**AUSTRALIAN WAR CRIMES IN AFGHANISTAN: PROSECUTIONS FACE AN UNCERTAIN ROAD AHEAD**

It has now been six months since the [Brereton Report](https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf) detailed credible evidence of a series of alleged SASR war crimes in Afghanistan from 2005-2016. According to the Report, 39 Afghans had been wilfully and unlawfully killed by 25 ADF members in 23 incidents, along with two instances of cruel treatment, in circumstances where it “was or should have been plain that the person killed was a non-combatant, or *hors-de-combat*” (paras 15-16 of Chapter 1.01). The killings and abuse were accompanied by a damning catalogue of slips in military discipline, culture and oversight, involving the “blooding” or initiation of young soldiers, a practice of covering up deliberate killings by placing “throwdowns” on bodies to make them look like legitimate kills, sanitising operational reports to make it appear that the laws of engagement had been complied with, and a marked culture of impunity. There were other issues relating to a lack of command and control of Special Forces in theatre, and insufficient impartial and effective investigatory mechanisms (paras 322-349 of Chapter 1.01, and Chapter 3.03). Brereton recommended the cases be referred to the AFP as there was a realistic prospect of a criminal investigation obtaining sufficient information to charge the perpetrators with the war crime of murder, and/or counselling, procuring or inciting the war crime of murder (*Criminal Code* (Cth) ss11.2, 11.4 and 268.70), in some cases on the basis of command responsibility (*Criminal Code* (Cth) s268.115). For the two instances of cruel treatment, there was sufficient evidence for charges under *Criminal Code* (Cth) s268.72. Overall, 36 matters arising out of 23 incidents by 19 individuals were recommended for potential prosecution (para 21 of Chapter 1.01).

Since the Inquiry, the (related) Ben Roberts-Smith case has dominated media coverage. A series of suppression orders have to date prohibited public release of a range of material in Roberts-Smith’s defamation case against *Nine* media outlets. However, sensational reports of his [alleged attempts to conceal evidence](https://www.theguardian.com/australia-news/2020/nov/11/ben-roberts-smith-defamation-case-ex-soldier-ordered-to-hand-over-war-crimes-inquiry-documents) from the AFP and from the Brereton Inquiry in relation to an already ongoing war crimes investigation into his conduct, including [alleged storage, altering and transmission](https://www.theage.com.au/national/buried-evidence-and-threats-how-ben-roberts-smith-tried-to-cover-up-his-alleged-crimes-20210408-p57hlr.html) of classified Defence Department footage and NATO information, have rightly drawn much attention. Arguments for *Nine* will reportedly rely on the defence of truth, and link to allegations contained in the Brereton Report. The defamation case is scheduled to commence in the Federal Court on 7 June and will be closely followed.

Although the regular drip of reporting on Roberts-Smith has given Australians a taste of some of the issues that may arise if cases head to court, in general the issue of prosecutions for other alleged SASR war crimes has largely fallen off the public radar. So, six months since the Brereton Report shocked Australia, it is worth examining what the potential for these prosecutions really is.

**Limited Experience**

In response to the Report’s findings, the Prime Minister announced the establishment of a new investigative body – the [Office of the Special Investigator (OSI)](https://www.legislation.gov.au/Details/C2020G01030) - within the Department of Home Affairs. The OSI commenced work on 4 January 2021. Its brief is to work with the AFP to assess the matters raised by the Brereton Inquiry and, if appropriate, prepare briefs of evidence for referral to the Cth DPP. Three [senior appointments](https://www.osi.gov.au/about-us/our-people) have since been made; the Special Investigator who is the lead responsible for the investigations (Mark Weinberg, a former Commonwealth Director of Public Prosecutions); the Director of Investigations who is responsible for the conduct of investigations (Ross Barnett, a former Queensland Deputy Police Chief with major crime experience); and the Director General, who is responsible for the running of the office (Chris Moraitis, a former Secretary of the Attorney-General’s Department with extensive diplomatic experience). No information on other OSI officials has been made public, but it is to be noted that no international criminal law practitioners have been appointed to the most senior roles. Perhaps this is a reflection of the fact that all prosecutions will be for offences against Australian law (Division 268 of the *Criminal Code* (Cth) in particular); nevertheless, reference to ICC and ICTY material will be invaluable, and it is hoped that there will be sufficient depth within the OSI as a whole.

