UNDER **THE INQUIRIES ACT 2013**

IN THE MATTER OF **A GOVERNMENT INQUIRY INTO OPERATION BURNHAM AND RELATED MATTERS**

Date of Minute: 14 September 2018

MINUTE NO 4 OF INQUIRY

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Introduction

[1] In Minute No 3, the Inquiry set out its preliminary views on its powers in relation to classified information and sought submissions on those views. The Inquiry has received submissions from the core participants;[1] from the Department of Prime Minister and Cabinet (DPMC) on behalf of itself, the Government Communications and Security Bureau (GCSB) and the New Zealand Security and Intelligence Service (NZSIS); and from the Ministry of Foreign Affairs and Trade (MFAT). The Inquiry is grateful for the submissions and has found them helpful.

[2] In determining what steps to take now, the Inquiry notes two points from the submissions:

(a) First, DPMC and the security agencies, MFAT and the New Zealand Defence Force (NZDF) take the view that they will need to know precisely how the Inquiry proposes to deal with classified material before any such material will be made available to the Inquiry.

(b) Second, in addition to addressing the Inquiry's powers in relation to classified information, counsel for the Afghan villagers and for Mr Stephenson have made submissions on the general procedure that the Inquiry should adopt. These are supported by Mr Hager. Their essential proposition is that the Inquiry should adopt a traditional adversarial process to the extent possible. As counsel for Mr Stephenson summarised it:

> … a more traditional, adversarial, process is appropriate in the circumstances, in which the Villagers, Mr Hager and Mr Stephenson act as the notional plaintiffs, including because it is likely to be the most effective way to test evidence produced by [NZDF].

NZDF indicated at an early stage that it supports an inquisitorial-style, investigative approach but has not developed its position in submissions as that issue was not something that the Inquiry intended to address until after it had determined its powers in relation to classified information.

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[1] The core participants are the New Zealand Defence Force; the authors of the book *Hit & Run*, Messrs Hager and Stephenson; and certain Afghan villagers.

[3] Against this background, we consider that we should set out in this Minute:

(a) how we intend to deal with classified/confidential information in light of the submissions received; and

(b) our current views about the procedure for the conduct of the Inquiry.

In addition, we will address the issue of the allegations which are the subject of the Inquiry. We will then ask for any further written submissions that anyone wishes to make. If any party seeks an oral hearing on the issues dealt with in the Minute, we will hold one, at which all issues will be open for legal argument and discussion.

Summary

[4] We begin with a brief summary of our views.

Process for handling classified information

[5] The Inquiry's process for dealing with classified information will be based on two fundamental principles:

(a) While such material remains classified, the Inquiry will handle it in accordance with the Government's Protective Security Requirements and will not make it available (whether directly or indirectly) to anyone other than those assisting the Inquiry who hold the appropriate security clearance (unless, of course, the originator agrees to disclosure).

(b) The Inquiry has the power, by virtue of s 27 of the Inquiries Act 2013 and s 70 of the Evidence Act 2006, to assess classification claims in relation to particular information.[2] We will not agree to any process or requirement that has the effect of limiting our ability to exercise our statutory power. To assist with the assessment of classification claims, the Inquiry has engaged a

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[2] As we note below, the applicable tests differ as between material controlled by New Zealand and material controlled by foreign governments or international organisations.

barrister, Mr Ben Keith, who is a former Deputy Inspector-General of Security and Intelligence.

Inquiry process overall

[6] We think it wrong to focus simply on two competing models of inquiry methodology – inquisitorial or adversarial. The choice is not a binary one. A third option, a mixed or hybrid model is also available. Section 14 of the Inquiries Act gives the Inquiry a wide discretion as to the procedure it will adopt and s 15 sets out the factors that the Inquiry must consider when deciding whether to hold public hearings. Accordingly, there are two interrelated questions – what type of process should the Inquiry adopt? How much of the Inquiry's work can be carried out in public sessions? It will be necessary that we retain some flexibility in order to deal with circumstances that are as yet unknown.

[7] Our current view is that the Inquiry should adopt an essentially inquisitorial or investigative approach, but could incorporate elements of a traditional adversarial-style approach where appropriate. We develop the reasons for this below, but note at this stage that there are two considerations that point powerfully to an inquisitorial and substantially non-public process:

(a) First, some of those who wish to give evidence are vulnerable in some way and/or will seek confidentiality in order to give evidence. For example, certain of the Afghan villagers have already sought orders protecting their identities. Some of those involved in intelligence gathering or military activities in relation to Afghanistan may well be willing to provide information to the Inquiry only on a confidential basis. In this connection, the Inquiry notes that it has already been approached by people who say they have relevant information, but who want assurances of confidentiality before they are prepared to speak to us or give evidence. To the extent that such people are "whistle blowers", requests for confidentiality are not surprising. In this particular Inquiry, our current view is that a non-public evidence-gathering process is likely to enhance our ability to get at the truth.

(b) Second, most of the documentary material relevant to the Inquiry is presently classified. Even if some or most of it is ultimately declassified, there will inevitably be significant relevant material that will remain classified, some of which will be the information of foreign governments or international agencies. As we explain below, the material that remains classified must be dealt with in a non-public process.

If we adopt an essentially inquisitorial approach to the gathering of evidence as we presently propose, we would treat all those who have information to give the Inquiry as the Inquiry's witnesses, rather than the witnesses of any particular participant, and the process for taking evidence would reflect this.

[8] However, we accept the need to hold public hearings where possible, to preserve public confidence in the Inquiry. We think, for example, that the opening and closing statements of core participants could be heard in public, as could submissions on legal issues. It may also be possible to have public hearings on particular technical or similar issues. And there may be other mechanisms through which we can keep the public informed. For example, we intend to publish the Inquiry's Minutes and Rulings on the Inquiry's website. We also see possible means to support core participants' engagement where material is not available to some or all of them. For example, it may be possible to provide summaries of classified material and opportunities for participants to suggest areas of inquiry or specific questions to be put to witnesses. Transcripts of evidence given by witnesses who do not seek confidentiality and are not dealing with classified information could be made available to core-participants, subject to non-publication orders.

[9] We emphasise that we have not yet reached a final view on the question of the procedure for the conduct of the Inquiry and that we intend to provide an opportunity for further submissions on that topic.

Allegations

[10] We said at the outset of the Inquiry that, because our overall purpose is to inquire into the allegations of wrongdoing by NZDF in connection with Operation Burnham and related matters, we needed to have the allegations clearly articulated. We discuss this below, and seek comment on the draft allegations prepared by counsel assisting.

[11] We note that NZDF has published a refutation of specific allegations made in *Hit & Run*. We consider that it would be helpful, both to the Inquiry and to the general public, if NZDF was able to prepare an unreferenced narrative account of the events at issue as it sees them that could be made publicly available.

[12] We now explain our views on these matters, starting with the Inquiry's approach to classified material.

Procedure for dealing with classified information

[13] We begin by giving a brief description of the classified information at issue as we presently understand it, before briefly describing the stances of the core participants and other parties to it. We then set out the Inquiry's position.

The classified material

[14] Most of the material said to be relevant to the issues in the Inquiry is presently classified. That classified material can be divided into three broad categories:

(a) Material derived by GCSB or NZSIS from, or in cooperation with, international partners and intelligence networks. Some material within this category may also be held by Crown agencies other than GCSB and NZSIS.

(b) Material that NZDF holds by virtue of its participation in International Security Assistance Force/North Atlantic Treaty Organisation (ISAF/NATO) operations in Afghanistan. As we understand it, some of the material in this

category will originate from foreign sources but some will have been generated by NZDF in the context of the ISAF/NATO operations. The submissions signal two areas of dispute about this category:

(i) First, where its boundaries should be drawn. The category could be limited to material originated by foreign sources or could include material generated by NZDF itself in connection with the operations, including, at its widest, items such as reports from NZDF personnel in Afghanistan to NZDF Headquarters in Wellington.

(ii) Second, the effect for the purposes of disclosure (to the Inquiry and/or to core participants) of any relevant international agreements, such as the Agreement between the North Atlantic Treaty Organisation and the Government of New Zealand on the Security of Information dated 3 October 2007.

(c) Other material relating to operations in Afghanistan generated by NZDF for its purposes.

In addition, it may be that the Ministry of Defence holds confidential material of a policy nature that is relevant to the issues in the Inquiry. As will become apparent, the different categories of material raise different considerations.

Crown parties' submissions

[15] The positions of the Crown parties in relation to classified information are largely similar, although there are some differences.

[16] NZDF advises that it is committed to providing to the Inquiry all material that may be relevant to the Inquiry's Terms of Reference irrespective of its security classification, but it opposes the disclosure of highly sensitive material to other participants. NZDF has proposed an approach which involves disclosure of all relevant information to the Inquiry in the first instance. The Inquiry would hold the information on a restricted access basis while it carried out a review in order to

identify any information that it considered should be released more widely. NZDF would then consider whether it agreed that the material identified by the Inquiry is able to be released more widely. If NZDF took a different view to that taken by the Inquiry, the issue would be addressed in a closed hearing, presumably a hearing under s 70 of the Evidence Act.

