5 October 2018

Submission concerning Inquiry Minute No. 4

Dear Sir Terence and Sir Geoffrey,

Thank you for the opportunity to comment on the Inquiry Minute No. 4. As with my earlier comments, since I am not a lawyer I am presenting them in the form of a letter rather than a memorandum.

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1. Overview

1.1 Subject to the points below, I broadly support the procedure for dealing with classified information that is set out in Minute No. 4. It fulfils the goal of being effective, efficient and fair. As I have stated in earlier communications, I believe that most or all of the key NZDF documents do not need to be classified: that they concern facts of place, time and event particular to the incidents eight years ago and can reasonably be declassified to help the work of the Inquiry. The examples of documents declassified in overseas inquiries I provided in response to Minute No. 3 strongly support this position.

1.2 There are some parts of the plan for handling classified information that are unclear. I discuss these below.

1.3 Minute No. 4 is in two parts, the first on processes for handling classified information and the second on the Inquiry's overall process. While the first part seems sound and fair, the second part seems unsound and unfair, primarily due to the exclusion of non-NZDF participants from critical parts of the process.

1.4 The problem with the proposals for the overall process is precisely what I have warned about in each of my earlier communications: that the claimed need to protect classified information would come to dominate the process, justifying a closed and unfair process. Stated bluntly, what is

proposed is a process that best suits NZDF. It would not provide the necessary scrutiny of NZDF's actions that are the subject of the Inquiry. I would feel very uncomfortable taking part in such an unequal process.

1.5 I describe the proposals as “unsound” in part because they are based on unsubstantiated and self-serving claims by NZDF about how much of its documentation needs to be secret. Part one of the Minute presents plans for how to assess the classified information independently and then part two pre-empts this process and concludes, without seeing the review of classifications, that military secrecy must trump the requirements of an effective, efficient and fair process.

1.6 The Minute justifies the secrecy-based approach by suggesting, I believe unsoundly, that closed processes are needed for a variety of reasons: protecting classified information, sensitive care of vulnerable villagers and providing confidentiality for any whistle blowers who wish to give evidence without retribution from NZDF. I will explain below why I think this bundling of these three issues is a false equivalence and does not justify the organisation being investigated getting away with closed processes and closed hearings.

1.7 Around the world people are facing the same issues, with security agencies increasingly insisting on special treatment and others working to achieve fair processes. The Minute seeks a process that is effective, efficient and fair. To achieve this, it is crucial that security concerns are not treated as absolute and other values such as openness and natural justice as coming second, to be fitted around the absolutes of secrecy as circumstances allow.

2. Proposals for handling classified information

2.1 As stated, I support the broad approach set out in the Minute: reassuring local and overseas agencies that classified documents will be handled properly but asking for all documentation to be supplied to the Inquiry now for review and potential declassification by an independent person, Ben Keith.

2.2 Mr Keith's work should be informed by the wide range of previously classified documents that have been declassified in similar overseas inquiries, as seen in examples that I provided to you in response to Minute No. 3.

2.3 There are some parts of the proposals for handling classified information that are not clear to me yet. I will comment on these parts now.

2.4 Paragraph 14(b)(i) of Minute No. 4 notes that there is dispute over where the boundaries should be drawn between “foreign” information that originates from foreign sources and so-called foreign information that had been “generated by NZDF in the context of ISAF/NATO operations”, including “reports from NZDF personnel in Afghanistan to NZDF Headquarters in Wellington.” This is a very important question, given that NZDF claims that the vast majority of its relevant information is foreign sourced and therefore doubly complicated to use during the Inquiry. However, having flagged the question, it does not seem to be resolved in the rest of the Minute.

2.5 If your plan is that all classified material, both foreign- and New Zealand-sourced, will go through the same independent declassification process, then this question perhaps does not need to be answered. That would be the best and simplest approach. It is very important that restrictions are not applied to documents produced by NZDF, which comprise the majority of key materials for the Inquiry. Please consider my 17 August 2018 letter on this subject if this question arises.

