

NOTICE OF FILING

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Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
File Number:	NSD989/2019
File Title:	AUSTRALIAN BROADCASTING CORPORATION v MARTIN KANE & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Warwick Soden".

Dated: 30/07/2019 3:52:33 PM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 59
Rule 29.02(1)

Affidavit

No. NSD989 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

Affidavit of: **Michael Antony Rippon**
Address: C/- ABC Ultimo Centre, 700 Harris Street, Ultimo NSW 2007
Occupation: Solicitor
Date: 30 July 2019

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Filed on behalf of (name & role of party) Australian Broadcasting Corporation, the Applicant
Prepared by (name of person/lawyer) Michael Rippon
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(include state and postcode)

[Version 3 form approved 02/05/2019]

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I, Michael Antony Rippon, affirm:

1. I am a solicitor in the employ of the applicant (the **ABC**) and I am authorised to make this affidavit on the ABC's behalf.
2. I presently have day to day carriage of this matter on behalf of the ABC.
3. The content of this affidavit is based on my own knowledge unless otherwise indicated.
4. I make this affidavit in relation to the interlocutory application dated 22 July 2019 filed on behalf of the second respondent (the **Commissioner**), in which it is sought that the proceeding be expedited and the ABC's Notice to Produce dated 10 July 2019 be set aside (**Interlocutory Application**).

Public Statements by Mr McBride

5. On 17 June 2019, I accessed a number of online articles containing reports of public statements made by Mr David McBride concerning allegations made against him by the Australian Federal Police (**AFP**), including the following:

- (a) *The Canberra Times* article titled "I'm not afraid of going to jail": Ex-Defence lawyer charged over document leak", dated 7 March 2019, available at the following URL: <https://www.canberratimes.com.au/story/5993118/im-not-afraid-of-going-to-jail-ex-defence-lawyer-charged-over-document-leak/> (**Canberra Times Article dated 7 March 2019**), a copy of which is annexed hereto and marked **MR14**;
- (b) *The Canberra Times* article titled "Ex-Defence whistleblower charged over leak to journalists committed to stand trial", dated 31 May 2019, available at the following URL: <https://www.canberratimes.com.au/story/6192028/ex-defence-whistleblower-charged-over-leak-to-journalists-committed-to-stand-trial/> (**Canberra Times Article dated 31 May 2019**), a copy of which is annexed hereto and marked **MR15**; and
- (c) *The Guardian* article titled "Afghan Files whistleblower David McBride's trial delayed to protect state secrets", dated 13 June 2019, available at the following URL: <https://www.theguardian.com/law/2019/jun/13/afghan-files-whistleblower-david-mcbrides-trial-delayed-to-protect-state-secrets> (**The Guardian Article dated 13 June 2019**), a copy of which is annexed hereto and marked **MR16**.
6. The Canberra Times Article dated 7 March 2019 reports the following (among other things):
- Speaking outside court, Mr McBride said he had admitted handing over the documents but would defend the charge on legal grounds.*
- "I saw something illegally being done by the government and I did something about it," he said.*
- "I'm seeking to have the case looking purely at whether the government broke the law and whether it was my duty as a lawyer to report that fact."*
- ...
- Mr McBride said he gave the documents to the ABC, the Sydney Morning Herald and Chris Masters but only the ABC published a report.*
7. The Canberra Times Article dated 31 May 2019 reports the following (among other things):
- Mr McBride has pleaded not guilty to all charges. He does not deny passing information on but will defend the charge on legal grounds. He said on an earlier occasion: "I saw something illegally being done by the government and I did something about it."*
8. The Guardian Article dated 13 June 2019 reports the following (among other things):

McBride does not dispute leaking the material but will argue that he was acting on his duty to report illegal conduct by the government.

9. On 6 June 2019, the ABC broadcast on its ABCNews24 channel a live press conference by the then Acting Commissioner of the AFP, Neil Gaughan (**Acting Commissioner Gaughan**), concerning, among other things, the execution of the search warrant at the premises of the ABC on 5 June 2019 (**AFP Press Conference**). Annexed hereto and marked **MR17** is a copy of a transcript which I caused to be made of the AFP Press Conference.

10. During the AFP Press Conference, a member of the audience asked the following question:

"Given Mr McBride has sort of openly admits (sic) that he has handed documents to the ABC journalists named on the warrant yesterday, why did the AFP feel it necessary to go into the ABC and do that? What sort of link are you establishing there, where the accused person who has been committed to trial says yep, there is a link, it was me?"

11. In response to the above question, Acting Commissioner Gaughan said the following:

"I think in relation to that one, we still have to follow the evidence trail. We still need to ensure that just because someone says they did something, doesn't mean they actually did, so there's still a fair way –"

12. On 18 July 2019, I accessed a video uploaded to the website of the *Gold Coast Bulletin*, titled *"RAW: Whistleblower David McBride speaks outside court"*, dated 18 July 2019, available at the following URL: <https://www.goldcoastbulletin.com.au/news/national/raw-whistleblower-david-mcbride-speaks-outside-court/video/1cc9e8e46602db9e9b322e7263989491> (**McBride Video**). Annexed hereto and marked **MR18** is a copy of a transcript which I caused to be made of the McBride Video.

13. The McBride Video depicts footage of Mr McBride saying, among other things, the following:

"I know exactly what'll be in the brief of evidence. It'll be documents that I gave to the journalists and some that I didn't, which I felt helped proved my case. The witnesses will largely be Defence officials saying that they did a check of the computer systems and they can prove that these are the documents which I printed off. Hopefully a lot of that we won't need to test in court. I will just got (sic) to admit it and say yes I did take the documents from the system."

...

"I've already admitted I gave the documents."

Timing of AFP's Investigations

14. On or about 11 July 2017, the ABC published on its website at <http://www.abc.net.au/news/> a series of online stories titled "*The Afghan Files*" (**The Afghan Files Online Stories**). Annexed hereto and marked **MR19** is a copy of The Afghan Files Online Stories.
15. On 13 September 2018, each of Mr Daniel Oakes and Mr Samuel Clark received, via their respective ABC email addresses, a letter from the AFP. Each of the letters, which were identical in substance (save that each was addressed to the relevant recipient) stated, among other things, that:
 - (a) an investigation had been commenced following a referral to the AFP from the then Chief of the Defence Force (Air Chief Marshal Mark Binskin) and the then acting Secretary for Defence (Phillip Prior) dated 11 July 2017;
 - (b) the relevant addressee was a suspect in relation to the offences of "*Receiving prescribed information, contrary to section 79(6) of the Crimes Act 1914 (Cth)*" and "*Unlawfully obtaining information as to defences, contrary to section 73A(2) of the Defence Act 1903 (Cth)*"; and
 - (c) the relevant addressee was requested to participate in a formal record of interview under criminal caution and rights in respect of those allegations.
16. Annexed hereto and marked **MR20** and **MR21** respectively are copies of the 13 September 2018 letters addressed to each of Mr Oakes and Mr Clark.
17. Also on 13 September 2018, Mr Gaven Morris, Director of News, Analysis and Investigations at the ABC, received, via his ABC email address, a letter from the AFP concerning the same investigation referred to in its letters addressed to Mr Oakes and Mr Clark, and requesting his assistance (on a voluntary basis) as a witness. Annexed hereto and marked **MR22** is a copy of that letter.
18. On 4 October 2018, the ABC sent a letter to the AFP advising that each of Mr Oakes and Mr Clark declined the AFP's request for an interview, and that Mr Morris declined the request to assist the AFP's investigation. Annexed hereto and marked **MR23** is a copy of that letter.
19. On 24 January 2019, I received a telephone call from the third respondent, in which I was advised, in effect, that the AFP considered it had sufficient evidence to obtain a search warrant against the ABC.



20. On 24 January 2019, following my telephone call with the third respondent, I received an email from the third respondent setting out a proposed approach to executing the potential search warrant. Annexed hereto and marked **MR24** is a copy of that email.
21. On 5 February 2019, I had a further telephone discussion with the third respondent, in which I expressed concerns in relation to the utility of a search warrant being executed.
22. On 1 April 2019, I received an email from the third respondent, attaching two substantively identical letters, one of which was addressed to Mr Oakes, and the other addressed to Mr Clark. Each of those letters:
 - (a) advised that the relevant addressee was a suspect in relation to the two offences identified in the AFP's previous letters of 13 September 2019, in addition to a third offence, being described as "*Receiving, contrary to section 132.1(1) of the Criminal Code Act 1995 (Cth)*"; and
 - (b) requested the relevant addressee's consent to a forensic procedure, being the copying of finger and palm prints.

Annexed hereto and marked **MR25** is a copy of that email and its attachments.

23. On 4 June 2019, I received a telephone call from Superintendent Andrew Smith, in which I was advised, in effect, that the AFP intended to execute a search of the ABC premises at Ultimo, New South Wales, the following day.
24. On 5 June 2019, the third respondent and other members of the AFP attended the premises of the ABC at 700 Harris Street, Ultimo, New South Wales, and purported to execute the search warrant the subject of this proceeding (**Search Warrant**).

High Court Proceeding

25. On 26 June 2019, Anika Smethurst and Nationwide News Pty Ltd commenced a proceeding in the High Court of Australia against the Commissioner challenging the validity of the search and seizure of materials by the AFP from Ms Smethurst's home on 4 June 2019 (**High Court Proceeding**). Annexed hereto and marked **MR26** is a copy of the Application for a Constitutional or other Writ filed by the plaintiffs in the High Court Proceeding.
26. The ABC is presently considering whether, in light of the matters the subject of the High Court Proceeding, it should seek to amend the Originating Application to raise similar



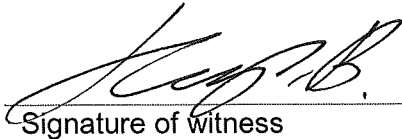
matters in this proceeding, and/or whether it should seek leave to intervene, or be heard as an *amicus curiae*, in the High Court Proceeding.

Affirmed by the deponent
at Ultimo
in New South Wales
on 30 July 2019
Before me:

)
)
)
)
)



Signature of deponent



Signature of witness

Hugh Bennett, Solicitor

No. NSD989 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

This is the annexure marked "**MR14**" referred to in the affidavit of Michael Antony Rippon affirmed before me on 30 July 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

Address of witness

C/- 700 Harris Street, Ultimo NSW 2007

March 7 2019 - 1:39PM

MR-14

'I'm not afraid of going to jail': Ex-Defence lawyer charged over document leak

- Alexandra Back

Crime

A former Australian military lawyer and captain in Britain's elite Special Air Service has been charged over the leak of documents exposing alleged unlawful government conduct.

David William McBride, 55, appeared in the ACT Magistrates Court on Thursday where he was charged with the leaks to journalists Dan Oakes, Andrew Clark and Chris Masters.



Whistleblower David William McBride has been charged for leaking defence documents to journalists. Photo: Alexandra Back

He has not entered any pleas.

The charges relate in part to an ABC investigation published in 2017 called "The Afghan Files: Defence leak exposes deadly secrets of Australia's special forces".

The investigation was said to give an unprecedented insight into the clandestine operations of Australia's special forces, including incidents of possible unlawful killings.

Speaking outside court, Mr McBride said he had admitted handing over the documents but would defend the charge on legal grounds.

"I saw something illegally being done by the government and I did something about it," he said.

"I'm seeking to have the case looking purely at whether the government broke the law and whether it was my duty as a lawyer to report that fact."

Mr McBride is charged with theft and three counts of breaching the Defence Act, for being a person who is a member of the the defence force and communicating a plan, document or information.

The charges, if prosecuted on indictment, attract an unlimited fine or imprisonment for any term as the maximum penalties.

If dealt with summarily the penalties are six months in prison or a small fine.

Mr McBride faces a further charge under old secrecy provisions in the federal Crimes Act, which make it an offence for a Commonwealth official to disclose information without authorisation.

That law has since been revoked and replaced in the Criminal Code, broadening its scope and increasing the penalties that apply in certain cases.

Mr McBride said he first sought an internal inquiry through defence and then went to police. When police did not act he went to the media.

Mr McBride said he gave the documents to the ABC, the *Sydney Morning Herald* and Chris Masters but only the ABC published a report.

The prosecution of Mr McBride will draw inevitable comparisons with that of the former Australian spy Witness K and his lawyer Bernard Collaery.

The pair are also being pursued by the Commonwealth Director of Public Prosecutions accused of revealing information about the Australian Secret Intelligence Service.

Witness K revealed an illegal bugging operation by the Australian government on East Timor during negotiations over an oil and gas treaty.

The pair face a maximum two years in jail if found guilty, a penalty since increased to 10 years. National security claims over the brief of evidence have delayed the defence access to it and the case's progress.

A preliminary hearing for that case will be heard in secret.

On Thursday, a Legal Aid lawyer for Mr McBride told the court some of the relevant material was classified and his office was having difficulty finding a lawyer with the necessary clearance.

The one option so far was the director of the service Dr John Boersig, the lawyer Hugh Jorgensen said.

Mr McBride said the government's claim of classified material was a smokescreen and there was no reason why the case shouldn't be held in the open.

Mr McBride said he had been living in Spain when he was arrested at the airport in Sydney on his way home in September last year.

Aware of the risk of arrest, he had returned home to attend a father daughter dance.

Mr McBride studied at Sydney University before going to Oxford. He then joined the British army, spending six years with the Blues and Royals, the Queen's household cavalry.

He also served with the SAS and did tours of duty in Northern Ireland and Afghanistan.

"I have a duty to look after Australia, if that means reporting illegal activity by the top brass of the ADF I'm going to do it, I'm not afraid of going to jail," he said.

"If I was afraid of going to jail, why would I have been a soldier?"

He is next due in court on May 13.

No. NSD989 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

This is the annexure marked "**MR15**" referred to in the affidavit of Michael Antony Rippon affirmed before me on 30 July 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

Address of witness

C/- 700 Harris Street, Ultimo NSW 2007

May 31 2019 - 11:42AM

MR-15

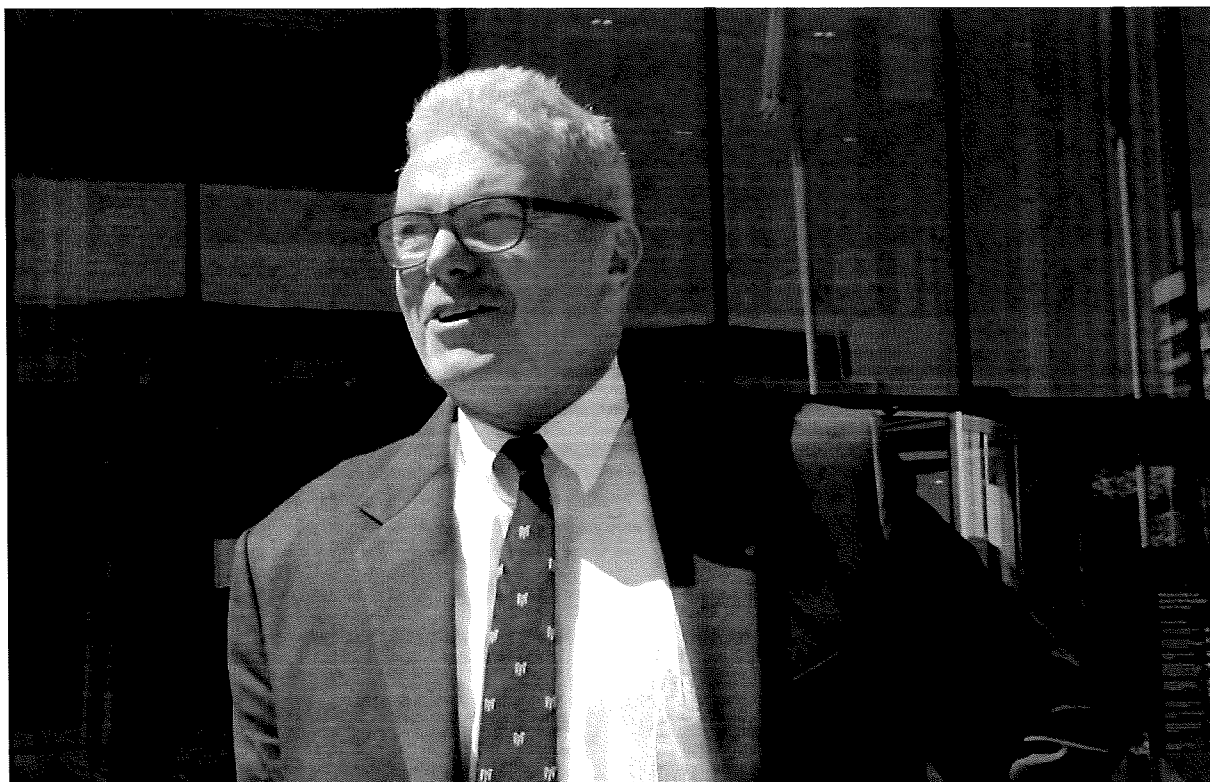
Ex-Defence whistleblower charged over leak to journalists committed to stand trial

- [Alexandra Back](#)

Crime

The case of a former Australian military lawyer charged over the leak of documents to journalists was committed on Thursday to stand trial in the ACT Supreme Court.

