

ETHICS AND THE SPECIAL FORCES



WHAT CAN WE LEARN FROM THE SHADOWS CAST BY AUSTRALIAN ACTIONS IN AFGHANISTAN?

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Major General Justice Paul Brereton, who led a four-year review of [Australian] special forces' conduct in Afghanistan between 2005 and 2016, found evidence showing that 25 perpetrators had unlawfully killed 39 Afghan civilians, most of whom were detainees, and none of whom died in the heat of the battle. In some cases, there is evidence that the alleged killings took place at the instruction of patrol commanders, who told young soldiers to make their first kill by executing prisoners, a practice known as "bleeding". The alleged victims were not combatants and there was no doubt or confusion about the intent of the special forces soldiers, the report said. Earlier work by the

military sociologist Samantha Cromptoets disclosed allegations that two teenage Afghan boys had their throats slit by Special Air Service operators, and canvassed "body count competitions" and the indiscriminate killing of "squirters" – villagers who fled from a helicopter's approach.
– *The Guardian, 19 Nov 2020*¹

AT the start of 2020 I was asked by the Inspector General of the Australian Defence Force to review the evidence gathered and to try and address some specific questions relating to what had gone wrong in Special Operations Command in Afghanistan.² My work was published as an annex

to the full Brereton Report in November 2020.

I was provided with unhindered access to a huge number of documents, including interview transcripts gathered over the previous four to five years. I am very aware from the source material that my report was

¹*The Guardian, 19th November 2020, [theguardian.com/australia-news/2020/nov/20/we-expected-better-from-australia-shock-and-anger-in-afghanistan-at-war-crimes-report](https://www.theguardian.com/australia-news/2020/nov/20/we-expected-better-from-australia-shock-and-anger-in-afghanistan-at-war-crimes-report)*

²*This paper is based on the transcript of a Webinar recorded on 10th December 2020 as part of a discussion organised by the European Chapter of the International Society for Military Ethics – euroisme.eu/index.php/en/events/euroisme-online-events/webinar-december-2020 (with some brief amendments for clarity).*

compiled from that the victims' voices are completely missing – the evidence I was referring to focused on the accounts of Australian Defence Force personnel who were in theatre at the time of the allegations, not those of the Afghan population and certainly not those of ambulance-chasing lawyers.

The results of the inquiry have received a lot of attention and some criticism from people, many of whom don't actually appear to have read the final report. I'm going to limit my observations on this to just one point – one that has been repeated by others – which is to criticise the Brereton Report for not proving things to the standard required for criminal convictions. However, to blame the report for failing to do this is to misunderstand what its purpose was in the first place. The Afghanistan Inquiry was quite deliberately set up to be an inquisitorial process, to actually find out whether or not the allegations of war crimes were credible. This process is unusual for people who are unfamiliar with it. Witnesses were compelled to give evidence under pain of law but nothing that they said can be used to incriminate themselves or other people. Once you understand that it becomes clearer why there are such large sections redacted from the full report, and even from my much smaller annex at the end of it.

Anything that might hinder, interfere or compromise a criminal investigation has been removed from, or rather redacted from, the report. The point there is that a criminal investigator's goal is to do something different – that is to prove a case beyond reasonable doubt, that a person did a specific act in a specific place. The Brereton inquiry was to establish what happened and to explore if the rumours and allegations regarding war crimes



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had any basis in fact, not to provide material to the standard required by a criminal court for any prosecutions that might follow.

I am satisfied that the number of corroborating accounts and confirmations that I have seen from multiple sources provide a strong basis for being able to build an understanding of what happened and what went wrong in Special Operations Command. In this article, I work through some of the elements of my section of the report and highlight some factors that I believe are pertinent in a wider sense. I will not, for obvious reasons, comment on areas that have been redacted.

