



AFP
AUSTRALIAN FEDERAL POLICE



Australian Government
Office of the Special Investigator

Memorandum of Understanding

between

the Office of the Special Investigator (OSI)
ABN 87 767 208 148

and

Australian Federal Police (AFP)
ABN 17 864 931 143

under Operation Emerald concerning the allegations of war crimes
by Australian Defence Force personnel in Afghanistan from 2005 to
2016

Version:

1.1

OFFICIAL: Sensitive
Legal privilege

1. Parties

- 1.1 This Memorandum of Understanding (**MOU**) is between the following agencies (the Parties):
- a. The Office of the Special Investigator (**OSI**); and
 - b. The Australian Federal Police (**AFP**).

2. Commencement and Duration

- 2.1 This MOU commences on the date it is signed by both Parties or where the Parties do not sign on the same day, the date the last Party signs. The Parties acknowledge the arrangements set out below may commence prior to the date of execution of this MOU.
- 2.2 This MOU will remain in effect until terminated by the Parties in accordance with clause 21.

3. Background

- 3.1 The Inspector-General of the Australian Defence Force Afghanistan (IGADF) Afghanistan Inquiry (Afghanistan Inquiry) was a statutory inquiry tasked with ascertaining whether there was substance to unspecified rumours and allegations of criminal, unlawful or inappropriate conduct, including possible breaches of the Laws of Armed Conflict by or involving the Australian Defence Force (ADF) Special Operations Task Group in Afghanistan between 2005 and 2016. The final report, delivered to the Chief of the Defence Force on 6 November 2020, included a finding of credible information of incidents of unlawful killing and cruel treatment by or at the direction of ADF members.
- 3.2 The Inquiry recommended the Chief of the Defence Force refer 36 matters for criminal investigation.
- 3.3 On 12 November 2020, the Government announced that the OSI would be established to address the potential criminal matters raised by the IGADF Afghanistan Inquiry. The OSI was subsequently established as an executive agency and commenced its operations on 4 January 2021.¹ The OSI is responsible for, among other things, reviewing the findings of the IGADF Afghanistan Inquiry and working with the AFP to investigate the commission of criminal offences under Australian law arising from, or related to, any breaches of the Laws of Armed

¹ The functions of the OSI are set out in the Order to Establish the Office of the Special Investigator as an Executive Agency dated 10 December 2020 and available at <<https://www.legislation.gov.au/Details/C2020G01030>>.

Conflict by ADF members in Afghanistan from 2005 to 2016. This may include allegations beyond the 36 matters referred for criminal investigation in the Inquiry.

4. Status

- 4.1 This MOU establishes the overall framework within which the Parties will work collaboratively in relation to the conduct of Operation Emerald consistent with the functions of the OSI described in clause 3.3 above.
- 4.2 This MOU does not create legally enforceable rights and obligations between the Parties.
- 4.3 This MOU does not affect any of the Parties' legal rights, delegated authorisations or obligations arising under regulation or legislation or from any other source.
- 4.4 This MOU is to be read in conjunction with any other relevant MOU or arrangements in place between or involving either of the Parties, including the arrangements to second State and Territory police officers into the AFP for deployment to Operation Emerald.
- 4.5 This MOU takes precedence in relation to administrative and reporting arrangements regarding the provision of services and funding for Operation Emerald as well as any letters of exchange or subordinate arrangements agreed upon between the Parties.

5. Interpretation

- 5.1 Unless a contrary intention is stated, the acronyms and terms used in this MOU have the following meanings:

AFP Act

Australian Federal Police Act 1979 (Cth).

AFP Appointee

means a deputy commissioner, AFP employee, Special Member or special protective service officer and includes:

- current or former State and Territory police officers who have been appointed as Special Members to the AFP;
- a person engaged under s. 35 of the AFP Act as a consultant or contractor to perform services for the AFP and determined under s. 35(2) of the AFP Act to be an AFP appointee;
- a person engaged overseas under s. 69A of the AFP Act; or
- a person seconded to the AFP under s. 69D of the AFP Act.

For the avoidance of doubt, any OSI Personnel who has been made an AFP Special Member is an AFP Appointee.

s 22(1)(a)(ii)

AFP Governance

means all primary AFP governance instruments and other AFP governance instruments including the following:

- Commissioner's Orders;
- AFP National Guidelines;
- Functional Governance Instruments and
- external agreements.

AFP Information

means any record which is created, received, used or maintained by the AFP regardless of its form, including but not limited to records derived from PROMIS or AFPNet.

AFP Member

means an AFP employee in respect of whom a declaration under s. 40B of the AFP Act is in force.

s 22(1)(a)(ii)

s 22(1)(a)(ii)

Commander Investigations	means the person holding or acting in the position identified in Schedule 1, who has been appointed a Special Member, and who is responsible for duties outlined in clause 9.14.
Department	means the Department of Home Affairs.
Director of Investigations	means the person holding or acting in the position identified in Schedule 1, who has been appointed as a Special Member, and who is responsible for the duties outlined in clause 9.7.
Joint Investigation	means an investigation conducted jointly between the AFP and the OSI into the commission of criminal offences under Australian law arising from or related to any breaches of the Laws of Armed Conflict by members of the Australian Defence Force in Afghanistan from 2005 to 2016. The roles of the Parties in each Joint Investigation is outlined in clause 6.
Legal Proceeding	means any legal proceeding, including criminal prosecution, civil proceedings, coronial investigation or inquiry, disciplinary proceedings, alternative dispute resolution and meditation.
Operation Emerald	means the overarching operational and support arrangements between the AFP and the OSI in which a Joint Investigation is conducted.
OSI	means the Office of Special Investigator, an executive agency established under section 65 of the <i>Public Service Act 1999</i> .