One of the largest hurdles to be faced is the significant experiential gap Australia has with war crimes prosecutions. Had the Government not felt the political imperative to create the OSI, the Department of Defence would have had responsibility for working with the DPP on the incidents involved. However, the Department of Defence has for many years [done very little to investigate and move forward the prosecutions](https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642?nw=0) of ADF members involved in alleged crimes, even after repeated and credible complaints. Additionally, there has been very limited success in the few prosecutions which have proceeded. Part of the problem has been a focus on charging soldiers for conduct during *kinetic encounters*, such as for ‘lesser’ crimes like manslaughter, where the DPP has faced problems in proving the requisite ‘intent’ for the offence. A typical recent example was the failure of charges against two Special Forces soldiers for the negligent [deaths of five Afghan children during a raid on a compound in 2009](https://www.theage.com.au/world/australian-troops-kill-5-afghan-children-20090213-874z.html). The allegedly deliberate nature of much if not all of the conduct in the Brereton Report would seemingly not face this difficulty, but the DPP’s recent experience demonstrates that this is a path largely untrodden. It is also to be hoped that the new agency - OSI - will be able to step effectively into a role that would otherwise have been carried out by various elements of the ADF (probably the Royal Australian Corps of Military Police, the Australian Legal Corps and/or the Australian Defence Force Investigatory Service (now part of the Joint Military Service Police)). Despite the understandable disadvantages of having Defence involved in the prosecution process (indeed, Brereton’s Report found ADFIS’s work in Afghanistan most deficient; Chapter 3.03), at least there might have been fewer problems with access to and cooperation from ADF personnel.

**The Difficult Decision to Prosecute**

Clearly there will be a challenge to garner evidence sufficient to meet the criminal standard. While the Brereton Report concluded that there is “credible information” sufficient to lay charges of war crimes, and its findings were corroborated, and relied on eyewitness accounts or “persuasive circumstantial evidence and/or strong similar fact evidence” (para 24 of Chapter 1.01), it did not set out to build a brief of evidence to the standard required for criminal prosecution, and it was explicit as to this limitation (paras 22-23 of Chapter 1.01). In fact, the standard of proof used in the Brereton Inquiry in many ways resembled that of a civil case, meaning the task of compiling evidence to the criminal standard now falls to the OSI/AFP.

Major obstacles are likely to be encountered in this process. According to the [*Prosecution Policy of the Commonwealth*](https://www.cdpp.gov.au/sites/default/files/CDPPProsecutionPolicy_0.pdf), in making the decision to prosecute the DPP’s ability to build a *prima facie* case against an accused is not sufficient by itself, and regard must be had to the likelihood of securing a conviction, i.e. how strong the case will be when presented in court (para 2.6). Evidential difficulties clearly include the lapse in time since the alleged offences, and the potential unavailability of key witnesses during pre-trial preparations and during the hearings themselves, even if allowed over video-link. Few Afghans will want to be cross-examined in an Australian court, and there may be doubts about how their evidence will hold up during the rigours of a trial. Quite possibly too, some ADF personnel may be reluctant to testify against their former comrades in court; Brereton himself noted the great difficulty investigators had in breaking through the SASR code of silence and bonds of loyalty to patrol commanders, with this culture having been instrumental for concealing the alleged criminal wrongdoing (paras 56-57 of Chapter 1.01).

Notably, the Report included witness evidence that had been obtained in circumstances which should normally attract use or derivative use immunity, and thus recommended that these witnesses be given undertakings in any future prosecution process if they assist the Crown’s prosecution(s) of others (paras 17, 63-73 of Chapter 1.01). Their alleged crimes have not been included in the tally mentioned in the Report’s recommendations. Decisions about whether to grant undertakings to these individuals to secure their testimony will need to be revisited, balancing their value in any other prosecution(s) against their own alleged criminal behaviour (both nature and prospect of conviction) as per Part 6 of the *Prosecution Policy of the Commonwealth*. This may mean that some war crimes will never be prosecuted. Decisions on undertakings arise in many contexts and the DPP only goes ahead with any prosecution if it considers it to be “in the public interest” (paras 2.9-2.10). That said, there is arguably a substantially greater public interest in ensuring compliance with the law relating to war crimes, not least due to the substantial profile the Brereton Inquiry has had in Australia and internationally, plus the political and legal ramifications of not acting. As such, immunity will be warranted very sparingly. In relation to the witnesses themselves, some may remain motivated to testify given appropriate undertakings, but the AFP’s ongoing [charging and investigation of war crimes whistleblower David McBride](https://intpolicydigest.org/the-david-mcbride-case-whistleblowing-afghanistan-and-australian-war-crimes/) (who was responsible for leaking the material published in 2017 as the ‘Afghan Files’) continues to send the wrong signals.

