

REPARATIONS FOR AFGHAN VICTIMS OF AUSTRALIAN WAR CRIMES

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Abstract

It has now been over two years since the *Brereton Report* detailed a series of Australian SASR war crimes in Afghanistan against non-combatants or persons *hors-de-combat*. Finally, the Office of the Special Investigator has produced its first prosecution of a former soldier for the war crime of murder, but there is a distinct lack of clarity over the extent of involvement of Afghan witnesses in the investigatory process, as well as in the trial itself. It is imperative that early plans be made for meaningful victim participation in the trial(s) ahead, despite the nature of Australia's adversarial process and uneasiness over the Taliban government. This would boost the evidentiary case and avoid any secondary victimisation that may occur if victims are not properly involved in a prosecution process. Australia's plans for reparation are well overdue and need to be given much more priority and attention than they have had to date.

Keywords

Reparations; victims; war crimes; Australia; Afghanistan

Introduction

It has now been over two years since the *Brereton Report*¹ detailed credible evidence of a series of alleged SASR war crimes in Afghanistan from 2005-2016. According to the *Report*, 39 Afghans had been wilfully and unlawfully killed by 25 ADF members in 23 incidents, along with two instances of cruel treatment, in circumstances where it “was or should have been plain that the person killed was a non-combatant, or *hors-de-combat*”.² The killings and abuse were accompanied by a damning catalogue of slips in military discipline, culture and oversight,

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¹ Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* ('Brereton Report'), <https://www.defence.gov.au/sites/default/files/2021-10/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>.

² *Id.*, Chapter 1.01 at [15-16].

involving the “bleeding” or initiation of young soldiers, a practice of covering up deliberate killings by placing “throwdowns” on bodies to make them look like legitimate kills, sanitising operational reports to make it appear that the laws of engagement had been complied with, and a marked culture of impunity. There were other issues relating to a lack of command and control of Special Forces in theatre, and insufficient impartial and effective investigatory mechanisms.³ Brereton recommended the cases be referred to the AFP as there was a realistic prospect of a criminal investigation obtaining sufficient information to charge the perpetrators with the war crime of murder, and/or counselling, procuring or inciting the war crime of murder (*Criminal Code Act 1995 (Cth)* ss11.2, 11.4 and 268.70), in some cases on the basis of command responsibility (*Criminal Code* s268.115). For the two instances of cruel treatment, there was sufficient evidence for charges under *Criminal Code* s268.72. Overall, 36 matters arising out of 23 incidents by 19 individuals were recommended for potential prosecution.⁴

Recently the Office of the Special Investigator (OSI) - the investigative body set up in early 2021 in the wake of the Brereton Report to collect and prepare briefs of evidence to the standard required for criminal prosecutions - produced its first indictment of a former SAS soldier. Former trooper Oliver Jordan Schulz was charged for the summary execution of a disabled Afghan man, Dad Mohammad, who was lying injured and unarmed in a field. Schulz has been charged with one count of the war crime of murder (*Criminal Code* s268.70(1)), which carries a maximum penalty of life imprisonment.⁵

Victim Participation in Prosecutions

It is to be noted that in announcing the decision to lay charges in the Schulz case there was no mention of participation plans for the victim’s family or claims for reparation. While the DPP may call upon Afghan relatives or other witnesses to give evidence in court to help secure Schulz’s conviction, there is no provision in the *Criminal Code* for victims to make a compensation claim during a criminal trial. Australia’s criminal law and practice follows that

³ Brereton Report n1, Chapter 1.01 at [322-349], and Chapter 3.03.

⁴ Brereton Report n1, Chapter 1.01 at [21].

⁵ OSI, “Former Australian Soldier Charged with War Crime”, <https://www.osi.gov.au/news-resources/former-australian-soldier-charged-war-crime>. See also B. Doherty, “Australian Defence Chief Warns Further Criminal Charges could be Laid over Alleged War Crimes in Afghanistan”, *The Guardian online* (11 April 2023), <https://www.theguardian.com/australia-news/2023/apr/11/defence-chief-flags-more-allegations-of-afghanistan-war-crimes-made-against-australian-soldiers>; D. Gavshon (Human Rights Watch), “First Australian Soldier Charged over Alleged War Crime in Afghanistan” (21 March 2023), <https://www.hrw.org/news/2023/03/22/first-australian-soldier-charged-over-alleged-war-crime-afghanistan>.

of other common law jurisdictions in leaving victims to pursue non-trial avenues for compensation. The role of victims in adversarial prosecution processes is limited to acting as a witness during trial, having the right to be kept up to date on the proceedings, and the opportunity to make a victim impact statement during sentencing. Victims and their advocates lack the opportunity to make claims against the assets of a convicted person, or against the person's employer (the Australian Department of Defence) in criminal prosecutions.

