investigation may have lacked some tact, appeared somewhat unnecessarily confrontational and tended to downplay the rights of potential witnesses and the role of legal officers, and the obligations of commanders to ensure members were afforded appropriate support, which would almost inevitably have negatively affected the attitudes and responses of the legal officers. ADFIS and SOCOMD representatives both showed levels of diminished tolerance of the other's position.

266. These observations from the [REDACTED] investigation are a manifestation of a relationship between ADFIS and SOCOMD characterised by considerable distrust on both sides, some fault residing with the attitude of members of SOCOMD towards ADFIS investigations, and some with the approach taken by ADFIS investigators. This distrust had an adverse effect on the efficient conduct of this and other investigations, and contributed to the time taken to conclude it. A similar adverse impact on the conduct of ADFIS investigations is apparent in other instances referred to above. This may well have, unintentionally, enhanced a sense amongst some operators that they would be protected from scrutiny.

Conclusion

267. The PMADF submission to the IGADF Afghanistan Inquiry concluded:

Over the period of 2007 to 2016, the ADFIS have had many interactions with SOCOMD. There have been several positive interactions however; the majority of interactions have indicated a deep-seated culture of command-supported interference and resistance towards ADFIS Investigators. This culture appears to be spread across SOCOMD and is evidenced at most rank levels. There appears to be a command-sanctioned practice of using SOCOMD LEGALOs to actively interfere with and obstruct investigations and when this does not achieve the desired result, there appears to be a willingness to conceal, or at best, obstruct the collection of evidence. There are also examples of using physical and operational security 'barriers' to achieve this end-state'.¹⁷⁸

268. The [REDACTED] investigations provides an illustration of a fraught relationship between ADFIS and SOCOMD, characterised by considerable distrust on both sides and a consequent lack of cooperation. Neither side is without fault. However, the state of distrust had an adverse effect on the efficient conduct of the investigation, and contributed to the time taken to conclude it. It was a manifestation of a wider distrust between the two organisations, to which a (but by no means the only) contributing factor was a resistance on the part of SOTG to external scrutiny, which is also manifest in other examples referred to above.

¹⁷⁸ PMADF Submission to the Inspector General Australian Defence Force Scoping Inquiry into the Conduct of Special Operations Command, [REDACTED]

269. Distrust and lack of cooperation between ADFIS and SOCOMD did no favours to either party, or to the identification of and disciplinary response to some potentially unlawful actions. Attitudes on both sides, compounded by other factors identified in this chapter, contributed to an environment in which attempts to conduct investigations were viewed as unwanted and unwarranted external interference by outsiders in SOTG and SOCOMD affairs. This may have contributed to some operators presuming that their actions would be protected from external disciplinary and administrative review.

270. A balance needs to be struck between the lawful rights of defence members, and the support of the investigation of criminal and disciplinary offences. Members of SOCOMD are in this respect in no different a position to any other defence member. It should be clearly promulgated and understood across SOCOMD that while a member is not under any legal obligation to submit to questioning by ADFIS, there is no impediment to agreeing to being questioned, and in particular that no obligation of secrecy prevents disclosure to or discussion with ADFIS of any criminal conduct. This recommendation supports the Inquiry's broader recommendation that it should be clearly promulgated and understood across SOCOMD that the acknowledged need for secrecy in respect of operational matters does not extend to criminal conduct, which there is an obligation to notify and report.

SECTION 5: THE ROLE OF SOTG STAFF

[REDACTED]

[REDACTED] 179

271. This section refers to evidence obtained by the Inquiry from SOTG staff officers, particularly during the period 2012 to 2013, to elicit attitudes and influences that contributed to the absence of scrutiny of engagements which, in the light of local national complaints or other indications, might at least in retrospect be considered to have been worthy of closer examination. These examples are provided, not to criticise with the benefit of retrospectivity to whom they are attributed, but to illustrate how a wide range of attitudes and influences, many well-intended and of themselves even commendable, nonetheless contributed to a failure of oversight.

272. [REDACTED], [REDACTED], was asked a number of questions about ROE, including:¹⁸⁰

Q48. Helicopters approach village, you know the story, personnel run. In what circumstances did you regard the ROE as permitting the soldiers to shoot at squirts? A. [REDACTED]

[REDACTED]

¹⁷⁹ Reference 72 – [REDACTED] TROI of [REDACTED]

¹⁸⁰ Reference 73 – [REDACTED] TROI of [REDACTED]

Q49. If not carrying a weapon or not seen to be carrying a weapon? A. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

273. These answers reflect, at the command level, an acceptance that [REDACTED]
[REDACTED]
[REDACTED]. That reflected what was heard from many operators. [REDACTED]
[REDACTED] evidence given by [REDACTED] FE [REDACTED], SOTG [REDACTED], [REDACTED]. Although
[REDACTED]
[REDACTED]
[REDACTED]:

A to Q213 ... [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Q214. Right, well [REDACTED] [REDACTED]. A. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

274. On the one hand, there is nothing wrong at all with entrusting a soldier with [REDACTED] discretion in a life-and-death situation. However, its extension, beyond armed insurgents, not only to those with [REDACTED], but those judged to be moving tactically to a possible cache, provided so broad a discretion that it could be invoked to use lethal force against any local national who was not entirely passive. Moreover, the trust placed in the operators meant that their decisions would not likely be questioned. Declining to reinforce the ROE, when a [REDACTED] suggested that it might be appropriate to do so, would if anything have reinforced a sense of impunity.

275. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

181 [REDACTED] TROI of [REDACTED].

Q143. The throwdowns were [REDACTED]

? A. [REDACTED]

Q144. [REDACTED]

282. [REDACTED] in evidence given by [REDACTED]'s [REDACTED] for SOTG [REDACTED], [REDACTED], who said:

283. In other words, [REDACTED]

[REDACTED] As appears from the [REDACTED] case study above, and further discussed below, legal officers contributed to this, by insisting that reports demonstrate compliance with the applicable rules of engagement. In itself, that was quite appropriate. However, it became problematic for two reasons: first, what was required to demonstrate compliance became notorious, and engagements were reported in a manner which did so, regardless of what had in fact occurred on the ground; and secondly, as appears in the [REDACTED] case, words were inserted better to demonstrate compliance with the ROE and attributed to a witness, who does not appear ever to have uttered them.

Legal Officers

284. A Legal Officer deployed within the Force Command Element (FCE) of all SOTG rotations. The duties of SOTG legal officers do not appear to have been reduced to writing. The SOTG Legal Officer during [REDACTED], [REDACTED], defined his role as 'providing legal advice to the Commanding Officer and Task Group as required on operational legal matters' including:

- a. interpretation and application of the LOAC;
- b. interpretation and application of relevant Australian and ISAF policy documents, such as ROE, targeting and tactical directives, detention policies, standard operating procedures and other relevant documents;

- c. kinetic targeting and non-kinetic targeting, including information operations;
- d. detention operations, including representing the CO on detention review boards and engaging with the local Afghan National Directorate of Security prosecutor in relation to the handover of detainees to Afghan authorities for prosecution;
- e. supporting the SOTG rule of law cell, including legal input to training activities conducted with partner forces and local law enforcement authorities, and attending ISAF rule of law meetings;
- f. reviewing operational reporting before it was sent to either Australian or ISAF higher headquarters to ensure that precise terminology was being used correctly. For example some terms used in both Australian and ISAF ROE had different meanings in each document and as SOTG had to report up both Australian and ISAF channels, ensuring correct terminology was being used in reporting, to reflect which ROE was being referred to.¹⁸⁶

285. Although this may be an accurate statement of the role of the SOTG Legal Officer in [REDACTED], there appear to have been some variations between Rotations. For instance, whereas [REDACTED] said part of his role in [REDACTED] was *'review(ing) operational reporting before it was sent to either Australian or ISAF higher headquarters ... in ensuring correct terminology was being used in reporting, to reflect which ROE was being referred to'*, [REDACTED], who deployed as SOTG Legal Officer in [REDACTED], said that was not part of his role.¹⁸⁷ Another difference is that [REDACTED]'s role as SOTG Legal Officer included the conduct of a number of QAs, while [REDACTED] said this was not part of his role (although he reviewed QAs from a legal perspective).

286. However, it is clear, from all the legal officers interviewed by the Inquiry, that SOTG legal officers had a role in advising CO SOTG on interpretation and application of LOAC in respect of civilian complaints about SOTG operations, including complaints of unlawful killing.

287. It is also clear that, at least from Rotation [REDACTED] ([REDACTED]), SOTG legal officers played a role in reviewing or shaping operational reporting before it was submitted to higher headquarters. [REDACTED] referred to *'review(ing) operational reporting before it was sent to either Australian or ISAF higher headquarters ... in ensuring correct terminology was being used in reporting, to reflect which ROE was being referred to'*. [REDACTED], who was the SOTG Legal Officer during the latter part of SOTG [REDACTED] and SOTG [REDACTED], said:

Q104. Did you take the view that you needed to approach operational reporting with a degree of scrutiny and scepticism, or...? A. And I don't know why but I just felt after my sort of, you know, all that energy that I expended on that sort of rule of law, law enforcement, type thing, I came back and I thought, look, when I was looking at the operational reporting it concerned me that the specific - there was not enough specifics. That's what concerned me, more than believing that they would lie or that they would put - plant things on individuals and that type of thing. I was never concerned about that, I was more concerned about what the circumstances were of the reporting.

288. He also said, *'my effort was to go, okay, well we have to be sure and we have to be certain about the information that we are receiving and how it's reflected in QA reports and that they're*

¹⁸⁶ Reference 75 – [REDACTED] statement to AFP provided to Inquiry on [REDACTED]

¹⁸⁷ Reference 76 – [REDACTED] TROI of [REDACTED]

accurate and that they're legally adequate'. However, it is clear from his role in the [REDACTED] incident QA that he was involved in shaping reporting better to demonstrate compliance with ROE. This is not sinister: although he does not recall it, he was probably doing what lawyers conventionally do, putting the witness's words into terms that legally express what he understood the witness to have said.

Identifying the client: Special Operations Task Group or the Commonwealth?

289. How a lawyer acts is necessarily influenced by his or her perception of who is the client: to whom professional legal duties are owed. In the light of suggestions that at least some SOTG legal officers 'drank the Kool-Aid', the Inquiry explored this question with a number of them. That is, was the legal officer acting for the CO, or the members of SOTG, or was the legal officer's duty to serve the interests of the Commonwealth of Australia, even if that conflicted with the interests of SOTG or its members?

290. Three of the legal officers interviewed by the Inquiry said that they considered their 'client' to be the Commonwealth of Australia.¹⁸⁸ This is undoubtedly correct. However, there is an overall impression that many SOTG legal officers did not closely turn their mind to this issue during their deployment, and it may not have been perfectly clear that their duty was to the Commonwealth, even if it conflicted with the interests of SOTG.

291. [REDACTED], who served as the SOTG legal officer in [REDACTED], felt that, with hindsight, deployed legal officers (in the early 2010s) did not have a clear understanding of what their roles, responsibilities, and expectations were.¹⁸⁹ Moreover, his view was that legal officers were '*not overly well prepared*' for deployments and should have had a better understanding of information requirements and the tactical situation. He said that not only was he not given a mission or duty statement, he did not receive any briefs from HQJOC or other command but did have 'a couple of briefs' at SOCOMD Headquarters over one or two days.¹⁹⁰ [REDACTED], who served as the SOTG Legal Officer during Rotation [REDACTED], also said there was no duty statement for his role.

Handling civilian casualty complaints: defensive or impartial?

292. The identification of the true client is relevant to the related question of the proper approach of a legal officer to the management of civilian complaints of wrongdoing against the very unit in which the legal officer is serving. If the civilian population makes a complaint against SOTG or its members, should the legal officer be defending the interests of SOTG, or treating the complaint impartially?

293. This question was also explored with SOTG legal officers interviewed by the Inquiry and the consensus was that the legal officer's duty was to deal with civilian complaints impartially.¹⁹¹ However, like the issue of identifying the 'client', the impression formed by the Inquiry is that this was never articulated, nor fully appreciated, at the time. For instance, while [REDACTED] agreed that, when he was reviewing operational reporting where there had been a civilian complaint, his role was to be impartial, adding, '*it wasn't my role to find a way to explain away a civilian complaint*

¹⁸⁸ [REDACTED] TROI of [REDACTED]; [REDACTED] TROI of [REDACTED]; [REDACTED] TROI of [REDACTED].

¹⁸⁹ [REDACTED] TROI of [REDACTED].

¹⁹⁰ [REDACTED] TROI of [REDACTED].

¹⁹¹ See for example [REDACTED] TROI of [REDACTED].

or any complaint'.¹⁹² Nonetheless, on a number of occasions in [REDACTED] he wrote or endorsed reports which said civilian complaints, since shown to have substance, were 'absurd'. [REDACTED] was also involved in the development of SOTG's truculent response to the JTF 633 RFI concerning the QA arising out of the [REDACTED] incident. His response to seeing [REDACTED] was unambiguous [REDACTED]

294. That civilian complaints should have been treated and managed impartially would appear uncontroversial and logically follows from acceptance that the legal officer's client is not the unit in which they are embedded, but the Commonwealth of Australia. Multiple Commanders of ISAF emphasised that the ISAF mission became a counter-insurgency mission, where the will of Afghan people needed to be won over, and a key to doing this was to keep civilian casualties to a minimum. Speaking in a NATO media interview on 31 August 2010, Commander ISAF, General (GEN) David Petraeus, said (emphasis added):

Well, we have to continue to reinforce every additional contingent that comes in has to be almost indoctrinated, if you will, in what it is we're trying to do and how we're taking steps to **keep civilian casualties at an absolute minimum**.... But clearly there are still civilian casualties. Inevitably, tragically, there will be civilian casualties in the course of military operations. **Our job is to drive them down to an absolute minimum** while also of course ensuring that as we protect the civilians, we also protect our own forces. That's a very important balance that we must achieve. **But if we incur civilian casualties in the course of a 'tactical' victory, in quotes, that often ends up being a strategic setback.** Our forces understand that, we have implemented instructions, I revised the tactical directive, tweaked that a bit, issued the COIN guidance that you have seen, all of which **emphasizes that we are protecting the population, not inflicting casualties on it.**¹⁹³

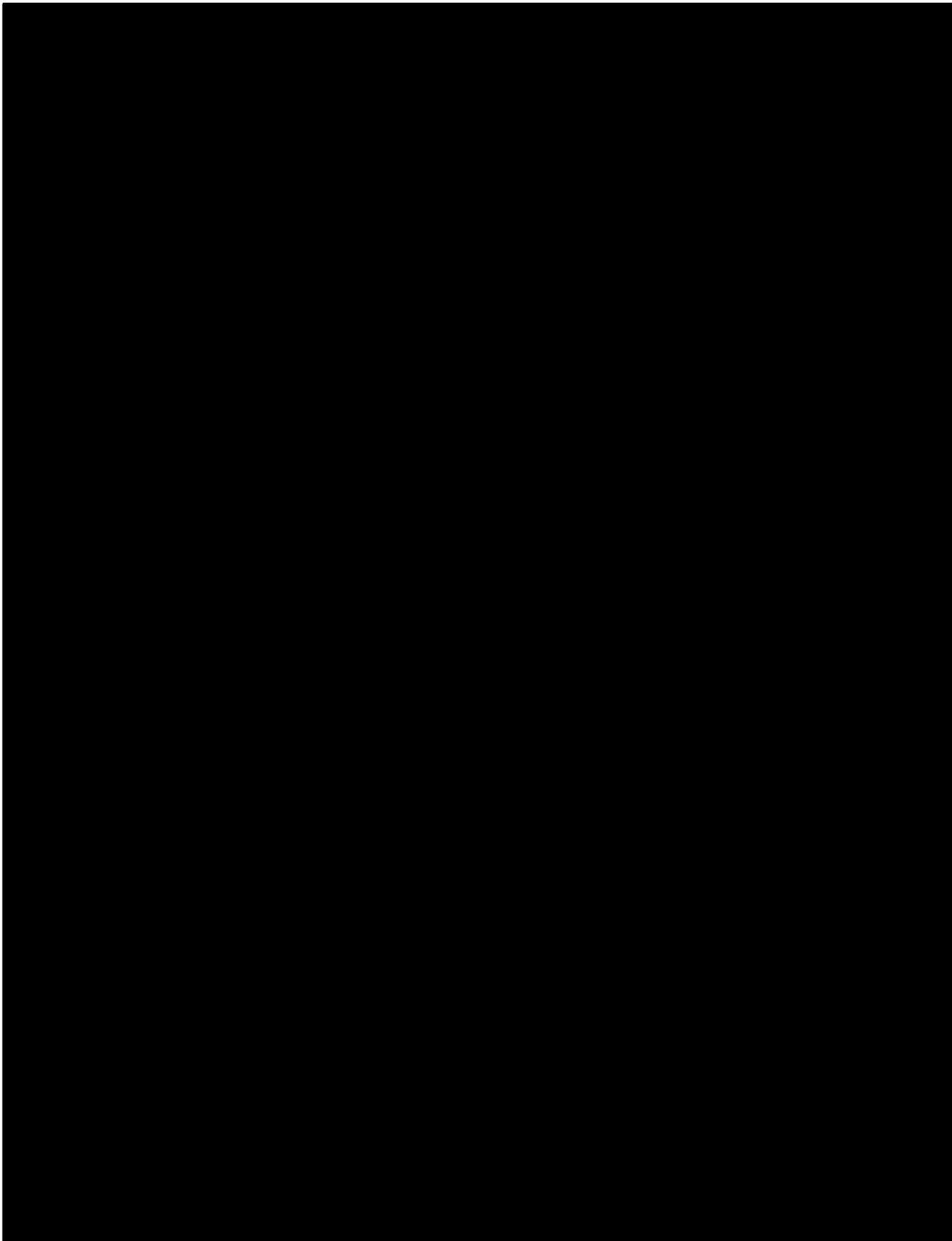
295. In fulfilling this mission, Coalition Forces were tasked with keeping civilian casualties to an absolute minimum. GEN Petraeus also identified that incurring civilian casualties in the course of a 'tactical' victory can often amount to a strategic setback. The only way this can be avoided is to identify when such civilian casualties are incurred and to take steps to avoid them in future operations. This requires a robust system of oversight and investigation of allegations of civilian casualties, which are invariably made by the civilians themselves, or their representatives (such as provincial governors or human rights groups). SOTG's predisposition, at least in examples drawn from comments on QAs conducted [REDACTED], [REDACTED] and [REDACTED], to discount civilian claims of unlawful killings as false, insurgent propaganda, and 'absurd', was inimical with a robust system of oversight of operations.

[REDACTED]

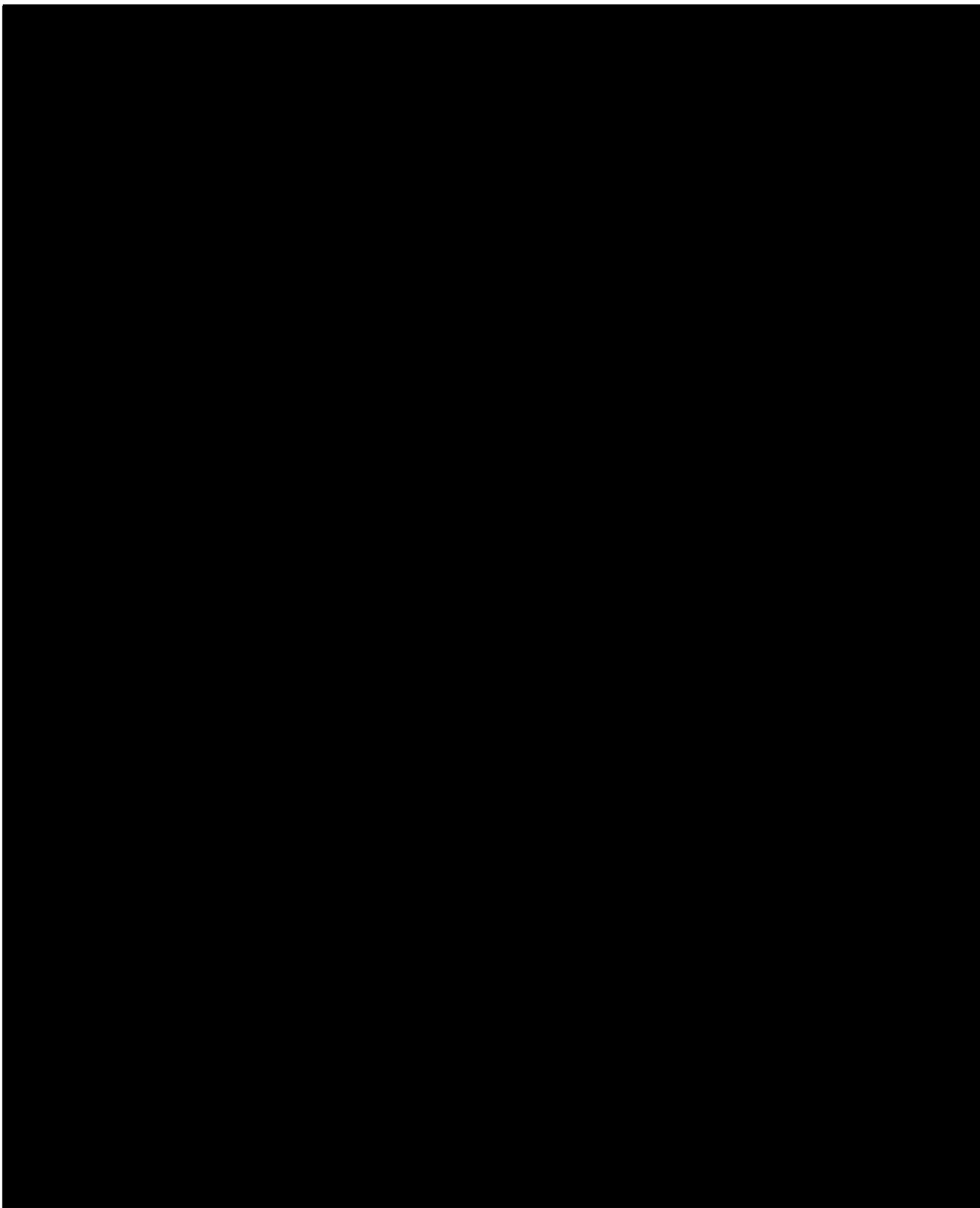
[REDACTED]

¹⁹² [REDACTED] TROI of [REDACTED]

¹⁹³ Reference 77 – 'ISAF Commander General David Petraeus interviewed on Afghanistan' (31 August 2010) - https://www.nato.int/cps/en/natolive/opinions_65854.htm



¹⁹⁴ [redacted] TROI of [redacted]
¹⁹⁵ Reference 78 - [redacted] TROI of [redacted]
¹⁹⁶ [redacted] TROI of [redacted]



197 [redacted] TROI of [redacted]
198 [redacted] TROI of [redacted]
199 [redacted] TROI of [redacted]
200 [redacted] TROI of [redacted]
201 [redacted] TROI of [redacted]
202 [redacted] TROI of [redacted]

and I don't believe that he fully ingratiated himself with our officer commanding and so often it wasn't necessarily briefed to him all information.

