

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

**A GOVERNMENT INQUIRY INTO
OPERATION BURNHAM AND
RELATED MATTERS**

Date of Minute: 4 June 2019

MINUTE No 16 OF INQUIRY

Introduction

[1] Following Minute No 14, in which we outlined a proposal in relation to the Afghan villagers' evidence, we received submissions from core participants. This Minute sets out an alternative approach that the Inquiry may be able to adopt depending on the particular circumstances of the Afghan villagers. It also addresses funding for counsel for the Afghan villagers.

The Inquiry's general approach to witnesses

[2] We begin by briefly summarising the principles set out in Minute No 4¹ (and confirmed in Ruling No 1)² and in the Witness Protocol for the handling of witnesses and the reasons those principles were adopted.

[3] The Inquiry took the view that witnesses should be the Inquiry's witnesses, rather than the witnesses of any particular "party". As a consequence, the Inquiry determined that Counsel Assisting would conduct an initial interview with potential witnesses and prepare "will say" statements. The Inquiry would then assess whether it wished to hear oral evidence from the witness. If so, the "will say"

¹ Minute No 4 dated 14 September 2018.

² Ruling No 1 dated 21 December 2018 at [79].

statement would form the basis of the witnesses' oral evidence to the Inquiry. That evidence would be tested by Counsel Assisting and by the Inquirers, with reference to documentary, video and other material as necessary. Most of the taking of evidence would have to be conducted in private for reasons which we explained.

[4] This approach was adopted because the Inquiry saw itself as conducting a factual investigation rather than determining an adversarial proceeding between parties, as would occur in court. One of the benefits of this approach was that it mitigated any concern that the evidence of, for example, present or former New Zealand Defence Force (NZDF) personnel might be "shaped" or influenced in some way by NZDF. This concern was succinctly expressed by Mr Hager in his submission of 5 October 2018 commenting on Minute No 4, where he made the following relevant comments:

- 3.10.1 I support the Minute's proposal ... that all witnesses be Inquiry witnesses However, I am very concerned that NZDF staff may not appear genuinely as Inquiry witnesses – ie that NZDF will not treat them as such.
- 3.10.2 I have already given the Inquiry a copy of an email sent to all NZDF personnel involved in Operation Burnham and the related operations. This showed NZDF asking any staff who wanted to give evidence to the Inquiry to contact the NZDF Special Inquiry Office. I believe there is a serious risk of NZDF using its position of authority over these people to direct and coach witnesses and manage their input to the Inquiry. There is a real risk of interference with witnesses.
- 3.10.3 I urge the Inquiry formally to instruct NZDF that it should play no part in preparing/grooming witnesses, including not offering them NZDF lawyers as "support"....

Mr Hager went on to submit that non-NZDF core participants should have the right to cross-examine past and present NZDF staff, a submission that the Inquiry ultimately did not accept, although it did accept that core participants could suggest questions or lines of inquiry to be put to witnesses.

[5] The Inquiry has implemented the approach described in paragraph [3] above. Counsel Assisting have interviewed and prepared "will say" statements for approximately 70 past and present NZDF personnel and others involved in the

operations at issue, many of whom will be required to give evidence to the Inquiry members. The hearing of evidence is underway.

[6] As Ruling No 1 indicates, the Inquiry considered that the principle that witnesses are witnesses of the Inquiry was one of general application; that is, it should apply to *all* witnesses, including the villagers. For that reason, the Inquiry was not attracted to the suggestion made by counsel for the Afghan villagers that they would prepare briefs of evidence for the Afghan villagers, which would form the basis of their evidence to the Inquiry. Furthermore, the timeframe which their counsel has indicated would be required for that exercise (which results from the complexities involved) is not one that the Inquiry can accept, given that it has a firm reporting deadline.³

Taking the Afghan villagers' evidence in Afghanistan

[7] In Minute No 14, the Inquiry set out a process whereby the account in *Hit & Run*, supplemented by the transcripts and other materials provided under conditions of confidence by Mr Stephenson, as well as his evidence and that of Mr Hager, would comprise the villagers' account of what happened on Operation Burnham. This was, however, subject to the likelihood that natural justice considerations would mean that particular matters would have to be put to the villagers so that they could respond. The Inquiry noted that it had access to objective evidence in the form of audio and video recordings, satellite imagery and photographs which would enable it to reach conclusions on particular points. In this connection the Inquiry observes that the areas of difference in the competing accounts of what happened during Operation Burnham have narrowed and crystallised.⁴

[8] It remains the Inquiry's view that the approach we described in Minute No 14 is appropriate, especially as the Inquiry has now received copies of the affidavits filed by AV1, AV2 and AV3 in the judicial review proceedings that preceded the

³ Counsel said their memorandum of 23 April 2019 at para [26] that they cannot confirm that the work would be completed in advance of the Inquiry's reporting deadline.

