

QUICK GUIDE

RESEARCH PAPER SERIES, 2020–21

3 SEPTEMBER 2020

The Inspector-General of the Australian Defence Force Afghanistan Inquiry (Brereton Inquiry): a quick guide

Karen Elphick
Law and Bills Digest Section

Background

Framework for IGADF inquiries

The Inspector-General of the Australian Defence Force (IGADF) is a statutory position outside the ordinary chain of command, established under section 110B of the [Defence Act 1903](#). The IGADF ‘[independently and impartially monitors](#) and assesses the health and effectiveness of the Australian Defence Force (ADF) military justice system’. The IGADF may conduct inquiries at his or her own initiative, or at the request of an individual, but only into those matters specified in the *Defence Act* or in the [Inspector-General of the Australian Defence Force Regulation 2016 \(IGADF Reg\)](#). However, under section 110C of the *Defence Act*, the Minister for Defence or the Chief of the Defence Force (CDF) may [direct the IGADF](#) to inquire into or investigate ‘a matter concerning the Defence Force’.

The direction is given to the IGADF; it is for the IGADF to decide whether to personally conduct, or [appoint another person to conduct](#), the inquiry. In October 2018, amendments to the IGADF Reg introduced the concept of an Assistant IGADF who is a judicial officer (JO-AIG) and prescribed a new kind of inquiry in [Part 4, Division 4A](#). Division 4A includes the unusual provision that ‘this Division has effect despite any other provision of this instrument’, indicating that JO-AIG are not subject to the rules which apply to other IGADF inquiries. Instead they are required by [section 28C](#) of the IGADF Reg to ‘conduct the inquiry in such manner as the Assistant IGADF considers appropriate having regard to the subject matter of the inquiry’.

For further information on the role and independence of the IGADF and the rules for IGADF inquiries, see K Elphick, [Legal Framework for Defence Administrative Inquiries into a ‘Matter Concerning the Defence Force’: a Quick Guide](#), Research paper series, 2019–20, Parliamentary Library, Canberra, October 2019.

Rumours of misconduct in Afghanistan

Media reports alleging serious misconduct by ADF personnel in Afghanistan began to be published in 2009.¹ Several journalists have reported that in 2015, responding to rumours and internal

1. For example: N McKenzie, ‘[Military in Afghan cover-up](#)’, *The Sydney Morning Herald*, 11 May 2009, p. 1; M Carney, T Cookes and S Sharifi, ‘[In their sights](#)’, *Four Corners*, ABC, 5 September 2011; J Kelly, ‘[Anger building as locals ask why young Afghan had to die](#)’, *The Australian*, 31 October 2011, p. 2.

accounts of misconduct, then Special Operations Commander, Major General Jeff Sengelman, commissioned Canberra-based sociologist Dr Samantha Cromptvoets to write a report on ‘Special Operations Command Culture Interactions’. Journalists said the report was intended to gather accounts of any wrongdoing² and that it [described a culture of impunity that may have normalised allegedly disturbing behaviour](#). The report also allegedly identified serious ‘governance and behavioural lapses’.

Major General Sengelman is [reported to have sent](#) Cromptvoets’ findings in a confidential report in early 2016 to the Chief of Army, then Lieutenant General Angus Campbell.

Initiation of the IGADF Afghanistan Inquiry

In March 2016, the Chief of Army requested that the IGADF conduct a scoping inquiry to ascertain whether there was any substance to rumours of unlawful conduct by the Special Operations Task Group (SOTG) during deployments in Afghanistan. The [IGADF Annual Report 2016–2017](#) stated the Inquiry commenced in May 2016 but, as a result of changes in legislation pertaining to the IGADF, since December 2016 the Inquiry has continued at the direction of the CDF.

The IGADF appointed Major General Paul Brereton, a Justice of the NSW Court of Appeal, to conduct *The Inspector-General of the Australian Defence Force Afghanistan Inquiry*, also known as the Brereton Inquiry (**the Inquiry**).³ The date of that appointment is not known.