OSI Deployment Manager	means the OSI staff member ² holding or acting in the position identified in Schedule 1, and who is responsible for: <ul style="list-style-type: none"> • managing this MOU; and • establishing and maintaining arrangements within the OSI to facilitate and administer the deployment of AFP Deployees.
OSI Director-General	means the person who has been appointed the head of the OSI agency and is responsible for strategic oversight and leadership of the OSI, and accountable for matters of governance, budget and broader management.
OSI Governance	means, policies, procedures, protocols, guidelines and instructions issued by or applying to the OSI.
OSI Information	means any document or record, regardless of form, that is in the OSI's possession.
OSI Information Systems	means information and communications technology systems to which OSI staff members, among others, have access, provided and administered by the Department of Home Affairs.
OSI Personnel	means an OSI staff member engaged to carry out investigative functions including but not limited to: <ul style="list-style-type: none"> • OSI Special Investigator • Director of Investigations; and • Commander Investigations.
OSI Special Investigator	means the person holding or acting in the position identified in Schedule 1, and who is responsible for the provision of advice and recommendations on investigative strategies and prioritisation.

² OSI staff member is a broader category than OSI Personnel and includes all persons working for the OSI whether working directly or through other means. e.g. engaged on contract, on secondment, on a transfer to the OSI itself.

Parties	means the AFP and the OSI.
PSPF	Australian Government Protective Security Policy Framework.
Special Member	means a current or former State or Territory police officer or any other appropriate person appointed as an AFP special member to assist the AFP in the performance of its functions under s. 40E of the AFP Act.

6. Roles of the Parties

Australian Federal Police

- 6.1 The AFP is a multi-faceted law enforcement agency. The AFP's role is to provide police and law enforcement services as described in s. 8 of the AFP Act including to enforce Commonwealth criminal law, protect national interests from crime in Australia and overseas, and deliver a community policing capability to the Australian Capital Territory through ACT Policing.
- 6.2 The AFP will work with the OSI to conduct Joint Investigations into the commission of criminal offences under Australian law arising from or related to any breaches of the Laws of Armed Conflict by members of the Australian Defence Force in Afghanistan from 2005 to 2016.
- 6.3 The AFP is responsible for operational oversight of Joint Investigations. The AFP's operational functions include responsibility for the use of any statutory powers by AFP Appointees; deployment of the AFP Deployees; issuing directions, procedures or similar to AFP Appointees about information management or information quarantining arrangements in connection with Operation Emerald; and the provision of AFP Support Services.

Office of Special Investigator

- 6.4 The OSI is headed by the OSI Director-General and supported by the OSI Special Investigator. The OSI's role as relevant to this MOU is to work with the AFP to investigate the commission of criminal offences under Australian law arising from, or related to, any breaches of the laws of Armed Conflict by ADF members in Afghanistan from 2005 to 2016, and, where appropriate, develop briefs of evidence for referral to the Commonwealth Director of Public Prosecutions for consideration. The OSI's role also includes reviewing the findings of the IGADF Afghanistan Inquiry. This function will be undertaken with the assistance and on the advice of the separate Special Counsel function within the Australian Government Solicitor.
- 6.5 The OSI is responsible for strategic advice to and resourcing of Joint Investigations. The OSI's operational functions include responsibility for providing advice to the AFP on investigative strategies, prioritisation, and resourcing of Joint Investigations; making recommendations about the triage of potential matters for investigation; issuing instructions to the Special Counsel; reviewing the findings of the IGADF Afghanistan Inquiry; receiving new enquiries concerning matters within the functions

of the OSI; and issuing directions, procedures or similar to OSI staff members about information management or information quarantining arrangements in connection with Operation Emerald.

Department of Home Affairs

6.6 The Parties acknowledge that the Department of Home Affairs (the Department) will provide corporate support functions to the OSI subject to separate arrangements between the OSI and the Department.

7. Arrangements

s 22(1)(a)(ii)

7.3 Further details of the Joint Investigation activities including any coordination, management and investigation arrangements may be agreed upon by the Parties in subsequent letters of exchange.

s 22(1)(a)(ii)

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12. Information management

- 12.1 The Parties acknowledge they both have obligations arising under Commonwealth legislation and policy in relation to the collection, use, retention and disclosure of relevant records.
- 12.2 The Parties will exchange information, relevant to this MOU, subject to the requirements of the *Privacy Act 1988* (Cth), the AFP Act, the *Crimes Act 1914* (Cth), the *Criminal Code Act 1995* (Cth) and any other applicable Commonwealth or State/Territory legislation.
- 12.3 Each Party will ensure any information received from the other Party is handled appropriately in accordance with the security guidelines contained in the PSPF. The Parties will not use or further disclose such information except for the purpose for which it was obtained, or a related purpose, as otherwise required, authorised by law, or otherwise appropriate for the official function of the agency.
- 12.4 Subject to clause 12.1, the Parties will comply with any condition, restrictions or caveat imposed by the other Party in respect to the access, handling or disclosure of information.
- 12.5 The Parties acknowledge that the employees and/or contractors of both Parties are subject to statutory obligations not to record, divulge or communicate information that comes into their possession or knowledge except in the course of their official duties.
- 12.6 Each Party will recognise the security clearances granted to the employees and/or contractors of the other Party and will on request, provide details to the security officers of the other Party. Parties will also ensure that an employee and/or contractor, who has or may be given access to the other Party's data and information (including any recordings) from or in relation to that system, has a current security clearance at the appropriate level.
- 12.7 The OSI agrees to ensure that the AFP Deployees will have access to relevant OSI Information Systems to enable them to perform their duties.
- 12.8 The AFP agrees to provide AFP Deployees and authorised OSI staff members with access to AFPNet, the AFP system which contains and enables access to PROMIS, Investigations Management Solution and the AFP Hub which enables access to the AFP Governance Instrument Framework and the Investigator's Toolkit.
- 12.9 The AFP will provide technical and training assistance needed to access AFPNet.
- 12.10 The Parties acknowledge AFP Deployees and authorised OSI Personnel will only be permitted to access and/or use AFP Information lawfully, in connection with a Joint Investigation.
- 12.11 For the avoidance of doubt, the AFP reserves the right to refuse and/or revoke access to AFPNet to AFP Deployees and/or authorised OSI Personnel in the event of a security incident or non-compliance with relevant legislation or AFP Governance. In

the event of revocation, the AFP will immediately inform the OSI and provide reasons for the revocation.