2.6 The German Kunduz Inquiry examples from my 10 August 2018 letter show that restrictions on

foreign-originated documents are unnecessary too. An important example of this is the helicopter weapon system video, which NZDF is very keen to present to the Inquiry without other parties present. It is worth noting that a lot of the NZDF's narrative about what happened during Operation Burnham is not based on what SAS troopers saw, but on what was inferred later from this video. It therefore matters very much to fair (and effective) process that the foreign source of this video is not an excuse to withhold it from the core participants.

2.7 However, when NZDF recently delivered its bundle of NZDF controlled documents, there were, according to Mr Radich, only approximately 150 documents. In response to a question from me, he replied that these documents included Cabinet papers, papers to the Minister, Directives and so on. In other words, NZDF appears not to have provided most key documents relating to the planning, conduct and consequences of Operation Burnham, presumptuously sticking to its line that the vast majority of its documents are under the control of NATO and the US military. These ones released to date do not appear to be the crucial documents.

2.8 Noting that your Minute No. 4 had already said that there is dispute over where the boundaries are between foreign and New Zealand information, NZDF should not have unilaterally decided what it was willing to give the Inquiry. It has absolutely no right to make the decisions about the process for classified materials. It should have handed over ALL New Zealand-produced documents, not excluded most of them under its own preferred definition. This is pre-empting the Inquiry's decisions. It is a tactical move to try to avoid proper scrutiny, attempting to push the vast majority of documents into the most closed and cumbersome process possible.

2.9 I request that the Inquiry order NZDF to hand over all NZDF-produced documents (ie those written by an NZDF staff member) and let the Inquiry – not NZDF – evaluate them and make the decisions about how they need to be handled.

2.10 I predict, based on NZDF behaviour to date, that left to themselves we will eventually be told by NZDF or MFAT that NATO and the US military are not prepared to declassify or allow non-NZDF core participants to see the NZDF documents claimed by NZDF to be under NATO and US military control. Likewise we will be told that they are not prepared to declassify or allow non-NZDF core participants to see the information that is legitimately under NATO or US military control. Somehow what was fine in the German inquiry will be impossible for us. If so, it will be some kind of officials-officials cook-up. Thus these decisions and any negotiations must not be left to NZDF and MFAT.

2.11 In addition, the Minute does not address the situation where some documents have their classification reduced but are not entirely declassified. For instance, Mr Keith could in theory recommend that some documents be reclassified from Top Secret to Confidential or Restricted. As the proposals stand, the core participants would still not be allowed access to these documents, even though they had only a low level classification (indeed, the NZDF position is that core participants should not even be allowed to see its non-classified documents). I have thousands of Restricted and Confidential NZDF documents and they concern subjects that are not sensitive nor risky to any person. There is no principled justification to withhold them from core participants.

2.12 I request that any documents classified or reclassified with a lower-level classification, such as Confidential and Restricted, be fully declassified by the Inquiry and then supplied to core participants under some form of non-disclosure agreement. I request the same for any crucial documents classified higher such as the helicopter video. The NDA terms would ensure that the documents did not become publicly available. (As an alternative, lower-level security clearances could be arranged for core participants.) The overall point is that a system devised for one purpose – protecting information which, if released, would seriously harm the nation – should not be used for

a different and unworthy purpose, such as trying to avoid being caught out involved in a cover up (which would constitute a different form of harm to the nation).

2.13 This leads to a wider subject. The current proposals for handling classified information appear to make no distinction between what is allowed to be provided to the public and what can go to the core participants. But as I described in my response to Minute No. 3, a similar British inquiry (Baha Mousa), under the UK Inquiries Act, gave core participants access to many hundreds of documents that were not made public. It's not clear what classification the documents had but nothing like this appears to be built into the Inquiry process yet. I am doing more research on this subject.

