

War Crimes: Where does ultimate responsibility lie?

Only a Royal Commission will determine the answer

Discussion paper

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Abstract

Justice Brereton's *Afghanistan Inquiry Report* on allegations of criminal misconduct by Australian special forces members in Afghanistan is confronting for the Australian community in general and the Australian Defence Force (ADF) in particular. His findings do not reflect well on the integrity and professionalism of the special forces, their leaders or the government that in the first place committed them to a long and ultimately pointless conflict in Afghanistan that at no time served any identifiable Australian strategic purpose.

It is impossible for armed forces to retain focus and purpose when armed conflict itself becomes purposeless. The retention of an ethical and moral compass also becomes impossible when soldiers do not know what they are fighting for, or why. This lack of clarity appears to have obliterated ethical and moral sensibility.

Trust, which lies at the heart of democracy and the rule of law that supports it, is broken.

As confronting as the *Afghanistan Inquiry Report* is, it has manifest shortcomings. The inquiry was intended to establish questions of fact, with narrow terms of reference to establish the substance of the alleged criminal acts and the circumstances in which they occurred.

The terms of reference did not extend to broader issues of accountability, blame or culpability. Yet Justice Brereton has interpreted his terms of reference expansively, laying blame squarely on the shoulders of the non-commissioned officer (NCO) special forces patrol commanders, with no responsibility to be taken by higher command or the government. This paper argues that the *Afghanistan Inquiry Report* may be premature and/or unsafe in its conclusions and judgements regarding matters that were beyond the scope of its terms of reference.

The unqualified statement that “**there is no credible information** (Justice Brereton's emphasis) that troop, squadron and task group commanders either knew or suspected that these things were happening” is *prima facie* incredible.

Justice Brereton would be familiar with the legal axiom *ignorantia legis non excusat* – ignorance of the law is no defence. The same principle applies to organisational accountability: leaders' lack of knowledge of events and misdemeanours does not excuse their inaction. It is the job of leaders to keep their fingers on the pulse of their organisations and institutions, constantly checking the vital signs and, above all, defending and reinforcing their integrity.

Extraordinarily, Justice Brereton completely absolves government, which in the Westminster system should be accountable for the consequences of its decisions, from any responsibility at all.

To rebuild the trust that is at the heart of the Australian democratic enterprise, Australia needs a Royal Commission if we are to discover how and why war crimes were committed and put in place fail-safe procedures that will prevent their re-occurrence.

Introduction

Th'expense of spirit in a waste of shame
Is lust in action; and till action, lust
Is perjured, murd'rous, bloody, full of blame,
Savage, extreme, rude, cruel, not to trust

William Shakespeare, Sonnet 129

War crimes are perhaps the worst manifestation of a 'victory at all costs' culture that can so easily persuade individuals, whether political leaders or combatants, to abandon their moral compass and to cross the boundary between legality (however moot that might be) and criminality.

The bloodlust generated by fear, the adrenalin that comes with a heightened sense of vulnerability, the feeling of power, exhilaration and of being beyond normal legal sanction appears to be little different from the uncontrolled lust of which Shakespeare wrote. Lust in any sense may be an understandable emotion. But its intelligibility neither legitimises nor validates it.

War crimes are tantamount to crimes against humanity, since the unsanctioned use of armed force against protected classes of persons – civilians, non-combatants, captives, detainees and prisoners – is an assault on the dignity and value of the person and the very notion of innocence. War crimes offend the core ideas on which the rule of law rests. The claim “well, doesn't everyone do it in the fog of war” repudiates the military code of honour that must be at the heart of the defence forces of democratic nations. So, war crimes are fundamentally inconsistent with and offend against any notion of democracy.

For some years, media reports and intra-Australian Defence Force (ADF) rumours circulated alleging criminal acts and serious infringements of the rights of people detained 'at the point of capture' by Australian forces on deployment in Afghanistan.¹ These rumours were given currency when, in 2014, an ADF lawyer, Major David McBride, working – it would appear – on his own initiative, compiled a dossier detailing the instances of misconduct. His aim was less to cast light on crimes and misdemeanours than to expose the failures of military command and civilian leadership that had allowed them to occur. His dossier

¹ See Karen Elphick, “Reports, allegations and inquiries into serious misconduct by Australian troops in Afghanistan 2005-13”, (Canberra: Parliament of Australia, Parliamentary Library, 9 November 2020) https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2021/Chronologies/AllegationsAfghanistan

formed the basis of the ABC's *The Afghan Files*, published by Dan Oakes and Sam Clark.² McBride was subsequently charged with the unauthorised release of classified information and awaits trial.

So, in early 2016, then Chief of Army, Lt Gen Angus Campbell (currently the Chief of the Defence Force) commissioned a scoping inquiry into these rumours, appointing Major General Paul Brereton, at the time a judge of the NSW Supreme Court, to conduct a full-time inquiry.³

Justice Brereton's inquiry was intended to establish questions of fact. His terms of reference were narrow, directing his investigation towards establishing the substance of the alleged criminal acts and the circumstances in which they occurred. He was also directed to examine systemic, cultural or individual failure (including by commanders and legal officers within Special Operations Command). The terms of reference did not extend to issues of accountability, blame or culpability within the higher ADF command structure, or to the more critical issue of the roles and responsibilities of the ADF in executing the directions of government, or to the accountability of government for the ADF's execution of its directives.

The publication of Justice Brereton's report⁴ (hereafter called the *Afghanistan Inquiry Report*) on allegations of criminal misconduct by Australian special forces members on the battlefield in Afghanistan – allegations of war crimes – is particularly confronting for the Australian community in general and the ADF in particular. Justice Brereton's findings do not reflect well on the integrity and professionalism of the special forces, their leaders or the government that in the first place committed them to a long and ultimately pointless conflict in Afghanistan that at no time served any identifiable Australian strategic purpose.

The purpose of the long deployment of special forces may have been to offer some sort of earnest of Australia's reliability as an ally of the US. It is more likely, however, to have confirmed Australia's place as an acolyte and strategic dependent rather than an ally and partner. To sacrifice Australia's integrity and reputation on the altar of the alliance destroys both Australia's credibility and that of the alliance.