⁴ See "Public accounts of events during Operation Burnham and Operation Nova given by the New Zealand Defence Force and the authors of *Hit & Run: A comparative analysis*" dated 17 May 2019 and issued by the Inquiry.

Inquiry's establishment. Those affidavits outline the deponents' accounts of what happened on Operation Burnham, albeit not in great detail.

[9] However, in light of the submissions received on Minute No 14, the Inquiry has given further consideration to a means of taking evidence from the Afghan villagers in Afghanistan. The Inquiry is conscious of the desirability of satisfying the Afghan villagers that their stories have been heard and to adopt a process that maintains public confidence in the outcome of the Inquiry's work.

[10] As the Inquiry sees it, there are two possibilities. The first is that the Inquiry could take evidence from the villagers in Afghanistan in person; the second is that their evidence could be taken by way of video link to the Inquiry in New Zealand. We now address these options.

[11] Despite the various concerns expressed in Minute No 14 about security conditions in Afghanistan, the vulnerability of the villagers and so on, the Inquiry considers that it may be possible to take evidence directly from the villagers in Afghanistan in a way that may mitigate the risk to them and to others as far as is reasonably possible.

[12] The Inquiry's Terms of Reference provide that the Inquiry "may, if appropriate and after liaising with the relevant State, conduct Inquiry business (including interviewing witnesses and/or conducting site visits) outside New Zealand (having regard to the need to avoid unnecessary cost in relation to public funds)".⁵ Assuming that the necessary permissions could be obtained, a member of the Inquiry could travel to Kabul to take the evidence of the Afghan villagers. The Inquiry would obtain assistance from *[withheld]*, a law firm which has offices in Kabul and elsewhere. One of its partners *[has a New Zealand connection and]* practised in Kabul for a number of years and now travels there regularly from overseas on legal business. She and the firm have relevant experience and can facilitate the evidence-gathering process in Kabul.

⁵ Terms of Reference, cl 11.

[13] What we have in mind is that the Inquiry, through a local person who is trusted by the villagers, would arrange for the villagers who are to give evidence to travel to Kabul and give their evidence at the offices of [withheld]. One of the Inquirers would travel to Kabul, where the villagers would be able to engage directly with the Inquiry and tell their stories. As we have said previously, we do not wish to have briefs of the villagers' evidence prepared by counsel. If we are to take evidence from the villagers other than as indicated in Minute No 14, we wish to hear from the villagers directly so that we can obtain their personal, unvarnished accounts. In this connection, we note that in the affidavits they filed in the original judicial review proceedings, AV1, AV2 and AV3 all complained that, immediately following Operation Burnham, no investigator came and spoke to them about what had happened. They went on to say that they wanted the New Zealand Government to investigate and wanted to speak to the investigators. Assuming the necessary arrangements can be made, this will be the opportunity for them to do so.

[14] We should also note here that counsel for the Afghan villagers have submitted that the Afghan villagers should not be subject to cross-examination in the traditional way, particularly by lawyers for NZDF,⁶ a proposition with which we have previously expressed our agreement.⁷

[15] We envisage that this evidence-taking process would occur in Kabul during [withheld] 2019, if it can be arranged. It may be that the evidence-taking could be videotaped to provide a record to counsel for the Afghan villagers.

[16] A second, and less satisfactory option, is that the villagers attend the firm's offices in Kabul and give their accounts by video link to the Inquirers in New Zealand.

[17] The viability of both options depends on a number of things, but two in particular are important. First, it must be possible for the villagers to travel to

⁶ Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik in response to Inquiry Minute No 4, dated 5 October 2018, para [3.6].

⁷ Ruling No 1, at para [78](c).

Kabul to participate in the process without putting themselves at undue risk and inconvenience. Second, they must be willing to participate in the process.

[18] Counsel for the Afghan villagers have advised that most of their clients live in different villages in [withheld], four live in [withheld], one lives in [withheld] and another in [withheld]. If the villagers living in [withheld] are close to [withheld], there should be no difficulty in arranging travel for them to Kabul to give evidence, providing it is convenient for them. The villagers living in [withheld] and [withheld] are more problematic. This is because, given security conditions in the District, whether it will be safe for them to travel to Kabul will depend on precisely where they live and what their personal circumstances are. They are the persons who are best able to assess the risks they face in travelling to Kabul, so we will seek their views.

[19] However, to do this, the Inquiry needs the assistance of counsel for the Afghan villagers. We have previously asked for contact details for the villagers, but counsel have not provided them. Most recently, in her memorandum of 22 May 2019, Ms Manning says that her instructions are that the villagers do not wish to engage directly with the Inquiry in the absence of counsel and that few of her clients can be contacted directly in any event. Moreover, in Minute No 10,⁸ the Inquiry asked counsel for clarification of a number of matters in relation to their clients. Counsel advised by email on 23 April that they were in the process of responding but in their memorandum of 22 May said that they did not have any funding to respond to the Inquiry's request. (We return to the issue of funding below.)