[17] DPMC, GCSB and NZSIS advise that release of partner-controlled classified material held by them to the Inquiry is unlikely to be permitted under the existing default disclosure permission, so that specific permission will have to be sought from partners for release. Partners are unlikely to provide permission without assurances about the handling of information, including that the Inquiry will not release classified material to persons who do not hold the appropriate security clearance. Redacted documents or summaries may be available in the absence of such assurances. DPMC suggests a process that involves the intelligence agencies summarising any intelligence support provided to NZDF so that the Inquiry can identify what, if any, of it the Inquiry considers may be relevant to the issues before it. DPMC then identifies a number of options for dealing with any documents relating to the matters identified by the Inquiry. The option selected would depend on the nature of the particular documents at issue. One of the options is that the intelligence agencies would seek a non-disclosure order in respect of particular material *before* that material would be made available to the Inquiry and would provide it only after the order is made.

[18] MFAT considers that obtaining consent from NATO or other overseas partners for the release of classified information that is subject to an obligation of confidence will be contingent on those parties understanding how the Inquiry will access, consider, disclose and report on the information. The degree of concern, and therefore the extent of assurance required, by overseas partners will reflect the nature of the particular material at issue. MFAT considers that the approach suggested by NZDF could be explored with overseas partners and suggests that the Inquiry should not seek to resolve issues relating to that information until further time has been allowed for MFAT and NZDF to make further inquiries of NATO, and institute inquiries with the United States of America.

Afghan villagers' and authors' submissions

[19] The Afghan villagers and the authors have previously signalled that they do not accept that all classified material provided to the Inquiry will currently justify classification. Accordingly, the status of classified material is disputed. Moreover, counsel draw a distinction between foreign-sourced material and locally generated material on the basis that the former category raises an issue that is irrelevant in relation to the latter category, namely whether there is a need to protect material provided in confidence so as not to disrupt the provision of information in the future. Necessarily, then, a clear distinction must be drawn between the two categories. Counsel indicated that they did not accept NZDF's description of where the boundary between the two categories was. They submit that they should be provided with a proper and adequate summary of any material not disclosed to them on the ground that it is classified.

[20] Mr Hager notes that he has considerable experience analysing defence and security information in various contexts. He considers that a meticulous examination of events, times and places is required to identify the truth of what occurred. He is concerned that NZDF might control decisions about what material is classified and confidential, which would impede the process and would, in any event, be a conflict of interest given NZDF's dual roles as custodian of relevant information and subject of the investigation. Mr Hager drew the Inquiry's attention to several inquiries conducted overseas where information that had been classified was ultimately declassified and made publicly available or re-classified and made available to core participants.

The Inquiry's process in relation to classified documents

[21] As we said at the outset of this Minute, the Inquiry's process for dealing with classified information will be based on two fundamental principles:

(a) While such material remains classified, the Inquiry will handle it in accordance with the Government's Protective Security Requirements and

will not make it available (whether directly or indirectly)[3] to anyone other than those assisting the Inquiry who hold the appropriate security clearance. (This is subject to the possibility that the originators of particular documents may agree to their wider disclosure.)

(b) The Inquiry has the power, by virtue of s 27 of the Inquiries Act and s 70 of the Evidence Act, to assess classification claims in relation to particular information. It will not agree to any process or requirement that has the effect of limiting the Inquiry's ability to exercise that statutory power.

We deal with each point in turn.

(i) Handling classified information

[22] The Inquiry will comply with the Government's Protective Security Requirements in respect of classified information. In order to achieve this, the Inquiry has taken two steps:

(a) The Inquirers, the two counsel assisting and key administrative staff hold security clearances for the classified information the Inquiry will receive. Access to classified information will be restricted to those members of the Inquiry team who have the appropriate clearance.

(b) The Inquiry has arranged access to SCIFs (sensitive compartmented information facilities), safes and cleared IT systems in order to access, store, and consider classified material. All classified material will be held and viewed in SCIFs and any interviews or evidence that involves classified material will take place in suitably secure premises.

[23] As the Inquiry said in Minute No 3, participants in an inquiry do not have a right to receive all material produced to the inquiry by other participants. Moreover, an inquiry has the power to order that the inquiry or any part of it be

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[3] For example, such material will not be referred to in the final report in a way that is inconsistent with, or undermines, its classification.

held in private.[4] In making such an order, an inquiry must take account of specified criteria, including the extent to which public proceedings may prejudice New Zealand's security or defence interests.[5] The Inquiry's Terms of Reference reinforce this.[6] No classified material will be made available to those without security clearances, although the Inquiry will consider options to support engagement by core participants, such as redaction and summaries, if feasible and appropriate.

[24] The Inquiry accepts that it will have to be scrupulous to avoid compromising any classified information in any material that it makes available to those who do not hold appropriate security clearances, including its final report. That report will not disclose material that is classified, but will be informed by it. Thus, the report will be accurate and reliable but not in breach of security requirements. The recent public report of the Inquiry of the Inspector-General of Intelligence and Security in relation to complaints of unlawful intelligence gathering in the South Pacific is a good example of how findings can be made in that way.[7]

(ii) Review of classifications

[25] As noted in Minute No 3, the Inquiry has the same powers as a judge to make orders under ss 69 and 70 of the Evidence Act. It will not agree to any process or arrangement as to the handling of classified information that would have the effect of limiting its statutory powers in this respect. It does not consider that it could properly do so.

[26] There are two points to be noted in this context:

(a) First, as counsel for the Afghan villagers emphasised, in terms of the operation of s 70 of the Evidence Act, different considerations apply to

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4 Inquiries Act 2013, s 15(1).
5 Section 15(2)(d).
6 See *Terms of Reference* Principles of the Inquiry 12-15.
7 Office of the Inspector-General of Intelligence and Security, Public Report, *Complaints arising from reports of Government Communications Security Bureau intelligence activity in relation to the South Pacific, 2009-2015* (Wellington, 4 July 2018).

material held by NZDF and other New Zealand agencies that is the information of foreign governments or international agencies than apply to information that NZDF and other agencies hold that is the information of those agencies. In relation to New Zealand-controlled material, the issue for the Inquiry under s 70 will be whether the disclosure of the information would prejudice the security or defence of New Zealand, or the Government's international relationships. In relation to foreign-controlled material, there will be an additional consideration, namely whether disclosure would risk the provision of information on a basis of confidence from overseas governments or organisations in the future.

(b) Second, as the Inquiry said in Minute No 3, when the Government established the current security classification regime in 2002, it recognised the danger of over-classification and the need for a system of regular review of classified material to ensure that the justification for classification remained current. It is unclear to us at this stage to what extent the classified material that will be provided to us has been subjected to a rigorous review process.

[27] To assist with the assessment of classification claims, the Inquiry has engaged a barrister, Mr Ben Keith, a former Deputy Inspector-General of Intelligence and Security. Mr Keith will provide advice to the Inquiry regarding matters of classification, including whether there are options such redaction or summaries that could be considered by the Inquiry if documentary or other material cannot be disclosed. Mr Keith will review the classified material as it is provided to test the claim to classification. If he has doubts about the continued need for classification of any material, he will advise the Inquiry and the relevant Government agency or agencies. He will then discuss the matter with the relevant agency to see whether agreement can be reached in relation to the material. If no agreement is reached, the Inquiry will determine the matter. The Inquiry will give the relevant agency or agencies the opportunity to make submissions in relation to classification before it reaches a final view. It may also seek further explanations or

take other procedural steps before determining the matter.[8] A similar process will be followed in relation to proposed redactions or summaries that are disputed. While the Inquiry does not rule out any legitimate exercise of its powers, the main alternatives in terms of a ruling are (a) maintaining the classification (in which case it will consider whether the options of redaction or providing a summary are available) or (b) de- or re-classification of the material (which would likely result in wider availability, certainly in the case of de-classification).

(iii) What now?

[28] NZDF, MFAT and DPMC have all said that they cannot make final decisions about providing the Inquiry with all relevant classified information in their possession or custody until they understand what procedures the Inquiry intends to operate in relation to classified information. What we have outlined above should meet their legitimate concerns.[9]

[29] We expect that classified material held by NZDF, MFAT, DPMC and other Government agencies that is not subject to the control of partner governments or international organisations (whether by international agreement or convention) will be provided to the Inquiry as soon as practicable. It will be handled in accordance with the procedures outlined in this Minute. The Inquiry has no objection if agencies coordinate their bundles of material so that the Inquiry does not receive multiple copies of identical documents.[10]

[30] Turning to classified information held by NZDF, MFAT, DPMC and other Government agencies that is subject to the control of partner governments or international organisations, we understand that NATO that has an established process for dealing with these matters and that it is waiting for a formal request for its consent to release relevant material that it controls to the Inquiry. We also understand that NATO has expressed its full support for national accountability mechanisms and has indicated that it will do all it can to enable the Inquiry to meet

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8 This might include seeking other submissions or advice.

9 For completeness, we note that if the Ministry of Defence holds any relevant material as a result of its role under the Defence Act 1990, in particular s 24, we expect that it will be supplied.

10 Obviously, this does not apply where there are differences between copies of the same document, such as handwritten notations.

its mandate. As a consequence, we envisage that disclosure of NATO-controlled material to the Inquiry is unlikely to be problematic. We understand that NATO will need around 30 days to process requests for material.

[31] We believe that the procedures that we have outlined in this Minute in relation to the Inquiry's handling of classified material should be effective in facilitating consent from NATO and relevant partner governments to providing the relevant material to the Inquiry. To achieve this, we ask that MFAT give high priority to seeking, from NATO and partner governments, consent to providing us with relevant material which they control.

