

A probe into Australian war crimes in Afghanistan is being stymied by the investigators' failure to interview the widows of the men who were killed.

Widows' testimony

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In a secluded Afghan village, two hours from the capital of Helmand province, Bibi Dhorko and Bala Nasta still seek justice for their slain husbands, who were allegedly executed by Australian soldiers in Darwan, Uruzgan province, during the spring of 2012.

"I'm ready to do it," declares Bala Nasta, regarding her readiness to testify to the Australian government over the alleged murder of her husband, Haji Nazar Gul. Dhorko is also willing to testify about the execution of her partner, Ali Jan. Her father, Yaro Mama Faqir, was also killed.

Frustrated by the lack of justice and compensation, the widows are interested to pursue a formal complaint with the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. "We can't do anything else," Dhorko says. "They destroyed our life, killed my husband and from that time still our life has not been good."

The alleged murders of their husbands gained significant public attention during the defamation case brought by Australian soldier Ben Roberts-Smith. In a landmark judgement, Justice Anthony Besanko ruled that allegations Roberts-Smith murdered four Afghans, including Ali Jan, were "substantially true".

While the widows' testimonies are missing from the Office of the Special Investigator (OSI) probe into Australian war crimes in Afghanistan, its director-general, Chris Moraitis, said the investigation "continues unabated" despite the Taliban's return to power.

However, evidence collection within Afghanistan has hit an impasse, entangled in Australia's non-recognition of the Taliban, safety concerns for investigators and witnesses, and a lack of understanding of Afghanistan's current legal framework.

The OSI was established in January 2021 in response to the Brereton report into war crimes committed by the Australian Defence Force (ADF) in Afghanistan between 2005 and 2016. The report uncovered 23 incidents involving the alleged unlawful killings of 39 Afghan nationals. It revealed a disturbing culture among certain SAS soldiers who served in Uruzgan, including practices such as "bloodings", where patrol commanders instructed junior soldiers to kill Afghans as an initiation rite.

Now in its fourth year, the OSI continues its collaboration with the Australian Federal Police under Operation Emerald. Fifty senior investigators, with significant expertise in homicide cases, continue examining alleged breaches of the Laws of Armed Conflict. The OSI's two-year budget for 2023-24 was \$129.4 million.

A stable internet connection exists in most of Afghanistan's provincial capitals, although the OSI won't accept online witness statements from Afghanistan.

Online testimony is common practice under Australia's *Mutual Assistance in Criminal Matters Act 1987* yet there appears to be a lack of clarity when it comes to Afghanistan, with the attorney-general's office saying it is "not aware whether Afghanistan requires mutual assistance requests to be made in order to facilitate the taking of evidence from its territory via audio-visual link".

Australia's refusal to accept online witness statements is puzzling for Afghan law expert Thomas Kraemer, senior counsel for Kakar Advocates. During the defamation trial of Roberts-Smith, Kakar Advocates was the Afghan counsel for MinterEllison, which represented Fairfax Media, now Nine Entertainment.

He explains: "In the civil defamation trial, the parties privately, with the help of Afghan legal counsel, arranged for Afghan witnesses to testify via video link. This procedure was deemed acceptable by the Australian court. There was no need to involve or even notify the Afghan authorities. In fact, Australian courts commonly take testimony in this manner."

Kraemer raises valid questions regarding Australia's approach, asking: "Can the Australian government point to a change in the rules since August 2021 that now requires prior interaction with the Afghan government to take testimony from a witness in Afghanistan? Afghan counsel is not aware of any."

He notes that other than women and workplace restrictions, Afghanistan's business legal system remains unchanged under the Taliban: "The same rules are in place. For example, it is still the same requirement for obtaining business licences, paying taxes."

Dr Chris Elliott, a war crimes researcher at the British Columbia Institute of Technology, questions the seriousness of the OSI's overall effort. "The Commonwealth, through the Australian Criminal Intelligence Commission, already has specialised investigative resources to chase international leads in support of complex organised crime investigations," he says. "It is disappointing that the OSI has evidently made no effort to repurpose any of this capability to seek out evidence at the actual scene of the crime."

