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Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
File Number:	NSD1485/2018
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Dated: 4/05/2021 10:55:51 AM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 59
Rule 29.02(1)

OPEN AFFIDAVIT OF JAMES GAYNOR

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL**

**NO NSD1485 OF 2018
NO NSD1486 OF 2018
NO NSD1487 OF 2018**

BEN ROBERTS-SMITH

Applicant

FAIRFAX MEDIA PUBLICATIONS PTY LTD and others

Respondents

Affidavit of: James Morgan Gaynor

Address: Level 4, Building 25 Brindabella Park, Canberra Airport, Australian Capital Territory, 2609

Occupation: Inspector-General of the Australian Defence Force

Date sworn: 3 May 2021

Contents:

Document Number	Details	Paragraph(s) of affidavit referring to annexure(s)	Page
1.	Open affidavit of James Morgan Gaynor in support of claim of public interest immunity sworn on 3 May 2021		2
2.	Annexure JMG-1 being a copy of the 'Contents' page of the Public Release Version of the Inquiry Report	34	15
3.	Annexure JMG-2 being a copy of the s 21 direction in respect of the Inquiry Report.	49	20
4.	Annexure JMG-3 being a copy of a letter from the Assistant IGADF to the IGADF dated 29 October 2020.	51	23

Filed on behalf of the Commonwealth of Australia

File ref: 21002103

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I, James Morgan Gaynor, of Level 4, Building 25 Brindabella Park, Canberra Airport, Australian Capital Territory, 2609, say on oath:

PART 1: ABOUT THE DEPONENT

1. I joined the Australian Regular Army in March 1993 as an officer in the Australian Army Legal Corps. As an Army officer, I deployed on operations to East Timor and Iraq.
2. In 2016, I was appointed Inspector-General of the Australian Defence Force (IGADF), which is a statutory appointment pursuant to the *Defence Act 1903* (Cth) (**Defence Act**) and the *Inspector-General of the Australian Defence Force Regulation 2016* (Cth) (**IGADF Regulation**). My appointment took effect from 1 December 2016. Consequential on my appointment as the IGADF, I resigned from the ADF. As the IGADF, I oversee the management of the Office of the IGADF, with assistance from my Deputy, Commodore Fiona Sneath.
3. Prior to my appointment as the IGADF in 2016, I was the Deputy IGADF from February 2013 to December 2015. I was Acting IGADF at various times for short periods from February 2013 to December 2015 and continuously from December 2015 until November 2016.
4. I was admitted to practise in December 1991 and have over 28 years' experience as a legal practitioner. During my Army career I held a number of military justice roles, I was the Deputy Director of Military Prosecutions from August 2003 to December 2008 and the Director of Military Justice Performance Review from February 2010 to February 2013. My tertiary qualifications include Bachelor of Commerce (UNSW), Master of Laws (UNSW), Master of Management in Defence Studies (UCanberra) and Master of Public Administration (ANU).

PART 2: ABOUT THIS AFFIDAVIT

Basis of this affidavit

5. Unless otherwise indicated, this affidavit is based on my personal knowledge and my review of material that is either held by the Office of the IGADF or has been provided to me for the purposes of making this affidavit.
6. Where I express an opinion in this affidavit, the opinion is based on my experience and expertise as described above. While I have consulted with staff members of and other persons working in the Office of the IGADF (including the Assistant or Assistants IGADF) to obtain information relevant to my opinions, the opinions expressed are my own.

Purpose of this affidavit

7. As the IGADF, I make a claim of public interest immunity (PII) in relation to documents sought by two subpoenas issued in these proceedings at the request of the Applicant:
 - 7.1. First, a subpoena dated 2 March 2021 (which was later reissued and dated 15 March 2021) (**IGADF Subpoena**).

- 7.2. Second, a subpoena dated 18 December 2020 issued to a person known in the proceedings as 'Person 18' (**Person 18 Subpoena**). Person 18 is a current or former SOCOMD member, and has a protected identity.
8. The purpose of this affidavit is to explain, as far as I am able to do so in open and unclassified form, the basis of that PII claim.

Sensitivity of this affidavit and confidential affidavit

9. This affidavit has been prepared in open and unclassified form, so that it may be made available to the Court and the parties. Consequently, in this affidavit I describe the basis of the PII claim in general terms. I am not able to provide in an open affidavit details which would, in effect, undermine the PII claim by revealing information which is the subject of the claim.
10. However, I have sworn a confidential affidavit which provides further detail about the information over which PII is claimed and describes the basis of the claim in more specific terms. That confidential affidavit will be made available to the judge of the Court who hears and determines the PII claim (if required).
11. The IGADF Subpoena and the Person 18 Subpoena are the subject of extant notices issued to the Attorney-General pursuant to s 38D of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**), dated 2 March 2021 and 3 February 2021 (**s 38D notices**). I understand that the s 38D notices were issued by the Applicant to the Attorney-General on the basis that responding to the subpoenas is likely to result in the disclosure of national security information within the meaning of the NSI Act.

