

**UNDER**

**THE INQUIRIES ACT 2013**

**IN THE MATTER OF**

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

Date of Minute: 25 March 2019

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**MINUTE No 12 OF INQUIRY**

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**Introduction**

[1] This Minute sets out the features of the second of the Inquiry's planned public hearings (Module 2) that will take place in Wellington on 22 and 23 May 2019. This hearing has four purposes.

[2] The first is to obtain an understanding of the effects of the conflict in Afghanistan upon the lives of the people who live there.

[3] The second and related purpose is to provide non-governmental core participants with the opportunity to respond to the presentations that were given on military and policy matters in Module 1.

[4] The third purpose is to ascertain the limits and restrictions on the use of lethal force in Afghanistan on the part of New Zealand military forces there. These are governed by what is known as the Rules of Engagement (ROE).

[5] The fourth purpose is to examine the rules governing the detaining of people in Afghanistan by New Zealand forces and to look at the safeguards used to ensure they were not tortured when delivered into the custody of others.

## **Effects of the conflict upon civilian life**

[6] The evidence that will open Module 2 comes from a witness who can speak to the issues of living in Afghanistan, and comment on the conflict and its impact. The presenter will provide a perspective on the human costs of the conflict and its effect on the lives of people living there. The need for this balance was raised by counsel for Afghan Villagers, Ms Deborah Manning, and *Hit & Run* author, Mr Nicky Hager.

## **Response to Module 1 from non-government core participants**

[7] The second segment of the hearing will give an opportunity to non-governmental core participants to respond to the contents of Module 1 on military and policy matters to the extent they consider it relevant and helpful to do so, as explained in Minute No 11.

[8] We note that counsel for *Hit & Run* author Mr Jon Stephenson requested that Mr Stephenson be allocated his own time for presenting oral submissions through counsel, separate from the time allocated to Mr Hager and Counsel for the Villagers.<sup>1</sup> We have acceded to that request and the time allocations have been made accordingly in the attached schedule.<sup>2</sup>

## **Rules of Engagement**

[9] It is not intended that anything in the public presentation should breach the Government's Protective Security Requirements. The Inquiry has, however, put in place a process to attempt to provide the most important elements of the ROE to non-government core participants and the public. It is intended that a version of ROE applicable to Operation Burnham will be made publicly available before the hearings on the Inquiry website so that the non-government core participants can

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<sup>1</sup> Memorandum of Counsel for Jon Stephenson 13 March 2019.

<sup>2</sup> We have assumed that Mr Stephenson wishes to comment on the Module 1 presentations. If he does not, we will reduce the overall time for this part of the Module.

consider them and make submissions to the Inquiry concerning their application. This is in accordance with the Inquiry's declassification protocol.<sup>3</sup>

[10] The New Zealand Defence Force will make two presentations on the ROE and military doctrine. These will include the following issues:

- a) what ROE are, their legal underpinnings and function;
- b) by what process are ROE designed, approved and revised and by whom;
- c) how the ROE were modified and applied to the SAS in a special operations context in Afghanistan;
- d) the extent to which those ROE were congruent with International Humanitarian Law, including the law relating to collateral damage to civilians and the duties to those injured;
- e) how ROE operate in joint operations involving relationships with International Security Assistance Force (ISAF), North Atlantic Treaty Organisation (NATO) and their command and control frameworks;
- f) how ROE interact with the military justice framework and the Armed Forces Discipline Act 1971;
- g) what training was delivered to SAS soldiers on deployment in Afghanistan on the ROE, both generally and before particular operations;
- h) discuss the decision to post a legal officer with the SAS and that person's duties;

- i) any information on how New Zealand's ROE and training related to, and compare with, those of the ISAF, NATO and the United States.

## **Detention**

[11] The fourth topic for examination concerns the policy on detention. The 1984 Convention against Torture and customary international law impose obligations on New Zealand at international law to guard against detainees being tortured, including being handed over to others where there is a credible risk of torture.<sup>4</sup> There are also obligations contained in New Zealand law.

[12] The presentation will be made by the relevant public agencies (Department of the Prime Minister and Cabinet, New Zealand Defence Force and Ministry of Foreign Affairs and Trade). This will deal with the nature and character of the duty to avoid placing people in a situation where they may be tortured in detention and examine the applicable law in non-international armed conflict. It will deal with the steps available to guard against the risks and how the New Zealand arrangements in this regard were set up. The presentation will deal with detention in the Afghanistan theatre, the relationships with Afghan and international partners on the issue. It will also deal with how the ROE applied to detention, the standard operating procedure adopted by New Zealand and how the practices changed over time.

[13] The Minister of Defence at the time, the Hon Dr Wayne Mapp, will make a presentation on the Government's processes for approving ROE generally and specifically in relation to detention. He will cover the nature of concerns on the detention issue and what was done about them. He will cover discussions in Afghanistan concerning the issue and with country representatives as well as the nature of the policy approvals by Cabinet.

[14] This will be followed by non-government core participants providing their views on the issues relating to application of ROE and detention. Important

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<sup>4</sup> See in particular Convention Against Torture and other Cruel Inhuman or Degrading Punishment 1465 UNTS85 (1984)

issues of law are under discussion in this hearing and we have provided more time for Counsel than for Mr Hager, who is not represented.

