

AUSTRALIAN   
 CENTRE  
FOR INTERNATIONAL  
JUSTICE 

# **Inquiry into Australia's Engagement in Afghanistan**

**Submission to the Senate Foreign Affairs,  
Defence and Trade References Committee**

**13 October 2021**

## **About the Australian Centre for International Justice**

The Australian Centre for International Justice (ACIJ) is an independent and not-for-profit legal centre working to develop Australia's domestic investigations and prosecutions of the international crimes offences in the Commonwealth Criminal Code. ACIJ aims to combat impunity and works with survivors of international crimes to seek justice, redress and accountability.

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# 1 Introduction

The Australian Centre for International Justice (**ACIJ**) welcomes the opportunity to make this submission to the Senate Foreign Affairs, Defence and Trade References Committee (the **Committee**) Inquiry into Australia's engagement in Afghanistan (the **Inquiry**).

## About ACIJ

ACIJ was established primarily to develop and encourage Australia's domestic investigations and prosecutions of egregious violations of human rights which amount to the international crimes offences in the Commonwealth Criminal Code, namely: torture, war crimes, crimes against humanity and genocide.

ACIJ represents victims of atrocity crimes and works with victims and survivor communities and organisations in Australia and abroad. We develop legal strategies to target the perpetrators of grave crimes and to hold them to account.

## Primary focus of submission

ACIJ's work focuses primarily on seeking avenues for justice and accountability, including through criminal justice. This submission thus focuses on relevant aspects of the Australian government's response to the recommendations of the Inspector-General of the Australia Defence Force's (**IGADF**) Afghanistan Inquiry Report concerning allegations of war crimes by Australia's Special Forces in Afghanistan between 2005 and 2016 (**Brereton Report**).

Australia's moral responsibility to adequately address these issues has been widely discussed. With this submission, ACIJ wishes to emphasise that Australia also has legal obligations attaching to its response to those allegations.

Australia's willingness and ability to meet these legal obligations has implications for the assessment of several of the issues under consideration by the current Inquiry. This applies in particular to the assessment of whether Australia's twenty-year engagement in Afghanistan was successful in achieving the Australian Government's stated objectives and the assessment of how the Australian Government should respond to recent developments in Afghanistan in order to prevent or mitigate damage to Australia's international reputation.

ACIJ welcomes any further opportunity to provide additional commentary or supplementary submissions to the Committee if it would assist its Inquiry.

## **Recommendations**

This submission makes the following recommendations.

### **Recommendation 1**

Criminal investigations should examine the extent to which legal responsibility for war crimes extends up the chain of command.

### **Recommendation 2**

Along with responsibility for the unlawful killings of prisoners, criminal investigations should examine other categories of unlawful killings as well as potential cases of cruel treatment.

### **Recommendation 3**

The Office of the Special Investigator (**OSI**), the Australian Federal Police (**AFP**) and the Commonwealth Director of Public Prosecutions (**CDPP**) should make the necessary preparations to ensure Afghan witnesses and victims can participate adequately in proceedings.

### **Recommendation 4**

OSI, AFP and CDPP staff with responsibility for dealing with Afghan victims and witnesses should have the requisite expertise in working with interpreters as well as cultural awareness and a trauma-informed approach.

### **Recommendation 5**

CDPP's Witness Assistance Service should be extended to include victims of international crimes, including war crimes.

### **Recommendation 6**

The Department of Defence Afghanistan Inquiry Reform Plan must address Australia's obligations to comply with the laws of armed conflict.

### **Recommendation 7**

The issue of compensation for Afghan victims should be resolved as a matter of urgency and the Australian Government should consult survivors on other forms of redress.

### **Recommendation 8**

Transparency should be a guiding principle in Australia's response to the findings of the Brereton Report.

### **Recommendation 9**

The fully unredacted Brereton Report should be released at the conclusion of any relevant legal proceedings.

**Recommendation 10**

The Australian Government should establish a permanent independent unit to investigate international crimes

**Recommendation 11**

The Australian Government should guarantee an additional humanitarian intake of at least 20,000 people from Afghanistan and should ensure that Afghan human rights defenders are adequately protected.

**Recommendation 12**

Australia's process of reckoning with its twenty-year engagement in Afghanistan should include Afghan perspectives.