PART 3: BACKGROUND MATTERS

The IGADF

12. The IGADF is a statutory office-holder who sits outside the ADF chain of command. The role of the IGADF is essentially to act as an 'integrity officer', by independently monitoring the effectiveness of the military justice system and providing an avenue by which complaints about or problems with the military justice system can be identified, examined and remedied and to inquire into matters concerning the ADF referred by the Chief of the Defence Force (**CDF**) or the Minister. The IGADF provides the CDF with an independent mechanism by which inquiries or investigations concerning the ADF may be conducted.
13. For example, the IGADF's functions include conducting reviews and audits of ADF units, conducting inquiries or investigating matters concerning the military justice system, conducting investigations into allegations of professional misconduct, investigating or inquiring into death or serious injury of ADF members in Australia or overseas, and advising on matters concerning the military justice system and making recommendations for improvement.
14. The relevant statutory provisions relating to the role, powers and functions of the IGADF include:



- 14.1. **Independence of the IGADF:** Div 2 of Pt VIIIB of the Defence Act contains administrative provisions to secure the independence of the IGADF. In particular, s 110L limits the circumstances in which the IGADF's appointment may be terminated.
- 14.2. **The IGADF's functions and powers:** provisions relating to the functions and powers of the IGADF are contained in Part VIIIB of the Defence Act and the IGADF Regulation. Under s 110C(1)(f) of the Defence Act, one of the IGADF's functions is, if directed by the CDF, to inquire into or investigate any matter concerning the ADF. Under s 110P of the Defence Act and s 10(2) of the IGADF Regulation, the IGADF may appoint a person, including a judicial officer, as an Assistant IGADF and direct that person to inquire into a matter.
- 14.3. **Procedures, powers and reporting obligations of the IGADF:** Part 4 of the IGADF Regulation sets out the procedures, powers and reporting obligations of the IGADF (and any Assistant IGADF) in respect of the conduct of an inquiry. Division 4A of Part 4 contains specific provisions relating to the conduct of an inquiry by an Assistant IGADF who is a judicial officer.
15. The current legislative regime governing the IGADF commenced in 2016, but a similar legislative regime existed prior to that time.

The Afghanistan Inquiry

16. Following the events occurring in the United States on 11 September 2001, the ADF commenced Operation SLIPPER, which was the ADF's contribution to the North Atlantic Treaty Organisation's (NATO) International Security Assistance Force. The Special Forces component of Operation SLIPPER was the Special Operations Task Group (SOTG), which was principally drawn from the Special Air Service Regiment (SASR). Operation SLIPPER contributed to the NATO coalition's action in Afghanistan to combat the threat posed by international terrorism. Australian Special Forces have been deployed in Afghanistan since October 2001. Operation SLIPPER concluded in 2014 (though a small number of ADF personnel, including Special Forces personnel, remain deployed in Afghanistan as part of Operation HIGHROAD).
17. On 20 March 2016, the Chief of Army wrote to me to request that I commence an inquiry to ascertain whether there was any substance to rumours and allegations of breaches of the Laws of Armed Conflict by elements of the ADF's Special Forces in Afghanistan (**the Inquiry**).
18. On 12 May 2016, I appointed Major General the Honourable Paul Brereton AM RFD, then a puisne judge and subsequently a Judge of Appeal, of the Supreme Court of New South Wales, as an Assistant IGADF (**the Assistant IGADF**) and I directed the Assistant IGADF to conduct the Inquiry. I also appointed a number of other Assistants IGADF, as well as a number of inquiry assistants, and directed them to help the Assistant IGADF to conduct the Inquiry. In doing so, I referred to unsubstantiated rumours concerning the culture and behaviour of or concerning Special Operations Command (SOCOMD) members, including allegations of criminal, unlawful and inappropriate conduct in Afghanistan.



19. As a result of amendments to the legislative regime governing the IGADF made in 2016 (mentioned in paragraph 15 above), the Inquiry continued pursuant to a direction given by the CDF to the IGADF on 14 December 2016 under s 110C(1)(f) of the Defence Act. The temporal focus of the Inquiry was initially the period 2007 to 2016, but that period was subsequently extended, by way of a further direction given by the CDF, to 2005 to 2016.
20. Having appointed the Assistant IGADF to conduct the Inquiry, I was not directly or personally involved in its day-to-day conduct. However, I received updates as appropriate from the Assistant IGADF (or persons appointed to assist him) as to the Inquiry's progress.
21. Under the provisions of the IGADF Regulation (ss 27(3), 28F and 28G(1)), the Assistant IGADF was required to prepare a report which set out his findings in relation to the Inquiry and any recommendations that he thought appropriate to make because of those findings. The Assistant IGADF was required to give this report to me as the IGADF.
22. On 29 October 2020, the Assistant IGADF provided me with a copy of a report setting out his findings and recommendations in relation to the Inquiry (**Inquiry Report**). On the same date, he also issued a non-disclosure direction under s 21 of the IGADF Regulation in respect of information contained in the Report. I explain the nature of this non-disclosure direction in further detail below.
23. Under ss 27(2) and (3) of the IGADF Regulation, I was required to make a record of the findings in relation to the Inquiry and give the Inquiry Report to the CDF. On 6 November 2020, I provided a copy of the Inquiry Report to the CDF.
24. On 19 November 2020, the CDF released a version of the Inquiry Report, with very substantial redactions, to the public. I have explained this process in further detail below.

The confidentiality of the Inquiry

25. From its inception, the Inquiry was conducted in circumstances of strict confidentiality. The publicly released version of the Inquiry Report (described further below) explains the reason for that privacy:

The Inquiry has been conducted in private, because it relates to operational matters, because protected identities are involved, to protect the reputations of individuals who may be the subject of what turn out to be unsubstantiated rumours, to protect witnesses, and to protect lines of inquiry.¹

26. The principal reasons for the Inquiry being conducted confidentially were:

- 26.1. To encourage all persons who may have had information relevant to the Inquiry to come forward and speak the truth to the Inquiry. The Inquiry was concerned to break down an entrenched 'culture of silence' within the ADF's Special Forces.

¹ Inspector-General of the Australian Defence Force Afghanistan Inquiry Report, Part 1, Chapter 1.01 at [52].