313. [redacted] was asked if he had a recollection of an instance [redacted] [redacted] [redacted]
[redacted] [redacted] [redacted] : 207

Q53. ... A. [redacted]
[redacted]

Q54. Do you have a recollection of an incident in which [redacted]
[redacted] [redacted] ? A. [redacted]
[redacted]

...

Q76. Do you have any recollection of this reporting or anything like it? A. [redacted]
[redacted]

Q77. Okay. So, this is an allegation that [redacted] [redacted] [redacted]
[redacted] [redacted] . So, [redacted] what happened in the SOCC? What
did the OC do about that? A. [redacted]
[redacted]

Q78. When you [redacted] ? A. [redacted]
[redacted]

Q79. Was it your impression that [redacted]
[redacted] A. [redacted]

²⁰⁷ [redacted] TROI of [redacted]

[REDACTED]

Q80. But your recollection is that [REDACTED]

? A.

Q81. [REDACTED], just can I ask, you said that [REDACTED]

can you recall whether

that occurred on this occasion? A.

314. [REDACTED] described a process where the INTREPs were '*provided either through the OPSO, XO or OC for their draft approval*'.

Q141. ... A. So, before it would be sent out of the squadron, the force element, FE [REDACTED], it will have been more than likely checked for consistency against the operational report and, like any document, he is welcome to make whatever changes that he feels appropriate. He can change anything...

315. On the appropriateness of making intelligence reporting consistent with operational accounts [REDACTED] also remarked.²⁰⁸

Sir, I understand and I also acknowledge that obviously the role of an intelligence analyst or officer is to provide frank and fearless advice to command and ideally you might not say what command want to hear but ideally you would say it to them so that they can make decisions and information reporting. In this instance and I'm sure it won't be a shock to you, it was more important that our post-operational reporting was consistent going out of the squadron that was providing intelligence (indistinct words).

So, simply like in checking it, they would make sure that what I was reporting was not inconsistent with the operational report and it was just a matter of checking that what I was writing and what was being released, either by myself of [REDACTED], was consistent with the operation report so that we had the same messaging as far as these were concerned.²⁰⁹

²⁰⁸ [REDACTED] TROI of [REDACTED]

²⁰⁹ [REDACTED] TROI of [REDACTED]

316. [REDACTED] was asked what he had heard about the use of throwdowns and offered, *'That they were utilised to put into the SSE photos to ensure that they were legitimate kills'*.²¹⁰ When asked who he had heard that from, and if he suspected that he was seeing throwdowns in photos, [REDACTED] said:

That was a rumour that I heard. I had also heard that during my first tour as well but obviously I never saw that. I wasn't on the ground so I wasn't able to say a particular example of that but it was something that I guess I heard. I always suspected that there were things that occurred – that the photos were – that the weapons were taken closer to a person or that they may have been moved around between people. I had suspicions on a few occasions, and then again, there was photos that were legitimate. But there were a few that I thought, *'That doesn't add up with what I've been told'*.²¹¹

317. [REDACTED] was also asked if he had any sense of unease when he looked at the depiction of weapons in SSE photos. He replied:²¹²

... But yes, receiving some of these photos certainly there was inconsistencies in the story, which is why often I then went back and asked for more information. However, I wasn't on the ground and I'm not in a position to speculate, or rather I'm not in a position to then question what I am told necessarily. But absolutely, yes, the photos did tell a different story.

318. [REDACTED] was asked to comment on [REDACTED]'s evidence regarding [REDACTED]

.213

Q40. But we've been told that [REDACTED]

what's your view about that? A.

319. **Conclusion.** The role of the patrol commanders in target development marginalised the professional intelligence advisers. The imperative of using air assets when they were available, coupled with an implied KPI based on EKIA achieved, caused SOTG personnel, particularly FE [REDACTED], to pressure intelligence staff for target information, even when it was not actionable. Control of intelligence reporting meant that command was denied an alternative perspective. Some intelligence staff developed suspicions, but were not in a position to challenge the accounts given by those who were 'on the ground'.

Conclusion

320. The examples and episodes referred to in this section, superimposed on the case studies presented earlier in this chapter, manifest a number of themes which contributed to the failure of oversight mechanisms. These themes are elaborated in Section 7, Conclusions and recommendations, below. Many of them are founded in attitudes which are, in themselves,

²¹⁰ [REDACTED] TROI of [REDACTED]

²¹¹ [REDACTED] TROI of [REDACTED]

²¹² [REDACTED] TROI of [REDACTED]

²¹³ [REDACTED] TROI of [REDACTED]

commendable: loyalty to the organisation, trust in subordinates, protection of subordinates, and maintenance of operational security. However, they have fostered less desirable features, namely avoidance of scrutiny, and thus accountability. Trust in subordinates and a desire to protect them and the organisation from what was seen as unwarranted scrutiny, combined with a predisposition to treat complaints as vexatious, to produce an environment in which staff were blind to the possibility that events were not as reported, and did not entertain what can now be seen to be reasonable suspicions. An understandable reluctance to be perceived as distrustful of the operators or disloyal to the organisation had the unintended consequence of shielding potentially unlawful action from exposure and scrutiny.

321. The references in this section to the attitudes and views of various witnesses is intended to be illustrative, not critical. It is not the purpose of this section to critique their performance, but rather to identify factors that may have contributed to a failure of oversight. In any event, were an evaluation of their performance to be undertaken, it would be necessary to bear in mind that they are not to be judged by a standard of perfection, having regard to facts and circumstances which have been ascertained only retrospectively, but according to the standard of what a reasonably capable and careful person of the member's rank, seniority and experience in a similar role in a similar operational environment, would have done (or refrained from doing).²¹⁴ The Inquiry does not suggest that, given the then prevailing circumstances, they did not meet that standard.

SECTION 6: COMMAND OBSERVATIONS AND REFLECTIONS

322. The inquiry interviewed a former CJOPS (██████████), who was CJOPS from (██████████) and several former JTF 633 commanders (relevantly, ██████████, who was CJTF 633 (██████████)), in order to obtain observations and reflections, from the perspective of their command experience, and in the light of the case studies presented earlier in this chapter, as to how oversight processes might be made more effective for the future. Necessarily, this involved reflection on why they had failed. Several themes arose from their observations.

Command and Control, and Special Forces autonomy

323. While, via HQJOC, HQ JTF 633 and HQ JTF 633-A, Australia sought to retain 'national command' over the SOTG, it was assigned under the operational command of ISAF Special Operations Forces (SOF). Headquarters JTF 633 and JTF 633-A sat outside the operational command chain, and did not have effective oversight of or influence on day-to-day SOTG planning and operations.

324. ██████████ observed:²¹⁵

... One of the commanding officers caused me some issues because I think ISAF SOF guys, because they're in that chain of command, were the third-largest SOTG in theatre, they were taking a fair bit of direction from them in prosecuting the special operations part of the campaign.

²¹⁴ *Lamperd v the Commonwealth* 46 ALR 371 (at [378])

²¹⁵ Reference 81 - ██████████ TROI of ██████████

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

326. [REDACTED] made further observations of the working of lower levels of command within the SASR, and more generally the command implication of the separation of SOCOMD from the conventional army.²¹⁷

The standard narrative, which I think has a good deal of weight, is that the NCOs are running the shop. And the officers were there to sign the, and do officer stuff, which is important and necessary, but not on the tools. And that bifurcation of responsibility was exacerbated over decades. So that's a key part. The second one was that the SAS Regiment in particular, and Special Forces in general were allowed to drift out of army control and not under any other control. It became almost a service within a service and respective chiefs of army – they'd been split from the line of command so they weren't part of the forces command, land command, construct. They were a separate entity operating independently under, you know, special operations command. And you might argue special operations command wasn't sufficiently supervised or governed in what was happening.

327. This phenomenon is not limited to Australia; the Inquiry encountered it among coalition partners also. The idea that Special Forces are a strategic asset that sit outside normal chains of command is well-entrenched. That they are a strategic asset is not questioned. However, since 1917 Australia has consistently espoused the position that it maintains command and control of its deployed Armed Forces.

328. **Comment.** While the complexities of coalition warfare, and the need for flexible command and control arrangements, are acknowledged, the devolution of operational command to the extent that the national command has no real oversight of the conduct of SF operations not only has the potential to result in the national interest and mission being overlooked or subordinated, but deprives national command of oversight of those operations. Australia should retain operational command over its deployed forces rather than delegating command to other entities.

Oversight Mechanisms

329. From time to time the Australian national chain of command was concerned by external allegations of breaches of LOAC related to SOTG operations. On occasions, higher command and HQ

²¹⁶ Reference 82 - [REDACTED] TROI of [REDACTED]

²¹⁷ [REDACTED] TROI of [REDACTED]

staff also had concerns related to the veracity of operational reporting from the SOTG when balanced against external complaints. Their response was generally and appropriately to seek further information.

330. The suite of options available to commanders who sought more information ranged from informal means to QAs, IOIs, and ADFIS investigations. All of these were used. Both [REDACTED] and [REDACTED] reflected on the limitations of QAs, IOIs and ADFIS investigations to provide a commander with the facts or evidence upon which to make a decision. Both recalled that ADFIS encountered issues with access in order to conduct investigations, and observed that the PMADF's disciplinary function was a somewhat blunt instrument for commanders. This exchange with [REDACTED] encapsulates some of the challenges encountered by command:²¹⁸

Q23. ... when you look at (the examples identified in this chapter), the QAs and the inquiry officer inquiries, they failed to get to the truth. However, the evidence which was available to them is really what this Inquiry has been relying on, and coming to some very different conclusions. How do you see it working if you were to be able to set back the clock and be back there as a CJTF 633 again? A. Nothing against the individuals. Largely they were reservists brought back in for their experience... But the other side of it, and this goes back to some of the things that came out of the Senate inquiry into military justice in 2004. And the question is can the ADF investigate itself?

Q24. Yes. A. And the conflict of interest between investigating officer and cheerleader, particularly in an operational theatre when the people are still at war and still going out beyond the wire. And this is a tension that I saw as a commander. The clear light of day doesn't exist until you've returned to Australia and you're out of contact. So it makes it difficult for the investigating officer to separate their role of being a true and impartial investigating, an inquiry officer – as you indicated – and then you just, as you descend through the layers the QA, the quick assessment being conducted by generally an officer of the unit who is not only a cheerleader but definitely within the chain of command. And the QA's for a different purpose. But I think from a number of your case studies you highlight that the QA and the IO's report tend to align very closely. And there isn't much divergence between what the QA has highlighted and then what the IO brings out in the longer term. And so this issue of conflict of interest is an interesting one, and how do you do that. Now, the inquiry officers were distanced from the chain of command, you know, outside. But they were also Australian officers coming in supporting Australian troops who were in active contact with the enemy. And it would be a very interesting character who would have a steely analytical forensic nature to investigate that.

Q25. Yes. A. And indeed, that's partly supported by why the ADFIS are so largely sort of reviled in many ways. Because they're the ones who are coming in saying, yes, I know what you're telling me but now I am willing to entertain doubt and I potentially am going to challenge you. Now, that's again a difficult ask to get that separation, particularly with the people who are coming back into theatre to do the investigations. A lot of them hadn't actually been in theatre at all and weren't familiar with the operations. And in some respects their currency may have been questioned around what the operations were and those sorts of things.

Q26. Okay. So how do we get around that? Do we have a professional organisation of inquiry officers who are better trained, better equipped to do the inquiry rather than the – I take it you're talking about sort of the amateur reservist brought in because they're independent, but

²¹⁸ [REDACTED] TROI of [REDACTED]

doesn't really have much experience, is that what I hear you saying or - - - A. None of them had experience but they're sort of coming off the bench cold.

Q27. Yes. A. Into the ADF and into an operational environment, and into a highly fraught situation, so they were brigadiers and, you know - [REDACTED], [REDACTED]. So I wouldn't say that's necessarily the problem but the - - -

Q28. No. A. But there's a gap between - I suppose the fundamental point I would make is that ADFIS exists in a prosecutorial, adversarial, criminal framework. IGADF, on the other hand, you might argue that if IGADF had officers - but then they might end up compromising the IGADF, or subsequent reviews. But somewhere - but I mean, more like the IGADF coming in with powers, or investigation, not prosecution. And again, I'll go back to the only model I've got, [REDACTED], is a coronial basis of investigation.

Q29. Yes. A. Or even a command, empowering the command and the commander to have authority to do that. Now, you might argue that the commander has that authority already to get to the truth. He doesn't need any additional legislation or jurisdiction, he's got it, or she has it, and they just get on with it.

Q30. Yes, there's - - - A. But that's not the model.

Q31. There was a separation, of course, between the disciplinary action, disciplinary powers that command have, and the like, the coronial powers which are there in an inquisitorial rather than an adversarial framework. A. So the intent for the - speaking as an operational commander, my intent was to find out what the hell was going on, not to establish a criminal scene, or not even to establish - I just wanted to find out the basis of which I would take, or could influence the next operational decision.

Q32. Yes. A. And so my focus was an operational focus, for which I needed the information. Now, if an offence had been disclosed, sure, we could deal with that and go to it. But I'm not even at that stage yet. I'm at the stage, *'What the fuck's happening,'* and what are we doing about it?

Q33. Having a sound basis to make a decision, whether it's going down some kind of administrative or disciplinary route, or whatever? A. Yes.

Q34. Yes. A. In the first instance it's an operational - the first priority is dealing with the operational situation.

Q35. Yes. A. And getting as much information as you can to deal with the operational situation. And how do you go about that? You then step in behind that with the other ones about okay, now we've decided, it could have been, you know, there could be cause here for some kind of inquiry. Now, the interesting thing is if you cast about say well, if the information comes to you that there could have been an offence committed and the sources that - a bit your A through F, one through six. If your source is one of your own people saying something's happened you might say that's an A1 and I'm going to do something really quickly about this. If it's potentially - and I'm not saying the civil inquiries were this - but the way the SOTG seemed to treat those ones was an F6. We don't trust the source, you know, the local people, and we don't trust the information. I don't know where that really gets you but it starts to shape it a little bit, you know. If I was, as a commander had, you know, one of your own team coming in saying, *'Hey, I think these boys have just done something pretty outrageous,'* you'd get onto it very quickly.

Q123. Yes. A. And I'll say well, I don't – all I'm trying to find is what happened. And so because it's framed with disciplinary - - -

Q124. A disciplinary - - - A. - - - finding a culprit that's what creates the barrier. So they say, *'Well, I'm not going to talk to you because, you know, you could charge me with illegal killing. And I don't want to be charged with illegal killing. I was just doing my job'*. And if that's the only, you know – when all we've got's a hammer and everything looks like a nail.

Q125. Yes. A. And that's sort of my point I suppose, [REDACTED], that that's the witness I felt, as an operational commander, had obligations to force itself to know what was going on and ensure that the right things were going on – the wrong things weren't going on. I had an obligation to our allies where incidents have occurred, so that they retained their confidence and trust in us. And had an obligation to ensure what was being reported back to Australia was a true and accurate reflection of what actually was happening.

331. [REDACTED] also referred to the desirability of members with concerns being able to access an alternative line of reporting:

Q36. Yes. I suppose we did have people who were coming forward, and I don't know if you read that account of [REDACTED] and says, *'Hey, I think something' – or, 'Did this happen to you'*? A. When I did my report [REDACTED], I recommended one of the things we need was a safe reporting conduit separate to the chain of command, where people could report safely. Now ideally, it would be the chain of command they trusted but in this case the [REDACTED] who – you know, from the case study seemed to have sufficient ADF experience and [REDACTED] to have said, *'Hey, there's something wrong here'*. But again, the question becomes was his loyalty to the SAS regiment greater than his loyalty to the truth?

...

Q39. ... A. Where people believe their loyalty to individuals is greater than their loyalty – and they confuse loyalty to what is right, to total loyalty to their mates and their organisation.

Q40. Yes. A. And it's – that's what I described as misguided loyalty. It's a misunderstanding. You know, that [REDACTED] that – for that incident, he should have gone off to somebody to say, *'Look, I just heard this, what do you think'*? In fact, he thought he could resolve it himself on his own terms, not pass it on. Now, the other example there is in the notion of sexual offenses. If someone reports a sexual offense, can you choose to do your own sort of investigation and decide there's nothing to see here, move on, or do you have to report it to the police?

Q41. Yes. A. And my understanding of the civil jurisdiction is if someone reports of sexual offence you have to report it to police.

Q42. Yes. A. So maybe that's a recommendation out of some of these things where, you know, an individual like the [REDACTED], when provided evidence of – or a concern of an issue had no discretion but to take it either to the chain of command or to an appropriate authority to then be inserted in the chain of command.

Q43. Okay. A. So in that case with the [REDACTED] he may well have been obliged to report to the next person in his [REDACTED].

Q44. Yes. A. To say, *'This is what I've just been made aware of. I don't think there's anything to it and I've told the individual to go back and not to worry. Have I done the right thing?'* So this sort of peer review or superior review outside the line chain of command – that may be in a [REDACTED] or in a non-threatening way, to validate their judgement, if you like.

332. **Comment.** As [REDACTED] observed, an ADFIS investigation is a blunt instrument for getting to the truth of an operational incident, although it may sometimes be absolutely appropriate. Consistent with observations made earlier in this chapter, Inquiry Officers may have lacked the independence, index of suspicion and forensic skills and tools to question and test potentially false evidence. That was even more the case for QAOs. And when ambiguities arose, there were strong pressures to accept Australian reporting at its face value, and to support rather than question the actions of Australian troops. Access to an alternative safe reporting conduit, separate to the chain of command, where members can report safely without fear of retribution, could at least facilitate the disclosure of unlawful conduct in otherwise closely compartmentalised environments.

SECTION 7: CONCLUSIONS AND RECOMMENDATIONS

333. The case studies, examples and episodes referred to in this chapter, manifest a number of themes which contributed to the failure of oversight mechanisms.

334. First, commanders trusted their subordinates: including to make responsible and difficult good faith decisions under ROE; and to report accurately. Such trust is an important and inherent feature of command. However, an aura was attached to the operators who went 'outside-the-wire', and whose lives were in jeopardy. There was a perception – encouraged by them and accepted by others – that it was not for those 'inside-the-wire' to question the accounts and explanations provided by those operators. This was reinforced by a culture of secrecy and compartmentalisation in which information was kept and controlled within patrols, and outsiders did not pry into the affairs of other patrols. These combined to create a profound reticence to question, let alone challenge, any account given by an operator who was 'on the ground'. As a result, accounts provided by operators were taken at face value, and what might at least in retrospect be considered suspicious circumstances were not scrutinised. Even if suspicions were aroused in some, they were not only in no position to dispute reported facts, but there was a reticence to do so, as it was seen as disloyal to doubt the operators who were risking their lives.

335. Secondly, commanders were protective of their subordinates, including in respect of investigations and inquiries. Again, that is an inherent responsibility of command. However, the desire to protect subordinates from what was seen as over-enthusiastic scrutiny fuelled a 'war against higher command', in which reporting was manipulated so that incidents would not attract the interest or scrutiny of higher command. The staff officers did not know that they were concealing unlawful conduct, but they did proactively take steps to portray events in a way which would minimise the likelihood of attracting appropriate command scrutiny. This became so routine that operational reporting had a 'boilerplate' flavour, and was routinely embellished, and sometimes outright fabricated, although the authors of the reports did not necessarily know that to be so, because they were provided with false input. This extended to alternative reporting lines, such as intelligence reporting, which was carefully controlled. It also generated resistance to lawfully authorised investigations and inquiries.

336. Thirdly, there was a presumption, not founded in evidence, to discount local national complaints as insurgent propaganda or motivated by compensation. This was inconsistent with the counter-insurgency effort, and resulted in a predisposition on the part of QAOs to disbelieve complaints.

337. Fourthly, the liberal interpretation of when a 'squirter' could be taken to be 'directly participating in hostilities', coupled with an understanding of how to describe an engagement to satisfy reporting expectations, combined to contribute to the creation of a sense of impunity among operators.

338. Fifthly, consciously or unconsciously, QAOs generally approached their task as being to collect evidence to refute a complaint, rather than to present a fair and balanced assessment of the evidence. They did not necessarily seek to question or independently confirm what they were told; and/or consider and weigh conflicting evidence, both external and internal, against what they were told and accepted on trust.

339. Sixthly, IOs did not have the requisite index of suspicion, and lacked some of the forensic skills and experience to conduct a complex inquiry into what were, essentially, allegations of murder. Nonetheless, allowance needs to be made for the difficulty of the task when faced with witnesses who are motivated not to disclose the truth, whether by self-interest or by misplaced loyalty. This Inquiry does not doubt that, even with its much heightened index of suspicion, and an approach in which accounts have been robustly tested by forensic examination, it has not always elicited the truth, and that there are matters about which it has been successfully kept in the dark, if not deceived. However, IOs would have had greater prospects of success if more suspicious, and better trained or experienced in investigatory and forensic techniques.

340. Seventhly, as a result, operational reporting, and the outcomes of QAs and IOIs, were accorded a level of confidence by higher command, which they did not in fact deserve.

341. Many of those themes are founded in attitudes which are, in themselves, commendable: loyalty to the organisation, trust in subordinates, protection of subordinates, and maintenance of operational security. However, they have fostered less desirable features, namely avoidance of scrutiny, and thus accountability. It is critically important that it be understood that not all of these themes are, in themselves, bad or sinister. There are good reasons for many of them. Their importance and benefits should not be overlooked when addressing the problem to which they have contributed.

342. The Inquiry reviewed operational reporting extensively during the examination of incidents and issues of interest. It has become plain that OPSUMs and other reports frequently did not truly and accurately report the facts of engagements, even where they were innocent and lawful, but were routinely embellished, often using boilerplate language, in order to proactively demonstrate apparent compliance with ROE, and to minimise the risk of attracting the interest of higher headquarters. This had upstream and downstream effects: upstream, higher headquarters received a misleading impression of operations, and downstream, operators and patrol commanders knew how to describe an incident in order to satisfy the perceived reporting requirements. This may be a manifestation of a wider propensity to be inclined to report what superior commanders are believed to want to hear. Integrity in reporting is fundamental for sound command decisions and operational oversight. The wider manifestation needs to be addressed in leadership training and ethical training,

from RMC and continuing. Its narrower application needs to be addressed through impressing on operations and intelligence staff, through duty statements and standing orders, their accountability for integrity in reporting.