David William McBride, 55, is accused of theft and three counts of breaching the Defence Act, for being a person who is a member of the defence force and communicating a plan, document or information, an offence that carries an unlimited fine or prison time as penalty when heard on indictment. He is also charged under old secrecy provisions in the federal Crimes Act, which make it an offence for a Commonwealth official to disclose information without authorisation.



Whistleblower David William McBride has been charged for leaking defence documents to journalists.

The leaks were to journalists Dan Oakes, Andrew Clark and Chris Masters. The charges relate in part to an ABC investigation published in 2017 called "The Afghan Files: Defence leak exposes deadly secrets of Australia's special forces."

Mr McBride has pleaded not guilty to all charges. He does not deny passing information on but will defend the charge on legal grounds. He said on an earlier occasion: "I saw something illegally being done by the government and I did something about it."

He was previously represented by Legal Aid, but appeared in court on Thursday representing himself. He told *The Canberra Times* of concerns about his Legal Aid lawyers being permitted to access the necessary documents, and his discomfort in using a large amount of the organisation's resources, for what could be a long period of time.

The ACT Magistrates Court heard on Thursday that Mr McBride would consent to a set of orders proposed by the Commonwealth attorney-general under the national security information laws that will govern how sensitive material is handled during the case.

Once the consent orders are made Mr McBride will be able to access the brief, the court heard.

Chief Magistrate Lorraine Walker committed the case for trial in the ACT Supreme Court.

The first directions hearing in the higher court is listed for June 13.

No. NSD989 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

This is the annexure marked **"MR16"** referred to in the affidavit of Michael Antony Rippon affirmed before me on 30 July 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

Address of witness

C/- 700 Harris Street, Ultimo NSW 2007

MR-16

The Guardian



This article is more than **1 month old**

Afghan Files whistleblower David McBride's trial delayed to protect state secrets

Prosecutor says agreement must be reached about how to deal with 'national security information' in case

Paul Karp

Thu 13 Jun 2019 12.49 AEST

Former defence lawyer David McBride has still not seen a full brief of evidence against him, as his trial for blowing the whistle on alleged unlawful killing in Afghanistan will be delayed to protect state secrets.

At a hearing in Canberra on Thursday, the crown prosecutor revealed that despite being committed for trial two weeks ago, McBride is in the "unusual position" of not having the full brief because an agreement must first be reached about how to deal with "national security information" in the case.

McBride is facing five charges of leaking classified material to three senior journalists at the ABC and the then Fairfax Media newspapers, which formed the basis of "The Afghan Files", an ABC expose in 2017 revealing allegations of serious misconduct by Australian special forces in Afghanistan.

McBride does not dispute leaking the material but will argue that he was acting on his duty to report illegal conduct by the government.

Outside the court McBride complained that the case is "not about secrets, it's about lies". But inside the supreme court, where he is self-represented, McBride raised no objections to proposed orders to determine the bounds of national security information "in chambers" - in private with the judge - before he receives the full brief.

Counsel for the attorney general said this would allow the case to proceed “in a way that doesn’t compromise security or defence”.

McBride told reporters that, despite being arrested nine months ago, he had not seen a full brief of evidence and claimed “that means they don’t have a case against me yet”.

He explained he had not objected to a private determination on national security information because “it may take forever for that side issue to run”.

“I’ve decided that I have faith in the judiciary of this country and if it means we have to have a closed court I’m prepared to have a closed court.”

McBride vowed that he would “never take a plea” despite it being “suggested to me before”.

McBride said he was afraid of his “conscience”, which he said had “almost killed me in the past for things I did do, [that I] shouldn’t have done” but the prospect of jail did not, despite acknowledging it is “going to be bad”.

“It was very bad the one night I spent there - but I can’t do the wrong thing just for selfish motives.”

McBride said the case was not about information that was “truly national security” related.

“None of it is about our secret mind-reading powers - it’s all about what happened 10 years ago on a mountaintop in Afghanistan ... it’s not national security, it’s just nationally embarrassing.”

The case was adjourned until 27 June for a further mention.

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Topics

- Law (Australia)
- Australian Broadcasting Corporation
- Australian media
- Fairfax Media
- news

No. NSD989 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

This is the annexure marked **"MR17"** referred to in the affidavit of Michael Antony Rippon affirmed before me on 30 July 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

Address of witness

C/- 700 Harris Street, Ultimo NSW 2007

Firstly, I want to start by assuring the public that the AFP actions over the last two days have been independent and impartial at all times. The AFP has been investigating these matters since July 2017, and April 2018 respectively. The matters primarily relate to secrecy offences under Part 6 and Part 7 of the Crimes Act 1914. The AFP's role, as I'm sure everyone is aware, is to investigate breaches of Commonwealth criminal law. We investigate laws passed by the Parliament, using powers granted to us by the Parliament. Our investigations are an objective search for the truth. It involves the discovery and presentation of evidence in an exhaustive, comprehensive, and organised manner [sic].

00:59

And this often includes the execution of search warrants. No sector of the community should be immune for [sic] this type of activity or evidence collection more broadly. This includes law enforcement itself, the media, or indeed, even politicians. There are criminal allegations being investigated and we cannot ignore them. We are duty bound to conduct these investigations impartially and thoroughly. Not to do so, would be a breach of our oath of office as police officers. These search warrants were authorised by an appropriate member of the judiciary, this is result [sic] of supporting documentation being presented to the court which provides sufficient suspicion that a criminal offence has been committed and evidentiary material is likely to be found at certain locations. The execution of these search warrants and the timing of these search warrants was a considered decision aimed at lawfully locating evidence and seizing that evidence in a manner which will withstand the scrutiny of a court of law.

02:09

The collection of evidence and investigation process undertaken by my staff and police more broadly in the AFP and indeed across the state and territory jurisdictions, when conducting investigations, must be done in accordance with the law. Throughout the execution of the search warrants, in collaboration with the people affected, the AFP in these particular matters took additional care to protect the confidentiality of other personal or professional information that was not subjected to the warrant. Both of these investigations relate to national security information, how it was handled, and who had access to it. The material subject to these investigations and search warrants relates to documents classified as both top secret and secret. The compromise of such material could cause exceptionally grave damage or serious damage to the national interest, organisations, or indeed, individuals.

03:09

The point of difference with these two particular investigations, or the most particular point of difference, is parts of the document were actually published. I need to emphasise in the strongest possible terms that not the government nor any minister has directed the actions of these investigations. As a standard practice, the AFP notified the minister's office it was investigating these matters at the time these matters were referred to the AFP. We did not provide regular updates on operational activities, nor did we tell them we have obtained search warrants and planned to execute these warrants. Notification of the search warrants being executed occurred after the activity had commenced. This was an operational decision and in accordance with our governance and standard practice. These investigations are typically complex and lengthy.

AFP Press Conference 6 June 2019 – Acting AFP Commissioner Neil Gaughan
2.06pm – 2.37pm

04:04

The timing of these investigations or these activities was influenced only by the progress of the investigation to date, and sufficient information being available to support the application of a search warrant. Any inference that suggests our decisions were influenced by anyone else outside the organisation is strongly refuted. I reject the claim over the last few days that we are trying to intimidate journalists or conduct a campaign against the media. The AFP is a strong supporter of press freedom. The media plays an important role in today's society in keeping the Australian community informed. And finally, and probably as importantly as anything else I've said, I'd like to state that my members over the last few days have been subjected to unprecedented scrutiny in relation to these particular matters. They have my strongest support for their actions and their activities. They have acted professionally and respectfully under challenging circumstances.

05:01

And I'm happy to take any questions.

Q: Can you confirm that by adding the words "add, copy, delete, alter" in warrants, including the one that was executed on the ABC, it gives the AFP the capacity to hack computers sometimes remotely without people knowing, and then removing that capacity later?

A: No, it doesn't and I'll explain why that's actually been added. I think it's a very good question, certainly one that I think is worthy of some discussion, noting that it has been discussed at length in the media today. Obviously, we operate now in a very technological savvy environment. Every time we execute search warrants, we are doing so because people have iPhones and the like. If we access a document, say on your phone, as soon as we access that, by the very nature of accessing it, we have altered it. If we copy it and we move it somewhere else, we have altered it. We have altered the metadata. The reason why that particular clause has been added to the legislation, is so that when we seize the document, it is altered. But the inference that we can remotely alter documentation or that we can change the way things are presented in their real sense is totally refuted. And I might add that particularly in relation to these particular search warrants, we have seized documentation that is currently locked down. That being that it is in the hands of the investigators, and we have signed an undertaking with the lawyers of both the ABC and News Corp, that we will not talk about those matters, we will not look at those particular files, or those documentation [sic], until such time as the lawyers from those relevant agencies and the lawyers from the AFP have gone through and looked at the privilege issue. And clearly at that stage if there is any inference there there's been alteration of documents that will be disclosed at that time. But I really refute the fact that the legislation has enabled us to do that. I think I've explained why the legislation has been changed. Now we're operating in an extremely complex environment, and I think that we need the legislation sometimes needs to keep pace with it and we'll do our best in relation to ensuring that.

07:20

Q: Were you planning other raids and have they been put on hold?

A: Look, I'm not going to give a blow by blow description in relation to where the investigation is at, and I think in fairness, nor would you expect me to. The investigation is complex, it is ongoing.

AFP Press Conference 6 June 2019 – Acting AFP Commissioner Neil Gaughan
2.06pm – 2.37pm

Potentially, yes we may do more search warrants. But again, as I said earlier, the legislation we are operating on here is extremely complex, and as such, we're required to examine what we're doing in a very thoughtful way, and if we determine it appropriate to execute more search warrants in relation to this investigation, we will do so, without fear or favour.

07:57

Q: Who is the subject of your investigation? Who could be liable for prosecution? Could the organisations' journalists be liable for prosecution?

A: Again, I think it's important to say at this phase that we are in the evidence collection phase of the investigation. Now, clearly, we've got a long way to go. But certainly, in relation to who is - we've got a person before the court already. It's in the public domain. In relation to what has been referred to as The Afghan Files matter. That matter is ongoing. I'm not going to rule in or rule out anyone being subject to further charges. I think that's inappropriate.

Q: Just for clarification though, it can be a crime to publish this material, can't it?

A: Look, it can be. But I think we also need to Chris here in relation to this particular issue, we need to look at the public interest issue. And I think you know I'm going to raise that because I'm sure you people are going to at some stage. Public interest is something that we look at in relation to our investigations from the outset. And it's something that we will consider in the course of producing our brief of evidence. I might also add that it's in the Commonwealth Director of Public Prosecutions' guideline in relation to whether or not they can commence a prosecution based on public interest. So we've got two fairly in-depth things that we need to overcome before we go down that path. But I think, you know, you guys have read the legislation. You guys understand exactly the potential possibility, but it is an offence to actually have that particular material still on websites. Yes, it is.

09:22

Q: You have chosen to reveal to us a couple of instances where there was contact with the executive government. Specifically at the outset of the investigations. Given you can reveal that much, can you tell us how much if any contact there has been with members of the executive on these two investigations over the intervening period, after two years, or are you saying today there was no other contact with the executive before those warrants were issued?

A: That's exactly what I'm saying. Look, this is not unusual in relation to these type [sic] of investigations. We are required under our national guideline to inform the minister when we receive investigations of this nature. We undertook that. But it's also important to note that, you know, sensitive investigations such as this, we utilise a fair amount of discretion not to brief the minister, or the minister's office I should say. And that's the undertaking in this particular instance.

Q: So from the outset of the investigation, no member of the executive or their staff was briefed or updated in any way on either investigation?

A: That's correct.

10:34

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Q: You sought the warrant for the ABC action through a court registrar in Nowra, why would you seek the warrant through a court registrar in Nowra instead of a magistrate or a judge in Sydney or Canberra?

A: Look, important question and I think that it's one that I'm happy to answer. Now, in the ACT, we certainly obtain the warrant from the magistrate, which is in accordance with the judicial process that exists within the Australian Capital Territory. In New South Wales, the judicial process is different, in that the warrants are issued by court registrars. So in this instance, we actually attended Queanbeyan Local Court in New South Wales and we obtained the warrant from the registrar there who also acts in a capacity in Nowra.

11:18

Q: What's the alleged harm to national security in these cases and why doesn't the Australian public have a right to know about plans to increase spying or alleged unlawful killing?

A: What we're investigating is the fact that code worded and top secret and secret information was disclosed to the Australian community. The substance of that is to our investigation process is somewhat irrelevant. The issue of whether or not the public has a right to know is really not an issue that comes into our investigation process. We're given a complaint in these instances by secretaries of other departments, we look at the criminality and then we investigate that. Now, we're not going to make a judgement and nor should we make a judgement, and indeed nor can we make a judgement in relation to whether a referral is a good referral or a bad referral. But in this particular instance, it was deemed that a likelihood of an offence being committed had been done so. And therefore we commenced an investigation.

12:20

Q: On that point, you mentioned in your opening remarks about how these documents had been published.

A: Yes.

Q: The actual. Can you explain why is that so different? If these documents actually hadn't been published on the papers and on websites, would that perhaps suggest that these cases may not have gone ahead?

A: No, I didn't say that. I think what is important to note that what sets these two, if you like, above others, is the fact the information was published online. Or in the newspaper, as the case may be. It doesn't take away from the fact it was still a breach of the national security guidelines in that top secret and secret information had been released by a member of Commonwealth employment to a member of the media.

Q: You mentioned that these investigations can be lengthy, but surely waiting so long before conducting a raid would increase the probability that the evidence is misplaced or destroyed, wouldn't it?

A: I think one thing I will say at the outset is they're search warrants, not raids, and even if we look at the Macquarie dictionary, we'll see that raid has a certain connotation which I find in relation to

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these particular issues not quite right. But in relation to the gathering of a search warrant takes a fair amount of time. It's not a simple matter of just deciding to do a search warrant. There's a fairly lengthy evidence collection phase before we go to the fact of executing a search warrant. And I will say that the execution of a search warrant in itself isn't necessarily the finalisation of the investigation. There are other things that we will continue to do. So if you like, it's a continuum that may change. Sometimes the search warrant will be very early, sometimes it will be in the middle of the investigation, and indeed sometimes the execution of a search warrant will be at the end. The timing of the execution of the search warrant is really irrelevant. The fact of the matter is the evidence that we obtained during the execution of the search warrants was also electronic, and electronic footprint is much more difficult to remove than a piece of paper.