## 2 Criminal justice response to war crimes allegations

### Requirements of genuine national proceedings

#### Recommendation 1

**Criminal investigations should examine the extent to which legal responsibility for war crimes extends up the chain of command.**

#### Recommendation 2

**Along with responsibility for the unlawful killings of prisoners, criminal investigations should examine other categories of unlawful killings as well as potential cases of cruel treatment.**

Australia is obliged to prosecute conduct amounting to war crimes by its armed forces. Primary responsibility for such prosecutions lies with Australian authorities.<sup>1</sup> Jurisdiction can only revert to the International Criminal Court (ICC) in the absence of genuine proceedings at the national level. This is line with the principle of complementarity, a cornerstone of the International Criminal Court's system of international justice which recognises the primacy of domestic jurisdiction over international crimes.

The ICC's Office of the Prosecutor's investigation into alleged crimes perpetrated in the territory of Afghanistan since 1 May 2003 was authorised in March 2020.<sup>2</sup> While the current focus of those investigations is on crimes committed by the Taliban and the Islamic State – Khorasan Province ('IS-K'),<sup>3</sup> the Office of the Prosecutor could also investigate crimes by international forces, including by Australian forces.<sup>4</sup>

<sup>1</sup> *International Criminal Court Act 2002* (Cth) s 3(2).

<sup>2</sup> *Situation in the Islamic Republic of Afghanistan* (Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, Appeals Chamber, ICC-02/17, 5 March 2020). The deferral of the investigation was requested by the Islamic Republic of Afghanistan in March 2020 but the Office of the Prosecutor has recently indicated its intention to proceed with the investigation. *Situation in the Islamic Republic of Afghanistan* (Request to authorise resumption of investigation under article 18(2) of the Statute, Office of the Prosecutor, ICC-02/17, 27 September 2021).

<sup>3</sup> Karim A. A. Khan, 'Statement of the Prosecutor of the International Criminal Court following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan' (27 September 2021) <<https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan>>.

<sup>4</sup> In its request to authorise the investigation the Office of the Prosecutor stated: "[m]ore recently, during the preparation of this Request, the Prosecution received media reports and article 15 communications concerning allegations attributed to special forces of a number of international forces operating in Afghanistan. The Prosecution was unable to adequately analyse the information and the sources provided in view of the limited

Jurisdiction for prosecuting crimes by Australian Defence Force (**ADF**) will remain at the domestic level where:

- relevant national proceedings are underway;
- the focus of those proceedings is on those most responsible for the most serious crimes committed;<sup>5</sup> and
- those proceedings are not vitiated by the unwillingness or inability to genuinely carry out the proceedings.<sup>6</sup>

In determining “unwillingness” the International Criminal Court’s prosecutor will consider, among other factors, whether the proceedings are being conducted independently or impartially and whether they are being conducted in a manner which is consistent with an intent to bring the persons concerned to justice.<sup>7</sup> Other relevant considerations could include the application of a regime of immunity for alleged perpetrators as well as manifest inadequacies in charging and modes of liability in relation to the gravity of the alleged conduct and the purported role of the accused.<sup>8</sup>

With regards to the need for independent investigations, ACIJ welcomes the establishment of the Office of the Special Investigator (**OSI**).<sup>9</sup>

OSI has acknowledged that its investigations will not necessarily be limited to the potentially criminal matters set out in the Brereton Report and that it will also consider further allegations of criminal offences that arise relating to actions of the ADF in Afghanistan from 2005 to 2016.<sup>10</sup>

ACIJ stresses the need for the investigations to examine the extent to which legal responsibility for war crimes extends up the chain of command. The Brereton Report found

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time at its disposal from the moment it was made aware of the allegations, without further delaying the submission of this Request. Should an investigation be opened, these and other alleged crimes that may occur after the commencement of the investigation, as well as any attendant assessments concerning complementarity and gravity, could be assessed further within the scope of the authorised situation.” *Situation in the Islamic Republic of Afghanistan* (Request for authorisation of an investigation pursuant to article 15, Office of the Prosecutor, ICC-02/17-7, 20 November 2017) [260].

<sup>5</sup> The Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (November 2013) [49].