[32] There are two further matters that we should note:

(a) First, we should signal that we have some concerns about one aspect of the procedure suggested by DPMC, GCSB and NZSIS. They indicated that some documents may not be made available to the Inquiry until the Inquiry has made a permanent non-disclosure order in relation to them. DPMC says that in seeking a non-disclosure order, the security agencies will provide evidence in support and, where possible, will provide a redacted or summarised version of the document at a lower classification. While we do not exclude the possibility that we may be able to make a ruling on the basis of such material, we think it more likely that we will feel unable to exercise our power to make a non-disclosure order without considering the documents themselves.

(b) Second, the Inspector-General of Intelligence and Security has initiated an inquiry which may overlap in some respects with our Inquiry. To the extent possible, we wish to avoid doubling-up. We will discuss with the Inspector-General the relationship between the two inquiries, in particular, issues about the provision of classified information.

[33] We conclude by saying that because:

(a) the Inquiry now has the capacity to handle any classified material in accordance with the Government's Protective Security Requirements;

(b) the Inquiry's jurisdiction is explicitly confined to New Zealand actors – it has no jurisdiction to make determinations about the actions of forces or officials other than NZDF forces or New Zealand officials; and

(c) the Inquiry has the statutory power to require disclosure to it of *all* relevant material in the possession of New Zealand actors, which it has not yet formally exercised but which it will exercise in due course,

we expect that issues about disclosure of material to the Inquiry will be quickly resolved.

Inquiry's overall process

[34] We will briefly summarise the position taken by counsel for the Afghan villagers and for Mr Stephenson, and by Mr Hager on his own account, on the Inquiry's process before setting out our own views, as they presently stand.[11] As we have said, they argued for an adversarial process to the fullest extent possible.

Arguments advanced in support of an adversarial-style process

[35] In their memorandum of 4 July 2018, counsel for the Afghan villagers made the following submission:

> Counsel submit that the purpose of the Inquiry requires a process that allows for the definitive determination (where possible) of the factual issues within the Inquiry's remit. To this end, the Inquiry must allow for the effective testing of contested and disputed facts, by use of adversarial processes including cross-examination, rebuttal, disclosure to all core participants of all information not restricted by direction of the Inquiry, and the substantive inclusion of the Villagers in the proceedings.

[11] As we noted at the outset, we have not yet formally sought the parties' views on the Inquiry's process, so NZDF have not made submissions on the issue, besides indicating at an early stage that they supported an inquisitorial, investigative process.

Counsel indicated that NZDF's submission in favour of an investigative and inquisitorial process was resisted. The dual role of NZDF as, on the one hand, the holder of, or conduit for, much of the material relevant to the Inquiry and, on the other, as a party accused of serious misconduct and illegality by other parties was highlighted. Counsel submitted that the core participants must be able to engage fully with the contested facts "including through discovery and disclosure, challenging of claims to withhold information, and ultimately through examination and cross-examination of witnesses".

[36] In their memorandum of 10 August 2018, counsel for the villagers argued that under the Inquiries Act, natural justice comes into play not only when the Inquiry is contemplating making a finding adverse to a person or of fault, but also when making a decision as to the conduct of the Inquiry. They argued that the Inquiry has procedural and investigative duties with respect to the alleged killings in Afghanistan which form part of the international law obligations regarding the "right to life".[12] The State, they submitted, has a positive duty to protect the right to life, which requires it to investigate possible or suspected breaches and to provide a remedy where a breach is proved. It is a "key aim" of the Inquiry to fulfil the requisite procedural and investigative obligations.

[37] Counsel argued that the villagers have a right to be heard. This requires that they have access to as much of the material before the Inquiry as possible, even if counsel are required to give confidentiality undertakings. In addition, the villagers have a right to respond to adverse findings, which included a right to cross-examine key witnesses. As victims, the Afghan villagers are entitled to participate fully and actively in the Inquiry.

[38] Counsel for Mr Stephenson relied on s 27(1) of the New Zealand Bill of Rights Act 1990 (NZBORA), which provides:

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to

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[12] Counsel refer to the New Zealand Bill of Rights Act 1990, s 8 and the United Nations International Covenant on Civil and Political Rights, 999 UNTS 71 (opened for signature 16 December 1966, entered into force 23 March 1976), art 6.

> make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

Counsel argued that s 27 was engaged because the Inquiry had the power to make determinations in respect of the rights, obligations and interests of others.[13]

[39] Counsel noted that s 5 of NZBORA provides that the rights and freedoms in NZBORA may be subject "only to such limits as can be demonstrably justified in a free and democratic society". In relation to classified material, this meant that there should be a strong reason not to disclose and that disclosure should be the default position.[14] Counsel referred to a number of cases, including the decision of the United Kingdom Supreme Court in *Al Rawi v Security Service*,[15] in support of their argument that closed hearings and similar processes should be avoided.

[40] Mr Hager supported the submissions made by counsel for the Afghan villagers. He said that he strongly supported an adversarial process, but one in which the Inquiry plays an investigative and inquisitorial role as well. He characterised the process suggested by NZDF as a "closed, securitised process". Mr Hager noted that some of his confidential sources may not be prepared to provide information to the Inquiry, either at all or without appropriate confidentiality protections in place.

The Inquiry's current view on process

[41] In determining the procedure for the conduct of the Inquiry, we will have to take account of six matters:

(a) First, this is an inquiry, not a court proceeding.

(b) Second, some of the material before the Inquiry will be classified, and some of that will be information controlled by foreign governments or international organisations, so that the potential disruption of the provision

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[13] Citing *Combined Beneficiaries Union v Auckland COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56.

[14] Citing the Law Commission *National Security Information in Proceedings* (NZLC PP38, 2015) at 6.9.

[15] *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531.

of information from such governments or organisations to New Zealand becomes a relevant consideration.

(c) Third, apart from issues of classification, there will be issues of confidentiality. For example, some witnesses will seek confidentiality before they agree to give evidence.

(d) Fourth, some of those who give evidence to the Inquiry will be vulnerable. In particular, potential witnesses in Afghanistan (the villagers and members of the Afghan armed forces) may be at risk, physically and psychologically. Their position must be respected and dealt with appropriately.

(e) Fifth, there is the Inquiry's obligation to conduct the inquiry fairly and to meet the requirements of natural justice.

(f) Finally, the Inquiry must take into account the principle of open justice and the need to preserve public confidence in the Inquiry's work.

We address each matter in turn, dealing with the matters identified in (b), (c) and (d) above under the general heading "Further context".

(i) An inquiry, not a court proceeding

[42] To state the obvious, this is an inquiry, not a court proceeding. It was established under the Inquiries Act for the purpose of inquiring into and reporting on allegations of wrongdoing by NZDF personnel in connection with Operation Burnham and related matters. An important purpose of the Inquiries Act is to enable inquiries to be carried out "effectively, efficiently, and fairly".[16] As Sir Richard Scott, then Vice-Chancellor, said extrajudicially, there is an inevitable tension between the requirements of fairness and the need for efficiency.[17]

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[16] Inquiries Act 2013, s 3(1)(c).

[17] Richard Scott "Procedures at Inquiries – the Duty to be Fair" (1995) 111 LQR 596 at 597. Sir Richard (later Baron Scott of Foscote) conducted an inquiry into the export by English firms of defence equipment and dual-use goods to Iraq. It reported in 1996.

[43] The Inquiry has no power to determine civil, criminal or disciplinary liability, although it may make findings of fault.[18] It has the power to conduct the inquiry as it considers appropriate, subject to the Inquiries Act and the Terms of Reference.[19] In terms of the Inquiries Act, the Inquiry may determine matters such as whether to conduct interviews and if so, who to interview; whether to call witnesses and, if so, who to call; whether to hold hearings and, if so, when and where the hearings will be held; whether to receive evidence or submissions from any person participating in the inquiry (subject to the caveat that core participants have a right to give evidence and make submissions);[20] whether to receive oral or written evidence or submissions and the manner and form of the evidence or submissions; and whether to allow or restrict cross-examination of witnesses.[21] This is, however, subject to the Terms of Reference, which provide that the Inquiry is expected to consider (among other things) available evidence of relevant government officials and NZDF personnel (including those who took part in Operation Burnham) and evidence of "Afghan nationals and/or other witnesses".

[44] Under the Inquiries Act, the Inquiry may receive any evidence that it considers may assist it to deal effectively with the subject of the inquiry whether or not it would be admissible in court.[22] However, witnesses and others participating in an inquiry have the same immunities and privileges as if they were appearing in civil proceedings, although such claims can be assessed by an inquiry in the same way as they can be assessed by a court.[23]

[45] As this structure indicates, an important component of an inquiry such as the present is to *investigate* in order to ascertain what happened. In conventional litigation in the courts, it is the parties who conduct investigations into the factual and legal background in the course of formulating their cases, which they then present to the court through pleadings (or, in criminal cases, charges), evidence and submissions at trial. The court then determines the matter based on the material

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18 Section 11.
19 Section 14(1).
20 Section 17(3).
21 Section 14(4).
22 Section 19.
23 Sections 20(c) and 27(1).

presented by the parties. Obviously, rules that apply to trials may be inapposite in relation to inquiries.

[46] Nevertheless, natural justice considerations are of vital importance. Section 14(2) of the Inquiries Act provides that, when making a decision as to its procedure or conduct, an inquiry must comply with the principles of natural justice and have regard to the need to avoid unnecessary delay or cost for all involved.

[47] We will return to s 14(2) and the requirements of natural justice later in this Minute. But putting that topic to one side for the moment, the philosophy underlying the Act largely reflects the philosophy underlying the approach of the common law to inquiries. This Inquiry is not an adjudicative process to resolve a dispute between parties in accordance with their rights and obligations at law. In that sense, the Inquiry has no legal consequences. Rather, it is an investigation into Operation Burnham and related matters, at the end of which the Inquirers will state their conclusions as to the facts and other matters on which they are required to report and make recommendations. None of it will be binding on anyone.