2.14 There is no good reason why core participants should not have access to all sorts of materials that are not able to be released to the general public. I have decades of experience handling sensitive information in a responsible way; the lawyers are subject to well established rules concerning privilege. Rather than the binary public/secret categories in the Minute, there should be three categories like the UK inquiry: 1. public, 2. core participants and Inquiry only and, for what are likely to be very few of the key documents, 3. Inquiry only.

2.15 This should include core participants having access to all but very highly classified documents (and for the few properly highly classified ones, redactions and summaries can be used). Also, there will be information that needs some protection for non-national security reasons, such as New Zealand public-employees' names (including military), and these could likewise be provided to core participants under a non-disclosure agreement. This was, for instance, the case in the Baha Mousa inquiry, where nearly all names were provided to core participants (but not phone numbers and addresses) As discussed more below, the need for an effective, efficient and fair process requires that core participants be allowed to read all written evidence and be present for all oral evidence of NZDF staff (past and present).

2.16 Non-NZDF core participants are currently given no role in the classification review process, whereas NZDF and other agencies are to be consulted on any possible declassification, agreement with them is to be sought, and if agreement can not be reached the agency can make submissions. This is obviously unfair. An equivalent process is required where, for any documents that may be withheld, redacted and/or summarised, consultation occurs with the non-NZDF core participants, agreement is sought and if agreement can not be reached then the core participants can make submissions.

2.17 As part of this process, I request that all core participants be provided with a full list of all classified documents as soon as possible, including the title, originating organisation and date, and that for each document the following information is provided (as it comes available): its original security classification, the independent reviewer's recommended security classification, the commissioners' decided security classification and, for NZDF-originated documents, whether it was addressed to NZDF or to a foreign military hierarchy. This list will enable discussions about the NZDF sources to be much better informed.

3. Proposals on the overall process

3.1 It is clear that the commissioners want a good process, but it seems that currently it is being bent out of shape by the claimed requirements of NZDF operational secrecy, including that much of the Inquiry needs to take place out of the view of non-NZDF core participants.

3.2 There is no evidential basis for this approach, since NZDF claims about the necessity of secrecy for the eight-year-old operations have not been tested and verified. The Inquiry should assess for itself, in consultation with all parties, whether NZDF is right that most or all its

documentation needs to be classified and withheld from other core participants. A process has been decided for independently reviewing current security classifications and other claimed needs for secrecy including “foreign-sourced” information, but has simply not had a chance to occur yet. Thus the proposed process in Minute No. 4 is based on NZDF claims, not fact.

3.3 If the overall process is built upon NZDF's claims about the paramount necessity of secrecy, the outcome of a closed, securitised process is inevitable. That seems to be the reason why openness, natural justice and the role of core participants come second and are so restricted in the current proposals. Considering whose actions are the subject of the Inquiry, the approach seems fundamentally unsound.

3.4 The reasoning behind a closed process

3.4.1 The Minute argues, reasonably, that the choice of process for the Inquiry does not need to be binary: inquisitorial or adversarial. It can be a hybrid (paragraph 6). This is fine. But the Minute itself is binary in another way, assuming there can only be either fully open hearings or closed and secret processes. It opts largely for the second. But the Inquiries Act (and international precedent) allow a third option, through the involvement of core participants.

3.4.2 The Minute says that two considerations “point powerfully” to an inquisitorial and substantially non-public process (paragraph 7): 1. vulnerable villagers and whistle blowers needing protection and 2.classified info needing protection. The Minute repeatedly bundles these separate and very different issues together (for instance at paragraphs 73 and 75), apparently suggesting that the result is a balanced position. I think it is a false equivalence, but this is where the classified information starts bending the process.

3.4.3 First, the villagers' information will presumably not be secret from NZDF. Its staff will presumably see it all, except perhaps the names, and anyway NZDF is not actually disputing that there were casualties, only saying they have “no evidence” of them. Treating the villagers with care is not even vaguely the equivalent of allowing a government organisation to present its evidence in secret. I note also that legal representatives for the villagers have no instructions from the villagers that they prefer secrecy.