<sup>6</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 17(1)(a). See also *Prosecutor v Saif Al-Islam Gaddafi (Decision on the admissibility of the case against Abdullah Al-Senussi)* (International Criminal Court, Pre-Trial Chamber 1, Case No ICC-01/11-01/11, 11 October 2013) [21].

<sup>7</sup> *Rome Statute of the International Criminal Court* (n 6) art 17(2).

<sup>8</sup> The Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (n 5) [51], [53].

<sup>9</sup> Australian Centre for International Justice, ‘The establishment of the Office of the Special Investigator is welcome and should be made permanent’ (Media Release, 12 November 2020) <<https://acij.org.au/media-release-the-establishment-of-the-office-of-the-special-investigator-is-welcome-and-should-be-made-permanent/>>.

<sup>10</sup> Opening Statement to Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 22 March 2021 (Chris Moraitis) <<https://www.osi.gov.au/news-and-resources/additional-estimates-22-march-2021>>.



that some commanders bore “moral command responsibility for what happened under their command and control”.<sup>11</sup> This finding obscures the fact that command responsibility is a legal doctrine which provides for the individual criminal responsibility of superiors in situations where they knew or should have known<sup>12</sup> about international crimes and failed to prevent or punish those crimes. The doctrine was borne of the understanding that those higher up in the hierarchy bear greater responsibility for international crimes, in part because they are better placed to ensure that such crimes are prevented, both through training and through punishment to prevent recurrence.<sup>13</sup> If Australia is to satisfy the complementarity requirements of the Rome Statute of the International Criminal Court, it will need to ensure that its investigations address systemic failures and the criminal liability of those bearing the greatest responsibility for the crimes. Systemic failures would appear to include the widespread use of “throwdowns”<sup>14</sup>, the broader practice of cover-ups and the inadequacy of initial investigations.

Regarding the criminal incidents to be examined, it is important that Australia's investigations not be limited to cases of unlawful killings of prisoners and persons who were *hors-de-combat*. Publicly available information suggests that investigations are warranted into potential incidents of the war crime of cruel treatment as well as potentially unlawful killings resulting from the targeting of persons claimed to be “spotters” or “squirters” i.e. persons running away from Australian forces or from a compound of interest.<sup>15</sup>

Notwithstanding the existence of an independent investigative body, the independence or the perceived independence of investigations could be undermined by the government's positions on the response to the findings of the Brereton Report.<sup>16</sup> The Australian Government should ensure that its responses to those findings – including on compensation for victims, on military reform and on the review of military honours and awards – demonstrate a genuine commitment to establishing and acknowledging the truth about Australia's engagement in Afghanistan. Similarly, the treatment of whistle-blowers and journalists who have brought to light allegations of war crimes can impact on the overall climate of accountability.

With regards to the adequacy of Australia's preparation for withdrawal from Afghanistan, the Inquiry should further examine whether genuine efforts were made to secure contact with

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<sup>11</sup> Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report* (November 2020) 103, 471.

<sup>12</sup> Under s 286.115 of the Commonwealth Criminal Code, the standard is knowledge or recklessness “as to whether the forces were committing or about to commit such offences” as well as failure to take measures to prevent or repress such crimes after the fact.

<sup>13</sup> See eg Guénaël Mettraux, *The Law of Command Responsibility* (Oxford University Press, 2009), 15.

<sup>14</sup> *Afghanistan Inquiry Report* (n 11) 297, 331, 490.

<sup>15</sup> *Ibid*, 29, 96, 297, 331.

<sup>16</sup> The ICC's Office of the Prosecutor has confirmed that in assessing the genuineness of domestic proceedings, it will examine the totality of the relevant factors in order to determine whether perpetrators are being shielded from prosecutions. *Situation in Iraq/UK* (Final Report, Office of the Prosecutor, 9 December 2020) [487].

witnesses relevant to the OSI and AFP's investigations before the closure of the embassy in Kabul as well as during the ADF's evacuations from Kabul and the withdrawal of Australian troops.