[48] It might be argued that this particular Inquiry has the characteristics of the disputes that courts commonly deal with, in the sense that it is dealing with allegations of wrongdoing made by two groups of core participants against another core participant who rejects them. In short, there is a *lis*. We return to this point in our discussion of the requirements of natural justice.

(ii) Further context

[49] The Inquiry faces significant challenges in terms of procedure in relation to:

(a) the treatment of classified information;

(b) the need to preserve confidentiality in certain contexts; and

(c) the need to treat vulnerable witnesses appropriately.

All place constraints on the Inquiry's ability to utilise a traditional adversarial-style process.

[50] We address each matter in turn.

(a) Classified information

[51] As we have said, it is inevitable that some material relevant to the issues in the Inquiry will be classified and/or subject to obligations of confidence. This creates difficulties for the proper operation of an adversarial process, as the United Kingdom Supreme Court discussed in *Al Rawi v Security Service*.[24]

[52] In that case, the claimants had brought proceedings against the Security Service and other State agencies alleging that those agencies had been complicit in their detention and mistreatment by foreign authorities. The State parties wished to put in evidence certain classified material and wished to utilise what was referred to as a "closed material procedure"[25] to do so (rather than dealing with the material through the usual public interest immunity process). They argued that this process could be adopted by a court in the exercise of its inherent jurisdiction. The claimants challenged the proposed use of the closed material procedure.

[53] The claims were settled before the matter came on for hearing in the Supreme Court, but the Court nevertheless addressed the issues given their importance. The Court concluded that the closed material procedure was inconsistent with certain fundamental features of civil and criminal trials at common law and so could not be utilised unless statutorily authorised. It also criticised the use of special advocates. The fundamental features to which the Court referred were the principles of open justice and of natural justice.

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[24] *Al Rawi*, above n 154.

[25] In essence, the State parties wished to use classified security information in their defence in the proceedings. That material would not be disclosed to the claimants (or, of course, the public) but would be disclosed to the court and to special advocates, who would make submissions about it on behalf of the claimants. This would presumably require the court to issue "open" and "closed" judgments. See the definition of "closed material procedure" in the judgment of Lord Dyson JSC at [1].

[54] Given the incompatibility of a closed material procedure with the traditional trial process, Lord Brown JSC expressed the view that cases involving highly sensitive security issues should go for determination by a body akin to the Investigatory Powers Tribunal "which does not pretend to be deciding such claims on a remotely conventional basis".[26] Lord Brown went on to say that claims involving the complicity of intelligence services in torture could not simply be ignored, which was why the claims in issue were, following the settlement, being investigated by Sir Peter Gibson in the Detainee Inquiry.[27]

[55] Contrary to the position adopted in *Al Rawi*, the New Zealand courts have been prepared to utilise the "closed material" procedure in situations involving detention or allegations of breach of human rights, making use of special advocates.[28] Nevertheless, if there is a significant body of sensitive security information which is (a) appropriately classified and (b) centrally relevant to the issues before the Inquiry, it will be difficult to operate a process that accords with the conventional adversarial model. And, of course, unlike the courts, the Inquiry does have the statutory power to utilise a closed process.

(b) Confidentiality

[56] The book *Hit & Run* contains numerous references to confidential sources. Some of these sources are, as we understand it, past or present members of NZDF. We also understand that, while some sources are likely to be willing to give evidence on an open basis, others will do so only on a confidential basis. To the extent that these latter sources express views adverse to the interests of NZDF, NZDF would presumably wish to cross-examine them. However, it is difficult to see how NZDF could be permitted to do this, given the need to preserve confidentiality.[29]

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[26] At [86].

[27] At [87]. The Detainee Inquiry was ultimately not completed: see Sir Peter Gibson, *The Report of the Detainee Inquiry* (United Kingdom Cabinet Office, December 2013) at 1.1.

[28] See, for example, the *Zaoui* and *Dotcom* litigation.

[29] This is subject to s 68 of the Evidence Act, which deals with the protection of journalists' sources.

[57] In addition, the Inquiry will be calling for people who have relevant information to come forward, if necessary on a confidential basis. Some who come forward may have been, or may continue to be, employed by NZDF. Some within this group may be, in effect, whistle blowers who are giving information to which they are privy as a result of their work experience, but which is contrary to the official narrative. These people are likely to have concerns about both their privacy and anonymity and will need to be protected from the possibility of organisational pressure and intimidation. The Inquiry has already received contacts from people who say they have relevant information but wish to speak on a basis of confidence. Again, it is difficult to see how such witnesses could be cross-examined by other parties while preserving the requested confidentiality. The procedure adopted by the Inquiry will have to accommodate these eventualities.[30]

[58] In addition to these categories, there are others who may be prepared to give evidence but only on a confidential basis, for example intelligence officials, who may be compromised if their identity is known and/or their sources of intelligence are disclosed.

(c) Vulnerable witnesses

[59] The international experience of inquiries such as the present one is that there is a significant risk that vulnerable witnesses will be further harmed if inappropriate information-gathering procedures are used.[31] To take the most obvious example, it may not be appropriate to expose Afghan villagers to a process such as cross-

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[30] The Protected Disclosures Act 2000 does not appear to apply in this context. However, the Inquiry has ample powers to protect whistle blowers should there be a need to do so.

[31] *Right to the Truth. Report of the Office of the High Commissioner for Human Rights* A/HRC/12/19 (2009) at [43]: "The practice of both ICTY and ICTR reveals that the concern for the security and safety of individuals and the psychological needs of victims and witnesses have been the overarching concern." See also Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), art 68(1): "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses."; Robert Petit, David Akerson and Maria Warren (eds) *Prosecuting Mass Atrocities, Lessons from the International Tribunals* (Open Society Foundations, New York, 2012) at [1238-1239]: "Where possible, the prosecution team should work with the defence to reduce or remove unnecessary cross-examination on matters relating to peripheral issues or disclosure in order to limit the amount of time the witness will be giving evidence. There is significant national jurisprudence on limiting cross-examination to protect special witnesses. The prosecution team should be fully acquainted with this jurisprudence and be prepared to argue this law when special victims are testifying to protect them."

examination by counsel for NZDF. Rather, as is the case with classified information, the Inquiry may have to utilise other means to engage fairly and effectively with that evidence. There are others who may also be vulnerable, such as past or present members of NZDF or of the local Afghan forces who participated in some of the activities at issue, so as to require an approach other than an adversarial one.

(iii) Natural justice

[60] The Inquiry and its members have a statutory obligation to act independently, impartially and fairly.[32] More particularly, in making a decision as to the procedure or conduct of an inquiry, or in making a finding that is adverse to any person, the Inquiry must comply with the principles of natural justice.[33] What are the requirements of natural justice in this context?

[61] Natural justice is a flexible concept, taking its precise content from the context in which it used. It has two key features, however, the first being that a decision-maker must be disinterested and unbiased, and the second that parties are given proper notice and an opportunity to be heard.[34] In *Al Rawi,* Lord Dyson JSC described natural justice has having several elements in the context of a traditional trial. He said:[35]

> A party has a right to know the case against him and the evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance.

Lord Dyson went on to say that a further aspect of the principle of natural justice was that the parties should be given the opportunity to call their own witnesses and to cross-examine opposing witnesses.[36] Implicit in these rights is the right of a party to be present throughout the trial.[37]

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32 Inquiries Act 2013, s 10.
33 Section 14(2)(a).
34 See *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at [11].
35 *Al Rawi*, above n 15, at [12].
36 At [13].
37 At [27].

[62] However, it is well recognised that the principles of natural justice applicable in a trial context do not necessarily apply in the context of an inquiry, as the Court of Appeal reaffirmed in *In re Royal Commission to Inquire into and Report upon State Services in New Zealand*.[38] There, North J said that an inquiry is neither a court nor a tribunal and went on to say:[39]

> There is nothing approaching a *lis*, a Commission has no general power of adjudication, it determines nobody's rights, its report is binding on no one.

Cleary J made observations to similar effect, describing the "basic difference" between a *lis inter partes* and an inquiry by Commissioners as follows:[40]

> In a controversy between the parties the function of the Court is "to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings" … The function of a Commission of Inquiry, on the other hand, is inquisitorial in nature. It does not wait for issues to be submitted, but itself originates inquiry into matters which it is charged to investigate. There are, indeed, no issues as in a suit between parties; no "party" has the conduct of proceedings, and no "parties" between them can confine the subject matter of the inquiry or place any limit on the extent of the evidence or information which the Commission may wish to obtain.

[63] The Privy Council in *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon*, while acknowledging important differences between ordinary civil proceedings and inquiries, held that a costs order made against Air New Zealand by Mahon J had been made in breach of the rules of natural justice.[41] Delivering the advice of the Privy Council, Lord Diplock said:[42]

> The rules of natural justice that are germane to this appeal can, in their Lordships' view, be reduced to those two that were referred to by the Court of Appeal in England in *R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456 at pp 480, 490, which was dealing with the exercise of an investigative jurisdiction, though one of a different kind from that which was being undertaken by the Judge inquiring into the Mt Erebus disaster. The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the

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[38] *In re Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR 96 (CA), discussed in Jason Beer QC (ed) *Public Inquiries* (OUP, 2011) at [5.02].
[39] At 109.
[40] At 115–116.
[41] *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662 (PC).
[42] At 671.

> inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.
>
> The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based on *some* material that tends logically to show the existence of facts consistent with the finding being made and that the reasoning supportive if the finding, if it be disclosed, is not logically self-contradictory.
>
> The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, *might* have deterred him from making the finding even though it cannot be predicated that it would inevitably have had that result.

[64] Section 14(3) of the Inquires Act incorporates, in effect, the two rules referred to in *Re Erebus*. It provides:

> (3) If an inquiry proposes to make a finding that is adverse to any person, the inquiry must, using whatever procedure it may determine, be satisfied that the person—
>
> (a) is aware of the matters on which the proposed finding is based; and
>
> (b) has an opportunity, any time during the course of the inquiry, to respond on those matters.

It is important to emphasise that while s 14(3) sets out important substantive requirements, it specifically reserves to the inquiry's decision the means by which it will meet those requirements – "using whatever procedure it may determine".

[65] Against this background, we consider that the requirement in s 14(2)(a) that an inquiry must comply with the principles of natural justice in making a decision as to the procedure or conduct of an inquiry was not intended to require an inquiry to apply the range of natural justice requirements that would apply in a trial context. Rather, it means that an inquiry's processes must be such as to give those about whom an inquiry is considering making adverse comment an opportunity to respond. In order to exercise that right of response, the person affected will have to know what it is that has led the inquiry to the point of considering making adverse comment. Given that context is critical to the content of the concept of natural

justice, however, we cannot rule out the possibility that other natural justice considerations will arise in the course of the Inquiry. We accept the need to be both vigilant and flexible to ensure fairness.

[66] As we noted earlier, it might be argued that this Inquiry is like a trial in the sense that it involves a *lis* between disputing parties and that this justifies a more adversarial approach than might otherwise be taken. While there is some force in this analysis, we note that inquiries are often set up to investigate allegations of wrongdoing that are contested. They do not thereby become notional trials with notional plaintiffs and notional defendants, nor do they adjudicate a *lis*. We agree with the observations of Vice-Chancellor Scott in the article already referred to, when, having described the characteristics of the adversarial trial system, he went on to say:[43]

> In an inquisitorial Inquiry there are no litigants. There are simply witnesses who have, or may have, knowledge of some of the matters under investigation. The witnesses have no "case" to promote. It is true that they may have an interest in protecting their reputations, and an interest in answering as cogently and comprehensively as possible allegations made against them. But they have no "case" in the adversarial sense. Similarly, there is no "case" against any witnesses. There may be damaging factual evidence given by others which the witness disputes. There may be opinion evidence given by others which disparages the witness. In these events the witness may need an opportunity to give his own evidence in refutation. But still he is not answering a case against himself in an adversarial sense. He is simply a witness giving his own evidence in circumstances in which he has a personal interest in being believed.

(iv) The principle of open justice

[67] Section 15(1) of the Inquiries Act gives the Inquiry wide powers to forbid the publication of evidence and submissions, to hold the Inquiry or any part of it in private and to protect the identity of witnesses. In making decisions under s 15(1), the Inquiry must take into account:[44]

> (a) the benefits of observing the principle of open justice; and
>
> (b) the risk of prejudice to public confidence in the proceedings of the inquiry; and

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[43] Scott, above n 17, at 598-599.
[44] Section 15(3)

(c) the need for the inquiry to ascertain the facts properly; and

(d) the extent to which public proceedings may prejudice the security, defence, or economic interests of New Zealand; and

(e) the privacy interests of any individual; and

(f) whether it would interfere with the administration of justice, including any person's right to a fair trial, if an order were not made under subsection (1); and

(g) any other countervailing interests.

[68] In the common law system, the principle of open justice is a critical element of adjudication through the courts. In *Al Rawi*, Lord Dyson described it as "a fundamental common law principle".[45] In *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2),* Thomas LJ said:[46]

> The reasons most commonly expressed as to why the courts must sit and do justice in public are as a safeguard against judicial arbitrariness, idiosyncrasy or inappropriate behaviour and the maintenance of public trust, confidence and respect for the impartial administration of justice. It has also been noted that sitting in public can make evidence become available. Furthermore the public sitting of a court enables fair and accurate reporting to a wider public and makes uninformed and inaccurate comment about the proceedings less likely: ...

[69] Thomas LJ went on to say that there were two further reasons for the open justice principle.[47] The first is that a judge's duty to uphold the rule of law does not relate simply to ensuring that a particular dispute between parties is resolved openly – it also encompasses ensuring that matters coming to the attention of the court during the proceedings that appear to involve an infringement of the rule of law are dealt with openly. The second is that facts relating to issues of public interest which would not otherwise emerge will be brought into the public domain. Information of this type could be important in a democracy, because it facilitates free speech, which promotes political debate and government accountability. In the appeal from this judgment, Lord Judge CJ discussed the open justice principle in

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[45] *Al Rawi*, above n 15, at [11].

[46] *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] EWHC 152 (Admin), [2009] 1 WLR 2653 at [36] (citations omitted).

[47] At [40]-[42].

similar terms, noting that "the principles of freedom of expression, democratic accountability and the rule of law are integral to the principle of open justice …".[48]

[70] Powerful as the principle of open justice is, however, there is no presumption at common law that inquiries must be conducted by way of a public process. This is made clear in cases such as *R (Persey) v Environment Secretary*[49] and *R (Howard) v Secretary of State for Health.*[50] While the English authorities provide support for the view that there are good reasons to follow a public process where an inquiry is established to look into discrete allegations of wrongdoing by State actors in the past, ultimately the decision as to a public or private process depends upon the circumstances of the particular inquiry.

[71] Section 15(3) draws attention to the terms of reference for the particular inquiry. It provides that "if the instrument that establishes an inquiry restricts any part or aspect of the inquiry from public access, the inquiry must make such orders under [s 15(1)] as are necessary to give effect to the restrictions". The Inquiry's Terms of Reference provide that the Inquiry "may" restrict access to "inquiry information" in order (among other things) to protect the security or defence interests of New Zealand, the Government's international relations, the confidentiality of information provided to New Zealand on a basis of confidence by any other country or international organisation, or the identity of witnesses. Accordingly, the Terms of Reference for the Inquiry contemplate that the Inquiry may not be able to operate in a fully public way.

[72] We accept that, in principle, it is desirable that an inquiry such as the present operate in public. Serious allegations have been made against the NZDF and others in relation to particular operations in Afghanistan in 2010. They are to be examined by an independent Inquiry. Ideally, the allegations should be examined through a

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[48] *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA 65, [2011] QB 218 at [41].

[49] *R (Persey) v Environment Secretary* [2002] EWHC 371 (Admin), [2003] QB 794.

[50] *R (Howard) v Secretary of State for Health* [2002] EWHC 396 (Admin), [2003] QB 830. See also *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455 at [48] per Lord Mance JSC (with whom Lords Neuberger and Clarke JJSC agreed) and per Lord Carnworth JSC at [237]-[240].

public process so as to enhance public confidence in both the process and the outcome, whatever it may be.

[73] However, there are features of this Inquiry which strongly militate against a fully public process. In particular:

(a) There is a real risk that we will not be able to get at the truth unless we are able to offer complete confidentiality to some witnesses. In addition, we have an obligation to put in place arrangements to protect vulnerable witnesses.

(b) Whatever the ultimate extent of the classified material, there will be some important material that remains classified.

In addition, although we would not regard this as a compelling consideration standing alone, we are also conscious of the need to guard against the possibility that fair trial rights will be affected.

[74] The circumstance that some of the Inquiry's work will have to proceed in private does not mean, of course, that all its work must be done in private or that we cannot take steps to facilitate public understanding. We consider that we can take steps to assist the public to understand matters such as the allegations made, the nature of NZDF's rebuttal, the methods that the Inquiry will use, the Inquiry's views on the legal issues that it must address, and the background to at least some of the technical issues the Inquiry will confront (such as geo-spatial mapping). We return to these measures below.

(v) Conclusion on Inquiry procedure

[75] We now outline the methods the Inquiry proposes to use to undertake its fact-finding role. As will be apparent, there are factors that render this particular Inquiry procedurally complicated. These factors include the need to preserve confidentiality for some material where the security of New Zealand may be involved, and the need to secure the safety of witnesses who give evidence and

protect their human rights and privacy to the extent appropriate. Further, it will be necessary to ensure that witnesses understand the processes of the Inquiry and are informed of any risks that its methods may pose for them. Vulnerable witnesses need protection and the Inquiry also needs to be vigilant to do no harm by its actions, including the processes that it adopts to take evidence. Our suggested process is informed by international best practice.

[76] The Inquiry proposes to use a mixed model methodology, one that is mainly inquisitorial but may have elements of traditional adversarial processes where that is appropriate. For example, witnesses will be witnesses of the Inquiry, not the witnesses of particular participants. In general, witnesses will be questioned and tested by the Inquiry, whether directly or through counsel assisting, although there may be circumstances where the Inquiry considers that it would be assisted by cross-examination by the core participants' counsel. Where relevant evidence is not available to a core participant (as when evidence is provided in confidence or involves classified information), we will consider steps to facilitate participant engagement, such as summaries.

[77] This does not, of course, mean that core participants will have no ability to influence the Inquiry's evidence-gathering process. We envisage that core participants will, for example, put forward or suggest people for the Inquiry to approach to be interviewed and/or to give evidence, suggest topics to be pursued in questioning and suggest particular questions or sequences of questions to be put to particular witnesses.