- ***The Inquiry recommends*** the training of officers and NCOs emphasise that absolute integrity in operational and other reporting is both an ethical obligation and is fundamental for sound command decisions and operational oversight.
- ***The Inquiry recommends*** standing orders for operations state that commanders and staff are accountable to ensure that there is absolute integrity in operational reporting.

343. This chapter has provided examples where specialist SOTG staff had concerns or suspicions regarding operations which they were not confident to raise, or unsuccessfully attempted to raise, with superiors. Technical lines of reporting in which concerns could have been raised appear to have been underutilised. Elsewhere in this report are examples of SOTG members, both specialist and SF, being deterred by the risk of professional or personal ostracism, or threats, bullying, or other retribution, from raising their concerns. A deep-seated team or tribal culture led to the ostracism of members who might question the actions of other team members, which in hindsight facilitated actions against Army values and behaviours. Existing whistle-blower protections and redress of grievance processes were not adequate for members who were fearful of professional, social and physical retaliation to raise their concerns or 'blow the whistle' on unlawful actions.

- ***The Inquiry recommends*** members have access to an alternative safe reporting line, apart from their chain of command, to report or discuss concerns about suspected unlawful behaviour. Specialist legal, intelligence, medical, chaplaincy and other technical chains can provide one avenue for this. Whistle-blower protections to shield and support personnel who raise suspicions, including regarding potential breaches of the LOAC, should be reinforced and promulgated.

344. Commanders at all levels were failed by oversight mechanisms provided by QAs and IOIs. ADFIS investigations, though sometimes entirely appropriate, are a blunt instrument with which to confirm or allay suspicions of wrongdoing. The Inquiry notes the suggestion that commanders could benefit for coronial-like powers with associated protections, beyond fact-findings, QAs, IOIs and ADFIS investigations that might be utilised to find the truth of matters and provide commanders with accurate information upon which to base decisions that might include administrative or disciplinary response options.

345. One problem with the ad-hoc approach to inquiries was that IOs, each conducting a separate individual inquiry, did not have the opportunity to see the emergence of patterns. A standing professional inquiry agency would be better positioned to do so. Any inquiry mechanism needs to have a substantial degree of independence, an index of suspicion, and the forensic skills, experience and techniques to question the veracity of evidence and to test it.

- ***The Inquiry recommends*** an independent tri-service multi-disciplinary specialist operations inquiry cell be established, for the conduct of administrative inquiries into operational incidents. The cell should comprise personnel with a mix of expertise drawn from Arms corps (to provide the requisite understanding of the battlespace and operations), lawyers (to provide the requisite forensic skills), investigators, and intelligence professionals, and be available as

an independent resource for command in any military operation. Such a cell could reside in IGADF, where it would have available the powers of compulsion available under the IGADF Regulation (with the associated protections).

346. A balance needs to be struck between the lawful rights of defence members, and the support of the investigation of criminal and disciplinary offences. Members of SOCOMD are in this respect in no different a position to any other defence member.

- ***The Inquiry recommends** that it should be clearly promulgated and understood across SOCOMD that while a member is not under any legal obligation to submit to questioning by ADFIS, there is no impediment to agreeing to being questioned, and in particular that no obligation of secrecy prevents disclosure to or discussion with ADFIS of any criminal conduct. This recommendation supports the Inquiry's broader recommendation that it should be clearly promulgated and understood across SOCOMD that the acknowledged need for secrecy in respect of operational matters does not extend to criminal conduct, which there is an obligation to notify and report.*

347. The mandatory use of body-cameras by police has proved successful in confirming lawful actions, rebutting false complaints, and exposing misconduct, and is now widely accepted. Privately-owned helmet cameras were enthusiastically used in Afghanistan by some SOTG members, [REDACTED]. Use of official helmet cameras by SF operators, perhaps more than any other single measure, would be a powerful assurance of the lawful and appropriate use of force on operations, as well as providing other benefits in terms of information collection, and mitigating the security risk associated with unofficial imagery.

- ***The Inquiry recommends** the wearing and use of an appropriate helmet camera or body camera by SF operators on operations should be mandated.*

348. While the complexities of coalition warfare, and the need for flexible command and control arrangements, are acknowledged, the devolution of operational command to the extent that the national command has no real oversight of the conduct of SF operations not only has the potential to result in the national interest and mission being overlooked or subordinated, but deprives national command of oversight of those operations.

- ***The Inquiry recommends** Australia should retain operational command over its deployed Special Forces, so far as practicable in a coalition context, and minimise delegation of operational command to other nations or organisations.*

349. It is apparent that legal officers have contributed to the embellishment of operational reporting, so that it plainly demonstrated apparent compliance with ROE. It is not suggested that this was done with an intention to mislead, as distinct from to express in legal terms what the legal officer understood to have happened, or more typically indirectly by explaining what needed to be stated in a report to demonstrate compliance. The manner in which some legal officers interacted with ADFIS investigations tends to suggest that they perceived their role as being to act for SOTG or its members.

- *The Inquiry recommends duty statements for deployed legal officers should clearly articulate that ultimately their client is, and their professional duties are owed to, the Commonwealth, as distinct from the deployed force, its members or Commanding Officer; that that requires that they treat and deal with civilian complaints impartially, rather than as if acting in defence of the deployed force; and that there is no place for embellishment in connection with operational reporting.*

References:

1. [REDACTED] TROI [REDACTED]
2. [REDACTED] TROI [REDACTED]
3. SOTG QA Allegations of LOAC Violation – [REDACTED]
4. SOTG [REDACTED] Quick Assessment Into the Intelligence Report of [REDACTED] Regarding an Insurgent Allegation that a Local National was Killed During a CF Operation date [REDACTED]
[REDACTED]
5. [REDACTED] witness accounts (CSI). [REDACTED]
6. [REDACTED]
7. Provost Marshal Australian Defence Force Submission to the Inspector General Australian Defence Force Scoping Inquiry into the Conduct of Special Operations Command.
[REDACTED]
8. [REDACTED] Inquiry Officer Inquiry Report of [REDACTED] into incident on [REDACTED]
[REDACTED]
9. [REDACTED] IOI Report of [REDACTED]
10. CJTF 633 Minute – Closure of Operational Allegation AIHRC [REDACTED]
[REDACTED]
11. HQ JOC Ref [REDACTED] Quick Assessment Brief for A/CJOPS: SOTG Incident [REDACTED],
[REDACTED]
12. [REDACTED] TROI of [REDACTED]
13. [REDACTED] TROI [REDACTED]
14. [REDACTED]
15. [REDACTED] TROI [REDACTED]
16. [REDACTED] TROI [REDACTED]
17. [REDACTED] TROI [REDACTED]
18. [REDACTED] TROI [REDACTED]
19. QA SOTG [REDACTED]
20. Lamperd v the Commonwealth 46 ALR 371 (at [378])
21. [REDACTED]'s TROI in the [REDACTED] IOI. [REDACTED]
22. [REDACTED]'s TROI in the [REDACTED] IOI, [REDACTED]
23. OPSUM [REDACTED]
24. FE [REDACTED] Incident Report DTG [REDACTED]
25. [REDACTED] chat log OP TVSN [REDACTED]
26. SOTG [REDACTED] Commander's Diary. [REDACTED]
27. Presidential Information Coordination Centre (PICC) Report [REDACTED] to HQ ISAF of [REDACTED]
[REDACTED]
28. Petition to UNAMA by [REDACTED] in [REDACTED]

29. SOTG QA of EKIA OP TEVARA SIN [REDACTED]
30. TF66 First Impressions Report [REDACTED] dated [REDACTED]
31. QA Report for DCJTF 633 Re LN Petitions to UNAMA. [REDACTED]
32. TF66 First Impression Report on dual SOTG and ISAF SOF Afghanistan letterhead. [REDACTED]
[REDACTED]
33. [REDACTED] chat log [REDACTED]
34. FE [REDACTED] Closure Incident Report [REDACTED]
35. Storyboard OP TVSN [REDACTED] FE [REDACTED] mission [REDACTED]
36. OPSUM OP TVSN [REDACTED]
37. [REDACTED] Troop post-op debrief OP TVSN [REDACTED]
38. TF66 CIVCAS LOAC Violation Report – [REDACTED]
39. Decision Brief for CJOPS of [REDACTED] - DB for CJOPS – LOAC Violation Allegation
[REDACTED]
40. Record of Meeting on [REDACTED] at PRT House Tarin Kowt between Inquiry Team and
[REDACTED] tribal elders from [REDACTED]
41. Image of deceased [REDACTED] [REDACTED] [REDACTED]
42. Reference 47 – [REDACTED] of [REDACTED] to [REDACTED] IOI, [REDACTED]
43. Reference 48 - Image [REDACTED] taken at 1127 on [REDACTED], provided by [REDACTED]
[REDACTED]
44. [REDACTED] TROI [REDACTED] [REDACTED]
45. [REDACTED] TROI [REDACTED]
46. [REDACTED]_OPSUM_OP_TVSN [REDACTED]_ARMED_RECON_ [REDACTED]_S3_APRVD
TF66 (FE-[REDACTED]) [REDACTED] [REDACTED]
47. COMMANDER's DIARY Rot [REDACTED]. [REDACTED]
48. LDSR [REDACTED] [REDACTED] [REDACTED]
49. [REDACTED] TROI of [REDACTED]
50. [REDACTED] TROI [REDACTED]
51. [REDACTED] TROI [REDACTED]
52. [REDACTED]/HQJTF633 OP SLIPPER [REDACTED] – CT-U, AIHRC OP ALLEGATION
([REDACTED]), [REDACTED]
53. [REDACTED]_TF66_INTREP [REDACTED]_ARMED_RECONNOSSANCE OF INS HAZ IVO
[REDACTED]
54. OP SLIPPER SIR CIR [REDACTED] AIHRC OP ALLEGATION [REDACTED]
[REDACTED]
55. [REDACTED] TROI [REDACTED]
56. [REDACTED] PMADF DSN-INV- [REDACTED] Final Report in the Matter of Shooting Death
[REDACTED] dated [REDACTED]
57. QA Brief for A/CJOPS: SOTG Incident [REDACTED], OP TEVARA SIN- [REDACTED]
Storyboard, [REDACTED] [REDACTED]
[REDACTED] 2012
58. Service Police Report into Shooting Death [REDACTED] dated [REDACTED]
[REDACTED]
59. HQJOC [REDACTED] Referral to ADFIS of Operational Incident Involving the Shooting Death [REDACTED]
[REDACTED] in Afghanistan on [REDACTED]
60. Critical Decision Brief for PM-ADF: Shooting Death [REDACTED] in Afghanistan on [REDACTED]
[REDACTED]

- 61. Noting Brief for CJOPS REF [REDACTED]: Shooting Death [REDACTED] in Afghanistan on [REDACTED]
- 62. [REDACTED] Major Investigation Plan. [REDACTED]
- 63. [REDACTED] DOIL/OUT/[REDACTED]
- 64. [REDACTED] DOIL/OUT [REDACTED] Request for Advice: [REDACTED]
- 65. Email: Review of legal advice re [REDACTED]. [REDACTED]
- 66. [REDACTED] Service Police Report Interim, [REDACTED]
- 67. [REDACTED] TROI [REDACTED]
- 68. [REDACTED] TROI [REDACTED]
- 69. [REDACTED] TROI [REDACTED]
- 70. [REDACTED] TROI [REDACTED]
- 71. [REDACTED] TROI [REDACTED]
- 72. [REDACTED] TROI [REDACTED]
- 73. [REDACTED] TROI [REDACTED]
- 74. [REDACTED] TROI [REDACTED]
- 75. [REDACTED] statement to AFP provided to Inquiry on [REDACTED]
- 76. [REDACTED] TROI [REDACTED]
- 77. 'ISAF Commander General David Petraeus interviewed on Afghanistan' (31 August 2010) - https://www.nato.int/cps/en/natolive/opinions_65854.htm
- 78. [REDACTED] TROI of [REDACTED]
- 79. [REDACTED] TROI [REDACTED]
- 80. [REDACTED] TROI [REDACTED]
- 81. [REDACTED] TROI [REDACTED]
- 82. [REDACTED] TROI [REDACTED]

Chapter 3.03

COMMAND AND COLLECTIVE RESPONSIBILITY

EXECUTIVE SUMMARY

This chapter considers the extent to which there is command and collective responsibility for the events described in this Report, and how it should be addressed.

Command responsibility is both a legal and a moral concept. In the narrow sense, command responsibility is a legal doctrine by which commanders may be held legally responsible for the misdeeds of their subordinates. But the concept has a much wider scope. At its core is responsibility for the effects and outcomes delivered by the unit or formation under command. Commanders are both recognised and accountable for what happens ‘on their watch’, regardless of their personal knowledge, contribution or fault.

Just as commanders are recognised for the achievements of their units, and bear responsibility for their failures, so there is a collective recognition and commensurate responsibility on the part of members of a unit.

It was at the patrol commander level that the criminal behaviour was conceived, committed, continued and concealed. It is overwhelmingly at that level that responsibility resides.

The Inquiry has found no evidence that there was knowledge of, or reckless indifference to, the commission of war crimes, on the part of commanders at troop/platoon, squadron/company or Task Group Headquarters level, let alone at higher levels such as Commander Joint Task Force (CJTF) 633, Joint Operations Command, or Australian Defence Headquarters. Nor is the Inquiry of the view that there was a failure at any of those levels to take reasonable and practical steps that would have prevented or detected the commission of war crimes.

There may well have been a sense, at least at Squadron level, not least because of the numbers of enemy killed in action (EKIA), and the number of them who were found to be unarmed, or armed with only a pistol, grenade or ICOM [radio], but to have been ‘manoeuvring tactically against the FE’, that the rules of engagement (ROE) were being exploited, and lethal force was being used when perhaps it was not always necessary. But that falls well short of knowledge, information, or even suspicion that non-combatants were being deliberately killed.

By 2012 to 2013 there was, at troop, and possibly up to squadron, level, suspicion if not knowledge that throwdowns were carried, but for the purpose of avoiding questions being asked about apparently lawful engagements when it turned out that the EKIA was not armed, as distinct from facilitating or concealing wilful unlawful killings. While dishonest, it was understood as a defensive mechanism to avoid questions being asked, rather than an aid for covering up war crimes. Their more sinister use was not known to commanders.

Commanders indirectly contributed to the criminal behaviour, in a number of ways, but in particular by accepting deviations from professional standards in respect of behaviour, by sanitising or

embellishing reporting to avoid attracting questions, and by not challenging or interrogating accounts given by those on the ground. Moreover, Special Operations Task Group (SOTG) troop, squadron and task group Commanders bear moral command responsibility and accountability for what happened under their command and control.

That responsibility and accountability does not extend to higher headquarters, including in particular HQ JTF 633 and HQ Joint Operations Command (JOC), because they did not have a sufficient degree of command and control to attract the principle of command responsibility, and within the constraints on their authority acted appropriately when relevant information and allegations came to their attention to ascertain the facts, but were frustrated by outright deceit by those who knew the truth, and, not infrequently, misguided resistance to inquiries and investigations by their superiors.

Some domestic commanders of Special Air Service Regiment (SASR) bear significant responsibility for contributing to the environment in which war crimes were committed, most notably those who embraced or fostered the 'warrior culture' and empowered, or did not restrain, the clique of non-commissioned officers (NCOs) who propagated it. That responsibility is to some extent shared by those who, in misconceived loyalty to their Regiment, or their mates, have not been prepared to 'call out' criminal conduct or, even to this day, decline to accept that it occurred in the face of incontrovertible evidence, or seek to offer obscure and unconvincing justifications and mitigations for it.

Although many members of SOTG demonstrated great courage and commitment, and although it had considerable achievements, what is now known must disentitle the unit as a whole to qualification for recognition for sustained outstanding service. It has to be said that what this Report discloses is disgraceful and a profound betrayal of Australian Defence Force professional standards and expectations. It is not meritorious. Revocation of the award of the meritorious unit citation would be an effective demonstration of the collective responsibility and accountability of SOTG as a whole for those events.

Unlike a collective award such as the Meritorious Unit Citation, the cancellation of an individual award such as a DSC impacts on the status and reputation of the individual concerned, could not be undertaken on a broad-brush collective basis, and would require procedural fairness in each individual case. However, it is difficult to see how any commander at SOTG, Squadron/Company or Troop/Platoon level, under whose command (or 'on whose watch') any substantiated incident referred to in this Report occurred, could in good conscience retain a distinguished service award in respect of that command.

Findings

- *The criminal behaviour described in this Report was conceived, committed, continued, and concealed at patrol commander level, and it is overwhelmingly at that level that responsibility resides.*
- *There is credible information that during SOTG Rotation [REDACTED], [REDACTED] believed that his troop was carrying throwdowns, at least for the purpose of fabricating incriminating evidence to justify the detention and prosecution of local nationals in respect of whom there*

would otherwise have been insufficient evidence, and took no step to prevent or prohibit that practice.

- *There is no credible information that any troop/platoon, squadron/company or SOTG commander knew that, or was recklessly indifferent as to whether, subordinates were committing war crimes.*
- *There is no credible information of a failure by any troop/platoon, squadron/company or SOTG commander to take reasonable and practical steps that would have prevented or discovered the commission of the war crimes referred to in this Report.*
- *However, SOTG troop, squadron and task group Commanders bear moral command responsibility and accountability for what happened under their command and control.*
- *That responsibility and accountability does not extend to higher headquarters, including in particular HQ JTF 633 and HQ Joint Operations Command, who did not have a sufficient degree of command and control to attract the principle of command responsibility.*
- *Commanding Officers of SASR during the relevant period bear significant responsibility for contributing to the environment in which war crimes were committed, most notably those who embraced or fostered the 'warrior culture' and empowered, or did not restrain, the clique of NCOs who propagated it.*
- *That responsibility is to some extent shared by those who, in misconceived loyalty to their Regiment, or their mates, have not been prepared to 'call out' criminal conduct or, even to this day, decline to accept that it occurred in the face of incontrovertible evidence, or seek to offer obscure and unconvincing justifications and mitigations for it.*

Recommendations

- .
- **The Inquiry recommends** that the award of the Meritorious Unit Citation to SOTG (Task Force 66) be revoked.
- **The Inquiry recommends** that the award of decorations to those in command positions at troop, squadron and task group level during SOTG Rotations , , ,  and  be reviewed.
- **The Inquiry recommends** that the award of decorations to those in command positions in SASR during the period 2008 to 2012 be reviewed.

INTRODUCTION

1. Major General Paul Cullen, who had commanded the 2/2nd Australian Infantry Battalion in New Guinea in World War 2, is reported to have said that there are no bad soldiers, only bad officers. However, while it would have been much easier to report that it was poor command and leadership that was primarily to blame for the events disclosed in this Report, that would be a gross distortion. While, as will appear, commanders at troop, squadron and Special Operations Task Group (SOTG) level must bear some responsibility for the events that happened ‘on their watch’, the criminal behaviour of a few was commenced, committed, continued and concealed at the patrol commander level.

Command responsibility

2. Command responsibility is both a legal and a moral concept. In the narrow sense, command responsibility is a legal doctrine by which commanders may be held legally responsible for the misdeeds of their subordinates.

3. Although the legal concept of command responsibility for the crimes of subordinates has been discussed above,¹ it is worth revisiting at this stage some key points, because they also inform wider notions of command responsibility. The idea that commanders can be held responsible for the misdeeds of their subordinates is founded on their positions of trust and authority, and in particular their ability to control the behaviour of their subordinates. It extends to ‘[where] there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops,’² and where the commander ought to have known of the crimes, and failed to take steps to prevent them,³ although it requires personal dereliction ‘where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part’.⁴ It includes failing to make proper enquiries to see whether offences were being committed, or to cause there to be a proper investigation after the event.⁵ As has been explained earlier, essentially, there are three elements to establishing criminal responsibility:⁶

- a. the existence of a superior-subordinate relationship, involving actual control, whether direct or indirect;⁷
- b. knowledge, or reckless indifference, of the actual or imminent commission of the offences; and

¹ Reference 1 - Chapter 1.10, Applicable Law of Armed Conflict.

² Reference 2 - 4 Law Reports of Trials of War Criminals, trial of General Tomoyuki Yamashita, United Nations War Crimes Commission (1948) 1 at 35.

³ Reference 3 - 8 Law Reports of Trials of War Criminals, *US v List 34* (1949); 11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 757 (1950).

⁴ Reference 4 - *United States v Von Leeb (High Command Case)*, 11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 (1951) 462 543-544.

⁵ Reference 5 - *Prosecutor v Strugar* ICTY IT-01-42-T.

⁶ Reference 6 - “Failure to Halt, Prevent or Punish: the Doctrine for Command Responsibility for War Crimes,” Andrew Mitchell, p384.

⁷ Reference 7 - *Bemba Case* ICC 01/05-01/08.

- c. failure to act to prevent the crimes, which may be satisfied by failing to make proper inquiries, or to cause there to be a proper investigation after the event.⁸
4. Insofar as it relates to individual incidents and issues of interest, potential legal liability on the basis of command responsibility has been addressed in the various Chapters in Part 2. This Chapter is concerned with its application at a more general and higher level, and with the moral and other aspects of command responsibility.
5. Responsibility means answerability, or accountability. At the core of the notion of command responsibility is responsibility for the effects and outcomes delivered by the unit or formation under command. Commanders are both recognised and accountable for what happens 'on their watch', regardless of their personal contribution or fault. Thus commanders are given credit for the achievements of their commands, notwithstanding that those achievements might be more directly attributable to the contributions of some or all of their subordinates. Commensurately, commanders are regarded as responsible for the failures of their commands and their subordinates, regardless of personal fault.
6. The fundamental reason for this is that, ultimately, commanders have direction and control of what is done under their command. Another reason is that commanders set the conditions in which their units may flourish or wither. This includes the culture which promotes, permits or prohibits certain behaviours.
7. One domain in which this is apparent is that of honours and awards. Commanders are often decorated for their performance in command, on account of the commendable performance of the unit under their command.

Collective responsibility

8. Just as commanders are recognised for the achievements of their units, and bear responsibility for their failures, so there is a collective recognition and commensurate responsibility on the part of all the members of a unit: they all share in its triumphs, and they all must share in responsibility for its shortcomings. That is because they are a team, in which each member bears some responsibility for holding the others to the standards and values of the ADF and the Army.

