

Witness Name: Barry Thomas Burton

Statement No.: TWO

Dated: Aug 2010

## THE BAHA MOUSA PUBLIC INQUIRY

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### Witness Statement of Barry Thomas Burton

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1. I, Barry Thomas Burton, of Ministry of Defence, Whitehall, London, WILL SAY as follows:
2. I am the Head of Legal Policy within the Operations Directorate in the Ministry of Defence, which is a Senior Civil Servant and 1\* post. I have held this particular post for 19 months. In my current role I am responsible for central Departmental policy on; inter alia, legal issues, as they affect military operations. Operations directorate is the designated lead for the Department's detention policy on overseas operations.
3. I have been asked to assist in answering 3 of the questions mentioned in the Inquiry's letter to Jeremy Williams of 21 December 2009 namely, questions 1, 6 and 18. Questions 1 and 18 were answered in my first statement to the Inquiry. The Inquiry was informed that an answer to question 6 would require wide consultation and therefore, would be addressed separately. This process is now complete with the three Services, Director of Service Prosecutions, MOD Central Legal Services and the Permanent Joint Headquarters (PJHQ) being consulted.

**Question 6 asks: "Should the use of the 5 techniques be specifically criminalised, or is legislation otherwise required?"**

4. The MOD does not consider that the use of the 5 techniques should be specifically criminalised nor do we consider that legislation is otherwise required.
5. As previously stated in response to question 1, the use of the 5 techniques as an aid to questioning is expressly prohibited in policy and doctrine and hooding is prohibited in all circumstances. We recognise the inquiry's concern that the original prohibition of the 5 techniques was allowed to disappear from doctrine over time and the concern that this may happen again. This has been addressed, however, by clearly stating the prohibition within JDP 1 – 10 [MOD028624], which is used as the basis of all subordinate instructions, planning activity and training. We will further improve on this by ensuring that JDP 1-10 is adopted as the cornerstone for planning of detention operations across all three services.
6. Furthermore, we are able to enforce the prohibition using existing legislation. As part of the current re-draft of JDP 1-10 we will add a requirement that standing orders<sup>1</sup> be put in place for each operation prohibiting use of the 5 techniques as an aid to questioning and prohibiting hooding at all times. Breach of these orders will be dealt with under the existing disciplinary provisions of the Armed Forces Act 2006 (AFA), e.g. s13 (contravention of a standing order) which carries a maximum sentence of 2 years' imprisonment. Standing orders are drafted for each operation to ensure that they account for the specific circumstances involved. This has the added benefit of ensuring that the orders are refreshed and disseminated for each operation. Section 13 is set out in full below:

### ***13 Contravention of standing orders***

*(1) A person subject to service law, or a civilian subject to service discipline, commits an offence if—*

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<sup>1</sup> Defined as an order which continues to be in force over a defined period of time or operation, as opposed to an order to carry out a specific, time limited, task.

- (a) he contravenes a lawful order to which this section applies; and*
- (b) he knows or could reasonably be expected to know of the order.*

*(2) This section applies to standing orders, and other routine orders of a continuing nature, of any of Her Majesty's forces, made for any—*

- (a) part of Her Majesty's forces;*
- (b) area or place; or*
- (c) ship, train or aircraft;*

*but paragraph (a) of this subsection does not apply in relation to a civilian subject to service discipline.*

*(3) A person guilty of an offence under this section is liable to any punishment mentioned in the Table in section 164, but any sentence of imprisonment imposed in respect of the offence must not exceed two years.*

7. A standing order banning the use of the 5 techniques as an aid to questioning on Op HERRICK in Afghanistan will be issued by 31 August 2010 to complement Standard Operating Instruction (SOI) J3-9, which is the definitive source of direction on detention for that theatre and is itself derived from JDP 1-10, which already clearly prohibits their use.
8. In so far as the application of the 5 techniques in any circumstances would constitute a criminal offence, it would also be a criminal offence under section 42 of the AFA. This section is set out as follows:

#### **42 Criminal Conduct**

*(1) A person subject to service law, or a civilian subject to service discipline, commits an offence under this section if he does any act that—*

- (a) is punishable by the law of England and Wales; or*
- (b) if done in England or Wales, would be so punishable.*

*(2) A person may be charged with an offence under this section even if he could on the same facts be charged with a different service offence.*

*(3) A person guilty of an offence under this section is liable to—*

*(a) if the corresponding offence under the law of England and Wales is under that law an offence punishable with imprisonment, any punishment mentioned in the Table in section 164;*

*(b) otherwise, any punishment mentioned in rows 5 to 12 of that Table.*

*(4) Any sentence of imprisonment or fine imposed in respect of an offence under this section must not exceed—*

*(a) if the corresponding offence under the law of England and Wales is a summary offence, the maximum term of imprisonment or fine that could be imposed by a magistrates' court on summary conviction;*

*(b) if that corresponding offence is an indictable offence, the maximum sentence of imprisonment or fine that could be imposed by the Crown Court on conviction on indictment.*

*(5) In subsection (4) "a summary offence" and "an indictable offence" mean, respectively, a summary offence under the law of England and Wales and an indictable offence under that law.*

*(6) In this section and sections 45 to 49 "act" includes an omission and references to the doing of an act are to be read accordingly.*

*(7) In subsections (1) and (8) and sections 45 to 49 "punishable" means punishable with a criminal penalty.*

*(8) In this Act "the corresponding offence under the law of England and Wales", in relation to an offence under this section, means—*

*(a) the act constituting the offence under this section; or*

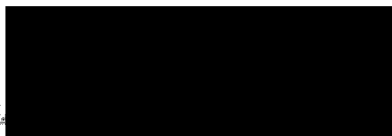
*(b) if that act is not punishable by the law of England and Wales, the equivalent act done in England or Wales.*

9. The criminal law provides a range of relevant offences from assault to torture, depending on the circumstances. The offences are wide enough to cover, not only physical attacks, but also the infliction of psychological harm and causing apprehension of unlawful violence. Criminal law is periodically considered by Government to reflect any new judicial interpretation. Given its ability and decision (referred to above) to make a comprehensive prohibition in relation to interrogations through its own rules and orders for the armed forces, the MoD's current view is that the balance of advantage between legislating and not legislating specifically as to the five techniques is that it is better to allow the courts to continue to develop the offences under the general law in response to different and new types of misconduct than to create new criminal offences or to try to define comprehensively what comes within existing offences such as assault.

**Statement of Truth**

I believe that the facts stated in this witness statement are true.

Signed

A black rectangular box redacting the signature of the witness.

Dated

5. 10. 2010

**Documents referred to in the Second Witness Statement of BARRY THOMAS BURTON**

<b>Paragraph #</b>	<b>URN</b>	<b>Title</b>
<b>5</b>	MOD028624	Joint Doctrine Publication 1-10 (JDP-1.10) Prisoners of War, Internees and Detainees (April 2006)