12.12 Should either Party become aware of a breach of this MOU or a misuse of either AFP or OSI Information, the Party that becomes aware of the breach or misuse will notify the other Party as soon as practicable.

12.13 The Parties agree that in order to comply with the AFP's legislative requirements, any document or record connected to the performance of an AFP Deployee's duties or any OSI Personnel when performing Special Member duties, must be stored on PROMIS or any other AFP information system in accordance with relevant AFP Governance.

12.14 In addition to this clause 12, the Parties must follow the further detailed terms of access to AFPNet and OSI Information Systems as set out in any letter of exchange, and relevant OSI Governance and AFP Governance.

12.15 If a Party becomes aware that information related to Operation Emerald is subject to any civil legal proceedings, subpoena, freedom of information, *Privacy Act 1988*, or prosecution disclosure request, the recipient of the request for information shall immediately notify the other Party. The Parties shall liaise upon the handling of the request and any Legal Proceedings that may emerge.

12.16 It is intended that this clause 12 will survive the termination of this MOU.

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22. Signatures

Signed for on behalf of the Office of the Special Investigator.

s 47E(c)

Chris Moraitis PSM

OSI Director-General

Date: 30 / 6 / 2021

Signed for on behalf of the Australian Federal Police.

s 47E(c)

Reece P Kershaw APM

AFP Commissioner

Date: 30 / 6 / 2021

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Mr James Gaynor, CSC
Inspector-General of the Australian Defence Force
Department of Defence
PO Box 7924
Canberra ACT 2610

Dear Mr Gaynor

I am writing to propose arrangements for substantive communications between the Inspector-General of the Australian Defence Force (IGADF) and the Office of the Special Investigator (OSI) in respect of IGADF Afghanistan Inquiry (Inquiry) information, and to seek your agreement to those arrangements.

Background

As you are aware, the functions of the OSI include to review the findings of the Inquiry and to investigate, jointly with the Australian Federal Police (AFP), the potential criminal matters raised by the Inquiry. The OSI will progress its work under a joint investigation model with the AFP. This joint investigation is known as Operation Emerald.

Operation Emerald investigators will need to consider aspects of the Inquiry Report and information, documents or other things collected or created in relation to the conduct of the Inquiry (collectively, Inquiry-related information¹). That information would be used by Operation Emerald investigators to inform and progress investigations. This may include disclosing Inquiry-related information to other persons and agencies in discharging the functions and exercising the powers of the OSI and AFP in relation to Operation Emerald,² and, where appropriate, preparing briefs of evidence for the Commonwealth Director of Public Prosecutions.

Because some Inquiry-related information was obtained by or connected to the IGADF's use of statutory notice powers (which compel individuals to provide information), there are significant limits on what information Operation Emerald investigators can receive and use. As you know, the IGADF's statutory notice powers are accompanied by statutory protections which make evidence inadmissible in a prosecution if it is evidence of, or derived from, disclosures compelled from an accused. The inappropriate use of information compelled from an accused may also give rise to fair trial concerns under the accusatorial process of criminal justice.

As a result, the OSI and the AFP are taking steps to ensure that certain compelled information, and information derived from it, is not received or used in Operation Emerald investigations because that may undermine those protections, or compromise future prosecutions.

As you know, the OSI is instructing Special Counsel, Mr Tim Begbie QC, and a team of lawyers from the Australian Government Solicitor (the Special Counsel Team) to conduct a quarantined review of the Inquiry

¹ *Inspector-General of the Australian Defence Force Regulation 2016* (Cth) (IGADF Regulation), s 28K.

² Any such disclosures of Inquiry-related information would occur in compliance with the Protective Security Policy Framework and any additional requirements which apply to security classified documents.

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Report and the Inquiry-related information, and advise on the disclosure and use of this information in Operation Emerald investigations. I appreciate the significant assistance you and your staff are giving to the Special Counsel Team.

Proposed communication arrangements between IGADF and OSI

From time to time, direct communications between the OSI on behalf of Operation Emerald and the IGADF will be necessary. Any communications between the IGADF and the OSI or AFP will need to be handled and recorded carefully. Under the joint investigation model, the OSI will lead engagement with the IGADF on behalf of Operation Emerald.

We anticipate the most significant communication will occur when the Special Counsel team has advised on the disclosure of specific Inquiry-related information and, in view of that advice, the OSI and AFP have determined that it is appropriate for investigators to receive and use that information. The OSI will then write to you requesting that you authorise the disclosure of that information to the joint investigation pursuant to s 28L of the IGADF Regulation.

I set out below some proposed arrangements for substantive communications between the IGADF and the OSI. The overarching purpose of the proposed arrangements is to ensure adequate safeguards to prevent the inadvertent disclosure of Inquiry-related information to the OSI and the AFP outside authorised channels.

The proposed arrangements would apply to all joint AFP-OSI investigations conducted as part of Operation Emerald. The proposed arrangements are not intended to have any bearing on arrangements between the IGADF and the AFP in respect of any war crimes or other investigations that the AFP is conducting separate to Operation Emerald.

Against the background matters set out above, I would like to propose for your consideration the following arrangements for substantive communications between the IGADF and the OSI in respect of Inquiry-related information:

s 47E(d)

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I look forward to receiving your response to these proposed arrangements. If the proposed arrangement at point 3 above is agreeable to you, I would be grateful if you could please provide the names of the designated persons at your office who will have responsibility for communication with the OSI on behalf of the IGADF.

s 22(1)(a)(ii)

Finally, I note that it may become necessary to review any agreed arrangements for communications between the OSI, AFP and the IGADF in future, including details of any relevant personnel changes.

I am grateful for your support and consideration of these matters.

