Under the Inquiries Act 2013

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

SECOND STATEMENT OF EVIDENCE OF DR WAYNE DANIEL MAPP QSO

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Introduction

1. As the Inquiry is aware, my full name is Wayne Daniel Mapp.

2. I served as Minister of Defence from 19 November 2008 to 30 November 2011.

3. As with my last statement of evidence, I have been guided in preparing this statement by the Minutes issued by the Inquiry, especially Minute No. 12, describing the scope of matters to be addressed.

4. My evidence relies on the publicly available documents published by the Inquiry and on my own recollection of events. I have not had access to my own Ministerial Papers in preparing my evidence.

5. If there are any matters of detail the Inquiry would wish me to address at a later time, I would be pleased to do this.

Rules of Engagement

6. Rules of Engagement (ROE) are the instructions which set out the manner and circumstances in which members of the NZDF may use force. ROEs necessarily reflect government policy and the New Zealand government's domestic and international legal obligations.

7. Because ROEs are reflections of New Zealand's national objectives when deploying the NZDF, ROEs are approved at the highest political level.

<u>Development of the ROE</u>

8. As part of the discussions in the first half of 2009 about whether the government should re-deploy the SAS to Afghanistan, I was responsible for overseeing the drafting of a Cabinet Paper. This Paper was prepared within the NZDF and Ministry of Defence as well as other relevant government agencies such as the Ministry of Foreign Affairs and Trade.

9. The Paper was presented to Cabinet on 6 July 2009.

10. The ROE was developed as part of the preparations for the Paper.

11. The Paper confirmed the legal authority for the deployment of the SAS to Afghanistan which was the relevant UN Security Council resolutions.

12. The Paper also confirmed that the New Zealand Chief of Defence Force "*would retain full command of all NZDF personnel posted or attached as part of this deployment.*" This command would be exercised through the senior SAS officer on the ground.

13. Any operations would be subject to the ROE. Paragraph 29 of the Paper states:

"The Rules of Engagement (ROE) for a NZSAS deployment to Afghanistan would be similar to those used for the previous NZSAS deployment in 2005. They have, however, been amended to reflect that the deployment would fall under ISAF authority rather than that of Operation Enduring Freedom (OEF). Prime Ministerial approval of these ROE is sought."

14. The draft ROE was attached to the Cabinet Paper.

15. As I recollect, my discussions about the development of the ROE for the Paper were mainly oral and took place as part of the other preparations we were making.

16. I had several discussions about the ROE with Brigadier Kevin Riordan, who was NZDF Director of Legal Services. He would usually be accompanied at our discussions by senior legal staff officers. Although I had some legal background knowledge about the international law of armed conflict and the role of ROE, the NZDF legal staff had much deeper and specialist knowledge of this area of law. They were also more aware of how the ROE would apply in the context of Afghanistan. They were the true experts in the field, and I appropriately relied on their advice and judgment.

17. When I was briefed on the ROE, I asked questions about their application in the Afghanistan conflict, which was primarily a counter insurgency mission. In particular, I was concerned about the distinction between Al Qaeda and the Taliban. I considered that the principal reason for New Zealand being part of the ISAF coalition was because Al Qaeda were the perpetrators of September 11 and had their principal base in Afghanistan.

By contrast, the Taliban were the former government of Afghanistan. As a result, I thought the ROE needed to make a distinction between Al Qaeda and the Taliban.

Context of the ROE

18. It is important to understand the context in which the ROE were first developed and approved.

19. The fundamental reason for the intervention in Afghanistan was to defeat Al Qaeda, to bring them to justice and to deny them a safe haven. Since Al Qaeda were being protected by the Taliban government, the intervention in Afghanistan was also against the Taliban government. I had come to the view that provided the Taliban were not actively opposing ISAF, we did not need to actively engage them. That was not true of Al Qaeda since they and their members had been proscribed by the United Nations as a terrorist organisation. This distinction was therefore reflected in the ROE that were developed in July 2009.