The report, even heavily redacted, is shocking in its detail and in its implications. It raises serious questions about the 'who dares wins' culture of the Special Air Services Regiment

² See Dan Oakes and Sam Clark, "The Afghan Files", Australian Broadcasting Commission, 11 July 2017 <https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642?nw=0>

³ See Karen Elphick, "The Inspector-General of the Australian Defence Force Afghanistan inquiry (Brereton Inquiry): a quick guide", (Canberra: Parliament of Australia, Parliamentary Library, 3 September 2020) https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp2021/Quick_Guides/BreretonInquiry

⁴ See P.L.G. Brereton, Inspector-General of the Australian Defence Force Afghanistan Inquiry Report (Canberra: Commonwealth of Australia, 2020) <https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>

(abbreviated SAS or SASR), the ethos of the commando regiments and the special forces more broadly. It also raises serious questions about the quality of leadership in the army and the ADF. Even more fundamentally, it raises questions about the accountability and responsibility of the Executive of government, particularly the accountability of the Prime Minister and the Minister for Defence. In a democracy, the Parliament must always hold the government to account, and government must always take responsibility for its decisions and their execution.

As noted above, the report was commissioned to ascertain the facts. It is not a brief of evidence, though it will certainly inform consequential criminal investigations and the preparation of charges to be laid by the Director of Public Prosecutions under the Crimes Act.⁵ Justice Brereton has drafted his report very carefully with a view to ensuring that it does not prejudice any further criminal investigation or prosecution. In other respects, he has interpreted his terms of reference expansively, laying blame squarely on the shoulders of the NCO special forces patrol commanders, but exculpating higher command and the government.

This paper argues that the *Afghanistan Inquiry Report* may be premature and/or unsafe in its conclusions and judgements regarding matters that were beyond the scope of its terms of reference, and, in consequence, calls for a Royal Commission into war crimes in Afghanistan, their antecedents and their implications for the moral character of the ADF.

The unqualified statement that “**there is no credible information** [Justice Brereton’s emphasis] that troop, squadron and task group commanders either knew or suspected that these things were happening”,⁶ without any indication of a deep analysis of intelligence reports and summaries, post-operation debriefings, post-operation evaluations, post-operation intelligence reviews and fully triangulated mission audits, is *prima facie* incredible.

⁵ See Christopher Knaus, “Australian war crimes inquiry: once the brutal details are revealed what happens next?”, *The Guardian (Australia)*, 12 November 2020 <https://www.theguardian.com/australia-news/2020/nov/12/australian-war-crimes-in-afghanistan-once-the-brutal-details-are-revealed-what-happens-next>

⁶ *Afghanistan Inquiry Report*, p. 103.

Did the ADF know what was expected of it?

The short answer is yes. As might be expected in a review of this kind, the legal chapters and their summaries of the requirements of the Laws of Armed Conflict are excellent – clear, concise and compelling. In chapter 1.10, “The Applicable Law of Armed Conflict”, of the *Afghanistan Inquiry Report*, Justice Brereton provides a comprehensive summary of the international legal constraints under which Australian forces in Afghanistan operated.⁷

Australia’s military commanders have long ensured that all members of the armed services, especially those who conduct operations involving lethal force, are fully conversant with the requirements of the Laws of Armed Conflict. It is a responsibility that the leaders of the ADF take seriously. In late 2000, then Chief of the Defence Force (CDF) Admiral Chris Barrie convened a group of high ranking ADF commanders to consider the question “Does Australia have a distinctive approach to war fighting?”

He subsequently commissioned the Defence Department’s Strategic Policy Division⁸ to prepare a clear, short and authoritative statement *The Australian Approach to Warfare*⁹ reflecting the senior commanders’ reflections. This statement was intended to be a key means of communicating the ADF’s vision of itself to members of the ADF, the community from which they all come, to allies and regional defence partners, and to people considering an ADF career.

The principal drafter of *The Australian Approach to Warfare* was Colonel Mike Goodyer, a conscientious, upstanding and experienced infantry officer. The lead-officer on this project, Colonel Goodyer “walked the talk”, producing a document that reflected the values of the ADF.

The document states clearly that the ADF is established and operates within a clear legal framework.

The Australian Defence Force is an important national institution. ... Its core function is to defend Australia from armed attack. In carrying out this and all its other functions, the Australian Defence Force is dependent on the support of the

⁷ *Ibid.*, pp. 263-286,

⁸ The author of this paper was head of the Strategic Policy Division at the time.

⁹ See *The Australian Approach to Warfare* (Canberra: Department of Defence, June 2002) <https://www.defence.gov.au/publications/docs/taatw.pdf>

Australian people, is governed by the rule of law, and is subject to the direction of the Commonwealth Government as the civil authority.¹⁰

It articulates clearly the need for the ADF to conduct its military activities in accordance with the Laws of Armed Conflict.

Australia also adheres to the Law of Armed Conflict, which is the body of international law governing how armed force may be used legitimately in resolving conflict.

Among other things, the Law of Armed Conflict provides for the:

- Humane treatment of prisoners;
- Distinction between combatants and civilians;
- Protection of objects of historical or cultural significance; and
- Prohibition of the use of certain kinds of weapons.

While armed conflict nearly always involves death and destruction, the Law of Armed Conflict provides an internationally accepted 'code of conduct' that seeks to prevent the worst excesses of warfare.¹¹

Subsequently, Admiral Barrie's successor as CDF, General Peter Cosgrove, issued an Australian Defence Doctrine Publication (ADDP) *Foundations of Australian Military Doctrine* which devoted a chapter to "Domestic Legal Considerations in the Use of the Australian Defence Force".¹² These legal considerations were amplified in considerable detail in Australian Defence Force Publication 37 dealing specifically with the Laws of Armed Conflict, which was in turn superseded by ADDP 06.4 *Law of Armed Conflict* issued on 11 May 2006 by then-CDF Air Chief Marshal Angus Houston. This is a detailed doctrinal treatment of the Laws of Armed Conflict, with chapter 9 dealing with protected persons and non-combatants, chapter 10 addressing the management of prisoners of war and detained persons, and chapter 11 dealing with the rights and duties of neutrals.

At the very least, the ADF cannot claim ignorance of the law to excuse any war crimes that might have been committed in Afghanistan.

¹⁰ *Ibid.*, p. 1.

¹¹ *Ibid.*, p. 8.

¹² This document has gone through several iterations during the past two decades. See <http://www.navedu.navy.mi.th/stg/databasestory/data/laukniyom/workjob/bigcountry-workjob/Australia/ADDP-D-FOUNDATIONS-OF-AUSTRALIAN-MILITARY-DOCTRINE.pdf> dated September 2002 and <http://www.navedu.navy.mi.th/stg/databasestory/data/laukniyom/workjob/bigcountry-workjob/Australia/ADDP-D-FOUNDATIONS-OF-AUSTRALIAN-MILITARY-DOCTRINE.pdf> dated 31 May 2012 authorised by General David Hurley.

