

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

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

Date of Minute: 27 June 2019

MINUTE No 17 OF INQUIRY

[1] The purpose of this Minute is to set out arrangements for the Public Hearing of Module 3 that is scheduled to take place in Wellington on Monday 29 July and Tuesday 30 July 2019 in Wellington (the July hearing).

[2] The focus of the July hearing is on some of the legal issues that arise from the events that took place in Operation Burnham on the night of 21-22 August 2010.

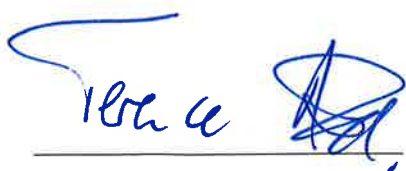
[3] Two legal experts will present on aspects of the legal principles that apply. On Monday 29 July, Emeritus Professor Sir Kenneth Keith, a former Judge of the International Court of Justice and of the New Zealand Supreme Court, will make a presentation on elements of the legal framework applicable to International Humanitarian law, Human Rights law, the United Nations Charter and customary international law. He will also comment briefly on the law relating to detention. On Tuesday 30 July, Professor Dapo Akande, from the University of Oxford, will deliver a presentation on the Joint Prioritised Effects List (JPEL) that was in use for Operation Burnham. Both these experts have provided their legal opinions in advance to the Inquiry and these have been published on its website. This will allow submitters to think carefully about the issues before making submissions at the hearing, as well as make the experts' views available to media and members of the public.

[4] Counsel for the villagers have formally notified the Inquiry that the villagers, that is to say the former residents of Khak Khuday Dad and Naik, have withdrawn from participation in the Inquiry. In addition, a notice of discontinuance has been filed in the High Court bringing an end to their application for judicial review challenging the Inquiry's methodology.

[5] The Inquiry regrets the Afghan villagers' decision to withdraw, especially as it was prepared to travel to Kabul to take their evidence. As a result of their withdrawal, adjustments must be made to the previously published schedule for the July hearing. A revised schedule is attached to this Minute.

[6] The New Zealand Defence Force (NZDF) in a memorandum to the Inquiry dated 13 June 2019, from its counsel Paul Radich QC, objected to the manner in which Mr Hager made his presentations in the Public Hearing of Module 2 and requested the opportunity to make oral submission in response. Mr Hager opposes that step being taken. The Inquiry notes that NZDF responded at length in its 13 June memorandum to what Mr Hager said and this document is published on the Inquiry's website. The Inquiry does not think it appropriate that time be taken up with further statements in response at the July hearing. NZDF has had the opportunity to answer Mr Hager and it has done so in a way that can be considered by the Inquiry and is readily accessible to the media and the public.

[7] NZDF also said it "would appreciate the inquiry providing specific directions to each party who is to speak at its future public hearings, including Mr Hager, about the points it wishes them to address." The Inquiry has set out in the programme for the July hearing the issues that it wishes to have covered. Those issues are legal in nature and the submissions made need to focus on those issues and be analytical in content. The Inquiry sees no need to go beyond that.



Sir Terence Arnold QC



Sir Geoffrey Palmer QC

**Government Inquiry into Operation Burnham
Public Hearing of Module 3 - Agenda**

Venue: The Thorndon Hotel, 24 Hawkestone Street, Thorndon, Wellington

Day 1 - Monday 29 July 2019

Time	Content	Presenter	Dur
1100-1110	<p>Opening remarks</p> <ul style="list-style-type: none"> • Objectives of Hearing 3 • Key issues to be discussed and why they matter 	Inquiry Chair	10 mins
Topic 1 – The Legal Framework			
1110-1240	<p>Expert presentation on applicable law</p> <ul style="list-style-type: none"> • Legal framework (application / intersection of International Humanitarian Law (IHL), International Human Rights Law, United Nations Charter, Customary International Law, domestic law) • Role and impact of United Nations Security Council resolutions • Law on detention (to extent not covered in Hearing 2) under IHL, Convention against Torture, other relevant law • Law of distinction • Law on proportionality • Law on precaution • Law on humane treatment of non-Direct Participation in Hostilities 	Emeritus Professor Sir Kenneth Keith ONZ, QC, former Judge of the International Court of Justice	1.5 hours
1240-1340	Lunch adjournment		1 hour
1340-1510	<p>Crown agencies joint presentation</p> <ul style="list-style-type: none"> • Legal issues on the applicable law on points above with reference to the expert view 		1.5 hours
1510	Non-government core participants		1.5 hours

	<p>presentation</p> <ul style="list-style-type: none"> Legal issues on the applicable law on points above with reference to the expert view 		
1510-1610	Presentation	Counsel for Jon Stephenson	1 hour
	Adjournment		10 mins
1620-1650	Presentation	Nicky Hager	30 mins
1650	Closing remarks	Inquiry Chair	5 mins

Day 2 – Tuesday 30 July 2019

Time	Content	Presenter	Dur
1000-1005	Opening remarks	Chair	5 mins
Topic 2 – Predetermined and offensive use of force			
1005-1135	<p>Expert presentation on Joint Prioritised Effects List (JPEL) JPEL includes the deliberate use of lethal force against an individual who has been specifically identified in advance as a target to be captured or killed.</p> <ul style="list-style-type: none"> What are the legal principles relevant to the way in which JPEL was compiled and used? Is the use of JPEL justified, in principle, in an insurgency such as existed in Afghanistan? What is the relevance of any involvement of the Afghanistan government in the process of compiling and using JPEL? For example, what difference would it make to the analysis if JPEL targets were the subject of arrest warrants issued by the appropriate Afghan authorities? 	Professor Dapo Akande, University of Oxford	1.5 hours

1135-1150	Adjournment		15 mins
1150-1320	<p>NZDF presentation</p> <ul style="list-style-type: none"> • A general description of the process by which people were placed, and kept on, the JPEL during the NZDF deployment in Afghanistan. • How the policy applied in practice – how the NZDF trained and operated in relation to this issue. • The specific legal principles relevant to targeting and the JPEL process • How does the concept of “direct participation in hostilities” work? • What is the relevance of any involvement of the Afghanistan government in the process of compiling and using JPEL? For example, what difference would it make to the analysis if JPEL targets were the subject of arrest warrants issued by the appropriate Afghan authorities? How would this impact on the use of the JPEL targeting process? • A description of any checks or safeguards employed in relation to operations carried out on the basis of JPEL against specific targets. 		1.5 hours
1320-1420	Lunch adjournment		1 hour
1420	<p>Non-government core participants presentation</p> <ul style="list-style-type: none"> • With reference to the expert view 		1.5 hours
1420-1520	Presentation	Counsel for Jon Stephenson	1 hour

	<i>Adjournment</i>		10 mins
1530-1600	Presentation	Nicky Hager	30 mins
1600	Closing remarks	Inquiry Chair	5 mins