20. However, it was also apparent that a resurgent Taliban was able to use their secure areas in Pakistan to launch attacks within Afghanistan with the intent of wearing down the resolve of ISAF and undermining the Afghan government. In contrast, Al Qaeda was no longer the global threat that it had once been, although it still had a presence in Afghanistan and Pakistan. The Taliban therefore posed a more serious threat to the integrity of the Afghan government. With Al Qaeda the issue was more about actually finding the terrorists who were now primarily fugitives from justice, rather than preventing future Al Qaeda terrorist acts.

21. In practical terms, that meant the SAS and Afghan Crisis Response Unit (**CRU**) would be primarily protecting Kabul from the actions of the Taliban. The SAS mission therefore involved a blend of military, police and political factors. Unlike previous deployments, the SAS would not be able to operate behind a veil of secrecy in remote areas. Much of what they did would be literally in the public gaze.

22. Initially, the ROE reflected the policing nature of the anticipated role. The SAS could use lethal force to defend themselves and others, in respect of operations against the Taliban. The ROE did not allow the SAS to engage any Taliban who were not acting in an actively hostile manner. This is in

contrast to a conventional war where all enemy soldiers are able to be lawfully engaged at any time.

23. As I have stated, initially, I made a distinction between members of the Taliban and members of Al Qaeda. As internationally declared terrorists, if members of Al Qaeda could not be apprehended, then lethal force ought to be an option to deal with them, rather than letting them escape.

24. On 10 August 2009 Cabinet approved the re-deployment of the SAS to Afghanistan. The Cabinet noted the ROE attached to the July Paper had been approved by the Prime Minister.

25. In the event this distinction became a moot issue. During the two and a half years in which the SAS were ultimately deployed, they were never tasked to capture Al Qaeda members. All their operations were against the Taliban.

26. On most occasions there was no actual combat. In fact, in over 90% of missions the SAS did not actually fire their weapons. Instead the Taliban insurgents were arrested by the CRU and dealt with through the Afghan justice system.

Amendment of the ROE

27. By the end of 2009, it was more and more apparent to me that a key role for the SAS in Afghanistan would be supporting the efforts of the new Afghan government to rebuild their country. Elements of the Taliban were increasingly a threat to those efforts. As I was aware from discussions with my NATO Ministerial counterparts, there was a quickly developing international consensus, that for rebuilding efforts to be successful, ISAF needed to engage those elements of the Taliban which were actively thwarting reconstruction efforts.

28. At the same time, we were not at war with the Taliban as a group. The Taliban represented a certain segment of the Afghan population. Any future stable government in Afghanistan would need to deal with them constructively. But to the extent that elements of the Taliban were an impediment to helping the Afghan government establish public order and were engaged in hostile action against that order, the NZDF may need to be able to take direct action.

29. In December 2009 I was advised by Lt General Mateparae that the rules that had been set out in the ROE as approved in July 2009 were too restrictive. He recommended that rule H be amended so that attack on individuals, forces and groups "*directly participating in hostilities in Afghanistan against the legitimate Afghan government*" would be permitted. This would clearly include elements of the Taliban.

30. Both ISAF and the SAS requested that the ROE be amended so that the SAS could carry out their role in accordance with the same rules that generally applied to ISAF Special Forces operating within Afghanistan.

31. I was also orally advised that these rules would nevertheless be more restrictive than those that applied to other nation's Special Forces, principally US Special Forces, who were authorised to carry out missions across the border into Pakistan. The mission that killed Osama Bin Laden being the most well-known of such operations.

32. I approached the request to amend the ROE on the basis that it was appropriate to consider if the rules should be altered to permit action against forces actively hostile to the Afghan government and/or ISAF. My concern was to ensure that the ROE were drafted so that they encompassed those persons directly taking hostile action against the Afghan government, ISAF or the NZDF but excluded those persons who were simply members of the Taliban. That distinction was crucial for me.