So, what happened?

For all the ADF's claims to professional mastery and expertise in the military art – many of them justified – it becomes more difficult to retain focus and purpose when armed conflict itself becomes purposeless. The retention of an ethical and moral compass also becomes more difficult when soldiers do not know what they are fighting for, or why. And for special forces, whose fundamental purpose was intelligence gathering, surveillance and reconnaissance, to have had their *raison d'être* gradually transform into the conduct of 'kill and capture' missions, the momentum of operations appears to have obliterated ethical and moral sensibility.

It is understandable but not excusable that this shifting 'fog of war' corrodes the authority and discipline of traditional military doctrine. The imbalance between the fast-moving dynamics of warfare and the always stretched forces available for the conduct of operations generates additional pressure to deliver tactical effects rather than strategic results. Whereas 'manoeuvre' has long been central to land force doctrine, there are some who are now advocating 'targeting' as providing a more immediate means of generating tactical effects. So we have a new, if somewhat Orwellian, term of military art, the 'kill chain', which eliminates individual threats while reducing risk to one's own forces. It is not simply kinetic, however. It is terminal – killing is the end result.

Here we have a former SASR member advocating a change in the way special forces see and go about their core tasks.

In Afghanistan, our special forces (a manoeuvre element) embraced targeting, while the conventional forces had no need, since they were largely consigned to guarding bases which were rarely seriously threatened. Special forces incorporated targeting into their skillset through the adoption of the concept of a 'kill chain'. The use of the kill chain methodology was required as our special forces increasingly work closely with US, European and other special forces. The kill chain concept proved to be ideal for identifying threats, tracking those threats down and destroying the individuals and/or cells in what are often described as 'targeted strikes'.¹³

¹³ Thomas Basan, "Time for a new approach to war? A case for adopting the kill chain concept", The Cove (The Australian Army's online newsletter), 2 January 2020 <https://cove.army.gov.au/article/time-new-approach-war-case-adopting-the-kill-chain-concept>. 'Kill Chain' is not a traditional or standard military term, and is thus subject to interpretation. It was used by the US Chief of Naval Operations Adm Jonathan Greenert in 2013 to describe the process whereby a submarine acquires and destroys a target <https://web.archive.org/web/20130613233413/http://cno.navylive.dodlive.mil/2013/04/23/kill-chain-approach-4/>. The fact that the term was used as the title for a US gangster movie lends an inappropriate connotation to the term.

Whether any of this has percolated into the operational mindset of Australia's special forces is unclear, though the repeated use of special forces, rather than conventional infantry forces, for 'kill and capture' missions, as identified in Justice Brereton's report, suggest some shift in force employment. To address this problem, Justice Brereton recommends the increased employment of conventional forces to reduce the operational tempo of special force operations.¹⁴

Such an emphasis on tactical efficiency, however, may well render its devotees blind to the fact that armed conflict, especially the type of ambiguous conflict represented by the war in Afghanistan, is always deeply political. 'Taking out targets' as mandated by the 'kill chain', oblivious to the collateral political effects generated by the killing of non-combatants and prisoners, is symptomatic of a vacuum at the strategic level. It is also symptomatic of a moral vacuum. It is a guaranteed way of losing a counter-insurgency war.

¹⁴ See, for instance, the Executive Summary at Ch. 3.01, *The Afghanistan Inquiry Report*, p. 325 and the section "The misemployment of Special Forces", p. 335.

The warrior culture - internal factors

Justice Brereton's consideration of internal cultural issues is illuminating. It identifies six factors that combined to generate a self-absorbed and self-referential culture within the special force elements deployed to Afghanistan.

- The dominant influence of patrol leaders over their troopers, and indeed over the junior officers further up the command chain – an aspect to which the former SASR Captain and currently federal MP for Canning WA, Andrew Hastie, referred in an opinion piece published in *The Australian*.¹⁵
- Exceptionalism, a consequence of the notion (and fact) that the SASR element was special, elite, and deserving of support and treatment quite different from the other Australian units serving in Afghanistan. While 'special' refers fundamentally to certain classes of irregular and unconventional operations, it has come to identify the forces that conduct such operations. As Justice Brereton notes, "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".¹⁶
- The adoption by SAS cadres of a 'warrior heroes' culture, rather than presenting themselves as model professional soldiers. This is a point on which Andrew Hastie appears to be confused: he eschews the 'warrior hero' culture that fused "military excellence with ego, entitlement and exceptionalism" while defending the "warrior culture" that he believes to be an important part of an elite combat unit.¹⁷ The term 'warrior' is a loaded one in this context, and one might wonder whether Justice Brereton would employ it in any context other than one of exceptionalism and separation from the mainstream of the deployed ADF, who are described as 'soldiers' rather than 'warriors'. Professionalism, honour and integrity would be much more appropriate terms.
- This 'warrior hero' aura was compounded when patrol commanders were elevated to the position of exemplars for everyone else in the SASR.
- The officers who might have counter-balanced this phenomenon were disempowered. Hastie confirms this in his opinion piece. From selection, NCOs were the gatekeepers. Junior officers were poorly supported, not well mentored and were

¹⁵ See Andrew Hastie, "SAS must put honour before glory", *The Australian*, 27 November 2020
<https://www.theaustralian.com.au/nation/defence/for-exsas-soldier-andrew-hastie-the-brereton-report-is-personal/news-story/6653a1cd2c2145c568531b074dc7f045>

¹⁶ *Ibid.*, p. 329.

¹⁷ See Andrew Hastie, *art. cit.*

left to sink or swim. “Those who did try to wrestle back some control were ostracised, and often did not receive the support of superior officers”.¹⁸

- All of this was accentuated during the conduct of operations in Afghanistan. Justice Brereton’s remarks are telling.

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.¹⁹

These cultural problems must have been identified by more senior officers, and it is surprising, to say the least, that such problems were allowed to fester to the extent that patrols became a law unto themselves. This flies in the face of everything that one might expect of military discipline and the exercise of command. But the culture of disdain and disrespect for officers has long distinguished private soldiers and NCOs in the ADF, and continues to display itself in the intemperate remarks made by former military members, including a Senator, who seem comfortable with directing personal criticism at senior commanders without ever having had to juggle the burdens of command themselves. The 20/20 vision of hindsight does not illuminate the fog of war or the chaos of battles and campaigns.