THE COMMANDERS

9. Against that background, the position of commanders at Troop/Platoon, Squadron/Company, and at Task Group level, is considered, with particular relevance to the period 2012-2013, when the criminal conduct appears to have been at its peak.
10. Previously, others at various levels and in earlier times would entertain some suspicions or concerns, but had no evidence, and they took what steps they could to resolve their concerns. In connection with the [REDACTED] incident, [REDACTED], then a patrol second-in-command, was questioning what had happened to the prisoners. There is little doubt that his persistence in this respect contributed to his sidelining from the patrol and transfer to mentoring responsibilities. In [REDACTED], following the [REDACTED]

⁸ *Prosecutor v Strugar* ICTY IT-01-42-T.

incident, [REDACTED], then the Troop sergeant, was concerned at what he heard, and involved his Troop commander, [REDACTED]. He gave this evidence:

Q249. And then the conversation that occurred after, you said something along the lines of 'Now, that didn't happen,' or - so just walk us through the brief - - - A Okay, so what happened - and the exact words I'm probably a bit - that happened, and then afterwards I remember getting the troop commander, [REDACTED] at the time, and saying 'We need to grip this up, you know, and then send people down and say, 'are people getting shot that aren't posing a threat?' in any event?' and then that's when I was I directed 'No, we're not doing that, that didn't happen'.

[REDACTED]: Q250. Who said that? A [REDACTED]. I had the 2ICs [second-in-command] and the patrol commanders and no one else at that stage, just trying to get a - just talking about what was going on. My sense of the whole thing at that time, probably not too worried, you know, but hearing things afterwards, and there's a lot of rumours as you know, and there's things that happened - to put it in perspective why it's like that - there's things that happened on that rotation, especially [REDACTED] and stuff like that, that people talk about what happened, and I can tell you 100 per cent it didn't, I was there, you know? I officially watched what you were talking about, and that didn't happen that way. So people have got a different perspective on things, I assume. Hence why, yes, there's a lot of hearsay out there. I believe anyway.

[REDACTED]: Q251. So [REDACTED] said it didn't happen, or it won't? A 'It didn't happen, it's not happening,' basically. Like people aren't getting shot that shouldn't be.

Q252. Okay, so he denied that there was any inappropriate - - - A Yes, 100 per cent. Because that was probably who I spoke (indistinct) that from that group, and that was the middle of the rotation. And at first I had the boss out of the room because I wanted to 'Hey, let's talk - let's just talk,' then I got the boss in.

The Troop / Platoon commanders

11. As to Troop or Platoon Commanders, reference has been made, in Part 2, to a number of cases in which a commander may have had suspicions of misconduct. Over the period from [REDACTED] to [REDACTED] [REDACTED]

- a. [REDACTED] ([REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED])
- b. [REDACTED] ([REDACTED] [REDACTED] [REDACTED])
- c. [REDACTED] ([REDACTED] [REDACTED] [REDACTED])
- d. [REDACTED] ([REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED])
and
- e. [REDACTED] ([REDACTED] [REDACTED] [REDACTED])

12. On SOTG [REDACTED], as has been mentioned in Part 2, [REDACTED]

He

13. [REDACTED] said that [REDACTED]

9 10

14. When [REDACTED] was shown the [REDACTED] video of [REDACTED]

,¹¹

²

15. The comment [REDACTED]

The Inquiry raised this with [REDACTED]

[REDACTED], who had been one of [REDACTED]'s patrol commanders. [REDACTED] said he [REDACTED]

¹³

⁹ Reference 8 - [REDACTED] TROI of [REDACTED]

¹⁰ [REDACTED] TROI of [REDACTED]

¹¹ Reference 9 - Chapter 2.29 ([REDACTED]).

¹² [REDACTED] TROI of [REDACTED]

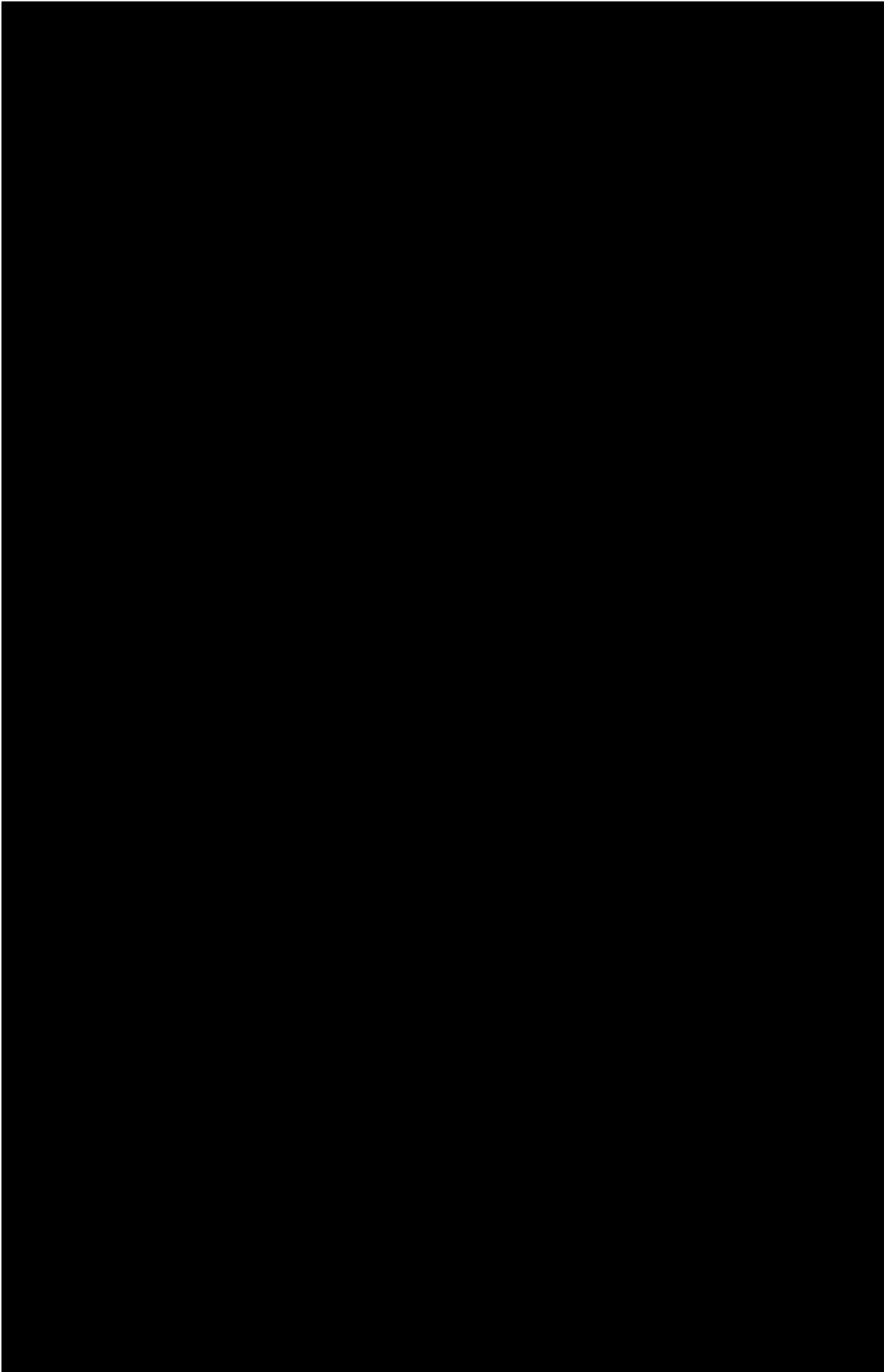
¹³ Reference 10 - [REDACTED] TROI of [REDACTED].

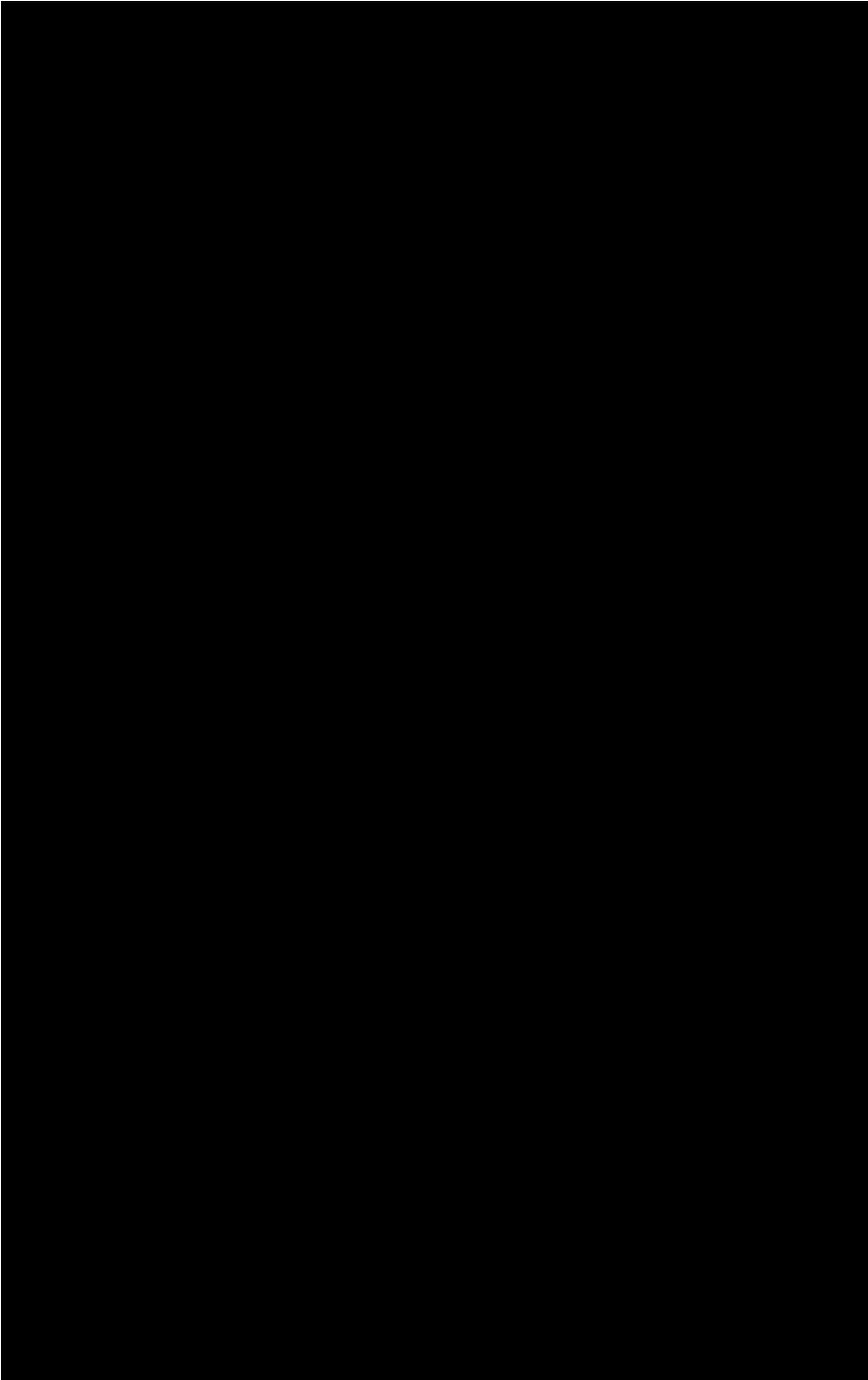
16. [REDACTED] was given notice that the Inquiry was considering whether or not to make a finding adverse to him to the effect that [REDACTED]

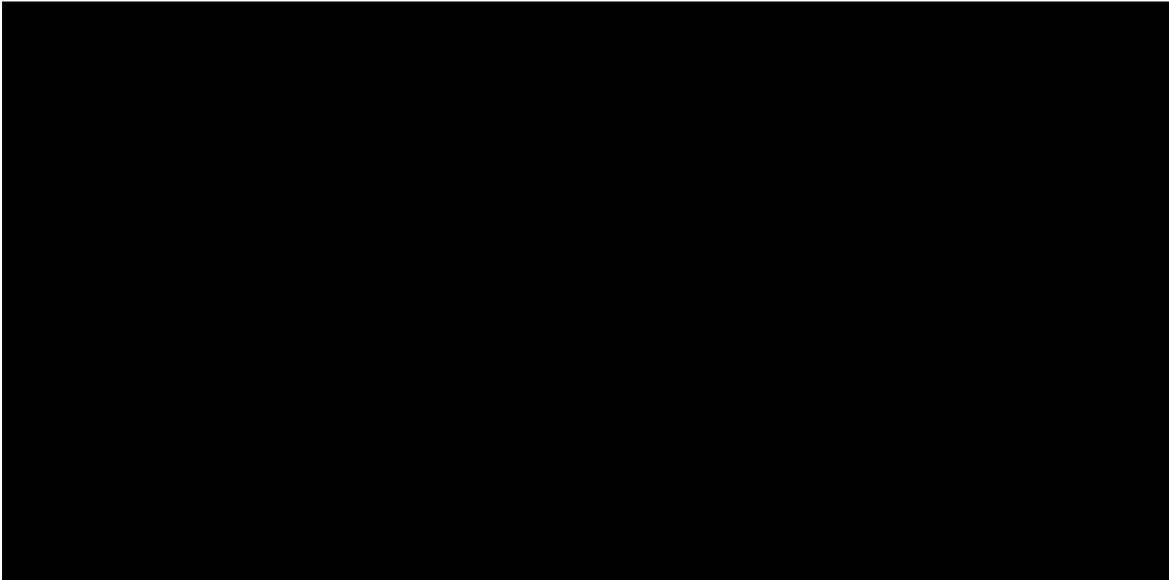
[REDACTED] Although some particular incidents were particularised, the potential finding was expressed in general terms. Parts of his response have been considered elsewhere, in Part 2, in respect of the particular incidents to which they relate. For present purposes, the relevant parts of his submission in response to the notice are as follows:¹⁴

[REDACTED]

¹⁴ Reference 11 - [REDACTED] Submission of [REDACTED] [REDACTED] (1) [REDACTED] to IGADF RE: IGADF Inquiry - NtPAP response [REDACTED]







17. There is no evidence that [REDACTED] actually knew of war crimes being committed by his Troop. He was [REDACTED]. The difficulty of his position was exacerbated by [REDACTED]. His trust in his subordinates and what they told him when he did ask questions is not only understandable, but to a considerable extent an appropriate attitude for a leader, many fine attributes of which he demonstrated (including in declining a decoration because he believed various of his subordinates more worthy). [REDACTED] said that [REDACTED] [REDACTED],¹⁵ and that [REDACTED] as he said.¹⁶



18. That is [REDACTED]. Trusting one's subordinates is a necessary element of leadership, especially in a Special Forces environment. Demonstrating distrust of them is liable to erode trust in both directions, and to be destructive of effective leadership. So for a commander to repose trust in what a subordinate reports is both natural and proper. However, as explained later, there are limits to this; it requires balance; proper trust is not enhanced by blindness to or avoidance of inquiry.



19. [REDACTED] commanded [REDACTED] Troop as part of FE [REDACTED] only for a relatively short period from [REDACTED] [REDACTED]. Chapter 2.33 dealing with the [REDACTED]

¹⁵ [REDACTED] TROI of [REDACTED]
¹⁶ [REDACTED] TROI of [REDACTED]

24. [REDACTED] was conscious that [REDACTED]
[REDACTED] This is another illustration of the insidious impact of the culture of deference to patrol commanders, and how it compromised the capacity of officers to exercise command and leadership.

25. [REDACTED] commanded [REDACTED] Platoon, [REDACTED] Company Commando Group, FE [REDACTED], SOTG [REDACTED], as to which see Chapter 2.51 ([REDACTED]).

26. While [REDACTED]'s approach to the rules of engagement was somewhat cavalier – [REDACTED] – the Inquiry has not elicited any evidence that suggests that he knew, or suspected, that prisoners were being killed.

[REDACTED]

27. [REDACTED] admitted to [REDACTED], but says [REDACTED]. In his interview of [REDACTED] was asked if during Rotation [REDACTED] there was there any mission which gave him any cause for concern that there had been something go wrong in terms of compliance with the LOAC. His reply was:¹⁹

A. [REDACTED]

28. He was asked if he had any suspicion, or any sense of something being amiss, at any stage during that operation, and replied:

A. [REDACTED]
[REDACTED]
[REDACTED]²⁰

29. In the later interview, following discussion on both occasions of the [REDACTED] at [REDACTED] and the [REDACTED] operation of [REDACTED], [REDACTED] was asked if he was comfortable with what was going on during Rotation [REDACTED]. His reply was:

¹⁹ Reference 14 - [REDACTED] TROI of [REDACTED]

²⁰ [REDACTED] TROI of [REDACTED]

A [REDACTED] .²¹

30. It is reasonably clear – from his evidence, and from the evidence of [REDACTED], and from the paltry battle damage assessment (BDA) – [REDACTED]. It appears, from the evidence of [REDACTED], that [REDACTED].
[REDACTED]. The probable reason for that is the trust in subordinates to which [REDACTED] had adverted, as mentioned above, coupled with the reluctance, explained below, of those inside the wire to question the accounts given by those on the ground.

31. As to the [REDACTED] mission, the circumstances and co-incidence of the name of the EKIA and that of [REDACTED], and the contemporaneous intelligence report of an execution, were so striking as to call for further inquiry. But such an inquiry was undertaken, in the form of a quick assessment, which miscarried for reasons explained elsewhere: [REDACTED]
[REDACTED] (QAO). There is some evidence that [REDACTED] [REDACTED].
[REDACTED].

32. The notice given to [REDACTED] in respect of the [REDACTED] incident and his response to it has been dealt with in the relevant chapter. However, [REDACTED]
[REDACTED]²²

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²¹ [REDACTED] TROI of [REDACTED]
²² [REDACTED] TROI of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

33. Later in the first interview, [REDACTED] was asked what happened about the use of throwdowns on his rotation ([REDACTED]), [REDACTED], and said that [REDACTED]

[REDACTED]²³

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²³ [REDACTED] TROI of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

34. In connection with the [REDACTED] [REDACTED] [REDACTED] provided this evidence:²⁴

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁴ [REDACTED] TROI of [REDACTED]

only that he was aware of the possible use of [REDACTED] throwdowns, that he had never spoken with anyone about their use, never authorised their use, never observed their use and that his statements to the Inquiry, [REDACTED] [REDACTED] [REDACTED]

[REDACTED]
[REDACTED].

38. [REDACTED]'s response, as to his knowledge of throwdowns, [REDACTED]
[REDACTED].²⁶

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

39. In the light of that evidence, [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED]

40. Nonetheless, the Inquiry has not elicited evidence that [REDACTED] knew, or suspected, that members of his troop were engaging in wilful unlawful killings. His Troop sergeant, [REDACTED]
[REDACTED], thought that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

But when the Inquiry observed that there was evidence of [REDACTED]
[REDACTED]
[REDACTED], he commented:

[REDACTED]
[REDACTED]

²⁶ [REDACTED] TROI of [REDACTED]

Review

41. Although the Inquiry has not elicited evidence that any troop or platoon commander actually knew or positively suspected that subordinates were committing war crimes, the question remains whether they failed to take reasonable steps which would have discovered or prevented them.

42. It is easy now, with the benefit of retrospectivity, to identify steps that could have been taken and things that could have been done. However, in judging the reasonableness of conduct at the time, it needs to be borne in mind that few would have imagined some of our elite soldiers would engage in the conduct that has been described; for that reason there would not have been a significant index of suspicion, rather the first natural response would have been disbelief. Secondly, the detailed superintendence and control of subordinates is inconsistent with the theory of mission command espoused by the Australian Army, whereby subordinates are empowered and entrusted to implement, in their own way, their superior commander's intent. That is all the more so in a Special Forces context where high levels of responsibility and independence are entrusted relatively low levels, in particular to patrol commanders.

43. Moreover, an accumulation of matters, all of them apparently for sound reasons and none inherently sinister, combined to ensure that troop commanders were not well-positioned – structurally or geographically – to discover anything that the patrol commanders did not want them to know.

44. First, mission planning was led by the lead patrol commander, with the Troop Commander usually located in an overwatch position, away from the objective, while the operation on the ground was effectively driven by the lead patrol commander. There was no reason to be suspicious of these arrangements *per se*: they accorded with the planning procedures that had evolved during the era when the focus was on domestic counter-terrorism operations, and it made perfectly good tactical sense for the Troop Commander to be in a position where he was out of the immediate fight on the ground, with good communications, and optimally placed to co-ordinate air support. However, as it happened, that also meant that the Troop Commander generally did not have visibility of events on the objective, let alone a significant ability to control them, at least until the compound was secure and he was called forward for a rendezvous, which did not invariably occur.

45. Secondly, information was closely held, within individual patrols. Even within a patrol, not every member would necessarily know of events. This is illustrated, for example, by the circumstance that [REDACTED] [REDACTED] [REDACTED] [REDACTED]. On a wider level, it is illustrated by the circumstance that many of the incidents in which it appears that [REDACTED] were involved during SOTG [REDACTED] were not generally known outside [REDACTED]. For example, the [REDACTED], [REDACTED], [REDACTED], [REDACTED] there is all the more reason to accept that the Troop Headquarters was unaware. It is also illustrated by the circumstance that while the events of [REDACTED] [REDACTED] involving [REDACTED] soon became known in some quarters, they did not in others: for example [REDACTED], who, like [REDACTED], was a strong and outspoken critic of [REDACTED] and [REDACTED], and [REDACTED]

[REDACTED]. His approach was probably typical. With the benefit of hindsight, it demonstrates the erosion of the authority of the officers, and their insecurity in the environment of powerful NCOs and experienced operators. It should not be considered unreasonable, or a sign of lack of trust, for a commander to [REDACTED]

[REDACTED] might have deterred the use of throwdowns. But while [REDACTED] might have detected an AK-47, whether it would have detected a pistol, grenade or ICOM is another matter, and it certainly would not have detected a weapon or equipment conveniently found on target.

52. In considering performance of duty, the standard to be applied is to ask what a reasonably capable and careful person of the officer's seniority and experience in a similar role in a similar operational environment, would have done (or refrained from doing).²⁹ Applying that standard, the Inquiry is not satisfied that there was a failure by troop or platoon commanders to take reasonable steps that would have prevented or discovered the commission of the war crimes referred to in this Report.

Squadron/Company Headquarters

53. If troop/platoon commanders did not know or suspect that some of their subordinates were engaging in criminal conduct, then the squadron/company commanders were even less likely to do so. Although there were exceptions, particularly in earlier years, it was rare for them to go 'outside the wire' on missions in the case of FE [REDACTED] though it was more common in FE [REDACTED], which was a company strength FE. This was not a matter of choice, but of policy: particularly in the case of FE [REDACTED], the squadron commander's responsibility was in the Special Operations Command Centre, not in the field.