3.4.4 Nor is arranging protection for whistle blowers. The New Zealand Parliament and law accept that whistle blowers need special care. A small number of whistle blowers are necessarily an exception to any process, not a justification for non-transparency elsewhere. This is about trying to compensate for inequality of power, a fundamental issue of which the current proposals do not take proper account. It would be quite possible for the Inquiry to have a distinct whistle blower process rather than set the entirety of the Inquiry to that setting (giving NZDF the same “protections” that whistle blowers legitimately need).

3.4.5 In addition, the Minute does not address the likelihood that closed and secret processes would favour security claims over effectiveness by making it harder to get the truth from the official sources.

3.4.6 But, most concerning, the primary reasoning behind the process proposals is that openness and natural justice are not compatible with the rules for the handling of classified information (documents and witnesses). Everything else follows from that. On openness, the minute states at paragraph 79 “We acknowledge the importance of open process and the need to maintain confidence in the Inquiry's work.... Despite this… all or most of the evidence-gathering activities will have to occur in private.” Paragraph 74 proposes minimal openness, including publishing allegations made and NZDF rebuttal (both already in public) and “some of the technical issues”

including “geospatial mapping” – this latter concession stated twice (in paragraphs 74 and 81) without explaining who proposed it. Geospatial mapping seems strangely peripheral to the main issues.

3.4.7 On natural justice, the Minute cites 1995 writing by Vice-Chancellor Richard Scott arguing that in an inquisitorial inquiry “the witnesses have no 'case' to promote.... they have no case in the adversarial sense.” This seems not directly relevant when applied to the current Inquiry: a large government organisation accused of a negligent mistake, other wrongdoing and a long-term cover up, which continues to deny everything, versus those affected by the negligent mistake and those who exposed the cover up. There is a “case”, in a highly adversarial sense. But the necessity of secret evidence and secret hearings, claimed by NZDF, make an adversarial inquiry seem “procedurally complicated” (paragraph 75).

3.4.8 Fortunately, I think NZDF has misled the Inquiry over the necessity of secret evidence and secret hearings and there is plenty of room to have a proper process. As my 10 August letter illustrated, other inquiries overseas have declassified virtually all the key documents to facilitate sound processes. It follows from this that core participants and/or the public could hear most witnesses' evidence as well. In the overseas inquiries, no one died and the sky did not fall down as a result. Again, NZDF seems to be giving self-serving advice on these matters. If other countries can do this, so can New Zealand.

3.5 Core participants

3.5.1 A major issue is the role of core participants (non-NZDF ones). The Minute says they might be given redacted and summarised material “if feasible and appropriate” (paragraph 23), and paragraphs 8 and 77 suggest that it “might be possible” for them to “suggest areas of inquiry or specific questions to be put to witnesses”. But the key point is that this is about closed hearings in which they are not allowed.

3.5.2 Note that there are no “might be possibles” or “if feasibles” in the proposals relating to NZDF secrecy. Again, security is treated as absolute and the rights of others as secondary, to be incorporated as circumstances allow.

3.5.3 The Minute says (paragraph 77) its proposals do not mean “that core participants will have no ability to influence the Inquiry's evidence-gathering processes.,” but if these proposals were adopted, core participants would not be present to notice inconsistencies in evidence, omissions and nuances, to ask questions on issues that arise, to probe witnesses and challenge unnecessary military secrecy, or to assess the credibility of witnesses. In proposing questions to the Inquiry, we would largely have to guess. Compared to the core participants' evidence, nearly all of which would be open to NZDF, much of NZDF's evidence would be hidden or obscured. This would be unfair in a process that is already inherently unfair. I think this is all about classified material dominating the thinking.

3.5.4 Given the already existing inequalities of power and resources for different parties to the Inquiry, non-NZDF core participants should have the same or more rights and involvement than NZDF. But non-NZDF core participants would have fewer rights and less involvement under the proposed process.