When the Chief of Army first referred the matters which became the subject of the Inquiry to me, he specifically raised the concern that a culture of silence within the ADF's Special Forces may have permitted or contributed to the occurrence of conduct of the sort being investigated by the Inquiry. Understanding and breaking down this culture of silence was a difficult and long-running challenge for the Inquiry.

- 26.2. To protect the integrity of the Inquiry's evidence-gathering processes and methods and, in particular, to protect from premature disclosure the lines of inquiry being pursued and the evidence gathered in respect of these lines of inquiry. Premature disclosure, especially to persons of interest, might have permitted (and still might permit) witnesses to be harmed, intimidated or prevailed upon, or evidence to be otherwise destroyed, concealed or fabricated (including by persons of interest or witnesses colluding with one another).
- 26.3. To avoid potential prejudice to any criminal investigation that may be occurring in parallel to the Inquiry, or that may flow from the Inquiry (noting that it is a matter of public record that the Australian Federal Police are conducting a criminal investigation that overlaps in part with the subject matter of the Inquiry), and to avoid prejudice to any criminal prosecution to which any such investigation may lead.
- 26.4. To protect information that is operationally sensitive and/or security classified, including: (i) information relating to the tactics, techniques and procedures (TTPs) of the ADF's Special Forces; (ii) information identifying Special Forces personnel, including the names of Special Forces personnel; (iii) information obtained confidentially from allied and partner forces with whom Australia maintains ongoing military relations; (iv) information relating to the rules of engagement (ROE) used by the ADF's Special Forces in the conduct of its military operations and activities; (v) information relating to Defence intelligence operations, including capabilities, sources, processes, analysis and advice; (vi) information relating to the manner in which the ADF conducts detention operations; and (vii) information relating to the technical and equipment capabilities of Special Forces.
- 26.5. To protect the reputations of persons who may have been (and may still be) unfairly harmed by disclosure or publication of rumours or allegations that may be found to be unfounded or unsubstantiated.
27. Although the Inquiry has now concluded, there are a number of very important reasons for continuing to preserve the strict confidentiality of many of the Inquiry's processes, information and conclusions. I outline these in further detail below.

Steps taken to preserve the confidentiality of the Afghanistan Inquiry

28. In light of the matters mentioned in paragraph [26] above, the Office of the IGADF and the Inquiry took a number of steps to preserve the confidentiality of the Inquiry. Without being exhaustive, these steps included the following measures.



28.1. First, when I first directed the Inquiry in May 2016, reg 94 of the *Defence (Inquiry) Regulations 1985* (Cth) mandated that the Inquiry be conducted in private. Subsequently, following the commencement of the IGADF Regulation, I made a direction in 2017, under s 19 of the Regulation, that the Inquiry was to be conducted in private. Further, since the amendment of the IGADF Regulation in October 2018, the Assistant IGADF proceeded on the basis that the Inquiry should be conducted in private under s 28C(1), which gives an Assistant IGADF who is a judicial officer power to conduct an inquiry in such manner as he or she considers appropriate having regard to the subject matter of the inquiry. The Assistant IGADF routinely made a statement to that effect at the commencement of each hearing.

28.2. Secondly, from its inception, the size of the Inquiry team was kept deliberately small. The number of persons helping the Assistant IGADF to conduct the Inquiry was never more than 17, and steps were taken to ensure that only those persons within the Inquiry team who had a demonstrated "need to know" were privy to the lines of inquiry being pursued and the evidence gathered in respect of these lines of inquiry. Thus, for example, while the Inquiry engaged a number of "witness liaison officers" to support witnesses who gave evidence to the Inquiry, these persons played a support role only and they had no exposure to the more sensitive aspects of the Inquiry's activities.

28.3. Thirdly, early in the life of the Inquiry, refurbishment works were carried out within the Office of the IGADF to ensure that the activities of the Inquiry could be carried out with the degree of confidentiality appropriate to the subject matter of the Inquiry and the sensitivity (and security classified nature) of the information being handled in the course of the Inquiry.

28.4. Fourthly, the Inquiry adopted a range of measures in respect of the witnesses who gave evidence to the Inquiry, including the following:

- a. The fact of each witness interview, and the date, time and place of the interview, was kept strictly confidential.
- b. To ensure discretion, witness interviews were typically conducted away from the usual places of employment of serving members. Where desirable, other arrangements were put in place to ensure a discreet entry and exit from the building where the witness interview was scheduled to take place.
- c. As a matter of practice, prior to the commencement of each witness interview, the witness was notified that he or she would be given a non-disclosure direction under s 21 of the IGADF Regulation at the conclusion of the interview. Section 21 authorises the IGADF to give a direction to a person restricting disclosure of particular information, including information contained in oral evidence given during the inquiry and all or part of any document received during the course of the inquiry. This power may be exercised by an Assistant IGADF who is a judicial officer by virtue of s 28E. Contravention of a non-disclosure direction is a criminal offence under s 21(3). For reasons explained below, s 21

directions were not given to the Afghan nationals who assisted the Inquiry.

- d. At the conclusion of each witness interview, and consistently with the notification given at the start of the interview, each witness was given a non-disclosure direction under s 21 of the IGADF Regulation.
- e. In the event that a witness sought a copy of the transcript of his or her witness interview, the practice of the Inquiry was to provide the transcript only on the basis that the same non-disclosure direction under s 21 of the IGADF Regulation applied to it.