## Victim and witness participation in proceedings

### Recommendation 3

**The Office of the Special Investigator, the Australian Federal Police and the Commonwealth Director of Public Prosecutions should make the necessary preparations to ensure Afghan witnesses and victims can participate adequately in proceedings.**

### Recommendation 4

**OSI, AFP and CDDP staff with responsibility for dealing with Afghan victims and witnesses should have the requisite expertise in working with interpreters as well as cultural awareness and a trauma-informed approach.**

### Recommendation 5

**The Commonwealth Director of Public Prosecutions' Witness Assistance Service should be extended to include victims of international crimes, including war crimes.**

Among Afghans, there is a strong appetite for truth and justice for crimes committed during the conflict. There is also a strong interest in the progress of investigations in Australia. This is clear from the preliminary work undertaken by our partners at the Afghanistan Human Rights and Democracy Organization as well as from the work done by Afghan survivor groups pursuing truth, justice and accountability, including in their advocacy at the International Criminal Court level.

The rights of victims in criminal proceedings is an area of increased focus, both in Australia and in international criminal law practice.<sup>17</sup> There is a growing awareness also that disregard of victims during the criminal justice process can potentially lead to secondary victimisation

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<sup>17</sup> In Australia, charters of victims' rights have been drawn up at the state and territory level and commissioners for victims' rights have been appointed in Australian Capital Territory, New South Wales, South Australia, Victoria, and Western Australia. The rights of victims have been a focus of the Victorian Law Reform Commission, the Royal Commission into Institutional Responses to Child Sexual Abuse and the Royal Commission into Family Violence. See also Tyrone Kirchengast, Mary Iliadis and Michael O'Connell, 'Development of the Office of Commissioner of Victims' Rights as an Appropriate Response to Improving the Experiences of Victims in the Criminal Justice System: Integrity, Access and Justice for Victims of Crimes' (2019) 45(1) *Monash University Law Review* 1–2. For more on the role of victims in international criminal law practice see eg Carla Ferstman, 'International Criminal Law and Victim's Rights' in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge, 2010) 407. See also Elisabeth Baumgartner, 'Aspects of Victim Participation in the Proceedings of the International Criminal Court' (2008) 90 *International Review of the Red Cross* 409; Daniel David Ntanda Nsereko, 'The Role of Victims in Criminal Proceedings – Lessons National Jurisdictions can learn from the ICC' (2010) 21 *Criminal Law Forum* 399.

and prolong the harm suffered.<sup>18</sup> Domestic and international practice shows that victims' experience of the criminal justice process can be improved without impairing the rights of the accused which are at the heart of the criminal justice system.

Prosecutions of international crimes in other domestic jurisdictions suggests that successful victim participation depends in large part on victims being informed of their rights as early as possible i.e. at the investigative stage.<sup>19</sup> At the investigative stage, victims should where possible be kept informed of the progress of investigations and any charges laid against the accused or any modification of charges.<sup>20</sup>

Victims have further rights at the prosecution stage. The CDPP Victims of Crime Policy stipulates that victims should be treated with courtesy, compassion, cultural sensitivity and respect for their dignity and entitlements. The focus on the dignity of victims is echoed in the Rome Statute of the International Criminal Court<sup>21</sup> and in the UN's 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.<sup>22</sup>

In Australia, victims of crime are entitled to be advised on and kept informed of the progress of the prosecution in a timely manner.<sup>23</sup> They should also be consulted where appropriate by prosecutors when deciding whether it is in the public interest to discontinue or commence a prosecution, to agree to a plea negotiation or decline to proceed with prosecution after a committal.<sup>24</sup> The victims should also be borne in mind when identifying the most appropriate

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<sup>18</sup> Michael O'Connell, Commissioner for Victims' Rights, South Australia 'Victims' Rights: Integrating Victims in Criminal Proceedings' (undated) 1.

<sup>19</sup> European Center for Constitutional and Human Rights, *Universal Jurisdiction in Germany? The Congo War Crimes Trial: First Case under the Code of Crimes against International Law* (8 June 2016, Executive Summary) 25. <[https://www.ecchr.eu/fileadmin/Juristische\\_Dokumente/Report\\_Executive\\_Summary\\_FDLR\\_EN.pdf](https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Report_Executive_Summary_FDLR_EN.pdf)>.

<sup>20</sup> Victims of Crime Commissioner ACT and Human Rights and Discrimination Commissioner ACT, *Victim and Witness Rights under the ACT Human Rights Act 2004: A Practical Guide for the Justice Sector on the Human Rights Act (ACT) 2004* (undated) 7.

<sup>21</sup> *Rome Statute of the International Criminal Court* (n 6) art 68. See also International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3 (adopted 9 September 2002) r 86.