[78] In adopting the approach outlined above, we note our general agreement with the following observations of Vice-Chancellor Scott:[51]

> Every witness … is the Inquiry's witness. Every witness must for the sake not only of fairness but also of efficiency, be given proper notice of the matters in respect of which he or she will be asked questions. For the purposes of an inquisitorial hearing conducted before an Inquiry, however, the distinction between examination-in-chief, cross-examination and re-examination is meaningless. All questions to the witness are part of the investigative process designed to uncover the truth about the matter under investigation. They are not designed to prove or disprove a "case".

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[51] Scott, above n 17, at 605.

And later:[52]

> In an inquisitorial Inquiry, the questioning of the witness by the Inquiry is not an examination-in-chief, nor is it cross-examination. Hearsay evidence may be sought. Opinions, whether or not expert, may be sought. Questions to which the questioner does not know the answer will frequently be asked – and, indeed, will be asked *because* the questioner does not know the answer. The techniques of questioning witnesses in adversarial litigation can be set aside. The questioning process is, or should be, a part of a thorough investigation to determine the truth. It is not a process designed either to promote or to demolish a "case".

[79] We acknowledge the importance of open process and the need to maintain public confidence in the Inquiry's work – as a general proposition, the more open the process, the easier it is to maintain public confidence in it. Despite this, the factors which we have discussed above point to the conclusion that not only will substantial portions of the Inquiry have to be conducted by inquisitorial methods, but also all or most of its evidence-gathering activities will have to occur in private.

[80] We do not think it feasible to hold a programme of both private and public hearings of evidence from witnesses of fact. That would provide a misleading impression to the public; it would be logistically difficult to operate; and it would be impractical, in our judgment, to switch from public hearings for the taking of evidence and back to private ones, bearing in mind the added complication that any of the evidence relating to classified material will need to be heard in an appropriate secure facility. We are satisfied, however, that the Inquiry will be able to meet all of its legal obligations set out in the legislation and conduct a fair inquiry that will be as open as it can be in the circumstances. We note that what we say above is subject to the qualification that, when we have seen all the documents and have a better feel for the issues in the Inquiry, our views on these matters may change.

[81] To achieve some degree of openness, the Inquiry has already determined that its Minutes and Rulings will be published on its website, subject to a five working-day delay to allow for the parties to seek redactions on the ground of confidentiality. Moreover, the Inquiry considers that legal argument should take place in public hearings and that submissions on legal issues should also be published on the Inquiry's website, again, subject to the possibility of redactions at

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[52] At 610.

the request of the parties for reasons of confidentiality. In addition, we consider that it may be possible to have public hearings on some discrete issues. A possible example is expert evidence on a particular topic, say geo-spatial mapping. And we consider that opening and closing statements should be made in public session.

[82] To facilitate evidence gathering, the Inquiry will advertise on its website, through the NZDF internal communication system and in selected New Zealand media outlets for people to provide any information they may have relevant to the issues before the Inquiry.

[83] People who wish to provide information to the Inquiry should make contact by using the process on the Inquiry's website as set out in Appendix 1. Where a person wishes to provide information in confidence, that will be respected. The Inquiry has the statutory powers necessary to preserve confidence, and its processes are intended to ensure that confidence is protected.

[84] For the Afghan villagers and other witnesses from Afghanistan (such as members of the Afghan Crisis Response Unit), enhanced arrangements will be necessary. Afghan residents are likely to be vulnerable due to their current circumstances and their geographical separation from the Inquiry. Villagers alleging that they were victims of the military action, where their dwellings were destroyed or otherwise disturbed and their relatives and friends killed or injured, are likely to be particularly vulnerable. The possibility of psychological injury in these circumstances cannot be overlooked. It is important to provide them with adequate security when being interviewed or giving evidence and to ensure they experience no avoidable trauma as a result of the Inquiry's work. The Inquiry will make every effort to ensure that evidence from Afghan nationals who are not resident in New Zealand can be provided in a way that will not place them at physical or psychological risk.

[85] The Inquiry will attempt to facilitate the giving of evidence remotely via a secure and safe AVL portal and provide, as appropriate, interpreters to facilitate both interviews and the giving of evidence. The Inquiry is concerned that requiring Afghan residents to give evidence in a public process will result in threats to their

physical or psychological wellbeing, or at least that they may perceive such threats. Given the challenges relating to this aspect of the Inquiry's work, the Inquiry needs to give further consideration to precisely how evidence from the Afghan villagers will be conveyed to the Inquiry. Its intention is that its approach will accord with international best practice.

[86] The Inquiries Act draws a distinction between interviews and evidence, an importance difference being that witnesses may be required to give evidence on oath or affirmation.[53] Counsel assisting will conduct initial interviews with all those who have relevant information for the Inquiry. This includes members of the public who have contacted the Inquiry, initially through its website as set out in Appendix 1, and who wish to provide information. In the event that the information they have is relevant to the issues raised by the Terms of Reference, the Inquiry will decide whether to interview or call them as witnesses.

[87] Those people whom the Inquiry wishes to call as witnesses will be briefed by counsel assisting as to the areas on which the Inquiry wishes to hear their evidence. As we have said, all witnesses will be witnesses of the Inquiry, not the participants.

[88] People who are interviewed by the Inquiry or are called as witnesses will be entitled to have their lawyer present at the interview or during the giving of evidence if they wish, subject to any issues relating to classified material. Evidence will be taken under oath or affirmation as provided by s 19 of the Inquiries Act.

[89] A written record will be kept of all interviews conducted by the Inquiry and all evidence given to the Inquiry. The text of interviews will be approved by the person interviewed and signed. In the event that the interview relates to classified information, that information will be protected and not disclosed to anyone other than the members of the Inquiry who hold any necessary clearances. Evidence given under oath or affirmation will be transcribed as in a court proceeding and handled on the same basis as texts of interviews.

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[53] Inquiries Act, s 19(b).

[90] The texts of interviews and the transcripts of evidence will not be publicly available (except in the case of evidence given in public session). However, transcripts of evidence from witnesses who do not seek confidentiality and are not dealing with classified material could be made available to core participants, subject to non-publication orders. Where material emerges which might form the basis of a comment by the Inquiry that is adverse to a person or organisation, that person or organisation will be given a summary of the relevant material and an opportunity to provide a response to it, both in writing and orally. These requirements are necessary in order to conduct an inquiry that is fair, as required in s 10, and meet the obligations under s 14(2) of the Inquiries Act to follow the rules of natural justice "where [the Inquiry] makes a finding that is adverse to any person…".

[91] It is possible, depending on the issues that emerge during the Inquiry that some expert evidence may be required. If that is the case, the experts will be dealt with in the same way as other witnesses as specified above, subject to the possibility that some of their evidence may be such that it could be given in public hearings.

Allegations

[92] According to the Terms of Reference, the purpose of this Inquiry is "to examine the allegations of wrongdoing by NZDF forces in connection with Operation Burnham and related matters". Among other things, the Inquiry is directed to:

> Seek to establish the facts in connection with the allegations of wrongdoing on the part of NZDF personnel during the Operations.

Under the heading "Scope of Inquiry", the Terms of Reference say:

> Having regard to its purpose, the Inquiry will inquire into and report on the following:
>
> 1. The conduct of NZDF forces in Operation Burnham, including compliance with the applicable rules of engagement and international humanitarian law;

2. The assessment made by NZDF as to whether or not Afghan nationals in the area of Operation Burnham were taking direct part in hostilities or were otherwise legitimate targets;

3. The conduct of NZDF forces in the return operation to Tirgiran Valley in October 2010;

4. The NZDF's planning and justification/basis for the Operations, including the extent to which they were appropriately authorised through the relevant military chains of command, and whether there was any Ministerial authorisation of the Operations;

5. The extent of NZDF's knowledge of civilian casualties during and after Operation Burnham, and the content of written NZDF briefings to Ministers on this topic;

6. Public statements prepared and/or made by NZDF in relation to civilian casualties in connection with Operation Burnham;

7. Steps taken by NZDF after Operation Burnham to review the conduct of the operation;

8. Whether NZDF's transfer and/or transportation of suspected insurgent Qari Miraj to the Afghanistan National Directorate of Security in Kabul in January 2011 was proper, given (amongst other matters) the June 2010 decision in *R (oao Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445;

9. Separate from the Operations, whether the rules of engagement, or any version of them, authorised the predetermined and offensive use of lethal force against specified individuals (other than in the course of direct battle), and if so, whether this was or should have been apparent to (a) NZDF who approved the relevant version(s) and (b) responsible Ministers. In particular were there any written briefings to Ministers relevant to the scope of the rules of engagement on this point; and

10. Whether, and the extent to which, NZDF's interpretation or application of the rules of engagement insofar as this involved such killings, changed over the course of the Afghanistan deployment.

[93] As can be seen, the Inquiry's task is to inquire into the particular matters set out under the "Scope of Inquiry", having regard to the Inquiry's purpose. The Inquiry's stated purpose is directed to "the allegations". The allegations are therefore an important part of the background against which the Inquiry must perform its specific tasks. For this reason, we think it important to have a clear statement of the allegations at the outset.

[94] Counsel assisting prepared a summary of the allegations on the basis of *Hit & Run*. Although that summary was provided to the core participants at an earlier

stage, we attach it to this Minute in Appendix 2 and invite comment on it. We have also included, from the unclassified material provided by NZDF, a summary of its response to specific allegations made in the book. This is Appendix 3. We consider that it would be helpful, both for the Inquiry and members of the public, to have a narrative account from NZDF's perspective of the events at issue. Such a narrative does not need to be supported by references or contain classified information. Rather, it would simply set out NZDF's narrative of events. The Inquiry, and members of the public, would then have the two competing accounts before them. We understand that NZDF has been working on such a narrative. It would be helpful to have that as soon as possible.