33. I considered the change to the ROE to be very significant and I wanted to get the amended ROE right. I sought detailed briefings on the change of the ROE, both from a legal and operational perspective. I received extensive briefings from the Defence Legal Service and as well as the Directorate of Special Operations.

34. I ultimately concluded, after the briefings and considering both the legal and operational situation, that I should approve the amendment to the ROE. I set out my reasons on the NZDF Cover Sheet, dated 14 December 2009. I inserted a handwritten comment saying:

"I have now been fully briefed on the change, including a discussion on the concept of operations. As a result I am satisfied that the new ROE meets two criteria:

a. It complies with New Zealand legal requirements

b. It meets the operational requirements of OP WATEA and NATO/ISAF"

35. I have a very clear recollection of taking particular care in setting out my reasoning in the Comments section of the Cover Sheet. I remember sitting at my desk and thinking through what I wanted to say. I was very much aware of the significance of the change so I specifically noted that the change of the ROE "*complies with New Zealand legal requirements*". By this I meant both domestic law as well as the law of armed conflict. By inserting that comment I was making clear my view that my approval was based on the understanding that only direct participation in hostilities would bring a person or group within the ROE.

36. Subsequently, the amended ROE was also approved by the Prime Minister.

Detainees

37. A vital part of drafting the ROEs was addressing the possibility that the SAS would take part in operations where Afghan persons would be detained by the CRU or the SAS.

38. From my background in international law and my interest in defence issues, I was well aware that there had been abuses of detainees in the past by overseas militaries. In particular, I was aware of an incident where SAS soldiers had detained Afghan persons after a raid in Band e Timur in 2002. The detainees were handed over to US forces. Subsequently, the NZDF complained about the way in which the detainees were treated by the Americans.

39. I was aware the treatment of detainees arrested by the CRU in operations where the SAS were involved could prove to be a problematic issue for the New Zealand government, as it did for most governments contributing forces to ISAF. The reality, succinctly put by Lt General Mateparae, was that the NZDF are only ever involved in these kinds of deployments when the host government and country has inadequate standards in respect of human rights, both in regard to the population in general, and for detainees in particular. If the host nation was an exemplar of human

rights, there would never have been need for an intervention in the first place.

40. It was therefore a high priority for me, and for the government, to ensure that the NZDF complied with all relevant legal standards.

Consideration of the Detainee Issue

41. In developing the July Cabinet Paper the need to address detainee policy and protocol was well recognised.

42. In my view, the July Paper shows the extent to which issues surrounding detainees were carefully considered before any decision to deploy the SAS was taken.

43. The Paper noted that persons detained by the CRU would be processed in accordance with Afghan law. If SAS personnel detained any persons, they would ensure compliance with well-established procedures which were consistent with international law.

44. The identities of those detained would also be provided to the International Committee of the Red Cross (**ICRC**).

45. Paragraph 34 of the Paper noted that former Minister of Defence Hon Phil Goff had received assurances from the Afghan government that detainees handed over to Afghan authorities would not be subjected to torture or capital punishment. The Paper further noted that these assurances had not yet been converted into a written agreement between New Zealand and Afghanistan.

46. As a result of the work of the Ministry of Foreign Affairs and Trade, a formal agreement about detainee transfer was reached between New Zealand and Afghanistan dated 12 August 2009. Under this arrangement representatives of the NZDF had full access to any detainees NZDF had transferred. In addition, detainees would be treated in accordance with international law and their treatment subject to scrutiny by the ICRC.

47. Attached to the July Paper was an Annex setting out in detail the guidance for detention of Non-ISAF personnel. This guidance applied only when New Zealand forces arrested or detained an Afghan person. If the

detention was made by Afghan National Security Forces then the guidance did not apply.

48. The guidance stated that as soon as practicable after the detention had taken place, the detention must be reviewed by an appropriate ISAF Authority. The detainee had to be informed of the reasons for his or her detention and given an information sheet detailing his or her rights as a detainee.