<sup>22</sup> *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*, GA Res 60/147, A/RES/60/147 (16 December 2005) annex para 10, which reads: "Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation."

<sup>23</sup> Commonwealth Director of Public Prosecutions, *Victims of Crime Policy* (undated) [4] <[https://www.cdpp.gov.au/sites/default/files/202103\\_Victims\\_of\\_Crime\\_Policy.pdf](https://www.cdpp.gov.au/sites/default/files/202103_Victims_of_Crime_Policy.pdf)>.

<sup>24</sup> *Ibid* [7].

charges to bring in order to minimise distress to victims through the downgrading or withdrawal of charges.<sup>25</sup> Victims (and in the case of a deceased person, their family members) should be consulted on decisions resulting in no charges concerning alleged offences resulting in death or very serious physical or psychological harm.<sup>26</sup>

With regard to the above rights afforded to victims of crime in Australia, it is essential that staff at the OSI, the AFP and the CDPP with responsibility for working with Afghan victims and witnesses have the requisite expertise in working with interpreters where necessary as well as cultural awareness and a trauma-informed approach to work with victims and witnesses. Expertise in a gender-sensitive approach to the investigations of war crimes is also important.

The CDPP's Witness Assistance Service (**WAS**) is currently available to children, victims of slavery and human trafficking and other vulnerable witnesses.<sup>27</sup> ACIJ submits that victims of international crimes, including war crimes, should also be entitled to access Witness Assistance Services if they choose to. The need for witnesses to be given a clear understanding of what their participation will entail is particularly important in cases involving international crimes, where victims and witnesses may be unfamiliar with the legal processes of the system they are engaging in.<sup>28</sup>

The CDPP's guidelines indicate that direct family members of a person who has died as a result of any alleged offence also be referred to the Witness Assistance Service.<sup>29</sup> This should include Afghan relatives of victims of unlawful killings by Australian forces. The cultural differences in family structures in Australia and Afghanistan should be borne in mind when determining who falls under the category of "direct family member". Witness Assistance Service Staff should have the requisite expertise in working with interpreters as well as cultural awareness and a trauma-informed approach to work with victims and witnesses.

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<sup>25</sup> Ibid [14].

<sup>26</sup> Ibid [8].

<sup>27</sup> Commonwealth Director of Public Prosecutions, *Witness Assistance Service Referral Guidelines* (1 July 2021) [6] <<https://www.cdpp.gov.au/sites/default/files/2021%20WAS-Referral-Guidelines.pdf>>.

<sup>28</sup> Carla Ferstman, 'International Criminal Law and Victim's Rights', n 17, 409. See also Mandira Sharma, 'Torture in Non-International Armed Conflict and the Challenge of Universal Jurisdiction: The Unsuccessful Trial of Colonel Kumar Lama' in Suzannah Linton, Tim McCormack and Sandesh Sivakumaran (eds), *Asia-Pacific Perspectives on International Humanitarian Law* (Cambridge University Press 2019) 624, 636.

<sup>29</sup> Commonwealth Director of Public Prosecutions, *Witness Assistance Service Referral Guidelines* (n 27) [6].

Witness protection measures may need to be considered in the course of the investigations and proceedings. This will require familiarity with Afghanistan's diverse ethnic makeup as well as the rapidly evolving security situation facing Afghans within and outside Afghanistan.

Considerable efforts have been undertaken to inform Australian witnesses and ADF veterans of their entitlements to counselling and support services in the context of the Brereton Report.<sup>30</sup> This is to be welcomed but should also be extended to Afghan witnesses and victims. Written information will need to be translated and work undertaken, e.g. by WAS officers, to ensure the information is understood. Counsellors provided should also have experience in working with people from a culturally and linguistically diverse background.

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<sup>30</sup> Department of Defence, 'IGADF Afghanistan Inquiry Welfare Support' (Web Page) <<https://afghanistandinquiry.defence.gov.au/welfare-support>>; Office of the Special Investigator, 'Health and Wellbeing Support Services' (Web Page) <<https://www.osi.gov.au/support>>; Prime Minister, Minister for Home Affairs, Minister for Defence, 'Statement on IGADF Inquiry' (Media Release, 12 November 2020) <[www.pm.gov.au/media/statement-igadf-inquiry](http://www.pm.gov.au/media/statement-igadf-inquiry)>.