Conclusion

[95] As we said at the outset, our views as to the procedure to be followed by the Inquiry are not final views and we welcome further submissions on them. Moreover, as we have emphasised, we need to retain the flexibility to deal with matters as they arise, as it is not possible for us to predict with assurance all possible eventualities.

[96] If any party wishes to make further written submissions on the matters covered in this Minute, they should be filed by email at the Inquiry's email address (operationburnham@inquiry.govt.nz) by 5 pm on Friday 5 October 2018. If any of those who have made submissions on the matters covered in this Minute wish us to hold a hearing for oral argument on them, they should advise us, and we will schedule such a hearing after consultation with counsel as to a suitable date.

Sir Terence Arnold QC

Sir Geoffrey Palmer QC

Participants:
Richard McLeod for the Afghan Villagers
Mr Radich QC for New Zealand Defence Forces
Mr Hager
Mr Stephenson

Appendix 1: Witness Protocol

1. This Protocol sets out how the Inquiry will gather information from interviewees and witnesses. It is divided into two parts:
   1.1 The first deals with people who will provide information to the Inquiry only under conditions of confidence ("sensitive witnesses").
   1.2 The second deals with people who do not require the same protections ("other witnesses").

Sensitive witnesses

2. The process for any person who has relevant information to provide to the Inquiry and who has concerns about their safety, security, or confidentiality involves three principal steps. Those steps are:
   2.1 A confidential preliminary meeting with counsel assisting to ascertain the witness' security concerns and needs, and an indication of the nature of the information that can be provided;
   2.2 Following appropriate protective orders by the Inquiry (including as to confidentiality), provision of a "will say" statement to counsel assisting;
   2.3 If requested by the Inquiry:
      (i) a closed session interview with the Inquiry; and/or
      (ii) the provision of evidence on oath or affirmation at a closed hearing,

   subject to protective measures. Witnesses may, if they wish, be accompanied by their lawyer.

Step 1: Initial confidential contact with the Inquiry

3. An initial approach should be made in confidence to either the confidential Inquiry email address or telephone number. The contact details are:
   3.1 Confidential Inquiry email address: talktotheinquiry@inquiry.govt.nz (access to this address is restricted to the Manager Secretariat to the Inquiry, and one other member of the secretariat).
   3.2 Confidential Inquiry telephone number: 0800 22 00 40 (callers will hear an automated introductory message asking them to leave their

preferred contact details. Access to the number is also restricted to the Manager Secretariat and one other member of the secretariat. All phone messages will be cleared and responded to within 24 hours (Monday to Friday)).

4. The witness will then be contacted by counsel assisting and a preliminary meeting with counsel assisting will be arranged at a suitable and secure location.

5. At the preliminary meeting a security needs assessment will be completed, which will identify any concerns or needs the witness may have in relation to the provision of information to the Inquiry. It is also expected that the potential witness will provide an overview of the nature of the information they can provide to the Inquiry.

6. The preliminary meeting with counsel assisting will be undertaken in confidence and in private. The following measures will apply:

   6.1 The individual will be designated with a cypher, and any document generated by the Inquiry will refer to the individual only by reference to their cypher. The name of the witness will be held separately in a secure environment within the Inquiry's office. Special facilities have been established to ensure that access to this information is restricted to Inquiry members and designated staff only.

   6.2 Any notes taken by counsel assisting will be anonymised and also secured within the Inquiry's office.

Step 2: Second meeting with counsel assisting to prepare "will-say" statement

7. For individuals whom the Inquiry wishes to interview, the Inquiry may issue orders under s 15 of the Inquiries Act 2013, including protective measures relating to anonymity and confidentiality. The Inquiry's consideration of protective measures at this stage will be undertaken on the basis of the security needs assessment completed by counsel assisting at the preliminary meeting.

8. Once protective measures orders are in place, counsel assisting will meet again with the witness to prepare a "will-say" statement, approved by the individual but unsigned. This will not be considered evidence. The same

precautions noted at paragraph 6 above will also apply to any "will-say" statement.

Step 3: Closed session interview by the Inquiry and/or a closed hearing to take evidence on oath or affirmation

9. A person being interviewed by, or giving evidence before, the Inquiry will be entitled to have his or her lawyer present. The lawyer will not be expected to take an active part in the process but rather to be available to the witness if he or she wishes to consult them. If classified material is to be discussed, the lawyer will have to hold an appropriate clearance, or not attend the interview or hearing during the discussion of that material.

(a) Closed session interview

10. Where a closed session interview is ordered by the Inquiry, this will take place in a secure location and in private.

11. Prior to the closed session interview, counsel assisting will provide a briefing to the witness on the issues the Inquiry may wish to canvass with the witness. The Inquiry may, however, ask questions at the interview on any matter it considers relevant.

12. Interviews will be digitally recorded and a transcript of the interview prepared either during the interview or subsequently. Digital recordings of the interview and transcripts will be stored in a secure environment within the Inquiry office and access will be restricted to Inquiry members and counsel assisting. Transcripts, if prepared, will be secured and anonymized using the witness' allocated cypher.

13. Questioning of the witness will be carried out by the Inquiry members and, where appropriate, counsel assisting.

14. In some cases, a second or subsequent interview or interviews may be required.

15. Protective orders appropriate to the circumstances of the witness will be made. These are likely to include (as a minimum) anonymity and non-publication orders.

16. If the Inquiry considers it necessary to meet the requirements of natural justice for some level of disclosure of the witness's statement to a party to

the Inquiry, the Inquiry will consult with the witness before this course is taken. The Inquiry will take steps to ensure that any disclosure to an affected party is made in a way that protects the identity of the witness.

17. It is possible that the Inquiry may ask a person who has been interviewed to give evidence on oath or affirmation at a closed hearing.

(b) Closed hearing

18. Prior to a closed hearing, Counsel assisting will provide a briefing to the witness on the issues the Inquiry may wish to canvass with the witness. The Inquiry may, however, ask questions at the hearing on any matter it considers relevant.

19. Witnesses will give evidence on oath or affirmation at closed hearings. Questioning will be carried out by the Inquiry members and/or by counsel assisting as appropriate.

20. Evidence will be digitally recorded and a transcript of the evidence will be prepared either during the hearing or subsequently. They will be stored and handled as described in paragraph 12 above.

21. Protective orders appropriate to the circumstances of the witness will be made. These are likely to include (as a minimum) anonymity and non-publication orders.

22. Where issues of natural justice require conveying the substance of a witness' evidence to others, a similar process to that outlined in paragraph 16 will be followed.

Protective measures

23. As part of its information gathering process, the Inquiry will consider taking protective measures suitable to the relevant circumstances at any stage of a witness' involvement with the Inquiry. These may include steps such as making orders protecting the identity of the person and preventing any publication of his or her statement or evidence or involvement with the Inquiry.

Approach for Afghan residents

24. The Inquiry considers that Afghan residents who have information that is relevant to the Inquiry are likely to be vulnerable and so will need protective measures. It wishes to take further time to consider the way in which evidence will be taken from Afghan villagers and other residents and the protective measures which will apply.

Other witnesses

25. In relation to witnesses other than sensitive witnesses, a similar staged process will be followed, but without the protective measures.

26. Interviews and evidence will generally be conducted in closed sessions, although transcripts will be made available to core participants, subject to non-publication orders.

Appendix 2: The Allegations made in *Hit & Run*

1. The Inquiry provides the following summary of the allegations contained in the book.

(i) Operation Burnham was based on faulty intelligence

2. Third informant was not trusted by intelligence staff (his motives or information) — and provided with inducements/placed in danger by intelligence staff (p 20).

3. It was primarily information from the third informant on identities and whereabouts of insurgents which "guided the retaliation" (p 20).

4. Attack on Abdul Razaq's family home in Khak Khuday Dad was based on faulty intelligence (p 54) — Ghafar (a wanted insurgent) was not present but three generations of his family were.

(ii) Operation Burnham involved the injury or killing of civilians

5. The raid was conducted as retaliation for the killing of Lt Tim O'Donnell (motive to act in a cavalier/reckless manner?) (pp 8; 16–17; 23; 32; 44; 79; 80).

6. It was carried out in circumstances where it can be inferred that the killing of unarmed civilians was known to NZDF personnel at the time the operation was carried out, or in circumstances where they were reckless as to that fact.

7. The actions of NZDF personnel constitute possible war crimes and breaches of domestic and international law (p 110 — for further particulars see paragraph vii).

(iii) No assistance (or investigation) was provided by SAS after they became aware of civilian casualties (p 70)

8. No sign that SAS tried to help villagers in Khak Khuday Dad after the helicopter attack (p 54).

9. Despite the SAS becoming aware very soon after the raid that there were civilian deaths and injuries, "they never came back to investigate, give help or offer compensation" (p 70).

(iv) There was misreporting of the success of the operation initially, and then consistent denials of civilian casualties amounting to a cover-up

10. SAS officers helped write the ISAF press release the day after Operation Burnham, which reported 12 insurgents killed and no civilian casualties (p 45).

11. Following reports of civilian deaths, "There was no acknowledgement … that anything wrong had happened or of any failure in the mission" (p 72).

12. ISAF would have known soon after the press release that it was incorrect, but did nothing to change it (p 75).

13. Throughout international reporting on civilian deaths, NZ forces remained silent (p 78).

14. ISAF investigation found a "gun site malfunction" caused several rounds of ammunition to fall short, which may have caused civilian casualties (p 78).

