

**Under** the Inquiries Act 2013

**In the matter of** a Government Inquiry into Operation Burnham and Related  
Matters

**MEMORANDUM OF COUNSEL FOR DR WAYNE MAPP QSO**

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**12 July 2019**

**K I E L Y | T H O M P S O N | C A I S L E Y**

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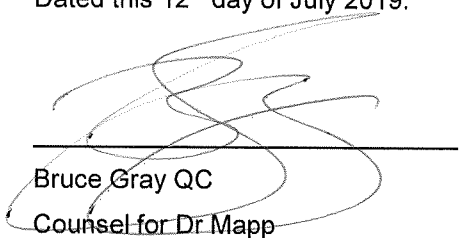
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**MAY IT PLEASE THE INQUIRY**

1. On 18 June 2019 Counsel received an email from Mr Ian Auld, Crown Counsel, Crown Law.
2. Mr Auld raised a potential issue with Dr Mapp's presentation at the Inquiry on 23 May 2019.
3. Mr Auld's email refers to Rule H of the December 2009 Rules of Engagement (ROE) and states that the key test under Rule H is whether the individual is "*directly participating in hostilities*". Mr Auld says that this phrase is a term of art in International Humanitarian Law and is drawn from the Additional Protocols to the Geneva Conventions.
4. In his evidence Dr Mapp referred to the definition of "*hostile intent*" in paragraph 2(x) of the ROE as assisting him in understanding the scope of the ROE and Rule H.
5. Mr Auld's email notes that "*hostile intent*" is referred to in Rule A but not in Rule H. Mr Auld commented that it would be helpful if Dr Mapp could clarify this issue for the Inquiry as the Crown Agencies will be addressing the meaning of "*direct participation in hostilities*" at the July Inquiry hearing.
6. During the hearing, Sir Geoffrey asked about Dr Mapp's awareness that the amended ROE authorised kill and capture operations (**Transcript, 23 May 2019 at 63**). Dr Mapp replied that he was aware that the NZDF could take "*direct action*".
7. In answering this question and questions about the application of Rule H, Dr Mapp responded, in part, by reference to the definition of "*hostile intent*".
8. There is no definition of "*directly participating in hostilities*" in Rule H. However, the controls inherent in Rule H are that the rule applies to "*individuals, forces or groups*" which are "*directly*" "*participating*" in "*hostilities*".
9. "*Directly*" speaks to the closeness of the connection between the individual, force or group and the hostilities.

10. "*Participating*" speaks to the part being played by the individual, force or group in the hostilities.
11. "*Hostilities*" is informed by the definitions of "*hostile act*" and "*hostile intent*" at paragraphs 2(ix) and 2(x) of the ROE. "*Hostile act*" refers to use of force where death or serious injury is likely to result. "*Hostile intent*" refers to the state of mind of those performing the hostile act and permits that state of mind to be assessed either by capability and preparedness, or alternatively by the presence of information including particularly intelligence.
12. Dr Mapp's answers at pages 63-66 of the Transcript show that he was considering the constituent elements which were required to bring conduct within the bounds of Rule H and the closeness of the connection between the individual, force or group and the hostile act. In assessing the nature of future potential hostile acts, it was necessary for Dr Mapp to consider what the state of mind of the individual, force or group might be. Dr Mapp therefore considered various possible scenarios in his own mind to test the application of the ROE to potential situations in Afghanistan.
13. Dr Mapp derived support from the definition of "*hostile intent*" for his consideration of whether Rule H provided appropriate control and authority for the use of force.
14. Dr Mapp considered it was appropriate to view the ROE as a whole and that while the definitions of "*hostile act*", "*hostile intent*" and "*direct participation in hostilities*" may have different sources, their use in the ROE informed each other. Dr Mapp's evidence shows he took a holistic approach to understanding the ROE and how it might be applied which he considers was both appropriate and necessary in the circumstances.
15. If the Inquiry would like Dr Mapp to confirm that his evidence is consistent with this Memorandum, then he will be pleased to do so.

Dated this 12<sup>th</sup> day of July 2019.



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Bruce Gray QC  
Counsel for Dr Mapp