54. There were additional impediments to Squadron/Company commanders learning, or even becoming suspicious, that some members of their FE might be engaging in criminal conduct. All of these factors were apparently innocent and reasonable at the time, but they had the effect that opportunities which might otherwise have imparted relevant knowledge or suspicion did not arise.

55. First, while it might be thought that the presence of intelligence, surveillance, and reconnaissance (ISR) assets, particularly in the air, would provide ongoing observation and imagery of events on target, the ISR was typically pushed 'off target' once the FE was there. Various legitimate reasons were given for why this was so. One – and perhaps the least persuasive – was so that others with access to the ISR would not be able to observe tactics, techniques and procedures. Others, which are entirely reasonable, were that once the FE was on target it was a better use of the ISR to monitor escape routes for potential 'squirters', and approaches for potential threats. However, the result was that the ISR did not provide visibility of what happened on target. The Inquiry has confirmed this in its review of many hours of Heron UAV [Unmanned Aerial Vehicle] imagery.

²⁹ Reference 17 - *Lamperd v The Commonwealth* 46 ALR 371 (at [378])

56. Secondly, a practice evolved of delaying the reporting of engagements until after the FE had returned to Multinational Base – Tarin Kowt. The Inquiry has observed a consistent trend, particularly across SOTG [REDACTED], SOTG [REDACTED], SOTG [REDACTED], SOTG [REDACTED], and SOTG [REDACTED], of engagements, EKIA, and cache finds occurring during operations not being reported contemporaneously through 5W [who, what, why, when, where] reports, but instead reported only after the FE had returned to Tarin Kowt. Some witnesses explained that there was no need to make the 5W reports any earlier, and that they would consolidate the incident report to describe an engagement and any other operational incident once they returned to Tarin Kowt and then enter it in Wyvern and Sametime Chat. Some witnesses said that the first report of an incident was often wrong, and so it was better to wait and get it right. This practice, though not universal, appears to have become a virtual SOP. This ‘SOP’ does not accord with long-standing practices and procedures that are intended to ensure that commanders are kept informed in as near to real-time as possible of what is happening with their troops on the ground, to enable timely adjustments to planning, to ensure troops have the support they need when they need it, and to analyse and react to intelligence which is almost always time-sensitive. For all those reasons it is important to report operational incidents at the first opportunity, even if incomplete, so higher headquarters is aware. Contemporaneous operational incident reporting is an essential contributing factor to effective tactical management on the battlefield – it is not a post-operational administrative task. The additional consequence of not adhering to and insisting on that practice was to create the opportunity to sort a story out in the post-mission hotwash first, including the opportunity to fabricate a narrative of what happened in circumstances where an engagement was not legitimate or where there might be questions asked about it. The practice of delaying incident reporting - particularly the reporting of engagements and EKIA - until post-mission, has the potential to adversely impact on tactical battlefield management, provides an opportunity to falsify engagement reports in the post-mission hotwash and After Action Review (AAR), is inconsistent with professional military standards, and must cease.

57. Thirdly, in the AAR process, through which the FE commander and Operations Officer (OPSO) would be briefed on how the operation unfolded and its outcomes, and provided with the information to complete the OPSUM, the first step was typically a ‘hotwash’ in which the members of the troop or platoon would meet and sort out the facts, before the patrol commanders would participate in the AAR with the Officer Commanding (OC) and OPSO to complete the OPSUM. This facilitated the sanitisation of information before it came to the notice of commanders at squadron/company level. Again, this was not necessarily or obviously sinister: it made sense for patrol commanders and team leaders to obtain their members’ perspectives and consolidate them, and reconcile discrepancies, before briefing the OC. However, it also facilitated the control and restriction of information provided to those compiling the OPSUM. Some OPSOs commented that [REDACTED]

³⁰

58. Fourthly, not only did those ‘inside the wire’ who prepared the reports have to rely on the information provided by those outside, but the Inquiry is of the view there was a widely held view, propagated by the operators but accepted by the staff, that those who were not on the ground were in no position and had no right to question what happened on the ground, where operators were putting their lives on the line on a daily basis. This contributed to a reluctance to question accounts provided by those who provided them. There were those in the Special Operations Command and Control Element who had suspicions about what they were told: [REDACTED]

³⁰ Reference 18 [REDACTED] TROI [REDACTED]

[REDACTED]

59. As to throwdowns, there is some evidence of [REDACTED]. By the time of his SOTG [REDACTED] deployment, [REDACTED] expected that [REDACTED]. Regarding the use of throwdowns, [REDACTED] gave this evidence:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

60. He said that [REDACTED].

61. As [REDACTED] intimated, [REDACTED]. However, it does not equate to knowledge, or even suspicion, of wilful unlawful killings:

[REDACTED]

³¹ Reference 19 - [REDACTED] TROI [REDACTED]

62. There is no evidence that Squadron/Company commanders knew or suspected that their subordinates were engaging in the wilful unlawful killing of non-combatants or person *hors-de-combat*.

SOTG Headquarters

63. If the commission of war crimes was not known or suspected at FE level, then it is even less likely to have been so at the more remote SOTG HQ. SOTG Commanding Officers would even less rarely be outside the wire on an operation than Squadron/Company commanders; again, this was a matter of policy, and in any event, there was no reason for a Task Group Commanding Officer to be in the field when each FE operated independently of the other.

64. Certainly, there were reported allegations that came to attention. Perhaps the most notable one is the [REDACTED] incident, because the allegation was, in substance, of an execution. The response of the Commanding Officer to that was, appropriately, to direct a QA. While a mind with a greater index of suspicion at the time might well have questioned the QA that resulted, it has to be remembered that the idea that Australian soldiers would be wilfully killing non-combatants would at the time have been heretical. There was, therefore, a predisposition to accept that the operational reporting of events was an accurate and honest account of what had occurred; and that the evidence given by operators to the QAOs and IOIs was truthful. Moreover, by at least early 2012, there was a consistent presumption on the part of the chain of command and a number of inquiry personnel that complaints by local elders were part of an insurgent strategy, and that the elders had either been coerced or were a willing party to supporting insurgent messaging; or were driven by compensation. This was reflected in the manner in which the three complaints investigated by the [REDACTED] IOI were handled at multiple levels, and also in the Commanding Officer's comments on the [REDACTED]. The evidentiary basis for that presumption now appears to be slight, but that does not deny that it was prevalent at the time.

65. It is particularly noteworthy that many, whose evidence the Inquiry has no reason to doubt – not least because they were themselves suspicious – spoke highly of the probity and professionalism of SOTG [REDACTED] Commanding Officer [REDACTED]. His XO for SOTG [REDACTED], [REDACTED], was one. Another was [REDACTED], who described him as 'impeccable' and 'professional'.³² The [REDACTED] who took the [REDACTED] matter to him found him always responsive, and that he took the [REDACTED] matter seriously and acted immediately when it was taken to him.

Headquarters Joint Task Force 633 and Joint Operations Command

66. The Inquiry has elicited no evidence of knowledge, at HQ JTF 633, Joint Operations Command, or for that matter Australian Defence Headquarters, that war crimes were being committed, or of any failure to take reasonable steps that would have prevented or discovered them. To the contrary, there is ample evidence of endeavours to assure themselves of the accuracy of reported facts. When civilian casualty complaints or allegations were received, they were acted upon, and investigated, and their status kept under review. Initial responses from SOTG were far from invariably accepted. Inquiry Officer Inquiries (IOI), and ADF Investigative Service investigations, were routinely directed.

³² Reference 20 - [REDACTED] TROI of [REDACTED]

They produced apparently comprehensive reports. Still, not infrequently, further investigation, inquiry and report would be directed.

67. When the repeated use of terminology such as ‘manoeuvring tactically to a position of advantage’ did attract attention, the [REDACTED] and [REDACTED] IOIs were both directed to examine it; the result was findings to the effect that insurgent TTPs provided a proper basis for making judgments about when a person was directly participating in hostilities.

68. The [REDACTED] incident provides a paradigm, and a useful one because it is already in the public domain. The SOTG QAO was deceived by those involved in the incident. HQ JTF 633 was dissatisfied with the QA, pressed for more information, and received a truculent and unhelpful response. Although no-one really suspected the truth that is now plain to see, CJTF 633 recommended an Inquiry Officer Inquiry, which CJOPS appointed. That inquiry failed to get to the truth for a number of reasons, but notably because it too was deceived by the operators involved.

Discussion

69. Not for want of trying, the Inquiry has found no evidence that there was knowledge, or even reasonable suspicion, at troop/platoon, squadron/company or task group command level, let alone at higher levels such as Commander JTF 633, Joint Operations Command, or Australian Defence Headquarters, that war crimes were being committed under their command. The possibility has been tested to the point of procedural fairness notices to several troop commanders, and having considered the available evidence as a whole, in the light of those responses, the Inquiry is reasonably satisfied that commanders at those levels did not have actual knowledge of, and were not recklessly indifferent to, the commission of war crimes. There may well have been a sense, at least up to Squadron level, not least because of the numbers of EKIA, and the number of them who were found to be unarmed, or armed with only a pistol, grenade or ICOM, but to have been ‘manoeuvring tactically against the FE’, that the ROE were being exploited, and lethal force was being used very readily when perhaps it was not always necessary. But that falls well short of knowledge, information, or even suspicion that prisoners were being killed.

70. However, the absence of knowledge or even suspicion that war crimes were being committed by some of their subordinates does not relieve commanders of all responsibility, as distinct from criminal responsibility, for the crimes of their subordinates. The Inquiry engaged Professor David Whetham, Professor of Ethics and the Military Profession at King’s College London, and Director of the King’s Centre for Military Ethics, to provide an independent professional assessment of this and other issues, for which purpose he was appointed an Assistant Inspector-General to assist the Inquiry. His report is at Annex A, and the following discussion is informed, though not solely, by it.

71. *First*, quite apart from the question of war crimes, ethical leadership was compromised by its toleration, acceptance and participation in a widespread disregard for behavioural norms: such as drinking on operations, the Fat Lady’s Arms, and lax standards of dress, personal hygiene and behaviour – and not only on operations – which would not have been tolerated elsewhere in Army. This significantly contributed to what Professor Whetham describes as a kind of collective organisational blindness, where the collective sacrifice on operations was seen to justify certain excesses.

72. *Secondly*, there was at least an ‘abandoned curiosity’ in matters which ought to have attracted attention. As has been mentioned, for a commander to repose trust in what a subordinate reports is both natural and proper. But while this may be so, a commander also cannot abandon curiosity for understanding deeper aspects of that which may be possible. A commander must maintain balance between fostering and sustaining trust and confidence, while retaining an appropriate measure of situational awareness. It should not undermine proper trust, for subordinates to understand that a commander has a need and obligation to scrutinise events. Proper trust is not enhanced by blindness to, or avoidance of, inquiry. As Professor Whetham observes, there was an excessive willingness of many to accept reports at face value. The Inquiry would add that there was no index of suspicion (which is to an extent understandable, because no-one would have expected that there were Special Forces operators wilfully killing non-combatants), and there was a significant reluctance to challenge the accounts given by those on the ground. The notion that those who were not on the ground were in no position and had no right to question what happened on the ground where operators were putting their lives on the line on a daily basis, infected the attitude of commanders at squadron/company level, and above. This contributed to:

- a. those who were ‘behind the wire’ being reluctant to question those who were on the ground, but in turn protective of their FE by being resistant to obtaining full and accurate accounts for provision to higher headquarters, and embellishing operational reporting to demonstrate the legitimacy of engagements;
- b. higher headquarters (SOTG Forward Command Element and even more so HQ JTF 633) being denied an accurate picture of events, and being given no reason to suspect that they were not as reported; and
- c. those who were ‘on the ground’ being able to act in the knowledge that their immediate superiors in the FE headquarters would be reluctant to call into question their professionalism and propriety, and unable to contradict their accounts.

73. *Thirdly*, leadership, particularly at the Squadron/Company but also at the SOTG level, contributed to the obfuscation, through the manner in which events were reported. It was seen as more important to report in terms that met the expectation of higher command (such as, in the period 2012-2013, the practically universal description of operations as [REDACTED] and the attribution of outcomes to the Wakunish partner force, when in reality they were not involved in planning, were not included in orders, were not told about the objective or destination in advance, there was a limited level of trust of them, those who inserted on the first turn operated in effect as a patrol under the command of their Australian mentor, and most inserted on the second turn, also under the effective command of an Australian mentor); but for present purposes more relevantly that any engagement was described in terms that would avoid questions being asked by higher headquarters. [REDACTED], FE- [REDACTED] OPSO on SOTG [REDACTED], described it this way, when being questioned about the operational reporting of the [REDACTED] incident:³³

[REDACTED]

³³ Reference 21 - [REDACTED] TROI [REDACTED]



74. Driven by a desire to avoid attracting questions from higher headquarters, and a sense of entitlement arising from the belief that it was their forces who were doing the hard and dangerous work, only to be questioned by ignorant staff officers far from the front line, operational reporting was bland and stereotyped, even though sometimes in apparent detail. Aspects which might have attracted attention or questions were sanitised, and in many cases the reports bore no real resemblance to actual events. Formulas such as ‘an insurgent was positively identified manoeuvring tactically against the FE to a position of advantage’, were routinely adopted, as they sufficiently demonstrated compliance with ROE. As a result, patrol commanders came to understand that if they reported an engagement in those terms, it would not be questioned, which enabled a belief that they could engage almost at will a person who was not completely passive. This was one manifestation of what [REDACTED], OC FE [REDACTED] on SOTG [REDACTED], described as [REDACTED], which became almost more important than the war against the Taliban.

75. *Fourthly*, commanders were over-protective of their subordinates. This was another aspect of the [REDACTED]. The Inquiry appreciates that this is a difficult judgment: commanders should be protective of their subordinates, because it is a critical function of a commander to take care for those under his or her command, and doing so is also central to gaining and retaining the trust of subordinates. However, that does not extend to shielding subordinates from appropriate scrutiny, especially by duly constituted and appointment assessments, inquiries and investigations. It is clear that there was a sense at the time that SOTG and its members were ‘over-investigated’, and indeed the Inquiry encountered that sentiment itself, particularly in its earlier days. One contributing factor was the frequent complaints of detainees that they had been mistreated upon capture, leading to incessant quick assessments. Another was that some inquiries were perceived to be into matters of minor consequence. However, it can now be seen that many major inquiries, into civilian casualties, were entirely justified, but met with obfuscation and deceit. This contributed to a sense that the operators were untouchable, as the investigators and inquiry officers were obstructed, deflected and deceived.

76. *Fifthly*, command accepted with little question that complaints by local elders of civilian casualty incidents were an insurgent tactic, in which the elders were either complicit or coerced, and/or motivated by compensation; yet there is little evidence to support this: to the contrary, many of the complaints now appear to have been legitimate.

77. *Sixthly*, there was the embracing of what Professor Whetham calls ‘inappropriate metrics of success’, or more crudely the EKIA count. While it was not officially a KPI, many regarded it that way. As [REDACTED] put it, [REDACTED]

already well-established several months into their tour; he described it as [REDACTED] [REDACTED]’.

83. They were in an environment in which the NCOs had achieved ascendancy. They were not well-mentored, but were rather left to swim or sink. As Professor Whetham observes, the cost of not fitting in was high, in that for a junior officer, not being accepted by their soldiers could mean the end of a Special Forces career: as [REDACTED] said, [REDACTED] [REDACTED]’. In that context, given the arduous selection process and how hard it is to get there in the first place, it is to an extent understandable that some might not be prepared to risk that position at the time to try to stop what was seen as an organisationally routine practice such as throwdowns.

84. Those who did try to wrestle back some control were ostracised, and often did not receive the support of superior officers. Indeed, this was not confined to troop level: a squadron commander who insisted on proper standards (and during whose command of FE- [REDACTED] no relevant impropriety has emerged) was permitted to be nominated by NCOs as ‘Cock of the Year’. This attitude fostered the empowerment of the patrol commanders and, thus, the disempowerment of those who might control and restrain them, and the ‘warrior culture’ that some, though by no means all, of the patrol commanders embraced. A substantial indirect responsibility falls upon those in SASR who embraced or fostered the ‘warrior culture’ and the clique of NCOs who propagated it. That responsibility is to some extent shared by those who, in misconceived loyalty to their Regiment, or their mates, have not been prepared to ‘call out’ criminal conduct or, even to this day, decline to accept that it occurred in the face of incontrovertible evidence, or seek to offer obscure and unconvincing justifications and mitigations for it.

85. All that said, it was at the patrol commander level that the criminal behaviour was conceived, committed, continued, and concealed. But for a small number of patrol commanders, and their protégées, it would not have been thought of, it would not have begun, it would not have continued, and, in any event, it would have been discovered. It is overwhelmingly at that level that responsibility resides.

THE DECORATIONS

86. Reference has been made, above, to the notion that commanders are recognised and held responsible for the achievements and failures of their units, and that all members of a unit also share in collective responsibility.

The Meritorious Unit Citation

87. The Meritorious Unit Citation is a collective group decoration awarded to a unit for sustained outstanding service in warlike operations. It was awarded to Task Force 66 (Special Operations Task Groups IV – XX) on 26 January 2015, ‘*For sustained and outstanding warlike operational service in Afghanistan from 30 April 2007 to 31 December 2013, through the conduct of counter insurgency operations in support of the International Security Assistance Force*’ The citation states:

Over a six-year period, Task Force 66 rendered outstanding service on operations in Afghanistan where it conducted highly successful counter insurgency operations within Uruzgan and surrounding provinces in support of the International Security Assistance Force. The Task Force's

outstanding performance against an unrelenting, cunning and ruthless enemy, in an unforgiving environment, was achieved through the collective efforts of every member of the contingent over the duration of the commitment. The superior combat operations results of Task Group 66 further emphasised the Group's exceptional courage and commitment.

88. Although many members of SOTG demonstrated great courage and commitment, and although it had considerable achievements, what is now known must disentitle the unit as a whole to qualification for recognition for sustained outstanding service. It has to be said that what this Report discloses is disgraceful, not meritorious. Revocation of the award of the meritorious unit citation would be an effective demonstration of the collective responsibility and accountability of SOTG as a whole for those events. The Inquiry recommends that the award of the Meritorious Unit Citation to SOTG (TF 66) be revoked.

The Distinguished Service decorations

89. All but two of the SOTG Commanding Officers during the relevant period were decorated for their command, receiving the Distinguished Service Cross. Many squadron/company commanders, and some troop/platoon commanders, were also decorated.

90. Of the two Commanding Officers who were not decorated, one was Commanding Officer at the time of the Commando civilian casualty incident in February 2009, and the other at the time of the severed hands incident in April 2013. That is unlikely to have been coincidental. Although there was no suggestion of personal responsibility on their part, the occurrence of those incidents 'on their watch' was enough to disqualify them. Those events were less grave and culpable than many referred to in this Report.

91. In that light, it must be said that it is inconceivable that if what is now known about events on SOTG ■, SOTG ■, SOTG ■, SOTG ■, and SOTG ■ had then been known, those in command at troop/platoon, squadron/company or task group level would have been decorated. One way of acknowledging command responsibility for what happened on those rotations would be to review the award of decorations to those in command positions during them.

92. Although that observation applies to SOTG Commanding Officers, it does so not because of personal fault, but because they are responsible for what happened 'on their watch'. The observation applies much more strongly to the Commanding Officers of SASR during the period under which the 'warrior culture' which enabled the criminal conduct flourished, because unlike the SOTG Commanding Officers they were in a position to influence and shape the culture of their commands. The evidence does not support a similar conclusion in respect of either Commando Regiment.

93. The Inquiry sees the command responsibility of Commander JTF 633 in a different light to that of Commanding Officer SOTG, for a number of reasons. First, JTF 633 was not positioned, organisationally or geographically, to influence and control SOTG operations: its 'national command' function did not include operational command. While those who had operational command are rightly held responsible and accountable for the deeds of their subordinates, the principle that informs that is that ultimately they command and control what happens under their command. Without operational command, JTF 633 did not have the degree of command and control over SOTG on which command responsibility depends. Secondly, commanders and headquarters at

JTF 633, JOC and ADFHQ appear to have responded appropriately and diligently when relevant information and allegations came to their attention, and to have made persistent and genuine endeavours to find the facts through QAs, following up with further queries, and Inquiry Officer Inquiries. Their attempts were frustrated by outright deceit by those who knew the truth, and, not infrequently, misguided resistance to inquiries and investigations by their superiors.

94. Unlike a collective award such as the Meritorious Unit Citation, the cancellation of an individual award such as a DSC impacts on the status and reputation of the individual concerned, could not be undertaken on a broad-brush collective basis, and would require procedural fairness in each individual case. However, it is difficult to see how any commander at SOTG, squadron/company or troop/platoon level, under whose command (or 'on whose watch') any substantiated incident referred to in this Report occurred, could in good conscience retain a distinguished service award in respect of that command. Without limiting that observation, the Inquiry recommends that the award of decorations to those in command positions up to and including SOTG Headquarters during SOTG ■, SOTG ■, SOTG ■, SOTG ■ and SOTG ■ be reviewed.

CONCLUSION

95. It was at the patrol commander level that the criminal behaviour was conceived, committed, continued, and concealed. It is overwhelmingly at that level that responsibility resides.

96. The Inquiry has found no evidence that there was knowledge of, or reckless indifference to, the commission of war crimes, on the part of commanders at troop/platoon, squadron/company or task group headquarters level, let alone at higher levels such as Commander JTF 633, Joint Operations Command, or Australian Defence Headquarters. Nor is the Inquiry of the view that there was a failure at any of those levels to take reasonable steps that would have prevented or detected the commission of war crimes.

97. There may well have been a sense, at least at Squadron level, not least because of the numbers of EKIA, and the number of them who were found to be unarmed, or armed with only a pistol, grenade or ICOM, but to have been 'manoeuvring tactically against the FE', that the ROE were being exploited, and lethal force was being used when perhaps it was not always necessary. But that falls well short of knowledge, information, or even suspicion that non-combatants were being deliberately killed.

98. Commanders nonetheless bear some responsibility for contributing to the environment in which war crimes were committed, most notably those in SASR who embraced or fostered the 'warrior culture' and empowered, or did not restrain, the clique of NCOs who propagated it. That responsibility is to some extent shared by those who, in misconceived loyalty to their Regiment, or their mates, have not been prepared to 'call out' criminal conduct or, even to this day, decline to accept that it occurred in the face of incontrovertible evidence, or seek to offer obscure justifications and mitigations for it.