14:19

Q: Taking it back to something you said a little earlier because you were finishing when you said it is an offence to have this material on websites. So can I take you back to that again. So, a crime therefore has been committed by the media organisations. Is it your intention to prosecute the journalists?

A: We haven't made a decision one way or the other.

Q: But a crime has been committed. In your view, that crime of having that material on the website has been committed.

A: We will need to go through the process of proving the elements of the offence. One of the critical issues for us is who is responsible for the uploading of that document on the computer, when it was done, et cetera, et cetera. So there's a fairly significant process, but I also did speak about public interest, and the fact of the matter is, regardless of where our investigation leads us to, there's a number of other steps that need to take place before we get to the phase that we're actually putting someone before the court. And I think that's being lost. The search warrant is a part of the process. It's a very minute part of the process indeed, but indeed it's a public part of the process. So whilst the collection of information is still ongoing, we can't lose sight of the fact that we've got a long way to go.

15:26

Q: The Attorney-General yesterday said Annika Smethurst was not the subject of an investigation per se. Based on your answers to the press, are you saying she could still face criminal prosecution. Was the Attorney-General wrong to say that yesterday?

A: No, because the way that the search warrants were crafted under the old legislation is indeed the Attorney-General is correct. The new legislation which was put in place towards the end of last year means that the publication of those things is an offence. We're probably not going to look at that particular offence in this instance.

Q: One of these cases is two years old. The other is 14 months old, and you served these warrants on two successive days, three weeks after a federal election. Are you asking us to take that as entirely coincidental?

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A: Well the execution of the search warrants in two consecutive days is not coincidental. That was planned. I must be very clear on that.

Q: Why?

A: I will get to that. The timing of the search warrants is irrelevant. I think that we would be having this press conference in relation to this particular activity whether we executed the search warrants before the election, during the election campaign, or indeed after, what we are now. The reason it was done consecutively, it was simply a matter of resourcing. I needed a number of investigators for both search warrants. More importantly, I needed digital forensics capability. Now obviously the AFP is a complex organisation. We do large scale investigations, obviously you know, this is part of it. But we also do counter-terrorism investigations, child protection, serious and organised crime and to crowd those resources for two full days, four people, four digital forensic people, is quite difficult. So, I'm still going, thank you. The issue for me was that this operation has taken a number of months to get to the phase where we are today. The suggestions that we, you know, the timing from my perspective is irrelevant. I honestly believe we would be having this discussion regardless of when I executed the search warrants.

17:32

Q: Just to follow that question, can you please tell us, did you or the AFP, any of your officers, take into account the timing of the federal election, in deciding when to apply to execute the search warrants? Just second to that, you say your officers took extra care in executing these warrants. How does rifling through the underwear drawer of a female reporter constitute taking extra care?

A: I will try to answer both of those, and if I fail, please pick me up and I'll come back to it. The timing, as I said, I understand why people are saying that the timing is suspicious or fishy or whatever the term is. But for me, the timing was about quarantine [sic] those resources to ensure that we were able to do the execution of the search warrants in an expedient manner to ensure that the integrity of the investigation wasn't lost. As I said, the ability for us to get the digital forensics resources ready to go is not an easy one. Noting the fact that my resources are also being used on national security investigations such as terrorism, organised crime, et cetera. In relation to the conduct of the search warrant in Ms Smethurst's house, we were looking for USBs. USBs by their nature, are quite small and are quite easy to conceal in different locations. That's why the search was conducted in accordance with our standard procedure in that we would always search those particular locations. We ensured due to her privacy, et cetera, that when that search of that particular location in her house was undertaken, it was done by two female officers. One reason why the search warrant took so long, both at her house and also at the ABC, is we were very, very careful in relation to the execution of the search warrant that we ensured that we were only targeting the information that was relevant to the search warrant. Only relevant to the search warrant. Same with all your phones and all your tablets, I'm sure there's other very sensitive information on there that you would not like in the public domain. The reason why it took us so long is the fact that we made it very clear with her assistance and her lawyer's assistance to ensure we only targeted bits relevant to the warrant, and the rest of the information we haven't.

19:46

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Q: Can you confirm that before you executed the search warrant, you also executed journalist warrants to access metadata from either/or Annika Smethurst and the ABC journalists?

A: I asked that question this morning and I was advised we did not. But, if that is incorrect, we will correct the record. But my advice this morning was we did not use journalist warrants in relation to this matter.

Q: Further on the ABC, you've already said that you've been investigating this for many, many months. Why didn't you continue your legal letters with the ABC, and seek to resolve this by subpoena rather than through the theatre and optics of a raid, or to use your terminology, the execution of a search warrant?

A: That's a good question and I'm glad you raised it. We've been in negotiation, we were in negotiation with the ABC for a considerable period of time in relation to the execution of the search warrant on their location. We received advice from their legal counsel in March of this year that they were of the view that they were no longer going to assist us and we were at loggerheads. We were of the view, based on the fact that we didn't see a way forward, that the only way to continue the investigation was to execute the search warrant as we did yesterday. I might add that the only way it was turned into a public display was based on what the ABC did when we arrived yesterday. Now they knew we were coming. It was a warrant by consent, for want of a better term. Agreed time for my officers to attend the location and undertake the search warrant, which they did. The ABC filmed it, which is their right, and they continued to tweet during the execution of the search warrant, which again is their right. And I think that goes to show the fact that, the fact that that was allowed to occur, without any hindrance whatsoever, does show the AFP supports freedom of the press.

21:49

Q: Can you explain the rationale behind starting your ABC search warrants at head offices, as opposed to with Annika Smethurst, turning her apartment upside down?

A: Look, that goes into the sequence of the investigation. The investigations are slightly different. I'm not going to give you a song and dance in relation to why we do things in a certain order, but as I said, there are other strategies at play here in relation to these particular matters that dictated the order in which we do things. And as I said, we believe, through a thorough investigation, through a very strong investigation plan which was put in place in relation to these matters, that that was the appropriate course of conduct in this instance.

Q: Can you confirm that even receiving these documents would be a crime and how can we have freedom of the press if that's the case?

A: Well it's not a crime in itself, depending on the circumstances in which it took place. I might add even it's not directly relevant - but it is relevant to some extent. There is a public interest disclosure regime which exists across the Commonwealth for public servants, and indeed any members of the public that may wish to prevail themselves of that. We have investigated many similar matters over the course of the last few years where people have availed themselves of the Public Interest Disclosure Act, and as such, the AFP has not proceeded with any action. The two persons involved in this investigation, who are alleged, and I do use the word alleged strongly, were involved in the disclosure of the material to journalists, did not avail themselves of the PID. That is still a matter for

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people to, for whistleblower activity for utilisation of the PID. But I think it's incumbent upon me also to say that it's important that people realise the reason why we are so strongly in our view of - certainly protecting top secret and secret information is that the Australian government, or particularly the Australian law enforcement intelligence communities, rely on secret and top secret information from our international partners, particularly Five Eyes partners, to ensure the fact that we keep the Australian community safe. Now if we can't be seen to protect our own internal information, we are concerned that the information flow to us dries up, and that's the fact [inaudible].

24:12

Q: In regards to the ABC, if you knew the source of the information already, in regards to David McBride, why did you need to go into the ABC to determine that source, and how is that not just a show of force, designed to intimidate the media and stop other whistleblowers from coming forward?

A: Look, I disagree with the premise but I understand where you're coming from. I'm sympathetic to the views of the journalists in relation to this particular issue, but we're in a different prism here. I'm trusted as a senior official of the law enforcement agency to execute lawful executioning [sic] powers. Now if it's an issue in relation to the law, and we think the law is inappropriate, well then we need to change the law. But as the law stands at the moment, we have to execute it. Now as far as executing the search warrant with a number of police officers all dressed in plain clothes, by appointment, I don't think that's intimidation.

Q: Whether they're wearing plain clothes or not, it's a show of force to go in and do what you were doing, is it not?

A: No I disagree. I think the fact is it was done through appointment, they knew we were coming. I don't agree it's a use of force.

Q: [inaudible] people wearing plain clothes is intimidating?

A: We're going to agree to disagree on that.

25:20

Q: How many leak investigations, leaks to the media, in the last three years, have been referred to the AFP, and given your point about resources and things like counter-terrorism, we're in a heightened threat environment, is it really the police's best use of time to conduct these sorts of witch-hunts?

A: Look, we get numerous leaking referrals to us and to be honest we get too many. But as I said, the premise of us investigating these matters is to ensure that the international community knows that we take the leaking of information, sensitive information, seriously. Because if we don't take it seriously, it closes down an avenue of people providing the Australian community or the Australian intelligence and law enforcement agencies very sensitive information which ultimately does save lives. I can't stress that enough.

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Q: Have you advised Annika Smethurst, Samuel Clark or Daniel Oakes that there could be a criminal prosecution as a result of your investigations going forward?

A: Look, I don't know what the investigators said during the course of the search warrant so it would be inappropriate for me to comment.

Q: [inaudible] your earlier answer to a question about the timing, I appreciate what you've said about resourcing and, you know, specialist skills being available at the right time, but can you please say whether the timing of the election was ever a factor in your decision on the timing of seeking and executing the warrants? You said to Tim earlier that the AFP never updated the government or anyone in the executive about the investigation. Can you tell us did anyone from the government or any department head contact the AFP seeking an update?

A: Certainly, the timing is irre- I made the decision of timing. That was my decision in my substantive position.

Q: Did you factor in the election?

A: No, I did not. I did not factor in the election. In relation to notifications of government, I can assure you there were no updates. In relation to updates of secretaries of government agencies, to the best of my - certainly I did not update them, but I have to be careful here, because I would be surprised if our investigators at some stage did not have some conversations with the referring agencies as I would expect.

27:35

Q: It strikes me that a story about the behaviour of our SAS troops abroad that might have involved the murder of innocents, and a discussion of whether one of our agencies might be re-tasked to spy on Australian citizens are of prime public importance. Are you saying that the public interest would have been better served had those two pieces of journalism not appeared?

A: No I've never said. What I'm saying is we have investigated a criminal offence. And I said, I think I've said at the outset, and correct me if I didn't, that we're investigating the criminality. Now the issue of public interest is a matter that we do consider and I have said that. But we considered that at various phases through the investigation. I will also say that in relation to one of those matters in particular, there is also some very sensitive personal information that has found its way into the hands of people who probably shouldn't have it. And I'm concerned about that, as are those individual members. We've got to take into consideration, as I said as well, individual privacy here is paramount as well.

Q: So when will the merit of these stories be factored in, Assistant Commissioner, and how? When and how will the public merit of the stories be weighed?

A: It's a good question. I think the public interest as I said is part of the consideration that we do during the course of our investigation. If we determine there is sufficient evidence to run a prosecution, and we've got a long way to go before we get there, it is then a consideration of the Commonwealth Director of Public Prosecution before they determine whether or not it's in the public interest to prosecute. And ultimately if they decide it is, then it's a matter for the judiciary. So

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it's a 3-step process. We investigate many crimes in the AFP where we know there could be a defence immediately. I use the example of common assault. When we investigate a common assault, we know in the back of our mind immediately that there's things such as self-defence, immediately could be proven or could be waived [sic]. It doesn't stop us from investigating the matter. What I'm trying to get my point across here, is that we're in the process of investigation. We're in the process of discovery. We're in the process of evidence collection. We've got a long way to go before we get to the stage of a prosecution or a brief of evidence.

29:52

Q: Are you still investigating the curious leak of some ASIO advice, cabinet level ASIO advice, to the Australian newspaper earlier this year?

A: I honestly don't have the answer to that question. Last question.

Q: Do you agree that it's peculiar that no people holding public office or politicians have been the subject of search warrants in relation to the previous cabinet leaks?

A: No. I mean, as I said, we follow an investigative process, and in those particular instances during the course of the investigation we deemed it wasn't necessary to undertake search warrants.

Q: Given Mr McBride has sort of openly admits [sic] that he has handed documents to the ABC journalists named on the warrant yesterday, why did the AFP feel it necessary to go into the ABC and do that? What sort of link are you establishing there, where the accused person who has been committed to trial says yep, there is a link, it was me?

A: I think in relation to that one, we still have to follow the evidence trail. We still need to ensure that just because someone says they did something, doesn't mean they actually did, so there's still a fair way-

Q: [inaudible 30.59] admit to a crime?

A: People do it, surprisingly people actually do it quite regularly.

Thanks everyone.

Q: How much does it cost to carry out the search warrants?

A: That's too early for us to tell. The investigation's still ongoing. We've still got a way to go before we can cost it. Thanks everybody.

No. NSD989 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

This is the annexure marked "**MR18**" referred to in the affidavit of Michael Antony Rippon affirmed before me on 30 July 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

Address of witness

C/- 700 Harris Street, Ultimo NSW 2007

MR-18

Transcript of video uploaded to the website of the *Gold Coast Bulletin*, titled "RAW: Whistleblower David McBride speaks outside court", dated 18 July 2019, available at the following URL: <https://www.goldcoastbulletin.com.au/news/national/raw-whistleblower-david-mcbride-speaks-outside-court/video/1cc9e8e46602db9e9b322e7263989491>

Why they won't declassify these documents. They're over 10 years old in most cases. There is no reason that any of our enemies could use them against us. It's impossible. And I want the government to tell Australia what they are hiding.

Q: So do you have any idea what will be in the brief of evidence, who the witnesses will be?

I know exactly what'll be in the brief of evidence. It'll be documents that I gave to the journalists and some that I didn't, which I felt helped proved my case. The witnesses will largely be Defence officials saying that they did a check of the computer systems and they can prove that these are the documents which I printed off. Hopefully a lot of that we won't need to test in court. I will just got (sic) to admit it and say yes I did take the documents from the system. If they do have any senior leadership witnesses, which I doubt, but if they do, that'll be good because I'd like to cross examine them.

Q: Do you think the journalist will be actively involved in the crown's case?

According to the directions at the moment, no they can't be, because the definition of national security information is extremely wide. It's things you learn in basic training at Kapooka which are not obviously anything to do with national security, where the mess all is. Everything that has got any kind of military designation is considered too hot for journalists to hear, and that's got to be wrong. And in the meantime, I may be applying either to the High Court or the most appropriate court to compel the feds to sensibly reclassify that information.

Q: Will you still be representing yourself?

Yes, I think I'm going to keep representing myself. As I said, I want to take the battle to Defence. I've already admitted I gave the documents. My justification is that it was my duty to do so because the government was breaking the law and my duty is to the people of Australia, not to the government of Australia. I haven't met a lawyer yet who is prepared to take them on. Maybe Amal Clooney if she's available but presumably she's not. I can't afford her, so I'll do it myself.

Q: Can I ask a basic question about – so you admit that you gave those documents to ABC journalists but you are pleading not guilty.

That's right. Because the offence is not giving the documents to the journalist. The offence [someone says something which is inaudible] yes that's right. Not guilty because the offence is not the fact that I gave the documents to the journalist. The fact – the essence of the offence is that I damaged national security and it wasn't my duty to do so. Now, firstly I'd say I didn't damage national security; I acted in the interests of national security. If the government breaks the law, if the government commits war crimes, it's actually a duty of a lawyer and an officer to speak up about it.