In assessing whether a prosecution is “in the public interest”, the *Prosecution Policy* requires the DPP to also consider the “intelligence, mental health or special vulnerability of the alleged offender” (para 7.1). Although these factors must be weighed against the seriousness of the allegations, the need for deterrence and public concern about the case, there are credible arguments possible about the alleged vulnerability of young SASR soldiers on secretive missions in a hostile environment while under the influence of an overbearing patrol commander, or alleged mental fatigue from back-to-back high-tempo tours of duty, which might derail decisions to launch individual prosecutions. The Brereton Report has already noted the psychological consequences of repeated deployments without intervening periods of rest (paras 36-37 of Chapter 3.01).

The UK’s newly-minted *Overseas Operations (Service Personnel and Veterans) Act* 2021 s3 requires the decision to prosecute to give “particular weight” to the adverse effect (or likely adverse effect) on an accused’s ability to exercise sound judgment or self-control or on their mental health, of the conditions they were exposed to during deployment. Further, the section requires regard be had to the “exceptional demands and stresses” of overseas deployment “regardless of an accused’s length of service, rank or personal resilience”. The danger such provisions pose to UK accountability is serious. Although Australia does not have exculpatory legislation of this nature, the prosecutorial decision will need to take into account the effect the demands of service had on the accused’s mental state. Brereton was of the view that it is doubtful that the statutory defence of ‘diminished responsibility’ is available in connection with the war crime of murder (para 53 of Chapter 1.12), however the [*Blackman case*](https://www.theguardian.com/uk-news/2017/mar/15/alexander-blackman-royal-marine-a-judges-quash-murder-conviction) *-* where a UK marine’s conviction for the murder of a wounded Taliban fighter was downgraded to manslaughter on the basis that he suffered an ‘adjustment disorder’- looms large. Even if such an argument does not preclude the decision to prosecute and is not accepted in defence, it will still be relevant to mitigation and thus have a bearing on sentence.

Regarding the method of trial, it has been suggested that there are likely to be difficulties in empanelling an impartial jury given the widespread reporting of Inquiry outcomes, which may mean cases will need to be [heard before a single judge](https://7news.com.au/politics/afghanistan-war-crime-prosecutions-complex-c-1617607). This would be despite the Report’s recommendation that trials be before a jury in regular criminal courts (para 74 of Chapter 1.01). The preparation of cases for trial is likely to take time even in the most straightforward cases, which might lessen some of the potential risks from media saturation. Even so, the highly classified nature of SASR operations means it is most unlikely that trials will be open – the [Attorney General invoked](https://www.theguardian.com/australia-news/2020/may/06/labor-wants-secrecy-in-ben-roberts-smith-defamation-case-to-be-examined-by-watchdog) the *National Security Information (Criminal and Civil Proceedings) Act* 2004 to ensure that the Roberts-Smith defamation trial be held behind closed doors and that documents be publicly withheld. A controversial use of this legislation to quash the release of any information regarding the 2018 charging, trial, conviction and jailing of a military intelligence officer known only as ‘Witness J’ was [described by the Independent National Security Legislation Monitor](https://www.theguardian.com/australia-news/2019/nov/22/act-justice-minister-says-even-he-was-kept-in-dark-over-secret-prisoner) (Dr James Renwick) as “unprecedented” and something he would “not like to see … repeated”. Following these two precedents, it is possible that war crimes prosecutions will also be gagged, although whether to the extent of the ‘Witness J’ case (where not even a name was revealed) is uncertain. This would be devastating in terms of public accountability and the principle of open justice.