28.5. Fifthly, any person who received a Potentially Affected Person or 'PAP' Notice (which was essentially a procedural fairness notice issued by the Inquiry to persons who may be affected by recommendations and findings the Inquiry was, at that stage, proposing to make) also received a non-disclosure direction under s 21 of the IGADF Regulation. This non-disclosure direction prohibited the recipient of the PAP Notice from disclosing the whole or any part of the notice, or any information contained therein, to any person (other than a lawyer, medical practitioner, registered counsellor or minister of religion on a strictly confidential basis), or using it for any purpose other than making submissions in response to it. The non-disclosure direction also required the recipient of the PAP Notice to return the notice on request and to inform the Inquiry immediately if the whole or any part of the notice, or any of the information contained therein, became the subject of any process which compelled disclosure to any other person or body.

28.6. Sixthly, aside from updates of a general nature about the progress and timing of the Inquiry, and the nature, number and timeframe of incidents under inquiry, the Inquiry did not provide any information about its activities (and, in particular, any information about the lines of inquiry being pursued and the evidence gathered in respect of these lines of inquiry) to the ADF chain of command, the Secretary of the Department or the Minister of Defence.

28.7. Seventhly, the Office of the IGADF and the Inquiry adopted a strict "no comment" policy in relation to requests for information about the Inquiry from the media or members of the public.

The Inquiry's activities in Afghanistan

29. In July 2019, the Assistant IGADF and members of the Inquiry team travelled to Kabul in Afghanistan for the purposes of furthering the Inquiry's investigation.

30. The Inquiry Report explains the purpose of the Inquiry's trip to Kabul as follows:

The Inquiry sat in Kabul in July 2019 in order to hear evidence from a number of Afghan nationals who could give evidence of relevance to the Inquiry. The Inquiry engaged a New Zealand lawyer who was a member of an international law firm with a practice in Kabul, and appointed her as an Assistant IGADF in order to assist with examination of witnesses. Interpreters were sourced through the ADF. The Inquiry was greatly assisted by the support of the Department of Foreign Affairs and Trade in arranging to sit in Kabul.



The evidence gained as a result of the Kabul hearings proved of great importance to the Inquiry.²

31. Although it was not a secret that the Inquiry travelled to Afghanistan, the Inquiry's activities in Afghanistan were conducted in the strictest secrecy. To the extent I am able to do so in this open affidavit, I explain further below the reasons why that secrecy was necessary (and continues to be necessary).

Public release of parts of the Inquiry Report

32. On 19 November 2020, the CDF publicly announced, in broad terms, the nature of the findings of the Inquiry. Also on 19 November 2020, the CDF caused to be released on a special section of the Department of Defence website a 'Public Release Version' of the Inquiry Report. The Public Release Version contained very substantial redactions to the content of the Inquiry Report, and extensive parts of the Inquiry Report were withheld from public release altogether.
33. The CDF, in consultation with me and the Assistant IGADF, gave very careful consideration to the extent to which parts of the Inquiry Report should be publicly released. In particular, I was concerned to ensure that the identities of persons who gave evidence to the Inquiry, and the content of their evidence, was not released to the public. This was in part to ensure that there could be no prejudice to any criminal processes which may be occurring in parallel with the work of the Inquiry or which may occur in the future. However, I was also concerned to avoid any risk of harm to persons who assisted the Inquiry and to ensure that the strict confidentiality with which the Inquiry was conducted was maintained, so that the integrity and information gathering processes of future similar inquiries would not be compromised or undermined. I elaborate on these concerns in Part 4 below.
34. **Annexure JMG-1** is a copy of the 'Contents' page of the Public Release Version of the Inquiry Report. The Contents page relating to Part 2 of the Inquiry Report, headed 'Incidents and Issues of Interest', is wholly redacted. That reflects a decision made by the CDF (in consultation with me and the Assistant IGADF, and having regard to the s 21 non-disclosure direction in respect of the Inquiry Report) to withhold from public release Part 2 of the Inquiry Report in its entirety. Part 2 of the Inquiry Report contains the evidence gathered by the Inquiry, and the findings and recommendations arising from consideration of that evidence.

PART 4: DOCUMENTS OVER WHICH PII IS CLAIMED

Documents sought by the IGADF Subpoena

Introduction

35. I have reviewed the IGADF Subpoena issued at the request of the applicant on 2 March 2021 (and reissued on 15 March 2021). The documents sought by the Applicant fall, broadly speaking, into two categories:

² Inspector-General of the Australian Defence Force Afghanistan Inquiry Report, Part 1, Chapter 1.03 at [49].

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- 35.1. Documents which identify, or disclose communications and information passing between the Inquiry and, individuals in Afghanistan who may have assisted the Inquiry (paragraphs 1 to 6) (**Afghan Information**).
- 35.2. Documents relating to the identity of four Afghan nationals who are deceased, referred to as Enemy Killed In Action (or EKIA) 1, EKIA 2, EKIA 3 and EKIA 4 (paragraph 7) (**EKIA Information**).
36. I have set out below the bases on which I claim PII in respect of any documents falling within those categories, to the extent that I am able to do so in an open affidavit. In doing so, I neither confirm nor deny whether any particular individual assisted the Inquiry in any particular way or at all.

Public interest immunity claim over Afghan Information

37. The Afghan Information sought on the face of the IGADF Subpoena includes communications and documents passing between the Inquiry and Afghan nationals who may have given assistance or evidence to the Inquiry. By its terms, the IGADF Subpoena seeks personal information about individuals (including residential addresses and identification documents), and information about the evidence they may have given to the Inquiry (including any transcripts of evidence, statements and notes of interview).
38. As set out above, aside from the fact of members of the Inquiry team having travelled to Afghanistan in 2019 to hear evidence from a number of Afghan nationals and the information disclosed in the Inquiry Report set out above, the nature of the Inquiry's activities in Kabul has not been publicly disclosed. The Inquiry operated in circumstances of the strictest secrecy. The reasons for such secrecy are explained below.
39. In my opinion, it would be contrary to the public interest for Afghan Information to be disclosed in the proceedings.