3.5.5 There are several important ways that core participants should – in fairness and in the best interests of the Inquiry – be involved. They are listed in paragraph 3.14.1.

3.5.6 Besides issues of fairness, core participants also need to be involved to assist the

effectiveness of the Inquiry. They bring important knowledge and resources that the Inquiry will not otherwise have. The current proposals give too little weight to what it brings to the process to have the core participants well informed about the NZDF evidence. I believe that the NZDF's best hope of maintaining the cover up is closed processes and that the best hope of finding the truth – in an environment of active hiding and evasion – is to make full use of the core participants and where appropriate the public.

3.6 Another issue of inequality

3.6.1 There is another issue that affects the Inquiry. I informed the counsel assisting recently that, against my urging, one of my sources had decided not to appear before the Inquiry. This was due to the person not feeling confident that they could remain anonymous. For a knowledgeable insider to decide to appear before the Inquiry they must weigh a number of factors, including the potential harm to themselves and their families but also the good they think they can do by appearing. People who bother to be sources are usually thoughtful and intelligent people. We can expect decisions on the Inquiry process to receive media publicity (as with “Public shut out of NZSAS inquiry” following posting of the Minute No. 4) and if the Inquiry appears to be unfair or ineffective, in a potential witness' opinion, they will be less likely to want to take a personal risk.

3.7 Another structural issue needs to be addressed

3.7.1 It could seem that the Inquiry process will consist of the commissioners hearing and testing the witnesses for each “side”. This will of course happen to some extent. But it is likely that many of the sources in the book will not be willing or able to come before the Inquiry. When they agreed to help with the book, they did not commit themselves to take any further risks. Huge issues of inequality arise, since NZDF can order any number of witnesses to appear. On some issues, there could conceivably be numerous witnesses backing up the NZDF narrative (with no risk of retribution and harm) and few or none present to substantiate the evidence of the book's sources.

3.7.2 This is not about the truth of the facts presented in the book. It is simply a reality of the situation. This is why I argue that a crucial part of reaching the truth will come from minutely scrutinising the NZDF narrative and the evidence for their position. This would be greatly aided by having people involved who bring long experience and knowledge of military issues, the Afghanistan war and the particular details of Operation Burnham and the other relevant operations. The military is a distinct area of government operations that is not well understood by outsiders.

3.7.3 One option would be for the Inquiry to have its own specialist in-house researchers with knowledge of military issues and documents: including what's normal, what's sensitive and what's not. But this seems unlikely to be possible. The best option is the non-NZDF core participants, all of whom have personal experience and knowledge of these subjects. This would satisfy the requirements of fairness and natural justice as well, and increase public confidence in the process. If we are shut out, except for offering suggestions blind from the outside, the inequality is heightened and the prospects of an effective process are reduced.

3.8 Inequality of resources

3.8.1 You have may have seen the news story (https://i.stuff.co.nz/national/106778657/2-million-budget-for-nzdf-afghanistan-sas-raid-special-inquiry-office) describing how NZDF has allocated itself $2 million (plus over another million dollars of salaries) for the first year of the Inquiry – more than the entire budget for the Inquiry itself. It appears that the Chief of Defence Force allocated the money for this without seeking the government's permission. (I was tipped off about the existence of the office by staff inside NZDF Headquarters and wrote an OIA about it. Only at

that point did NZDF announce the existence of the office.) I think it is outrageous that an agency under suspicion of wrongdoing is outspending all other participants and outspending the Inquiry itself. This matters. I believe, with respect, that you, as the protectors of good process, should be questioning it. Meanwhile NZDF also holds most of the official information and has authority over most witnesses, not to mention chilling our potential witnesses by the fear of punishment if they are found out.

3.8.2 It does not seem from Minute No. 4 that the fundamental inequality between different parties to this Inquiry is being considered with the importance it warrants. The main way to reduce the inequality is in the process decisions.

