

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER

A GOVERNMENT INQUIRY INTO OPERATION
BURNHAM AND RELATED MATTERS

Brief of Evidence of Peter Te Aroha Emile Kelly

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1. I am Major General (Retired) Peter Te Aroha Emile Kelly. I am the Chief Executive Officer of the Upper Hutt City Council.
2. I enlisted in the New Zealand Army in 1985 and graduated into the Royal New Zealand Infantry Regiment. I served in the 1st New Zealand Special Air Service Regiment (NZSAS) between 1990 and 2000, and as Commanding Officer of the NZSAS between 2004 and 2006. In my time at the NZSAS, I was deployed to Kuwait (1998), East Timor (1999), and Afghanistan (2002 and 2005).
3. I have held a number of staff appointments at the New Zealand Defence Force (NZDF), including Director of Special Operations (DSO) between 2009 and 2011. I represented the NZDF as the Military Attaché to the United States. Before leaving the NZDF in 2018, I was Deputy Chief of Army and, subsequently, Chief of Army.
4. I have a Bachelor of Administrative Leadership from the University of New England, Australia (2003); a Masters in Management and Defence Studies from the University of Canberra, Australia (2011); and a Masters in Art in International Security and Strategy from King's College, London (2012).

Basis for briefings to the CDF and to the Minister - August to December 2010

5. I was the DSO, based in Wellington, during the planning and execution of, and in the months following, Operation Burnham. In this role I was responsible for the NZSAS, and their provision of special forces capabilities to the NZDF, and for keeping the Chief of Defence Force (CDF) informed on the activities and operations of the NZSAS. I also assisted the CDF in drafting, along with staff from the Assistant Chief Strategic Commitments and Intelligence Branch, the Notes to the Minister of Defence (Minister), the Hon. Dr Wayne Mapp in 2010.
6. After Operation Burnham (the Operation) was conducted in the early hours of 22 August 2010, I received daily email updates from Rian McKinstry, who was the Senior National Officer (SNO) at the time. We also spoke regularly on a secure telephone line.
7. These communications between me and Rian, and later between me and his successor, Chris Parsons, formed the basis of my briefings to the CDF. Those briefings were sometimes provided in written form, and presented by way of a projected slideshow but, more often than not, the briefings I provided to the CDF were verbal briefings at our weekly meeting in the CDF's office.

8. The information derived from the communications with Rian McKinstry and Chris Parsons also served as the basis of the CDF's briefings to the Minister. The CDF met weekly with the Minister to keep him informed about NZDF business, including NZSAS matters. Additionally, when sought, the CDF provided written Notes to the Minister. As I have already said, I assisted in drafting those Notes.
9. Within hours of the 22 August 2010 Operation, Rian sent me a copy of the storyboard and an Operation Summary for the Operation. I refer to the Bundle, at pp 1-9, which is an email from Rian to me, sent on 23 August 2010 at 1:53am (with attachments). The Operation Summary indicated that some insurgents had been engaged; that one member of the NZSAS had sustained an injury; and that there were no civilian casualties.
10. At the same time, I received a copy of the ISAF press release of 23 August 2010, which is included in the Bundle at p 13. This press release confirmed that insurgents had been killed and that "no civilians were injured or killed during this operation".
11. You will see in my email of 23 August 2010 at 8:42am, which is in the Bundle at p 11, that I wrote to Rian asking if he could try to delay the ISAF press release so as to enable the Prime Minister to make a statement first. In that email I asked Rian "Has any TB media come out about the incident at this time?"
12. I am referring here to "information operations" conducted by the Taliban; the Taliban were known for disseminating exaggerated or false reports about civilian casualties, and about damage to property, with a view to weakening the local people's support and trust in the coalition forces.
13. Some hours later, in an email of 23 August 2010 at 10:20pm, which is in the Bundle (with attachment) at pp 15-17, Rian relayed to me that allegations had surfaced that 20 civilians had been killed and 20 houses burnt down during the Operation. Rian went on to say, in that email, that reporting of possible non-combatant casualties is likely to contradict reporting that all those engaged were insurgents, and that establishing the correct outcomes was his highest priority.
14. By email of 25 August 2010, at 5:33am, which is in the Bundle at p 19, Rian provided an update about the allegations of civilian casualties. In this email he explained, amongst other things that ISAF had initiated an investigation into reports of civilian casualties; and that he, the Ground Force Commander, and the Joint Tactical Air Controller had attended a VTC meeting with the ISAF investigation team.
15. All of this information was conveyed to the Minister in CDF's Note to the Minister of 25 August 2010. I refer to the Bundle at pp 23-26.