Risk of harm to individuals who assisted the Inquiry

40. The primary reason for strict secrecy in relation to the Inquiry's activities in Afghanistan was to ensure that any Afghan national who gave assistance to the Inquiry was not placed at risk of harm by reason of that assistance becoming known.
41. It is my understanding that Afghan nationals faced, and continue to face, a significant security risk (and, in particular, a significant risk to their personal safety) if it became known to Taliban in Afghanistan that they had provided assistance to an Australian military inquiry (which may have been regarded by Taliban as providing assistance to Coalition forces). The Inquiry gave assurances to Afghan nationals who were able to assist the Inquiry that the fact of their cooperation with the Inquiry and the information they gave would be treated with strict confidentiality.
42. The Inquiry took a number of steps in Afghanistan to ensure that the individuals who assisted the Inquiry were not identified by the Taliban. I am unable to give further detail about these steps in this open affidavit without undermining the PII claim.



43. Unlike other witnesses before the Inquiry, Afghan nationals who assisted the Inquiry were not provided with non-disclosure directions pursuant to s 21 of the IGADF Regulation. Leaving aside matters of jurisdiction, the obvious reason for that was because such a direction was unnecessary in circumstances where the Afghan nationals themselves wanted to ensure the fact of their assistance, and the nature of their evidence, was not exposed due to fears for their and their families' safety.

Prejudice to the integrity of the Inquiry and the IGADF's statutory functions

44. A secondary, but nonetheless significant, reason for ensuring the confidentiality of the Inquiry's engagement with Afghan nationals was to preserve the overall confidential nature of the Inquiry. As set out above, the Inquiry was conducted wholly in private. The reasons for conducting the Inquiry in private, and the steps taken to maintain the strict confidentiality in which the Inquiry was conducted, are explained at [28] above.
45. In my opinion, disclosure of Afghan Information would be injurious to the public interest, because it has the potential to prejudice the integrity of the Inquiry and future similar inquiries, and to undermine the efficacy of the IGADF's statutory function. I hold that opinion notwithstanding that the Inquiry has now concluded. Without being exhaustive, my primary reasons for this opinion are explained below.
46. Another significant reason for preserving the confidentiality of Afghan Information is that, as stated above, the Inquiry gave assurances of strict confidentiality to Afghan nationals who cooperated with the Inquiry. If it became known that the IGADF was unable or unwilling to make good on those assurances and preserve confidentiality, there is a significant risk that individuals will be deterred from engaging with future similar inquiries. Having regard to the serious risk of harm to personal safety, Afghan nationals (or individuals of any nationality who may consider engaging with a future inquiry) may consider the risk of cooperating is simply not worth it. In my opinion, such an outcome would seriously prejudice my ability as the IGADF to discharge my statutory function as an integrity officer for the ADF (as well as prejudice future IGADFs in their discharge of the role). It would undermine the efficacy (and potentially the reputation) of my office.
47. The types of inquiries that the Office of the IGADF conducts pursuant to its statutory mandate are very often of a most serious nature (as was the case with the Inquiry). Investigations of this kind require a very high degree of trust and confidence in the integrity of the Office of the IGADF, and I and members of the Inquiry team have taken great care to build and foster sufficient trust and confidence within the ADF and with others who may be considering engaging with my Office. By way of illustration, the IGADF's 2018-2019 Annual Report said the following with respect to the Inquiry (at pages 8-9):

It has ... taken some years for members of the Special Forces community—both those who continue to serve and former members—to develop sufficient confidence in the Inquiry and the genuineness of Defence senior leadership's desire to find out if the rumours are true, to be prepared to make disclosures to the Inquiry.

Gaining the confidence and trust of some of these witnesses, whose ADF careers have been spent in an environment in which secrecy is treated as fundamental, has required considerable effort and time. As this has been progressively achieved, more witnesses have been prepared to make disclosures, and new evidence has continued to emerge,

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some resulting in new lines of inquiry, and some reinforcing or corroborating existing lines of inquiry.

During the reporting period and even now, some witnesses are only just becoming willing to make disclosures.

48. The proceedings are also likely to generate a significant amount of media interest and reporting, and a great deal of public interest. It is my view that the publicity the proceedings are likely to attract will serve to compound the sense of 'breach of trust' that the Afghan nationals may feel should their identities and information not be protected in keeping with the assurances they were given.

Undermine the s 21 direction in relation to the Inquiry Report

49. As explained in paragraph 22 above, the Inquiry Report is subject to a non-disclosure direction pursuant to s 21 of the IGADF Regulation made by the Assistant IGADF on 29 October 2020. **Annexure JMG-2** is a copy of the s 21 direction in respect of the Inquiry Report.
50. The s 21 direction provides that there is to be 'no public disclosure of the names of, or anything which would tend to identify' either 'any person who gave evidence or information to the Inquiry who is referred to in Parts 2 or 3 of [the Inquiry Report]' or 'any person mentioned in any finding or recommendation contained in the Inquiry Report'.
51. The rationale for the s 21 direction in respect of the Inquiry Report is explained in a letter from the Assistant IGADF to me dated 29 October 2020:

The Report is in three parts.

Part One provides background and context. The unclassified introduction and executive summary is intended to be capable of immediate public release, should the Chief of the Defence Force wish to do so. However, its annexures contain material the publication of which at this stage could compromise potential criminal proceedings, and for that reason ought not be publicly released until such proceedings are finalised...

