Government
Legal Department

Piers Doggart
Solicitor to the Inquiry

Litigation Group
102 Petty France
Westminster
London
SW1H 9GL

DX 123243,
Westminster 12

www.gov.uk/gld

Your ref: IIRTA
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2 May 2024

Dear Piers,

Independent Inquiry Relating to Afghanistan – Ministry of Defence Resourcing

Introduction

I write in response to your letter dated 25 April 2024. In that letter, you set out concerns regarding compliance by the Ministry of Defence (MOD) with deadlines set by the Inquiry for the provision of evidence to the Inquiry as well as concerns regarding the adequacy of the resourcing which the MOD has allocated to its work in respect of the Inquiry.

First, and before turning to the substance of the concerns set out in your letter, on behalf of the MOD I wish to apologise to the Chair and to all participants in the Inquiry that the MOD's present conduct of the Inquiry is such that the Chair has felt compelled to write to the MOD to raise these concerns and to arrange a hearing at which to explore them. I also wish to reiterate the MOD's commitment to support the Inquiry to the fullest extent possible. The former Secretary of State for Defence, the Rt Hon. Ben Wallace MP, with the support of the Heads of Services, established this wide-ranging Inquiry as one step towards establishing the truth of very serious allegations and made clear their commitment to supporting its work to the fullest extent . The current Secretary of State for Defence, the Rt Hon. Grant Shapps MP, along with the current Heads of Services, have similarly made clear their committment to supporting the work of the Inquiry.

Elizabeth Mackie - Head of Division
Simon Gomes (old)- Deputy Director, Team Leader Defence, Security & General Public Law

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Background and context

The Inquiry's Terms of Reference, concerning allegations of unlawful killings during deliberate detention operations carried out by UK Special Forces (UKSF) in Afghanistan between mid-2010 and mid-2013 as well as allegations of subsequent cover up within the MOD and inadequate investigation by the Royal Military Police, require this Inquiry to consider difficult, complex and sensitive events which now date back more than 10 years.

The MOD has always recognised that this Inquiry would be a challenging undertaking and has sought to support and resource both the Inquiry's work and the MOD's work in responding to the Inquiry. This has included hosting the Inquiry in suitable, secure premises within the MOD's Main Building and providing the funding and support requested by the Inquiry to enable the Inquiry to recruit and maintain an appropriate, expert team (including solicitors, counsel, expert military and policing advisors and senior civil servants) to carry out its work. Funding for the Inquiry team, up to this point in time, stands at over £6m.

As you are also aware, to date the MOD has facilitated the provision to the Inquiry of extensive written and documentary evidence in response to nearly one hundred requests from the Inquiry. Some of this evidence has been heard publicly and it has been necessary to hear some evidence in private hearings. The MOD has ensured that senior, suitably qualified witnesses, including the Chief of the Defence Staff, Admiral Sir Tony Radakin, have provided detailed background and contextual evidence on a range of topics, including, for example, the involvement of British armed forces in the conflict in Afghanistan, the background to, make up and responsibilities of UKSF, the role of UKSF in Afghanistan, the law of armed conflict and the applicable rules of engagement during the conflict in Afghanistan. In addition to the provision of detailed witness statements on those topics, the MOD has disclosed thousands of relevant documents. The MOD has also facilitated the provision to the Inquiry of a large number of witness statements (and supporting exhibits) from many individuals who have supplied evidence on matters relevant to the Inquiry's Terms of Reference. A series of hearings have been held at which those witnesses have given oral evidence and further such hearings are planned in the coming months. On occasions, for example regarding the computer information management systems maintained by UKSF during the relevant period, the evidence has resulted in complex, further enquiries being made and a need to identify and locate further witnesses.

