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INDEPENDENT INQUIRY RELATING TO AFGHANISTAN

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Government Legal Department

By email only

URGENT

Thursday, 25 April 2024

Dear [redacted]

Independent Inquiry Relating to Afghanistan – Ministry of Defence Resourcing and Failure to meet Inquiry Timelines

The Chair has directed that the Inquiry convene a public hearing which will take place in **Court 73 on Friday 3 May 2024, starting at 10:30am**.

At that hearing, the Chair will expect the Ministry of Defence ('MoD') to explain:

(a) Why it has repeatedly failed to meet deadlines for the provision of evidence set by the Inquiry;
(b) Why resource considerations are only now being addressed when they were raised with the MoD by the Inquiry over 6 months ago;
(c) Why it is 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;
(d) Where and with whom responsibility for these failures lie; and
(e) What immediate steps will be taken to ensure that the Inquiry's progress is maintained and who will assume responsibility for this.

The Chair expects attendance at the hearing from leading Counsel for the MoD, supported by a senior member of the Government Legal Department, as well as attendance of those within the client group who are able to provide instructions on the issues set out above.

The Inquiry's DDO Investigative Strategy

The Inquiry will shortly publish a Note from Counsel to the Inquiry ('CTI') summarising its Investigative Strategy for Deliberate Detention Operations ('DDOs'). The Note was recently circulated to Core Participants. However, as you are aware, the Strategy and the details of the Inquiry's 'Phased' approach to the investigation of DDOs and the DDO hearings have been known to the MoD for a long period of time. At each stage over the past 12 months, the MOD legal team has been kept apprised of the planned timetable and what was expected from the MOD in terms of Rule 9 responses and disclosure. The Inquiry has engaged proactively with the MoD to ensure they were fully informed about each Phase and that progress was as efficient as possible:

Phase 1

(a) By agreement, the Inquiry made an informal request to the MoD for material relevant to **Phase 1** of the investigation of DDOs. Disclosure of material commenced on the 5 April 2023.

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Phase 2

(b) The MoD has known from the outset that the Inquiry's intended methodology would be to seek further specific documentation relating to a proportion of DDOs at **Phase 2** of its Investigative Strategy. By agreement, a trial run of **Phase 2** in respect of a single DDO was undertaken to ascertain likely timeframes for the searching and review process. Thereafter, the first Rule 9 request relating to **Phase 2** was issued by the Inquiry on 7 July 2023. An initial response was received on 4 August 2023 and the remaining disclosure was provided over many months.

(c) Although the Inquiry has proceeded to hear the **Phase 2** evidence, in order to maintain the strict timetable required under the Terms of Reference, the Inquiry has observed that there are instances where documents which should have been disclosed within **Phase 2** have been disclosed as responsive to Phase 3. As a result, the Inquiry has concerns about the **Phase 2** disclosure and the adequacy of the MoD searches.

Phase 3

(d) The MoD has known from the outset that **Phase 3** would require an extensive disclosure exercise. The MoD has known this exercise would necessitate searches of all information held across Defence and the consequent review of all returned results in relation to a number of DDOs, so that all relevant and necessary documentation could be provided to the Inquiry. This was to include, but was not limited to JChat, Radio Logs, FMV or other video imagery, and SSE documents.

(e) To assist the MoD, the Inquiry divided Phase 3 into two parts: **Phase 3A** was limited to the disclosure exercise, with witness statements being required later under **Phase 3B**.

(f) As with Phase 2, a trial run of **Phase 3A** in respect of one DDO to ascertain likely timings was again undertaken by agreement (the need for a trial run was raised by the Inquiry at the end of August 2023).

(g) Documentation for the **Phase 3A** DDOs was requested under Rule 9 by the Inquiry on 5 February 2024. This was to be returned by 11 March 2024. Some material was provided on 15 and 25 March 2024, but the vast majority of the disclosure remains outstanding.

(h) The methodology for **Phase 3** was discussed between the MoD and the Inquiry regularly, including at meetings between Counsel. Whilst the MoD raised concerns about its ability to provide a large number of witness statements under **Phase 3B**, no formal concerns about their ability to meet the Phase 3A timeframe were brought to Inquiry's attention until March 2024.

The Inquiry's timeline

The Chair regards the need to resolve matters expeditiously as being of fundamental importance, in the public interest, and in particular because of:

(i) the age of the allegations,
(ii) the nature and gravity of the allegations,
(iii) the importance of removing any unjustified taint and/or to ensure accountability for any wrong-doing; and
(iv) the need to make any appropriate recommendations as to future action.

The MoD has known for some time that in order to meet the current timetable, the Inquiry would need to start hearing **Phase 3B** evidence no later than September 2024. In order to achieve this, the MOD had to

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ensure that the Phase 3A disclosure was made by March 2024 (so that **Phase 3B** requests, including requests for witness statements, could be made in April 2024, thereby allowing an appropriate period of five months for the provision, review and preparation of that material for the evidence hearings and to take account of the MoD's concerns relating to preparing witness statements). Whilst the Inquiry has always recognised that this is a challenging timetable, the importance of adhering to the identified deadlines has been repeatedly emphasised to the MoD.