No. NSD989 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

This is the annexure marked "**MR19**" referred to in the affidavit of Michael Antony Rippon affirmed before me on 30 July 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

Address of witness

C/- 700 Harris Street, Ultimo NSW 2007

MR-19

The Afghan Files

Defence leak exposes deadly secrets of Australia's special forces

By the National Reporting Team's Dan Oakes and Sam Clark

Updated 11 Jul 2017, 8:49am
Published 11 Jul 2017, 6:02am

Hundreds of pages of secret defence force documents leaked to the ABC give an unprecedented insight into the clandestine operations of Australia's elite special forces in Afghanistan, including incidents of troops killing unarmed men and children.

The ABC can reveal that some of the cases detailed in the documents are being investigated as possible unlawful killings.

The Afghan Files

This is one story in a seven-part series based on leaked documents exposing Australian special forces troops' role in the Afghanistan war. For context, they are best read in order.

#1 Leaked documents expose deadly secrets of Australian special forces NOW READING	#2 An interrogation, a shooting and no witnesses	#3 What the documents reveal about killings of unarmed Afghans
#4 The spy and the SAS soldier with a loaded Glock	#5 Who is the enemy? Australia's secretive rules of engagement	#6 Chaos over severed hands
#7 Relations between Australia's special forces units on 'knife edge'		

This comes a day after the ABC revealed the alleged cover up of the killing of an Afghan boy and another alleged incident in which a father and son were shot dead during a raid.

The documents, many marked AUSTEO – Australian Eyes Only – suggest a growing unease at the highest levels of Defence about the culture of Australia's special forces as they prosecuted a bloody, secretive war against insurgents across a swathe of southern Afghanistan.

One document from 2014 refers to ingrained “problems” within special forces, an “organisational culture” including a “warrior culture” and a willingness by officers to turn a blind eye to poor behaviour.

Another document refers to a “desensitisation” and “drift in values” among elite Special Air Service soldiers serving in Afghanistan, while others allude to deep divisions between the two elite units which primarily comprise the special forces - the SAS based in Perth and 2 Commando Regiment based in Sydney.

A large proportion of the documents are reports on at least 10 incidents between 2009-2013 in which special forces troops shot dead insurgents, but also unarmed men and children.

The Inspector General of the Australian Defence Force is investigating at least two of the incidents as part of its inquiry into the conduct in Afghanistan of special forces, which includes alleged unlawful killing.

Those two incidents – which both occurred in September 2013 – are the deaths of a man and his six-year-old child during a raid on a house, as revealed yesterday by the ABC, and the killing of a detainee who was alone with an Australian soldier and allegedly tried to seize his weapon.

A report into another 2013 incident in which an Afghan man riding a motorcycle was killed by Australian troops, and a female passenger possibly injured, states that Afghan authorities were becoming increasingly agitated over Australians allegedly killing unarmed civilians, and threatened to stop working with Australians.

The documents also provide fresh details of some notorious incidents, including the severing of the hands of dead Taliban fighters by Australian troops.

The report shows Federal Liberal MP Andrew Hastie, then a SAS officer and commander of the soldier who cut off the hands, immediately expressed alarm about what happened and reported the incident up the chain of command.

The incident also caused tension between the SAS and Australian Defence Force Investigative Service (ADFIS), with the commanding officer of the SAS Regiment writing an angry letter to the head of ADFIS, in which he claimed ADFIS was seeking to charge SAS members over the incident in order to obscure their own culpability in what happened.

Another letter, sent in 2013 by a senior officer of 2 Commando to Chief of Army David Morrison, exposes the rift between the SAS and 2 Commando.

The letter, in response to claims made by SAS Victoria Cross winner Mark Donaldson in his autobiography, said relations between the two units were on a "perilous knife edge" and in "an extremely unhealthy state".

The most dense and complex documents are those that seek to codify what tests Australian soldiers have to apply before they shoot to kill.

In 2013, sparked by an incident the previous year in which Australians killed two unarmed Afghan men, a series of directives and memos was issued by the Defence Force hierarchy stressing the need to be certain that Afghans were "directly participating in hostilities" before shooting them.

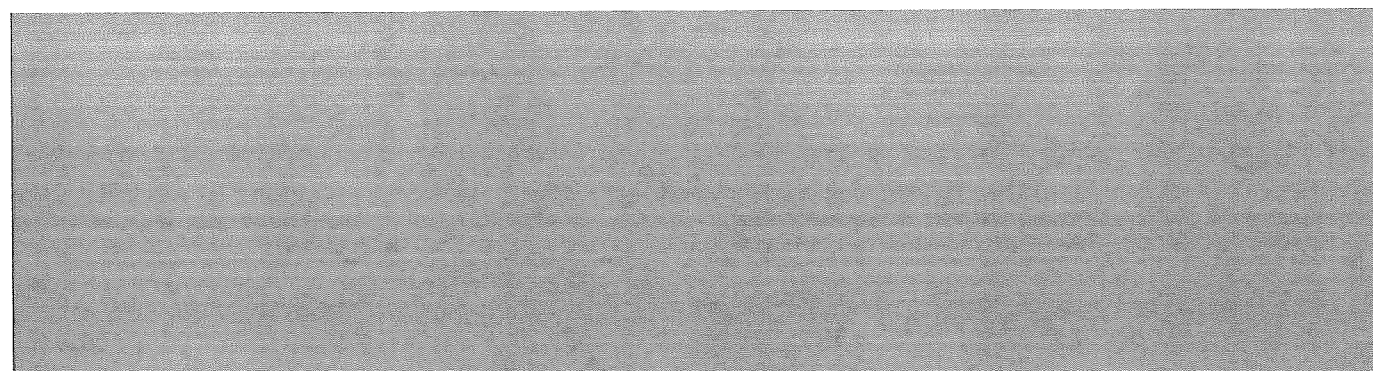
The documents indicate just how difficult this certainty could be to arrive at, particularly regarding 'spotters', or Afghans who kept watch and relayed information to Taliban fighters, without necessarily being armed.

Spotters could be shot for riding a motorcycle in a 'stop-start' fashion, talking on a radio or "manoeuvring to gain a tactical advantage", according to the documents. But as Australia began to step back from operations in Afghanistan, purportedly to allow the Afghan security forces to take responsibility for security in Uruzgan province, an Australian officer hinted that Afghan patience might be wearing thin.

"This shift may require a review of the burdens of proof as they pertain to the necessity of engaging spotters perceived to be directly participating in hostilities," he wrote after an Afghan man on a motorcycle was shot and killed, but the Australian soldier responsible cleared.

"The necessity of [special forces] to press the tactical advantage of the engagement needs to be weighed against the political disadvantage created by civilian casualty allegations against [Coalition forces] at this stage of the campaign."

Delve further into the documents and read the full stories uncovered as part of the ABC's investigation into The Afghan Files.



What the documents reveal about killings of unarmed Afghans

A helicopter attack killing boys and their donkeys, a detainee allegedly lunging for a knife shot dead and a boy mistakenly killed as he hid under blankets are all detailed in the documents.

They show that on a number of occasions Defence investigations only occurred because locals complained to Afghan authorities, and those authorities demanded answers from the Australian forces, or because journalists or NGOs raised concerns.

Some of the incidents detailed have been publicly acknowledged by Defence previously, usually in response to media reporting, but the outcomes of investigations are seldom made public — until now.

Read summaries of 10 cases between 2009-2013 in which special forces troops shot dead insurgents, but also unarmed men and children.

READ THE SUMMARIES

An interrogation, a shooting and no witnesses

Inside a hut, in the far east of Afghanistan's Uruzgan Province, an Australian soldier was left alone with a captured insurgent.

But while others outside prepared for a helicopter transfer, the detainee was shot dead.

The ABC can reveal the secretive defence inquiry probing allegations of unlawful killings in Afghanistan is now investigating the incident.

READ THE STORY

‘What the f* are you doing’: Chaos over severed hands**

It was one of the most notorious incidents in Australia’s recent military history — the severing of hands of dead Taliban fighters in Afghanistan.

When it was first reported by the media in August, 2013, it caused a public furore and deep concern within Defence.

Now, for the first time, secret defence documents obtained by the ABC reveal the full story of how and why the “chopped hands” controversy came about.

READ THE STORY

The spy and the SAS soldier with a loaded Glock

Even in a warzone like Afghanistan, spies and soldiers need to relax, to let their hair down.

And so it was that on December 7, 2013, a handful of officers from the Australian Secret Intelligence Service and nine Australian soldiers — deployed to guard the spies — decided to put a lamb on the barbie.

But what started as a convivial dinner in covert premises in Kabul ended badly with an SAS trooper pulling his handgun on a female ASIS officer.

READ THE STORY

Who is the enemy?

From the very beginning of the war in Afghanistan, Australian troops were faced almost every day with decisions that had to be made within a split second.

The farmer smiling at you as you patrolled through his village could have an AK-47 stashed behind a nearby wall. The youth watching silently as you left your base could be reporting your movements to the insurgents.

The Taliban didn't wear uniforms and often did not carry weapons on them. They travelled on motorbikes and in utes. They shook your hand by day and laid improvised explosive devices by night.

Now, Defence documents obtained by the ABC give an insight into the ambiguities and difficulties faced by troops on the ground.

READ THE STORY

'Unhealthy' relations between elite teams

They are the most celebrated and prestigious units in the Australian Army.

The SAS - the Special Air Service Regiment - and the 2nd Commando Regiment are Australia's special forces elite, the soldiers tasked with the most difficult missions in warzones like Afghanistan.

But now Defence Department documents leaked to the ABC reveal that relations between the two units — which also have a crucial role in domestic counter-terrorism operations — have reached an all time low.

READ THE STORY

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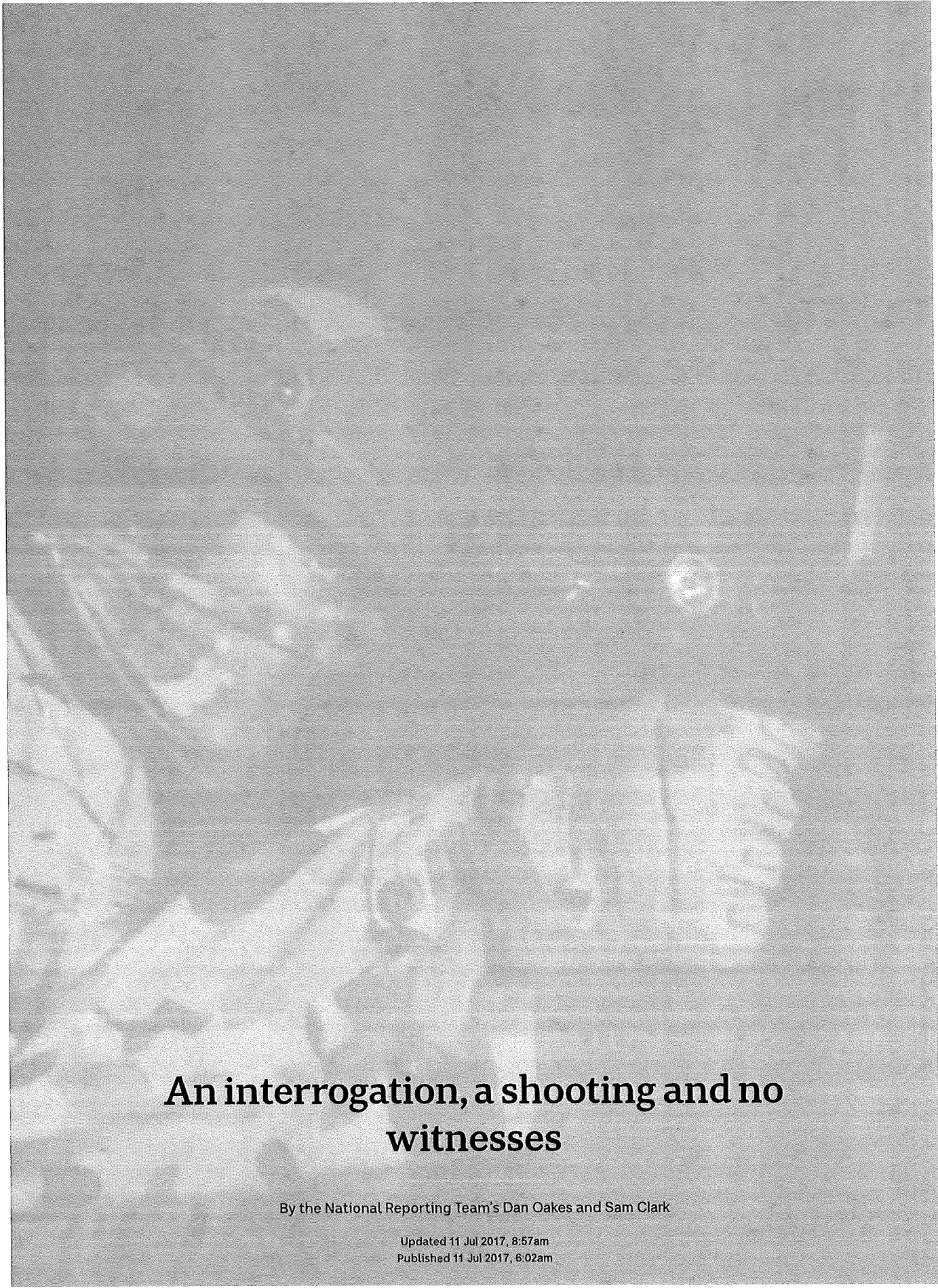
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Photos: Margaret Burin





An interrogation, a shooting and no witnesses

By the National Reporting Team's Dan Oakes and Sam Clark

Updated 11 Jul 2017, 8:57am
Published 11 Jul 2017, 6:02am



A secretive inquiry probing allegations of Australian war crimes in Afghanistan is investigating the killing of a Taliban detainee by an Australian soldier in 2013.

It was revealed on 7.30 last night that the inquiry is already investigating the possibility that Australian soldiers covered up their killing of a 14 or 15-year-old Afghan boy in 2012, and also investigating the death of man called Bismillah Azadi and his six-year-old son in 2013.

Defence has confirmed to the ABC that the inquiry, headed by NSW Supreme Court judge Paul Brereton on behalf of the Inspector General of the Australian Defence Force, is also "reviewing" the death of the detainee which has never been publicly disclosed until now.

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According to a "quick assessment" report obtained by the ABC, the man and two other "persons of interest" were captured during a clearance operation carried out by Afghan and Australian troops in the far east of Uruzgan province.

The Afghan troops interrogated them and told the Australians the men were Taliban and needed to be taken back to the main base at Tarin Kowt for questioning.

At some point one Australian soldier was left alone with one detainee in a hut.

According to the report, the Australian removed the cuffs from the Afghan in order to transfer him to a helicopter and the detainee allegedly tried to grab the Australian's rifle.

There were no witnesses to the killing and the quick assessment cleared the Australian of any wrongdoing.

The commanding officer of the special operations task group wrote on the quick assessment report: "I don't believe an [Australian Defence Force Investigative Service] investigation will 'value add' at this stage due to their inability to compel witnesses to give statements (ie. the members will exercise their right to remain silent, as has been evidence in previous cases)."

"If a serious incident is deemed to have occurred, ADFIS will be involved as a matter of course by the inquiry officer."

Inside the Afghan Files ABC News

However, investigators from ADFIS who arrived in Afghanistan soon afterwards declared they were investigating a potential war crime of "wilful killing". They demanded the weapon used to kill the Afghan detainee be handed over for examination.



The commanding officer of the special operations task group — on the advice of the Defence lawyer assigned to the task group — refused, saying the investigators' warrant was flawed as it listed the wrong offence, and that the killing was a clear cut case of self-defence.