The MOD recognises that it has been necessary on occasion to seek extensions of time from the Inquiry in order to respond to requests for evidence, and can see that that must have been frustrating for the Inquiry. However, it should be observed that, in contrast to practice in other Inquiries, the initial deadlines imposed by the Inquiry have rarely if ever involved consultation with the MOD. As a result, other factors often mean that the Inquiry's default deadline of 28 days is problematic. By way of example only, such difficulties have arisen where individuals have left the MOD or been deployed overseas for extended periods. Additionally, requests for evidence from individuals are not accompanied by any supporting or memory-refreshing documents, despite witnesses often being asked about events many years ago. Whilst that approach no doubt speeds up the work of the Inquiry in issuing requests for evidence, it is an inevitable consequence of that approach that the onus then falls on the MOD to ensure an individual has access to relevant material so as to be able fairly and properly to respond to the questions asked. That inevitably slows down the MOD's work in response. The MOD is committed to ensuring that individuals are able, fairly and properly, to provide their best evidence to the Inquiry. This is particularly important given the gravity of the matters under investigation. The MOD's commitment to the Inquiry must be balanced with its commitment to supporting its people, which must not be compromised as a result of challenging deadlines. Also, there is a very real risk that media coverage of previous Inquiry hearings in OPEN will serve to heighten anxiety on the part of potential witnesses and increase the amount of witness support required.

Regarding the deliberate detention operations (DDOs) which are the subject of the Inquiry's investigation, the MOD has already provided, under phase 1 of its DDO disclosure, information regarding hundreds of those operations which were carried out between mid-2010 and mid-2013. Under phase 2, the MOD has disclosed core contemporaneous documentation (the categories of which were agreed with the Inquiry) relating to a significant sub-set of those hundreds of operations. Also, in 2024, members of the Inquiry legal team attended a demonstration of the tactics, techniques and procedures used in deliberate detention operations. As the Inquiry knows, that demonstration represented a very substantial commitment by the MOD (in terms of planning and resource) to assist the Inquiry's understanding of this core aspect of its work. It is phase 3A of the Inquiry's investigation of the DDOs, where the Inquiry essentially requires more extensive searching across the MOD in relation to a further subset of operations, which has caused the current difficulties that now imperil the Inquiry's desired timetable. In short, the phase 3A exercise has given rise to more substantial difficulties and delays than had been contemplated. Indeed, those problems are part of the reason why the MOD has recently and of its own initiative supplied the Inquiry with two detailed witness statements explaining the processes and limitations in relation to its ability swiftly to conduct extensive searches for relevant material across the MOD.

The MOD has been grateful for the collaborative working relationship which has been fostered with the Inquiry legal team, which the MOD understands to have benefited both the MOD and the Inquiry. In relation to phase 3A, however, the true scale of the exercise was only truly understood when the searches were run across the MOD in relation to the specific phase 3A operations set out in the Rule 9 request that was received in early February 2024. No scoping exercise undertaken previously indicated the volume of material or the complexity of the task which has since emerged. Contrary to what you assert in your letter, no trial run in relation to phase 3A was undertaken. The MOD has been in regular contact with the Inquiry about its progress, including by providing detailed weekly written updates, since early March 2024.

The MOD acknowledges and endorses the desire for the Inquiry *"to move at pace"*, and the strong public interest in it doing so. However, the identification, review and disclosure of relevant material for the purposes of this Inquiry involves an unprecedented disclosure exercise drawing on a range of OPEN, SECRET and TOP SECRET computer information systems and physical storage facilities. It is also in the public interest that the disclosure exercise is not rushed and is conducted carefully and comprehensively.

Nevertheless, it is plainly a matter of great regret for the MOD that the position has been reached where MOD capacity and resource is failing to permit the Inquiry to discharge its Terms of Reference as quickly as had initially been expected. It is therefore clear that a significant and rapid increase in resourcing is required to ensure the MOD better supports the Inquiry's work, to try to meet the Inquiry's requirements in relation to phase 3A of the DDO disclosure and other ongoing and future strands of work. Ministers and the Permanent Under-Secretary (PUS) have already made clear that this must happen as swiftly as possible. As a result, the focus of this letter is on the MOD's efforts to increase its resourcing (both in terms of personnel and computer information systems), and the challenges it has faced in doing so, to meet the Inquiry's requests for evidence and disclosure of relevant information. These efforts are made, I wish to repeat, in the context of the MOD's absolute commitment to assisting the Inquiry to conduct a full, frank, and fearless investigation including, but not limited to, the provision of all relevant documentation.

Existing MOD Inquiry Response Resourcing

The MOD has committed very significant personnel and financial resource to the Inquiry. Spending on the headcount for the MOD's response is projected to be over £15 million over the course of the Inquiry, (set to increase should new business cases be approved). This does not include the £6 million already spent on funding the Inquiry team itself, a figure which will increase significantly over the course of the Inquiry.