49. It is important to understand that our mission in Afghanistan was to help build the capability of Afghan forces to govern and manage their society in accordance with international law. We were there to assist and not to impose. On joint operations between the SAS and CRU, the detaining authority was the CRU and not the SAS. That did not mean the SAS would ignore what was occurring but it did mean that the primary responsibility for detainees rested with the CRU in almost all cases. The SAS could not remove an individual from the custody of the Afghan police or security forces or prevent an Afghan official from arresting an Afghan person in accordance with local law.

My Continued Involvement with Detainee Issues

50. After the SAS redeployed to Afghanistan, I continued to monitor detainee issues closely. I was concerned to ensure that New Zealand used all of its efforts to comply with human rights law. I consistently engaged with detainee issues and sought advice and reassurance about the treatment of detainees.

51. As Minister, I could raise the detainee issue in a number of ways both domestically and internationally.

52. Domestically, I could seek advice from officials, ask questions and seek information. This involved discussing detainee issues with Lt General Matepaere, Brigadier Riordan, the NZDF and Ministry of Defence officials. I discussed detainee issues with interested groups such as Amnesty International. I also had to respond to Parliamentary Questions on this issue which meant I had to be appropriately informed and knowledgeable.

53. Internationally, I raised detainee issues with ISAF, the NATO Secretary General and ISAF commanders. I discussed detainee issues with other

Ministers from governments which were part of ISAF and/or NATO. I also raised detainee issues with the Afghan government directly at a ministerial level.

54. In August 2010, when I visited Afghanistan, I requested a meeting with officials from the ICRC. I met with Mr Reto Stocker, an ICRC delegate. It was a robust meeting. I wanted to explore with the ICRC what additional things we could do in relation to detainees and I wanted the ICRC's views. I was concerned that New Zealand should do as much as we reasonably could given our relatively small size and influence. I was looking for ways to strengthen our approach to detainees.

55. At the meeting we discussed having an NZDF legal officer attached to ISAF HQ so that New Zealand would have a presence on detainee issues and a voice in any discussions at ISAF HQ. After that meeting I raised this suggestion with the NZDF and ultimately an officer was attached to ISAF HQ. This officer was assigned in April 2011.

56. In May 2010, the government announced the appointment of an Ambassador to Afghanistan. Previously, the Ambassador to Iran had also been Ambassador to Afghanistan. We hoped that the appointment of former Brigadier Neville Reilly as Ambassador would allow us to have a better and more direct connection to the Afghan government. With better access and better understanding, we hoped we could more effectively influence the Afghan government including in relation to detainee issues.

57. I raised detainee issues at international meetings and with international partners. European members of NATO were especially concerned about detainee issues. At ISAF/NATO meetings, New Zealand joined with our partners in raising our concerns about detainees. As a result, there was a concerted effort by ISAF to address this issue and monitoring of detainees improved significantly.

58. As I noted in my last statement to the Inquiry, I discussed detainee issues with Norwegian Minister of Defence Grete Faremo. Minister Faremo had a strong legal background and she had previously been Director of Law, Corporate Affairs and Public Relations at Microsoft Europe. I respected her views and expertise. In addition, she came from a country which, like New Zealand, has a strong commitment to human rights and is a leader in the field. The Norwegian public was concerned about detainee issues

and Minister Faremo (like myself in New Zealand) was required to respond to these concerns. Building ties with partners like Minister Faremo allowed New Zealand, in co-operation with other countries, to keep the detainee issue at the forefront of the issues we were confronting in Afghanistan.

59. One of the issues that was especially important to us was the status of facilities to which detainees were transferred. New Zealand forces could only transfer detainees they had captured to Afghan facilities if they were sure that the person would not be at risk of torture, or other cruel or degrading treatment and we could monitor the detainee.

60. When the High Court of England and Wales issued its decision in the *ex parte Maya Evans* case in June 2010, I was quickly made aware of the decision. I read the judgment and discussed it with officials.

