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War crimes can only be determined by a court

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One of the most important contributions to the debate over allegations of war crimes by Australian soldiers has come from John Howard. The former prime minister reminded the nation that the men under investigation are innocent until proven guilty.

Howard's statement is in line with the approach taken by NSW Court of Appeal judge Paul Brereton in his report for the military on rumours of unlawful killings in Afghanistan.

Brereton found credible information that, when taken collectively, led him to believe the rumours had substance. But he also added a caveat that is frequently overlooked: he believes there is a possibility prosecutions might not succeed.

This is what he said, on page 27 of his report: "In any individual case it may well be that in a forum where different standards of proof and rules of evidence apply the matter may not be proved beyond reasonable doubt."

In Australia, the question of whether a war crime has been committed can only be determined conclusively by a court governed by the rules of evidence. That is beyond the competence of any inquiry, even when the inquiry has been conducted by a judge as eminent as Brereton.

Until a court rules otherwise, the presumption of innocence means anyone accused of wrongdoing is innocent, particular those who have gone into battle under the Australian flag. This means the national self-flagellation that followed the release of Brereton's report was ludicrously premature. It also raises doubts about the wisdom of the apologies that have already been issued by the head of the defence force, Angus Campbell.

The day might come when Australian soldiers are found to have engaged in unlawful killings. But that day has not yet arrived and it is a simply wrong for public figures to conduct themselves as though it has.

Brereton was clear about the different status of his findings and any future ruling by a court: "The highest the inquiry's findings rise in respect of potential criminal conduct of an individual is that there is credible information that a person has committed a certain identified war crime or disciplinary offence. This is not a finding of guilt, nor a finding (to any standard) that the crime has in fact been committed."

So what are we to make of Campbell's public apologies to the people of Australia and Afghanistan for what he said was the "alleged" behaviour of Australian forces.

Since when does it make sense to apologise to another country for unproven allegations that have not even been assessed by prosecutors let alone a court? Compared to that, the inclusion of the word "alleged" is, at best, tepid endorsement of the presumption of innocence.

Brereton's inquiry was not conclusive. It was simply the opening move.

The next move is up to Mark Weinberg, the newly appointed special investigator, who will gather evidence and consider which, if any, matters justify sending briefs of evidence to the Commonwealth Director of Public Prosecutions. The CDPP will consider those briefs, assess them against the prosecution policy of the Commonwealth and decide which, in any, should be prosecuted.

The fourth and final stage is the court process, which includes multiple levels of appeal and will provide the only conclusive answer to whether Australian soldiers engaged in unlawful killings in Afghanistan.

And all that will happen long after Campbell's apologies. What will he do if all 19 men are acquitted? Apologise for Australian justice?

The presumption of innocence is of ancient origin and is sometimes associated with Magna Carta. It gained impetus in 17th century England during the reaction to the abuse of state power that took place during inquiries conducted by the court of Star Chamber.

The great English jurist Lord Denning, in his book What Next in the Law, outlined one of the notorious cases that led to the English civil war and explains why this court became a byword for barbarity and lack of fairness.

In 1634, shortly before the Star Chamber's abolition in 1641, a puritan lawyer, William Prynne, was branded on both cheeks and had his ears removed for writing a pamphlet that impugned the character of King Charles I and his Queen. That was not the end of the story.

Prynne was pursued a second time. This time having the stumps of his ears removed and his nose slit.

In 1649 the head of this tyrannical king suffered the same fate as Prynne's ears.

With this sort of history, it should come as no surprise that the common law that has been inherited by Australia places such a premium on the presumption of innocence.

With rare and regrettable exceptions, nobody in this country is obliged to prove their innocence. The onus is on the Crown to prove its case.

The benefits of the presumption of innocence are the subject of an analysis by Robin Speed, co-founder of the Rule of Law Institute of Australia, who points to their relevance to the matters now under investigation.

Speed writes that it would be unfair and unjust if an Australian soldier who is charged with committing an offence in Afghanistan seven years ago had to prove that they did not do so.

"Proof might involve collecting evidence in Afghanistan and bringing witnesses to Australia. How would this be possible for the ordinary individual? Placing the onus on the prosecution is reasonable and fair," he writes.

Speed's analysis, which appears on the website of the Rule of Law Institute, points to a link between the freedom enjoyed by those living in this country and the observance of the presumption of innocence.

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