He also said that the weapon had been used in operations since the killing and he therefore failed to see how forensically testing it would be of any use. The investigators then allegedly threatened to take the weapon by force.

The situation was only defused when the commanding officer reluctantly handed over the weapon. He and the legal officer were later investigated for allegedly obstructing an ADFIS investigation but counter-claimed that they had been threatened by the investigators. It was also later determined that the warrant was, indeed, faulty.

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Relations between Australia's special forces units on 'knife edge'

Header photo: Margaret Burin



What the documents reveal about killings of unarmed Afghans

By the National Reporting Team's Dan Oakes and Sam Clark

Updated 11 Jul 2017, 10:45am

Published 11 Jul 2017, 6:02am



On occasion, the killing of Afghan civilians or unarmed insurgents was investigated by the Australian Defence Force.

Usually, this was an inquiry conducted by an officer from outside the unit.

Often the inquiry officer's job was made more difficult by the fact that, due to the security situation, it wasn't possible to visit the scene of the killing and interview locals who witnessed the incident.

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The ABC has obtained a number of the inquiry reports and other documents which show that on a number of occasions the inquiries occurred only because locals complained to Afghan authorities, and those authorities demanded answers from the Australian forces, or because journalists or NGOs raised concerns.

Yesterday, the ABC revealed that Defence's Inspector General (IGADF) is investigating the killing of two children in separate incidents in 2012 and 2013. It is not clear whether all of the incidents listed below are being investigated by the Inspector General's inquiry.

Sometimes, particularly after 2011, when concerns began to grow in Canberra about the actions of Australia's special forces in Afghanistan, staff from the Australian Defence Force Investigative Service (ADFIS) were sent to investigate incidents.

This culminated in September 2013, when in the space of a week Australian special forces soldiers killed a man and his sleeping child, and an Afghan detainee was shot dead after allegedly trying to seize the weapon of an Australian SAS trooper.

On at least one of these occasions, the commanding officer of the Special Operations Task Group in Tarin Kowt refused to hand over evidence to ADFIS investigators without a warrant, leading to an ugly confrontation between officers from special forces and ADFIS investigators.

Some of the incidents detailed below have been publicly acknowledged by Defence previously, usually in response to media reporting, but the outcomes of investigations are seldom made public.

Heavily redacted inquiry reports were sometimes released, but political considerations were taken into account when that decision was made.

For example, advice to the Defence Minister about the inquiry into the killing of two mullahs by SAS members in 2012 said "publishing additional detail through release of a redacted report would increase the risk to Australia's relations with Afghanistan".

In that case, Afghan officials from then-president Hamid Karzai down had complained bitterly and publicly about the killings, stating that the dead men were not Taliban and the deadly raid was not authorised by the Afghan Government.

Inquiry officer inquiries invariably found that Australian soldiers had acted within their rules of engagement, and that no further action should be taken.

The following are summaries of the inquiry reports found among the hundreds of pages of secret Defence documents leaked to the ABC.

Three men killed, including one hiding in hay stack

Date: 2/4/2009

Location: Jalbay, Uruzgan Province

Description: Australians hunting for a “medium value” target arrived at the village of Jalbay in helicopters after dark. The Taliban target was not there, but the Australians killed three men, including one who was hiding in a hay stack, one hiding in a chaff pile, and another trying to take cover in a line of trees nearby. The Australians later said that the men who were hiding in the chaff pile and hay stack were in a “firing position”, but no weapons were found afterwards.

Outcome: Inquiry found the Australian soldiers had acted within the rules of engagement, yet admitted no weapons were found, and that a number of intelligence sources said the men were civilians, not insurgents. The inquiry officer also claimed that an alleged lack of protest by locals over the killings, and the fact the dead men supposedly did not behave like “uninvolved” Afghan civilians when the soldiers arrived, meant they were likely to have been “associates” of the Taliban member being targeted.

Apache helicopter destroys vehicle that switched off lights

Date:10/6/2009

Location: Noy Juy, Mirabad

Description: After heavy fighting between Australian troops and insurgents, the Australians saw suspected fighters leaving the area in a number of vehicles at dusk. Radio chatter intercepted by Australian soldiers suggested that insurgents had been instructed to turn the headlights of their Toyota Hilux off as they retreated from the area. Soon after this, Australian soldiers on the ground and the crew of a Dutch Apache attack helicopter saw a vehicle switch its lights off as it drove away from the area. The Apache helicopter destroyed the Hilux. The headlights of another vehicle were seen to be switched off and the Apache destroyed that car as well. Media reports later suggested civilians were killed.

Outcome: Inquiry found the killing of the suspected insurgents fell within the rules of engagement. A legal assessment of the incident suggested that the civilian casualties may have resulted from a large explosion witnessed earlier in the day, however, this seems to contradict claims of locals who say they were targeted by two helicopters.

Detainee whose handcuffs 'separated' shot dead

Date: 3/10/2010

Location: Zangitan, Kandahar Province

Description: Australian troops detained two men. One Australian soldier questioned the detainees through an interpreter. The interpreter left the room, followed by one detainee walking and then the Australian. The detainee then allegedly reached up and grabbed a knife from a ledge just above the doorway. The detainee, whose plastic handcuffs had “separated” then struggled with the Australian, before the Australian shot him several times and killed him. It was not until two years later, after a journalist asked questions, that a Defence quick assessment discovered that dead man was a detainee, and had not been killed during a battle. ADFIS then investigated the incident.

Outcome: It was determined that the man was a detainee when he was killed, and the chief of joint operations, Lieutenant General Ash Power, said in a brief in August 2012 that he was “disappointed with the operational decision making and reporting procedures at the time of the incident”. However, it was determined that the Australian was within his rights to shoot the detainee dead.

Man and boy killed ‘returning from local medical clinic’

Date: 27/3/2011

Location: Sah Zafar, Chora Valley

Description: Australian and Afghan troops conducting a 'cordon and callout operation' were sent to a location where it was hoped they would capture a high-value Taliban target. As they moved along a road they were shot at from a concealed area. The Australians returned fire and immediately moved up to the location from where the shots originated. There they found a dead man and a fatally injured child. Locals in a "distressed state" arrived at the scene and told the Australians that the dead man was the boy's uncle, and that he was returning with his nephew from the local medical clinic. Australian soldiers tested the dead man's hands and found traces of nitrate, which they said proved he had handled explosives and was an insurgent. However, this was later disproved, as there was no evidence the man was an insurgent, and nitrates are present within commonly-used fertilisers in Afghanistan. The report says the commanding officer and the officer who carried out the initial 'quick assessment' had an "incomplete" understanding of the technology. Bags containing medication were also found at the scene of the killing, lending further credence to the locals' story.

Outcome: The inquiry found the Australian troops were acting within the rules of engagement when they killed the man, but was heavily critical of the process by which he was labelled an insurgent after his death.

Afghan boy survives being shot through face

Date: 1/5/2012



Location: Deh Rafshan area of Uruzgan Province

Description: Australians were carrying out a “capture/kill” mission targeting a mid-level insurgent commander and bomb maker in the Deh Rafshan area of Uruzgan Province. The insurgent leader was holding a meeting with “four known key insurgents”, so the Australians set up a number of “blocking positions” to contain them. An Australian sergeant saw two Afghans who he believed were trying to evade the cordon, and both he and an Afghan soldier called on them in Pashtu to stop. They kept walking towards some elevated ground, and the Australian, believing they would gain a tactical advantage if they reached the higher ground, fired a single shot. The men kept moving, and a 13-year-old boy, drawing water from a well nearby, walked after them in order to convince them to stop. The Australian fired at the men again, and they finally stopped. When he approached the men he found the 13-year-old boy with a gunshot wound to neck and an exit wound through his mouth. No weapons were found, and the men were ultimately released. The boy survived.

Outcome: The inquiry report found the Australian soldier had acted within the rules of engagement. However, it says that at a meeting held with village elders after the shooting, the boy’s father said he witnessed a “heated argument” between two Australian soldiers, which he believed to be about the shooting.

On the hunt for deadly Afghan soldier, two men killed

Date: 31/8/2012

Location: Sula

Description: Australian troops were hunting for an Afghan soldier who had killed three Australian troops on August 29. During the operation, an SAS trooper wrestled Mullah Jalil Akhund to the ground. The inquiry report said Mullah Jalil Akhund was initially compliant, but then tried to grab the Australian’s weapon, so the Australian soldier shot him dead. Another man, Mullah Janan Akhund, was allegedly seen by two Australian special forces soldiers talking on a radio as an Australian helicopter approached the area. According to the



report, he “failed to comply with a number of directions to stop and was assessed by the SOTG members to be manoeuvring to gain tactical advantage through a covered position and potentially accessing a cache of weapons”, so the Australians killed him.

Outcome: The inquiry found that the Australians acted according to their rules of engagement. However, it also found that the Australian troops were using International Security Assistance Force (ISAF) rules of engagement instead of Australian. It also revealed that Australians were relying on their own experience to determine when an Afghan was demonstrating insurgent “tactics, techniques and procedures”, and then killing them, but that those criteria had not been endorsed by senior officers. A “communications pack” accompanying the report recommended that the report not be made public “following consideration of Australia’s national interests”.

Helicopter strike kills boys and donkeys

Date: 28/2/2013

Location: Char Chineh District, Uruzgan Province

Description: Australian and Afghan troops were conducting a sweep through a remote region. The Australians reportedly picked up radio chatter from insurgents indicating an “imminent threat”, and pinpointed two insurgents 1.3 kilometres away from a checkpoint they had set up. They called in a helicopter strike, but then saw the helicopter’s fire hit an area a few hundred metres from where they believed the insurgents were. They halted the air strike and went to where the shots had hit, finding two dead Afghan boys and three dead donkeys

Outcome: Despite the ADF saying no Australian was to blame, a NATO enquiry carried out in the days afterwards found the Australian commander on the ground and the pilot of the American attack helicopter “did not fulfil their obligations” when they failed “to coordinate observation and fire onto the same point”.

Motorcyclist gunned down for stopping and starting

Date: 9/3/2013

Location: Southern region of Uruzgan Province

Description: During an armed reconnaissance of “insurgent high activity zones” with their Afghan partner troops, Australian troops saw a motorbike carrying two people moving in a “stop/start” fashion. One Australian said he tried using hand gestures and verbal commands to get the motorcyclist to stop but that the motorcycle was heading to an area that “would provide a tactical advantage within the greenbelt”. A second Australian shot and killed the rider, while the female passenger fell off and sat on the ground, seemingly unhurt. The Australian did not tell anybody at the time that he had shot the motorcyclist, and it was erroneously reported that Afghan troops were responsible.

Outcome: The inquiry found that the killing fell within the rules of engagement, but that Afghan officials were becoming increasingly agitated about incidents in which Australian troops killed unarmed Afghans. The report said there should be consideration given to changing to the rules of engagement around unarmed suspected “spotters”.

Detainee shot dead in hut prompts war crime probe

Date: 23/09/2013

Location: Patan, Chenartu District

Description: Australian and Afghan soldiers detained three “persons of interest”. They were handcuffed and taken to a nearby area to be questioned. The first two men were questioned inside a hut and then sent outside. The third man was questioned and a helicopter was arranged to fly the three suspected insurgents for further questioning. While alone with the third detainee, a special forces soldier removed the plastic handcuffs from the man. The Australian soldier said that as soon as he removed the cuffs the detainee grabbed for his rifle. The soldier, who was alone with the detainee, called out for assistance but before help arrived he shot and killed the detainee.

Outcome: A “quick assessment” of the incident found that the soldier operated within the rules of engagement, however just days after the incident ADFIS investigators arrived in Afghanistan, telling the commanding officer of special forces that the soldier was under investigation for the war crime of wilful killing. They demanded the soldier’s weapon for forensic testing, and the commanding officer refused, saying the killing was in self-defence, and that the warrant supplied by the ADFIS investigators was invalid. The weapon was later given to the investigators, and the commanding officer and his legal officer investigated for allegedly hindering an ADFIS investigation. Nobody was ever charged, and the warrant was later found to have been flawed. Defence has referred this case to the Inspector General’s inquiry.

Child found under blankets with bullet wound

Date: 26/9/2013

Location: Spin Kecha village, north west Uruzgan Province

Description: While searching a compound as part of an operation targeting a high value Taliban target, special forces soldiers saw a man, later named as Bismillah Azadi, allegedly pointing a pistol at them. Bismillah was shot and killed by two special forces soldiers, but they were unaware of a child hidden in blankets near him. The child was later discovered with a single gunshot wound to the abdomen and within five minutes was pronounced dead. A payment to the child's family of \$US1,500 was made.

Outcome: Inquiry found there was insufficient evidence to conclude that Bismillah was a member of the Taliban or an insurgent. However, the fact that he had pointed a loaded pistol at Australian troops and the absence of a local outcry following his death was cited as reason to suspect that he was supportive of the insurgency. The inquiry also concluded that the Australian soldiers who fired on Azadi had fired in self defence and exercised appropriate restraint. Defence has referred this case to the Inspector General's inquiry.

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Relations between Australia's special forces units on 'knife edge'

Header photo: Margaret Burin



The spy and the SAS soldier with a loaded Glock

What started as a convivial dinner in covert premises in Kabul ended badly with an SAS trooper pulling his handgun on a female spy.

By the National Reporting Team's Dan Oakes and Sam Clark

Updated 11 Jul 2017, 8:57am
Published 11 Jul 2017, 6:02am



Even in a warzone like Afghanistan, spies and soldiers need to relax, to let their hair down.

And so it was that on December 7, 2013, a handful of officers from the Australian Secret Intelligence Service and nine Australian soldiers – deployed to guard the spies – decided to put a lamb on the barbie.

The beer and spirits were flowing freely.

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Two Afghan interpreters were present and at one stage, some Canadians joined the party.

But what started as a convivial dinner in covert premises in Kabul ended badly with an SAS trooper pulling his handgun on a female ASIS officer.

The ABC first reported the incident in 2014 but little detail was made public.

Now, a secret report obtained by the ABC paints a much fuller picture about what happened that night including how the SAS trooper allegedly held his loaded Glock pistol under the chin of the female spy.

It also reveals that some Australian troops in Afghanistan regularly drank alcohol – some of it supplied by the Australian Embassy – in direct contravention of standing orders.

The 36-page report is marked Secret AUSTEO (Australian Eyes Only).

It says that on the night in question three members of “another government agency” and nine defence force personnel were at the BBQ.

Soldier put muzzle directly under spy's chin

The report says alcohol was consumed during the evening.

There was evidence both the man and the woman involved “were to some degree intoxicated”.

Neither is named in the report. They are referred as A35 (the soldier) and Officer L.

It says that around 11:00pm A35 headed back to his room “carrying his pistol in his hand, because his holster was in his room”.



"Officer L followed soon after him.

"As she entered the courtyard she alleges in a written statement that A35 pointed his pistol directly at her.

"She alleges he then lowered the pistol, while further conversation took place, before raising it again and placing the muzzle directly under her chin. She saw that his finger was not on the trigger, and did not believe he intended to fire.

"However, she was aware that a magazine was attached to the pistol, was conscious that they had both been drinking and was worried about the potential for an accident."

A35 was 'talking with hands'

The report says A35 denied placing the weapon under her chin but admitted he was "possibly waving (the pistol) around and 'talking with his hands'."

Officer L walked away and when at what she thought was a safe distance, turned and called A35 "a complete dickhead".

She immediately told a colleague who noticed that she was "visibly shaking and had a quavering voice".

The reasons for the incident were not made clear, although Officer L told investigators A35 was interested in a relationship, something he denied. A35 countered that Officer L was known as "a flirt".