61. We knew that in the past, the Afghan government's treatment of detainees had had some deficiencies. But we were also aware that the Afghan detention facilities were improving. ISAF headquarters in Kabul had a committee to monitor the conditions at the various facilities, including the National Directorate of Security (**NDS**) facility at Kabul. A number of nations, including Australia and Canada, which directly transferred detainees to the NDS, monitored these facilities.

62. I continued to raise the issue of detainees with my officials. I was concerned by various reports about detainees and their treatment. The *Evans* judgment fed into those concerns. Even where the SAS were not detaining individuals, I was concerned that New Zealand was taking reasonable steps to ascertain that persons detained by the CRU had their human rights respected.

63. I was concerned to receive advice about the treatment of detainees and whether we were complying with our legal obligations. I wanted to make sure I was on top of this issue. I remember meeting Brigadier Riordan at about this time to discuss these issues.

64. On 16 September 2010 I was provided with a letter from Lt General Mateparae. This letter was based on legal advice from the NZDF Director General of Legal Services. The letter advised that New Zealand forces were compliant with international law when partnering with the CRU.

The letter also addressed the efforts we were making to ensure that those persons arrested by the CRU were treated humanely. One of the possibilities explored in the letter was whether New Zealand could monitor the treatment of detainees at Afghan detention facilities.

65. On 9 November 2010 I was provided with a further opinion from the Solicitor-General. This opinion confirmed that New Zealand partnering operations in Afghanistan did not give rise to liability in relation to torture. The opinion also confirmed that if the NZDF took prisoners, those prisoners could only be transferred to Afghan authorities if they did not face a real risk of torture and were monitored by New Zealand personnel while in custody. The opinion did not recommend monitoring by New Zealand officials of detainees taken into custody by Afghan authorities.

66. By May 2011 we were advised that ISAF headquarters regarded the NDS facility in Kabul as the detention facility of choice and ISAF was directing its member nations' forces to use this facility because it was properly monitored.

67. On 16 May 2011 I was able to respond in a written answer to a Parliamentary Question from Hon Maryan Street that:

"*I have received reports from the Defence Force that the standards of the NDS have improved substantially. This improvement is continuing, with considerable support from the international community. ISAF regards the NDS facility in Kabul as the "detainee arrangement of choice" and directs troop-contributing nations to make use of these facilities. The facility is regarded as the one to which International Committee of the Red Cross has the best access and which has the best record-keeping. Reports from theatre indicate that Australia, Canada and the United Kingdom all routinely transfer detainees into NDS facilities. NDS facilities in all locations are considered satisfactory by Australia and Canada. An NDS Oversight Committee has recently been established to handle allegations of mistreatment. On each of my visits to Afghanistan, and also in regular NATO/ISAF meetings, I have discussed these and other issues with the NATO/ISAF leadership and other countries with which I have had discussions. I will be releasing the report which covers these areas in the near future."* (Parliamentary Question 3693, 16 May 2011)

68. I would also note that I received significant numbers of parliamentary questions from opposition Members of Parliament, especially Keith Locke and Ms Street about detention issues. I was well aware that these issues were matters of concern across the Parliament. I ensured that my oversight of detainee issues was such that it could withstand this scrutiny.

69. To my knowledge during my time as Minister of Defence only one Afghan person was detained by the SAS. On 30 January 2011 the SAS detained a mid-level Taliban commander. After his detention, he was visited by New Zealand officials on 15 February and 25 April 2011. On the first visit, the detainee was being held in the Battlefield Detention Site at Bagram Air Field. On the second visit, he was being held at the joint United States-Afghan Detention Facility in Parwan.

70. The first visit was conducted by a medical officer and legal officer serving with the SAS. The medical officer conducted a medical examination of the detainee. The second visit was conducted by the Legal Staff Officer, New Zealand Forces – Afghanistan.

71. The detainee was then to be visited again on a monthly basis until he was either released or brought before an Afghan judicial authority.

