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## Opening Statement to Legal and Constitutional Affairs Legislation Committee Additional Estimates, 22 March 2021 Director-General, Office of the Special Investigator

Thank you for the opportunity to make a short opening statement to the Committee today. I'm pleased to be here for the first time as Director-General of the Office of the Special Investigator – the OSI.

### **Remit**

As Committee members may recall, last November the Prime Minister announced the OSI would be established to address potential criminal matters raised in the Inspector-General of the Australian Defence Force's Afghanistan Inquiry Report.

In a joint statement about the IGADF Inquiry on 12 November 2020, the Prime Minister made clear that the Australian Defence Force had served our nation in Afghanistan over a prolonged period, with great sacrifice, while dealing with significant challenges. The Minister for Home Affairs also noted that “[a]s with any allegations of serious and possibly criminal misconduct, these matters need to be assessed, investigated and, where allegations are substantiated, prosecuted in Court”.

The OSI will work closely with the Australian Federal Police to investigate these potential criminal matters and, should they arise, any new allegations of criminal offences under Australian law by members of the ADF in Afghanistan from 2005 to 2016.

Where appropriate, we will develop and refer briefs of evidence to the Commonwealth Director of Public Prosecutions for consideration.

### **Experts/independence**

In my role as Director-General of the OSI I am responsible for strategic oversight and leadership of the organisation, and accountable for matters of governance, budget and broader management.

The Honourable Mark Weinberg AO QC has been appointed to the key role of Special Investigator. Mark is a former judge of the Court of Appeal of the Supreme Court of Victoria and of the Federal Court of Australia, and a former Commonwealth Director of Public Prosecutions. As Special Investigator Mark will oversee the investigations and make decisions on both case prioritisation and the referral of briefs of evidence to the Commonwealth Director of Public Prosecutions.

As Director of Investigations, Ross Barnett APM [who is here today] is responsible for the conduct of the investigations. Ross was most recently Queensland's first Racing Integrity Commissioner. Prior to that he was one of the most distinguished officers in the Queensland Police Service with a career of almost 40 years including considerable criminal investigative and major case experience. He has also served in senior roles at the National Crime Authority, the Australian Crime Commission and the Queensland Crime Commission.

We are well-prepared to thoroughly and independently address the allegations of criminal offences by ADF personnel which fall within our remit.

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### Work so far

Since the OSI started work on the 4<sup>th</sup> of January (11 weeks ago) we have been focussed on establishing the appropriate workforce, structures, systems and protocols which will underpin our independence, and our ability to conduct an impartial and rigorous process.

We have made good progress on engaging experienced investigators, as well as legal, governance and other support staff – we are taking care to find people with the right skills and experience.

In particular, recruitment is currently underway for joint teams of suitably qualified investigators and analysts from the AFP and state and territory police services – I thank the several jurisdictions which have indicated their willingness to provide some of their best to undertake this challenging work.

And it will be challenging work – not least of all due to the legal complexities involved.

As the Committee would be aware, and as clearly identified in the IGADF Afghanistan Inquiry Report, there are important differences between a statutory inquiry and a criminal investigation.

For example, the IGADF Afghanistan Inquiry used statutory powers to compel Special Forces members to provide information to the Inquiry. But if a member is to be charged with criminal offences, that compelled evidence – and any other evidence derived from it – will be inadmissible in the criminal proceedings against the individual who provided it. An accused person also has other fundamental rights which do not apply in an IGADF inquiry, such as the privilege against self-incrimination and the broader right to silence which arises from the protections of the criminal justice system. Investigators and prosecutors must take care to respect these rights.

To ensure the integrity of any potential future prosecutions, I have engaged Tim Begbie QC, from the Australian Government Solicitor, to perform the role of Special Counsel. This role is fundamental to the OSI's future work. As Special Counsel, Mr Begbie will advise on the legal principles that will guide the OSI's access to the Afghanistan Inquiry information.

Mr Begbie and a team of lawyers at the Australian Government Solicitor will undertake a review of the Inquiry Report and evidence obtained by the Inquiry to advise the OSI on the information we should, and should not, receive from the Inquiry. This process will help ensure investigators will only receive information they can lawfully obtain and use in criminal investigations and any future criminal proceedings. Given the size and complexity of the task, the review of this material by the Special Counsel is expected to take some time. As the work of the Special Counsel team progresses, and information is made available to the OSI, it will be able to commence its investigations into specific allegations in the Inquiry Report.

As made clear by the Prime Minister, the OSI will exist as long as is needed to fulfil its functions. However, we are clear-eyed on the need for our work to be undertaken as expeditiously as necessary caution allows. Indeed, given the timeframe of the alleged activities – in many cases a decade ago – we are mindful that the complexity around evidence collection is likely to increase over time.

While we are acutely conscious that we do not want to unnecessarily add to the burden for anyone impacted by the investigations, we must take the time needed to get this right. It is important that the OSI take this precautionary approach to its work. This is so for two equally important reasons:

First, so that potential suspects are afforded all the protections provided by the Australian criminal justice system; and

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Secondly, so we do all we can to ensure the integrity and robustness of our investigation and any future prosecution processes.

### **Stakeholders/engagement**

As appropriate, we will build on the work of the IGADF Afghanistan Inquiry. While we have been established to undertake our role independently, we are conscious that our role is one element of a broader response to the Inquiry Report. This includes the Department of Defence's proposed implementation plan to action the Inspector-General's recommendations and the role of the independent Afghanistan Inquiry Implementation Oversight Panel.

We have established effective working relationships with the AFP, the Department of Defence and the Commonwealth Director of Public Prosecutions, as well as the Department of Foreign Affairs and Trade and the Attorney-General's Department. The Department of Home Affairs has provided for our initial establishment needs and will provide us with ongoing corporate services. However, it will not, in any way, be involved in investigations or governance matters that may impact the OSI's independence.

We will continue to seek and welcome input from a range of stakeholders, including relevant domestic and international organisations.

### **Conclusion**

We have started on this complex path firm in the understanding that our success should not be judged by anything other than the Office of the Special Investigator ensuring a fair, impartial and independent process within Australia's robust legal system.

That is our objective.

Thank you for your indulgence. I'm happy to take any questions you might have.