

## Government Inquiry into Operation Burnham

### Progress Report No 5

3 July 2019

#### Latest disclosure of classified documents

The Inquiry, on 1 July 2019, published the latest tranche of documents that have been reviewed under the [protocol](#) for reviewing classified material. These relate to detention policy, Objective Yamaha (the operation to capture Taliban insurgent Qari Miraj and allegations of mistreatment by New Zealand soldiers) and Operation Burnham.

The documents can be found [here](#). Further material will be disclosed in coming months.

To assist public understanding of this material, the Inquiry has also published a glossary of the most common acronyms found in the documents. This can be found [here](#).

#### United States Government material

[Minute No 18](#) sets out the Inquiry's approach to publishing United States Government material released under the United States Freedom of Information Act. This includes the report of the United States Army investigation into the conduct of its forces during Operation Burnham and three video clips taken from the weapons systems of two Apache helicopters operating on the night of 21/22 August 2010.

The Minute states: "Although United States authorities have placed no restriction on the clips being made available to the public, the Inquiry has concerns about posting them to its website so that they are freely available. On the villagers' account of what happened on the Operation, one of the videos shows their friends, relatives and/or neighbours being killed or wounded by helicopter fire. Obviously, making that footage available for public viewing and public dissemination involves understandable sensitivities from their perspective and is likely to cause them considerable distress. On NZDF's [New Zealand Defence Force] account, the relevant clip shows insurgents being killed or wounded, but even on that basis there would still be an issue as to whether in the current climate the Inquiry should be facilitating the public availability of footage showing people, particularly people of the Muslim faith, being killed or wounded. There is obviously a risk that the footage might be misused. While the Inquiry wishes to achieve as much transparency as possible, the Inquiry considers that the considerations noted above point powerfully in the direction of limited disclosure."

The Inquiry has invited media to view the footage and report on the clips. The United States Army investigation report can be read [here](#).

#### Expert legal opinions published for Public Hearing Module 3

The Inquiry has published expert legal opinions it commissioned from two prominent international lawyers ahead of Public Hearing Module 3 being held in Wellington on 29 and 30 July 2019.

Emeritus Professor Sir Kenneth Keith, a former judge of the International Court of Justice, has provided an opinion on International Humanitarian Law and the Law of Armed Conflict. These bodies of law limit the use of force in non-international armed conflict such as the conflict in Afghanistan was at the time of Operation Burnham. Professor Keith also covers the law on detention. The opinion can be found [here](#).

Professor Dapo Akande from Oxford University has provided an opinion on the international legal principles and rules that govern predetermined and offensive use of force against identified individuals in the context of non-international armed conflict. The opinion specifically references the Joint Prioritised Effects List. The opinion can be found [here](#).

The legal issues under scrutiny are difficult. Their application is not simple. These opinions will help clarify the issues.

The Inquiry is grateful to the two experts for their willingness to provide their views. They will also speak at the hearing.

Following the withdrawal of the Afghan villagers as core participants in the Inquiry, the agenda for the Module 3 hearing has been revised. It can be read in [Minute No 17](#).

### **Afghan villagers withdraw as core participants/judicial review proceedings**

In [Minute No 16](#) the Inquiry responded to concerns expressed by counsel for Afghan villagers. It set out a process to take evidence directly from the villagers by visiting Afghanistan or via audio-visual link and requested assistance from their counsel to help facilitate this.

The Inquiry was unable to obtain full information about the villagers from their counsel. This was important to the Inquiry, as it decided that all witnesses – including villagers, and former and current NZDF personnel and government officials – would be witnesses of the Inquiry to ensure the integrity of the process.

However, this process was overtaken by the announcement on 18 June 2019 that the Afghan villagers were withdrawing as [core participants](#). In a [media statement](#) in response, the Inquiry said it remained confident that it would still get to the truth of the matters under scrutiny.

The statement said: “The Inquiry stands by the processes it has adopted.

“It has carefully struck a balance between safeguarding classified information and the identity of all witnesses while meeting the principles of natural justice and open justice.

“While the withdrawal of the Afghan villagers so late in the piece is disappointing, it does not significantly impact the Inquiry’s work as the Inquiry has a wide range of information and sources available to it. This includes the authors of Hit & Run who obtained much of their information from the villagers, and the affidavits of three villagers filed in earlier court proceedings.”

The counsel for Afghan villagers have subsequently withdrawn their proceedings seeking a review of the Inquiry’s processes as set out in [Ruling One](#).