Neither the instrument directing the Inquiry nor the terms of reference of the Inquiry have been published. According to the [Defence Annual Report 2017–2018](#), the Inquiry was investigating ‘rumours of breaches of the law of armed conflict in Afghanistan between 2005 and 2016 and associated matters’. Major General Brereton cited (with redactions) his formal appointment documents in the course of reporting a [formal decision on a complaint](#) on 15 October 2018:

On 14 December 2016, the Chief of the Defence Force directed the Inspector-General of the Australian Defence Force (IGADF), under s 110C(f) of the *Defence Act 1903* (Cth), to inquire into a matter concerning the Defence Force, in substance whether there is any substance to rumours of breaches of the Law of Armed Conflict by elements of the Special Operations Task Group in Afghanistan during the period 2005 to 2016. As an Assistant IGADF, I was directed under s 10(2)(a) of the *Inspector-General of the Australian Defence Force Regulation 2016* to conduct the Inquiry, and a number of other Assistants IGADF, some of them lawyers and some of them not, were directed to help me do so.⁴ [at p. 1]

When the amendments to the IGADF Reg commenced on 13 October 2018, the Inquiry [automatically](#) became an inquiry governed by Part 4, Division 4A, because it was being conducted by an Assistant IGADF who was a judicial officer. Section 37 of the IGADF Reg ensures the 2018 amendments applied to the Inquiry since it was begun but not completed before the 2018 amendments commenced.

-
2. See D Oakes, ‘[Claims of “illegal violence”, drug and alcohol abuse alleged in leaked Australian Defence report](#)’, ABC News (online), 9 June 2018 and N McKenzie, D Wroe and C Masters, ‘[Beneath the bravery of our most decorated soldier](#)’, *The Sydney Morning Herald*, 10 August 2018, p. 1. Cromptvoets’ report has not been publicly released; however, journalists Nick McKenzie and Chris Masters claimed in 2018 to have obtained a copy: N McKenzie and C Masters, ‘[Former spy chief heads new “war crimes” inquiry](#)’, *The Age*, 11 June 2018, pp. 1, 6; N McKenzie and C Masters, ‘[SAS soldiers committed war crimes: secret report](#)’, *The Sydney Morning Herald*, 8 June 2018, pp. 1, 6.
 3. A Greene, ‘[Supreme Court judge examining conduct of Australia’s special forces, including alleged war crimes](#)’, AM, ABC Canberra 666, 13 October 2016; Department of Defence, [Inspector-General of The Australian Defence Force inquiry calls for information about possible breaches of the laws of armed conflict in Afghanistan](#), media release, 1 September 2017; Major General Paul Brereton is an Army Reservist and Justice of the NSW Court of Appeal, cited in M Speakman (NSW Attorney-General), [Justice Brereton to join the Court of Appeal](#), media release, 22 August 2018.
 4. Footnote references have been omitted from this quotation and can be viewed in the source document.

Focus of the Inquiry

The [IGADF Annual Report 2017–2018](#) contained a description of the focus of the Inquiry:

The Inquiry is an administrative process, not a criminal investigation. This process is intended not only to ascertain whether there has been misconduct, but equally to exonerate those who may be affected by unsubstantiated rumours and allegations.

As CDF directed IGADF to conduct the Inquiry, the Inquiry has powers to compel the production of evidence similar to those of a Royal Commission. [at p. 7]

According to the [IGADF Annual Report 2018–2019](#), by the end of June 2019 the Inquiry was examining:

- **55 separate incidents or issues** covering a range of alleged breaches of the Law of Armed Conflict (LOAC), predominantly unlawful killings of persons who were non-combatants or were no longer combatants, but also ‘cruel treatment’ of such persons and
- incidents relevant to the organisational, operational and cultural environment which may have enabled the alleged LOAC breaches.

The IGADF noted the Inquiry was not focused on decisions made during the ‘heat of battle’. Rather, its focus was the treatment of persons who were clearly non-combatants or who were no longer combatants.

Powers and independence of Major General Brereton

As a judicial officer conducting a Division 4A inquiry, Major General Brereton has almost complete freedom in the conduct of his Inquiry. This includes freedom from direction by the IGADF. He is required by [section 28C](#) of the IGADF Reg to ‘conduct the inquiry in such manner as the Assistant IGADF considers appropriate having regard to the subject matter of the inquiry’.