The MOD's response to the Inquiry has included the creation of three entirely new units to co-ordinate the MOD and UKSF response and engagement with the Inquiry.

- The Afghan Inquiry Response Unit (AIRU) was established in 2023. AIRU is located within MOD Head Office, Security Policy and Operations Department. It is responsible for co-ordinating the MOD Core Participant (CP)'s engagement with the Inquiry and overseeing MOD policy and strategy in relation to the Inquiry. It is led by a 2* Director, 1* Deputy Director and staffed by 16 civil servants and supported by 5, shortly to be 15, paralegals. In addition to this, an external qualified senior solicitor has been brought in who provides guidance and support in establishing robust systems and processes to facilitate AIRU's disclosure response to the Inquiry. The leadership of AIRU regularly report to the PUS and Secretary of State for Defence.

- In 2023, additional military support for AIRU, including from UK Special Forces, was generated. That support has subsequently expanded and now comprises 32 military and civilian personnel, drawn from across Defence, with a significant focus on providing witness welfare support as well as assisting AIRU to locate, review and disclose documentary evidence.

- The Afghan Inquiry Response Unit (Army) (AIR(A)) - the Chief of the General Staff (CGS) has appointed a Major General (supported by a Deputy Head (Policy Civil Servant) and an Army Major) to represent CGS at the Inquiry and engage with MOD on all issues relating to the Army's involvement and response.

The MOD has also been responsible for setting up and resourcing the separate Royal Military Police CP team, which functions independently from the MOD CP team.

As you know, in addition to AIRU, the military support and AIRU(A), the MOD's response to the Inquiry is supported by GLD (both advisory lawyers from within MOD legal advisers and litigation lawyers) and counsel drawn from the Attorney General's Panel. There are currently 9 GLD litigation lawyers and paralegals (for both corporate and witness teams) and approximately 20 counsel (including 2 x Kings Counsel, 3 x A Panel counsel) instructed for the MOD.

In total there are currently more than 80 people working on the MOD CP's response to the Inquiry. In the next 4 to 6 weeks this number will increase to more than 90 when an additional 10 paralegals join the AIRU disclosure and document review team. In addition, GLD are separately exploring whether it is possible to use an existing Panel firm to bring in more resource to support the work of the team. In recent days, the MOD has also started exploring upscaling the disclosure team by using military clerks on an emergency basis.

In your letter, you raise two specific concerns about the existing team's approach to its work. First, you criticise the rate at which the paralegals are reviewing documents and seek to draw a comparison with other document reviews in other contexts when a higher daily rate of document review would be expected. The MOD does not accept such comparison is fair in this context. The review being carried out for the Inquiry utilises a different computer system which is not designed for document review. The

AIRU review involves not only reading the documents and assessing them for relevance but also organising and scheduling the documents to create a proper audit trail of the material generated by the searches and disclosed to the Inquiry. Of course, the MOD is keen to see an increase in efficiency and the rate of progress but the comparison with reviews in litigation in other parts of Government does not appear fair in this context. Secondly, you express concern at the suggestion that concurrent Inquiry demands will impact the phase 3A timescales or that other areas of the Inquiry's work will be delayed by phase 3A. To be clear, the additional resource which the MOD is seeking to put in place is intended to prevent these difficulties crystallising.

The resourcing explained above represents a very significant personnel commitment and corresponding financial cost to the MOD. As I have made clear above, the MOD deeply regrets that the existing resource commitment has been unable to meet all the challenging deadlines set by the Inquiry. It is fair to say that the scale, intensity, complexity and pace of the Inquiry have surpassed the assumptions against which the MOD planned its resources (particular areas which have exceeded assumptions include, but are not limited to: (i) the pace and breadth of the Rule 9 requests; (ii) the volume of documents requiring relevancy review; (iii) the complexity and difficulties using SECRET and TOP SECRET Computer Information Systems; (iv) the availability of GLD and Counsel resource). Further detail regarding the challenges posed by the phase 3A DDO disclosure exercise has been set out in SECRET correspondence with the Inquiry. As the Inquiry will recognise, when spending significant sums of public money, the need must be clearly identified and proven. This is particularly so in circumstances when the Civil Service headcount is under pressure.

