

1 NOVEMBER 2018



**He Uiuinga i a
Inquiry into
OPERATION BURNHAM**



OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

Memorandum of Understanding

Between

**Inquiry into Operation Burnham
(the “Inquiry”)**

and

**Inspector-General of Intelligence and Security
(the “IGIS”)**

This MoU sets the terms and understanding for the necessary cooperation between the Inquiry and the IGIS concerning their respective inquiries, which are detailed below.

Background

1. Operation Burnham was a military operation conducted in August 2010 in Afghanistan in which the New Zealand Special Air Service (NZSAS) participated as part of the International Security Assistance Force.
2. In response to a 2017 publication accusing the New Zealand Defence Force (NZDF) and the NZSAS of wrongdoing during Operation Burnham, the Attorney-General announced in April 2018 that an inquiry would be held. The Inquiry, comprising Sir Terence Arnold QC (Chair) and Sir Geoffrey Palmer QC, was established under s 6(3) of the Inquiries Act 2013 and its Terms of Reference were gazetted in April 2018. The Inquiry aims to assess the conduct of the NZDF with respect to Operation Burnham and related matters.

3. In March 2018, the IGIS advised the Directors-General of the New Zealand Security Intelligence Service (NZSIS) and Government Communications Security Bureau (GCSB) that she was commencing an inquiry, pursuant to the Intelligence and Security Act 2017, into the roles of the NZSIS and GCSB in relation to specific events in Afghanistan from 2009-2013, including Operation Burnham (the "IGIS Afghanistan Inquiry"). The IGIS published terms of reference for the IGIS Afghanistan Inquiry in June 2018.
4. The Inquiry and the IGIS both have a mandate to, and must, act independently, and have the necessary statutory powers to carry out their respective inquiries. Nevertheless, some issues are common to both Inquiries and it is in the public interest that the Inquiry and the IGIS cooperate so as to ensure both Inquiries are as thorough and accurate as possible, and to avoid unnecessary duplication of efforts and resources.
5. The public sector agencies directly affected by the two Inquiries, the NZDF, the Department of the Prime Minister and Cabinet, the Ministry of Foreign Affairs and Trade, the NZSIS and the GCSB, have all committed to full cooperation with the relevant Inquiries.

Purpose

6. The Inquiry and the IGIS Afghanistan Inquiry inevitably overlap on some topics, notwithstanding that the former is focussed on the actions and knowledge of the NZDF and the latter on the actions and knowledge of the NZSIS and GCSB.
7. Accordingly, this MoU is designed to facilitate the thorough, expeditious and efficient progress of the Inquiry and the IGIS Afghanistan Inquiry while maintaining the strict independence of each. It is intended to assist in avoiding duplication of effort, while ensuring that no important aspects of Operation Burnham and related matters are left unexamined. The MoU addresses key areas of cooperation between the Inquiry and the IGIS and is intended to provide a formal yet flexible avenue for engagement.
8. The Inquiry and the IGIS want to engage in particular on the following matters:
 - a. Access to relevant classified information, consistently with all the requirements related to the handling of classified information.
 - b. Information and evidence from witnesses (which includes interviewees) that is relevant to both Inquiries.
 - c. The possibility of joint briefings on topics relevant to both Inquiries.

In addition, other matters requiring discussion between the Inquiry and the IGIS may arise in the course of the Inquiries.

9. The IGIS has a statutory duty to conduct the IGIS Afghanistan Inquiry in private (Intelligence and Security Act, s 176(1)). The Inquiry recognises that it should not take any action which would run counter to, or undermine, that statutory requirement.
10. This MoU also sets out an agreed understanding in relation to the receipt of confidential, including classified, material and information provided by witnesses to either inquiry.

