

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

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

Date of Minute: 22 March 2019

MINUTE No 11 OF INQUIRY

Introduction

[1] In Minute No 8, dated 11 February 2019, the Inquiry set out the programme for the first of the Inquiry's public hearings, Module 1, scheduled to take place in Wellington on 4 April 2019. Minute No 9, dated 12 March 2019, addressed several issues in relation to Modules 1, 2 and 3 that Ms Manning for the Afghan villagers and Mr Hager had raised. In this Minute, the Inquiry sets out the revised features of Module 1 as a result of the feedback received.

[2] Most features of Module 1 will remain the same. In particular:

- (a) A background paper from the Ministry of Foreign Affairs and Trade will be made available on the Inquiry's website in advance of the hearing.
- (b) Another paper will be made available on the website from Government agencies on the Government's Cabinet decisions to deploy the NZDF in Afghanistan as set out in the earlier minute. Relevant Cabinet documents will be made publicly available early next week.

- (c) There will be written and oral presentations from Sir Angus Houston concerning the conflict in Afghanistan from a military perspective as previously indicated.
- (d) The Hon Dr Wayne Mapp, who as Minister of Defence at the time of the deployment of the NZSAS to Afghanistan in 2009, will describe the process leading up to the decision and its implementation.

[3] As previously advised, in response to the feedback received, the Inquiry has arranged a presentation on the conflict in Afghanistan from the perspective of Afghan civilians to be given at Module 2. In addition, the Inquiry has decided to make time available during Module 2 for non-Crown core participants to respond to the oral presentations made at Module 1, to the extent that they consider it relevant and helpful to the Inquiry.

[4] The afternoon portion of Module 1 dealing with location will change, however. Originally, this segment of Module 1 was intended to allow the Inquiry to understand the competing versions as to where the events in relation to Operation Burnham occurred. Some modification is now required.

Feedback on location

[5] Both Ms Manning and Mr Hager expressed the view that there was no point in a hearing on location as it was now accepted that there were errors in *Hit & Run* as to location and there is no disagreement as to where Operation Burnham occurred. In addition, Ms Manning said that because of conditions in Afghanistan, it is not possible for her to secure instructions from her clients on location in time for the hearing. We addressed those matters in Minute No 9.

[6] Since the publication of Minute No 9, the Inquiry has received a very helpful submission from Mr Hager in which he:

- (a) explained how the location errors had occurred;

- (b) identified the consequential errors in the book;
- (c) accepted that the information about location which the Inquiry sought in Minute No 8 was "crucially important";
- (d) indicated that he was in the process of gathering the information but would not be in a position to make a suitably reliable presentation on it in time for Module No 1 on 4 April 2019.

New approach

[7] In light of this feedback, the Inquiry has decided to hear from the New Zealand Defence Force on the question of location at Module 1, as planned. However, the Inquiry will not ask the non-Crown core participants to present on location at Module 1, nor will it ask its independent expert, Mr Napier, to present at Module 2 on the issue of location. Rather, the Inquiry will defer this aspect until after the Inquiry's taking of evidence is substantially completed. At that point, the Inquiry intends to hold a substantial hearing on the basis of a preliminary (or provisional) summary of its findings.

[8] The preliminary summary of findings will have two important features:

- (a) First, it will set out the Inquiry's views on the legal issues arising from the events at issue in the Inquiry, in particular the issues that have been the subject of Modules 2 and 3.
- (b) Second, it will set out the Inquiry's preliminary views, based on its investigations, of what happened on Operation Burnham and related matters. While this preliminary account will not contain or refer to classified information or otherwise breach the Government's Protective Security Requirements, it will give a general account of the factual narrative as the Inquiry sees it at that time. In addition, the processes that the Inquiry has put in

place may well mean that some information that is currently classified may be able to be made publicly available by then.