The CDF and the Chief of Army decided to strike 2 Squadron of the SASR off the Army’s Order of Battle – a very serious and telling decision – in order to extirpate the source of further moral hazard within the special forces.²⁰ Whether this will be enough is debatable. While specific capabilities currently within the operational control of the special forces, especially counter-terrorism capabilities, need to remain within Army’s Order of Battle, it may not be necessary that they remain allocated to the SAS Regiment. They could be re-allocated. Indeed, there are voices calling for the SAS Regiment to be disbanded if the rogue culture is to be eliminated.²¹ But whether closing down the SASR removes the external pressures favouring a warrior culture is by no means clear. Perhaps command vigilance, rather than disbandment, is the better option.

¹⁸ The *Afghanistan Inquiry Report*, p. 330

¹⁹ *loc. cit.*

²⁰ In 1993, members of the elite Canadian Parachute Regiment tortured and murdered a Somali teenager during a UN Peacekeeping operation in Somalia. It was not an isolated event. A military inquiry followed immediately. Only low ranked personnel were charged and subsequently sentenced. In 1994, the Canadian government instituted a Commission of Inquiry, led by a Federal Court judge. In 1995, the regiment was disbanded and struck off the Canadian Defence Force Order of Battle.

²¹ See, for example, Christopher Knaus, “Australia’s entire SAS regiment must be disbanded after Brereton report, expert says”, *The Guardian (Australia)*, 25 November 2020 <https://www.theguardian.com/australia-news/2020/nov/25/australias-entire-sas-regiment-must-be-disbanded-after-brereton-report-expert-says>

The warrior culture - external factors

At several points in his report, Justice Brereton adverts to external factors that might have blurred responsibilities, diluted national command and introduced external doctrinal and operational factors for which the Australian special forces were not prepared. In particular, he notes that Australian special forces were assigned under the operational command of International Security Assistance Force (ISAF) Special Operations Forces,²² subject to overall US command since 2007. And while, for most of the time Australian special forces were deployed in Afghanistan, they were under NATO ISAF direction, their 'gung-ho' operating style channelled that of the US special forces.

Special forces have long seen themselves as members of an international special force elite. As 'unconventional' or 'irregular' forces, they identify with their peers in the special forces of allied or friendly nations rather than with the regular forces of their own nation. The antecedents of the Australian SAS Regiment are to be found in Z Special and M Special units formed during World War 2 (WW2) to conduct special operations. During the Malayan Emergency in the early 1950s, Australian infantry forces were impressed by the operational skills of the British SAS Regiment as it had emerged from WW2 operations in North Africa – mainly intelligence, surveillance and reconnaissance operations. The affinity between the British SAS and Australian SASR is evidenced by their similar badges and the "Who Dares Wins" motto.

But in more recent times, the Australian special forces have tended to model themselves on their US counterparts, the Green Berets and the Navy Seals, and to have come progressively under the influence of special force doctrine developed at Fort Bragg, North Carolina. This tends to reinforce the cultural separation between the Australian Army's conventional and special forces. Although the *Afghanistan Inquiry Report* does not specifically refer to the 'Americanisation' of Australia's special forces as contributing to its unique cultural identity, there are several paragraphs that hint in this direction. So, for instance,

SOTG [the Special Operations Task Group], 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

²² See *Afghanistan Inquiry Report*, pp. 333-5

operational command chain, and did not have effective oversight of or influence on day-to-day SOTG planning and operations.

It is clear that, at least at times, HQ JTF 633 was perceived by SOTG as largely irrelevant and inconvenient, if not an impediment.²³

Particularly telling is the oblique reference to the culture of violence that is unfortunately manifest in parts of American society, whether in the availability of guns or the unnecessary force to which so many US police departments resort.

Moreover, ISAF SOF, under the operational command of which the SOTG sat, were strongly influenced by a predominantly [redacted, but US-dominated would fit well] 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.²⁴

This culture of violence and unnecessary force in the SASR has come to notice previously. In 2014, a group of protesters entered prohibited Commonwealth property at Swan Island, Victoria, where they were apprehended by military personnel believed to be members of the SASR. The protesters were hooded, stripped and their hands cable-tied.²⁵ The level of force used was probably excessive in the circumstances, though it should be noted that the subsequent in-house Defence inquiry into the incident found that the actions of the Swan Island Army Detachment (SASR members with protected identity status) were "reasonable in the circumstances".²⁶ The report also determined that the perception of 'heavy-handedness' was justified.²⁷ The fact that a legal challenge by three of the protesters concerning their treatment was later settled by the Department of Defence out of court

²³ See *Ibid.*, paras 20 and 22, p. 333.

²⁴ *Ibid.*, para 27, page 334.

²⁵ See Louise Milligan, "Swan Island protesters claim they were hooded and stripped at ASIS base: Critics say 'dumb' to trespass in heightened security climate", *ABC News*, 10 October 2014
<https://www.abc.net.au/news/2014-10-09/adf-to-probe-claims-of-treatment-of-anti-war-protesters/5802818?nw=0>

²⁶ See "Inquiry Report: Inquiry into the circumstances surrounding the trespass incident at Swan Island on 02 October 2014", para. 28, p. 9

<https://www.defence.gov.au/publications/coi/Reports/IOIReportintotheSwanIslandTrespasson2Oct14.pdf>

²⁷ *Ibid.*, para. 32, p. 10.

suggests that Defence sought to avoid any additional publicity that the incident might have attracted.²⁸

The suggestion that any members of the ADF are ‘exceptional’ and are accordingly entitled to behave in their dealings with the Australian community in ways that do not conform with socially accepted or acceptable norms is not consistent with the role of an all-volunteer force in a democratic society. Yet the corrosive effects of sanctioned brutality that might have become normalised in a theatre of war can be seen when highly trained personnel (and highly trusted, it should be added) behave inappropriately. It may never be known whether the actions of SASR members within Australia in 2014 were in any way influenced by the commission of illegal acts and war crimes by SASR members in Afghanistan. But it would be surprising if they were not. For there was a culture of exceptionalism and violence within the SASR, or at least elements of the SASR, when then-Captain Andrew Hastie joined the SAS Regiment in 2010.

Hastie recalls that when he joined the Regiment, he was befriended by a chaplain who confronted what he called a “pagan warrior ethos” that was about power, ego and self-adulation.²⁹ To attribute this to some kind of latter-day version of the doctrine of original sin, as Hastie does, is to miss the point: the chaplain was reflecting on gossip and rumours swirling around the regiment, cautioning an honourable young officer to be on his guard. Hastie was himself aware of the rumours. So, what did he do? He made it very clear to his junior leaders what his expectations were.³⁰ That was all well and good. But did he seek to confirm the rumours, test them higher up the command chain, question what was being done to rectify the situation, or peel open the layers of the onion to identify the systemic issues that always sit underneath such problems? Not on his own admission at least. And nor, would it appear, were any of his seniors prepared to do so either. Why would a troop commander do what the squadron, regimental or task force commander failed to do?

