



6 May 2019

Hon Sir Terence Arnold QC
Rt Hon Sir Geoffrey Palmer QC
He Uiuinga i a Inquiry into Operation Burnham
PO Box 12008
Wellington 6011

Dear Sir Terence and Sir Geoffrey

Review of classified/withheld material: Rules of Engagement and detention opinions

1. In accordance with our appointment and instruction under the *Inquiry Procedural protocol for review of classified information / claims to withhold information from disclosure* and further to our discussion last week, we can advise that two further tranches of documents may now be considered for release under the *Protocol*:
 - 1.1. The New Zealand Defence Force Rules of Engagement (RoE) applicable in Afghanistan in 2009 and 2010, together with training material; a doctrine publication; and supporting documentation; and
 - 1.2. Two late 2010 letters from the then Chief of Defence Force to the Defence Minister incorporating legal opinions on the obligations applicable to detention of prisoners.

Rules of engagement

2. Following paragraphs [5](a), [5](b) and [8] of the *Protocol*, we have identified and assessed claims to non-disclosure made in respect of parts of these documents in consultation with relevant Crown agencies, principally the New Zealand Defence Force.
3. In the course of the review and consultation process:
 - 3.1. We have accepted some limited redactions from these documents, for reasons outlined below, and where possible have agreed upon summaries or “gists” of the withheld passages. We have also accepted that the reference numbers to the rules can be withheld;

- 3.2. The Crown agencies have substantially amended initial claims to withhold parts of these documents; and
 - 3.3. We have also identified several passages in the documents upon which we have not been able reach agreement with the Crown agencies but that deal with aspects of New Zealand Defence Force operations in Afghanistan outside the terms of reference. For example, there is some detail concerning NZDF operational practices for categories of operation unrelated to those terms.
4. As with the preceding tranche of documents, the detail of the grounds to withhold the particular passages is set out in a classified appendix. Because that appendix discusses the withheld content in detail, it cannot be made public and is required to be classified according to the classification of that content but put short:
- 4.1. Significant parts of the Rules of Engagement and related documents describe the detail of military equipment and/or tactics followed by the NZDF. While it has been possible to reach agreement to disclose many of these, we have accepted that the remaining passages would, if disclosed:
 - 4.1.1. Disclose particular technical equipment used by New Zealand armed forces and the circumstances of that use and so allow an adversary to know of, and potentially counter, those means; and/or
 - 4.1.2. Disclose the specific ways in which New Zealand armed forces undertake particular aspects of military operations, and so potentially assist an adversary and/or put New Zealand personnel at risk.
 - 4.2. Several other short passages in the Rules of Engagement and related documents identify the detail of decision-making procedures. NZDF has stated, and we have accepted, that disclosure of that particular detail would similarly assist an adversary and/or put personnel at risk.
 - 4.3. A small number of specific references in the Rules of Engagement relate to arrangements with other countries entered into on the basis of confidence.
 - 4.4. The reference numbers could also allow an adversary to infer or otherwise ascertain the content of other rules, unrelated to the present inquiry, to similar prejudicial effect.
5. We have carefully considered the claims made by the Crown agencies to assess their cogency. We have in particular taken account of two factors:

- 5.1. **The availability in the public domain of substantial material comprising and/or concerning rules of engagement:** In particular, at least one text of the standard NATO Rules of Engagement has been released by NATO itself; other RoE texts and/or purported texts have been released without apparent approval; and some RoE-related material has also been disclosed through official publications, court and inquiry decisions and otherwise.¹ In light of that material and of the particular public interest factors raised by this inquiry, substantial disclosure of the RoE is appropriate:² what has not been disclosed is the particular detail of certain rules that are not in the public domain and that would, as above, unduly prejudice interests protected by the Evidence Act 2006 if disclosed.
 - 5.2. **The passage of time:** All of these documents date from 2009-2010. However, and while the risk of prejudice can and here, in parts, did pass with time, the concerns underlying the still redacted passages have not, for two reasons. First, the passages dealing with particular equipment or tactics are or may well be followed in current and future NZDF operations, such that disclosure here would cause prejudice. Second, the arrangements with other countries remain subject to confidence.
6. As also noted:
- 6.1. We have agreed upon summaries of the redacted passages, so far as it is possible to summarise that content without giving rise to the same prejudice; and
 - 6.2. We do not agree with the claims of prejudice made in respect of a small number of passages in these documents and/or the adequacy of the summaries inserted. However, we do accept that these passages are not relevant to the terms of reference of the Inquiry: they relate to aspects of NZDF operations that are simply not in issue here.

Opinions concerning detention obligations

7. The letters in this tranche are:
 - 7.1. a letter dated 16 September 2010, written by the Chief of Defence Force to the Minister of Defence on the topic of detainee arrangements in Afghanistan, incorporating reference to legal advice from the Director General of Defence Legal Services; and

¹ See, for example, the disclosure of some similar material within the 2008-2011 United Kingdom inquiry into the death of Mr Baha Mousa accessible at www.bahamousainquiry.org. Particular rules of engagement have, however, also often been withheld from publication.

² See, for example, *Mohamed, R (on the application of) v Foreign Secretary* [2011] QC 218, [52]; and *Robinson v South Australia (No 2)* [1931] AC 704.

- 7.2. a similar letter dated 9 November 2010 attaching a legal opinion on that topic from the Solicitor-General.
8. The Crown has waived legal privilege in the letters.
9. As Ben Keith contributed to the Solicitor-General's opinion, and that opinion is a review of the Director General's opinion, David Johnstone acted independently as advisor to the Inquiry in respect of these documents.
10. In the course of the review and consultation process:
- 10.1. We accepted some limited redactions from these documents, but sought further information in respect of others.
- 10.2. The Crown agencies amended initial claims to withhold parts of these documents.
- 10.3. We have since reached agreement as the scope of disclosure, for your approval under paragraph [11] of the *Protocol*.
11. In the event this agreement is approved, it contemplates immediate publication of the bulk of the letters, and potential publication of a further passage in due course. I recommend approval of the agreement in this format as it will allow publication of significant material prior to the Inquiry's 'module 2' public hearing scheduled for 22 and 23 May 2019.
12. The grounds to withhold the particular passages are that the withheld text relates to:
- 12.1. Personal details of individuals;
- 12.2. Confidential communication with an international agency;
- 12.3. Potential prejudice to an international relationship.
13. As with the Rules of Engagement material, the further detail of those grounds concerns the particular content of the withheld text, which we accept would if disclosed prejudice protected interests. It is therefore provided as a classified appendix to this letter.

Yours sincerely



Ben Keith / David Johnstone
Specialist advisors