Despite non-recognition of the Taliban, Australia pledged \$140 million for humanitarian assistance to Afghanistan from 2021 to 2024. Australian aid is facilitated through intermediaries, primarily its United Nations partners, who have "demonstrated experience" in "negotiating with the Taliban regime", according to DFAT. Engaging the UN and using intermediaries in a similar manner could serve as a model to overcome obstacles in evidence collection or gaps in understanding Afghan laws.

Haroun Rahimi, an associate professor of law at the American University of Afghanistan and an expert on Afghanistan's current legal and governance structures, says: "There are already examples of evidence collection surrounding human rights abuses in Afghanistan through other agencies such as the UN and the International Criminal Court. If Australia cannot communicate with the Taliban, it could request the UN to obtain assurances from the Taliban, likely its



Bala Nasta, wife of Haji Nazar Gul, at her home in Helmand Province, Afghanistan. Mahab Azizi

"We can't do anything else. They destroyed our life, killed my husband and from that time still our life has not been good."

Ministry of Foreign Affairs if this is allowed, including the use of a third party to collect testimonies."

Leveraging legal firms already operating within Afghanistan as interlocutors, particularly from the perspective of maintaining an evidentiary chain of custody, is another option for the OSI. Rahimi states: "There are a bunch of legal firms on the ground in Afghanistan who had to be relicensed with the Ministry of Justice and obtain business licences and are in good standing with the Taliban."

Professor Ben Saul, an international law expert and a special rapporteur to the UN, argues instances exist where Australia doesn't recognise a government but can still maintain a legal relationship in a range of areas. "A state can engage with an unrecognised foreign government as much or as little as it likes. Under international humanitarian law, just because Australia doesn't recognise the Taliban doesn't mean they cannot have a specific relationship for evidence collection and compensation of war crime victims."

Last month, *The Saturday Paper* travelled to Kandahar to interview Zabihullah Mujahid, the spokesman of the Taliban, about the group's view on women testifying to the Australian government. Despite the Taliban's imposition of stringent female gender rules, Mujahid asserts women won't be barred from testifying. He also suggested witnesses could provide testimonies online. "If the investigators coordinate with the Islamic Emirate [Taliban] and if it's necessary to testify ... witnesses can testify," he says. "As it's a judicial process, there is no problem."

Another solution to gather testimony would be to use third countries for Afghan witnesses and OSI investigators meetings. OSI investigators have already travelled to other countries, meeting witnesses to obtain statements. As Moraitis stated, the OSI endeavours to do this "as best we can and, where those circumstances exist".

The Taliban is also open to widows testifying in a third country. Mujahid explains: "After we are satisfied that this court [OSI investigation] is being held ... and it is really for the solution of people's problems and there is no abuse, the Ministry of Foreign Affairs will help and coordinate it ... There's no problem."

OSI investigators cannot travel to Afghanistan due to safety concerns, taking advice largely from DFAT, which ranks Afghanistan as "Do not travel". However, Mujahid said investigators would be safe and were welcome if they coordinated with government officials: "There is no problem and their security will be ensured here ...

Foreign or Australian tourists come. There is no security problem, so there is no problem for them."

A spokesperson for the OSI said: "The OSI's Director-General has previously publicly stated the security situation in Afghanistan makes it more difficult to obtain evidence and access potential witnesses in Afghanistan. Any future engagement in Afghanistan would require an assessment of the security situation and other considerations. The safety of investigators and Afghan nationals remains the paramount concern. The OSI continues to monitor the situation closely."

While the Taliban may claim it proposes no threat, security risks cannot be understated. Less than 800 metres away from where the interview with Mujahid took place, the next day a bomb blast killed several Afghans. ISIS-K, the same group that killed at least 145 people at a Moscow concert venue the same week, claimed responsibility.

A key recommendation of the Brereton report was compensation to victims' families. The Australian Defence Force promised resolution by the end of 2021, but its commitment remains outstanding.

Bibi Dhorko and Bala Nasta have received no support in the decade since their husbands were killed.

"Our life's going so bad," Dhorko tells *The Saturday Paper*. "We want to be helped. Make our life good; cooperate and help us." ●