## 3 Role of legal obligations in defence response to the Brereton Report

### Recommendation 6

**The Department of Defence Afghanistan Inquiry Reform Plan must address Australia's obligations to comply with the laws of armed conflict.**

The Department of Defence Afghanistan Inquiry Reform Plan sets out its proposed measures to address the findings of the Brereton report and to bring about “transformational reform”. It fails, however, to outline any plans to improve training in international humanitarian law standards. There is no mention in the plan of international humanitarian law or war crimes or any measures to improve adherence to the laws of armed conflict. There is no mention either of the obligation to conduct independent, impartial and thorough investigations if there are reasonable grounds to believe that a war crime has been committed.<sup>31</sup> These are striking omissions given the nature of the findings of the Brereton Report.

The Department of Defence Reform Plan states that “[e]very person interviewed throughout the Afghanistan Inquiry indicated that they understood the Law of Armed Conflict and the Rules of Engagement under which they operated.”<sup>32</sup> This ignores the findings of the Brereton Report showing that these laws and rules were routinely violated. These findings include that:

- there is credible information of 23 incidents of unlawful killings and a further two incidents of the war crime of cruel treatment;<sup>33</sup>
- there is credible evidence that junior soldiers were required by their patrol commanders to shoot prisoners to “achieve” their first kill;<sup>34</sup>
- there is credible evidence of the use of “throwdowns” (eg the placing of weapons or radios on the bodies of people who were killed) to conceal deliberate unlawful killings;<sup>35</sup>

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<sup>31</sup> International Committee of the Red Cross and the Geneva Academy of International Humanitarian Law and Human Rights, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy and Good Practice* (September 2019), 26–29.

<sup>32</sup> Department of Defence, *Afghanistan Inquiry Reform Plan: Delivering the Defence Response to the IGADF Afghanistan Inquiry* (30 July 2021) 4, 24.

<sup>33</sup> *Afghanistan Inquiry Report* (n 11) 28, 29.

<sup>34</sup> *Ibid* 29.

<sup>35</sup> *Ibid* 29.

- operational reporting was sometimes outright fabricated amid resistance to investigations and inquiries;<sup>36</sup>
- legal officers assisted with the distortion of operational reporting in order to conceal non-compliance with the rules of engagement;<sup>37</sup>
- complaints to the ADF from affected Afghans, the Afghanistan Independent Human Rights Commission, the ICRC and the government of Afghanistan were discounted;<sup>38</sup> and
- the rules of engagement were routinely subverted or broken when Special Operations Command personnel disagreed with them.<sup>39</sup>

The question, then, for Defence reform is not only whether members of the special forces understand the laws of armed conflict but also whether they understand the binding legal obligation to comply with those laws. This lesson should be reinforced in future by training but also by genuine attempts to investigate suspected violations of those laws and take the appropriate legal measures to punish and to prevent recurrence.

Further, the Brereton Report recommended that training be provided to members of the ADF on the causes of war crimes<sup>40</sup> and on the legal duty to disobey an obviously unlawful order.<sup>41</sup> The Department of Defence's Afghanistan Inquiry Reform Plan fails to address these recommendations.

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<sup>36</sup> Ibid 34.

<sup>37</sup> Ibid 49.

<sup>38</sup> Ibid 359.

<sup>39</sup> Ibid 509.

<sup>40</sup> This recommendation relates to members of Special Operations Command, see *Afghanistan Inquiry Report* (n 11) 338.

<sup>41</sup> *Afghanistan Inquiry Report* (n 11) 338.



## 4 Redress

### Recommendation 7

**The issue of compensation for Afghan victims should be resolved as a matter of urgency and the Australian Government should consult survivors on other forms of redress.**

In November 2020, the Brereton Report recommended that Australia compensate the families of Afghan nationals who were unlawfully killed and that this be done swiftly, without waiting for the establishment of criminal liability.<sup>42</sup>

The Australian Government failed to take any action on this recommendation. In late July 2021 the Department of Defence indicated that “further information on the approach to be taken will be available by end-2021”.<sup>43</sup> Shortly afterwards, the Afghan government fell and the Taliban took control of the country, a development which is likely to significantly complicate the process of arranging compensation.