3.9 The reasoning behind a non-closed process

3.9.1 The proposals in the Minute are for an inquisitorial and closed process. But the Inquiry can be inquisitorial without being closed. Instead of the ruling factor being secrecy – exacerbating the other inequalities – the plan should be to set up as open, effective and fair a process as possible and make exceptions to this in the (I believe limited) instances of genuinely sensitive information.

3.9.2 The starting point for a fairer, more effective and more open process is a more realistic view of the information that will be needed for the Inquiry.

3.9.3 First, and perhaps most important, is information about the deaths, injuries, loss of homes and possessions and other harms that occurred in the two villages. This is an essential part of the Inquiry, from which everything else flows. Information about these things will come from the villagers and their families, Afghan government agencies, UN and other humanitarian agencies and the book. This part of the Inquiry should proceed reasonably smoothly. As stated, the information is largely not secret and, while some names and other details should not end up on the Internet to avoid risks back in Afghanistan, it does not require secret hearings.

3.9.4 Second is information about NZDF's knowledge of the civilian casualties and other harms, information about what steps NZDF took to investigate what had happened and details of why it offered no medical or other aid. Contemporary NZDF documents and NZDF witnesses will provide information about this. But this is not sensitive information about methods and capabilities either. There is no good reason for this material to be secret and withheld from core participants and the public.

3.9.5 Third is information about the preparations and conduct of Operation Burnham itself and other relevant operations. NZDF holds most of the information on these matters and, as stated, it will not be realistic to expect the vulnerable sources from the book *Hit & Run* single handedly to disprove the NZDF position in the absence of us being able vigorously to test the NZDF information and source materials.

3.9.6 On the other hand, I strongly suspect that the most crucial information will be found in a relatively small number of key documents. NZDF told the Inquiry that it had identified over two thousand potentially relevant classified documents. However, I predict that the key disputed issues concerning conduct of the NZSAS operations come down to only a few dozen main documents, originating from NZDF personnel and no longer requiring any security classification. They will be about time, place and event, not sensitive methods and capabilities (although NZDF will claim the latter). Just as most of all or these documents do not need to be classified, so too logically for evidence from witnesses about the same subjects.

3.9.7 Fourth, is a probably much larger body of documentation from the weeks and years since

Operation Burnham, the years of the cover up. They will be communications and other reports that bear upon what NZDF and others knew about civilian casualties and other matters, what they reported within NZDF and to the government and why they did not offer assistance to the victims as, over the years, the story of the events repeatedly reached the news media. I expect this will include hundreds of documents, including many emails, PR documents and other documents that are organisationally or politically sensitive but not operationally sensitive, ie that do not need special protection in the Inquiry (indeed I predict that many of these documents will date from after *Hit & Run* was published, meaning that the stated numbers give a distorted picture of how much material, claimed to be sensitive, needs to be handled on most issues). Unless it was true that a document headed "NZSAS" automatically deserves permanent classification (which is not the case), all or nearly all of these documents will not require a security classification either.

3.9.8 Fifth, there will be a large number of relevant documents on training, policy, rules of engagement, international law and so on. I expect there could be debate over the classification of some of these but, for instance, I have already sent you openly available copies of coalition rules of engagement, which NZDF always claims require great secrecy. However, the world is full of open source documents on these subjects so I do not think secrecy will be a real obstacle here.

3.9.9 Finally, there are intelligence reports and the capture-kill documents (eg Joint Prioritised Effects List) that will be claimed to be very sensitive. For most of these, this will not be true. I note that my 10 August 2018 letter appended a range of intelligence documents released in overseas inquiries. But if some of these end up not being released in full to core participants, it will not be crucial.

3.9.10 The purpose of this overview is to make the point that, discussed in generality, NZSAS and military intelligence documents can sound very sensitive. But the types of information described here do not imperil New Zealand in 2018. It is reasonable to make process plans on the assumption that by far the majority of the key information will be able to be released to the core participants and/or public (like the overseas inquiries). Genuinely classified documents should be handled as an exception, not as the basis of the process.