Whether it’s in the hands of a corporal, a captain or a colonel, the decision to “leave sleeping dogs lie” and not establish the truth or otherwise of such rumours is a failure of leadership. Anyone familiar with the final report of the Royal Commission into Institutional Responses to Child Sexual Abuse will know of the systemic leadership failure in institutions responsible for the care of children. As the Commissioners said,

²⁸ See Kieran Finnane, “Power and pain’: an Australian citizens’ (sic) encounter with the SAS”, *Pearls and Irritations* (John Menadue’s blog site), 26 November 2020 <https://johnmenadue.com/power-and-pain-an-australian-citizens-encounter-with-the-sas/>

²⁹ See Andrew Hastie, “SAS must put honour before glory”, *The Australian*, 27 November 2020 <https://www.theaustralian.com.au/nation/defence/for-exsas-soldier-andrew-hastie-the-brereton-report-is-personal/news-story/6653a1cd2c2145c568531b074dc7f045>

³⁰ See Andrew Probyn, “Former SAS captain, Liberal MP Andrew Hastie heard rumours of wrongdoing before deployment to Afghanistan”, *ABC News*, 25 November 2020 <https://www.abc.net.au/news/2020-11-24/former-sas-liberal-mp-andrew-hastie-heard-rumours-wrongdoing/12915892>

It is not a case of a few 'rotten apples'. Society's major institutions have seriously failed. ... Some leaders did not take responsibility for their institution's failure to protect children. Some leaders felt that their primary responsibility was to protect the institution's reputation, and the accused person.³¹

Referring to the Anglican Church, the Commissioners said, "A failure of leadership by diocesan bishops contributed to inadequate responses to child sexual abuse".³² Referring to the Catholic Church, the Commissioners said,

In its responses to child sexual abuse, the leadership of the Catholic church failed the people of the Catholic Church in Australia, in particular its children. The results of that failure have been catastrophic. It appears that some candidates for leadership positions have been selected on the basis of their adherence to specific aspects of church doctrine and the commitment to the defence and promotion of the institutional Catholic Church, rather than on their capacity for leadership.³³

Across all the religious and secular institutions, the Royal Commission revealed catastrophic and entrenched failures in leadership.

Similarly, former High Court Justice Kenneth Hayne's Royal Commission into Misconduct in the Banking, Superannuation and Financial services Industry found a similar systemic failure in institutional leadership, even more than greed, to be the main reason for the gross and persistent failure of Australia's financial services sector in protecting the interests of its customers.

There can be no doubt that the primary responsibility for misconduct in the financial services industry lies with the entities concerned and those who managed and controlled those entities: their boards and senior management. Nothing that is said in this Report should be understood as diminishing that responsibility.³⁴

Perhaps the former Chief of the Defence Force, Governor of NSW and current Governor General, General David Hurley, has best summed up the problem when he said "the standard you walk past is the standard you accept".³⁵ For the inescapable fact is that to

³¹ Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, pp. 5-6. https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_preface_and_executive_summary.pdf

³² Ibid., p. 59.

³³ Ibid., p. 70.

³⁴ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, p. 4. <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf>

³⁵ Rachel Baxendale, "Q&A: David Morrison 'stole' best line from David Hurley", *The Australian*, 2 February 2016 <https://www.theaustralian.com.au/nation/defence/david-morrison-admits-to-stealing-best-line-from-david-hurley/news-story/ed62c19c65f5c548f64c5b709362f4d9>

ignore rumours of war crimes is to accept the possibility of their veracity and to adopt plausible deniability as one's defence.

How is it possible, in the face of rumours circulating in 2010, that the *Afghanistan Inquiry Report* can claim that "there was no credible information" that no one knew? Justice Brereton would be familiar with the legal axiom *ignorantia legis non excusat* – ignorance of the law is no defence. The same principle applies to organisational accountability: leaders' lack of knowledge of events and misdemeanours does not excuse their inaction. It is the job of leaders to keep their fingers on the pulse of their organisations and institutions, constantly checking the vital signs and, above all, defending and reinforcing their integrity.

Leaders of all organisations, especially those that deal with the lives and well-being of others, have a particular responsibility to model ethical and moral behaviours, and to instil them within their organisations.

Problems of command

Justice Brereton's comments on the nature and exercise of command in Afghanistan, as it relates specifically to the commission of war crimes, do not appear to be consistent with traditional approaches to the continuity of command and the over-arching moral responsibility of military commanders. By placing responsibility for the alleged crimes committed on the shoulders of the alleged perpetrators, he overturns a long tradition of command responsibility for the deeds and misdeeds of troops, and in consequence absolves higher levels of command and senior commanders of responsibility for the moral consequences of their command. Had the SASR patrols carried out their operations with extraordinary levels of gallantry, success and ethical probity, their senior commanders would most certainly have claimed overall responsibility and success, and been rewarded with high military honours and awards. Some were.³⁶ But if they can claim success, what of failure?

But quite extraordinarily, Justice Brereton completely absolves government, which in the Westminster system should be accountable for the consequences of its decisions, from any responsibility at all.

Table 1 shows the structure of the upper Defence hierarchy during the period when most of the alleged war crimes occurred.

³⁶ It is noteworthy that all the Commanders and Assistant Commanders of JTF 633 listed in Table 1 below received appropriate distinguished operational service awards for their service.

Table 1: Who's Who in the Australian Chain of Command in Afghanistan 2007-2018

	Minister for Defence	Chief of the Defence Force	Special Operations Commander Australia (SOCAUST)	Chief of Army	Commander JTF 633	Assistant Commander JTF 633
2007	Joel Fitzgibbon (2007-2009)	ACM Angus Houston (2005-2011)	Maj Gen Mike Hindmarsh (2004-2008)	Lt Gen Ken Gillespie (2008-2011)	Maj Gen Mark Evans (2007-2008)	
2008			Maj Gen Tim McOwan (2008-2011)		Maj Gen Michael Hindmarsh (2008-2009)	
2009					John Faulkner (2009-2010)	Maj Gen Mark Kelly (2009-2010)
2010	Stephen Smith (2010-2013)	Gen David Hurley (2011-2014)	Maj Gen Gus Gilmore (2011-2013)	Lt Gen David Morrison (2011-2015)	Maj Gen John Cantwell (2010-2011)	Brig Shane Caughey (2010-2011)
2011					Maj Gen Angus Campbell (2011-2012)	Brig Simone Wilkie (2011-2012)
2012					Maj Gen Stuart Smith (2012)	
2013	David Johnston (2013-2014)	ACM Mark Binskin (2014-2018)	Maj Gen Daniel McDaniel (2013-2014)	Lt Gen Angus Campbell (2015-2018)	Maj Gen Michael Crane (2012-2013)	Brig Peter Short (2012-2013)
2014	Kevin Andrews (2014-2015)				Maj Gen Craig Orme (2013-2014)	Brig Michael Mahy Budd (2013-2014)
2015	Marise Payne (2015-2018)				Maj Gen Jeff Sengelman (2014-2017)	
2016		AVM Tim Innes (2016-2017)				
2017						
2018						