Together with Afghan partner organisations, ACIJ wrote to the Australian Government earlier this year emphasising the urgency of the compensation issue and the need for further reparative measures as part of a more comprehensive redress package.<sup>44</sup> Afghan survivors should be compensated but they also want to be consulted on other forms of reparation, including truth, accountability and memorialisation.<sup>45</sup>

The Inquiry should further examine the extent to which the government's failure to act swiftly on this recommendation has, in light of recent events in Afghanistan, impacted its ability to fulfill its obligations to provide redress to victims. The Inquiry should in particular investigate the impact of the closure of the Australian embassy in Kabul in May 2021 on the process of arranging for compensation.

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<sup>42</sup> Ibid 173.

<sup>43</sup> Department of Defence, *Afghanistan Inquiry Reform Plan* (n 32) 13.

<sup>44</sup> Australian Centre for International Justice et al, *Letter re: Adequate, effective and prompt reparation to Afghan victims of Australian war crimes* (3 August 2021) <<https://acij.org.au/wp-content/uploads/2021/08/Joint-Letter-Reparations-Afghan-Victims-3-August-2021.pdf>>.

<sup>45</sup> Ibid.

## 5 Truth, transparency and access to information

### **Recommendation 8**

**Transparency should be a guiding principle in Australia's response to the findings of the Brereton Report.**

### **Recommendation 9**

**The fully unredacted Brereton Report should be released at the conclusion of any relevant legal proceedings.**

It is important for all Australians, the Afghan people, and the wider international public that information on Australia's responses to the Brereton Report is publicly available. This allows for public debate, contributes to a more accurate historical record and helps to combat misinformation.<sup>46</sup>

Publicly available information about government responses to the Brereton Report and on the work of the OSI should be updated on a regular basis. Information should also be available in Dari and Pashto. The publication in Dari and Pashto of the apology by the Chief of the Defence Force is a welcome step but more needs to be done in terms of ongoing outreach to an Afghan audience.

If investigations lead to trials, ACIJ emphasises the need for such trials to be as open and accessible as possible. Proceedings should be live streamed where possible. Any requests to exclude the public from parts of the proceedings due to national security considerations must not be accepted at face value but subjected to rigorous examination. This is especially so given that Australia's military engagement in Afghanistan has come to an end.

Prior to the release of the Brereton Report, over 20 Australian, Afghan and international human rights organisations, including a coalition group of over 17 Afghan civil society groups and human rights defenders, wrote to the Assistant Inspector-General of the ADF, Justice Brereton, to urge him to exercise powers available to him<sup>47</sup> to release his report in full

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<sup>46</sup> The provision of information by the Afghanistan Inquiry in the form of Frequently Asked Questions (Workforce and Administrative Action) has been helpful in this regard. See Department of Defence, 'IGADF Afghanistan Inquiry: Frequently Asked Questions (Workforce and Administrative Action)' (Web Page) <<https://afghanistandinquiry.defence.gov.au/content/frequently-asked-questions-workforce-and-administrative-action>>.

<sup>47</sup> *Inspector-General of the Australian Defence Force Regulations 2016* (Cth), s 28H(2).

following the conclusion of any relevant criminal or civil proceedings.<sup>48</sup> In furnishing his Report, Justice Brereton indicated that part two of the Report, which was required to be completely redacted, must not be released publicly “at least until any such proceedings are finalised.”<sup>49</sup> ACIJ reiterates the need for the publication of the unredacted version of the Report following the conclusion of legal proceedings.

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<sup>48</sup> Australian Centre for International Justice et al, *Letter to Assistant IGADF* (30 October 2020) <<https://acij.org.au/joint-media-release-afghan-australian-and-international-human-rights-and-legal-organisations-call-for-public-release-of-justice-breretons-afghanistan-inquiry-report/>>.

<sup>49</sup> *Afghanistan Inquiry Report* (n 11) 11.

## 6 Need for a permanent unit to investigate international crimes

### Recommendation 10

**The Australian Government should establish a permanent independent unit to investigate international crimes.**

As part of the reflection on Australia's twenty-year engagement in Afghanistan it is useful to examine the shortcomings in investigating allegations of war crimes and any measures which could address such shortcomings in future. While the Brereton Report has already indicated some internal failings within the ADF and special forces culture that could be factors in contributing to delays, in this brief section we focus on criminal investigations by the AFP.