Further Advice from NZDF

72. In the middle of 2011, I sought further advice from the NZDF regarding the detainee issue and whether there was any prospect that partnering with the Afghan armed forces and police could potentially render the NZDF complicit in torture. While we had done a great deal of work on the detainee issue, including most obviously the Solicitor-General's opinion, I still thought we needed to pay further attention to this issue to make sure New Zealand forces were complying with international law.

73. On 31 August 2011, Lt General Jones replied on behalf of the NZDF. General Jones noted that given the size of the NZDF force in Afghanistan and their duty to mentor, guide and train members of the CRU, New Zealand could not have responsibility for bringing about changes throughout the broader Afghan legal system. At the same time, NZDF forces must comply with international and domestic New Zealand law at all times.

74. General Jones' letter also emphasised that the SAS were in almost all cases not the arresting authority. Rather, the CRU detained individuals and then handed those individuals over to Afghan authorities. The letter noted that *"all evidence at our disposal suggests the CRU have acted appropriately in respect of persons that they have arrested. The CRU is now regarded by ISAF as the leading unit of its kind".* (paragraph 8)

75. The letter concluded that the *"actions of our personnel in Afghanistan do not even approach the threshold for complicity* [in torture]". (paragraph 19)

76. On 20 October 2011, Lt General Jones wrote me a further letter. This letter was a response to the United Nations Assistance Mission in Afghanistan (**UNAMA**) report. This report raised serious and troubling issues about mistreatment of detainees by Afghan law enforcement agencies although the report also found that this mistreatment was not institutionalised.

77. In terms of preventing mistreatment and monitoring detention facilities, the letter states that it was *"not within the NZDF's capability to unilaterally assume a comprehensive monitoring role. Our activities fit within a larger scheme of ISAF involvement."* (paragraph 10) However, within the larger scheme NZDF could play an active part.

78. General Jones states in his letter that no person could be transferred from NZDF custody to any other authority without permission from General Jones and he would not authorise transfer to any sites listed in the UNAMA report as unsatisfactory.

79. On 22 October 2011, I released both letters on the Beehive website. I said: *"We have made known to the Afghan authorities our expectations for respect for human rights. The UNAMA report said the contributing nations must continue to work with the Afghan authorities to lift them to internationally accepted standards of behaviour."* (Beehive website, https://www.beehive.govt.nz/release/minister-defence-releases-detainees-report, 22 October 2011)

Amnesty International

80. Throughout the redeployment of the SAS to Afghanistan, Amnesty International raised its concerns about the human rights of detainees with me.

81. I remember meeting with representatives of Amnesty International on 2 or 3 occasions. Amnesty International's view was that anyone detained in an operation involving both the CRU and the SAS was in fact detained by the SAS. That was not my view. My view, based on official advice, was that where the CRU detained a person, that person was the responsibility of the CRU.

82. In response to Amnesty International's request for more information about how the NZDF was ensuring it was complying with its international law obligations, my office drafted a careful and informative response. However, as a result of a dialogue with the Prime Minister's Office, the final response to Amnesty International issued shortly before I left office was less comprehensive than I would have liked.

Conclusion

83. In my view, the ROE was developed (and amended) after careful and thoughtful consideration.

84. The ROE was drafted with special cognisance of the legal authorisation for being in Afghanistan, namely, to assist the local Afghan forces rather than to take over from them. The amendment to the ROE at the end of 2009 reflected our role in supporting the Afghan government and reconstruction of Afghanistan.

85. The ROE also reflects the fact that NZDF had an obligation to comply with the law of non-international armed conflict and intentional humanitarian law especially with regard to detention issues.

86. Once the SAS were on the ground, I continued to closely monitor the situation to reassure myself that appropriate steps were being taken. I was well aware that as a small force we could not reform Afghan society or stop every abuse. Not could we monitor all detention facilities. Rather, we acted as part of ISAF to improve standards and ensure compliance

with international norms. We were advised by ISAF that the NDS facility at Kabul was closely monitored and the preferred option for detainees.

87. In my view, the government, and myself as Minister, took all the appropriate steps to ensure compliance with our domestic and international legal obligations.