Note: This list of senior commanders is evidently incomplete. Official sources – Defence Department media announcements and the like – are difficult to find. *It's an Honour*, the Department of Prime Minister and Cabinet website listing of national honours, is a treasure trove, though difficult to mine. It would have been interesting to include SASR Commanding Officers, but their protected identity status makes that difficult. It appears that some former SASR officers have deleted earlier entries on *LinkedIn* and similar sites. One can only assume that they no longer wish to be identified with units the conduct of which was less than meritorious.

As mentioned earlier, Justice Brereton's comments appear to go beyond his terms of reference, narrowly construed. His remarks should be read *in extenso*.

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 [sic] 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.³⁷

One must assume that Justice Brereton undertook extensive research and went to considerable pains to support his assertion that the consequences of constant re-deployment to Afghanistan and the associated risks were never brought to the attention of “any government, of any persuasion”. If that is the case, senior commanders failed in their duty to provide government with the comprehensive advice that is its right. High level command entails a duty both to advise and to warn. Sergeant Schultz, of the long-running sitcom *Hogan’s Heroes*, and his constant refrain “I know nothing” is not a credible model for senior Australian commanders.

There are many go-to texts that analyse the nature of military command and the moral dimension within command is exercised.³⁸ Given that the *Afghanistan Inquiry Report* addresses war crimes and other criminal acts alleged to have been committed in Afghanistan, the views of H.R. McMaster, the distinguished US General who served briefly as President Trump’s National Security Advisor, are both contemporary and pertinent. Speaking at the US Naval War College in 2010, then Brigadier General McMaster said:

³⁷ *Afghanistan Inquiry Report*, pp. 33-4. In this part of his report, it is not clear whether Justice Brereton includes operational control within his use of the term ‘operational command’ (opcom), or whether he uses ‘operational command’ as interchangeable with ‘operational control’. The Commander of JTF 633 could have allocated the SAS elements under the ‘operational control’ (opcon) of the SOTG without relinquishing opcom.

³⁸ See, for example, John Keegan, *The Face of Battle* (London: Jonathan Cape, 1976) and *The Mask of Command* (New York: Viking Press, 1987) and Martin van Crevald, *Command in War* (Cambridge, Mass: Harvard University Press, 1985)

Common to all of these efforts to preserve the moral character of soldiers and units is leadership. Lack of effective leadership has often caused combat trauma. Sun Tzu had it right 2,500 years ago, in his classic *The Art of War* – “Leadership is a matter of intelligence, trustworthiness, humaneness, courage, and sternness.” Humaneness in the face of the ambiguous and difficult situations we are facing today and will face tomorrow will permit soldiers to remain psychologically ready, and it must be an area that our leaders focus on. Sternness involves ensuring that leaders are in positions of leadership. ... Senior commanders must establish the right climate and send a simple, clear message continuously to their troopers: “Every time you treat a civilian disrespectfully, you are working for the enemy.” It is, however, junior officers and noncommissioned officers who will enforce standards of moral conduct. Preparing leaders at the squad, platoon, and company levels for that responsibility is vitally important.³⁹

Just as it defies both common sense and credulity that no senior Australian military leader was aware of rumours of war crimes and other criminal acts in 2009, so it defies credibility that no one thought to address these rumours until Major General Jeff Sengelman, Special Operations Commander Australia, raised the issue in 2015.⁴⁰ Nor should ignorance be a defence. Commanders have a responsibility to ensure that their orders are implemented conscientiously and legally, and to put in place review and accountability mechanisms to ensure that happens. Effective command simply cannot afford not to know.

Yet Justice Brereton is firm in his view:

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 use 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

³⁹ See H.R. McMaster, “Moral, Ethical and Psychological Preparation of soldiers and Unites for Combat”, address delivered on 14 May 2010 at the Naval war College Spring Ethics Conference by Brigadier General H. R. McMaster, U.S. Army <https://apps.dtic.mil/dtic/tr/fulltext/u2/a536633.pdf>

⁴⁰ Maj Gen Jeff Sengelman was Special Operations Commander Australia (SOCAUST) from 2014 to 2017. He avoids publicity and any form of self-promotion. Early in his tenure as SOCAUST, Sengelman came to the view that the SASR was the worst unit in the Army (see Chris Masters, “How the man in charge of Australia’s special forces avoided an ‘iceberg’”, *The Age*, 12 December 2020 <https://www.theage.com.au/national/how-the-man-in-charge-of-australia-s-special-forces-avoided-an-iceberg-20201210-p56mbj.html>). In mid-2015, with the support of the then-Chief of Army, Gen Angus Campbell, he engaged sociologist Dr Samantha Cromptvoets to undertake a cultural study of the SASR. Her findings were disturbing, and provided a catalyst for the Brereton Inquiry and the Review of Special Operations Command conducted by Mr David Irvine, a former Director-General of ASIO <https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/Irvine-Report-2020-Review-of-SOCOMD-Australian-Army.pdf>

level bear moral command responsibility for what happened under their command, regardless of personal fault.⁴¹

Nonetheless, the CDF is in command of the ADF. The core of the CDF's job is to maintain the readiness of the ADF, maintain it at appropriate levels of preparedness, develop future capability, and generally ensure that the ADF is fit for purpose. The CDF must always be deeply focused on the future, to which the past is only sometimes a guide. But if mindsets and structures of the past render the ADF less capable of doing its job, then the CDF must also look back. It is in that context that the CDF is responsible for fixing such systemic problems as might lie at the core of the allegations of war crimes, and in this Justice Brereton's recommendations are correct.

Here the CDF has a critical ally in the Secretary of the Department of Defence, whose job it is to deal with what a former Secretary, Bill Pritchett, was wont to call "the muscles and sinews of war". To deal with issues of culture, Secretaries have very considerable resources at their disposal – not to deal with problems in the place of the CDF, but to deal with them as enablers of the CDF. To this end, the Secretary might well consider engaging an experienced, respected and retired former senior military officer to oversee a remediation program.