The first point to digest is that many military investigations over

the years have started with, and far too many have ended with, the theory that anything that went wrong was the responsibility of just a few bad apples. If we apply Ockham's Razor to the question and seek the least complicated answer, it is feasible that all of the crimes that are alleged to have been committed were carried out by a tiny number of bad apples, and there's no doubting that some people are more likely to commit war crimes than others. One American study suggests that members of the military are twice as likely as the general public to have some sort of anti-social personality disorder and there's no reason to think that this ratio would be exclusive to the US military. If there's a concentration of people predisposed to a particular type of behaviour in one place it is obvious that there's

a greater chance of seeing that kind of behaviour. It's impossible to know if the special forces' selection and training processes would have removed such people or condensed them, but the evidence doesn't suggest that the behaviour of personnel in Special Operations Command started out as 'bad' in 2007. The story doesn't work in that way. It isn't a case of things happening straight away, rather we have a narrative of actions emerging over time despite many of the same people returning to theatre. Therefore bad apples, while possibly a contributing factor, can't be the only explanation.

Could it be that personnel just didn't know what they were doing? Or that what they were doing was wrong? There is evidence that soldiers who receive effective ethics education and training are less likely to commit acts of atrocity, therefore the time spent on training soldiers to deal with the challenges they're likely to face in a counterinsurgency environment is a central part of any examination into the possible causes of aberrant behaviour.

Special Operations Forces units operate with a very flat structure, with life and death decisions in extreme and ambiguous situations being pushed right down to the absolute lowest tactical levels. That means understanding the difference between training and education is essential. Ethics education needs to deal with complexity and ambiguity as opposed to values and standards training and/or law of armed conflict briefs, which focus very much upon right and wrong answers in specific black and white situations.

Unfortunately, this type of education tends to be focused almost exclusively upon officers. That's not to say, however, that the officers involved were necessarily particularly well equipped either, and the lack of support for junior

officers in these situations is mentioned in several transcripts. What comes across very clearly from multiple points is that the rule of engagement briefs “back here in country”, as they were described, were hated by some soldiers due to their confusing nature, apparently sometimes leaving soldiers actually in doubt about what they were permitted to do. And that feedback was often from soldiers who had already been in the theatre, so those grey areas may have created some ambiguity for some people about what was permitted and what was not. This explanation does have 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. There is no suggestion anywhere in the extant accounts that anyone, including the alleged perpetrators, claim that what they were doing was not clearly and unambiguously illegal.

So why were the rules broken? Firstly, there was a series of rules applied to Special Operations Command personnel which, according to some, made their missions more challenging and put their personal and collective safety at risk. Rules of

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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 rules were to find ways to subvert and break them. The frustrations on the ground come out again and again. For example, an understandable and even laudable desire to ensure that detainees were not abused meant that even legitimate injuries, i.e. those injuries caused in the legitimate apprehension and handling of a detainee, could become the cause of massive investigations as far as those in theatre were concerned, and this was resented. The policy of what became known as “catch and release”, which is repeatedly referred to, came to signify for many people an out-of-touch chain of command which created a “them and us” situation between the people on the ground and higher command. Catch and release involved releasing detainees if there was no clear evidence of serious criminal misconduct, or if the people 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 the province they were operating in. The effect on the people who were supposed to be doing the catching was just as profound.

It’s suggested that the use of ‘throw-downs’ – 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, and the interviews taken over a number of years build up a picture of their use gradually becoming an acceptable practice to solve what was seen as a real problem on the ground.

One can see the mindset that emerged – these are practical people being presented with what became seen as a practical rather than an ethical or legal problem. They were denied what they felt to be a sensible solution that supported them and,

consequently, a parallel reality was created to cope with the gap. For any reader of battlefield reports, it would appear that the rules were being followed. To any direct observer on the ground, it would have been evident that entirely different processes were being applied. It came to be that it was preferred if the target that was supposed to be apprehended fired shots, as this justified a lethal response and removed the known problem of a person being briefly interrogated then possibly released straight back into the battlefield.

A second area to concentrate on is organisational culture, including peer approval, and a gradual decline in standards over time. A sense of exceptionalism is very evident from the accounts. As a collective they were treated differently to other members of the military, and they knew it. One clear example of this was that, despite there being an alcohol ban in theatre, the special forces had a pub – a pub that was resupplied through the military system. This was 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. It is hard not to see a correlation between this kind of activity and attitudes towards protective clothing, field craft and equipment



checks – amongst many other things. Creating the routine assumption that some rules are optional is bound to undermine the way other problems and situations are viewed, and this atmosphere combined to challenge the consistency of the chain of command and may have contributed to a degree of learned helplessness.