In your letter, you ask why resource considerations are only now being addressed when they were raised with the MOD by the Inquiry over 6 months ago. However, it is not right to say that resource considerations are only being addressed now. The current resource set out above has come into place steadily over the past year and in response to the emerging scale of the demands which the Inquiry will place on the MOD. The MOD has been and remains determined to increase its resource but has faced significant challenges in doing so, which have frustrated the MOD's abilty to respond to the Inquiry as quickly as it would have liked. Following the meeting between the Chair and the PUS on 31 October 2023, the MOD shared its resourcing plan with the Inquiry, prioritised clearances, secured recruitment control exemptions, and appointed a 2* Director to head up AIRU. PUS specifically raised resourcing with the Treasury Solicitor and the MOD has provided weekly updates to both the Inquiry and PUS on its output since.

The MOD accepts that one of the key limiting factors in the MOD's ability to meet deadlines, including on phase 3A, has been the resourcing of the review and disclosure function in AIRU, both in terms of staff and technology. AIRU's bid in July 2023 for further resource for disclosure and review initially comprised 10 paralegals (split across the MOD and RMP CPs) and 3 civil servants, to augment the existing Disclosure Co-ordination Unit (DCU) within the Directorate of Judicial Engagement Policy (DJEP). After that business case was approved, the processes to contract the paralegals was begun in September with the bids received in late November and assessed in December. The civil servant recruitment exercise was frozen due to recruitment constraints but in October 2023 the 3 civil servants were bid for again, along with an additional 7 roles. These were exempted in part from recruitment controls and 4 civil servants were recruited between January and February 2024. Of the remaining posts, several recruitment campaigns failed to identify suitable candidates, some candidates did not meet security requirements, and some candidates rejected offers in favour of roles in other departments. One post was moved to the DJEP DCU as a result of other urgent work. The MOD recognises that that process was plainly too slow and has hampered the MOD's ability to increase resource rapidly, both during that period and since.

In the time between July and November 2023, the DJEP DCU resourced the review and disclosure function for AIRU. However, by November 2023, and following the Chair's meeting with the PUS on 31 October 2023, it was recognised that this system was unsustainable and preventing DJEP from being able to service other ongoing litigation. Therefore, the decision was made for AIRU to establish its own Disclosure Unit. This was planned to include 3 civil service staff drawn from DJEP, the 10 civil service staff from the October bid and 5 of the 10 contracted paralegals. One civil servant and and a senior solicitor to act in an advisory role were also recruited to manage this team. They joined between December 2023 and February 2024.

The MOD has actively considered resource throughout the Inquiry, although commercial and HR processes mandated by the MOD, as well as administrative processes carried out by contracted organisations such as Defence Business Services, have meant that resource has not been in place as quickly as the MOD would have wished. The significant administrative processes involved in recruitment also mean that the MOD is not able to react nimbly to resource problems when they do arise. The problem has not been a failure to identify the need to recruit or increase resource. The MOD and AIRU in particular have been exploring all options for expanding recruitment for many months but have experienced various challenges in doing so. During prior rounds of searching for paralegals, the MOD struggled to find many who had existing clearance. While the MOD can prioritise a small number of clearances, this allocation is shared with other departmental priorities. The MOD cannot assume that they will either find a sufficient number of cleared paralegals, or be able to prioritise all those who do not hold clearance. To date, the MOD have been able to prioritise 2-3 individuals per month. Also, during previous recruitment rounds, particularly for lower grades, the MOD has seen few suitably qualified candidates apply. The length of time to onboard successful candidates, clearance timelines and the competitive civil service jobs market has also meant that on a number of occasions our preferred candidate has rejected an offer in favour of another Government Departments. The MOD has also faced difficulties with recruitment rounds not identifying any suitable candidates, or suitable candidates refusing offers on the basis of securing other work with lesser security clearance requirements, as referenced above.