Moreover, the decision to prosecute is not only a legal one. Section 268.121(1) of the *Criminal Code Act* 1995 (Cth) provides that prosecutions under Div 268 require the approval of the Attorney-General. Additionally, s268.122 renders the Minister’s decision immune to challenge. Should the Attorney-General decline to give approval, there are no prospects for Afghan victims or other private individuals to bring prosecutions instead; in *Taylor v Attorney-General (Cth)* [2019] HCA 30, a narrow High Court majority rejected the possibility of s13(a) of the *Crimes Act* 1914 (Cth) being used by a private individual to launch a prosecution under Div 268. This was despite Lord Wilberforce’s observation in Gouriet v Union of Post Office Workers [1978] AC 435that private prosecutions ‘remain a valuable constitutional safeguard against inertia or partiality’ (at 437). The decision in *Taylor* has therefore just closed off an important means for counteracting Australia’s long-standing [passivity in investigating and prosecuting international crimes](http://ilareporter.org.au/2019/09/private-prosecutions-for-international-crimes-the-high-court-of-australia-closes-the-door-on-individuals-seeking-to-end-impunity-keilin-anderson/).

**The ICC Dimension**

Despite the comments above, the conduct of trials in secret (for reason of national security) will not actually violate Australia’s obligations under the Rome Statute as long as they are credible. Failure to meet this requirement (such as conducting ‘sham’ trials for the purpose of shielding) may leave cases admissible in the ICC in accordance with Article 17(2). However, the conduct of investigations and trials in secret will mean it will be very difficult for the [Office of the Prosecutor](https://www.icc-cpi.int/nr/rdonlyres/66a8dcdc-3650-4514-aa62-d229d1128f65/281506/otpprosecutorialstrategy20092013.pdf) to establish whether Article 17(2) admissibility has been met in respect of any particular accused, or the group as a whole. In 2017 the UK government closed its secretive IHAT/SPLI investigation into UK Special Forces abuse in Iraq, and its Operation Northmoor investigation into UK Special Forces abuse in Afghanistan, with [neither process having resulted in a single prosecution](https://www.gov.uk/government/news/ministry-of-defence-response-to-allegations-relating-to-the-conduct-of-uk-forces-in-iraq-and-afghanistan). Even so, the ICC Prosecutor had to close her preliminary investigation into UK forces in Iraq, despite finding there was a [‘reasonable basis’ for concluding a number of war crimes](https://www.middleeasteye.net/news/uk-british-forces-six-war-crimes-committed-icc) had been committed, as she [could not conclude on the limited information](https://www.icc-cpi.int/Pages/item.aspx?name=201209-otp-statement-iraq-uk) her Office had before it that shielding had taken place. This was despite noting numerous deficiencies in the conduct of the UK investigations, including reports of deliberate disregarding, falsification and destruction of evidence. The Prosecutor has shown no inclination to date to conduct any investigation into UK forces in Afghanistan, perhaps for similar reasons. The ICC’s practice of ‘positive complementarity’ also means considerable deference in practice to the processes of national governments. This example demonstrates the significant hurdle for admissibility that secret investigations and trials will pose.

Even if Article 17(2) admissibility is able to be established in future, there are other reasons why the ICC is unlikely to step in. Indeed, there may not be ‘sufficient gravity’ according to Articles 17(1)(d) and 53(1)(c) - each incident detailed in the Brereton Report involved one or only a small number of victims, and although there were aggravating factors (the apparent deliberate nature of the killing(s), abuse of power, the vulnerability of victim(s)), the [Prosecutor has previously declined](https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf) to open investigations into [situations involving limited numbers of victims](https://doi.org/10.1093/jicj/mqw027). This is of course before any assessment is made of the ‘[interests of justice’](https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF). The current ICC investigation into alleged crimes in Afghanistan is understood to not involve Australia.

**Command responsibility**

Although there have been calls on the Chief of the Defence Force, or the Chief of the Army, to resign on the basis that the “higher-ups” could not have not known or that they [failed to prevent criminal behaviour](http://crossingtheline.co/2020/12/a-public-relations-fiasco-hangs-our-best-and-bravest-out-to-dry/), these are unrealistic. The Brereton report was conclusive in finding that while more senior commanders at the troop, squadron and SOTG-level bore “some [moral] responsibility for the events that happened ‘on their watch’, the criminal behaviour of a few was commenced, committed, continued and concealed at the patrol commander level, that is, at corporal or sergeant level” (para 25 of Chapter 1.01). Therefore, “[i]t is overwhelmingly at that level that responsibility resides” (para 26 of Chapter 1.01). Indeed, even at the next command level up - troop commander - there was not sufficient command and control over conduct on the ground.