The report found that while ASIS officers were allowed to consume alcohol under certain circumstances, ADF personnel were not, except on special occasions such as ANZAC Day.

All the Defence Force members present on the night – except A35 – initially denied they had been drinking.

However, they later changed their story and said the ADF chain of command was "well aware" that members of the detachment drank alcohol.

They added that senior members in their chain of command also drank.

They told investigators alcohol was needed as a "currency" to gather information from intelligence agencies and the armed forces of other countries, and it was unworkable to have defence force personnel and ASIS agents living and working together under different alcohol restrictions.

Incident followed order of large amount of alcohol

The report said that early in the inquiry, investigators had been informed one large alcohol order had been requested and supplied to ADF members through the Australian Embassy's duty free facility.

"The order included 12 cases of beer and 40 bottles of spirits."

Both the ASIS officer and the SAS member were sent back to Australia within days of the incident.

Other documents obtained by the ABC show that the Army hierarchy was concerned about turning the matter over to the Australian Defence Force Investigative Service because it could end up in a public hearing, and compromise operational security (OPSEC).

However the then Chief of the Defence Force, General David Hurley, cautioned against this approach.

"I think we are placing too much emphasis on the OPSEC aspect of this incident. There appears sufficient evidence for [Special Operations Command and Chief of Army] to act re the consumption of alcohol and the 'blind eye' turned to it by the [chain of command]," General Hurley writes.

"The provision of false evidence is more serious and could be forwarded to ADFIS (Australian Defence Force Investigative Service) – the OPSEC issue need not be a barrier to this. We need to smarten our response to these matters."

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Header photo: Margaret Burin





Who is the enemy? Australia's secretive rules of engagement

By the National Reporting Team's Dan Oakes and Sam Clark

Updated 15 Jul 2017, 1:18pm
Published 11 Jul 2017, 6:02am

Picture this: you are an Australian special forces soldier on operations in Afghanistan. Out of the corner of your eye you've spotted a person you believe to be a "squirter".



Do you shoot?

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And if you do open fire on the “squirter”, are you operating within the Australian Defence Force Rules of Engagement?

From the very beginning of the war in Afghanistan, Australian troops were faced almost every day with decisions that had to be made within a split second.

The farmer smiling at you as you patrolled though his village could have an AK-47 stashed behind a nearby wall. The youth watching silently as you left your base could be reporting your movements to the insurgents.

The Taliban did not wear uniforms and often did not carry weapons on them. They travelled on motorbikes and in utes. They shook your hand by day and laid improvised explosive devices by night.

Now, Defence documents obtained by the ABC give an insight into the ambiguities and difficulties faced by troops on the ground.

Which brings us back to the squirter.

In Australian military terms, a “squirter” is a person seen moving quickly away from an object of interest.

That person might be moving to gain a tactical advantage.

If you do decide to pull the trigger — and shoot a civilian — will your superiors find that you operated within the ROE — the all-important Rules of Engagement?

The ROE: a tightly-held secret

No army wants to let its enemy know when it will pull the trigger and when it will hold fire.

Obviously, any person pointing a weapon at an Australian was a valid target.

But documents obtained by the ABC show the Australian Defence Force instructed its members that unarmed Afghans might be legitimately killed if they were DPIH — “directly participating in hostilities”.

Much paper and ink was expended on defining this term but in the context of day-to-day operations in Afghanistan it often pertained to two distinct patterns or types of activity: moving in a “tactical” fashion or to an area where weapons might potentially be stored, and “spotting” for Taliban fighters.

This meant that if you were an Afghan riding a motorcycle in a certain fashion near Australian troops, or were seen talking on a radio or mobile phone, you could be considered fair game.

The documents seen by the ABC stress that mere suspicion, or instinct, was not enough, though. There had to be a solid basis for that suspicion, based on knowledge of insurgent “tactics, techniques and procedures”.

In April 2013, the Chief of the Defence Force, the Chief of Joint Operations and the head of the Joint Taskforce 633 (Australia's troops deployed in the Middle East), all issued directives stressing that Australian soldiers must have a high degree of confidence that a targeted person is directly participating in hostilities.

“An ADF member is exposed to criminal and disciplinary liability, including potentially the war crime of murder ... for opening fire on a person when there is a substantial risk that the person is not DPH,” General David Hurley, then the CDF, wrote.

Given the potential consequences, it is perhaps unsurprising that – with the exception of one infamous incident – in more than a decade of Australian involvement in Afghanistan, not one Australian soldier appears to have been subjected to legal or disciplinary action over the killing of a civilian.

In May 2009, an internal inquiry found that Australian soldiers who killed three men during an assault on a compound were cleared despite the fact that one of the dead was hiding in a pile of chaff, another was running away from the compound and the third was hiding in a hay stack.

None of the three were armed, no weapons were found nearby and none of the eight Afghan men captured alive was questioned about the identities of the dead men.

The officer who carried out the inquiry did not travel to the scene or question the local inhabitants.

Despite all this, he determined the dead men “acted in a manner consistent with taking a direct part in hostilities.”

When Australian SAS troopers hunting for the killer of three Australian soldiers in October 2012 killed two Afghan men, the Minister for Defence, David Johnston, was told in a briefing paper: “The scope of the legal concept of direct participation in hostilities ... is necessarily subjective in nature ... there is no compelling reason to second-guess the judgement of the soldiers involved.”

On that occasion, one of the dead men, Mullah Janan Akhund, was seen talking on a radio as an Australian helicopter was about to land, then “assessed by SOTG members to be manoeuvring to gain tactical advantage through a covered position and potentially accessing a cache of weapons”.

He was shot multiple times in the head and chest by two Australians, including Victoria Cross winner Ben Roberts-Smith.

The other man, Mullah Jalil Akhund, allegedly tried to wrest a weapon from an SAS trooper after being detained and was killed with “close range and deadly fire”.

Nonetheless, the inquiry officer in that case did “identify a number of concerns in relation to the application of Australian ROE with respect to individuals taking a direct part in hostilities”.

It was this incident that prompted General Hurley's warning to his troops that they could be tried for war crimes if they killed civilians without sufficient justification, and the clarification of rules of engagement that went out to all Australian forces in April 2013.

Civilian killings turning locals against troops

One other incident provides a window into the growing realisation that the killing of civilians was turning the local population against Australia and its allies.

On March 10, an Australian commando shot and killed a man on a motorcycle during an operation south-east of the main Australian base at Tarin Kowt. A female passenger was injured.

It was not until the provincial chief raised the incident a day later that Australian commanders realised their man had killed the Afghan motorcyclist.

A report on a subsequent meeting between Australian Special Forces personnel and the chief of police, Matiullah Khan, noted that he was agitated about "shooting civilians, especially females who do not target [Coalition Forces] or [Afghan National Security Forces]."

A later report compiled by a NATO investigation team noted that the local head of the Afghan national intelligence service, the NDS, "... echoed Matiullah Khan's sentiments, stating that Uruzgan citizens already blamed the National Directorate of Security for civilian casualty incidents arising from Special Operation raids."

The commando who killed the Afghan motorcyclist was cleared on the basis that intercepted communications revealed insurgents were active in the area, and the motorcyclist had exhibited behaviour — ignoring commands to stop and watching the Australian troops — that was consistent with "spotter" behaviour.

However, the author of the NATO report, an Australian officer, hinted that the patience of Afghan authorities with the killing of civilians might be wearing thin.

"The President of Afghanistan's recently declared delegation of responsibilities to Provincial security officials shows the national acceptance of [Afghan National Security Forces] as the lead security agency. This shift makes discretionary [Coalition] unilateral operations less acceptable to the Afghan population and [Government]," he wrote.

"This shift may also require a review of the burdens of proof as they pertain to the necessity of engaging spotters perceived to be directly participating in hostilities.

"The necessity of [special forces] to press the tactical advantage of the engagement needs to be weighed against the political disadvantage created by civilian casualty allegations against [Coalition forces] at this stage of the campaign."

It is not known if a formal review of Australia's Rules of Engagement took place following this recommendation.

Editor's note July 15, 2017: This article has been edited from the original published on Tuesday, July 11, 2017.

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The Afghan Files

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Relations between Australia's special forces units on 'knife edge'

Header photo: Margaret Burin



'What the f* are you doing': Chaos over severed hands**

By the National Reporting Team's Dan Oakes and Sam Clark

Updated 11 Jul 2017, 10:25am
Published 11 Jul 2017, 6:02am



It was one of the most notorious incidents in Australia's recent military history — the severing of dead Taliban fighters' hands in Afghanistan.

When it was first revealed by the ABC in August, 2013, it caused a public furore and deep concern within Defence.

Now, for the first time, secret defence documents obtained by the ABC reveal the full story of how and why the "chopped hands" controversy came about.

The documents — one of which is marked "SECRET AUSTEO, INQUIRY IN CONFIDENCE" — reveal the incident caused bitter infighting within defence and sparked allegations of a "drift" in values within Australia's elite special forces.

REPORT OF THE INQUIRY OFFICER

INQUIRY INTO INCIDENT INVOLVING SENSITIVE SITE EXPLOITATION BY MEMBERS OF SOTG ON 28 APR 13

F69031

The documents state that on April 28, 2013, special forces were in search of a particular insurgent — an Australian National Priority Target codenamed Objective Rapier, a senior insurgent commander responsible for numerous attacks.

According to the documents, helicopters and a total of 120 soldiers were involved in the operation, including troops from the SAS and commandos.

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One of the SAS officers in the patrol was Captain Andrew Hastie, now a federal Liberal MP.

The documents say that during the fighting in the southern province of Zabul, four insurgents were killed.

An SAS corporal searched the first body, finding a Makarov pistol.

The report of the defence inquiry into the matter says: "[He] then severed a single hand of the EKIA (enemy killed in action) with a scalpel."

He repeated the process with two other EKIA's, cutting off their right hands.

Australian troops are required to collect fingerprints and eye scans of every Taliban fighter who is killed, if it is possible to do so.

But the mutilation or mistreatment of the bodies of the dead is a violation of the laws of war.

The report says: "In his evidence (the SAS corporal) said that once again he had severed the hands of EKIA's 2 and 3 of his own volition, as there was time pressure to retrieve the biometric material and to get back to the helicopters for extraction."

"At this point in time patrol commander (a sergeant) ... arrived at EKIA 3, and seeing the two hands on the ground, exclaimed words to the effect:

"What the f*** are you doing?"

Cutting off hands 'a tactical necessity'

The patrol commander told Defence investigators the soldier with the scalpel was "speechless" but a colleague replied: "This is a tactical necessity. This is a procedure to conduct latent fingerprints in the laboratory to take explosive residues."

The report states that Captain Hastie, then the commander of Troop B, observed a severed hand "at the site of the EKIA 3" and also asked what was going on.

When Captain Hastie and the sergeant returned to their base they discussed the incident at length and asked another SAS member to find out if the practice was permitted under Defence rules and regulations.

Cpt Hastie told his men not to sever any more hands and the next day reported the incident to his commanding officer.

The report paints a picture of confusion and growing alarm as news of what the SAS member had done began to radiate from the base at Tarin Kowt.

It says the soldier "... exercised poor judgment, in that he failed to adequately appreciate the possible strategic consequences of those actions, in particular the potential responses from local nationals, (the Afghan Government), the Australian public and the media."



As the report makes clear, a training session just nine days before the patrol went out played a key and controversial role in what later transpired.

The training session was conducted by an Australian Defence Force Investigative Service (ADFIS) sergeant posted to Afghanistan as a crime scene officer as well as a civilian fingerprint expert. A number of SAS members and a Defence scientist also attended the session.

'You're sweet with us bringing back a hand?'

What was discussed remains hotly disputed.

Some SAS members claimed that the two experts explicitly sanctioned the removal of hands, one SAS trooper claiming that the experts described it as the "gold plate solution". Another said someone asked, "So you're sweet with us bringing back a hand?" to which the reply was, "Yes ... you've got to do what you've got to do on the ground".

The Defence scientist who was present — described in the report as "possibly the most independent person at the training" — characterised the advice given by the experts as, "Here are a range of techniques that can be used to gather evidence from a scene. It's up to those guys, under the tactical situation that they're experiencing, to determine what is the most appropriate technique to use."

The civilian expert said he had only discussed body parts being examined in the context of "post-blast" investigations and denied ever discussing the severing of hands.

The ADFIS Sergeant said that when the subject of severing hands came up, he agreed that it would be a good method of securing fingerprints, but cautioned that the SAS members had to ask their superiors whether it was acceptable.

The sergeant also said he was not surprised the SAS members left the training thinking the severing of hands was legitimate, as "... that was all they were focused on".

This division between the SAS members and the experts who provided the briefing was reflected later in a letter from the commanding officer of the SAS Regiment to head of ADFIS, in which he accused ADFIS investigators of attempting to save the reputation of their colleague at the expense of the SAS.

"To be clear, I believe the ADFIS team were deliberately seeking to charge members of my team to prevent any adverse action on members of their own. This is a perception shared by persons outside my chain of command as well," the SAS officer wrote in October 2013.

As the inquiry progressed, it became clear that Australian troops in Afghanistan had not been explicitly instructed about whether the collection of body parts for biometric testing was acceptable.

New guidelines were quickly put in place emphasising that "the mutilation and otherwise maltreatment of human remains" is not permitted.

Despite this, the officer who carried out the inquiry wrote that some SAS members still sought clarification about whether the practice was acceptable in any circumstances.

"The above position could be attributed to a common desire by the members to support [the SAS trooper who severed the hands], following his employment of the technique. That type of support is not surprising considering the nature of the unit and its operations. However, the views expressed appeared to go beyond mere support for [him] and demonstrated a drift in values, or at least a degree of desensitisation."

Other, more senior personnel who were interviewed by the inquiry were less ambivalent.

Cpt Hastie is quoted as saying, "My gut instinct was okay, that's a strange practice." Another SAS member said, "There's no uncertainty. I wouldn't cut f***ing people's hands off, sir."

The inquiry officer said in conclusion that he could not identify what had caused any "value shift" in the SAS members, but noted that they regularly see dead and dismembered bodies, and themselves regularly killed and injured people.

"The significance of [this] is that these members require very clear direction in relation to what they can and can't do, and the members request as much," he wrote.

"Additionally, it would be imprudent for commanders to assume that these members are in a position to make value judgements, in a way that will align with the judgement of the commanders, and others."

More than four years after the incident, it is not clear if any disciplinary action was ever taken against the SAS trooper who severed the hands.

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Header photo: Margaret Burin





Relations between Australia's special forces units on 'a perilous knife edge'

By the National Reporting Team's Dan Oakes and Sam Clark

Updated 11 Jul 2017, 1:48pm
Published 11 Jul 2017, 6:02am



They are the most celebrated and prestigious units in the Australian Army.

The SAS — the Special Air Service Regiment — and the 2nd Commando Regiment are Australia's special forces elite, the soldiers tasked with the most difficult missions in warzones like Afghanistan.

The Afghan Files

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Relations between Australia's special forces units on 'knife edge'

NOW READING

But now Defence Department documents leaked to the ABC reveal that relations between the two units — which also have a crucial role in domestic counter terrorism operations — were severely damaged by the war in Afghanistan.

The tensions between the SAS, based in Perth, and the commandos, based in Sydney, are revealed in letters written in 2013 by a former senior commando officer to the then Chief of Army, David Morrison and to Victoria Cross (VC) winner, SAS Corporal Mark Donaldson.

The letters from the senior officer, obtained by the ABC, were prompted by Corporal Donaldson's book, *The Crossroad*.