⁴¹ *Afghanistan Inquiry Report*, p. 103.

Back to basics

The Australian Approach to Warfare, referred to earlier in this paper, reflects upon the core qualities that distinguish the Australian Defence force and differentiates it from the defence forces of other nations. The document makes no special claims for the ADF. But it does identify the values that the Australian people, and the Australian government, might expect to see modelled by their defence personnel.

The Australian Defence Force aims to cultivate and display certain core qualities in its personnel. And while these qualities may exist in other national armed forces, it is the way the Australian Defence Force fosters these through training and experience that has shaped the Australian Defence Force's *esprit de corps* and enabled it to develop its distinctive approach to warfare. These qualities, which are vital in combat situations, are:

Professionalism. To achieve effectiveness and efficiency in military operations, there is no substitute for professional skill and attitude. Professionalism is the level of competence displayed by individuals, combat teams, headquarters, formations and units. Professionalism is about having high levels of technical skill and applying that skill with discipline, good judgment and adherence to ethical standards. This professionalism is developed in the Australian Defence Force through careful selection, thorough military training, ongoing education and experience.

Trustworthiness. Operational success, morale and group cohesion all depend on trust. All Australian Defence Force members need to have this vital attribute given the life-threatening situations in which Australian Defence Force members may be placed during military operations. Australian Defence Force members must act with integrity, regardless of the personal cost, and gain the trust of their fellow Australian Defence Force members. In peacetime we help to build this sense of trust by nurturing and caring for our people through placing a strong emphasis on safety and the elimination of unnecessary risk from our training activities. Further, we seek ensure that their families are properly looked after, particularly when they are not there to do this themselves.

Morality and Legitimacy of Action. Combat operations inevitably involve death and destruction. Nevertheless, all Australian Defence Force members need to adhere to the Law of Armed Conflict and the moral principles that underlie them, so that military operations are conducted in ways that ensure the Australian Defence Force retains its legitimacy as a fighting force.

Teamwork and Initiative. Although the Australian Defence Force emphasises the importance of individual initiative, it does so in the context of the effect this has on enhancing teamwork. Only through good teamwork can the potential contribution of each individual member be maximised.

Courage and Compassion. The Australian Defence Force seeks to ensure that its members balance a strong fighting spirit with a spirit of compassion – particularly towards non-combatants caught up in a conflict. Also, Australian Defence Force leaders at all levels have a duty of care to those under their command.

Fairness and Respect for the Individual. The Australian Defence Force balances the need for a hierarchical structure for reasons of operational necessity and effectiveness with the recognition that all members of the Australian Defence Force are of equal worth as human beings and are entitled to ‘a fair go’.

Carefully Directed Effort. While the Australian Defence Force seeks to achieve militarily decisive outcomes, it also seeks to do this in ways that avoid needless loss of life or property. Australian Defence Force commanders and members therefore need to apply armed force with discrimination so as to achieve decisive military outcomes with as little collateral damage and wastage of resources as possible.⁴²

These are precisely the qualities that were not demonstrated by the SASR patrol teams and their patrol commanders, or by the units in which those particular patrols were embedded. Indeed, if the allegations of war crimes are substantiated and lead to successful prosecutions, those patrols and the units in which they were embedded were far from ‘meritorious’. They were criminal, a disgrace to the ADF, a disgrace to the government that sent them to Afghanistan in the first place, and a disgrace to the nation. And as a disgrace to the government and the nation, there must be a higher level of accountability and responsibility.

⁴² *The Australian Approach to Warfare*, pp. 26-7.

The need for the Executive and Ministers to be accountable and responsible

The doctrine of Ministerial and Government accountability has long been a central tenet of the Westminster tradition of parliamentary government. It goes to the core issue of trust that must exist between those who elect governments in a democratic system and those who are elected. During the past two decades in Australia, Ministerial accountability appears to have been more honoured in its absence than in its practice. In Australia, as in the United Kingdom, ‘ducking and weaving,’ has been more characteristic of successive Commonwealth governments than has Ministers ‘falling on their swords’.

At issue here is the fact that the accountability and responsibility of the Executive and Ministers is not about the theatre of accusation and defence in the Parliament, especially at Question Time. Nor is it about resignation of office. And least of all is it about the ‘gotcha’ moment that precedes disgrace. It is all about transparency, the reasons for decisions (especially decisions that bear on life and death), the reasons for success and equally the reasons for failure – the lessons learned.⁴³ The late Sir Geoffrey Yeend, formerly Secretary of the Department of Prime Minister and Cabinet, was quoted in *The Canberra Times* as follows:

It is not for Parliament to determine the penalty for any ministerial shortcoming – and certainly not a chamber divided on party lines. But the parliamentary process can expose a Minister and enable the electorate, ministerial colleagues or the Prime Minister to make judgments about efficiency, competence and honesty.⁴⁴

A more recent view is to be found in the 2002 report of the *Senate Select Committee for an Inquiry into a Certain Maritime Incident* (the ‘Children Overboard’ inquiry). The Committee’s report provides an extended consideration of the accountability requirements to be met by the Australian Public Service, the Australian Defence Organisation, the ‘diarchy’ (the mysterious relationship between the Secretary of the Department of Defence and the CDF), Whole-of-Government, the People Smuggling Taskforce Inter-Departmental Committee

⁴³ For an excellent account of how Ministerial accountability works, or should work, see David Butler, “Ministerial Accountability: Lessons of the Scott Report”, *Papers on Parliament No. 29*, March 1997 https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/~link.aspx?_id=8C1E033E16B64FC2A2CC44A9D078EF02&_z=z#_ftn7 Sir Richard Scott, a senior British judge, conducted an inquiry on the export of arms and machine tools to Iraq in the period leading up to the Gulf War (1990-91).

⁴⁴ *The Canberra Times*, 2 June 1993, p. 12 as quoted in David Butler, *art cit.*

(IDC), and Ministerial Advisers. The Committee's approach to public sector accountability appears to envisage higher standards in terms of both expectation and performance than is required of Ministers and the Executive.

In contrast, the Committee's approach to Ministerial accountability was conventional and prosaic. It notes, in entirely standard terms, that

The convention of ministerial responsibility is one of the centre-pieces of Westminster style parliamentary democracy. It enshrines the fundamental principle that the government is accountable to parliament through its ministers. It asserts the essential capacity of parliament to acquire accurate information, so that debate can be meaningful and scrutiny effective.⁴⁵

Then, towards the end of the chapter, it attenuates this view by blurring the differing accountabilities of the Executive and the public service:

The Committee appreciates that there are tensions associated with the accountability requirements in contemporary public administration. The Committee's earlier discussion of the Defence 'diarchy' and the whole-of-government responsibilities of the Secretary of the Department of Defence explored these tensions in their 'real life' manifestation.