In addition, GLD Litigation have increased the resources working on the Inquiry through a variety of methods. As a consequence, the GLD Litigation team has grown significantly since the Inquiry commenced and now stands at 15 lawyers and paralegals across the CPs with a further lawyer scheduled to join shortly. As with any other Government Department, GLD is restricted by the availability of suitable security-cleared staff who are also UK nationals, other pressing work streams, and staff willingness to transfer teams. However, new staff have joined the team since the Inquiry began through a combination of new hires, internal transfers and promotions. A business case was also submitted in May 2023 in order to recruit further external lawyers and paralegals on a temporary basis with an intention to recruit an additional five lawyers and five paralegals, who could be deployed on the MOD and RMP CP teams. Numerous interviews were undertaken, however this exercise unfortunately only resulted in one lawyer and three paralegals of sufficient calibre being recruited.

The issue of adequate resourcing has been escalated all the way up to the executive team at GLD since at least October 2023. As a consequence, in November 2023 a request was sent to all GLD Legal Directors seeking staff with inquiry experience or experience of taking witness evidence and document disclosure to work on the Inquiry for up to three months to assist the team on a short-term urgent basis. Unfortunately, this request did not result in significant numbers of volunteers. There were however four volunteers who came forward to provide support on a short-term basis. Three were allocated to the MOD CP team and one to the RMP CP team starting in January 2024, however three of these people have since had to return to their home teams as they could only be released for three months. In parallel, in November 2023 GLD ran an 'expressions of interest' campaign to lawyers in the wider government legal profession, with the aim of seconding security cleared and suitably qualified

lawyers from other parts of the public sector. Unfortunately, no suitable candidates were identified as able to be released.

GLD's Rapid Response Team (RRT) was also deployed in December 2023. The RRT is GLD's agile resourcing team consisting of lawyers, paralegals and business management professionals who are ready to temporarily transfer into another team in GLD in order to support and augment them at a time of particular need. The aim was to provide sufficient additional resource to assist pending a longer-term resourcing solution. Unfortunately, due to the security clearance and nationality requirements required for this work along with competing urgent demands from other high priority work for MOD, we were unable to take anyone from the RRT onto the Inquiry. Efforts to increase the resource available have continued and adverts seeking expressions of interest from appropriately cleared junior and senior lawyers in both GLD and across the wider Government Legal Profession have gone out this month.

GLD is also exploring bringing in nine additional lawyers and four paralegals from panel firms to assist with the Inquiry work with the potential to increase such resource as needed. Discussions with an external provider in relation to this suggestion have been underway since February 2024. GLD has also sought to instruct additional external counsel to assist. However, GLD has struggled to instruct suitably cleared junior Panel counsel and junior juniors to assist with the MOD's work (in particular disclosure work). Other ongoing public inquiries in particular, as well as large-scale litigation, have resulted in a severe shortage of security-cleared junior counsel who are available and/or willing to be instructed on lengthy disclosure exercises. This is a problem which is not unique to the MOD and is affecting GLD across a number of Inquiries and in other areas of litigation.

PUS has been briefed on the existing challenges and has directed that the MOD must do 'whatever it takes' to increase its resourcing to speed up the MOD's working practices and better meet the Inquiry requests for disclosure. Similarly and subsequently, the Parliamentary Under Secretary of State (Minister for Defence People and Families), the Rt Hon. Dr Andrew Murrison MP, has directed that legal and civil service resource must be increased and as swiftly as possible. However, and as referenced above, there are various mandatory legal, commercial, and practical considerations, which limit the MOD's capacity immediately and rapidly to increase resourcing, although efforts are being made to minimise the impact of those processes on the timetable. Nevertheless, in accordance with PUS and Ministerial direction, the MOD is exploring five methodologies in parallel. Separately, and as referenced above, GLD are working on options to increase their resource on the Inquiry. These five methodologies being explored by the MOD are not mutually exclusive and are all being progressed as soon as reasonably practicable:

(i) Increasing personnel in AIRU through civil service recruitment;
(ii) Increasing personnel in AIRU through the external contracting of paralegals and solicitors;
(iii) Increasing personnel in AIRU through the recruitment of military clerks;
(iv) Contracting an external solicitor's firm to manage the entire document review and disclosure process; and
(v) Commissioning bespoke eDisclosure software to accelerate the document review and disclosure process.

Further information regarding the work that the MOD is doing in relation to each of these methodologies is set out in Annex A to this letter.