The extensive powers and independence of Major General Brereton are comparable to those of a Royal Commission. He may:

- [add to or vary the terms](#) of the inquiry⁵
- [consult with any person](#) in relation to the inquiry
- use the [powers of compulsion](#) in sections 22 and 23 to require, by notice in writing, a person to appear, to give information or to produce a document or answer questions
- give directions regarding [disclosure of evidence](#) and
- conduct the inquiry [within or outside Australia](#).

[Self-incrimination](#) is not a sufficient ground for refusal to give evidence unless an individual is concurrently facing related charges; however, evidence given cannot be used in civil or criminal proceedings, or proceedings before a service tribunal, against the person who gave it. Persons attending the inquiry to answer questions [may have legal assistance](#).

5. On 25 October 2017, then Chief of Army, Lieutenant General Angus Campbell told the Senate Foreign Affairs, Defence and Trade Legislation Committee that the scope of the Inquiry would be determined entirely by Major General Brereton, except that it was confined to activities in Afghanistan. Senate Foreign Affairs, Defence and Trade Legislation Committee, [Official committee Hansard](#), 25 October 2017, pp. 92–94.

Conduct of the Inquiry

Inquiry held in private

The [IGADF has explained](#) that the Inquiry is being conducted in private:

- because it involves matters of operational security and protected identities
- for the protection of witnesses and of the reputations of individuals who may be unfairly harmed by publication of rumours that turn out to be unsubstantiated, and
- to protect lines of inquiry. [at pp. 7–8]

The IGADF also noted the Inquiry conducts its proceedings so as to minimise the impact on witnesses and ensure that they have access to appropriate support mechanisms and that access to a range of legal, psychological, medical, pastoral and social work support services was provided to persons involved in, or concerned by, the Inquiry.

[During 2017–2018](#), refurbishment works were carried out within the Office of IGADF to enhance information security in connection with the Inquiry.

Five phases of the Inquiry

The [IGADF Annual Report 2017–2018](#) described, at pages 7–8, the Inquiry as being conducted in five phases:

- **Phase 1: Familiarisation**—identify and gain a detailed understanding of the operational, structural, cultural and historical environment that existed during the period under inquiry and which potentially contributed to the occurrence of the rumoured and alleged incidents—the cause and effect aspects of each factor. Factors considered include:
 - the organisational structure of Special Operations Command (SOCOMD), including the organisational structures within the units that comprise SOCOMD
 - operational procedures within SOCOMD and within its constituent units and
 - the operational environment in Afghanistan.
- **Phase 2: Evidence and information gathering**—details of specific rumours or allegations (including dates, times and locations of incidents of interest), and surrounding and associated information and evidence are identified.
- **Phase 3: Consideration of alleged incident(s)**—inquiring into each of the rumours and allegations.
- **Phase 4: Consideration of cultural, psychological, operational and organisational factors**—these are being considered concurrently with the evidence gathering and incident consideration phases. The aim is to determine if and how any of these factors may have contributed to the rumoured and alleged conduct, and/or to the proliferation of the rumours and how these issues may be addressed for the future.
- **Phase 5: Report preparation and finalisation**—once evidence gathering is complete, given the seriousness of the allegations, there will have to be a rigorous procedural fairness process before the report can be finalised (see [IGADF Annual Report 2018–2019](#)).

The administrative law [rules of natural justice](#) require that a person be given an opportunity to comment on prejudicial or adverse information or findings that might be made by an inquiry. In July 2020, journalist [Ellen Whinnett claimed](#) that a number of current and former special forces

soldiers had been served with ‘potentially affected person (PAP)’ notices by investigators. Issuing a PAP notice to a person would indicate that Major General Brereton is considering making comments or findings in his report that are prejudicial or adverse to those persons.

Reported progress

According to the [IGADF Annual Report 2017–2018](#), following the call for information from the public (open from 1 September–3 November 2017), the Inquiry ‘gained significant momentum’. By mid-2018, the Inquiry was in phase 3 and more than 200 witnesses had been interviewed. The Inquiry was also ‘pursuing additional lines of inquiry’.

During the 2018–2019 reporting period the [Inquiry’s focus shifted](#) from phases two, three and four to phases three, four and five. However, further lines of inquiry continued to emerge. From its commencement in May 2016 to the end of June 2019, the Inquiry had examined 338 witnesses. In August 2019, journalist [Dan Oakes of the ABC reported](#) Major General Brereton and staff had recently travelled to Afghanistan to interview witnesses.

