



Government Inquiry into Operation Burnham

Progress Report No 3

Public hearings underway

The Inquiry held the first in a series of public hearings on relevant issues in Wellington on [Thursday 4 April 2019](#). Presentations and submissions covered the history of Afghanistan and the political and military context of the current conflict, including New Zealand's involvement.

Former Chief of Defence Force in Australia, Sir Angus Houston, provided an overview of the history of the current conflict, with particular reference to the counter-insurgency strategy, the command and control structure of the International Security Assistance Force, Rules of Engagement, the Joint Priorities Effects List and risks to civilians. Read his presentation [here](#).

Former Minister of Defence Hon Dr Wayne Mapp explained the Cabinet decision-making process which led to the deployment of New Zealand forces to Afghanistan after 9/11 with particular reference to the Parliamentary debates on the issue and the decisions by the National-led government to re-deploy the NZSAS at the time he was Minister. Read Dr Mapp's presentation [here](#).

The Inquiry also heard from the [New Zealand Defence Force](#) on locations relevant to the events on 21/22 August 2010 (i.e. Operation Burnham). A full transcript of the hearing can be found [here](#).

The agendas for two further public hearings have also been set. Public Hearing 2, being held on Wednesday 22 May 2019 and Thursday 23 May 2019, will provide a perspective on how the conflict in Afghanistan has impacted on the lives of people who live there, provide an opportunity for non-government core participants to respond to presentations on military and policy matters in Hearing 1, examine the limits and restrictions on the use of lethal force by New Zealand forces in the conflict (Rules of Engagement) and canvass the rules governing the detaining of people by New Zealand forces there.

Public Hearing 3, being held on Monday 29 July 2019 and Tuesday 30 July 2019, will hear from international experts on International Humanitarian Law and other applicable law (Sir Kenneth Keith QC, former Judge of the International Court of Justice), and cover issues that arise from capture or kill operations, involving the use of Joint Prioritised Effects List (Professor Dapo Akande from Oxford University). Core participants and Crown agencies will also discuss these issues.

The agendas for these hearings are set out in [Minute No 12](#) and [Minute No 13](#).

The Inquiry also confirmed a fourth public hearing as discussed in [Minute No 11](#). This will be held in October 2019 at the conclusion of its evidence gathering process. The Inquiry envisages that hearing to canvass its preliminary views on what happened on Operation Burnham and related matters, and the views on the legal issues that were subject to earlier hearings.

The non-Crown core participants, as explained in Minute No 11, were unable to present on location issues at Public Hearing 1. Following this feedback the Inquiry agreed to defer their presentations to this final hearing. Inquiry aerial imagery expert David Napier will also present on location at this hearing.

Release of declassified information

The first tranche of documents declassified under the [protocol](#) established by the Inquiry has been distributed to core participants and published on the Inquiry website [here](#). These are various Cabinet documents, dated 10 February 2009 to 1 February 2011, and relate to decisions to deploy New Zealand forces to Afghanistan.

Under the protocol, two legal counsel are assisting the Inquiry to review the material classified on national security grounds and to test the claims to classification. The Inquiry's approach to the handling of classified information is discussed at length in [Minute No 4](#) and [Ruling No 1](#).

Over coming months, further documents relating to some of the other key issues under scrutiny by the Inquiry, including the Rules of Engagement for New Zealand forces in Afghanistan, detention, Joint Priorities Effects List and material on Operation Burnham, are expected to be declassified and published on the Inquiry website.

The Inquiry's intention is to ensure that relevant documents are released in time for each of the public hearings.

Provision of relevant information

The Inquiry understands it has received the majority of relevant material held by New Zealand government agencies to assist its investigations.

The New Zealand Defence Force (NZDF), in a [memorandum](#) dated 28 March 2019, stated it had provided 1,140 relevant items to the Inquiry. It was also seeking consent from the North Atlantic Treaty Organisation (NATO) and the United States Government – in regard to the disclosure of approximately 65 further items under their control that may be within scope of the Inquiry's terms of reference.

In December 2018 NZDF provided the Inquiry 20 documents under the control of NATO. The Ministry of Foreign Affairs and Trade (MFAT) is also seeking consent from NATO in relation to potentially relevant documents under its control.

NZDF has advised the Inquiry that the Government Communications Security Bureau (GCSB) was in possession of a repository of classified material generated or received by NZDF personnel that may contain relevant material. NZDF is working with GCSB to assess the contents.

GCSB and the New Zealand Security Intelligence Service (NZSIS) are still in the process of providing material to the Inquiry.

On 28 March 2019 NZDF stated in a [statutory declaration](#) that it had provided all material of potential relevance in its possession, excluding items for which consent of foreign partners was still required.

In correspondence, the Inquiry has informed NZDF that it has identified a range of documents that the agency has yet to provide to the Inquiry. NZDF is now working to identify those documents, some of which could need the consent of foreign partners.

Evidential hearings

Over the coming months the Inquiry will begin hearing evidence under oath from witnesses. These will not be held in public due to confidentiality requirements. The hearings will involve the most material witnesses who have been identified following initial interviews that have been conducted by Counsel Assisting.

In general terms, the Inquiry intends to hear evidence from a range of witnesses, including sensitive witnesses – Afghan villagers, the *Hit & Run* authors' sources, other whistle-blowers, NZSAS personnel, and personnel from the intelligence and security agencies.

On [3 April 2019](#) the Inquiry ordered Crown agencies – NZSIS, GCSB, MFAT, the Department of the Prime Minister and Cabinet, and the Ministry of Defence – to provide lists of staff involved in matters under investigation by Friday 26 April 2019.

Budget increase and time extension

Under the [terms of reference](#) announced in April 2018, the Inquiry was due to provisionally report back within 12 months of its establishment. Cabinet agreed a budget of \$2 million at that time. Late last year the Inquiry requested an extension and additional budget after deciding on the process it had determined for its investigation. As a result, Cabinet has granted an extension for the Inquiry to report back to 31 December 2019 and agreed an additional \$5 million in funding to allow it to complete its work.

Judicial review

Three people who have identified themselves as former residents of two villages in Afghanistan have filed proceedings seeking a review of the Inquiry's Ruling One. They have also applied for an interim order suspending the Inquiry's evidential hearings until their substantive application for review has been heard. That application has now been vacated. The substantive hearing is expected to take place in July.

As is normal with such proceedings, the Inquiry will abide by any decisions the Court makes in relation to this.

In the meantime, in accordance with its obligations under the Inquiries Act 2013 and its terms of reference, the Inquiry is continuing with its investigation. Its focus remains on getting to the truth of the matter.