3.10 NZDF personnel as witnesses

3.10.1 I support the Minute's proposal at paragraph 76 that all witnesses be Inquiry witnesses and also the proposal that the Inquiry will advertise for information (as in paragraph 82). However I am very concerned that NZDF staff may not be able to 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". If witnesses want legal representation, presumably there could be provision for them to apply to the Inquiry for costs for independent legal representation, possibly with the expense passed on by the Inquiry to NZDF (in the Baha Mousa inquiry, for instance, military witnesses had their legal expenses paid by the British Ministry of Defence). All NZDF should do is provide addresses so that the Inquiry letter(s) can be send directly to a widely defined set of past and present staff (the breadth and parameters agreed with the Inquiry and core participants). There should also be letters

requesting appearances by personnel who played particular roles in the events covered by the Inquiry. The Inquiry letters could include a quote from the current Chief of Defence Force instructing the past and present staff to act with integrity and tell the truth – including (indeed, especially) where their recollections are not the same as the official NZDF narrative. This is how a government organisation genuinely cooperating with the Inquiry would act.

3.10.4 The letters to all relevant staff should offer them the option of appearing confidentially if they wish, possibly under the Protected Disclosures Act. This is important as potential witnesses could fear consequences including criminal charges if they say things to the Inquiry without permission of their past or present employers.

3.10.5 It is essential that non-NZDF core participants can question the past and present NZDF staff. In the Baha Mousa inquiry, the commissioners questioned first and then, following this, core participants were allowed to question as well.

3.11 Witness Protocol

3.11.1 Without actually saying it directly, this Protocol seems to be saying – without explanation or justification – that all NZDF staff will be heard in closed hearings from which core participants are excluded. If this is not the case, it would be good to hear. But if this is what is proposed, no single move could reduce the credibility and likelihood of success of the Inquiry more. It would be a huge procedural victory for NZDF. I think this is a make or break issue for the Inquiry.

3.11.2 As already stated, there is no good reason why most currently classified documents cannot be declassified and made available to all parties in the Inquiry. So why should evidence from witnesses, which after all is on exactly the same issues as the documents, not be accessible too?

3.11.3 The proposals in the Witness Protocol seem incoherent, acting as though vulnerable whistle blowers are the same and need the same procedure as NZDF staff appearing. This is not practical. The plans look like they were written for whistle blowers (eg the methods for making contact) then apparently apply to all New Zealand witnesses. But the processes are not safe enough for whistle blowers and at the same time are needlessly secretive and closed for NZDF staff. A good way forward, with the potential whistle blower witnesses, would be for the Inquiry staff to ask the core participants' views on the best process.

3.11.4 The current Protocol processes will not feel safe to a vulnerable whistle blower. Please consider it through their eyes. First, the person is expected to leave their name and contacts, on an answer phone, before they have even spoken to a person. Second they are expected to give away their identity before they even know with certainty what the subsequent process will be. This is not considering it from their point of view. It risks deterring potential sources of information.

3.11.5 But the Protocol does, if adopted, cement in special treatment for all NZDF witnesses (“NZDF witnesses” in the sense that they are not whistle blowers.) Thus our (the authors') evidence will be open to all parties. Likewise, the villagers' evidence will be all or largely open to other parties. But the proposal is that NZDF gets the secret process it wants.

3.11.6 I have spoken to media contacts who knew about the plans for secret hearings for NZDF before the Minute was placed on the Inquiry website. The same insiders had told them that they expected the Inquiry would adopt this proposal. If correct, I urge you to rethink this approach.

3.11.7 The Minute says its process proposals are international best practice. It would have been helpful to provide some explanation or references as to which overseas inquiries or writing are

being referred to because it does not seem to be international best practice.