Findings

- *The criminal behaviour described in this Report was conceived, committed, continued, and concealed at patrol commander level, and it is overwhelmingly at that level that responsibility resides.*

- *The Inquiry recommends that the award of decorations to those in command positions in SASR during the period 2008 to 2012 be reviewed.*

References:

1. Chapter 1.10, Applicable Law of Armed Conflict.
2. 4 Law Reports of Trials of War Criminals, trial of General Tomoyuki Yamashita, United Nations War Crimes Commission (1948) 1 at 35.
3. 8 Law Reports of Trials of War Criminals, *US v List 34* (1949); 11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 757 (1950).
4. *United States v Von Leeb (High Command Case)*, 11 Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10 (1951) 462 543-544.
5. *Prosecutor v Strugar* ICTY IT-01-42-T.
6. 'Failure to Halt, Prevent or Punish: the Doctrine for Command Responsibility for War Crimes,' Andrew Mitchel, p 384.
7. *Bemba Case* ICC 01/05-01/08.
8. [REDACTED] TROI of [REDACTED]
9. Chapter 2.29 [REDACTED]
10. [REDACTED] TROI of [REDACTED]
11. [REDACTED] Submission of [REDACTED] [REDACTED] (1) [REDACTED] to IGADF RE: IGADF Inquiry · NtPAP response [REDACTED]
12. [REDACTED] Submission of [REDACTED] || [REDACTED] - Response to Procedural Fairness Notice - [REDACTED]
13. Chapter 2.35: [REDACTED]
14. [REDACTED] TROI of [REDACTED]
15. [REDACTED] TROI of [REDACTED]
16. [REDACTED] TROI of [REDACTED]
17. *Lamperd v The Commonwealth* 46 ALR 371 (at [378])
18. [REDACTED] TROI of [REDACTED]
19. [REDACTED] TROI of [REDACTED]
20. [REDACTED] TROI of [REDACTED]
21. [REDACTED] TROI of [REDACTED]

Annex:

- A. Whetham Report

Special Operations Command: Leadership and Ethics Review

Professor David Whetham, King's College London, Assistant Inspector-General of the Australian Defence Force, July 2020

Executive Summary

This review into the leadership and ethics of Special Operations Command (SOCOMD) personnel during the period 2007 to 2014 draws a picture of a gradual erosion of standards over time resulting in a culture within which, ultimately, war crimes were tolerated. This was contributed to by: the character and tempo of the deployments (and redeployments); inadequate training and support; inappropriate metrics of success imposed from above warping behaviour within the Special Forces (SF) Task Group; a lack of clarity about purpose and gradual loss of confidence in both the mission and the higher chain of command; a fractured, compartmentalised and dysfunctional leadership, and; a general lack of effective oversight aided and abetted by the very people who should have been providing it. This combination of factors led to a normalisation over time of behaviours that should never have been considered normal and ultimately, the effective covering up of, or wilful blindness to, the perpetration of war crimes by some soldiers.

Purpose, Scope and Methodology

As directed by Major General (MAJGEN) the Honourable Justice Paul Brereton, this report is concerned solely with why, during the period 2007 to 2014, Australian military personnel:

- **knowingly committed clear and unambiguous acts of murder**
- **why these actions were apparently reported by no-one**
- **if senior commanders did not know about those incidents, could they, or should they have done?**

The purpose of this research paper is not to establish the evidential basis to support specific allegations of wrongdoing. While we will have to see how any criminal investigations turn out, the evidence already in the public domain,¹ along with the evidence gathered for the Inquiry that has been shared with me as part of creating this report strongly suggests that war crimes were committed, that we are not talking about just a tiny number of isolated incidents, and that their commission probably culminated in the period [REDACTED] 2012 to [REDACTED] 2013.

It is important to note at the start that an explanation is not the same as an excuse. For some of the reasoning below, it may appear as if this paper is attempting to justify or excuse the behaviour of certain SOCOMD personnel. This is not the case - if there is a desire to find out why things happened, and how to prevent them from happening again, it is necessary to examine causes. At best, some of the situational factors that are discussed amount to a degree of mitigation rather than a defence.

¹ [REDACTED]

However, it is important to note that the extensive interview transcripts consulted for this report were derived from a process in which the normal rules of evidence do not apply – for example, hearsay evidence was acceptable. This reflects an inquisitorial process, aimed at finding the truth rather than necessarily providing evidence to the standard required to secure a criminal conviction (ie, beyond reasonable doubt). Amongst other sources, I have also had access to the SOCOMD Culture Report informed by the extensive anonymised, candid, and lengthy conversations carried out by Dr Samantha Crompvoets across the wider Army and then specifically within the Special Forces community. Across the range of available sources, I am satisfied that they represent ‘multiple authentication points’, providing a sufficient evidential base to be able to draw some reliable conclusions within those caveats.² I have attempted to preserve the words of the interviewees where possible as I believe the language adds both richness and depth to the analysis and should help the reader get a better understanding of what happened. However, I am very aware that due to the focus of the review and the nature of the evidence consulted, the voice of both the victims and their families is entirely absent.

Due to this report being narrow in focus, it should be read alongside and understood within the context of the full Inquiry Report by MAJGEN Paul Brereton.

Author

The author of this research paper is Dr David Whetham, Professor of Ethics and the Military Profession at King’s College London, and the Director of the King’s Centre for Military Ethics, appointed as an Assistant Inspector-General of the Australian Defence Force (IGADF) for the purposes of completing this Report.³ Since 2003 I have delivered or coordinated the military ethics component of courses for between two and three thousand British and international officers a year at the United Kingdom’s (UK) Joint Services Command and Staff College, covering the full breadth of officer professional training and education post commissioning. I have held Visiting Fellowships at the Stockdale Center for Ethical Leadership, United States (US) Naval Academy Annapolis, the Centre for Defence Leadership and Ethics at the Australian Defence College in Canberra and I am currently a Visiting Professorial Fellow at the University of New South Wales.

I co-founded the European Chapter of the International Society for Military Ethics, and my wider defence engagement includes working regularly with the armed forces in Australia, Ireland, the US, Canada, Brunei, Estonia, and Romania, amongst others, and since 2012, I have been engaged with the Colombian Armed Forces introducing a full Military Ethics curriculum. From a Special Forces perspective, in the UK I was involved in the ethics review conducted by 22 Special Air Service which contributed to the new Regimental Handbook in 2018, and have supported ethical development with both the Royal Marines and Special Boat Service.

My teaching, extensive publications in the area of military ethics, understanding and approach have all been heavily influenced by the experience and feedback of the practitioners that I engage with on a daily basis during my professional career in this area.

² Reference 2 - [REDACTED]

³ Reference 3 - [https://kclpure.kcl.ac.uk/portal/en/persons/david-whetham\(6a382e7f-1960-4031-93ef-227750f2fe34\).html](https://kclpure.kcl.ac.uk/portal/en/persons/david-whetham(6a382e7f-1960-4031-93ef-227750f2fe34).html)

During the period 2007-2014, why did Australian military personnel knowingly commit clear and unambiguous acts of murder?

1. Understanding what is in the mind of the soldiers is impossible. What is clear, however, is that Australian SOCOMD soldiers are not the only soldiers to have ever been guilty of aberrant and murderous conduct during war. [REDACTED]

[REDACTED] I have attempted to categorise the key factors into three broad areas: bad apples, training, and application of rules. While I describe these factors individually, it is the aggregation of all them together that created the cauldron of malfeasance within which the Australian SOCOMD soldiers operated.

Bad apples?

2. Applying Ockham's razor to the question, and seeking the least complicated answer, it is at least possible that all of the crimes were carried out by a tiny number of 'bad apples'. After all, this is a common theme from various military inquiries and creates the impression that once those individuals are dealt with, the military institution can return to business as usual.⁴

3. There is no doubting that some people are more likely to commit war crimes than others. There is a significant body of evidence that links traits associated with psychopathy, or antisocial tendencies, with unethical behaviours and the committing of atrocities.⁵ In 2012, MacManus et al showed that UK military personnel who had demonstrated antisocial behaviour prior to enlistment were likely to continue on the same trajectory after they joined the military, with an increased risk of negative behaviour, including outbursts of anger and assault.⁶ This, and other research, has led some to conclude that psychopathy may be the most important predictor of unethical military behaviour. In the future, it might be possible to predict, and therefore screen out and prevent, moral transgressions on operations based on the presence of malevolent individual difference factors, specifically: the 'Dark Triad' of Machiavellianism, narcissism and psychopathy; and socio-political attitudes relating to social-dominance orientation; and right-wing authoritarianism.⁷ One US study suggests that members of the military are twice as likely as the general public to have some sort of Antisocial Personality Disorder, and there is no reason to think that this ratio would be exclusive to the US military.⁸

⁴ Reference 4 - P Rowe, 'Military Misconduct during International Armed Operations: 'Bad Apples' or Systemic Failure?', *Journal of Conflict and Security Law*, 13.2 (2008): 165-189.

⁵ Reference 5 - Darren W. Holowka et al, 'Associations among personality, combat exposure and wartime atrocities,' *Psychology of Violence* 2, no. 3 (2012): 260-272.

⁶ Reference 6 - Deirdre MacManus et al, 'Impact of pre-enlistment antisocial behaviour on behavioural outcomes among UK military personnel,' *Social Psychiatry and Psychiatric Epidemiology*, 47 (2012): 1353-1358.

⁷ Reference 7 - M Lind n, F Bjorklund, M Backstrom, D Messervey, D Whetham, 'A latent core of dark traits explains individual differences in peacekeepers' unethical attitudes and conduct,' *Military Psychology* 31, no. 6 (2019): 499-509. The US Mental Health Advisory Team IV (MHAT) survey for Operation Iraqi Freedom found that soldiers were twice as likely to mistreat non-combatants if they had high levels of anger or screened positive for 'mental health problems'. Office of the Surgeon General, 'Mental Health Advisory Team (MHAT) IV Operation Iraqi Freedom 05-07 Final Report,' United States Army Medical Command, 17 November 2006

⁸ Reference 8 - American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th Edition (Arlington: American Psychiatric Association, 2013), 301.7; Stephen C. Messer et al, 'Projecting mental disorder

4. If there is a concentration of people predisposed to a particular type of behaviour in one place, it seems obvious that there is a greater chance of seeing that behaviour. For this author, it is impossible to know if the Special Forces selection and training processes would have removed such people or condensed them. Likewise, it is impossible to know if screening would have helped prevent the behaviours that are the focus of this paper, but the evidence does not suggest that the behaviour of personnel in SOCOMD started out as bad in 2007. Specifically, given the evidence that has so far come to light, it would be impossible to support the claim that the deployment started with the murder of detainees. Therefore 'bad apples', while possibly a contributing factor, cannot be a full explanation, and there must have been other factors that need to be considered.

Was the training received adequate - perhaps they didn't realise that it was murder?

5. The quality and type of training given to Australian SOCOMD personnel both before, and during, their deployments is a vital consideration. There is evidence that soldiers who receive effective ethics education and training are less likely to commit acts of atrocity.⁹ Therefore, the time spent on training soldiers to deal with the challenges they are likely to face in a Counter Insurgency (COIN) environment is an essential part of any examination into the possible causes of aberrant behaviour.

6. There is a difference in the balance between training and education provided for enlisted personnel and officers. While there are common elements, especially in pre-deployment, due to the way people come into Special Forces from their parent units, this is replicated here as well. While the two terms are often used interchangeably, training and education are both vital and represent different processes which are aimed at creating different outcomes. Training equips one to deal with the specifics; education that leads to reflective, deliberative thinking is required to allow the flexibility to adapt to the uncertainties of the real world. This is particularly evident in COIN – what the US Marines have traditionally referred to as 'Small Wars'.

Small Wars demand the highest type of leadership directed by intelligence, resourcefulness, and ingenuity. Small wars are conceived in uncertainty, are conducted often with precarious responsibility and doubtful authority, under indeterminate orders lacking specific instructions.¹⁰

7. While this characterisation may be extreme, the description of elements of the contemporary operating environment will be familiar to many, and even more so for special operations in this COIN environment. And yet, despite the fact that Special Forces units operate with a very flat structure, with life and death decisions in extreme and ambiguous situations pushed right down to the lowest tactical levels, ethics education aimed at dealing with complexity and ambiguity, as opposed to values and standards training and/or Law of Armed Conflict briefs of the kind mentioned above (focusing upon right and wrong answers in specific black and white situations), tends to be focused almost exclusively upon officers. They are supposed to be the ones in command and control, and therefore traditionally it has made sense to concentrate resources and time on developing their

prevalence from national surveys to populations-of-interest: An illustration using ECA data and the U.S. Army,' *Social Psychiatry and Psychiatric Epidemiology* 39, issue 6 (June 2004): 419.

⁹ Reference 9 - For example, Warner, Appenzeller, Mobbs, Parker, Warner, Grieger & Hoge 'Effectiveness of battlefield-ethics training during combat deployment: a programme assessment', *Lancet* 378 (2010): 915-24.

¹⁰ Reference 10 - *US Marine Small Wars Manual* 2004.

effective ethical analytical and decision-making skills.¹¹ Ambiguity surrounding orders or expectations is a major cause of ethical failure if and when people without clear direction attempt to 'fill in the gaps' themselves.¹² The manifestation of such a tradition is, at least in part, clear to see, by people feeling they lack the necessary tools to navigate and resolve those ambiguities. One of the peculiar challenges of this situation is that officers, with their greater degree of education in ethics and decision-making, were removed, both in a physical sense and in cultural relevance, from situations where they would be able to exercise influence (see below).

8. That is not to say that officers were necessarily particularly well equipped either, despite their additional education. The lack of support for junior officers is mentioned in several transcripts. [REDACTED]. While one may expect a tough environment for leaders in such a demanding unit, [REDACTED]

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9. Military ethics should be considered as a core competency that needs to be updated and refreshed if it is to be maintained. For example, research in the British Army demonstrates that while officers were generally well aligned with the army's stated values, this was most prominent for cadets, declined for lieutenants and captains and only partially recovered as majors, suggesting that whatever ethics training British junior army officers received, it was insufficient to counter their lived experience when it came to maintaining army values.¹⁴ It would be very surprising if these findings were unique to the British Army, given the similar institutions and cultures with the ADF and it would be surprising if this finding was also not replicated across enlisted personnel.

10. There is no doubt that the Rules of Engagement (ROE) briefs 'back here in country' were hated by some soldiers due to their confusing nature, apparently sometimes leaving soldiers in doubt about what they were permitted to do 'and that was soldiers who had already been there'.¹⁵ It could well be that this tension between what was supposed to happen and the experience of those who had already been in theatre reflects the gradual divergence of theory and practice that will be discussed in more detail below, but it also reflects the issue that being told 'a whole lot of lawyer speak without the practicalities' created a difference between the black and white legal position that was presented, and the experience of those who felt that out in the field, 'there are so many grey areas'.¹⁶ These grey areas may have created some ambiguity for some people about what was

¹¹ Reference 11 - David Whetham, 'Challenges to the Professional Military Ethics Education Landscape' in Carrick, Connelly & Whetham, *Making the Military Moral* (Routledge 2018), 148. Therrien and Messervey demonstrated that ethical attitudes do vary between officer and enlisted personnel, to which differences in training and education will have contributed. M Therrien & D Messervey, *Ethical Attitudes and Intentions on the Battlefield: empirical evidence from the Human Dimensions of Operations Survey*. Defence Research and Development, Canada. DRDC-RDDC-2019-R185 (Nov 2019).

¹² Reference 12 - For example, Kelman & Hamilton assert that ambiguous orders contributed to My Lai. HC Kelman, & VL Hamilton. *Crimes of obedience: Toward a social psychology of authority and responsibility*. Yale University Press, 1989.

¹³ Reference 13 - [REDACTED] TROI of [REDACTED]

¹⁴ James Arthur, David Ian Walker and Steve Thoma, 'Soldiers of Character: Research Report'. University of Birmingham, The Jubilee Centre for Character and Virtues, https://www.jubileecentre.ac.uk/userfiles/jubileecentre/pdf/Research%20Reports/Soldiers_of_Character.pdf

¹⁵ Reference 14 - SAS Forum, 16 Sep 19. 28/134 [REDACTED]

¹⁶ [REDACTED]

permitted and what was not. This explanation has some intuitive appeal until one realises the nature of some of the allegations. There is a huge and important difference between pulling a trigger and getting it wrong in the heat of the moment despite trying to do the right thing, and taking a handcuffed prisoner and executing them in cold blood.¹⁷

11. There is no suggestion anywhere in the extant accounts that anyone, including the perpetrators, claimed that what they were doing was not clearly and unambiguously illegal. Therefore, while there are clear lessons that need to be learned for the training and education environment, changes here, even if combined with improved screening for ‘bad apples’, cannot be a complete answer to the first question.

The ‘wrong’ rules, peer (and wider) approval and lack of consequences

12. Grasmick and Green suggest that three independent variables – moral commitment, threat of social disapproval and the perceived threat of legal punishment – represent a key set of factors which inhibit illegal behaviour.¹⁸ To explain each one: if a rule is not considered justified in a particular situation, it can come to have low moral commitment. For example, why obey a ‘reduce speed now’ sign when it is obvious that the traffic queue has dispersed? While it might have done once, the rule doesn’t make sense anymore so it seems justified to now ignore it. Alternatively (and sometimes in tandem), if a rule is frequently being broken by people around you, it creates an impression that the rule-breaking behaviour is either not actually viewed seriously by other people, or is even condoned by those that are aware of it – if everyone breaks the rule, why bother to adhere to it? Finally, if people believe that any negative consequences in terms of punishment for their actions are either unlikely, so far in the future as to be irrelevant, or they do not believe that the action would be considered ‘bad’ at all (perhaps even regarding perpetrators as heroes rather than villains), the rules become far easier to ignore.¹⁹ Each of these three factors will be examined below to show how individually, or in some cases cumulatively, they join with the bad apples and education/training deficiencies to explain the answer to our first question – why did people knowingly commit acts of murder?

(1) The ‘wrong’ rules and cultural responses to them

13. There were a series of rules applied to SOCOMD personnel who, in their view, made their missions more challenging and put their personal and collective safety at risk. Rules of engagement and rules regarding detainee handling and processing are both frequently mentioned as being either wrong in design, or wrong in application. The cultural responses to such ‘wrong rules’ was to find ways to subvert and break them.

14. There are many references to a feeling from personnel that were routinely ‘outside of the wire’, that the ROE were sometimes inappropriate for the tasks that were required. An example of this is in the case of the prohibition on firing warning shots, even where it was believed that this

¹⁷ Reference 15 - [REDACTED].

¹⁸ Reference 16 - H.G. Grasmick, and D.E. Green, ‘Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior’, *Journal of Criminal Law and Criminology*, 71 (1980): 4.

¹⁹ Reference 17 - D Whetham, ‘Drones to Protect’, *International Journal of Human Rights*, 19 iss. 2 (2015): 22;

Reference 18 - M. Verkuyten, *Why Do People Follow (Formal) Rules?* (Rotterdam: Erasmus University, 1992).

could be used to save lives – ‘So, we either shoot to kill, or we do nothing’.²⁰ An example was given where a young child was moving towards a discarded rocket-propelled grenade. In this case there are some accounts of warning shots being fired despite the ROE in order to avoid using lethal force when it was legally permitted but considered ethically unjustified.²¹ There were cases where it was necessary to subvert the rules (in this case, aiming to miss deliberately), in order to do the right thing, because for the people applying the rules, those rules did not make sense. Simply relaxing the rules is clearly not the right response to such concerns, however. For example, other cases demonstrate that the ROE in general was actually very permissive in many situations,

This particular incident was entirely within the Law of Armed Conflict and extant ROE, but in this case, when the Coalition Forces returned to that area, the action had motivated the local population to the extent that it was the whole population rather than just the Taliban that were now hostile to the International Security Assistance Force (ISAF).²²

15. There was some admiration for US practice, especially when it came to maintaining the ‘shock of capture’ on detainees where their disorientation contributes to them sharing time-sensitive and useful information. The maintenance of this pressure was deemed essential for the successful extraction of actionable intelligence within the narrow window of opportunity following the apprehension of a target. The desire to maintain that pressure, unsurprisingly, led to some tension. An understandable (and laudable) desire to ensure that detainees were not abused led to the first question being asked of any detainee brought in for questioning being ‘have you been mistreated?’.²³

²⁴ Even legitimate injuries caused in the apprehension of suspects became the cause of investigations. The hassle and frustration this generated meant that it became preferable in many instances to hand them straight over to Afghan forces as at least it was considered that they would be held on to for six months.

16. Other policies were perceived as far more problematic than this and, due to the perception of being ill-thought through, or even counterproductive. These appear to have had a corrosive effect on behaviour. First among these was the policy of ‘catch and release’ as it is repeatedly referred to, which came to signify an out of touch chain of command, helping to create a ‘them and us’ situation between them and higher command. This involved releasing detainees if there was no clear evidence of serious criminal misconduct or if they were not considered to be important enough in terms of leadership. From a policy position, one can see the logic. Unlawful or unfair detention leads to ill feeling that ultimately can fuel an insurgency, but the rapid release of ‘known’ insurgents was possibly ‘the single most important factor in the population’s lack of confidence in the government in Uruzgan Province’.²⁵ The effect on the people who were supposed to be doing the catching was just as profound:

²⁰ . I note that this prohibition is not unique to the ADF.

²¹ .

²² .

²³ .

²⁴ Reference 20 – TROI of .

²⁵ Reference 21 - .

– it’s counterintuitive. It’s like, why are we doing this?’²⁶; and, ‘If you haven’t got enough to keep them, don’t send us out there to risk our lives’.²⁷

17. It was suggested that the use of throwdowns – the planting of contraband weapons or military equipment that could be linked to hostile intent such as a grenade, radio or rifle – was a response to this ‘catch and release’ policy, by ensuring that people could be held for longer without automatically being released straight back into the field. The interviews taken over a number of years build up a picture of their use gradually becoming an acceptable practice to solve this real problem on the ground. While they may not have been spoken of openly, the practice was widespread and [REDACTED], [REDACTED]

[REDACTED]²⁸
[REDACTED]²⁹
[REDACTED]³⁰
[REDACTED]³¹ An officer noted that

[REDACTED]³² Any organisation’s ethical culture is degraded when even good people feel they need to systematically falsify, fudge, and exaggerate in order to make the system work properly.³³

18. It appears that this practise gradually morphed into a new, more insidious activity as time went on. The perversity of the rules were recognised by the local Afghan forces that the Australian forces were working alongside, with accounts of ‘bad guys’ being executed because they believed that the restrictive Coalition rules on detention would result in a release after three to five days.