While we hope that this hearing can be a fully public one, we cannot commit to that at this stage, for two reasons. First, it will depend on the extent to which we can provide a summary account of factual matters that helps in meeting any natural justice requirements while at the same time preserving confidentiality to the extent appropriate. Second, as a government Inquiry, we are required to present our final report to the Attorney-General, who must then decide what to do with it. Even though our preliminary findings may well not be reflected in our final report, this is an aspect we wish to consider further. We anticipate that the hearing will take place in October 2019.

[9] At the hearing, all core participants will have the opportunity to make submissions on the Inquiry's preliminary views. After taking time to consider the submissions made, the Inquiry will prepare a final report for submission to the Attorney-General.

[10] The Inquiry will hear from David Napier on location issues at this hearing. By that stage, the non-Crown core participants should be in a position to offer any comments they may have on this aspect, although we expect that by then they will have already addressed location issues in their evidence to us. We hope that this approach will enable a better and more informed public discussion about where various events at issue occurred.

[11] The hearings for Modules 2 and 3 will take place as planned (subject to the modification in relation to Mr Napier's evidence).

Modules 2 and 3

[12] Module 2 is a two-day hearing on 22 and 23 May 2019 on the effects of conflict in Afghanistan, rules of engagement and military doctrine. The issues will include: How do Rules of Engagement work? Who approves them? What are the consequences of breaching them? There will also be extensive information made


available on the instructions given to soldiers about the detention of people in Afghanistan, the practices adopted and the reasons for them.

[13] Module 3 on 29 and 30 July 2019 will cover the legal principles relating to the Law of Armed Conflict and International Humanitarian Law. It will also cover the issues that arise from operations involving the predetermined and offensive use of force. These operations include capture or kill operations, when some insurgents were placed the Joint Prioritised Effects List (JPEL).

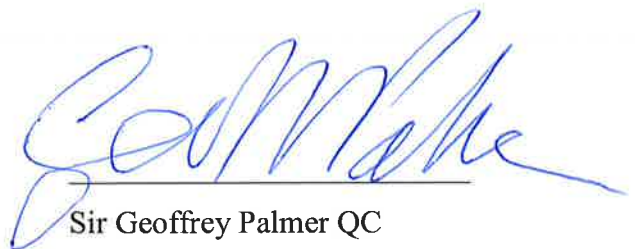
[14] Minutes setting out the details of the hearings for Modules 2 and 3 will be issued shortly.

[15] It should be noted that in respect to all modules, core participants can make supplementary written submissions to the Inquiry within fourteen days of a hearing's conclusion.

[16] Attached is a timetable for Module No 1.



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



Government Inquiry into Operation Burnham

Hearing 1 agenda – Thursday 4 April 2019

Venue: Meetings on the Terrace – 152 The Terrace, Wellington.

Attendees are requested to be seated by 9.55am.

Time	Content	Presenter	Dur
1000	Karakia		10 mins
1010-1025	Opening remarks <ul style="list-style-type: none">Objectives of Hearing 1	Sir Terence Arnold – Chair	15 mins
Topic 1: Military context			
1025-1155	Expert presentation <ul style="list-style-type: none">Nature of the conflict from a military perspective (counterinsurgency, general tactics employed, challenges such as terrain)Overview of military structure and decision-making processes (International Security Assistance Force/ Operation Enduring Freedom / Afghan forces, Provincial Reconstruction Teams)Role of special forces generally (not NZ-specific)	Sir Angus Houston – Formerly the Chief of the Defence Force in Australia	1.5 hours
1155-1210	Adjournment		15 mins
Topic 2: Decision-making processes			
1210-1340	Former NZ Defence Minister presentation <ul style="list-style-type: none">NZ Government decisions in 2009 to deploy the NZSAS, including Cabinet decision-making processes, role of Ministers and agencies.How decisions were made about specific operations at the time of the events in question.	Hon Dr Wayne Mapp	1.5 hours
1340-1440	Lunch		1 hour

Topic 3: Location			
1440-1610	NZDF presentation <ul style="list-style-type: none"> Identifying locations relevant to events of 21/22 August 2010. 	NZDF	1.5 hours
1610-1615	Closing remarks	Chair	5 mins
1615	Karakia		5 mins