Contributing to this gradual decline in standards was fatigue in general, and a sense of a loss of purpose as the tasks that were assigned to them became less and less “special”. The accounts build up a picture of people just not being sure how what they were being asked to do contributed to the bigger picture. A quote from one of the many sources underlines this: “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.”

Due to the small size of the command, multiple rotations of the same personnel returning to the deployed task group would also ensure that any ingrained behaviour became reinforced and entrenched over time, with little fear of repercussions.

What about rewarding the right type of behaviour? The military’s institutional way of rewarding behaviour it wishes to see at the individual level is through the use of citations and awards and while many – if not nearly all of – the decorations presented over the period in question were no doubt well deserved and represented the best traditions of the Australian Defence Force, there may have been a number handed out with far less scrutiny than should have been the case. Let’s be clear here – I’m drawing this view from the words of people who were there. What comes out in multiple accounts is that there was a sense that rewarding some people who



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were objectively demonstrating the wrong kinds of behaviour further contributed to the poisoning of the organisational culture. This was referred to by several people who were distressed by the signals that the organisation was sending to its people.

The transcripts and the accounts chart a gradual move from a justified confidence in the ability of the unit to an arrogance and feeling of being untouchable. Soldiers became more and more confident over time – basically a law unto themselves – and poor behaviours became equated with being a good and effective soldier. According to some of the allegations, for a number of rotations, a new team member fresh into theatre who hadn’t yet shot someone would be required to shoot a prisoner. This was the price of entry into the group.

While healthy competition is obviously a good thing in most situations, when competition is measured by bad or inappropriate metrics internally as well as externally it becomes

corrosive. For example, there was an adoption of an unofficial body count metric – the kind of thing that is going to skew the way operations are conceived and executed and there’s clear evidence that some elements did keep score of the number of kills. This isn’t itself a breach of the law of armed conflict, but as one of the accounts from the ground says, in terms of establishing an ethical framework for your troops as a patrol commander “it’s a clear fail”. A tally board total and a desire to take it from 18 to 20 appears linked to the death of two prisoners, for example.

Finally, if you see fellow group members breaking the rules or cheating – with no apparent consequences – then the chances are that you’re going to do it too. Conversely, seeing other people passing up opportunities or doing the right thing, also tends to get mirrored and this demonstrates how behaviour becomes embedded at the level of organisational culture, which then determines what is

considered ‘normal’. There was some evidence that there was a deliberate effort made to conceal some behaviours and goings-on from junior officers and the rest of the chain of command. If true – and further inquiries may confirm this – a fractured unit command culture was likely partly culpable and would have directly impacted on oversight and transparency, and, in turn, consequences for actions. Several people referred to officers being no longer really in control, with troop commanders effectively becoming figureheads and some patrol commanders hero worshipped.

For those who retained enough awareness to see that the situation was dangerously wrong, it was clear that doing anything about it was simply not going to be easy and there were potentially serious repercussions for those who had the temerity to speak up. If you broke that rule then it was widely understood that there would be repercussions. Dr Crompvoets, who played a pivotal part in



sparking an inquiry by alerting the chain of command to issues after completing extensive interviews across the army environment, recorded that it was explicitly said to her that being a lone whistle-blower in a Special Operations Forces world would be met with intense resistance – shaming, ostracising, scapegoating, hostility and vindictiveness. Some people were clearly fearful for their safety, career and for their family’s safety, and challenging organisational culture is difficult when you are trying to fit in. For a junior officer, not being accepted by your soldiers could mean the end of your special forces career. 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, others, including lawyers who couldn’t reconcile what they’d seen or read with what they thought should have happened, simply left the organisation.

This environment meant that those with the specific responsibility to sustain

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the integrity of the chain of command and the link between operations on the ground and operational and strategic ambition were unable to perform their task. It was recognised before the Brereton inquiry even began that there was an issue with leadership accepting practices that should not have been permitted. The drinking on operations previously referenced, for example, was tacitly endorsed and such ‘compromises’ had over the years resulted in an inherited culture that was endemic across special forces and had become normalised.

The organisation had voluntarily become collectively blind to what was going on. While there was a clear feeling in the accounts of some staff officers that the vast majority of the reported killings were being 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.