15. NZDF acted throughout as if nothing had gone wrong and instead claimed success in Afghanistan (p 97).

16. In response to *One News* story, NZDF issue a press release stating allegations of civilian casualties were "unfounded" (p 100). Repeated by Defence Minister Wayne Mapp.

(v) Qari Miraj was detained by SAS. They beat him, and handed him over to Afghan NDS "secret police". He was then tortured (p 124 – timeline)

17. The SAS took Miraj to the NDS knowing he would be tortured there (p 88).

(vi) Later missions involved a targeted killing strategy which was unlawful (p 90–91)

(vii) The actions of NZDF personnel constitute possible war crimes and breaches of domestic and international law (p 110)

18. First Chinook helicopter deployed SAS at Khak Khuday Dad, gunshots are heard (SAS believe it is insurgents firing at the helicopter), then Apache gunships open fire on the houses, circling and attacking repeatedly (p 36). Appears SAS called the Apaches for support (p 37).

19. No evidence that insurgents identified in the village when Apaches open fire (p 37).

20. SAS likely to have called in the airstrike and had overall responsibility for the operation (p 55).

21. SAS saw the intensity of the attack but "apparently did nothing to stop it" or search houses, or check to see if anyone needed assistance (pp 36-37).

22. Civilians began fleeing homes/tents. Helicopters should have seen some people were children through powerful night vision (p 50).

23. Two villagers appear to have been shot by SAS (one by a sniper) as they fled (pp 56-59).

24. Second Chinook deployed SAS at Naik. Neither insurgent target (Abdullah Kalta and Maulawi Naimtullah) were present. SAS set fire to a room

containing religious books and personal possession and left house burning (p 39). Also burned down Naimtullah's father's house, and Abdullah Kalta's.

25. Houses were burned as punishment (p 40).

26. After searches of Naik complete and (Afghan) commandos confirm there were only civilians present, the Apaches re-appeared and fired at houses (p 41). This time they check first that the houses are unoccupied.

27. Apaches opened fire because "it was more like retaliation and they didn't care whether there were 'bad guys' there" (p 44).

28. Apache helicopters then pursue two "squirters" fleeing Naik. Rules of engagement for Apaches required targets to be positively identified as target presenting and "imminent threat". They fire upon them until "it is certain they are dead" (p 42).

29. Wounded elderly civilian from Khak Khuday Dad approached CRU commandos who render assistance. They then board helicopters (by implication the SAS become aware of the civilian casualty?) (p 44).

30. SAS officers, Mapp and Lt-General Jerry Mateparae help write ISAF press release which does not mention New Zealand or SAS involvement (p 45).

31. Ten days after the first raid troops, returned to destroy houses being rebuilt in Naik; "it was to punish them" (p 80).

(viii) There was or may have been Ministerial knowledge of and authorisation of Operation Burnham before it took place (p 28)

32. Mapp and Mateparae were briefed "on the plan by [Lt-Colonel McKinstry's] staff".

33. They met General Petraeus to thank "him for the aircraft and other resources he had made available for the raid".

34. "Mapp and Mateparae also got involved in some practical work, including helping control the post-raid publicity".

35. Technically NZDF did not need ministerial sign off, "but this mission was different. It was unusually large, was very much SAS initiated and driven, and the success or failure had serious implications".

36. Mapp and Mateparae obtained approval for the operation from the Prime Minister (p 30).

Appendix 3: New Zealand Defence Force public response to the allegations in *Hit & Run*

1. A detailed rebuttal of the allegations in *Hit & Run* has been made by NZDF after the publication of the book in March 2017. The first detailed rebuttal was made at a press conference by Lt-General Tim Keating on 27 March 2017 and that has been elaborated since. This account is principally drawn from the "Talking Points for the Prime Minister and Minister of Defence — Key Messages — Operation Burnham" dated 23 February 2018.

2. The Chief of Defence Force, Lt-General Keating, issued a detailed rebuttal at a press conference on 27 March 2017, and described an operation, called Operation Burnham, carried out on the night of 21–22 August 2010.

3. *Hit & Run* alleges that the SAS conducted an operation in Khak Khuday Dad Village and Naik Village. It provided detailed lists of the dead and wounded from those two villages, and lists of the houses destroyed.

4. NZDF rebuts the book's claims that the NZSAS committed war crimes or acted inappropriately during Operation Burnham. In all respects, the conduct of the New Zealand ground forces during the operation was exemplary.

5. NZDF says that Operation Burnham did not occur in the villages named in the book, but in a place called Tirgiran Village, two kilometres away, in the north-east of Bamyan Province. The operation followed the attack on 3 August 2010 on the New Zealand Provincial Reconstruction Team (PRT) that killed Lt O'Donnell.

6. NZDF knew in a matter of days, from local and ISAF intelligence, who had attacked the patrol.

7. The New Zealand Government gave permission to use the SAS, who were operating out of Kabul with the Afghan Crisis Response Unit, to see if they could help enhance the PRT's security. Greater security would allow the PRT to continue with the progress it had achieved to date in its mission.

8. The underlying premise of the book was that the SAS conducted an operation in Khak Khuday Dad Village and Naik Village that inflicted considerable damage to property and deliberately killed civilians, and which added up to war crimes that need to be investigated. However, Operation Burnham was conducted in Tirgiran Village, some two kilometres away. A feature of all SAS operations was the involvement in the planning, conduct and subsequent debriefs and review of the operation by a lawyer. New Zealand was one of the first in the ISAF coalition to adopt this practice of legal oversight at the tactical level, which was aimed to provide a level of additional assurance to the commander and troops on the ground that their actions were within their operational directive and any offensive actions were within the Rules of Engagement.

9. The SAS and partner ground forces arrived at the Helicopter Landing Zone at 0030 on 22 August 2010. They were provided covering support by Coalition

Aircraft. The role of these aircraft was to provide protection to the ground patrols.

10. The ground force commander was an SAS Officer who controlled both the ground activities and provided clearance, after the appropriate criteria had been met, for any involvement of the aircraft. These elements were coordinated by an air controller in his location.

11. The criteria were that the target was positively identified as a direct participant in hostilities and that any collateral damage would be minimised.

12. On arrival of the ground patrols by helicopters, insurgents with weapons were identified leaving the village to take up positions on the high ground and within the village which were deemed, appropriately, by the ground force Commander to threaten the ground force. On meeting the necessary criteria within the Rules of Engagement, coalition aircraft were given permission to engage these insurgent groups.

13. Meanwhile, the ground forces entered a number of the buildings where intelligence had indicated insurgent leadership was staying. While the insurgents themselves had left, significant quantities of weapons and ammunition were found and destroyed on site.

14. During the destruction of the ammunition, two dwellings caught fire, one through exploding ammunition failing on the roof and one by an unattended cooking fire.

15. The SAS suffered one casualty, who was injured by falling debris during the operation.

16. Planning for the operation went to great lengths to protect all civilians on the ground, and this was followed through meticulously by the ground force during the conduct of the operation.

17. Part of this included a procedure known as a callout, where before entering the village, the ground forces announced their presence and intention to the villagers through loudhailers, advising the villagers that this was a security operation. The obvious downside of this approach is that it gave away the element of surprise and allowed the insurgents time to respond, thereby putting the ground forces at greater risk.

18. Two shots fired by the SAS ground force were targeted at an insurgent who was approaching one of the ground force positions. The insurgent was shot and killed.

19. The situation in Afghanistan at the time was considered by New Zealand to be one of a non-international armed conflict. The legal framework governing the conduct of members of NZDF was one regulated by international humanitarian law also called the Law of Armed Conflict.

20. For many operations, NZDF will also develop its own rules of engagement. These are rules drafted with input from legal officers and operators and signed

off at the highest level. These rules can never exceed the limits of the Law of Armed Conflict.

21. All members of the Armed Forces, and indeed all members of this deployment, are required to undergo training in the Law of Armed Conflict — it is a baseline training requirement for all members of the Armed Forces. All members of this deployment undertook specific pre-deployment training that incorporated briefs and scenario-based training involving the application of the rules of engagement. All personnel were issued with a Code of Conduct card which outlined their obligations under international law.

22. As part of this SAS deployment, NZDF sent a legal officer to accompany the deployment at the tactical level.

23. The legal officer did not observe any activity in relation to Operation Burnham which gave them any cause for concern around compliance with the law of armed conflict or the rules of engagement.

24. It is a tragic reality that civilian casualties occur in times of armed conflict. Civilian casualties, however, are not necessarily unlawful at international law.

25. Information received after Operation Burnham indicated that civilian casualties may have been possible.

26. ISAF was required to assess all reports of possible civilian casualties and was also required to notify such instances to the United Nations Assistance Mission in Afghanistan and the International Committee of the Red Cross.

27. After the operation, reports of civilian casualties were made to the Afghan regional governor. ISAF stood up an investigation team lead by an ISAF Brigadier General and supported by a team including an ISAF Legal Officer as well as the Afghan Government representatives.

28. The investigation team concluded that civilian casualties may have been possible due to the malfunction of a weapon system in a supporting Apache helicopter, as was made public by ISAF on 29 August 2010.

29. The investigation team also concluded that members of the NZSAS appear to have complied with the ISAF commander's tactical directive, the rules of engagement, and accordingly the law of armed conflict. The investigation concluded no further action be taken.

30. NZDF says that in all respects the conduct of the New Zealand ground forces during the operation was exemplary.