Yours sincerely

s 47E(c)

Chris Moraitis PSM
Director-General
Office of the Special Investigator

2 September 2021

CC: Deputy Commissioner Ian McCartney, Australian Federal Police

Attachments

s 22(1)(a)(ii)

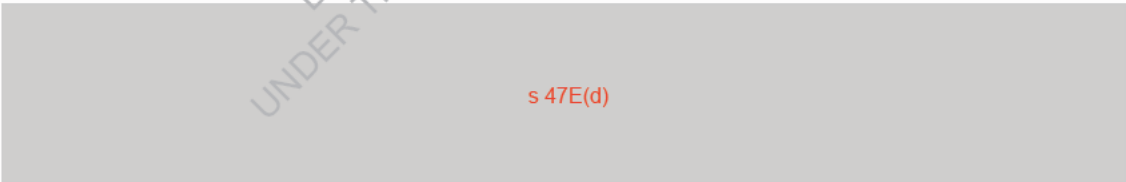
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DFAT Sensitivity Review of Operation Emerald Material

Scope

1. The Office of the Special Investigator (OSI) and the Australian Federal Police (AFP) are undertaking a joint investigation of criminal offences under Australian laws, arising from or related to breaches of the Law of Armed Conflict by ADF members in Afghanistan between 2005 and 2016, known as Operation Emerald.
2. Operation Emerald will, where permitted by law, provide the Department of Foreign Affairs and Trade (DFAT) with copies of material for inclusion in briefs of evidence (BoE) or otherwise in support of court proceedings, for the purpose of DFAT conducting a *sensitivity review* to determine whether:
 - a. the material contains any sensitive 'national security information' in accordance with the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act), and/or
 - b. the material contains information that should be protected by a Public Interest Immunity (PII) or Legal Professional Privilege (LPP) claim

Material to be provided

3. The material will be provided by Operation Emerald to DFAT based on categories of information agreed by DFAT and Operation Emerald, and information identified by Operation Emerald, or other agencies, as being relevant to international relations for the purposes of the sensitivity review.
4. The material provided to DFAT in accordance with this Protocol has been obtained or created for the purpose of Operation Emerald. Except where used in accordance with paragraph 19, the information contained in this material will not be used by DFAT for any purpose other than this sensitivity review, as outlined in paragraphs 2 and 15.
5. 

s 47E(d)
6. Certain categories of material provided to DFAT may also be subject to legislative restrictions or caveats that limit the use and disclosure of this material. DFAT undertakes to comply with any such restrictions or caveats. Any restrictions or caveats will be clearly identified to DFAT when relevant material is provided.

Disclosure material

7. Disclosure material includes material held by Operation Emerald that may be disclosable under the Commonwealth Director of Public Prosecutions' *Statement on Disclosure in Prosecutions Conducted by the Commonwealth* (March 2017), and, if it is disclosable,

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must be made available to the accused in order to ensure that he or she receives a fair trial.

8.

9.

s 47E(d)

Process

10. The material will be provided to DFAT by s 47E(d) or any other mutually-agreed means. The material will be accompanied by a document schedule listing each item.

11.

s 47E(d)

12. Operation Emerald will provide DFAT with reasonable notice, where possible, of the date it intends to provide a tranche of material as part of the sensitivity review. Operation Emerald will advise DFAT of the date by which a sensitivity review of the relevant material is sought. DFAT will give appropriate priority to the task and will communicate with the relevant Operation Emerald contacts if any delays are anticipated.
- a. For routine requests, the sensitivity review is to be completed by DFAT within 2 weeks unless otherwise agreed.
 - b. For urgent requests, the sensitivity review is to be completed by DFAT as soon as possible, and within 5 working days, unless exceptional circumstances apply.
13. DFAT will return the completed document schedule to the relevant contacts and advise the results of the sensitivity review. This will include identifying in the schedule any material which DFAT has determined contains:
- a. national security information, which DFAT requests be covered by any NSI Act orders in effect, to protect the information, and/or
 - b. information that should be protected by, and over which DFAT intends to, make a PII or LPP claim.

14.

s 47E(d)

15.

[Redacted]

s 47E(d)

Storage and handling of material

16. All material will be handled in accordance with its classification, consistent with the Commonwealth's Protective Security Policy Framework (PSPF) and applicable laws (including the *Privacy Act 1988* and the *Criminal Code Act 1995*). DFAT will take all reasonable steps to ensure that appropriate information security and access controls are applied and observed with respect to any Operation Emerald material stored, held or transmitted by DFAT.

17. DFAT will conduct its sensitivity review, including managing any necessary consultation and anything required as a result of the invocation of the NSI Act or a PII claim, in such a way as to protect the confidentiality, integrity and source of the information.

18. Noting the subject matter of these investigations,

s 47E(d)

[Redacted]

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DFAT will ensure material is treated and managed appropriately.

19. DFAT will ensure material is only shared as required to undertake the sensitivity review. In the event DFAT wishes to use information contained in this material for any purpose other than to undertake the sensitivity review, DFAT must consult with Operation Emerald and obtain written approval of the alternative use, prior to the information being shared or used.

20.

[Redacted]

s 47E(d)

Signatures and Authorisation

Version	Date	Endorsed by
1	12 / 3 /2024	<p>[Redacted]</p> <p>s 47E(c)</p> <p>Kieran BUTLER Assistant Director-General, OSI</p>

	15 / 3 / 2024	s 47E(c)	
	8 / 3 / 2024	s 47E(c)	Commander Brett JAMES <i>Commander of Specialist Capabilities and International Operations, AFP</i>
		Natalie MENDELSON <i>A/g General Counsel and Assistant Secretary, DFAT</i>	

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Information Sharing Protocol – DFAT support to OSI and AFP joint investigative activities

1. Definitions

ADF	Australian Defence Force
AFP	Australian Federal Police
Defence	Department of Defence
DFAT	Department of Foreign Affairs and Trade
Operation EMERALD	The AFP/OSI joint investigation into the commission of criminal offences under Australian laws, arising from or related to any breaches of the Laws of Armed Conflict, by members of the ADF in Afghanistan from 2005 to 2016
OSI	Office of the Special Investigator
OSI's activities	As set out in clause 2.1
OSI/AFP personnel	OSI staff members engaged to carry out investigative functions for the purposes of Operation Emerald, who are members or special members of the AFP.
RFI	Request for Information (using a format accepted by DFAT, AFP and OSI).