16. On 26 August 2010, at 11:27pm, Rian provided another detailed update. I refer to the Bundle at pp 31-38. Rian advised that it was likely that if civilian casualties had occurred, this would likely have been as a result of a weapons problem rather than incorrect application of force.

17. I refer now to the Bundle, at p 43. This is an email of 30 August 2010, at 6:59am, from Rian in which he advises that:

The Incident Assessment Team has produced a report on this Op ... on the issue of CIVCAS (civilian casualty) claims. The report has found that there is no case to answer for TF81 [Task Force 81] here. One of the AH64s had a gun that was not firing true and if any CIVCAS has occurred it is here that any blame will probably lie.

18. In that same email chain, I respond to Rian (see p 41 of the Bundle):

I will brief these updates tomorrow at the CDF brief. I will have to draft another note to Min Def informing him of the IAT work and outcome, but will wait for CDF direction as to whether he wishes to wait for the final report or he may require an interim note drafted.

19. As foreshadowed in the response to Rian, the following day I provided a briefing to the CDF in which I relayed these updates. I refer to the Bundle, at pp 45-47. This is an extract from the briefing to the CDF. The relevant information is set out under the heading "CIVCAS INVESTIGATION UPDATE":

- The Incident Assessment Team has produced a report on this Op
- The report has found that there is no case to answer for TF81
- One of the AH64s had a gun that was not firing true and if any CIVCAS has occurred this is most likely the cause
- Despite the public claims, no CIVCAS have yet been seen or produced and the two claimed females in Hospital have now turned out to be Fighting Aged Males with probable links to INS
- This type of CIVCAS claim is not new and is an INS strategy to undermine ISAF operations.

20. On 31 August 2010, at 8:40am, I received an email with a copy of the ISAF news release of 29 August 2010. This is in the Bundle at p 53. The ISAF news release advised:

In response to Baghlan provincial governor's concerns about civilian casualties, a joint assessment team composed of representatives from the ministries of interior and defense, and International Security Assistance Force officials, conducted a full assessment of an operation on Aug. 22 in Talah wa Barfak district, Baghlan province.

The team determined that several rounds from coalition helicopters fell short, missing the intended target and instead striking two buildings, which may have resulted in civilian casualties.

21. On the back of that, I asked Rian by email of 31 August 2010, at 1:05pm (which is in the Bundle at p 49) whether he could get a copy of ISAF's findings "sooner rather than later" so that "we can report back to the PM [Prime Minister], MFA [Minister of Foreign Affairs] and MINDEF [Minister of Defence]". I also noted, in that email, that the "CDF updated them last night ... and is up to date".
22. On 2 September 2010, at 8:17am, I emailed Rian to request the ISAF report again, noting that "there is a degree of urgency around this" as it needs to be sent "across the road to the PM, MFA and MinDef". This email is in the Bundle at p 55.
23. I was briefing the CDF and he, in turn, was briefing the Prime Minister and Minister of Defence as promptly and comprehensively as possible, on the basis of all information received.
24. On 6 September 2010 at 1:32am, Rian forwarded the latest correspondence he had received on the Operation. I refer to the Bundle at p 57-60. Attached to Rian's email is a chain of emails from ISAF, dated 3 September 2010, the last of which states (at p 59):

An official update on the CIVCAS allegation against TF81. LEGAD has confirmed that [blank] has been briefed on the IAT findings and agrees that TF81 have no case to answer. It appears that the air spt [support] aspect of that op in RC(N) [Regional Command (North)] is part of an ongoing investigation.

25. After reading this email, and seeing the phrase "ongoing investigation", I assumed that the IAT investigation was still in progress, at least in relation to the actions of the coalition air support.
26. It was on that basis that, on the following day, the brief to the CDF (which is in the Bundle at pp 61-75), under the heading "Other Issues" (at p 73), says:

ISAF Initial Assessment Team (IAT) report still in progress.

- ISAF LEGAD [legal advisor] assigned to IAT has advised that COM IJC [Commander IJC] has been briefed by the IAT and agrees that TF 81 have 'no case to answer'.
- COMISAF [Commander ISAF] has been briefed on the progress of report.
- Investigation into RW CAS [rotary wing casualties] is ongoing.