The book included details of operations involving the two units in which the VC winner criticised the conduct and professionalism of the commandos.

The two units operated alongside each other in Afghanistan as part of Australia's Special Operations Task Group on an operation called CASTNET.

The most controversial claim was that during an operation in Helmand Province, commandos used explosives to enter Afghan homes, after saying they wouldn't do so.

As a result Australian troops were exposed to attack from insurgents, Corporal Donaldson wrote.

'Extremely unhealthy' culture among teams

The former senior commando officer initially wrote to Corporal Donaldson saying he was "incredibly disappointed" with the criticisms, that they were not true and that the SAS had been told explosives were going to be used.

He told Corporal Donaldson: "Relationships between the two units are at an extremely unhealthy state ..."



"The culture of your unit, my unit and SOCMND (Special Operations Command) is on a perilous knife edge."

Receiving no reply, he wrote to General Morrison on November 25, 2013.

The former senior commando officer said the book contained factual errors.

"Furthermore it unfairly maligns officers and commandos and may place in doubt their role in effectively implementing Australian Government policy."

He said it "unjustly criticises the commando reputation and dishonours their service".

In doing so, he said, it "exacerbates a systemic internal cultural divide".

The book "appears to undermine the reputation of the 2nd Commando Regiment and therefore the ongoing trust and support of the nation to which we belong".

In his reply, General Morrison stressed the book was a personal memoir and not an official military history and that "a degree of editorial latitude" had to be given to the author.

He also said he was concerned about the former commando officer's comments about a "cultural divide" and that he would take this up with senior officers.

While in his letter to Corporal Donaldson, the former commando officer was critical of the book, he praised his army service and noted that the VC winner was a "truly humble and self-effacing individual".

He also said, rather curiously, "Furthermore I noted your VC is one in which there is no doubt that it was deserved".

A spokesperson for Pan Macmillan Australia, the publisher of The Crossroad, did not respond to a request for comment.

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NOW READING

Header photo: Margaret Burin



No. NSD989 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

This is the annexure marked “**MR20**” referred to in the affidavit of Michael Antony Rippon affirmed before me on 30 July 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

Address of witness

C/- 700 Harris Street, Ultimo NSW 2007



AFP

AUSTRALIAN FEDERAL POLICE

MR-20

13 September 2018

Daniel Oakes
Senior Reporter
ABC National Reporting Team
Via email: Oakes.Daniel@abc.net.au

Dear Mr Oakes,

I write to you regarding a matter currently under investigation by the Australian Federal Police (AFP) relating to the alleged unauthorised disclosure, communication and receipt of classified Australian Defence Force (ADF) documents and information.

An investigation was commenced following a referral to the AFP from the then Chief of the Defence Force (Air Chief Marshal Mark Binskin) and the then acting Secretary for Defence (Phillip Prior) dated 11 July 2017. A number of classified documents and information central to the allegations were featured in ABC articles co-authored by yourself and Mr Samuel Clark, namely:

- Inside the Afghan Files (ABC promotional video dated 10 July 2017;
- Rules of Engagement (ABC 7.30 report dated 10 July 2017; and
- The Afghan Files (ABC internet series dated 11 July 2017).

The classified documents and information was not authorised for release or disclosure. I can confirm you are a suspect in relation to the following alleged offences:

- Receiving prescribed information, contrary to section 79(6) of the *Crimes Act 1914 (Cth)*
- Unlawfully obtaining information as to defences, contrary to section 73A(2) of the *Defence Act 1903 (Cth)*.

The AFP are now requesting for you to participate in a formal record of interview under criminal caution and rights in respect of these allegations. You are under no obligation to take part in an interview. You may seek legal advice to assist your decision.

I would appreciate if you or your legal representative could advise Federal Agent Ian Brumby on (02) [REDACTED] or via email at [REDACTED]@afp.gov.au and Federal Agent Philip Turner on (02) [REDACTED] or via email at [REDACTED]@afp.gov.au of your decision within seven (7) days of receiving this correspondence.

Yours sincerely

[REDACTED]

Andrew Smith
Detective Superintendent
Offshore and Sensitive Investigations
Crime Operations

POLICING FOR A SAFER AUSTRALIA

No. NSD989 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

This is the annexure marked "MR21" referred to in the affidavit of Michael Antony Rippon affirmed before me on 30 July 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

Address of witness

C/- 700 Harris Street, Ultimo NSW 2007



AFP
AUSTRALIAN FEDERAL POLICE

MR-21

13 September 2018

Samuel Clark
Producer
ABC National Reporting Team
Via email: Clark.Samuel@abc.net.au

Dear Mr Clark,

I write to you regarding a matter currently under investigation by the Australian Federal Police (AFP) relating to the alleged unauthorised disclosure, communication and receipt of classified Australian Defence Force (ADF) documents and information.

An investigation was commenced following a referral to the AFP from the then Chief of the Defence Force (Air Chief Marshal Mark Binskin) and the then acting Secretary for Defence (Phillip Prior) dated 11 July 2017. A number of classified documents and information central to the allegations were featured in ABC articles co-authored by yourself and Mr Daniel Oakes, namely:

- Inside the Afghan Files (ABC promotional video dated 10 July 2017;
- Rules of Engagement (ABC 7.30 report dated 10 July 2017; and
- The Afghan Files (ABC internet series dated 11 July 2017).

The classified documents and information was not authorised for release or disclosure. I can confirm you are a suspect in relation to the following alleged offences:

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The AFP are now requesting for you to participate in a formal record of interview under criminal caution and rights in respect of these allegations. You are under no obligation to take part in an interview. You may seek legal advice to assist your decision.

I would appreciate if you or your legal representative could advise Federal Agent Ian Brumby on (02) [REDACTED] or via email at [REDACTED]@afp.gov.au and Federal Agent Philip Turner on (02) [REDACTED] or via email at [REDACTED]@afp.gov.au of your decision within seven (7) days of receiving this correspondence.

Yours sincerely

[REDACTED]

Andrew Smith
Detective Superintendent
Offshore and Sensitive Investigations
Crime Operations

No. NSD989 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

Australian Broadcasting Corporation

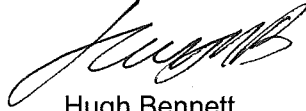
Applicant

Martin Kane and others

Respondents

This is the annexure marked "**MR22**" referred to in the affidavit of Michael Antony Rippon affirmed before me on 30 July 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

Address of witness

C/- 700 Harris Street, Ultimo NSW 2007



AFP
AUSTRALIAN FEDERAL POLICE

MR-22

13 September 2018

Gaven Morris
Director News, Analysis and Investigations
Australian Broadcasting Corporation
Via email: Morris.Gaven@abc.net.au

Dear Mr Morris,

I write to you regarding a matter currently under investigation by the Australian Federal Police (AFP) relating to the alleged unauthorised disclosure, communication and receipt of classified Australian Defence Force (ADF) documents and information.

An investigation was commenced following a referral to the AFP from the then Chief of the Defence Force (Air Chief Marshal Mark Binskin) and the then acting Secretary for Defence (Phillip Prior) dated 11 July 2017. A number of classified documents central to the allegations were featured in ABC articles co-authored by Mr Daniel Oakes and Mr Samuel Clark, namely:

- Inside the Afghan Files (ABC promotional video dated 10 July 2017;
- Rules of Engagement (ABC 7.30 report dated 10 July 2017; and
- The Afghan Files (ABC internet series dated 11 July 2017).

The AFP is aware of communications between yourself and Brigadier Chris Smith (then Chief of Staff to the Chief of the Defence Force) in relation to the aforementioned ABC reporting. Investigations into this matter are on-going, however the AFP are now seeking your assistance as a witness, to provide a statement and any associated supporting material in respect of those communications.

Any assistance you may provide would be on a voluntary basis. There is no legal obligation for you to provide a statement, however any assistance would be appreciated. AFP investigators are in a position to facilitate the taking of any statement at a place and time convenient to you.

I would appreciate if you or your legal representative could advise Federal Agent Ian Brumby on (02) [REDACTED] or via email at [REDACTED]@afp.gov.au and Federal Agent Phillip Turner on (02) [REDACTED] or via email at [REDACTED]@afp.gov.au of your decision within seven (7) days of receiving this correspondence.

Yours sincerely

[REDACTED]

Andrew Smith
Detective Superintendent
Offshore and Sensitive Investigations
Crime Operations

POLICING FOR A SAFER AUSTRALIA

No. NSD989 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

This is the annexure marked "**MR23**" referred to in the affidavit of Michael Antony Rippon affirmed before me on 30 July 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

Address of witness

C/- 700 Harris Street, Ultimo NSW 2007

Our Ref: 18432
Your Ref:

4 October 2018

Federal Agent Ian Brumby
Australian Federal Police
47 Kings Avenue
BARTON ACT 2601

By email: [REDACTED]@afp.gov.au

Dear Mr Brumby

ABC publications concerning "The Afghan Files"

We refer to our letter dated 18 September 2018.

Mr Oakes and Mr Clark decline your request for an interview. In addition, in the circumstances, Mr Morris respectfully declines your request to assist the investigation.

Yours sincerely



Michael Rippon
Senior Lawyer
ABC Legal
E: rippon.michael@abc.net.au

No. NSD989 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

This is the annexure marked "**MR24**" referred to in the affidavit of Michael Antony Rippon affirmed before me on 30 July 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

Address of witness

C/- 700 Harris Street, Ultimo NSW 2007

Genevieve Hartney

From: BRUMBY, Ian <[REDACTED]@afp.gov.au>
Sent: Thursday, 24 January 2019 2:52 PM
To: Michael Rippon
Subject: AFP Investigation - ABC publications concerning "The Afghan Files" [SEC=UNCLASSIFIED]

Follow Up Flag: Follow up
Flag Status: Flagged

UNCLASSIFIED

Good afternoon Michael,

Thank you for taking the time to speak today.

As discussed, the AFP investigation with regards to the Afghan Files and associated publications is ongoing. We are currently at a point where the AFP will seek the issuance of 3E Search Warrants to be executed on ABC premises, for material which we believe will provide evidence of indictable offences against the laws of the Commonwealth.

To expedite this process and create minimal interference to the ABC, its premises and staff, I propose that the manner of how we execute the warrant be similar to other organisations that are prepared to assist, that being –

1. You respond to this email agreeing to provide assistance as would be required by the search warrant; namely search ABC premises for any material that satisfies the conditions to be specified in the warrant and collate any such material that may be found, and any other material found at the premises in the course of the search where there are reasonable grounds to believe it is evidential material in relation to an offence to which the warrant will relate.
2. I will then forward a copy of the conditions of the warrant which describe what we would be seeking from the ABC.
3. We would seek your agreement on a date range of between 2 – 3 weeks to allow for the collation of material.
4. When we are notified that all material relevant to the warrant has been collected, AFP members would attend at the ABC Head Office in Sydney and provide the sworn warrant and obtain the material sought under the search warrant.

If you are happy with this proposal, could you please advise and I will endeavour to provide a copy of the warrant conditions as soon as possible. We are not seeking any material from the ABC outside of that identified in the search warrant.

If you have any questions or concerns at any point, please feel free to contact me.

Regards,

Ian

FEDERAL AGENT IAN BRUMBY
OFFSHORE AND SENSITIVE INVESTIGATIONS
CRIME OPERATIONS
Tel +61(0) 2 [REDACTED]
www.afp.gov.au



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Federal Court of Australia
District Registry: New South Wales
Division: General

Australian Broadcasting Corporation

Applicant

Martin Kane and others

Respondents

This is the annexure marked "**MR25**" referred to in the affidavit of Michael Antony Rippon affirmed before me on 30 July 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

Address of witness

C/- 700 Harris Street, Ultimo NSW 2007

MR-25

Genevieve Hartney

From: BRUMBY, Ian <[REDACTED]@afp.gov.au>
Sent: Monday, 1 April 2019 2:34 PM
To: Michael Rippon
Subject: AFP Investigation - The Afghan Files [SEC=UNCLASSIFIED]
Attachments: AFP Letter (2) - Daniel Oakes.pdf; AFP Letter (2) - Samuel Clark.pdf

Importance: High

Follow Up Flag: Follow up
Flag Status: Completed

UNCLASSIFIED

Good afternoon Michael,

Please find attached two requests for your clients, Messrs Daniel Oakes and Samuel Clark, to consent to a forensic procedure (finger and palm prints).

I will be out of the office for the next month, however if you could please notify Detective Sergeant Matt Neesham or Federal Agent Phil Turner of your clients decision within the next 7 days, that would be appreciated.

Regards,

Ian

FEDERAL AGENT IAN BRUMBY
 OFFSHORE AND SENSITIVE INVESTIGATIONS
 CRIME OPERATIONS
 Tel +61(0) 2 [REDACTED]
www.afp.gov.au



POLICING FOR
A SAFER AUSTRALIA

UNCLASSIFIED

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AFP Web site: <http://www.afp.gov.au>



1 April 2019

Mr Daniel Oakes
Senior Reporter
ABC National Reporting Team

By email: rippon.michael@abc.net.au

Dear Mr Oakes,

Further to the letter from Detective Superintendent Andrew Smith, dated 13 September 2018, regarding the alleged unauthorised receipt of classified Australian Defence Force (ADF) documents and information.

I am satisfied on the balance of probabilities that you are a suspect for an indictable offence, namely:

- Receiving prescribed information, contrary to section 79(6) of the *Crimes Act 1914* (Cth);
- Unlawfully obtaining information as to defences, contrary to section 73A(2) of the *Defence Act 1903* (Cth); and
- Receiving, contrary to section 132.1(1) of the *Criminal Code Act 1995* (Cth)

As such, I am requesting your consent to a forensic procedure being the copying of your finger and palm prints.

There are reasonable grounds to believe that this forensic procedure is likely to produce evidence tending to confirm or disprove that you committed the indictable offence, and forensic material has been recovered from documents which can be compared to the forensic material to be obtained by this procedure.

Under the Crimes Act 1914, I am satisfied that the request for consent is justified in all the circumstances.

You may refuse to consent to the carrying out of the forensic procedure. If you do not consent, an application may be made to a Magistrate by the Australian Federal Police for an order authorising the carrying out of the forensic procedure.

If you refuse to give consent, fail to give consent, or withdraw your consent to the forensic procedure, evidence of this refusal or failure to consent is not admissible in proceedings against you, except to establish or rebut an allegation that police or another person involved in the investigation acted contrary to law in carrying out that investigation.

Should you consent to the carrying out of the forensic procedure, arrangements will be made for you to attend the AFP Melbourne Office at a convenient time and date.

I would appreciate if you or your legal representative could advise Federal Agent Phil Turner via email at [REDACTED]@afp.gov.au or Detective Sergeant Matt Neesham via email at [REDACTED]@afp.gov.au of your decision within seven (7) days of receiving this correspondence.

Should you have any questions about the foregoing, please do not hesitate to contact me.

Yours sincerely

[REDACTED]

Ian Brumby
Federal Agent
Offshore and Sensitive Investigations
Crime Operations
Australian Federal Police



AFP

AUSTRALIAN FEDERAL POLICE

1 April 2019

Mr Samuel Clark
 Producer
 ABC National Reporting Team

By email: rippon.michael@abc.net.au

Dear Mr Clark,

Further to the letter from Detective Superintendent Andrew Smith, dated 13 September 2018, regarding the alleged unauthorised receipt of classified Australian Defence Force (ADF) documents and information.

