

The Case of Major David McBride

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The story of David McBride has its origins in the deployment of Australian Special Forces (SASR) to Afghanistan in 2001. Initially, it was just a Squadron but, in September 2005, an Australian Special Forces Task Group was deployed. On account of rumours emerging about possible breaches of the Laws of War, the Inspector-General of the Australian Defence Force commissioned an inquiry into the Special Operations Task Group in Afghanistan over the period 2005 to 2016. In 2020 the Inspectorate General concluded that 36 incidents should be referred to the Australian Federal Police for criminal investigation. According to what is now known as the “Brereton Report”, there was credible information that up to twenty-five members of the SASR were implicated in war crimes which included the summary execution of prisoners and the fabrication of operational reports by planting false evidence (“throw downs”). There were even allegations that some junior soldiers had been ordered by their superiors to kill prisoners (“bleeding”).

In the midst of these various deployments was David McBride. David McBride was born in 1963 and, after reading law at the Universities of Sydney and Oxford, he joined the British Army where he was commissioned into the Blues and Royals. He left the British Army after six years’ service and, after various jobs including working for a major law firm in Australia, he enlisted in the Australian Army as a military lawyer.

He deployed twice to Afghanistan in 2011 and 2013 and was attached to the SASR where he began to have a sense of unease about the military operations that were being conducted. He was particularly concerned about targeted operations against specific Afghan personnel as well as, what he saw, as the dishonest way that the Australian Government were representing the conflict. At first, he tried to raise his concerns through the chain of command. However, realising that he was getting nowhere, he eventually took the information to the Australian Broadcasting Corporation (ABC). The information which he provided to ABC subsequently underpinned a series of reports called "The Afghan Files" which gave unprecedented insight into the Australian Special Forces and contained allegations of war crimes. The report by ABC News (in conjunction with Fairfax Media) also led to Australia's most decorated soldier, Corporal Robert's-Smith VC MG being accused of war crimes, specifically kicking a handcuffed man off a cliff in 2012 as well as ordering a junior soldier to execute a civilian. Robert's-Smith subsequently sued Fairfax Media for defamation but lost his case in 2023. The Judge remarked at the end of the trial that Roberts-Smith had:

"broken the moral and legal rules of military engagement and is therefore a criminal"

Meanwhile, David McBride was arrested at Sydney Airport and charged with theft of Commonwealth documents and for also breaching the Defence Act 1903. David MacBride is now awaiting trial for whistleblowing but, in the meantime, no special forces soldier or senior officer, has been charged with anything at all. His trial is listed for March 2024.

Although the trial of David Mc Bride was listed for March 2024, McBride changed his plea to one of guilty in November 2023. He had originally intended to argue that his disclosures to the Press had been covered by whistleblowing safeguards in Australia but this argument was abandoned when his arguments were ruled to endanger national security. He also argued that he had a duty to leak the documents in the national interest. After several days of pre-trial arguments, the judge rejected this argument as well and ruled that neither of these arguments could be put to a jury. This was held to be a “fatal blow” to his defence and, as a result, David McBride changed his plea to guilty to three charges against him (from an original five). These included stealing Commonwealth documents and passing them onto journalists.

A date for sentencing was then set for the 7th May 2024 but this was vacated after the Commonwealth sought to file an affidavit setting out the damage that some of the further documents could have caused if they had also been disclosed by ABC. In a perverse twist, much of the affidavit was classified. In the event, sentencing was simply postponed for a further week. At his sentencing hearing on 14th May, the court heard that McBride had taken a total of 235 documents with 207 of them classified as secret and some marked as Cabinet documents. McBride was sentenced to just under six years for his offences and only deemed eligible for parole after twenty-seven months. In sentencing, the Supreme Court Justice David Mossop said that McBride was “obsessed with the correctness of his own opinions” and had a “misguided self-belief”. Interestingly, he said that he was “unable to operate within the legal framework that his duty required him to”. The judge also commented that he was unlikely to be rehabilitated. Unsurprisingly, McBride’s defence lawyer, Mark Davies said that they would be preparing an appeal on the basis that McBride believed that it was in the public interest to disclose the documents.

The sentence imposed against David McBride has been widely condemned. Perhaps the most telling comment was made by the head of Human Rights Watch in Australia, Daniela Gavshon who said

"It is a stain on Australia's reputation that some of its soldiers have been accused of war crimes in Afghanistan, and yet the first person convicted in relation to these crimes is a whistleblower not the abusers,"

- Daniela Gavshon, Head of Human Rights Watch

As mentioned before, the Brereton Report into the conduct of Australian Special Forces in Afghanistan found evidence of the murders of thirty-nine civilians and detainees and that twenty-five members of the SASR were involved, some of them who are still serving. The supreme irony of this case is that those who have, allegedly, committed war crimes have yet to be brought to justice, yet the State of Australia has not wasted any time in prosecuting those who have sought to expose the truth. Who knows the real reason behind this? As we have learnt from our own UK Public Inquiry into allegations of extra-judicial killings in Afghanistan, knowledge of such killings was known up to Cabinet level. Furthermore, it appears that evidence was wilfully destroyed and that some of the evidence had been deliberately locked away rather than being handed to the police. To what extent did the politicians in Australia know what was going on? Perhaps, McBride got it right when he said that the excessive investigation of lesser offences was an attempt to mask the most serious? Perhaps the trial of David McBride is also largely performative, warning whistleblowers to back off before getting too close? Whatever the truth, this case has further to run and is potentially a pivotal case in the history of military whistleblowing.