Moreover, it is likely that such trials are to be held in closed sessions not open to the public as a result of national security considerations⁶, meaning further difficulties in victims following the trial and participating in it. Already it is evident that substantial difficulties surround evidence-gathering and participation of Afghan victims and witnesses. When Brereton Inquiry investigators travelled to Afghanistan in July 2019 to hear evidence from a number of Afghans, the trip was supported by the Australian Department of Foreign Affairs and Trade and the Australian Embassy in Kabul.⁷ Since the Taliban's takeover of Afghanistan in 2021, no such local establishment is in place as Australia and most other Western governments have closed their representational offices and refuse to work with an Afghan government committed to what the West regards as serious human rights abuses. This is despite Brereton's view following discussions with the ICC's Office of the Prosecutor in 2019 that best practice for trials would involve Afghan participation.⁸ Additionally, the Brereton Report stressed repeatedly how Afghan voices had been completely disregarded up to that point and that that is one of the reasons why initial Australian investigations were so poor. Indeed, Afghan witnesses and civil society had been presumed to be making things up.⁹

The Head of the OSI (Chris Moraitis) fielded a question about its victim liaison and public outreach when he was giving evidence to the Australian Senate Estimates hearing in March 2021; he said that victim and witness liaison will form a part of OSI's approach in line with standard criminal investigation processes.¹⁰ Indeed, the OSI appears to be focusing not on

⁶ A. Fowler, 'Australian war crimes in Afghanistan: Prosecutions face an uncertain road ahead' in *ILA Reporter* (4 June 2021), <http://ilareporter.org.au/2021/06/australian-war-crimes-in-afghanistan-prosecutions-face-an-uncertain-road-ahead-alexandra-fowler/>

⁷ Brereton Report (n1), Chapter 1.03 at [49].

⁸ Brereton Report (n1), Chapter 1.03 at [32].

⁹ Brereton Report (n1), Chapter 1.01 at [42]; at 112 and 359; and Chapter 3.02 at [279] and [295].

¹⁰ Question from Jordon Steele-John (Senator for Western Australia) to the OSI regarding Australian Special Forces War Crimes in Afghanistan – Victims' Liaison Unit (AE21-204, Senate Standing Committee on Legal and Constitutional Affairs, 22 March 2021).

gathering information from people in Afghanistan, but on gathering other evidence.¹¹ In October 2021 Moraitis told representatives of the Australian Senate in Supplementary Estimates hearings that he thought it would be difficult to envisage that Afghan witnesses would come to Australia to give evidence in future¹², although he did concede that there would be certain advantages to being able to gather evidence in person.

As Nelson has observed, it is important for the OSI/DPP to realise that investigations of international crimes, even those carried out domestically, bring with them a heightened need for victim outreach and participation. This includes ensuring that victims and witnesses from another country are sufficiently familiar with court processes and what to expect from them. These are things that are difficult for many witnesses anyway, and these difficulties are exacerbated where there are cultural and linguistic barriers.¹³ There are rights victims have in accordance with internal guidelines and policies of the AFP. The DPP (Cth) also gives victims the right to be kept up to date with where proceedings are at, to be consulted on decisions about which charges to proceed with and the right to give victim impact statements. The Witness Assistance Service (WAS) is available to guide witnesses and offer them support, including support during the potentially traumatic process of giving evidence, but this is available only to a limited number of people – children and victims of sexual assault (some jurisdictions), and victims of certain international-type crimes like slavery. It is unclear whether it might be available to victims of war crimes or other offences against the Rome Statute.

There is no information as to whether the OSI/DPP have included evidence from Afghan witnesses in their charging brief for Schulz (or will do for any future accuseds), or whether they plan to integrate witnesses into the trial in some respect. It is already known that in relation to New Zealand's inquiry, victim groups pulled out of the process due to frustration about being denied access to key information about the incident, such as the gun tape footage that would have showed what had happened.¹⁴ The final Brereton Report stressed repeatedly how Afghan voices had been completely disregarded up to that point and that that is one of the reasons why the initial Australian investigations were so poor, namely, Afghan witnesses and civil society

¹¹ See also D. Hurst "Investigation of Alleged Australian War Crimes could be Hindered by Fall of Afghan Government" *The Guardian* (online ed, London, 21 August 2021).