For example, questions could have been asked about the high death count caused by some patrols, despite them not being engaged in a two-sided contest. How was it possible to end up with so many casualties when there were no accounts of shots being returned? When flags were raised, which was rare, questions or investigations were viewed through a headquarters versus Camp Russell [where Australian Special Forces and supporting units were based in Afghanistan] prism and considered a persecution of those just trying to do their job. There developed a culture of protecting the people on the ground from

what may have been perceived as unnecessary scrutiny. Recurring themes involved a reluctance to assist [Australian Defence Force legal officers], obstruction and interference, and the active concealment of some evidence, which culminated in an adversarial resistance to any form of scrutiny.

The result of this interference and obstruction was that, as well as pushing away issues that were regarded as trivial, rightly or wrongly, by those involved, it was almost impossible for more serious allegations to be followed up and examined. 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. Events on the ground and the after-action reports were therefore informing [what was recorded as the pre-operation] intelligence summary. Things were being done the wrong way around. Ultimately, rather than being part of the oversight and institutional understanding process, in some cases, the doctored record 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.

Other actors were trying their best unsuccessfully to raise awareness of what was happening. Complaints – a number of which can now be seen to have had substance – were made by or through the International Committee of the Red Cross, the Afghan Independent Human Rights Commission and local elders but were routinely passed off as simply Taliban propaganda or motivated by a desire for compensation. It is clear that there were warning signs but nothing happened.

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'. However well-intentioned some of these efforts to block or push away investigations may have been, it seems clear that the protection afforded by such actions also contributed to an attitude of untouchability among some personnel. This may have

facilitated the escalation to the most serious of the crimes that are alleged to have taken place.

In summary, the detailed accounts I was privileged to work through consistently paint a picture of a gradual erosion of standards that was contributed to by the character and tempo of the deployments and redeployments; inappropriate metrics of success imposed from above and the unit warping behaviour within the special force task group; a lack of clarity about purpose and a 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, or to be charitable, wilful blindness to the perpetration of war crimes.

The recommendations that I

“THERE IS AN IMPORTANT DIFFERENCE BETWEEN PULLING A TRIGGER AND GETTING IT WRONG, AND TAKING A PRISONER AND EXECUTING THEM IN COLD BLOOD.”

made, unsurprisingly perhaps, focus very much on training and education. I argue very strongly that military ethics training should employ case studies drawn from military personnel that look like yourself. Military personnel of all countries need to understand that good guys can do bad things, and that it is not just bad people that do bad things. Understanding how good people can end up doing bad things is absolutely essential if an organisation is to armour itself and its personnel against revisiting such behaviour.

I would also argue very strongly for the normalisation of the right kinds of routine ethical discussions. The Australian Defence Force has identified specific values – professionalism, loyalty, integrity, courage, innovation, teamwork – that underpin a virtue ethics approach, and these represent the institutional articulation of expected behaviour. I would like to see even more routine critical reflection on the values and standards of the Australian Defence Force and how these can and should be interpreted in different situations. For example, courage is a value or a 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 commanding officer, or the chief of the defence force when faced with a questionable direction from the Prime Minister. Exploring how one demonstrates courage in different circumstances is not something that should just happen in institutions during phase one training, it should be

a routine part of the normalised process of healthy ethics discussion taking place at all ranks under all stages of military careers. It should be a routine part of everyday activity.

My final point is on the importance of accountability. In 2015 Major General Sengelman 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 fails. I believe it is clear that a wider organisational accountability for creating a system that made those failures possible is also required.

My report ends with a quote from Dr Cropvoets, to whom we owe an enormous debt of gratitude. I put it there for a reason. She had access to many of the same sources as I did and amongst the transcripts consulted, there were countless references to exceptional soldiers and officers who upheld army values and whose character was unquestionably of high standing. Ultimately, there is an important difference between pulling a trigger and getting it wrong, and taking a prisoner and executing them in cold blood. I argue that anyone who does not recognise this distinction, or is prepared to ignore it, doesn't deserve to belong in any professional military, and certainly not the Australian Defence Force.

● *The Ethics of Special Ops: Raids, Recoveries, Reconnaissance, and Rebels* – co-authored by Baker, D, Herbert, R. and Whetham, D and published by Cambridge University Press – is due out this autumn.