Part Two, in six volumes, is the main body of the Report, and examines the various incidents and issues which have been the subject of the inquiry. It contains material the publication of which at this stage could compromise potential criminal proceedings, as well as security classified information, and for that reason ought not be publicly released, at least until any such proceedings are finalised.

Part Three considers more systemic issues. It is presently classified 'PROTECTED.'

Because of the risk of compromise to potential criminal proceedings, and to protect the identity of witnesses, the Report is also subject to and accompanied by a non-disclosure direction under s 21(1) of the IGADF Regulation, prohibiting the public disclosure of the names and identifying information of those who have given evidence or information to the Inquiry, and of any persons named in its findings and recommendations.

Annexure JMG-3 is a copy of this letter.

52. The CDF made the decision to make parts of the Inquiry Report public. It is my understanding that the CDF gave careful consideration to the extent to which the Inquiry Report could be made public, consistent with the s 21 direction, and the CDF consulted with the Assistant IGADF and me to ensure that information which was to be

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publicly released was appropriate. The Office of the IGADF, along with staff from the ADF, then undertook a careful process of redacting the Inquiry Report so that a version could be made publicly available without disclosing the names and identifying information of those who gave evidence or information to the Inquiry or in respect of whom findings or recommendations were made.

53. Disclosure of the Afghan Information would have the effect of undermining the s 21 direction made by the Assistant IGADF in relation to the Inquiry Report to the extent that it would reveal the names and identifying information of those who gave evidence or information to the Inquiry. In my opinion, the disclosure of such information would be contrary to the public interest for the reasons explained above, and because it would tend to demonstrate that non-disclosure directions made by the IGADF (or an Assistant IGADF) may be easily set aside, at the instigation of a private party, in the context of civil litigation. This would erode respect for directions made by the IGADF and for the Office of the IGADF more generally.

PII claim with respect to EKIA Information

54. I claim PII with respect to documents that would disclose EKIA Information to the extent that they also reveal Afghan Information. I do not otherwise claim PII over those documents.

Documents sought by the Person 18 Subpoena

55. I am informed that there are a small number of documents in the possession of Person 18 which may be responsive to the Person 18 Subpoena in which I have an interest as IGADF, and in respect of which I claim PII.
56. I describe in further detail the nature of those documents in my confidential affidavit. However, in general terms, the basis for the claim is that the disclosure of the documents would have the potential to prejudice the integrity of the Inquiry and the IGADF's statutory functions for the same reasons explained in [44] to [48] above. Disclosure would also have the effect of undermining the s 21 non-disclosure direction made in respect of the Inquiry Report.

Orders made under s 38B of the NSI Act

57. I am aware that the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) has been invoked in the proceedings, and his Honour Justice Besanko made orders on 15 July 2020 (as amended on 17 December 2020 and 5 March 2021) (**s 38B orders**) dealing with the disclosure, storage and handling of national security information in the proceedings.
58. In the event my PII claims are not upheld, the documents responsive to the IGADF Subpoena and the Person 18 Subpoena could not be disclosed in the proceedings as 'Sensitive IGADF Documents' under the s 38B orders without amendments being made to those orders. Even if appropriate amendments could be agreed with the parties and the Attorney-General, I would nevertheless be concerned about the risk of inadvertent disclosure. Though that risk may be small, in my opinion, it could have very serious consequences if the risk materialised.



59. I do not consider that non-publication orders would be adequate protection for the documents responsive to either the IGADF Subpoena or the Person 18 Subpoena. While a non-publication order would prevent publication of Afghan Information, but it would not prevent the documents being discussed, put to witnesses or tendered in open court.

Sworn by the deponent

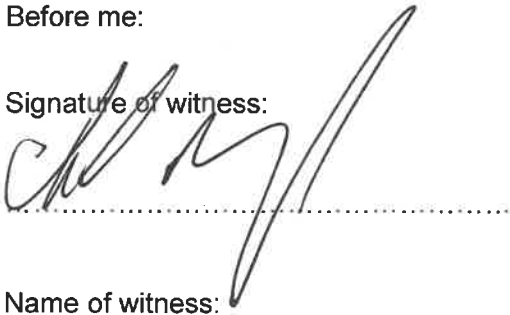
at CANBERRA

in the AUSTRALIAN CAPITAL TERRITORY

on 3RD MAY 2021

Before me:

Signature of witness:



Name of witness:

Clint Gill Maynard

Qualification of witness:

Australian Legal Practitioner

ANNEXURE JMG-1

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL**

**NO NSD 1485 OF 2018
NO NSD 1486 OF 2018
NO NSD 1487 OF 2018**

BEN ROBERTS-SMITH

Applicant

FAIRFAX MEDIA PUBLICATIONS PTY LTD & ORS

Respondents

The following 4 pages is the annexure marked JMG-1 referred to in the affidavit of James Morgan Gaynor made 3 May 2021 before me:


.....
Signature

Australian Legal Practitioner
.....
Qualification



**INSPECTOR-GENERAL
OF THE AUSTRALIAN DEFENCE FORCE**

REPORT

OF

INQUIRY

UNDER DIVISION 4A OF PART 4

OF THE

INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE

REGULATION 2016

INTO

**QUESTIONS OF UNLAWFUL CONDUCT
CONCERNING THE SPECIAL OPERATIONS TASK
GROUP IN AFGHANISTAN**

Part 1 – The Inquiry

**Part 3 – Operational, organisation and
cultural issues**

CONTENTS

Part 1 – The Inquiry

	Contents	06
	Foreword - Covering letter to IGADF	10
	Section 21 Direction	12
	Inquiry staff	14
	Map – Uruzgan and surrounding Provinces	15
	Glossary	16
1.01	Introduction and Executive Summary	26
	Terms of Reference (Annex A)	44
	Chronology (Annex B)	60
	List of Findings and Recommendations (Annex C)	68
1.02	Genesis and Justification	118
1.03	Conduct of the Inquiry	126
1.04	Legal issues	143
1.05	Rationale for recommendations	166
1.06	Sample Testing	175
1.07	Witness Welfare Support Program	179
1.08	War Crimes in Australian History	183
1.09	Afghanistan, Australia and Special Operations Task Group	242
	Special Operations Task Group – Key Appointments (Annex A)	
	Special Operations Task Group Rotations 1 to 20 – Australian Statistics (Annex B)	
1.10	The Applicable Law of Armed Conflict	263
1.11	The Applicable Rules of Engagement	287
1.12	War Crimes Investigations of Other Nations in Afghanistan	301
	Findings and Recommendations of New Zealand Operation Burnham Inquiry (Annex A)	
	.....	318
	Media Release - United Kingdom Chief of the General Staff - 8 September 2011 (Annex B)	
	.....	323

Part 2 – Incidents and Issues of Interest

Volume 1

2.01	.....
2.02	.....

2.03	[REDACTED]
2.04	[REDACTED]
2.05	[REDACTED]
2.06	[REDACTED]
2.07	[REDACTED]
2.08	[REDACTED]
2.09	[REDACTED]
2.10	[REDACTED]
2.11	[REDACTED]
2.12	[REDACTED]

Volume 2

2.13	[REDACTED]
2.14	[REDACTED]
2.15	[REDACTED]
2.16	[REDACTED]
2.17	[REDACTED]
2.18	[REDACTED]
2.19	[REDACTED]
2.20	[REDACTED]
2.21	[REDACTED]
2.22	[REDACTED]
2.23	[REDACTED]

Volume 3

2.24	[REDACTED]
2.25	[REDACTED]
2.26	[REDACTED]
2.27	[REDACTED]
2.28	[REDACTED]
2.29	[REDACTED]
2.30	[REDACTED]
2.31	[REDACTED]

Volume 4

2.32	[REDACTED]
2.33	[REDACTED]
2.34	[REDACTED]

2.35	[REDACTED]	.....
2.36	[REDACTED]	.....
2.37	[REDACTED]	.....
2.38	[REDACTED]	.....
2.39	[REDACTED]	.....
2.40	[REDACTED]	.....
2.41	[REDACTED]	.....
2.42	[REDACTED]	.....

Volume 5

2.43	[REDACTED]	.....
2.44	[REDACTED]	.....
2.45	[REDACTED]	.....
2.46	[REDACTED]	.....
2.47	[REDACTED]	.....
2.48	[REDACTED]	.....
2.49	[REDACTED]	.....
2.50	[REDACTED]	.....
2.51	[REDACTED]	.....

Volume 6

2.52	[REDACTED]	.....
2.53	[REDACTED]	.....
2.54	[REDACTED]	.....
2.55	[REDACTED]	.....
2.56	[REDACTED]	.....
2.57	[REDACTED]	.....
2.58	[REDACTED]	.....
2.59	[REDACTED]	.....
2.60	[REDACTED]	.....

Part 3 – Strategic, Operational, Organisational and Cultural Issues

3.01	Strategic, Operational, Organisational and Cultural Factors	325
3.02	Inquiries and oversight	359
3.03	Command and collective responsibility	470
	Whetham Report (Annex A)	504

ANNEXURE JMG-2

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL**

**NO NSD 1485 OF 2018
NO NSD 1486 OF 2018
NO NSD 1487 OF 2018**

BEN ROBERTS-SMITH

Applicant

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Respondents

The following 2 pages is the annexure marked JMG-2 referred to in the affidavit of James Morgan Gaynor made 3 May 2021 before me:



.....
Signature

Australian Legal Practitioner
.....
Qualification



**FINAL INQUIRY REPORT OCTOBER 2020
NON-PUBLICATION DIRECTION**

References:

- A. *Defence Act 1903* (Cth), s 110C(1)(f).
- B. *Inspector General of the Australian Defence Force Regulation 2016* (Cth), s 21(1), s 28E and s 28F.
- C. Final Inquiry Report under Division 4A of Part 4 of the IGADF Regulation into Questions of Unlawful Conduct concerning the Special Operations Task Group in Afghanistan.

Introduction

1. The Chief of the Defence Force has, under reference A, directed the Inspector General of the Australian Defence Force ('the Inspector General ADF') to inquire into a matter concerning the Defence Force, namely whether there is any substance to rumours of criminal or unlawful conduct by or concerning Australian Defence Force Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2005 to 2016.
2. Reference B provides (by s 21(1)) that if the Inspector General ADF is satisfied that it is necessary to do so in the interests of the defence of the Commonwealth, or of fairness to a person who the Inspector General ADF considers may be affected by an inquiry, the Inspector General ADF may give a direction restricting the disclosure of information contained in oral evidence given during the inquiry, all or part of any document received during the course of the inquiry; and information contained in a report about the inquiry that is given to a person under section 27 (which, by s 27(1)(a)(i) includes a report given by an Assistant IGADF to the Inspector General ADF under s 28F).
3. A person commits an offence if the person contravenes such a direction, for which the applicable penalty is 10 penalty units.
4. I have been directed to conduct the Inquiry. Division 4A of the *Inspector-General of the Australian Defence Force Regulation 2016* ('the IGADF Regulation') applies to me as a judicial officer within the meaning of that Regulation, so that I may exercise the powers of the Inspector General ADF under s 21(1) of the Regulation referred in paragraph 2 above (see s 28E(a) of the Regulation).
5. Reference C is the Report of the Inquiry which I have now provided to the Inspector General ADF under and in compliance with s 28F of the Regulation ('the Report').