¹² Senate Legal and Constitutional Affairs Legislation Committee *Estimates: Home Affairs Portfolio* (Official Committee Hansard, 25 October 2021) at [54] and following.

¹³ See n8 at [19]-[20].

¹⁴ T. Arnold and G. Palmer, *Report of the Government Inquiry into Operation Burnham and related matters* (July 2020) [Burnham Inquiry Report]. Chapter 1 at [46]; and "Afghan villagers pull out of Operation Burnham inquiry" Radio New Zealand (18 June 2019), www.rnz.co.nz.

were presumed to be making it all up.¹⁵ Thus it is vital that plans for meaningful victim participation are made at an early stage, not least because increasingly in domestic (and in international) criminal law there is an understanding that secondary victimisation may occur if victims are not properly involved in a prosecution process.¹⁶

This is even more so because even assuming they had the evidence required to meet the criminal standard, it would not be possible for victims to launch a criminal case against an accused in an Australian court.¹⁷ Section 268.121(1) of the *Criminal Code* provides that prosecutions under Div 268 require the approval of the Attorney-General, and there is no other legislation that would support such an action. Further, s268.122 renders the Minister's decision immune to challenge, and the High Court (by a narrow majority) has ruled in *Taylor v Attorney-General (Cth)* (2019)¹⁸ that s13(a) of the *Crimes Act* 1914 (Cth) cannot be used by a private individual to launch a prosecution under Div 268.

Australia's Practice on Afghan Compensation

To date the Government has made some statements about compensating Afghan victims and their families. The Brereton Report had found that payments should be offered quickly to restore "Australia's standing" and this be done immediately and irrespective of the outcome of any subsequent criminal prosecutions.¹⁹ In the wake of the public release of the Report Australia's Chief of the Defence Force made an apology to the people of Afghanistan which was translated into Dari and Pashto.²⁰ However, the then Prime Minister Morrison, while acknowledging that the alleged war crimes were "disturbing and distressing", denied that compensation was owed and stated that the then Government was not considering any.²¹ However, by the end of 2022 and the election of a Labor Government the narrative had changed, and new Defence Minister Richard Marles announced that the Government *was* planning to compensate the families of victims of alleged Afghanistan war crimes. Further, a

¹⁵ Chapter 1.01 at [42]; at 112 and 359; and Chapter 3.02 at [279] and [295].

¹⁶ U. Orth, "Secondary Victimization of Crime Victims by Criminal Proceedings", 15(4) *Social Justice Research* (December 2002) 313.

¹⁷ See n6.

¹⁸ *Taylor v Attorney-General (Cth)* [2019] HCA 30.

¹⁹ Brereton Report n1, Chapter 1.01 at [76].

²⁰ "Defence Response: Afghan Inquiry Reform Plan" (February 2022), Inspector-General of the Australian Defence Force Afghanistan Inquiry, <http://afghanistandinquiry.defence.gov.au>.

²¹ G. Fernando, "Scott Morrison Condemns Alleged War Crimes in Afghanistan as 'Disturbing and Distressing'", *SBS online* (21 November 2020); Human Rights Watch, "Australia: Ensure Justice for Alleged War Crimes" (8 December 2020).

spokesman for Marles noted that “[w]hilst there are a number of complexities associated with this, the Government remains committed to implementing, to the extent that it can, the *Brereton Report*”.²²

The ready acknowledgment by the Australian Government that crimes were committed is an important first step for victims to start the healing process, but clearly much remains to be done on reparations to bring Australian practice in line with the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.²³ Australia has already missed its target of ‘end 2021’ to formulate a reparations plan.²⁴ Had that been done, say, at the beginning of 2021, then it would have been more straightforward, as Australia still had a military and diplomatic presence in Afghanistan at that time. That delay in acting has made things a lot more complicated, and it is clear that the issue needs to be given much more priority and attention than it has had to date.

²² D. Hurst, “Australia Looking to Compensate Afghanistan War Crime Victims’ Families”, *The Guardian online* (4 December 2022).

²³ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by United Nations General Assembly Resolution 60/147 of 16 December 2005 (A/RES/60/147).

²⁴ See Department of Defence *Afghanistan Inquiry Reform Plan: Delivering the Defence Response to the IGADF Afghanistan Inquiry* (Australian Government, 30 July 2021) [*Afghanistan Inquiry Reform Plan*], 2. Also D. Hurst, “Australian Government Misses Compensation Deadline for Victims of Alleged War Crimes”, *The Guardian online* (23 April 2022), <https://www.theguardian.com/australia-news/2022/apr/24/australian-government-misses-compensation-deadline-for-victims-of-alleged-war-crimes>.