Is it credible that not even troop commanders bear criminal responsibility? Section 268.115(2), which implements Art 28 of the Rome Statute, provides that a military commander is criminally responsible for the failure to exercise control properly over forces under his *effective command and control* where (a)  the military commander or person either *knew or, owing to the circumstances at the time, was reckless* as to whether the forces were *committing or about to commit* such offences; and (b)  the military commander or person failed to take *all necessary and reasonable measures within his or her power* to prevent or repress their commission. The requirements for the offence are thus three, “effective command and control”, the requisite mental element (of which there are two types), and the failure to prevent or repress. These will be examined in turn.

For “effective command and control”, the ICTY Appeals Chamber determined in [*Hadzihasanovic et al*](https://www.icty.org/x/cases/hadzihasanovic_kubura/acdec/en/030716.htm) (paras 37-56), which was endorsed by the ICC in [*Bemba*](https://www.icc-cpi.int/CourtRecords/CR2009_04528.PDF) (para 424), that for superior responsibility to arise, the crimes must be committed whilst the superior has “effective control” over the offenders. While a patrol commander leading a patrol has “effective control” over their patrol members, there may be doubts over whether the troop commander, who was generally remote from the encounter (for legitimate operational/tactical reasons) (para 29 of Chapter 1.01) had close enough control to meet this standard. Additionally, the Brereton Report expressed sympathy for troop commanders as it noted that they were often new and inexperienced junior officers who were generally unsupported by senior officers and faced difficulties in implementing control over battle-experienced patrol commanders (NCOs) on the ground (para 33 of Chapter 1.01). As such, and perhaps counter-intuitively, this requirement may not be met.

Second, the mental element: Brereton found that the troop commanders and those more senior had no evidence that crimes were being committed or that they may have been likely. Indeed, “commanders trusted their subordinates: including to make responsible and difficult good faith decisions under rules of engagement; and to report accurately. Such trust is an important and inherent feature of command” (para 40 of Chapter 1.01). While this may be so, there are a number of factors which point to a heightened risk of criminal conduct in Afghanistan. First, the nature of “Special Forces” is that they are elite, and their *modus operandi* by definition is irregular and unconventional. The notion they are “special” gave rise in some to notions of superiority and exceptionalism (para 5b of Chapter 3.01). Second, after having undergone gruelling selection and training, they are looking to prove themselves to their unit and to their superiors. Third, they are deployed “in a foreign environment, far from the influence of the norms of ordinary Australian society, where the incident could be compartmentalised as something that happened outside the wire to stay outside the wire” (para 27 of Chapter 1.01). Fourth, the Taliban has long been condemned and dehumanised at the highest political and military leadership levels, in Australia and by international allies. A hefty dose of anti-Islamic bias, and a desire to punish for previous attacks, has been part of this narrative. Fifth, the amount of firepower and resources the SASR has available is completely disproportionate to the poorly-equipped villagers they encounter. In such an environment, combined with repeated tours over a decade, “a ‘Lord of the Flies’ syndrome” can prosper (paras 13, 41 of Chapter 3.01), and it is completely unrealistic to assume that every soldier will abide by the rules. Moreover, there was evidence that troop commanders already knew of a decline in standards in the use of ‘throwdowns’ to make accidental/mistaken kills look legitimate (paras 30, 33 of Chapter 1.01). In all, it is difficult to accept that such a risk is recognisable only in hindsight.

Article 28 of the ICC Statute speaks of when a superior “knew or owing to the circumstances of the time, *should have known* that the forces were committing or about to commit such crimes”, and has made clear that failure to seek out such information could lead to liability ([*Bemba*](https://www.icc-cpi.int/CourtRecords/CR2009_04528.PDF), para 432-433). However, Australia’s s268.115(2)(a) refers to *recklessness*, which is a different standard to “had reason to know” in Article 28. Perhaps it is closer to the test applied in the ICTY Trial Chamber in [*Blaskic*](https://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf); where the “absence of knowledge is the result of *negligence* in the discharge of his duties”, this amounted to “reason to know” within the meaning of the Statute (para 332) [this was rejected in the *Blaskic* [Appeals Chamber](https://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf) (para 63), which preferred to endorse the [*Celebici*](https://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf) Appeals Chamber’s interpretation of “had reason to know” (para 241).] Even if it is nonetheless the closest case to the wording of s268.115(2), it is still most unclear whether the factors in the preceding paragraph would amount to ‘recklessness’, as judged at the time. Additionally, the temporal element - “committing or about to commit” - would pose an additional hurdle.