Initial analysis of documents obtained through freedom of information requests reveals at least two allegations of potential war crimes in Afghanistan were referred to the AFP, in 2015 and 2016 respectively. The partially redacted records of those investigations suggest that in at least one case, ADF incident and inquiry reports were accepted without extensive further scrutiny.

With regard to the AFP's current capacity to investigate international crimes not relating to the activities of the ADF in Afghanistan, there appears to be structural problems including the lack of expertise, resources and will to undertake what can be complex investigations. This has been evident also in another case – concerning international crimes in another jurisdiction – about which ACIJ has been in correspondence with the AFP.

Regarding investigations of the alleged war crimes in Afghanistan, these structural problems appear to have been addressed through the establishment of OSI. However, OSI is a temporary unit with a narrow remit. ACIJ is concerned about Australia's capacity to investigate other international crimes, including after the completion of OSI's work.

ACIJ has long called for a specialist, permanent investigations unit that is primarily tasked with investigating the international crimes offences in the Commonwealth Criminal Code.<sup>50</sup> Sometimes referred to as 'war crimes units', such units are an important feature in domestic

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<sup>50</sup> Rawan Arraf, 'Australia needs a Permanent War Crimes Investigation Unit', *The Sydney Morning Herald* (7 October 2020); Australian Centre for International Justice, 'Advancing International Justice in Australia Structural and Institutional Reform' (Web Page) <<https://acij.org.au/our-work/policy-and-law-reform/advancing-international-justice-in-australia/>>.

police investigative services across Europe and North America.<sup>51</sup> These units have also been pivotal in investigations of allegations of war crimes and crimes against humanity in Syria and Iraq, Iran, Rwanda and Sierra Leone, thus contributing to fulfilling states' international obligations to investigate and where appropriate prosecute the most serious crimes of concern to the international community.

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<sup>51</sup> For more see TRIAL International et al, *Universal Jurisdiction Review 2021* <<https://trialinternational.org/latest-post/ujar-2021/>>.

## 7 Further recommendations

### **Recommendation 11**

**The Australian Government should guarantee an additional humanitarian intake of at least 20,000 people from Afghanistan and should ensure that Afghan human rights defenders are adequately protected.**

### **Recommendation 12**

**Australia's process of reckoning with its twenty-year engagement in Afghanistan should include Afghan perspectives.**

ACIJ supports the broad civil society call, led by the Afghanistan Australia Advocacy Network (AAAN), asking the Australian government to guarantee at least an additional 20,000 humanitarian places for people fleeing the Taliban.<sup>52</sup> It also calls on Australia to grant permanent protection to more than 5,100 refugees from Afghanistan who are currently on temporary protection visas in Australia. The open letter is supported by over 400 organisations and close to 190,000 Australians.

The Australian Government should ensure it includes in its humanitarian intake Afghan human rights defenders who have worked for years to document crimes committed during the conflict, including by Australian forces. Their work documenting crimes by all parties to the conflict, including the Taliban, means that many are currently facing grave risks.<sup>53</sup> Allowing such human rights defenders to come to Australia would also facilitate their valuable contribution to the evaluation of Australia's twenty-year engagement in Afghanistan.

Australia's process of reckoning with its engagement in Afghanistan must include Afghan perspectives. No accurate assessment of Australia's Afghanistan War legacy – or the extent to which Australia achieved its aims in that conflict – can be formed without looking at the impact of that engagement on the Afghan people.

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<sup>52</sup> Afghanistan-Australian Advocacy Network, Open Letter to the Australian Government on the Obligation to Support the People of Afghanistan (undated) <<https://www.actionforafghanistan.com.au/open-letter>>.

<sup>53</sup> For security reasons, no further specific details will be provided in this public document.

## 8 Conclusion

An examination of the legacy of Australia's twenty-year engagement in Afghanistan is a welcome step. Genuine investigations into war crimes by Australian forces is a necessary element of this process. Conducting thorough investigations in line with best international practice will serve to reaffirm Australia's commitment to its legal obligations in war.

This – along with a broader reflection on Australia's engagement in Afghanistan that includes Afghan perspectives – will contribute to the important process of reckoning with the past that is crucial for victims, their families as well as for the wider Australian and Afghan public.