2. Context and Purpose

- 2.1 The role of the OSI is to work with the AFP under the auspices of Operation EMERALD to investigate the commission of criminal offences under Australian laws, arising from or related to any breaches of the Laws of Armed Conflict, by members of the ADF in Afghanistan from 2005 to 2016.
- 2.2 As part of OSI/AFP joint investigative activities, OSI/AFP personnel may from time to time seek information from DFAT where they reasonably believe that information will assist with an investigation.
- 2.3 DFAT acknowledges the challenging and crucial work being undertaken by OSI/AFP, in ensuring allegations of war crimes are assessed, investigated, and, where allegations are substantiated, a brief of evidence is prepared for the CDPP for a matter to be prosecuted in court. DFAT acknowledges the OSI and AFP's commitment to a fair, impartial and independent process within Australia's robust legal system. DFAT is committed to supporting the joint work of the OSI and AFP.

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- 2.4 The purpose of this Protocol is to set out:
- a. how DFAT information will be handled and managed between DFAT and the OSI/AFP, in support of the OSI and AFP's joint investigative activities;
 - b. a process for OSI/AFP personnel to request or seek access to DFAT information; and
 - c. how the OSI/AFP may use information obtained from DFAT under this Protocol.

3. Security Obligations

- 3.1 DFAT information will be handled in accordance with the Commonwealth's Protective Security Policy Framework (PSPF) (including processes consistent with the PSPF for showing classified documents to witnesses) and applicable laws (including the *Privacy Act 1988* and the *Criminal Code Act 1995*) and OSI/AFP will take all reasonable steps to protect the information from unauthorised use or disclosure. In particular:
- a. OSI/AFP will ensure all staff who access DFAT information for OSI/AFP purposes are appropriately cleared.
 - b. OSI/AFP will ensure that all DFAT information (both electronic and hardcopy) is appropriately handled and stored in a manner agreed by the Chief Information Security Officers (as delegated) for both DFAT and OSI/AFP.
 - c. OSI/AFP acknowledge that DFAT remains responsible for controlling the sanitisation, or reclassification of their information.
- 3.2 Any changes to the security arrangements set out in this clause will require prior consultation with DFAT, including any changes to electronic storage.

4. Request and Use of DFAT Documents

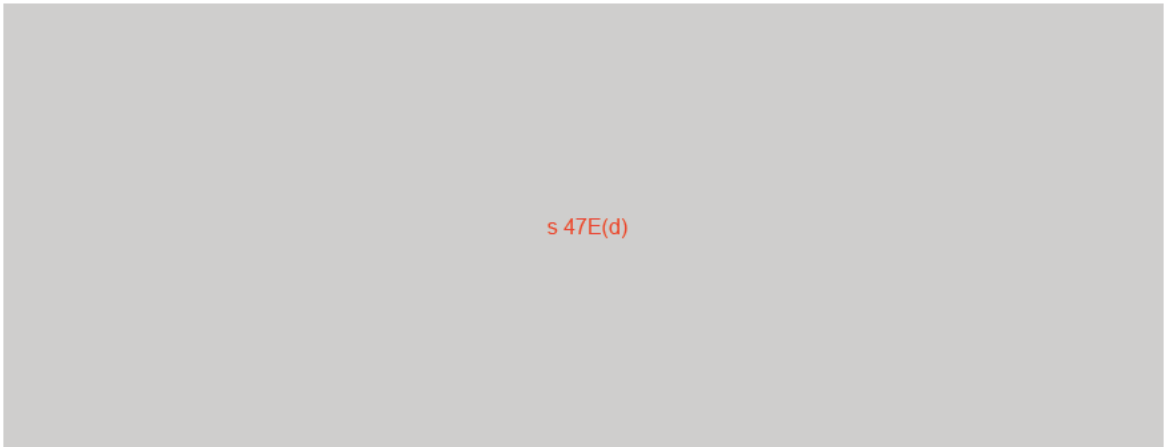
- 4.1 OSI/AFP may issue RFIs to DFAT seeking documents held by DFAT for the purposes of Operation EMERALD investigations.

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- 4.4 DFAT may, acting reasonably, advise OSI/AFP of conditions on the provision of the documents.

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4.7 The parties to this Protocol acknowledge that documents that are received by the AFP/OSI under this Protocol may be used for investigative purposes.

4.8 'Investigative purposes' include, but are not limited to:



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6. Subpoenas, FOI requests etc.

6.1 OSI/AFP will first consult DFAT, in respect of DFAT documents or information, where it:

- a. receives a subpoena, freedom of information request or other legal demand for access to DFAT documents or information provided under clause 4 or 5 of this Protocol; or
- b. intends to disclose documents or information received under this Protocol to any third party (other than a person working for the OSI, AFP, or the CDPP and other than for an 'investigative purpose', as referred to in clause 4.8).

7. Agreement by DFAT, OSI and AFP

- 7.1 This Protocol is agreed to by DFAT, the OSI and AFP. It will commence when signed by all parties and may be terminated by a party providing 30 days written notice to the other two parties (in which case it will cease to have effect upon the expiry of the 30-day period).
- 7.2 This Protocol does not create any enforceable rights or impose any legally binding obligations on DFAT, OSI or AFP.

s 47E(c)

Adam McCARTHY
Chief Legal Officer and
First Assistant Secretary, DFAT

21/12/2022

s 47E(c)

Helen DANIELS
Deputy Director-General, OSI

16/12/2022

s 47E(c)

Ian McCARTNEY
Acting Commissioner, AFP

19/12/2022

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Department of Defence and the Australian Defence Force (Defence)

Australian Federal Police (AFP)

Office of the Special Investigator (OSI)

(collectively, 'the Parties')

**Protocols for Referrals, Information Sharing and Communications in the
Context of Operation Emerald**

As at 21 March 2024

Version 4.0

References

- A. [Inspector-General of the Australian Defence Force Afghanistan Inquiry Report](#) of 10 November 2020
- B. [Order to Establish the Office of the Special Investigator as an Executive Agency](#) of 10 December 2020

s 22(1)(a)(ii)

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Part 1 – Purpose

1.1 The purpose of these Protocols is to formalise cooperative arrangements between Defence, the AFP and the OSI that support the investigation of matters within the scope of the Joint Investigation, and related matters.