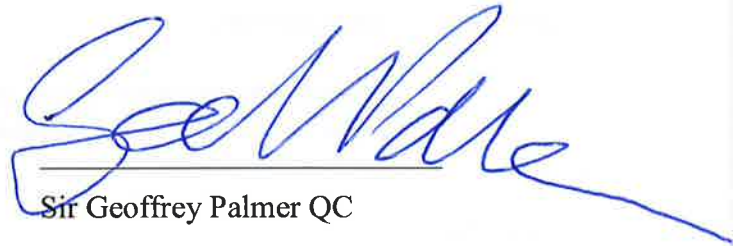
**Conclusion**

[15] All core participants can make supplementary written submissions to the Inquiry within fourteen days of the hearing's conclusion.

[16] Attached is a timetable for Module 2.



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 Public Hearing 2 – Agenda

Venue: Mercy Conference Centre 15 Guildford Terrace, Thorndon, Wellington

Day 1 - Wednesday 22 May 2019

Time	Content	Presenter	Dur
0930-0940	Opening remarks <ul style="list-style-type: none"> <li>• Objectives of Hearing 2</li> <li>• Key issues to be discussed and why they matter</li> </ul>	Inquiry Chair Sir Terence Arnold	10 mins
<i>Continued from Hearing 1 – military and political context</i>			
0940-1040	Afghanistan civilian perspective		1 hour
1040-1055	<b>Adjournment</b>		15 mins
	<b>Response by non-government core participants to presentations on military context and political context in Hearing 1</b>		
1055-1155		Counsel for Jon Stephenson	1 hour
1155-1255		Counsel for Afghan Villagers	1 hour
1255-1340	<b>Lunch</b>		45 mins
1340-1410		Nicky Hager	30 mins
<b>Topic 1 – Rules of Engagement (ROE) and military doctrine</b>			
1410-1540	<b>NZDF presentation</b> <ul style="list-style-type: none"> <li>• What ROE are (legal underpinnings and function)</li> <li>• Process for developing, approving, and revising ROE (including by whom)</li> <li>• How ROE ensure congruence with International Humanitarian Law (IHL) and other relevant law (e.g. collateral damage, duty to injured, others)</li> <li>• How ROE apply to NZSAS</li> </ul>	Brigadier Ferris, Director of Defence Legal Services, and others	1.5 hours

	<ul style="list-style-type: none"> <li>• Modifications in Afghanistan (the complexity of ROE and their modification to meet changing conditions)</li> <li>• How ROE operate in joint operations context - relationships with the International Security Assistance Force (ISAF), North Atlantic Treaty Organisation (NATO), and command and control framework</li> </ul>		
1540-1555	<b>Adjournment</b>		15 mins
1555-1725	<b>NZDF presentation</b> <ul style="list-style-type: none"> <li>• Military justice framework and discipline (including Armed Forces Discipline Act 1971)</li> <li>• What training is delivered to NZSAS soldiers in the field and before each operation on IHL/ROE</li> <li>• How ROE/IHL operational advice is delivered in the field – role of legal advisers or other precautions</li> <li>• Any information on how NZ's ROE and training relate to and compare with those of ISAF, NATO and United States</li> </ul>	NZDF	1.5 hours
1725	Closing remarks	Chair	5 mins

## Day 2 – Thursday 23 May 2019

Time	Content	Presenter	Dur
<b>Topic 2 – Rules of Engagement and detention</b>			
1000-1130	<p><b>Crown agencies joint presentation</b></p> <ul style="list-style-type: none"> <li>• The international duty to avoid placing people into a situation where they may be tortured in detention – applicable law in non-international armed conflict</li> <li>• The steps available to guard against those risks (i.e. the practical, in-field application of rules regarding detention)</li> <li>• Detention in the Afghanistan theatre – the political and military context, relationships with Afghan and international partners on issue</li> <li>• NZ's policies on detention in Afghanistan, standard operating procedure – how NZDF operated and did the practices change over time?</li> <li>• Discussions in Afghanistan about this issue with country representatives</li> </ul>		1.5 hours
1130-1145	<b>Adjournment</b>		15 mins
1145-1315	<p><b>Former Defence Minister presentation</b></p> <ul style="list-style-type: none"> <li>• The Government's process for approving ROE generally and policy approvals on detention</li> <li>• The NZ concerns about detention and torture as matters developed in Afghanistan and what was done about this</li> <li>• Discussions in Afghanistan about these issues with country representatives and the policy approvals by Cabinet</li> </ul>	Hon Dr Wayne Mapp (with input as required from the Department of the Prime Minister and Cabinet)	1.5 hours
1315-1415	<b>Lunch</b>		45 mins
	<p><b>Non-government core participants presentation</b></p> <ul style="list-style-type: none"> <li>• Issues concerning ROE, military doctrine and detention.</li> </ul>		
1415-1515		Counsel for Jon Stephenson	1 hour
1515-1615		Counsel for Afghan Villagers	1 hour



1615-1630	<b>Adjournment</b>		15 mins
1630-1700		Nicky Hager	30 mins
1700	Closing remarks	Chair	5 mins