In late March 2020, journalist Karen Middleton [reported in The Saturday Paper](#) that the IGADF will likely recommend that police investigate and prosecute a range of alleged incidents. The AFP reportedly declined to say whether it had already received referrals from the IGADF.

Offences under IGADF Reg including contempt

There are offences in the IGADF Reg for [failure to comply with a notice](#), [contempt](#) and [taking reprisals](#). Contempt means conduct insulting the person conducting the inquiry; conduct disturbing or interrupting the inquiry; and conduct that would, if the inquiry were a court of record, constitute a contempt of that court. The offences are not limited in their application to service personnel.⁶

Staffing of the Inquiry

Table 1 below shows the number of Inquiry staff 2017–2019 who worked, varying according to the needs of the Inquiry over time. The IGADF [reported in 2019](#) that it was a deliberate decision to keep the Inquiry team relatively small:

This is because of the seriousness of the rumours and allegations, and the classified nature of the operational circumstances of the incidents under inquiry. A relatively small team facilitates the control of inquiry information ... additional administrative support was provided from time to time by the Office of the Inspector-General of the Australian Defence Force. [at p. 7]

6. Justice Brereton mentioned contempt offences in a paper he presented in 2010, [The Director of Military Prosecutions, the Afghanistan Charges and the Rule of Law](#), in which he discussed the public criticism of the Director of Military Prosecutions (DMP) for her decision to charge some commandos involved in a 2009 civilian casualty incident. He said the DMP’s decision: ... provoked intense, emotional and largely ill-informed debate in military, political and legal circles. Without knowledge of the evidence available to the DMP, many have expressed intemperate views that the charges should not have been brought. [at p. 91]

For a DPP to be subjected to the type of criticism that the DMP has attracted could very well be a contempt, and **the various petitions and other very public attempts that have been launched to endeavour to persuade high authorities to intervene in the prosecution process would almost certainly be so**, if directed at a prosecution in a civilian court. Their proponents may be unaware that ... [the] *Defence Act 1903* (Cth), s 89, creates a similar offence, not limited to service personnel, which extends to all. [at p. 93, emphasis added]

Table 1: Afghanistan Inquiry staff

Rank	2017–18	2018–19
O7 [Brigadier equivalent]	1 (Army Reserve)	1 (Army Reserve)
O6 [Colonel equivalent]	3 (2x Navy, 1x Army)	6 (3x Navy Reserve, 3x Army Reserve)
O5 [Lieutenant Colonel equivalent]	2 (1x Navy, 1x Air Force)	3 (1x Navy Reserve, 1x Army Reserve, 1x Air Force)
O4 [Major equivalent]		2 (1x Army Reserve, 1x Air Force Reserve)
E07 [Warrant Officer equivalent]		1 (Army Reserve)
E06 [Staff Sergeant equivalent]		1 (Navy Reserve)
TOTAL	6 personnel	14 personnel

Source: Table compiled by Parliamentary Library July 2020, from material in [IGADF Annual Report 2017–2018](#), p. 7; [IGADF Annual Report 2018–2019](#), p. 7.

The final report

Time frame for final report

On 19 October 2016, Acting Chief of the Defence Force, Vice Admiral Ray Griggs, said at a [Senate Estimates hearing](#) of the Senate Foreign Affairs, Defence and Trade Legislation Committee the scoping inquiry was ‘likely to take up to two years to draw out all of the issues’, but that there was no specified timeframe.

The [IGADF Annual Report 2018–2019](#) reported that the Inquiry was ‘approaching the final stages of evidence-taking; however, evidence gathering remained ongoing in relation to some lines of inquiry, concurrently with drafting of sections of the Inquiry’s report’:

The time frame for the Inquiry is influenced by the number and complexity of lines of inquiry; the number, location, availability and welfare of witnesses; and above all the need for thoroughness and fairness. [at p. 8]

The IGADF explained the slow progress of the Inquiry is partly because it did not have specific allegations to examine at the beginning. Unlike most inquiries, the incidents, events and potential witnesses were not already identified. Considerable time and effort was required to:

- find out what rumours there were, and then to try to track each rumour through multiple witnesses and documentary records back to its source
- gain the confidence and trust of the Special Forces community, members of which have spent their careers in an environment where secrecy is treated as fundamental and
- develop sufficient confidence in the Inquiry, and the genuineness of Defence senior leadership’s desire to find out if the rumours were true, that witnesses were prepared to make disclosures.