1.2 Nothing in these Protocols is intended to have a legal or binding effect or create a legally binding relationship between Defence, the AFP and the OSI.

1.3 Nothing in these Protocols is intended to affect the independence of the AFP's and OSI's performance of their functions or exercise of their statutory powers to the extent relevant.

1.4 These Protocols build upon and formalise arrangements already in place between the Parties. They are to be read in a spirit of cooperation between the Parties and read in conjunction with any other documentation relevant to the relationship between the Parties.

1.5 For the purpose of these Protocols, the Inspector-General of the Australian Defence Force (IGADF) is treated as a separate entity to Defence and is not a party nor subject to the arrangements established under these Protocols. These Protocols will not apply to, or regulate, the flow of Afghanistan Inquiry information from the IGADF to Operation Emerald (the name of the joint OSI-AFP investigation into allegations of criminal offences under Australian law, arising from or related to any breaches of the Law of Armed Conflict, by members of the ADF in Afghanistan from 2005 to 2016). Communication arrangements between the OSI, the AFP and the IGADF are subject to a separate set of arrangements.

Part 2 – Definitions

2.1 Unless stated otherwise, the acronyms and terms used in these Protocols have the following meanings:

“**ADF**” means the Australian Defence Force.

“**Administrative Release**” means the release of documents by the Department of Defence to the OSI under requests for information for the purposes of investigating the commission of criminal offences under Australian law arising from or related to breaches of the Law of Armed Conflict by ADF members in Afghanistan from 2005-2016.

“**Afghanistan Inquiry**” means the inquiry established at the request of the Chief of the Defence Force and conducted by the IGADF to inquire into rumours and allegations of possible breaches of the law of armed conflict by members of the Special Operations Task Group in Afghanistan from 2005 to 2016.

“**Afghanistan Inquiry information**” means any information, document or thing received or obtained by the IGADF in the conduct of the Afghanistan Inquiry, or obtained as a direct or indirect consequence of any such information, document or thing. For the avoidance of doubt, this includes any information, document or thing obtained by another agency, organisation or individual from the IGADF, if that material was initially received or obtained by the IGADF in the conduct of the Afghanistan Inquiry. Afghanistan Inquiry information does not include information in the redacted version of the IGADF Afghanistan Inquiry report published on 19 November 2020.

“**AFP**” means the Australian Federal Police.

“**Defence**” means the combined Department of Defence and the ADF.

“**IGADF**” means the Inspector-General of the Australian Defence Force.

“**Joint Investigation**” means the investigation conducted jointly between the AFP and the OSI which is investigating the commission of alleged criminal offences raised by the Afghanistan Inquiry as well as any criminal matters arising from or related to breaches of the Law of Armed Conflict by members of the ADF in Afghanistan from 2005 to 2016.

“**LOAC or Law of Armed Conflict**” means the international law regulating the conduct of states and combatants engaged in armed hostilities. Note: Law of Armed Conflict is often termed the 'law of war'.¹

¹ [Webpage - Australian Defence Glossary \(mil.au\)](http://www.defence.gov.au/glossary/)

“Operation Emerald” means the operational and support arrangements between the AFP and OSI in which the Joint Investigation is conducted.

“OSI” means the Office of the Special Investigator, an executive agency established under section 65 of the *Public Service Act 1999*.

“Parties” means Defence, the AFP and the OSI.

“Request for Information” or **“RFI”** means any request from the OSI to Defence made on behalf of Operation Emerald for the purposes of the Joint Investigation.

“ROE or Rules of Engagement” means Chief of the Defence Force (CDF) directives issued to the Australian Defence Force, in consultation with the Australian Government, which regulate the use of force and activities connected to the use of force. Note: The document by which the CDF promulgates Rules of Engagement is a Rules of Engagement authorisation.²

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² [Webpage - Australian Defence Glossary \(mil.au\)](http://www.defence.gov.au/glossary/)

Part 3 – Background

The Afghanistan Inquiry

- 3.1 At the request of the Chief of the Defence Force (CDF), in 2016 the Afghanistan Inquiry was established to inquire into rumours and allegations of possible breaches of the Law of Armed Conflict by members of the Special Operations Task Group (SOTG) in Afghanistan over the period 2005 to 2016.
- 3.2 To ensure the independence and integrity of the process the Afghanistan Inquiry was conducted at arm's length from the ADF chain-of-command and the Government. The Afghanistan Inquiry was conducted by Assistant IGADF, Major General the Honourable Paul Brereton AM RFD.
- 3.3 The Inquiry was an administrative inquiry, not a criminal investigation.
- 3.4 CDF received the Afghanistan Inquiry Report (Reference A) from the IGADF on 6 November 2020 and announced the findings on 19 November 2020.
- 3.5 The full report is approximately 3,000 pages in length and consists of three parts:
- a. Part One provides background and context. It explains the genesis of the Afghanistan Inquiry, the conduct of the Afghanistan Inquiry; the Afghanistan Inquiry team's view of the relevant legal issues and framework as well as the rationale applied when making findings and recommendations. Part One also explains the applicable Law of Armed Conflict, the rules of engagement (in general terms) and provides a historical overview of war crimes investigations and inquiries.
 - b. Part Two is the main body of the Afghanistan Inquiry Report. Chapter 2.01 is an introductory chapter and provides commentary on witness credibility. Chapters 2.02-2.58 examine 57 separate incidents and issues of interest, setting out the relevant evidence, and the Afghanistan Inquiry's findings and recommendations in respect of each incident or issue. Each chapter has been drafted so that it can be read as a stand-alone document. Chapter 2.59 deals with discontinued incidents and issues. Chapter 2.60 details a further 10 incidents and issues which remain open, predominately because they came to the attention of the Afghanistan Inquiry team at a relatively late stage in the Afghanistan Inquiry process.
 - c. Part Three addressed systemic issues. In particular the strategic, operational, organisational and cultural issues which may have contributed to the creation of an environment in which this conduct could take place. Part Three also

considers why the mechanisms of the ADF administrative inquiries and other oversight mechanisms failed to detect these behaviours; and the responsibility of commanders.