[REDACTED]

[REDACTED]³⁴ But there was also some sympathy for ensuring that there was the ‘right’ outcome:

...when you realise your detainees are getting released and they’re going to go and, as we found, kill people again. So sometimes understanding how that process works and inherently these are evil people, then they don’t come off alive.³⁵

19. One can see a mindset that emerged - these are practical people being presented with what became seen as a practical rather than ethical or legal problem - denied the ‘sensible’ solution that should have supported them. A mindset emerged where SOCOMD soldiers found practical ways of

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ Reference 22 – [REDACTED] TROI of [REDACTED]; [REDACTED] TROI of [REDACTED].

²⁹ [REDACTED] TROI of [REDACTED].

³⁰ [REDACTED] TROI of [REDACTED].

³¹ [REDACTED] TROI of [REDACTED].

³² [REDACTED] TROI of [REDACTED], [REDACTED].

³³ Reference 23 - Michael Skerker, ‘Honesty’, in Skerker, Whetham & Carrick, *Military Virtues*.

³⁴ [REDACTED].

³⁵ [REDACTED].

subverting and breaking the rules with which they did not agree. A parallel reality was created to cope with the resulting gap: to any reader of reports it would be clear the rules were being followed; to any direct observer on the ground it would have been evident that entirely different processes were being applied.

20. This is not limited to a SOCOMD chain-of-command issue, of course, but reflects a wider failure of policy to provide appropriate guidance to those on the ground.³⁶ This led to an attitude where it was preferred if the target that was supposed to be apprehended fired shots, as it justified a lethal response and removed the known problem of the person being briefly interrogated and possibly released straight back into the field:

The intransigence of government to agree an appropriate detention strategy for a substantial period of the war in Afghanistan could have, and potentially did, lead to circumstances where the lawful prosecution of operations through the applications of lethal force was preferred to detention'.³⁷

21. With it already an established habit as a response to perverse policies, it can be imagined how engagements resulting in lethal casualties were subsequently justified by placing a throwdown on or near the body.

(2) Peer approval, organisational culture and gradual decline in standards over time

22. A sense of exceptionalism is very evident from the accounts. SOCOMD as a collective were treated differently to other members of the military, and they knew it:

‘To that end, some soldiers believed quite passionately that an Australian soldier is expected to ‘muck up’ on operations. It seemed as though many soldiers felt that they were almost obliged to live up to a rogue, irreverent and scruffy stereotype (a distorted view of the larrikin) and that their leaders ought to tolerate such things’.³⁸ They were, after all, the ‘Force of Choice’ of the Australian government for a number of years. ‘The hyperbole surrounding the contribution of Australian soldiers in Afghanistan makes the soldiers feel entitled to be treated almost as Roman gladiators’.³⁹ Unsurprisingly, this may have led to a feeling of ‘exceptionalism’ and even a sense of entitlement.⁴⁰

23. When members were challenged on the declining standards in the unit, there was a feeling that in some areas, the unit had higher standards than the rest of the Army, but there was also an acknowledgement that they were ‘more relaxed’ about other rules which were considered to be just ‘minor infringements’.⁴¹ For example, there was supposed to be no alcohol, but there was a pub

³⁶ Reference 24 - This failure was evident in other areas as well, for example, failing to provide help or guidance to ADF personnel faced with the Thursday night rapes being committed by some partner forces on prepubescent boys up to and including 2009. See D Whetham, ‘Coalition Operations in Afghanistan, Iraq and Beyond: Two Decades of Military Ethics Challenges and Leadership Responses’, in Olsthoorn, P. (ed.), *Military Ethics and Leadership* (Brill Nijhoff, International Studies in Military Ethics; vol. 3, 2017).

³⁷ [REDACTED]

³⁸ [REDACTED]

³⁹ [REDACTED]

⁴⁰ [REDACTED]

⁴¹ [REDACTED]

in the base – the Fat Lady’s Arms – ‘somewhere there where we can do certain stuff but we’re not going to get caught and it’s not going to be regarded as misconduct because that’s who we are and that’s what we do’.⁴² Although unauthorised, the pub managed to get resupplied through the system. A Sergeant with 10 operational tours said, ‘I have seen alcohol consumed on every operation since 1999 by every rank on every operation since 1999, by every rank and including JTF and unit commanders’.⁴³ While alcohol on deployments was linked to ‘risky or unacceptable behaviours’, it is ‘difficult to conclude that almost everyone in the SOCOMD chain of command was not aware of this’.⁴⁴ Alcohol was widely justified as a coping mechanism for stress, grief and high tempo operations and the unit was basically given a pass because it was ‘special’, reinforcing a perception of entitlement, with the ‘logic of exceptionalism warranting the application of different rules and behaviours to those that applied to other ADF members’.

24. While it is easy to get used to some rules not being applied, and justifying such exceptions as warranted by the extraordinary situation, when seen in the broader context of the decline in standards in the field, it is hard not to see a correlation between this and attitudes towards ‘protective clothing, fieldcraft and equipment checks’, amongst other things.⁴⁵ Even if alcohol consumption or relaxed personal hygiene was regarded as a symptom rather than a cause of other behaviours, it was also a symptom of how this was a unit that did things differently. If someone was punished for such infringements, perceived as minor or trivial issues, it came to be seen as double standards. Creating the routine assumption that some rules are optional is bound to undermine the way other problems and situations are viewed.⁴⁶ If a group has normalised a behaviour that was previously regarded as against the rules, then members are more likely to acquiesce to more significant acts in the future.⁴⁷

25. The atmosphere combined to challenge the consistency of the chain of command and may have contributed to what MAJGEN Sengelman referred to as ‘degree of learned helplessness’ in the face of certain activities that may not have been just limited to the breaking of rules against drinking on operations.⁴⁸ For example, there are accounts that ‘drugs were rampant’, ‘buying, selling, everything’.⁴⁹ This sense of exceptionalism clearly started to seep into other areas as well though, and many accounts refer to a gradual decline in standards over time.

[REDACTED]⁵⁰
[REDACTED]. In the case of throwdowns, although they were being used in 2008, this was at a much smaller and more discrete level. [REDACTED]⁵¹

⁴² [REDACTED].

⁴³ Reference 25 - Sengelman, *Commanding in Adversity*. [REDACTED]

⁴⁴ Sengelman, *Commanding in Adversity*.

⁴⁵ [REDACTED].

⁴⁶ Michael Skerker, ‘Honesty’, in Skerker, Whetham & Carrick, *Military Virtues*.

⁴⁷ Reference 26 - Cialdini, Robert B., and Noah J. Goldstein. ‘Social Influence: Compliance and Conformity’. *Annual Review of Psychology*, 55 (2004): 591-621.

⁴⁸ Sengelman, *Commanding in Adversity*. [REDACTED]

⁴⁹ Reference 27 - [REDACTED]

[REDACTED].

⁵⁰ [REDACTED] TROI of [REDACTED].

⁵¹ [REDACTED] TROI of [REDACTED].

26. Contributing to this gradual decline in standards was fatigue and a general sense of loss of purpose. Fatigue is an issue that is going to be a factor on any deployment and was mentioned by multiple interviewees.⁵² It is also recognised as a major ethical risk factor in its own right.⁵³ Insufficient sleep and fatigue leads to poor judgment, lack of self-control, and impaired creativity as well as increasing the likelihood that people will engage in unethical behaviour.⁵⁴ A factor that must have increased the challenge of getting any psychological rest was the lack of safe space, even in Camp Russell, [REDACTED]

[REDACTED] 55

Past that four-month mark in a rotation, and you can physically see guys sort of slowly degrading as far as, you know, just alertness and things like that.⁵⁶

27. There was a perception among some that despite the extra resources at their disposal such as helicopters, protected mobility vehicles, drones (and so on) compared to actors in other areas of the battlespace, the shift to day operations instead of night in response to pressure from the Afghan government added to the risks for SOCOMD personnel and [REDACTED]⁵⁷

[REDACTED] 58

[REDACTED] 59

We were out there fighting on a daily basis. If we didn't go out that day, I'd just about guarantee it wouldn't make a pinch of shit of difference...we were playing with people's lives, both ours and theirs.⁶⁰

28. The disenchantment caused by 'catch and release' also added to that sense of fatigue, and due to the small size of SOCOMD, multiple rotations of the same personnel returning to the deployed Task Group would also have ensured that bad habits became reinforced and perpetuated over time. The behavioural economist Dan Ariely notes that the meaningfulness of one's work has a large part to play in how well we do it. While it may seem counterfactual, rule-breaking behaviour actually goes down when the stakes are higher. If one's work is valued or recognised to be important, it will generally be done to a higher standard than work that is not.⁶¹ One could conclude from this that it is not surprising that a decline in standards of behaviour coincided with the loss of a sense of purpose for some in SOCOMD.

52 [REDACTED]

53 Reference 28 - OK Olsen, S Pallesen, J Eid. The Impact of Partial Sleep Deprivation on Moral Reasoning in Military Officers, *Sleep*, 33, no. 8 (2010): 1086-90

54 Reference 29 - C Barnes, J Schaubroeck, M Huth, S Ghumman. Lack of Sleep and Unethical Conduct. *Organizational Behavior and Human Decision Processes*, 115, no. 2 (2011): 169-180.

55 [REDACTED]

56 [REDACTED]

57 Reference 30 – TROI of [REDACTED]

58 TROI of [REDACTED]

59 TROI of [REDACTED]

60 [REDACTED]

61 Reference 31 - Dan Ariely (2012). *What Makes Us Feel Good About Our Work?*
https://www.ted.com/talks/dan_ariely_what_makes_us_feel_good_about_our_work

29. This coincided with

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⁶³ As the mission profile changed, and the type of activity became less 'special' and more routine, while still maintaining a high tempo, there was sense that they were trying to create activity to justify their presence in the scale that they were deployed as Special Operations unit.⁶⁴

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⁶⁶ This coincided with the way the Australian force began to align themselves towards a 'Warrior mentality' culturally at odds with the mission that was still supposed to be based on a 'hearts and minds' approach, and with the ADF as a whole.⁶⁷

30. Rewarding the behaviour you want to see is as, if not even more, important than applying discipline to prevent the behaviour you want to eliminate, and will ultimately promote the behaviour you are seeking. These issues are just as true at the systemic level as they are at the individual one.

⁸ If the system is looking for and expecting enemy killed in action, it would be naïve not to expect that this is what people are going to try and achieve, by whatever means were available. The narrative that emerges is not one of a limited number of exceptional events, but rather, widespread and systematic behaviours:⁶⁹ *'I think there was that thirst to get out there and chase. You know, chase, chase, chase. Keep going, sometimes beyond reason'*.⁷⁰

31. The military institutional way of rewarding the behaviour it wishes to see at the individual level is through the use of citation and awards. While many of the awards and citations made over this period were no doubt well-deserved and represented the best traditions of the ADF, there may also have been a number of awards handed out with far less scrutiny than should have been the case, and even less merit. In one case, for example, *'the only thing they got right in that citation was the person's name'*.⁷¹ It adds to the impression of entitlement, where it was X's turn to receive a

⁶² TROI of
⁶³ TROI of
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⁶⁵ TROI of
⁶⁶ TROI of
⁶⁷ See also Reference 32 - Wavell Room May 5, 2020. <https://wavellroom.com/2020/05/05/the-warrior-culture-is-more-than-a-badge/> accessed July 10, 2020.

⁶⁸ TROI of
⁶⁹

⁷⁰
⁷¹

medal this time. However, by rewarding (some) people who were objectively demonstrating the wrong kinds of behaviour, this further contributed to the poisoning of the organisational culture and was referred to by several people who were distressed by the signals that the organisation was sending to its people.

32. 'That one's compass may adjust within the norms of a combat zone is perhaps not a remarkable occurrence'.⁷² What is clear is that people became very 'business-orientated', perhaps at the expense of being 'humanity-orientated' with regards to the people who were being directly affected.⁷³ One example where ROE and interpretations changed over time was the attitude towards 'squirters'. This was the term given to people who would run away as a helicopter landed in a particular area. Clearly, an unarmed non-combatant should not be engaged. But, if it was deemed they were moving towards a prepared fire position or could be trying to access a weapons cache, then it became accepted that it was appropriate to engage them with lethal force.

33. While this interpretation may have been a pragmatic and necessary permission to exercise lethal force when it was deemed necessary, even if the person was not seen to be armed at that specific time, [REDACTED]

[REDACTED]⁷⁴ Running became a death sentence, even for women and children, with the dead person's actions being recorded as 'tactically manoeuvring' to a firing position or suspected weapons cache in the subsequent report once it had been 'legally massaged'.⁷⁵ 'It got to the point where the end justified the means'.⁷⁶

34. The transcripts and accounts chart a gradual move from a justified confidence in the abilities of the unit, into arrogance and even a feeling of being 'untouchable'.⁷⁷ Soldiers became more and more confident overtime, 'a law unto themselves',⁷⁸ and these 'behaviours became permissible and equated with being a good and effective soldier'.⁷⁹ For some rotations, a new team member fresh into theatre who hadn't yet shot someone would be required to shoot a prisoner, 'to pop his cherry...to prove that he was up to it'.⁸⁰ That appeared to be the price of entry into the in group. While healthy competition is obviously a good thing, when competition is measured by bad or inappropriate metrics internally as well as externally, it can become highly corrosive. For example, adopting a body count metric, formally or informally, is likely to skew the way operations are conceived and executed.⁸¹ There is clear evidence that some elements did keep score of the number of kills. While not in itself a breach of the Law of Armed Conflict, 'in terms of establishing an ethical framework for your troops as a Patrol Commander, it's a clear fail'.⁸² A tally board total, and a desire

72 [REDACTED]
73 [REDACTED]
74 [REDACTED] TROI of [REDACTED]
75 [REDACTED]
[REDACTED]
76 [REDACTED]
77 [REDACTED]
78 [REDACTED]
79 [REDACTED]
[REDACTED]
80 [REDACTED]
81 [REDACTED]
82 [REDACTED]

to take it from 18 to 20 appears linked to the deaths of two prisoners who were shot following an explosive entry into a compound that didn't result in the expected outcome. [REDACTED]

[REDACTED] .⁸³

35. [REDACTED]

[REDACTED] ⁸⁴ Other accounts of similar events refer to 'Guys just had this blood lust. Psychos. Absolute Psychos. And we bred them'.⁸⁵

36. The last of Grasmick and Green's three factors – chance of being caught and lack of consequences – is also closely linked to the second question asked by MAJGEN Brereton.

During the period 2007 to 2014, why were serious criminal actions apparently reported by no-one?

37. There is a necessary secrecy attached to Special Forces. However, due to the enduring, 'persistent', long-term nature of the mission, many of the tasks that the SF Task Group ended up being involved with could be considered routine military activity rather than 'special operations'. As the character of the mission changed, the continued secrecy that would normally be appropriate just hampered accountability and oversight when this particular military tool was employed in a sustained fashion.⁸⁶

(3) Lack of consequences for rule-breaking

38. There is a significant body of research demonstrating that group identity can have a profound impact on behaviour, both good and bad. Group conformity, even in a benign environment, is an incredibly powerful social force. Solomon Asch demonstrated as far back as the 1950s that when a group was asked to make simple judgments, most individuals would conform to group consensus, at least some of the time, even when they knew it to be wrong.⁸⁷ Just as the role of the leader at every level is vitally important in shaping the ethical climate of the group,⁸⁸ the group itself is also a significant actor in its own right, and peer-to-peer influence is likely to be a powerful factor in any organisation, but I would argue even more so in the tightly knit special operations world.⁸⁹ The support (or rejection) of ethical norms by immediate peers and direct leaders is even more influential than that of senior military officers.⁹⁰ If the group has a strong *positive* identity, that is

⁸³ [REDACTED] TROI of [REDACTED].

⁸⁴ [REDACTED]

⁸⁵ [REDACTED]

⁸⁶ [REDACTED].

⁸⁷ Reference 33 - Solomon E. Asch, 'Opinions and Social Pressure,' *Scientific American* (November 1955): 31-35.

⁸⁸ Reference 34 - Schminke, M., Ambrose, M. L., & Neubaum, D. O. The effect of leader moral development on ethical climate and employee attitudes. *Organizational Behavior and Human Decision Processes*, 97, no. 2 (2005): 135–151.

⁸⁹ Reference 35 - O'Keefe *et al*, suggest that understanding the relationship between these two groups is important. O'Keefe, D., Messervey, D., & Squires, E. Promoting Ethical and Prosocial Behavior: The Combined Effect of Ethical Leadership and Coworker Ethicality. *Ethics and Behavior*, 28, no. 3, (2018).

⁹⁰ Reference 36 - M Murdoch, JB Pryor, MA Polusny, GD Gackstetter & D Cowper Ripley. Local Social Norms and Military Sexual Stressors: Do Senior Officers' Norms Matter? *Military Medicine*, 174, no. 10, (2009): 1100-4; see also

itself an excellent defence against ethical drift away from appropriate conduct, whilst if you see other members of the group breaking rules or cheating, it spreads further very fast.⁹¹ Group identity prompts people to ask ‘what do we do in this situation?’ If you see fellow group members breaking the rules or cheating, then the chances are you will too, whereas seeing other people passing up ‘opportunities’ or doing the right thing, that too will tend to get mirrored.⁹² This demonstrates how behaviour becomes embedded at the level of organisational culture, which then determines what is considered ‘normal’. Fighting against that is extremely challenging.

39. One officer

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40. Some will have concluded that the best they could do was try and make the most of a bad situation.

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41. This suggests that

42. There is some evidence that there was a deliberate effort made to conceal some behaviours and goings on from the junior officers (there is also the suggestion that they became cut out of the loop in some regards between the troopers, the NCOs, and those who helped compile the reports).

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GR Weaver, LK Treviño, & B Agle. ‘Somebody I Look Up To:’ Ethical Role Models in Organizations. *Organizational Dynamics*, 34, no.4, (2005): 313-330.

⁹¹ Reference 37 - Unethical behaviour by peers is often judged less harshly than those outside of the group. F Gino & AD Galinsky. Vicarious Dishonesty: When Psychological Closeness Creates Distance from One’s Moral Compass. *Organizational Behavior and Human Decision Processes*, 119, (2012): 15-26.

⁹² Reference 38 - Dan Ariely (2013). *The Honest Truth About Dishonesty: How We Lie to Everyone - Especially Ourselves* (New York), 197-207.

⁹³ TROI of

⁹⁴ ROC of

⁹⁵ ROC of

⁹⁶ Reference 39 - TROI of

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43. While officers were not so sure to confirm this, this [REDACTED], suggests that, to at least some extent, there was an attempt to keep junior officers out of the loop by soldiers and NCOs:⁹⁸ [REDACTED].⁹⁹ For example, while the practice appears to have been widespread, there was an attempt not to draw attention to the use of throwdowns. [REDACTED]

[REDACTED]¹⁰⁰ However, the questions weren't asked, partly because [REDACTED]¹⁰¹

44. [REDACTED]¹⁰² This had the effect of empowering the NCOs, with Patrol Commanders basically doing the Troop Commander's job. For example, in a compound clearance operation, the *modus operandi* would be for the Troop Commander to be in an overwatch position until the area was secured. [REDACTED]¹⁰³, but it also had the effect of removing officers from effective control in many situations, and as such, afforded an opportunity for Patrol Commanders and soldiers to act without oversight.

45. In some cases, as their role became in many ways superfluous, the traditional relationship between junior officers and NCOs changed as well:

It may be the case that the guidance and nurturing normally provided by NCOs to their junior officers was replaced by a more domineering or controlling approach.¹⁰⁴

46. That this is perhaps an understatement is supported by multiple accounts, [REDACTED]¹⁰⁵ The Troop Commanders effectively became figureheads – [REDACTED]

[REDACTED]¹⁰⁶ It is hardly surprising that one Troop Commander described it [REDACTED]¹⁰⁷
[REDACTED]¹⁰⁸
[REDACTED]¹⁰⁹ One anonymous soldier explained:

Patrol Commander level is the worst. They were responsible for the worst of it. Core group of people who wield so much influence that officers find it very difficult to manage, especially if

⁹⁸ [REDACTED] TROI of [REDACTED].

⁹⁹ [REDACTED] ROI [REDACTED].

¹⁰⁰ [REDACTED] ROI [REDACTED].

¹⁰¹ [REDACTED] TROI of [REDACTED].

¹⁰² [REDACTED] TROI of [REDACTED].

¹⁰³ Reference 40 - [REDACTED] TROI of [REDACTED]

¹⁰⁴ [REDACTED].

¹⁰⁵ [REDACTED] TROI of [REDACTED].

¹⁰⁶ [REDACTED] TROI of [REDACTED].

¹⁰⁷ [REDACTED] TROI of [REDACTED].

¹⁰⁸ [REDACTED] TROI of [REDACTED].

¹⁰⁹ [REDACTED] TROI of [REDACTED].

the Patrol Commander [REDACTED]. They are hero worshipped and unstoppable.¹¹⁰

47. Another person noted that they were 'treated like God by young guys and it all just repeats again and again'.¹¹¹ There was an 'operator mafia' at play and 'I think we as a command element failed'. [REDACTED]

[REDACTED].¹¹²

48. For those who retained enough awareness to see that the situation was dangerously wrong, it was clear that doing anything about it was not going to be easy and there were potentially serious repercussions for those who had the temerity to speak up. While it was acknowledged that the SOCOMD organisational culture has now changed for the better, [REDACTED].¹¹³ If you broke that rule, then it was widely understood that there would be repercussions. Dr Crompvoets recorded that it was explicitly said to her that 'being a lone whistle blower in the SF world on these atrocities would be met with intense resistance; shaming, ostracising, scapegoating, hostility and vindictiveness'. Some people clearly were fearful, for their own safety, their family's safety and for their career.¹¹⁴

49. It is obviously hard to challenge an organisational culture or to speak out when you are trying to fit in. It was acknowledged as far back as 2012 that there an issue with a wider force culture of 'overfamiliarity' and desire for 'peer validation' from junior leaders.¹¹⁵ However, it must also be recognised that in this environment especially, the cost of not fitting in was high. For example, for a junior officer, not being accepted by their soldiers could mean the end of your Special Forces career

- [REDACTED]
[REDACTED].¹¹⁶
[REDACTED]¹¹⁷

There is a sense that people had to pick their fights.

50. [REDACTED].¹¹⁸ For example, when a Troop Commander wouldn't let the troopers engage spotters, he was apparently branded [REDACTED] and unworkable.¹¹⁹ There was a perception that this Troop Commander received no support from above, [REDACTED].¹²⁰ There were, then, many good reasons why people may have chosen not to speak out. Cultures of silence thrive when people are victimised for

¹¹⁰ [REDACTED]

¹¹¹ [REDACTED]

¹¹² [REDACTED] TROI of [REDACTED].