[20] The Inquiry is prepared to do what it can to hear the villagers' stories, but needs counsel's assistance to do so. We reiterate our request for the necessary information.

⁸ Minute No 10 dated 20 March 2019.

[21] If it proves impossible to arrange safe travel for the sufficient of the villagers to make the endeavour worthwhile, the Inquiry will revert to the process described in Minute No 14 as it does not consider there to be any other tenable alternative.

Funding for counsel for the Afghan villagers

[22] Ms Manning advised the Inquiry by Memorandum dated 7 May 2019 that no counsel for the Afghan villagers would be attending Modules 2 or 3 because she considered the funding offered by the Department of Internal Affairs (DIA) was inadequate to enable counsel to represent their clients' interests properly. The Inquiry was concerned to hear this as it had understood that funding for the three Modules had been agreed. Accordingly, we asked the Inquiry's Manager Secretariat, Ms Anna Wilson-Farrell, to look into the position, even though, under the Inquiries Act 2013, the Inquiry simply makes recommendations that funding should be granted (indicating the scope of the anticipated work) and the Chief Executive of DIA makes a grant, subject to any conditions.⁹ We set out below what we understand to have occurred and suggest a way forward.

[23] On 2 April 2019, immediately before Module 1 on 4 April, Ms Manning contacted Ms Wilson-Farrell to express her concern at the offer that DIA had made by way of funding for the Modules 1 – 3. That offer provided \$31,200 funding for preparation and attendance by two counsel at the Modules and an additional \$9,984 for disbursements, giving a total of \$41,184. In response to Ms Manning's concern, Ms Wilson-Farrell contacted DIA. That same day, DIA acknowledged that there was an error in their calculations and provided a revised calculation, which resulted in an overall grant of \$92,232. There was a meeting between Ms Manning and DIA on 3 April and a further meeting on 5 April, which Ms Wilson-Farrell attended for a time.

[24] On Monday 8 April, DIA sent an email to Ms Manning setting out its further revised calculations in light of the further information she had provided at the 5 April meeting. The revised calculation for the three Modules provided for

⁹ Inquiries Act 2013, s 18(1) and (3).

funding of \$64,800 for counsel hours and up to \$27,500 for disbursements, for a maximum total of \$92,300. Much of the amount allowed for disbursements related to the costs of communicating with the Afghan villagers, particularly on the issue of location. Following further discussion with Ms Manning and clarification from the Inquiry as to what the Modules involved, DIA sent an email on 11 April setting out a revised calculation. The revised calculation allowed \$69,600 for counsel hours and a maximum of \$20,000 for disbursements, for a total of \$89,600. The email made it clear that the grant related to the three Modules and that further funding in relation to work with the Afghan villagers (such as evidence gathering) would await advice from Ms Manning as to what she thought was necessary. Finally in this sequence, DIA emailed on 17 April to say that the amount allowed for disbursements would be further reduced from \$20,000 to \$15,000 to reflect the fact that the Inquiry had put back the non-Crown core participants' presentations on location issues (which had originally been scheduled for Module No 1) until the final hearing in October 2019 to ensure that they had a proper opportunity to prepare. On this basis, the total amount allowed was \$84,600.

[25] On 18 April Ms Manning wrote to DIA referring to the meetings and emails noted above. Ms Manning described her letter as being a request for further funding separate from the funding the DIA was considering in relation to Modules 1 – 3. Ms Manning outlined her best estimate of the funding that counsel would require over the following ten months to undertake their work on behalf of the Afghan villagers, including gathering the villagers' accounts of what happened. She noted several caveats, however – that the funding sought did not cover costs associated with the proposed October hearing and that further funding might be required depending on how the inquiry developed.

[26] In calculating the overall amount of counsel time required, Ms Manning incorporated the \$69,600 that DIA had proposed for Modules 1 – 3. Incorporating that amount and providing for disbursements at the agreed basis of 32 per cent of counsel fees, the total amount sought was \$196,568.

[27] On 23 April 2019, DIA wrote to Ms Manning indicating that funding had been granted for a maximum of \$69,600 (plus GST) for counsel and disbursements of up to \$15,000. This funding was for Modules 1 – 3 and was subject to deduction of the \$25,000 already agreed on account of Module 1. DIA also wrote to the Inquiry advising of this. At this point, the Inquiry thought that funding for counsel for the Afghan villagers for Modules 1 – 3 had been settled, so that it remained for a final tranche of funding to be settled for the other work of the Inquiry, including the proposed October hearing.