It is imperative that departmental secretaries pay special attention to their whole-of-government responsibilities, and that both senior public servants and ministers recognise the validity and desirability of horizontal accountability. This may require some adjustment in the attitudes and expectations of both parties.

The Committee is in no doubt that a diligent pursuit of broader accountability responsibilities at the senior levels of the public service, and a clear acceptance by ministers of the legitimacy of that pursuit, is the only way to effectively meet the challenges of contemporary governance.⁴⁶

The Select Committee's report then addresses the accountability of the Executive in rather more forthright terms that seem applicable to the antecedents to the war crimes allegations that formed the basis of Justice Brereton's report. Its observations are pertinent.

The executive as a whole has been very keen to take the credit for what it regards as a successful whole-of-government operation on border protection and the handling of asylum seekers. In the Committee's view, the executive is therefore similarly

⁴⁵ See Select Committee for an inquiry into a certain maritime incident, Parliament of Australia, 23 October 2002, chapter 7, para. 168

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/report/c07

⁴⁶ *Ibid.*, paras 191-3.

obliged to take corporate responsibility for any shortcomings. ... The Committee notes that none of the ministers closely involved in the 'children overboard' affair appear to have taken any action to reprimand or discipline advisers or officials who have performed either inadequately or inappropriately in their various roles. ... Ministers have been quick to assert that they 'were not told' or were given 'faulty advice', but have been singularly reluctant to admonish those responsible for those failures or faults. ...

The government's handling of the Senate Inquiry into a Certain Maritime Incident has been characterised by minimal cooperation and occasionally outright resistance. During the early days of the Inquiry, and notwithstanding that some agencies had already indicated to the Select Committee that they were preparing submissions to it, the government prohibited Commonwealth agencies from providing submissions. Cabinet also made a decision, about which the Committee learned via media reports, that it would not allow *MoPS* Act staff (ministerial staff) to appear before the Committee. ...

In the Committee's view, the government's actions during the Inquiry into a Certain Maritime Incident do not promote transparency, and are inimical to accountability.

It is imperative that the executive accept corporate responsibility for, and deliver corporate accountability in respect of, any failures associated with the whole-of-government approach to people smuggling. These failures, as this report has described, include acts and omissions by senior officials, inadequate IDC procedures, and the witting involvement of ministerial advisers and a former minister in the deception of the public about events surrounding SIEV 4.

In this context, the Committee endorses the views expressed on 2 July 2002 by Professor Richard Mulgan of the Graduate Program in Public Policy at the Australian National University.

The first step will be for the Government to admit the fact of failure... [E]ven if ministers were not personally to blame they should still be held accountable under the normal conventions of ministerial responsibility. The public were misled on a politically sensitive issue when the truth was readily discoverable by the government machine.

Ministers, including the Prime Minister, should ... express regret that such a failure occurred on their watch. ... Only when the failure is openly admitted will there be any chance of seeking to avoid its repetition.

The Select Committee for an Inquiry into a Certain Maritime Incident re-enunciated and re-established important principles of public accountability. They were critically important in any consideration of the 'children overboard' intentional misinformation and cover-up. They

are even more relevant to allegations of war crimes that go to the heart of Australia's credibility, image and identity as a fully paid-up 'rule of law' democracy. The allegations represent a catastrophic failure in governance, from which subsequent failures in command and behaviour flowed.

The extraordinary and totally ill-considered 'raid' by ASIS officers on the Melbourne Sheraton hotel in November 1983 led to an extension of the second Royal Commission conducted by Justice Robert Hope into Australia's security and intelligence agencies. These Royal Commissions were, in most respects, pre-emptive, responding less to particular incidents than to the need for a more fundamental review of their roles, status and legislative foundations.

In the case of alleged war crimes, the situation is quite different. Criminal acts have been committed. They impugn the SASR, the special forces, the ADF, the government and the entire Australian community, given that Australia has an all-volunteer force that is deeply embedded in the Australian community.

Against this background, it was an extraordinary snub to the ADF and the CDF that the Minister for Defence, Senator Linda Reynolds, herself a former senior officer in the Army Reserve, chose not to lend her support and stand with General Campbell when he delivered his public statement on Justice Brereton's report on 19 November 2020.⁴⁷ The Prime Minister had earlier prepared the Australian community for disturbing news.⁴⁸ Yet when the 'disturbing' news was finally released, neither the Prime Minister nor the Defence Minister were anywhere to be seen.

It has become a commonplace for Prime Ministers to populate the stage on which they make many ADF-related announcements – the "Call Out" of the ADF to assist in bush fire relief in January 2020, for instance – with the Defence Minister, senior Defence officers and a forest of Australian flags. The employment of the ADF as a political prop has become a feature of the securitisation of serious matters that demand a national response (but generally fall outside the purview of the ADF). But when it is the ADF dealing with matters that are a consequence of major decisions of the Australian government? The government is invisible, though its responsibility is plain enough.

Successive governments have adopted the practice of going to ground when there are problems to be fixed – whether it might be addressing Aboriginal deaths in custody,

⁴⁷ See Matthew Doran, "Afghanistan war crimes report released by Defence Chief Angus Campbell includes evidence of 39 murders by special forces", *ABC News*, 19 November 2020 <https://www.abc.net.au/news/2020-11-19/afghanistan-war-crimes-report-igadf-paul-brereton-released/12896234>

⁴⁸ See Andrew Tillet, " 'Disturbing' claims: new investigator for war-crimes accused", *The Financial Review*, 12 November 2020 <https://www.afr.com/politics/federal/disturbing-claims-new-investigator-for-war-crimes-accused-20201112-p56dy9>

adopting a humanitarian approach to refugees, finding phoney accounting tricks to fix carbon reduction targets, addressing the cruelty of the Robodebt fiasco, or taking care of aged people in care facilities during the COVID-19 pandemic. Ministers are nowhere to be seen. Nonetheless, as the Royal Commissions into Child Sexual Abuse and the Finance Industry have amply demonstrated, trust can be rebuilt.

To rebuild the trust that is at the heart of the Australian democratic enterprise, Justice Brereton's report demands a Royal Commission if we are to discover how and why war crimes were committed and put in place fail-safe procedures that will prevent their re-occurrence.