- 3.6 The Afghanistan Inquiry report has been produced in three different versions:
- a. a full text version classified at the PROTECTED level,
 - b. an identity-protected version where the names of the individuals have been replaced with a code, also classified at the PROTECTED level, and
 - c. a public release version (published 19 November 2020) classified at the OFFICIAL level and available online at <https://afghanistainquiry.defence.gov.au/>.

Establishment of the Office of the Special Investigator

3.7 On 12 November 2020, the Prime Minister announced the creation of the OSI. The OSI was established by executive order of the Governor-General, pursuant to section 65 of the *Public Service Act 1999* (Cth), and commenced operations on 4 January 2021 (Reference B). A copy of the executive order is available online at <https://www.legislation.gov.au/Details/C2020G01039>.

- 3.8 The functions of the OSI include:
- a. review the findings of the Afghanistan Inquiry;
 - b. investigate, jointly with the AFP, the commission of alleged criminal offences under Australian law arising from or related to any breaches of the Law of Armed Conflict by members of the ADF in Afghanistan from 2005 to 2016; and
 - c. develop briefs of evidence in respect of any offences that are established, for referral to the Commonwealth Director of Public Prosecutions (CDPP).

3.9 The OSI and the AFP are working together through a Joint Investigation, known as Operation Emerald, to investigate the commission of alleged criminal offences raised by the Afghanistan Inquiry as well as any criminal matters arising from or related to breaches of the law of armed conflict by members of the ADF in Afghanistan from 2005 to 2016.

3.10 Under the Joint Investigation, the OSI leads engagement with Defence on behalf of Operation Emerald in respect of requests for information, and shares with the AFP any information properly obtained by the OSI from Defence in accordance with the terms of these Protocols.

3.11 These Protocols do not govern or apply to the use of investigative powers, including the process of executing search warrants by Operation Emerald.

Investigators working on Operation Emerald are either members or special members of the AFP. Powers, duties and functions of members or special members of the AFP are subject to the command, control and oversight of the AFP Commissioner and, given the legislative basis for the exercise of those powers, fall outside the scope of these Protocols.

3.12 The arrangements contained in these Protocols do not have any bearing on arrangements between Defence and the AFP in respect of any other investigations arising out of the Afghanistan Inquiry, or otherwise that the AFP is conducting outside of the Operation Emerald construct.

Special Counsel

3.13 The Afghanistan Inquiry obtained information that is subject to legal protections, including statutory use and derivative use immunities within the Defence Act and IGADF Regulation. Those provisions have the effect that, if a person is to be charged with a criminal offence, any of the information or documents they provided to the Afghanistan Inquiry—and any other evidence derived from it—will be inadmissible against them in criminal proceedings. An accused person has other fundamental rights, such as the privilege against self-incrimination and the broader right to silence. Investigators and prosecutors will take care to respect these rights.

3.14 To help protect the integrity of the Joint Investigation and any future prosecutions, the OSI has established a separate Special Counsel function within the Australian Government Solicitor. The Special Counsel team is advising on requirements for handling and using information obtained by the Afghanistan Inquiry, and undertaking a quarantined review of that Inquiry material to ensure investigators only receive information which can lawfully be obtained and used for investigative purposes. Special Counsel review of information received directly from external sources (for example, members of the public) may also be necessary where such information includes or arises from information obtained by the Afghanistan Inquiry.

Department of Defence Support to and liaison with Operation Emerald

3.15 In May 2020 as directed at Reference C, Defence established the Afghanistan Inquiry Task Force to receive and respond to the Afghanistan Inquiry report. In December 2020, the Afghanistan Inquiry Task Force transitioned to the Afghanistan Inquiry Response Task Force (AIRTF) to lead Defence's response to the Afghanistan Inquiry (Reference D).

s 47E(d)

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Approach to Information Management

3.19 Operation Emerald is adopting a precautionary approach to its interactions with Defence to ensure information disclosed by Defence can be used by Operation Emerald. As indicated above, this approach is important to preserve and respect the relevant statutory protections that attach to the statutory powers exercised during the Afghanistan Inquiry, as well as other fundamental rights of an accused person. This includes practical quarantining measures for persons in Defence who have had access to Afghanistan Inquiry Information.

3.20 Annex B provides a list of Defence contacts who have had access to Afghanistan Inquiry Information and some practical measures to support the appropriate sharing of information.

3.21 The sharing of information between Defence and Operation Emerald may also include new allegations and reports of potential criminal conduct arising from or related to breaches of the Law of Armed Conflict by members of the ADF in Afghanistan from 2005 to 2016.

s 47E(d), s 37(2)(b)

s 47E(d), s 37(2)(b)

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Part 4 – General

Application of these Protocols

4.1 The Parties will conduct meetings as often as appropriate to discuss matters relating to these Protocols. Schedule includes:

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Key Contacts for Matters Relating to these Protocols

4.2 The Parties will nominate contact officers within their respective organisations. When a contact officer is nominated, their role and contact details are to be provided. A list of key contacts will be maintained by the Parties as set out in Annex A. The Parties may amend the details of their key contacts at any time by notification in writing.

4.3 Subject to the independence of the AFP and the OSI, any relevant legislation, or investigative sensitivities, the Parties will:

- a. keep each other informed of developments within the scope of these Protocols that may be of interest to each other;
- b. consult with each other on media matters which may impact other Parties; and
- c. consult with each other during the drafting of sections of their annual reports, relevant aspects of respective Senate Estimates briefs or other publications, which are of mutual interest.