[28] On 3 May 2019, Ms Manning submitted an invoice in relation to counsel's participation in Module 1 on the basis of an interim grant of funding agreed by DIA on 8 March 2019.

[29] On 7 May 2019, Ms Manning filed a memorandum with the Inquiry advising that she had written to DIA rejecting their offer of funding in relation to Modules 2 and 3. Her memorandum said:

- 2 Counsel regrettably advise that it has not been possible to confirm funding arrangements for our clients' participation in the Inquiry's public hearings. In our view, the proposed grant of funding and basis of funding is insufficient to enable our clients' adequate participation in these hearings.
- 3 In light of the above, counsel advise that our instructions are that our clients do not intend to actively participate in Modules 2 or 3, directly or through counsel. While counsel request to remain included in all Inquiry correspondence, disclosure and memoranda, our instructions at this time are that we will not be appearing at Modules 2 or 3.

Ms Manning also provided a copy of her letter to DIA of the same date. That said that she considered the grant of funding to be inadequate and noted that DIA did not provide for an amended grant in the event that further work was required (in addition to that provided for by the grant), a topic which she said she had raised in a telephone conversation with DIA on 9 April.

[30] The Inquiry was both surprised and concerned to receive this memorandum. We instructed Ms Wilson-Farrell to contact Ms Manning to see whether the Inquiry could assist in any way. Ms Manning responded that she had

raised the possibility at the 5 April meeting that counsel might be unable to accept a funding proposal if they felt that it was inadequate to enable them to carry out their professional responsibilities. As to the possibility of participation in Module 2, Ms Manning indicated that that in the two and a half weeks remaining before the Module, she would not be able to consider the material which had been publicly disclosed and complete legal submissions along with meeting her other professional obligations. Accordingly, there was no representation of the Afghan villagers at Module 2.

[31] We do not propose to comment on the rights and wrongs of what has occurred. We would, of course, prefer that the Afghan villagers were represented at the Modules. Indeed, one of the presentations made at Module 2 was included in response to a request by Ms Manning on their behalf. We would like, therefore, to ensure that the villagers are represented at Module 3 and that their funding for the remaining work of the Inquiry is finalised.

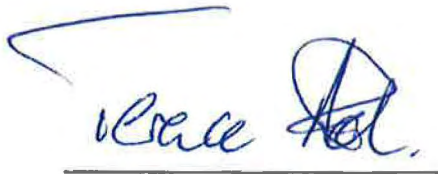
[32] To this end, we note that in the 18 April letter to DIA, counsel for the Afghan villagers requested some form of financial certainty for the remainder of the Inquiry. Counsel estimated that 80 counsel hours per month (ie, \$19,200) would be required for the remainder of the Inquiry. Ms Manning sought funding of \$122,400 on account of counsel's work, \$35,000 for interpreter's fees and \$39,168 by way of other disbursements.

[33] There are aspects of Inquiry's work programme that remain to be finally settled, although these will be settled in a further minute to be issued shortly. Taking everything into account, and to give counsel certainty, we consider that Ms Manning's estimate should be increased by 15 per cent to 92 counsel hours per month (ie, \$22,080) and recommend DIA make a grant to that effect. We note that Ms Manning's calculations included some work (for example, preparation of her clients' evidence) that the Inquiry does not require. There is likely, however, to be some further gathering of information from the villagers (to respond to issues raised to meet natural justice concerns, for example). And apart from the matters covered in Ms Manning's estimate, there are other areas where the Inquiry wishes counsel for the Afghan villagers to contribute, such as participation in Module 3 in July and

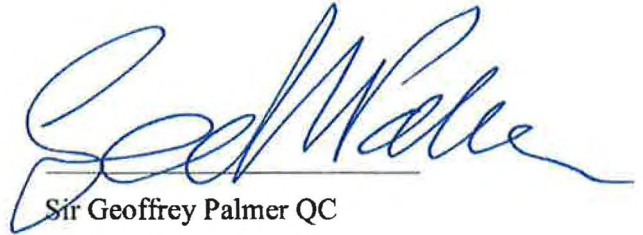
in the proposed October hearing. These additional matters justify an increased estimate of time.

[34] On this basis, the Inquiry recommends that that DIA consider a grant of up to 92 counsel hours per month for the period from 1 June to 30 November 2019, together with disbursements of up to 25% of that amount. This would give counsel for the Afghan villagers an overall grant of up to \$132,480 for counsel's fees and \$33,120 by way of disbursements.

[35] A further funding recommendation may also have to be made for counsel for Mr Stephenson. Counsel should contact the Manager Secretariat to advise their estimate of work for the same period.



Sir Terence Arnold QC



Sir Geoffrey Palmer QC

Parties:

Mr McLeod for the Afghan Villagers

Mr Radich QC for New Zealand Defence Force

Mr Hager

Mr Salmon for Mr Stephenson