27. I never saw an ISAF media release of 30 August 2010 and, therefore, did not know that the "ongoing investigation" into the coalition air support's actions - referenced in the ISAF email exchange - was, in fact, a new investigation.

28. On 8 September 2010, at 7.12am, I received an email from Chris Parsons. I refer to the Bundle at p 77. He had just taken over from Rian McKinstry as the NZ SNO in Afghanistan. The email read:

Today I have sighted the Accident Investigation Team's (AIT) conclusion into the claims of civ cas [civilian casualties] in BAGLAN. IJC wasn't willing to release the report to us, so I can not fwd a copy. However, it **categorically clears both gnd [ground] and air c/s [call signs] of any allegations.** It states that having reviewed the evidence there is no way that civ cas could have occurred. We already knew we were without fault, but the AWT have now also been cleared which is good news.

You may recall it was claimed that two females were injured and in hospital. When the AIT asked to see these persons, the district governor admitted that they were in fact military aged males.

The other alleged civ cas were reputed to be the 'sisters' of KALTA (B1) and Nematullah (B2) ... the usage of 'sister' may have in fact been INS veiled speech to describe B1 and B2.

29. In my mind, Chris Parsons' email of 8 September 2010 signified two things: first, that ISAF's "ongoing investigation" had now come to an end and, second, that the report had concluded that there was no way that civilian casualties could have occurred. Accordingly, I regarded this information as updating and superseding earlier information that had been conveyed by Rian.

30. Although I cannot remember specifically, I believe - for two separate reasons - that I must have briefed the CDF verbally about Chris Parsons' email. The first reason is that it was such a significant development that I would not have waited until our next weekly meeting.

31. The second reason is that, by the time of the CDF's next written briefing, on 15 September 2010, which is in the Bundle at pp 83-85, the issue of civilian casualties had fallen off the radar. The only explanation for this is that we had all understood, by then, that the allegations of civilian casualties had been investigated and found not to have any substance.

32. On 23 September 2010, at 4:09pm, I sent an email to the Minister's Military Secretary, attaching the ISAF press release of 29 August 2010. I refer to the Bundle at pp 87-88. In that email, I note:

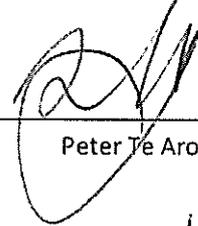
This [ISAF press release of 29 August 2010] was the last I saw from ISAF on this. I am not aware of any other releases since.

It does note that the helicopter gun was slightly off, but we now know that no casualties were caused as a result.

I am not sure how ISAF put the record straight further to what they have said here, where they state that casualties may have occurred, but we now know that none did.

33. This reflected my understanding of the situation at the time; while I was aware that the ISAF press release accepted the possibility of civilian casualties, I understood from Chris Parsons' email that the final report had in fact concluded that there was no way civilian casualties could have occurred.
34. I wondered whether, in the spirit of winning the hearts and minds of the local people (which was one of ISAF's objectives), ISAF had - in the press release - softened its actual conclusion. In other words, it had found that civilian casualties had not occurred but was prepared to accept publicly the possibility of casualties so as to appease the local population. In the same vein, ISAF would sometimes pay compensation to villagers in the absence of proof of harm, as a gesture of goodwill.
35. The information contained in Chris Parsons' email formed the basis for the advice that I drafted from the CDF to the Minister, contained at paragraph [7] of the 10 December 2010 Note (which is in the Bundle at pp 163-166). Namely, that the ISAF assessment team concluded that "having reviewed the evidence there is no way that civilian casualties could have occurred". The text in quotation marks comes from Chris Parsons' email rather than from the IAT report itself. I can see now that the way this is expressed in the Note makes it look like a quote from the IAT report.
36. As Rian McKinstry reflected in his email of 23 August 2010, at p 15 in the Bundle, establishing the outcome was our highest priority. It was essential for us that we were able to provide the most accurate information to the Minister and, as a consequence, to the public.
37. I did not see the IAT report at the time and did not know anything about its terms, beyond what was expressed in Chris Parsons' email of 8 September 2010 (which is in the Bundle at p 77), until it was shown to me in preparation for this hearing. I did not

appreciate that the content Chris was permitted to see from the IAT report reflected only the conclusions as they related to the New Zealand ground forces, and not the conclusions as they related to the Operation as a whole.



Peter Te Aroha Emile Kelly

15/9/19

Date