As this has been progressively achieved, the IGADF said more witnesses have been prepared to make disclosures, and new evidence has continued to emerge, some resulting in new lines of inquiry, and some reinforcing or corroborating existing lines of inquiry.

On 16 December 2019, journalists [Masters and McKenzie reported](#):

The inquiries by both Justice Brereton and the AFP have faced significant challenges in piercing the code of silence in the special forces and Justice Brereton has faced pressure from some politicians and media commentators over the time taken to complete his inquiry. [at p. 2 of clipping]

On 19 July 2020, journalist [Ellen Whinnett](#) reported that the inquiry had been expected to hand its report to the Defence Minister in June or July 2020, but that it had been further delayed and would not report until at least September 2020.

Reporting requirements

The IGADF Reg provides that Major General Brereton [must prepare a report](#) once satisfied that all relevant information that is practicable to obtain has been obtained. The [report must be given to the IGADF as soon as practicable](#) and must set out the findings and make any appropriate recommendations. It must be accompanied by a copy of the transcript of oral evidence, copies of each document accepted as evidence, and a list of other things produced to the inquiry and their location. The IGADF [must not direct](#) Major General Brereton to inquire further or to prepare a further report.

The IGADF [must make an official record of the findings](#) of the inquiry and attach any transcripts of oral evidence and documents accepted as evidence.⁷ However, because the IGADF was directed to conduct the inquiry, the IGADF does not exercise independent control over distribution and publication of the report. The IGADF *must* send Major General Brereton's [full original report](#), including the findings and any recommendations, to the CDF.

Major General Brereton [may independently inform](#) any of the following persons of his findings or give them a copy of the report, if he thinks it appropriate to do so:

- the Minister
- the CDF
- a service chief
- an employee of the Department
- a member of the ADF
- a person who is affected by a submission or the inquiry or
- any other person.

Major General Brereton may [redact information](#) from the copy of the report given to a person if that information would be inappropriate to include for reasons such as:

- considerations of privacy
- the person's responsibilities
- the person's interest in the matter or
- the information being classified or relating to national security.

7. The [Archives Act 1983](#) requires that [Commonwealth records](#) are retained and there are penalties for non-compliance.

Public release of the report

The CDF [may publicly release](#) all or part of the report.

The IGADF does not have power to release the findings or report to individuals and to the public without consulting the Assistant IGADF about the release. However, Major General Brereton is not required to consult any other person before releasing a copy of the report or findings to any individual. If he gives a person a report, Major General Brereton may, **after consultation with CDF**, [publicly release all or part of the report](#) (including a redacted version of the report).

Planned content of the final report

The IGADF indicated in his [2018–2019 Annual Report](#) that, on completion of the Inquiry, the IGADF will provide a report to the CDF who will decide on further action. The IGADF said the report will include:

- a. A summary and analysis of the evidence pertaining to each significant line of inquiry, and a conclusion as to whether or not and to what extent there is evidence of a breach of the Law of Armed Conflict or other misconduct.
- b. Where there is evidence of misconduct, appropriate and nuanced recommendations, having regard to the available evidence and its strength, for consideration by the Chief of the Defence Force, as to what action should be taken to address it.
- c. A review of the structural, operational, command and cultural environment in which these acts may have occurred and which may have enabled them, and make recommendations for consideration by the Chief of the Defence Force about potential reforms and measures to address them, in order to minimise any risk of recurrence.
- d. Provide closure for SOCOMD by exposing past misconduct where appropriate to do so, enabling it to be considered separate from but informing the present and future development of the Command.
- e. Provide closure for the many serving and former soldiers who have lived with concerns about the subject matter of these rumours for many years. [at p. 9]

© Commonwealth of Australia



Creative Commons

With the exception of the Commonwealth Coat of Arms, and to the extent that copyright subsists in a third party, this publication, its logo and front page design are licensed under a [Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia](#) licence.