I am satisfied on the balance of probabilities that you are a suspect for an indictable offence, namely:

- Receiving prescribed information, contrary to section 79(6) of the *Crimes Act 1914* (Cth);
- Unlawfully obtaining information as to defences, contrary to section 73A(2) of the *Defence Act 1903* (Cth); and
- Receiving, contrary to section 132.1(1) of the *Criminal Code Act 1995* (Cth)

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Should you consent to the carrying out of the forensic procedure, arrangements will be made for you to attend the AFP Melbourne Office at a convenient time and date.

I would appreciate if you or your legal representative could advise Federal Agent Phil Turner via email at [REDACTED]@afp.gov.au or Detective Sergeant Matt Neesham via email at [REDACTED]@afp.gov.au of your decision within seven (7) days of receiving this correspondence.

Should you have any questions about the foregoing, please do not hesitate to contact me.

Yours sincerely



Ian Brumby
Federal Agent
Offshore and Sensitive Investigations
Crime Operations
Australian Federal Police

No. NSD989 of 2019

Federal Court of Australia
District Registry: New South Wales
Division: General

Australian Broadcasting Corporation

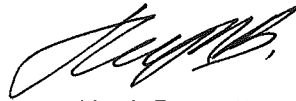
Applicant

Martin Kane and others

Respondents

This is the annexure marked "**MR26**" referred to in the affidavit of Michael Antony Rippon affirmed before me on 30 July 2019 at Ultimo.

Signature of witness



Name of witness

Hugh Bennett

Qualification of witness

Solicitor

Address of witness

C/- 700 Harris Street, Ultimo NSW 2007

MR-26

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. *S196* of 2019

BETWEEN:

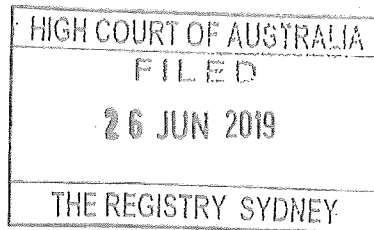
Anika Smethurst
First plaintiff

Nationwide News Pty Ltd
Second plaintiff

and

Commissioner of Police
First defendant

James Lawton
Second defendant



APPLICATION FOR A CONSTITUTIONAL OR OTHER WRIT

The plaintiffs apply for the relief set out in Part I below on the grounds set out in Part II below.

Part I: Orders sought

1. A writ of certiorari quashing the search warrant for the search of the premises of the first plaintiff, issued by the second defendant on 3 June 2019.
2. A declaration that s 79(3) of the *Crimes Act 1914* (Cth), as it stood on 29 April 2018, was invalid.
3. A writ of mandamus, alternatively an injunction, compelling the first defendant to deliver up to the plaintiffs all material seized or otherwise obtained pursuant to the warrant or during its execution, together with all copies of such material.
4. A writ of prohibition, alternatively an injunction, restraining the first defendant from inspecting, providing to prosecuting authorities or retaining any material seized or otherwise obtained pursuant to the warrant or during its execution, or any copies of such material.
5. Costs.

Part II: Grounds

1. The warrant is invalid on the ground that:
 - (a) it misstates the substance of s 79(3) of the *Crimes Act 1914* (Cth), as it stood on 29 April 2008;
 - (b) further or alternatively, it does not state the offence to which the warrant relates with sufficient precision;
 - (c) further or alternatively, s 79(3) of the *Crimes Act*, as it stood on 29 April 2018, was invalid on the ground that it infringed the implied freedom of political communication as alleged in ground 2 below.
- 10 2. Section 79(3) of the *Crimes Act*, as it stood on 29 April 2018, was invalid on the ground that it infringed the implied freedom of political communication.
3. Since the warrant is invalid, the first defendant (**the Commissioner**) should be ordered to deliver up all material seized or otherwise obtained pursuant to the warrant or during its execution, together with all copies of such material.
4. For the same reason, the Commissioner should be restrained from inspecting, providing to prosecuting authorities or retaining any material seized or otherwise obtained pursuant to the warrant or during its execution, or any copies of such material
5. Costs should follow the event.

20 Part III: Remittal

1. The plaintiffs submit that it is not appropriate that the matter be remitted for the following reasons.
2. *First*, the matter raises no evidentiary questions. Indeed, at least from the plaintiffs' perspective, it would be possible for the matter to be determined wholly on the basis of the brief and uncontroversial affidavit of Jason Robert Strachan filed herein, without even a need to agree a special case.

3. *Secondly*, the matter raises an important question, namely whether the “official secrets” provision in s 79 of the *Crimes Act* as it stood prior to its repeal infringes the implied freedom of political communication. While the provision has been recently repealed, the Court’s determination of the question of its validity remains a matter of public importance. As explained further below, replacement provisions have been enacted. The Court’s consideration of the way in which the implied freedom applies to “official secrets” provisions is therefore of ongoing significance. That is especially so since various Australian jurisdictions retain “official secrets” provisions in similarly broad terms.¹
- 10 4. *Thirdly*, the matter generally is of public importance. It involves the execution of search warrants against the premises of a journalist employed by a national media organisation after the publication by them of articles of significant public importance. The search was, apparently, directed to the identification of the journalist’s confidential source or sources and the possible prosecution of the journalist and the media organisation for publication of the articles.

Part IV: Facts

5. The second plaintiff (**Nationwide News**) is the publisher of, among other things, a mass circulation newspaper called *The Sunday Telegraph* and a website called dailytelegraph.com.au. The first plaintiff (**Ms Smethurst**) is a journalist employed
20 by Nationwide News.
6. On 29 April 2018, Nationwide News published, in the paper copy of *The Sunday Telegraph* and on the website dailytelegraph.com.au, a number of articles written by Ms Smethurst. Copies of the articles are contained in exhibit JS1 to the affidavit of Jason Robert Strachan filed herein. The articles concerned proposed changes to the legislation regulating the activities of the Australian Signals Directorate (**ASD**), the *Intelligence Services Act 2001* (Cth), which were apparently being considered by the Commonwealth government. The articles referred to “top secret letters” between heads of government departments together with a ministerial submission,

¹ *Criminal Code* (Qld), s 85; *Criminal Code* (WA), s 81; *Criminal Code* (Tas), s 110; *Crimes Act 1900* (ACT), s 153; *Criminal Code Act 1983* (NT) s 76.

which were said to outline a proposal for the ASD to be given powers to access data within Australia (cf *Intelligence Services Act*, s 7(1)(a), (c)).

7. On 4 June 2019, members of the AFP executed a search warrant issued under s 3E of the *Crimes Act 1914* (Cth) by the second defendant, which purported to authorise a search of Ms Smethurst's residential premises. A copy of the warrant is contained in exhibit JS2 to the Strachan affidavit. In purported compliance with s 3E(5)(a) of the *Crimes Act*, the offence to which the warrant related was described as follows:

10

On the 29 April 2018, Annika Smethurst and the Sunday Telegraph communicated a document or article to a person, that was not in the interest of the Commonwealth, and permitted that person to have access to the document, contrary to section 79(3) of the *Crimes Act 1914*, Official Secrets.

8. Section 79(3) of the *Crimes Act* was repealed with effect from 29 December 2018 but continues to apply to conduct before that date.²
9. Pursuant to an undertaking given on 18 June 2019 (see exhibit JS3 to the Strachan affidavit), the AFP has agreed not to make available to AFP investigators material seized during the execution of the search warrant pending the determination of the present proceeding.

Part V: Argument

- 20 10. The plaintiffs contend that the search warrant is invalid on its face (prayer for relief 1; ground 1). The warrant was required to specify the offence to which it related (*Crimes Act*, s 3E(5)(a)) and to do so with sufficient precision.³ The description of the offence in the "third condition" of the warrant failed to do so.
11. *First*, contrary to what is stated in the "third condition", under s 79(3) of the *Crimes Act* it was never an offence to "communicate a document or article to a person, that was not in the interest of the Commonwealth" or to "[permit] that person to have access to the document" (ground 1(a)). In fact, s 79(3) only prohibited

² *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth), sched 2 items 5, 7.

³ *Beneficial Finance Corporation v Commissioner of Australian Federal Police* (1991) 31 FCR 523 (FC) at 533, 534, 539, 543, 544; *New South Wales v Corbett* (2007) 230 CLR 606 at [97]–[108]; *Commissioner of Australian Federal Police v Caratti* (2017) 257 FCR 166 (FC) at [36]–[42].

communication of materials which fell within the definition of “prescribed” materials in s 79(1) and, importantly, when those documents were “prescribed” in the hands of the person alleged to have contravened s 79(3). The offence described in the third condition is of considerably broader scope than the actual offence.

12. Section 3E(5)(a) of the *Crimes Act* requires the officer issuing a warrant to specify the offence to which it relates. A warrant relates to an offence through the requirement that the issuing officer be satisfied that there are reasonable grounds for suspecting that there is “evidential material” at the premises to be searched (s 3E(1)). “Evidential material” means “a thing relevant to an indictable offence or a thing relevant to a summary offence” (s 3C(1)). The definitions of “thing relevant to an indictable offence” and “thing relevant to a summary offence” in turn refer to offences against a law of the Commonwealth, a Territory or a State (s 3(1)). The requirement in s 3E(5)(a) is, accordingly, to specify an offence known to law. By describing an offence considerably broader than that created by s 79(3) of the *Crimes Act*, the warrant failed to do this.
13. Further, the condition of the warrant containing the description of the offence was the principal effective limit on the scope of the search and seizure purportedly authorised by the warrant at Ms Smethurst’s residence. By conditioning the scope of the warrant by reference to an erroneously broad description of the offence, the warrant purported to authorise the search for and seizure of material that would not be “evidential material” in the sense of being material relevant to the commission of an offence against s 79(3).
14. *Secondly*, the warrant failed to provide any meaningful particulars of the actual offence of which the plaintiffs are suspected so as to limit the scope of search and seizure to areas of apparent investigation (ground 1(b)). The description of the “offence” does not specify: (i) the “document or article” alleged to have been “communicated” on 29 April 2019; (ii) the persons to whom the alleged communications took place; (iii) in what way the communication was not in the interest of the Commonwealth; (iv) what conduct each of Ms Smethurst, on one hand, and Nationwide News, on the other, engaged in; or (v) in what way the document or article was a “prescribed” document *in the plaintiffs’ hands* (see *Crimes Act*, s 79(1)).

15. *Thirdly*, the underlying offence, s 79(3) of the *Crimes Act* as it stood on 29 April 2018, was invalid as it infringed the freedom of political communication, at least so far as it applied to the plaintiffs' conduct (ground 1(c), ground 2; prayer for relief 2). At least in that application, s 79(3) of the *Crimes Act* is neither directed to any legitimate object nor reasonably appropriate and adapted to such an object.
16. Section 79(1) could apply to the circumstances of the plaintiffs (and other journalists and news media in their position) where a communication is made by a person (**the journalist**) of a document or information provided to the journalist by a person (**the source**):
 - 10 (a) where the source holds a relevant Commonwealth office (s 79(1)(b));
 - (b) where the source is subject to a "duty" to treat that document or information as "secret" by "reason of its nature and the circumstances under which it was entrusted to him or her", by reason of "how it was made or obtained", or "for any other reason" (s 79(1)(b)); and
 - (c) where the source is not "authorised to communicate" that document or information to the journalist (79(3)(a)) and it is not the "duty" of the source to communicate the material to the journalist "in the interest of the Commonwealth" (s 79(3)(b)).
17. In those circumstances, s 79(1)(a) may render the document or article a prescribed
 - 20 document or article in the hands of the journalist and s 79(3) would prohibit the journalist from communicating that document or article. In so doing, at least in its practical effect, s 79(3) can prohibit communication about matters relevant to the choices to be made by electors at federal elections and thus burden the implied freedom of political communication.
18. This limb of the definition in s 79(1) applies irrespective of whether the eventual communication of the document or information is capable of having some identifiable adverse impact on the legitimate interests of the Commonwealth. The definition (and with it the offence) operates whenever, through an opaque and in practice unreviewable course of executive action, the executive government of the
 - 30 Commonwealth deems the material secret for any reason, such as a directive by a

senior public servant to his or her subordinates not to disclose certain information beyond the relevant department. The duty to keep the information secret, and with it the classification of the information as “prescribed”, exists irrespective of whether the material in question is, for example, already in the public domain, wholly innocuous, or merely embarrassing to the government or its individual officers.

- 10 19. These features of s 79(3) demonstrate that it is not directed to a legitimate object, such as to maintaining national security. Rather, its object is the impermissible object of protecting government secrecy as an end in itself, whether or not that secrecy can be justified in the national interest. Conferring on unidentified members of the executive government the ability to prevent the dissemination of information solely on the basis that they think it should be kept secret (for instance because it may cause embarrassment to the government) is not consistent with the constitutionally prescribed system of representative and responsible government.
20. Further, to the extent that s 79(3) is directed to any legitimate object, it is not reasonably appropriate and adapted to that object precisely because of the overbroad features of the provision identified above. For instance, as noted above, it is readily capable of being used simply to protect the government or its officers from embarrassment.
- 20 21. By comparison, without conceding the constitutional validity of this new provision, the current cognate offence now set out in s 122.4A of the *Criminal Code* (Cth):
 - (a) attempts, either directly or indirectly, to make criminal liability contingent on proof that the disclosure in question caused some form of recognisable damage or prejudicial effect to specified interests that may warrant legislative protection (such as a prejudicial effect on defence or national security) (s 122.4A(1)(d));
 - (b) is subject to a range of defences directed to ensuring, to some extent, that the disclosure creates some real harm — for example, by creating a defence that the material in question is already authorised to be the public domain (s 122.5(2)); and
- 30

- (c) is subject to a specific “journalist defence” under s 122.5(6) which, subject to various exceptions, covers “public interest” reporting of the type engaged in by the plaintiffs.

22. Since the warrant is invalid, it follows that:

- (a) the Commissioner should be ordered to deliver up all material seized or otherwise obtained pursuant to the warrant or during its execution, together with all copies of such material (prayer for relief 3; ground 3); and
- (b) the Commissioner should be restrained from inspecting, providing to prosecuting authorities or retaining any material seized or otherwise
10 obtained pursuant to the warrant or during its execution, or any copies of such material (prayer for relief 4; ground 4).

23. As noted above, at least from the plaintiffs’ perspective, the correctness of these arguments could be determined wholly on the basis of the Strachan affidavit, without even a need to agree a special case. That being said, the plaintiffs will correspond with the defendants as to the conduct of this matter.

Part VI: Costs

24. There is no reason an order for costs should not be made in favour of the defendants in the event that the application is refused.

Part VII: Authorities

20 *Beneficial Finance Corporation v Commissioner of Australian Federal Police*
(1991) 31 FCR 523 (FC) at 533, 534, 539, 543, 544

Commissioner of Australian Federal Police v Caratti (2017) 257 FCR 166 (FC) at
[36]–[42]

New South Wales v Corbett (2007) 230 CLR 606 at [97]–[108]

Part VIII: Statutory provisions

25. Copies of the relevant statutory provisions are annexed.

Dated 26 June 2019

This application has been settled by

Stephen Lloyd SC

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Perry Herzfeld

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Ben Hancock

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10

Robert Todd, Ashurst
Solicitor for the plaintiffs

To: First defendant
C/- Australian Government Solicitor
Level 42, MLC Centre
19 Martin Place
Sydney NSW 2000

20

Second defendant
C/- ACT Magistrates Court
4 Knowles Place
Canberra ACT 2601

TAKE NOTICE: Before taking any step in the proceeding you must, within **14 DAYS** from service of this application enter an appearance in the office of the Registry in which the application is filed, and serve a copy on the plaintiffs.

30

THE PLAINTIFFS ARE REPRESENTED BY:

Ashurst
Level 11, 5 Martin Place
Sydney NSW 2000