Turning back to the specific questions in your letter, and addressing each in turn in light of the above:

(a) Why has the MOD repeatedly failed to meet deadlines for the provision of evidence set by the Inquiry?

Multiple factors, including factors not within the MOD's control, have contributed to the need for the MOD to seek extensions of time to provide evidence to the Inquiry. Following the normal dialogue between the MOD and the Inquiry regarding progress, extensions of time are agreed to deadlines imposed initially without consultation. The MOD would be grateful for more warning and/or detail of imminent requests in order to allocate resource and plan more efficiently. In any event, the MOD accepts that it has struggled to put more resource in place rapidly, which would enable the MOD to respond to requests in a more agile and flexible way. In particular, the lack of availability of suitably qualified and security-cleared legal resource, despite multiple attempts to resolve it, has been a limiting factor in the MOD's ability to proceed at the pace both the Inquiry and the MOD would have wished.

(b) Why are resource considerations only being addressed by the MOD now when they were raised with the PUS by the Chair in October 2023?

The MOD has sought to address resource both before and since the meeting between the Chair and the PUS on 31 October 2023, as set out above in detail. Since the October 2023 meeting, the MOD has shared its resourcing plan with the Inquiry, prioritised clearances, secured recruitment control exemptions, increased the provision of SECRET IT and appointed a 2* Director to head up AIRU. The MOD has also increased the size of its team, in accordance with that plan, and provided weekly updates to the Inquiry.

(c) Why is it only now that the MOD has admitted that they will be completely unable to meet the Phase 3A deadline for the provision of evidence to the Inquiry, a delay which imperils the Inquiry timeline of which the MOD has been aware for many months?

The MOD first formally raised its concern regarding the scope of the searches required by Phase 3A and the volume of returns that would need to be reviewed in early March 2024. The MOD has been in regular contact with the Inquiry about its progress, including by providing regular weekly written updates, since then. There is ongoing discussion with the Inquiry regarding how searches might be refined such that the number of documents to be reviewed is proportionate. The MOD has also been pursuing a range of options for increasing resource and assessing the various options in order to try to minimise the impact on the Inquiry's timetable. Those options include contracting additional paralegals and seeking to repurpose other legal resource for the purposes of this Inquiry. The MOD remains committed to securing additional resource to complete this task as quickly as it reasonably can.

(d) Where and with whom responsibility for these failures lies?

Ultimately the PUS is accountable for the efficient and effective conduct of the official business of the MOD. However, as set out above, PUS has ensured that significant resource has been committed to supporting the Inquiry and has issued instructions that the Department should continue to do "whatever it takes" to ensure the Inquiry's success. Susanna McGibbon is the PUS of the Government Legal Department and takes responsibility for the output of GLD, which would usually deliver this work and instruct suitably cleared counsel. As detailed above, there is a specific shortfall on the suitably cleared legal resource (both at GLD and the Bar) available at present, due to a series of simultaneous pressures including the Covid Inquiry and Undercover Policing Inquiry, and despite multiple attempts to recruit additional resource internally. This is why MOD and GLD are now looking at further external legal options.

(e) (i) What immediate steps will be taken to ensure that the Inquiry's progress is maintained?; (ii) Who will assume responsibility for this?

As set out above, the MOD is pursuing multiple strategies to increase its resourcing as quickly as possible. Ministerial and PUS engagement has resulted in recent decisions to use expedited procurement routes to contract paralegals directly and to partner with an external solicitor's firm. Several groups across MOD, including Commercial and Defence Digital will dedicate specific additional resource to suppor AIRU. The Directors-General of those respective areas will be responsible for delivering the resource and technology uplift, overseen by the PUS who will have overall responsibility.

On behalf of the MOD, I wish to reiterate the apology set out at the outset of this letter. The issues raised by the Inquiry and addressed in this letter have been considered at the highest level of the MOD and this letter has been personally approved by the PUS. The Secretary of State has offered to meet with the Chair next week to discuss these concerns. The MOD is committed to finding a solution to these problems and continuing to support the Inquiry's work, and will continue to seek to work collaboratively with the Inquiry to do so.

Yours sincerely,

Elizabeth Mackie

For the Treasury Solicitor

[redacted]