Defence Contacts with Access to Afghanistan Inquiry Report Un-Redacted Version

4.4 The persons listed at Annex B work in or with the Department of Defence and have been granted access to Afghanistan Inquiry information up to and including full access to the un-redacted version of the Afghanistan Inquiry report as approved by the Chief of the Defence Force through the AIRTF. Annex B contains tables of current and historic access as well as the current location of documents. Defence will keep the names at Annex B up to date and regularly advise OSI of any changes.

4.5 The persons listed at Annex B should ensure that, in communicating with OSI and the AFP, particularly in respect of any information that may flow through to Operation Emerald, that:

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s 22(1)(a)(ii)

Duration and Review

4.7 **Duration.** These Protocols will operate until the Parties terminate them or agree to their modification.

4.8 **Review.** The Parties may, in consultation with each other, review this covering document or any of the attached Protocols at any time as agreed between them. Such review may include the development of new protocols for the purpose of supporting Operation Emerald. Revised versions of this covering document or the supporting Protocols will come into effect when agreed to by all parties.

4.9 Updates to approved protocols will be issued as a variation to the most recent version (for example, Version 1.1) and can be agreed at the Band 1 / 1 Star level. New protocols will be issued as new versions (for example, Version 3.0) and will be agreed no less than annually at the Band 1 / 1 Star level.

4.10 The Parties will review the appropriateness and effectiveness of these Protocols, and this covering document, annually to coincide with the end of the financial year.

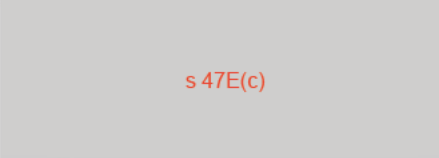
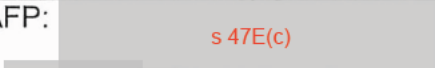

4.11 **Staff Duties.** The desk officer responsible for managing this document is AIRTF SO1 Future Operations, Lieutenant Colonel s 47E(c) contactable on:

- a. Mobile: s 47E(d)
- b. Email: s 47E(d) [@defence.gov.au](mailto: @defence.gov.au)

4.12 From the OSI, the desk officer responsible for managing this document is s 47E(c) OSI Legal and Policy contactable on:

- a. Mobile: s 47E(d)
- b. Email: s 47E(d) [@osi.gov.au](mailto: @osi.gov.au)

4.13 Signatures and Authorisation.

Version	Date	Endorsed by
4.0	26/3/24	OSI:  Kieran Butler, Assistant Director-General, OSI
4.0	26/3/29	AFP:   Brent Jones Commander OSI,
4.0		Defence / AIRTF: catherine.wallis Digitally signed by catherine.wallis Date: 2024.03.21 12:40:33 +11'00'

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Key Contacts for Matters Relating to these Protocols

Office of the Special Investigator, Legal and Policy

Name	Role	Contact Details
Ms Helen Daniels	Deputy Director-General, OSI	s 47E(d) @osi.gov.au
Mr Kieran Butler	Assistant Director-General, Legal & Policy	s 47E(d) @osi.gov.au
s 47E(d)	Director – Legal	s 47E(d) @osi.gov.au
s 47E(d)	Director – Policy	s 47E(d) @osi.gov.au
Detective Sergeant	OSI LO to the Defence	s 47E(d) @osi.gov.au
s 47E(d)		

Australian Federal Police / Office of Special Investigator, Operation Emerald Investigations

Name	Role	Contact Details
Mr Ross Barnett	Director Investigations	s 47E(d) @afp.gov.au
Commander Matthew Stock	Commander Investigations	s 47E(d) afp.gov.au
Commander Brett James	Commander Specialist Capability & International Operations	s 47E(d) @afp.gov.au

Department of Defence

Name	Role	Contact Details
Rear Admiral Brett Wolski, AM, RAN	Head Afghanistan Inquiry Response Task Force	s 47E(d) @defence.gov.au
Air Commodore Catherine Wallis	Director General Afghanistan Inquiry Response Task Force	s 47E(d) @defence.gov.au
s 47E(c)	Director Response Operations	s 47E(d) @defence.gov.au
	Director Information Access and Assurance	s 47E(d) @defence.gov.au
	Director AIRTF Legal	s 47E(d) @defence.gov.au
	Acting Director Ministerial and Executive Communication	s 47E(u) @defence.gov.au
	AIRTF LO to the OSI	s 47E(d) @defence.gov.au

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Current Defence Contacts with Access to Afghanistan Inquiry Report Un-Redacted Version³

Position	Name	Version	Held / Access	Access issue date
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³ The persons listed below, work in or with the Department of Defence and have been granted access to Afghanistan Inquiry information up to and including full access to the un-redacted version of the Afghanistan Inquiry report as approved by the Chief of the Defence Force through the AIRTF. The list provided does not include Major General Paul Brereton or officers from the IGADF who have had any involvement in the Afghanistan Inquiry or any other officers involved in inquiries involving incidents in Afghanistan in the period 2005 to 2016 (for example, Inquiry Officer inquiries). The list is current as at 1400h on Tuesday, 5 March 2024.

Position	Name	Version	Held / Access	Access issue date
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Historic Defence Contacts with Access to Afghanistan Inquiry Report Un-Redacted Version⁴

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⁴ The persons listed above, work or previously in or with the Department of Defence and have been granted access to Afghanistan Inquiry information up to and including full access to the un-redacted version of the Afghanistan Inquiry report as approved by the Chief of the Defence Force through the AIRTF. The list provided does not include Major General Paul Brereton or officers from the IGADF who have had any involvement in the Afghanistan Inquiry or any other officers involved in inquiries involving incidents in Afghanistan in the period 2005 to 2016 (for example, Inquiry Officer inquiries). The list is current as at 1400h on Tuesday, 5 March 2024.

Position	Name	Version	Held / Access	Access issue date	Date removed
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Current Full Report Holding Location

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