3.12 Allegations

3.12.1 I attach my proposed changes to the wording of the Allegations, as requested in the Minute.

3.13 NZDF narrative

3.13.1 I want to draw the Inquiry's attention to the job description of the Strategic Inquiry Liaison Officer who is employed by NZDF as one of the senior staff in the Special Inquiry Office. The job description called for a PR professional to work closely with the NZDF Public Affairs unit, helping, "through analysis and synthesis", to manage information going from NZDF to the Inquiry. The job description includes that they are to "Maintain a strategic awareness of the issues arising as part of the inquiry, carry out risk analyses, and provide mitigation strategies as necessary." I hope it is clear that this is not how NZDF should be approaching a government-ordered inquiry. Public relations staff should play no part in NZDF's response to the Inquiry.

3.13.2 The NZDF "narrative" discussed in paragraph 94 of the Minute will presumably be produced under the direction of this PR person. NZDF Public Affairs people and other staff have already presented their position in public a number of times. We do not need more unsupported claims from NZDF as part of this Inquiry.

3.13.3 A more helpful contribution from these publicly-funded staff would be to put together a referenced position paper that answers all our points, including their position on each of the casualties named in the book and Afghan government records, which explains item by item which document(s) or other evidence support each claim.

3.14 Key issues to provide a fair, efficient and effective process

3.14.1 The problems with the current proposed process – which undermine the fairness, natural justice and effectiveness of the Inquiry – will best be solved by strengthening the role of the non-NZDF core participants. In particular the non-NZDF core participants should:

- have access to all classified and reclassified documents confidential or below, and redacted versions and summaries for all documents Secret and above.
- be involved in the classification review as proposed in paragraph 2.16 above.
- be given lists of NZDF and other official documents as proposed in paragraph 2.17 above.
- be present for all witnesses and other hearings, with provision for a witness to present any very sensitive information separately to the Inquiry (with, still, redacted versions and summaries of this provided to core participants.)
- be given lists of all NZDF and other agency New Zealand personnel involved with Operation Burnham and related matters (and their positions and roles, and names redacted only if necessary); and be able to request which ones should give evidence.
- generally, be consulted on the selection of witnesses to be called by the Inquiry.
- be given copies of all correspondence between New Zealand officials/officers and foreign organisations, to provide transparency in the negotiations over access to claimed "foreign-sourced" information.

At the same time, the more open the processes are to the public, the better it will be for the Inquiry.

3.14.2 The other issue is to address the crucial inequality of resources and influence between the different participants and potential participants in the Inquiry. I have flagged these issues at various points through this submission. Areas deserving action by the Inquiry include:

- challenging NZDF over the need to outspend all other parties (including the Inquiry itself) with its self-allocated $2 million budget for the Special Inquiry Office plus over a million dollars of salaries.
- challenging NZDF over the appropriateness of using PR people to manage interactions with the Inquiry and to oversee preparation of information requested by the Inquiry.
- instructing NZDF to play no part in preparing and supporting NZDF staff witnesses (as discussed in paragraph 3.1.3).
- instructing NZDF to hand over all NZDF-originated documents immediately and let the Inquiry evaluate them and make the decisions about how they need to be handled. These decisions and any negotiations must not be left to NZDF and MFAT.

3.15 My involvement in the Inquiry

3.15.1 In the interests of openness, I should give notice of my intentions concerning the Inquiry. I have been preparing for an Inquiry for 18 months and consider that I, and other non-NZDF participants, can add real credibility and robustness to the Inquiry. But, as I have stated from the beginning, I believe finding the truth will not be straight forward and that the Inquiry process will greatly influence the Inquiry findings. If the Inquiry adopts a closed, secrecy-based process, I do not have confidence that it would produce a fair and accurate result. I would attempt in any way I could to have the decision reversed and, if that was unsuccessful, I would withdraw from participating in the Inquiry. I do not want to legitimise an unsound process.

Thank you again for the opportunity to comment.

Yours sincerely,

Nicky Hager