¹¹³ [REDACTED] TROI of [REDACTED].

¹¹⁴ [REDACTED].

¹¹⁵ [REDACTED].

¹¹⁶ [REDACTED] TROI of [REDACTED].

¹¹⁷ [REDACTED] TROI of [REDACTED].

¹¹⁸ [REDACTED] TROI of [REDACTED].

¹¹⁹ Incidentally, there were no reported incidents from that deployment. [REDACTED] TROI of [REDACTED].

¹²⁰ [REDACTED] TROI of [REDACTED].

challenging the status quo or speaking out. People who felt they had no effective way of speaking up without making their own situation precarious at best may well have decided that discretion was the better part of valour in this situation: 'There is a culture of silence and I do think people get ostracised who potentially speak out against it. There's also the people who stay silent and they tend to continue on. But that's maybe the party line'.¹²¹ Others, including lawyers, who couldn't reconcile what they saw with what they thought should have happened just left the organisation.¹²²

51. This environment meant that those with the specific responsibility to sustain the integrity of the chain of command, the link between operations on the ground and the operational and strategic ambition, were unable to perform this task due to physical and cultural separation from operations on the ground. That is not to say that Troop Commanders must be in direct command of all aspects of those operations. The unique nature of SOCOMD tasks combined with the knowledge, skills, and experience of SOCOMD non-commissioned leaders, make the flat structure of SF operations not only desirable but necessary. Within this context, however, it is a clear sign of failure where junior officers are not able to exercise any form of leadership over the teams they serve.

How much was known by the chain of command (above Troop Commander)?

52. It was recognised before the Inquiry was started, there was an issue with leadership accepting practises that should not have been permitted. For example, drinking on operations was 'tacitly endorsed', and such things had, over the years:

resulted in an inherited culture that was endemic across deployed SOCOMD forces and had become normalised...the extended period over which this applied, translated into generational behaviours which involved all ranks.¹²³

53. The result was a kind of organisational blindness, where the collective sacrifice on operations justified certain excesses. The organisation became voluntarily 'collectively blind' to what was going on.¹²⁴

54. The way that the system responded to things if and when they went wrong is also telling and seems in part to be connected with this inexplicable disinterest mentioned above. While there are some positive observations about the tactical training in the reinforcement cycle, and even some of the psychological preparation that was put in place,¹²⁵ there was also a perception that the Army wasn't actually interested in learning lessons – 'there was no learning mechanism in place'.¹²⁶ Inquiries were felt to be about arse-covering rather than being interested in making sure that it wasn't repeated. For example, if there was an injury in the field, the questions all focused on availability of kit and medical provision but didn't ask about tactics, techniques and procedures, and what people *should have known*.

¹²¹ [REDACTED]

¹²² [REDACTED]

[REDACTED]

¹²³ Sengelman, Commanding in Adversity.

¹²⁴ Sengelman, Commanding in Adversity.

¹²⁵ [REDACTED]

¹²⁶ [REDACTED]

55. Was it simply a case of too much trust at the time? From some transcripts, there is an almost sense of bewilderment from staff officers when presented with the evidence of what was happening on 'their watch' – [REDACTED]

[REDACTED].¹²⁷ As seen above, there is no doubt that people can very quickly become acclimatised to a new normal. Some people may have seen something that was wrong, but saw it as an isolated incident, perhaps easier to dismiss and move on, rather than as a pattern of behaviour.¹²⁸ The dangers of drawing a line in the sand are well articulated by Robillard, once a US Ranger, now an academic, when he points out that the problem with people thinking they will take action if this line is ever crossed, is that they therefore allow many things to pass that don't quite reach or cross that line. By having a point at which you will absolutely take a stand, it often means that one never acts at all: 'I remained complicit and silent... because I was waiting for a moment of unquestionable, discernible immorality to clearly manifest itself before taking decisive action'.¹²⁹ It would appear that such a position may have been common. One anonymous interview stated:

If they didn't do it, they saw it. If they didn't see it, they knew about it. If they knew about it, they probably were involved in covering it up and not letting it get back to Canberra. And to make it even harder, if they didn't know about it, the question will be: why didn't you, because you should have.¹³⁰

56. The widespread nature and normalisation of the use of throwdowns [REDACTED]

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57. While there is a clear feeling in the accounts from the SF Staff Officers that the vast majority of reported killings were seen as justified by the 'fog of war' and nature of disruption operations, there is also a sense that much of the supposed oversight and control from above was 'characterised by an abandoned curiosity to explore these matters further', even when the reports should have demanded it.¹³² For example, when asked about the high death count caused by some patrols, despite them 'not being engaged in a two-sided contest', one officer replied, [REDACTED]

[REDACTED] 133

[REDACTED].¹³⁴ Some believed that the knowledge of what was going on was at every level of the SOTG, and beyond. For example, [REDACTED]

[REDACTED] 135

¹²⁷ [REDACTED] TROI of [REDACTED].

¹²⁸ [REDACTED]
[REDACTED].

¹²⁹ Reference 41 - M Robillard, 'Integrity, Institutions, and the Banality of Complicity' in M Skerker, D Whetham, & D Carrick, *Military Virtues* (Howgate 2019), p182.

¹³⁰ [REDACTED]
[REDACTED].

¹³¹ [REDACTED] TROI of [REDACTED].

¹³² [REDACTED].

¹³³ [REDACTED] TROI of [REDACTED].

¹³⁴ [REDACTED] TROI of [REDACTED].

¹³⁵ [REDACTED] TROI of [REDACTED].

Many people spoke of how widespread the knowledge of wrongdoing was, making it very difficult to believe that the lack of oversight can be put down to simple disinterest:

What was really concerning was everyone knew which SF units, Squadrons and patrols, and under which commanders, most of the killings were perpetrated. The same names would pop up with remarkable frequency. A reasonable person would think, now that's odd, that name has popped up at a few incidents, the circumstances and witness accounts are very similar, hmm there is a pattern here. That didn't happen, [REDACTED]

[REDACTED] 36

58. Beyond the excessive willingness of so many people to take things at face value when told from those outside of the wire of what had happened, there were also others who played a more active role. Many things were simply not reported upwards or were intentionally hidden by those who were in a position to look after their personnel and possibly believed that shielding subordinates was part of their job requirement. It is clear from multiple sources that investigations could be seen as a manifestation of the Headquarters versus Camp Russell mentality – manifesting in the persecution of those who were just trying to get on with their job. There developed a culture of ‘protecting’ the people on the ground from what may have been perceived as unnecessary scrutiny. These negative interactions with ‘ADF legal officers assigned to SOCOMD and with various levels of command within SOCOMD’ were noted by the Provost Martial ADF (PMADF) as indicative of a ‘systemic culture of command interference, obstruction and the apparent concealment and/or fabrication of evidence’.¹³⁷ Recurring themes involved a reluctance to assist, obstruction and interference, and the active concealment of evidence culminating in an ‘adversarial resistance to any form of scrutiny’.¹³⁸ From the other side, officers refer to [REDACTED].¹³⁹ There was an appreciation within SOCOMD that while trying to a difficult job, sometimes, people in the unit would get things wrong or make mistakes, and this [REDACTED].¹⁴⁰

59. Some of the issues that were being investigated may have appeared to be of very low importance, or even vexatious, to those who were risking their lives. For example, the obvious fabrication of damage to vehicles despite CCTV footage that contradicted the account. From the PMADF’s point of view, there seemed no concern from SOTG chain of command that one of his members had staged an accident, and the attitude was one of trying to ensure the matter went away rather than being dealt with.¹⁴¹ From the side of the soldiers, there was some frustration that investigative officers were seeking to gather evidence from areas that were not considered safe, or trying to employ air assets that were required for ‘real’ operations. Nevertheless, push back, sometimes to the point of making investigators fear for their own safety, was not limited to investigations into lesser issues.¹⁴² It is not clear, at least to this author, if the interference and

¹³⁶ [REDACTED]

¹³⁷ Reference 42 – [REDACTED] Submission to IGADF of [REDACTED].

¹³⁸ [REDACTED].

¹³⁹ [REDACTED] TROI of [REDACTED].

¹⁴⁰ [REDACTED] TROI of [REDACTED].

¹⁴¹ This particular issue resulted in administrative action rather than prosecution.

¹⁴² [REDACTED].

obstruction remained constant, but it would fit the pattern of the general decline in standards of behaviour if it escalated over time as it became normalised. The results of this interference or obstruction were that as well as pushing away issues that were regarded as trivial (rightly or wrongly) by those involved, it ensured that it was also simply impossible for more serious allegations to be followed up and examined. For example, the investigation into a fatal shooting of a detainee took 12 months to complete after [REDACTED] made it clear that they didn't want 'another ADFIS Inquisition'.¹⁴³ In another similar case involving a very serious allegation, 'we were unable to visit the scene, we were unable to access Afghan interpreters, Afghan military and Afghan detainees, who would all more than likely have been in a position to offer valuable evidence'.¹⁴⁴ Given that no one was held accountable for these and other incidents, and these are just the ones that we actually know about, it is difficult not to conclude that some people were literally getting away with murder.

60. Some Joint Operations Command lawyers above the SF Task Group started to try and assert some control over what they increasingly believed were 'sanctioned massacres'. The ROE were tightened up, but there was scepticism about whether this had any actual effect as 'SF just got more creative in how they wrote up incidents'.¹⁴⁵ As the lawyers started to become more 'troublesome', the SF unit started to rely more on their own lawyers, 'with the promise of being inside their 'elite tent', doing cool stuff in return for legally polishing their version of events and the truth in a way that created enough doubt as to exonerate them...'¹⁴⁶ The support of the legal officers was appreciated by many of the unit personnel as a barrier to some of the 'phenomenal' pressure that was felt to be coming from Headquarters Joint Task Force 633.¹⁴⁷ For example, ensuring a 24-hour gap between returning from an operation and the debrief. The inevitable fact-finding process that followed any detainee's allegation was seen as particularly draining. There was also general uncertainty about what would actually trigger an investigation from higher up, and a desire within the unit to insulate people from this as much as possible. There was a perception that there was a 'distinct lack of understanding of someone coming in to do a job which was investigation-focused compared to the realities of what was actually going on in the battlespace at the time'.¹⁴⁸ There was also, ironically, a general frustration from some in the Task Group that ADF Staff Officers at Headquarters were implying they were hiding things. And yet, the Task Group was hiding things. It was considered normal practice to change the Intelligence Summary that was supposed to drive activity to accord with what actually happened on the ground, [REDACTED]

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[REDACTED].¹⁵⁰ After Action Report writing was assisted by the legal officer and the CO who would then defend SOCOMD personnel from higher level scrutiny. That can be understood as prudent in many ways, but there is evidence

143 [REDACTED].

144 [REDACTED].

145 [REDACTED].

[REDACTED]

146 [REDACTED].

[REDACTED]

147 [REDACTED].

148 [REDACTED].

149 [REDACTED] TROI of [REDACTED].

150 [REDACTED] TROI of [REDACTED].

that

.151

¹⁵² Ultimately, the After Action Reports, rather than being part of the oversight and institutional understanding process, in some cases became a way of removing scrutiny for wrongdoing. This would have added to the insidious corrosive effect of some people believing that they were untouchable thanks to the legal whitewashing of their activities.

61. Other actors were trying their best, unsuccessfully, to raise awareness of what was happening. Complaints made by or through the International Committee of the Red Cross, the Afghan Independent Human Rights Commission, or local elders – a number of which can now be seen to have substance – were routinely passed off as Taliban propaganda or motivated by a desire for compensation.¹⁵³ It is clear that there were warning signs out there, but nothing happened.

62. One can perhaps be sympathetic to a desire to push away vexatious investigations, or protect one's people from the scrutiny of those who just 'wouldn't get it'. Perhaps there was [REDACTED].¹⁵⁴ But this demonstrates a dangerous gap between what the force had become acclimatised to and what was actually acceptable. However well-intentioned some of these efforts to block or push away investigations may have been, it seems clear that this feeling of protection that such actions generated would have contributed to an attitude of untouchability for some people. This may have facilitated the escalation into the most serious of the crimes that are alleged to have taken place. Ironically, if the Headquarters motivation was to protect their people, they were letting down some of the very people they were supposedly looking out for:

[REDACTED].¹⁵⁵

63. Many sources refer to the moral injury that will have been compounded by the betrayal of those who were put in an impossible position.

64. There is also the observation that appropriate scrutiny from higher up may have been avoided in part, due to the SF officers who have proliferated throughout the ADF.¹⁵⁶ This may have contributed to a lack of institutional appetite to look into things earlier, either because it sounded like the continuation of behaviours that were 'ok in my day' and perceived troublemakers making a mountain out of a molehill. On the other hand, it is notable that the present Inquiry was instigated by and continued under two Chiefs of Army, both with SF backgrounds.

¹⁵¹ [REDACTED] TROI of [REDACTED].

¹⁵² [REDACTED] TROI of [REDACTED].

¹⁵⁴ [REDACTED] TROI of [REDACTED].

¹⁵⁵ [REDACTED] TROI of [REDACTED].

¹⁵⁶ [REDACTED]

Conclusion and Recommendations

65. The accounts consistently paint a picture of a gradual erosion of standards, contributed to by the character and tempo of the deployments (and redeployments), inappropriate metrics of success imposed from above and warping behaviour within the SF Task Group, a lack of clarity about purpose and gradual loss of confidence in both the mission and the higher chain of command, a fractured, compartmentalised and dysfunctional leadership, and a general lack of effective oversight aided and abetted by the very people who should have been providing it. This combination of factors led to a normalisation over time of behaviours that should never have been considered normal and ultimately, the effective covering up of, or wilful blindness to, the perpetration of war crimes.

66. While the nature of successive rotations saw a deterioration of moral standards, there was also [REDACTED]

[REDACTED]

¹⁵⁷

67. Many if not all of the ethical risk factors that lead to the failures in this report are understood and can be both taken into account at the institution, training and leadership levels. In their book *War Crimes: Causes, excuses and blame*, Talbert and Wolfendale make three recommendations for preventing war crimes, and each is pertinent to the findings above. The recommendations are around education, narrative of truth, and accountability.

Recommendation 1: Deliver education to all SOCOMD personnel on the causes of war crimes.

68. Educating military personnel about the causes of war crimes so that they understand how such crimes can come to be seen as almost required and therefore justified, is vital. Making sure that such deviation from the expected values and standards of the ADF cannot happen again is important, but such 'armouring against atrocity' is not necessarily easy. Talbert and Woldendale argue that rather than focusing on writings committed by others, military ethics training should employ case studies drawn from military personnel 'from the same services and country as themselves' so that they understand that they too could become torturers or murderers – that the 'good guys' can also do bad things.¹⁵⁸ [REDACTED] the Australian Defence College at Weston Creek historically has utilised officers to talk candidly about being on the wrong end of a (justified) court martial.¹⁵⁹ The pedagogical value of this was clear at the time and it was reviewed by the student body to be an exceptionally worthwhile and humbling session, in particular for demonstrating that nobody was immune from making a really bad decision.

¹⁵⁷ [REDACTED] TROI of [REDACTED].

¹⁵⁸ Reference 43 - M Talbert & J Wolfendale, *War Crimes: Causes, excuses, and Blame* (Oxford University Press, 2019), 152.

¹⁵⁹ Reference 44 - Advanced Command and Staff Course, 2009. Australian Defence College, Weston Creek.

The pedagogical value of learning directly from the experience of ADF personnel, both bad and good, is already firmly embedded.

- a. Every member of SOCOMD should receive education on the causes of war crimes. This education to be delivered by SOCOMD soldiers themselves and reviewed by appropriate external (ie, non-SOCOMD) reviewers who can act as critical friends.¹⁶⁰
- b. Members of the SOCOMD community should be recorded talking candidly, and on the record, about the ethical drift that took place over a period of time, how hard it was to resist the prevailing organisational culture and the missed opportunities that could and should have been taken to address the failures that so many people appeared to recognise at the time but felt powerless to change.

Recommendation 2: The normalisation of the *right kinds* of routine ethical discussion.

69. The second recommendation is to encourage alternative and dissenting narratives, encouraging military personnel to be able to construe alternative ways of understanding events and situations. This can help prevent a ‘monolithic and flawed articulation of morality within military forces’,¹⁶¹ expressed above by the change in perception about what a ‘good soldier’ was supposed to do.¹⁶² They cite the stoic and virtue ethics traditions as being potential tools to help do this. Clearly there are a number of different approaches, but looking to the very values that the ADF already state in a more robust way may be a good place to start. The values-based foundation for the ADF represents a broader Western virtue ethics approach to training and education in the military. Just like many professional militaries, the ADF invests a huge amount of effort in ensuring that those they promote into positions of authority have the character to be able to rise to the challenge of their new position. The virtue ethics approach concentrates on the importance of character and how we can nurture the right types of behaviour. The ADF have identified specific values (professionalism, loyalty, integrity, courage, innovation and teamwork) that underpin this virtue ethics approach, and these represent the institutional articulation of expected behaviour. The idea is that they are internalised through conscious training and unconscious institutional diffusion: ‘This is what we should do’. The more we do the right thing, the more it becomes habit and therefore part of the stable disposition that informs one’s character. The hope is that, by ‘fostering such behaviours, and promoting those who consistently demonstrate them, people will be able to do the right thing when the situation demands it’.¹⁶³

70. The desire to realign Australian SF back to Army standards was expressed in 2015 and hopefully is already well underway.¹⁶⁴ It must be remembered that the power of the situation to undermine even the strongest of characters is now well documented.¹⁶⁵ Therefore, preparing

¹⁶⁰ It is vital that such an external view is present, but also that the role is able to provide constructive feedback as an accepted and trusted friend rather than as an ombudsman, permitting two-way candour without compromising the necessary objectivity of the role.

¹⁶¹ M Talbert & J Wolfendale, *War Crimes: Causes, excuses, and Blame* (Oxford University Press, 2019), 153.

¹⁶² [REDACTED]

¹⁶³ Reference 45 - David Whetham, *What senior leaders in defence should know about ethics and the role that they play in creating the right command climate*. Defence Academy of the UK, 2020.

¹⁶⁴ [REDACTED]

¹⁶⁵ [REDACTED]

people for the environmental effects on their ethical perception and likely behaviour is vital. Therefore, in addition to Recommendation 1, this should include routine critical reflections on the values and standards of the ADF and how these can and should be interpreted in different situations. Whilst the values and standards can and should be understood as universal within the ADF, the way that individual values will need to be interpreted will be different due to the context. For example, 'courage' is a value (or virtue) that is supposedly easy to understand, but what courage looks like on a patrol in Helmand or Uruzgan Province may be very different to the courage required by an administrator who wants to question the receipts submitted by a CO, or the Chief of the Defence Force when faced with a questionable direction from the Prime Minister. Military ethics must be considered as a core competency that needs to be updated and refreshed as part of professional development and specific training if it is to be maintained – it cannot just be assumed that once a base level of understanding has been achieved it can just be left alone.¹⁶⁶ Exploring how one demonstrates courage in different circumstances is not something that should just happen in institutions during phase one training, but should be part of a normalised process of healthy ethics discussions taking place at all ranks and at all stages of military careers – it should just be a routine part of everyday activity. Even mentioning ethics changes peoples' awareness and behaviour.¹⁶⁷ Therefore, the normalisation of the *right kinds* of routine ethical discussion is important.

Recommendation 3: Accountability for actions

71. Finally, Talbert and Wolfendale argue that any other activity, no matter how well intentioned or delivered, will come to nothing without genuine accountability for wrongdoing. As I noted at the start of this research paper, it is easy to muddle up seeking to understand why war crimes are committed with an attempt to excuse them. This must not happen, for a lack of accountability 'does much to undermine our faith in the commitment of governments and military forces worldwide to the prevention of war crimes'.¹⁶⁸ While legal accountability for wrong-doing is likely to be focused on a tiny minority of personnel, there is no doubt that this goes beyond the law. Responsibility and accountability beyond purely legal matters is something that is recognised in the ADF. In 2015 MAJGEN Sengelmann quite rightly stated his intent to ensure that people should not only 'own their mistakes' but that any blame and punishment should be fairly apportioned, including acting upon any 'clear breaches of integrity or significant character flaws'. It is clear that a wider organisational accountability for creating a system that made those failures possible is also required.

72. The last quote of this report should go to Dr Cropvoets:

Amongst the sources and transcripts consulted, it must be mentioned the countless references to exceptional soldiers and officers, who upheld Army values and whose character was unquestionably of high standing.¹⁶⁹

¹⁶⁶ Reference 47 - M Therrien & D Messervey, *Ethical Attitudes and Intentions on the Battlefield: empirical evidence from the Human Dimensions of Operations Survey*. Defence Research and Development, Canada. DRDC-RDDC-2019-R185 (Nov 2019), 17.

¹⁶⁷ For example, Ariely found that even reminding people of non-existent rules is enough to make them behave better. Reference 48 - N Mazar, O Amir, D Ariely. *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*. *Journal of Marketing Research*, Vol. XLV, (2008): 633-644.

¹⁶⁸ M Talbert & J Wolfendale, *War Crimes: Causes, excuses, and Blame* (Oxford University Press, 2019), 153.

¹⁶⁹ [REDACTED]

73. Ultimately, there is an important difference between pulling a trigger and getting it wrong, and taking a prisoner and executing them in cold blood.¹⁷⁰ Anyone who does not recognise this distinction, or is prepared to ignore it, does not deserve to belong in any professional military, let alone the ADF.

Postscript

From the start of being asked to write this report, I have been given full access to anything that I requested and candid responses to any questions I have had. Because of that access, I have been privy to some of the institutional responses that were generated by the SOCOMD Culture Review and extensive interviews that were required for this to be produced. I have also been given access to the significant number of interview transcripts that have since been generated as part of this Inquiry. I have seen the internal institutional conversations and clear concern to get to the bottom of the allegations. While reputation was a factor that was considered, it was not, according to what I have seen, a primary motivating factor and the actions that were taken were very clearly not those of an organisation that wished to ‘brush anything under the carpet’. Instead, the Inquiry led by MAJGEN Justice Brereton, the breadth and scope afforded to its investigative team, the ongoing attempts to reform and reorganise the way that the SF community is managed and operated, and the legal actions that will no doubt proceed, demonstrate an organisation that recognises that something has gone very badly wrong and is determined to put it right.¹⁷¹

[REDACTED]

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¹⁷⁰ [REDACTED] TROI of [REDACTED].

¹⁷¹ Reference 49 - For example: [REDACTED]; Letter as incoming CO of SOCOMD [REDACTED], and; [REDACTED].

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