The current position

Your letter of 17 April 2024 states[1]::

'*The MOD has been actively pursuing various options to bolster resourcing to meet the demands of the inquiry, including the option of additional paralegal support. On 11 April 2024 the MOD approved the employment of a further 10 paralegals to conduct Phase 3A disclosure review. It is anticipated that these paralegals will be operational within 4-6 weeks (the delay in becoming operational is attributable to the need to recruit, security clear and commission computer log ins and terminals).*

The need to further bolster the resourcing and speed up the time it takes to become operational is being addressed by AIRU and the Permanent Under Secretary. We can assure the Inquiry that all options are being considered to increase resourcing and substantially increase the speed of document review. There are very substantial resourcing and practical / security issues which we are working to resolve. The current options to complete the Phase 3A review (on the assumption that this will consist of no more than 100,000 documents) being considered by MOD are as below:

1) *Maintain current levels of resource (including the additional 10 paralegals due to join in the next 4-6 weeks). We would estimate the MOD will not be able to complete our response to Phase 3A until February / March 2025.*

2) *Contract a law firm to conduct document reviews. We estimate the MOD will not be able to complete our response to Phase 3A until November / December 2024.*

3) *Incrementally increase internal resource as required and procure eDisclosure software. We estimate the MOD will not be able to complete our response until October / November 2024.*

4) *Maintain current levels of resource (including the additional 10 paralegals due to join in the next 4-6 weeks), but proceed with the procurement of eDisclosure software. We estimate the MOD will not be able to complete our response to Phase 3A until December 2024.*

The timescales set out above have been calculated on the assumption that the additional resourcing secured will be dedicated to work on Phase 3A – concurrent demands from the Inquiry will therefore impact on these timescales. We will continue to update the Inquiry on the progress made.

…

MOD is also actively considering further resourcing to respond to the Rule 9 requests for witness evidence for Phase 3B. To date, the MOD has identified additional Counsel resource and is exploring further legal resource options. We would welcome early engagement with the Inquiry in relation to the scope of Phase 3B to assist the MOD with resource planning.'

[1] The Inquiry does not assess this information to be sensitive.

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The Chair was extremely troubled to receive this letter and to learn that even on the MoD's 'best case' (i.e. disclosure of the **Phase 3A** material by October / November 2024) the evidential hearings for DDO Phase 3 would be delayed by 7 to 8 months (i.e. to March 2025). This is unacceptable.

It was also noted that the MoD appears to suggest in the letter that it will be unable to respond to *other* requests for evidence during the **Phase 3A** disclosure period. This is similarly unacceptable – it would curtail the ability of the Inquiry to backfill the Autumn period with other evidence, impede the Inquiry's progress and inevitably extend the work of the Inquiry.

At a meeting between the Inquiry Legal Team and the MoD Legal Team the next day on 18 April in which the contents of the letter were discussed, the Inquiry was informed that the current MoD paralegal resource – 5 individuals – are now 'working through' documents responsive to the Phase 3A request at an average rate of only 37 documents per day, per paralegal.

The paralegal resource allocated to this significant task by the MoD is derisory. It is obvious that a far greater resource should have been applied to the disclosure task from the outset. As you will also be aware, ordinary document review is normally conducted at rates of around 250 documents per day, or around 30 documents per hour at the very least - not the 4-5 documents per hour apparently now being conducted by manifestly inadequate MoD paralegal numbers.

The current situation is completely unacceptable and a most regrettable failure by the MoD to meet its responsibilities.

The Chair expects an explanation as to why these matters have not been identified and resolved to ensure that the Inquiry's work can continue.

Previous delays

The gravity of the situation is compounded by the fact that over the last 12 months the MoD has failed to keep pace with the work of the Inquiry. By way of example, 86 rule 9 requests have been made of the MoD, the first being issued on 21 March 2023. Only 22% of these rule 9 requests have been answered on or before the deadline, and some responses have been incomplete. We have included below a snapshot of a number of the requests by way of illustration of delays by the MoD across all requests issued:

Rule 9	Topic	Requested on	Requested by	Provided on	Number of days delayed
9.2	Witness Statements and documents relating to 'ITS 1', interactions with 'ITS1' and other servers	21.03.2023	18.04.2023	Partial response served on: 10.05.2023 and 30.05.2024 Full response provided by 08.06.2023	51
9.16	Request for witness statement	04.09.2023	16.10.2023	13.11.2023	28
9.18S	Request for documentation	15.12.2023	26.02.2024	25.03.2024	28

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	relating to DDOs				
9[redacted]	Request for a witness statement	[redacted]	[redacted]	[redacted]	91
9[redacted]	Request for witness statement	[redacted]	[redacted]	[redacted]	66

The continued delayed provision of evidence has had, and continues to have, an adverse impact on the timetable for restriction of material, and the consequent pace at which documents could be prepared for hearings and open versions supplied to Core Participants.

Concerns about the troubling inability of the MoD to respond to the Inquiry within timescales set have been repeatedly raised, both by the Inquiry Legal Team (including Counsel) and more formally.

The Chair was sufficiently concerned by the MoD's repeated delays in responding to the Inquiry's requests to seek a meeting with the Permanent Under Secretary on 31 October 2023. At that meeting, the Chair was assured by the Permanent Under Secretary that all appropriate steps would be taken to ensure that restructuring would take place and proper resources would be devoted by the MoD to ensure timely response to the Inquiry going forward. For whatever reason, it is now clear that assurance has manifestly not been met. The Chair will expect an explanation as to why not.

Furthermore, the Chair regards it as remarkable that the MoD now contest that 'concurrent demands … will therefore impact on those timescales' relating to Phase 3A rather than resourcing itself to accommodate the ability of the Inquiry to work on requests concurrently. Again, the Chair will expect an explanation.

For the avoidance of any doubt, at the hearing the Chair will expect clear and detailed answers to *all* of the questions set out at the beginning of this letter and in particular firm proposals as to what steps will be taken **immediately** to remedy the situation.

Yours sincerely,

[redacted]

Piers Doggart
Solicitor to the Inquiry
Independent Inquiry Relating to Afghanistan

CC. Secretary of State for Defence

Chief of the Defence Staff

Permanent Secretary