Direction

6. I am satisfied that it is in the interests of the defence of the Commonwealth, and of fairness to persons who may be affected by the Inquiry, to give the following direction restricting disclosure of information contained in the Report, within the meaning of s 21.

7. *I direct that there is to be no public disclosure of the names of, or anything which would tend to identify:*

- a. *any person who has given evidence or information to the Inquiry who is referred to in Parts 2 or 3 of Reference C;*
- b. *any person mentioned in any finding or recommendation contained in the Report.*



P. Brereton, AM, RFD
Major General
Assistant IGADF

29 October 2020

ANNEXURE JMG-3

**FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL**

**NO NSD 1485 OF 2018
NO NSD 1486 OF 2018
NO NSD 1487 OF 2018**

BEN ROBERTS-SMITH

Applicant

FAIRFAX MEDIA PUBLICATIONS PTY LTD & ORS

Respondents

The following 2 pages is the annexure marked JMG-3 referred to in the affidavit of James Morgan Gaynor made 3 May 2021 before me:


.....
Signature


.....
Qualification



OFFICE OF THE INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE

IGADF [REDACTED]

Mr James Gaynor, CSC

Inspector-General of the Australian Defence Force

Dear Mr Gaynor,

On 12 May 2016, under regulation 87(1)(b) of the *Defence (Inquiry) Regulations 1985*, you directed me, as an Assistant IGADF, to inquire into a matter concerning the military justice system raised in a referral from the Chief of Army to you, namely whether there is any substance to persistent rumours of criminal or unlawful conduct by, or concerning, the Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2007 to 2016. You authorised me to make recommendations resulting from my findings.

On 17 January 2017, following receipt by you of a direction dated 14 December 2016 from the Chief of the Defence Force to inquire into a matter concerning the Defence Force, namely whether there is any substance to persistent rumours of criminal or unlawful conduct by, or concerning, the SOTG deployments in Afghanistan during the period 2007 to 2016, and under s 10 of the *Inspector General of the Australian Defence Force Regulation 2016* (the IGADF Regulation), you directed me to assist you to inquire into that matter.

On 21 February 2017, you varied the terms of that direction so that the subject matter of the inquiry extends to SOTG deployments in Afghanistan during the period 2006 to 2016.

Since 13 October 2018, I have been conducting the inquiry under Division 4A of Part 4 of the IGADF Regulation, as an Assistant IGADF who is a judicial officer.

Having regard to the nature of the Inquiry contemplated by the Inquiry Directions, I am satisfied, for the purposes of s 28F(1)(a) of the Regulation that 'all information relevant to the inquiry that is practicable to obtain has been obtained'.

I therefore have the honour of presenting my report about the Inquiry, including my findings and recommendations, as contemplated by s 28F, for provision by you to the Chief of the Defence Force in conformity with s 28G(1) of the IGADF Regulation.

The Report is in three parts.

Part One provides background and context. The unclassified introduction and executive summary is intended to be capable of immediate public release, should the Chief of the Defence Force wish to do so. However, its annexures contain material the publication of which at this stage could compromise potential criminal proceedings, and for that reason ought not be publicly released until any such proceedings are finalised. Although the remainder of Part One is presently classified 'PROTECTED', much of it (other than the chapter dealing with the rules of engagement) could be declassified, and publicly released.

Part Two, in six volumes, is the main body of the Report, and examines the various incidents and issues which have been the subject of inquiry. It contains material the publication of which at this stage could compromise potential criminal proceedings, as well as security

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(redacted for security, privacy and legal reasons)

11

classified information, and for that reason ought not be publicly released, at least until any such proceedings are finalised.

Part Three considers more systemic issues. It is presently classified 'PROTECTED'.

Because of the risk of compromise to potential criminal proceedings, and to protect the identity of witnesses, the Report is also subject to and accompanied by a non-disclosure direction under s 21(1) of the IGADF Regulation, prohibiting the public disclosure of the names or identifying information of those who have given evidence or information to the Inquiry, and of persons named in its findings and recommendations.

As you know, in order to ensure the independence of an inquiry by an Assistant IGADF who is a judicial officer, s 28G(2) has the effect that I may, if I think it appropriate to do so, inform various persons of my findings, and give them my report; and s 28H provides that if I do so I may, following consultation with the Chief of the Defence Force, publicly release all or part of the report (including a redacted version of the report).

You have informed me that you intend to notify persons affected by the Inquiry of my findings insofar as they are relevant to them. In those circumstances, and knowing that you will transmit my report to the Chief of the Defence Force, I do not presently intend to exercise any of those powers, although you will understand that, consistently with the independence which those provisions are intended to assure, I must reserve my right to do so.

Thank you for your support in the conduct of this unique inquiry. I have been given all the resources I have requested, and I do not believe that additional resources would have enhanced the quality of the result, nor shortened the timeframe: as the Report explains, the time taken has chiefly been a result of the need to create an environment in which some members of a closed and compartmentalised community have become willing to speak honestly to the Inquiry.

I would also like to record my appreciation of the understanding of the Chief Justice of New South Wales, and the President of the Court of Appeal, whose support has enabled me to devote much more time than was ever originally anticipated to this undertaking.

Finally, I have had the immense privilege of being supported by a diverse and dedicated team. They are identified in the staff list. Their work on a difficult task, which would inevitably be unpopular in some circles, has been in the best traditions of the Australian Defence Force.

Yours sincerely



The Hon PLG Brereton, AM, RFD

Major General

Assistant Inspector-General of the Australian Defence Force

26 October 2020

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(redacted for security, privacy and legal reasons)