The last part of the test is in relation to failed to take *all necessary and reasonable measures within his or her power* to prevent or repress commission of war crimes. Given the dynamics of the relationship between troop commanders and their superiors as highlighted in the Brereton Report (paras 5e-f of Chapter 3.01), it is questionable whether they could have prevented criminal behaviour within the ground patrols. It appears that they had no authority to call for investigatory services (which proved ineffective anyway), and even if they did, the calls are likely to have been both ignored by their superiors and sidelined by the patrol commanders, and criminal behaviour would still have been actively concealed (paras 39-51 of Chapter 1.01).

In sum, it will be difficult to charge troop commanders for command responsibility. Brereton argued instead that the commanders of the SASR parent units who were responsible for the ‘warrior culture’ which bred criminal behaviour bear greater responsibility than the rest of the ADF structure (paras 34-35 of Chapter 1.01), but it will be very difficult to hold any of these individuals to account under s268.115 given their indirect role. Even further up, more senior personnel within Task Group 633 (in Bahrain), and Joint Operations Command and the ADF leadership, “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 attentionto ascertain the facts” (para 35 of Chapter 1.01).

The result is that due to (accidental) operational design and the difficulties of meeting the criminal standard, *no-one more senior is likely to bear any criminal responsibility at all*. In any case, the likely workload the OSI/AFP faces will mean that priority is most likely to be given to charging direct perpetrators rather than commanders remote from the scene. There is a possibility of subjecting those deemed responsible to military discipline processes even if no criminal charges are brought, or otherwise dealing with command issues through the Special Forces organisational restructure already getting underway. Thus allegations of protecting those further up are likely to persist.

**The Road Ahead**

Of course there are factors suggesting that Australia may prosecute even ‘though [other “Five Eyes” allies](https://www.defenseone.com/ideas/2020/11/theres-no-easy-fix-australias-special-forces-culture/170215/) have avoided doing so. First, although the ICC has processes to manage sensitive or classified information pertaining to a State Party (e.g. Articles 54(3), 57(3)(c), 64(7), and 72), the Government will be loath to see national security information of this nature in the hands of an international body, perhaps suggesting it will want to act itself. Second, there has been acknowledgment that the reputation of the SASR, the ADF and perhaps that of Australia, has been damaged, and senior Defence officials have committed to [ensuring real organisational change](https://www.abc.net.au/news/2020-11-22/lieutenant-general-rick-burr-speaks-on-afghan-report/12909166).

However, the OSI’s work is expected to take at least five years, and it is likely that the process will come under political and ADF pressure over time. The new Defence Minister has already intervened to placate Defence and veterans’ groups by [overruling the Chief of the Defence Force](https://www.theguardian.com/australia-news/2021/apr/19/peter-dutton-overrules-decision-to-strip-medals-from-sas-soldiers-who-served-in-afghanistan)’s move to strip meritorious unit citation medals from all members of the SOTG - now, only those members who are in future convicted of a war crime will lose their medal. This is in tune with the Government’s rhetoric ever since the Brereton Report was delivered that the conduct of a few ‘bad apples’ is in no way a reflection on the service of the SOTG as a whole. In [downplaying collective accountability](https://www.theguardian.com/australia-news/2020/dec/02/australians-should-not-dismiss-war-crimes-scandal-as-just-a-few-bad-apples-expert-says), it suggests a clear attempt to minimise political damage from the Inquiry.

All the above considered, there is a real danger that over time the Government’s attention will be on demonstrating consistent progress on organisational change while the prosecution process - politically and militarily embarrassing, and out of the public eye - will wither. The prospects for prosecutions, much less successful ones, are thus most uncertain. As indicated in the Brereton Report itself,

“Most of Australia’s coalition partners in Afghanistan have had to deal with allegations of war crimes. Even where the evidence is apparently strong and clear, pitfalls have been encountered, both political and popular. It is predictable that Australian prosecutions could encounter similar obstacles” (para 52 of Chapter 1.12).

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