Meetings and discussions

11. At any time, with the approval of a Member of the Inquiry and the IGIS, the Inquiry and the IGIS can discuss matters of procedure and provide assistance to one another with respect to best practice in the conduct of inquiries.
12. The Inquiry and the IGIS will hold regular meetings ("scheduled meetings") to discuss matters of relevance to both Inquiries and will update one another on the general progress of their respective work. The Inquiry and the IGIS will hold these meetings at least monthly, but may have more frequent meetings if required.
13. To protect the integrity of each process and of sensitive information, bilateral conversations between the Inquiry and the IGIS in relation to classified material or to the evidence of potential witnesses will only occur at a scheduled meeting in an appropriate facility.
14. Only individuals holding the requisite security clearances and required to attend by a Member of the Inquiry or the IGIS will be present at any scheduled meeting.
15. At scheduled meetings, the Inquiry Members and the IGIS may discuss:
 - a. Any issue relevant to the disclosure of classified information by the NZDF, NZSIS, GCSB or any other agency or person to the Inquiry or the IGIS Afghanistan Inquiry. This includes, but is not limited to, the parameters for searches in holdings and systems, the access to relevant hard copy or electronic documents, as well as the access to relevant persons for the purposes of interviews.
 - b. Any issue relating to information provided or to be provided by witnesses to one inquiry that is relevant to the other inquiry.
 - c. Because the Inquiries may require information briefings for the purpose of acquiring specialised knowledge in any field relevant to their respective terms of reference, the options for joint briefings on any topic of common interest to both inquiries.
 - d. Any other matter relating to the Inquiries, including whether there are additional steps that the Inquiries should take to liaise and cooperate.

Sharing of information from documents, witnesses, and findings

16. The Inquiry and the IGIS may, at a scheduled meeting, bring to one another's attention the existence of specific documents which are considered relevant to the terms of reference of the Inquiry or the IGIS Afghanistan Inquiry. Such a document may be described and discussed to such an extent as is necessary for the other party to assess its need to review the document.
17. The Inquiry and the IGIS shall not, at any time, hand over a classified document obtained from the NZDF, NZSIS or GCSB directly to one another. When either the Inquiry or the IGIS seeks to obtain a document which has not yet been disclosed to them by the holder of that document, the proper approach is for the Inquiry or the IGIS to obtain it directly from the relevant agency.
18. The Inquiry and the IGIS, at a scheduled meeting, may also bring to one another's attention the existence of any potential witness whose evidence is considered relevant to the terms of reference of the Inquiry or the IGIS Afghanistan Inquiry as the case may be. The person's evidence may be described and discussed to such an extent as is necessary for the other party to assess the need to interview or summons that person. This may include the sharing of "will-say" briefs, interview transcripts, interview recordings or summaries of evidence, as applicable, but only with the consent of the person concerned and subject to any requirements or commitments made as to confidentiality.
19. When either the Inquiry or the IGIS seeks to obtain evidence from a person about whom they were alerted pursuant to paragraph 18, the Inquiry or the IGIS will conduct their own interview or examination of that person, which may include asking the person to confirm on oath or affirmation the evidence previously given to the other inquiry. It is accepted that each inquiry must have the ability to structure its interviews as required by the specific circumstances and in accordance with its independent powers to compel and receive evidence and to protect witnesses.
20. The Inquiry and the IGIS may share and discuss their preliminary findings and recommendations at any scheduled meeting.
21. The Inquiry and the IGIS may share and discuss their draft final reports at any scheduled meeting.

Procedure in relation to protected disclosures

22. The Inquiry and the IGIS acknowledge each other's independent power to compel and receive evidence and documents of a classified nature and corresponding

1 NOVEMBER 2018

powers to protect the identity of their respective witnesses and the confidentiality of their evidence.

23. It is also acknowledged that, pursuant to the Protected Disclosures Act 2000, the IGIS is the “appropriate authority” in New Zealand for receiving protected disclosures relating to classified information or the activities of the intelligence and security agencies. The IGIS also has a statutory role in providing guidance to any person considering making a protected disclosure in relation to such matters. The statutory protections and immunities contained in the Protected Disclosures Act then apply.

24. Should the IGIS be approached by any individual in relation to a protected disclosure determined by the IGIS to be relevant to the Inquiry, and subject to consent from that individual, the IGIS and the Inquiry will discuss, at the earliest scheduled meeting, how to provide the Inquiry with the protected disclosure information. This will be done in the manner that best ensures that the Inquiry is able to use its statutory powers to provide such individuals with all the appropriate protections to which they are entitled independently of the protected disclosures regime.

Recording

25. Any agreements between the Inquiry and the IGIS on matters of substance to the Inquiries will be recorded in writing.

Duration

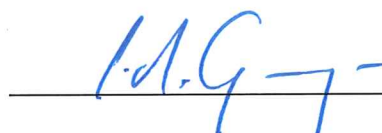
26. This MoU may be modified by mutual consent of the signatories at any time. It shall become effective upon signature and will remain in effect until terminated by mutual consent.

1 NOVEMBER 2018



Date: 16 Nov 2018

For the Inquiry:
Sir Terence Arnold, Chair
Inquiry into Operation Burnham



Date: 16/11/18

For the IGIS:
Cheryl Gwyn
Inspector-General of Intelligence and Security