

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER

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

Brief of Evidence of Gordon Ross Smith

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1. I am Commodore (Retired) Gordon Ross Smith.
2. I joined the Royal New Zealand Navy in 1981 as a Sub Lieutenant in the Seaman/Executive Branch specialisation. The early part of my career followed the general path of a Seaman Officer serving at sea for many years with breaks ashore to conduct professional and developmental courses. Ship appointments included: Bridge Watchkeeper / Officer of the Watch (1982-83); Navigating Officer (1984-1987); Principal Warfare Officer (1988-91); Operations Officer (1991-1993); Executive Officer (1993); and Commanding Officer (1998-2001).
3. During the period of my service, operational deployments/missions included the Indian Ocean, Bougainville, East Timor, the Arabian Gulf, the Solomon Islands, and Afghanistan.
4. Between 1998 and September 2018, I held a number of diverse appointments within the New Zealand Defence Force (NZDF), including Commanding Officer of HMNZS Te Kaha (1998 - 2001), Director of Naval Warfare (2001 - 2002), Operational Requirements Manager for Project Projector - a multi-ship acquisition project (2002 - 2004), Chief of Staff (Operations) and Chief of Staff (Plans) of the Headquarters Joint Forces (2004 - 2006), Commander of the New Zealand Provincial Reconstruction Team and Senior National Officer in Afghanistan (2006), Assistant Chief of Navy (Personnel) (2006 - 2009), Maritime Component Commander (2009 - 2011), New Zealand's Defence Advisor in Canberra (2011-2014) and Chief of Staff of the Office of the Chief of Defence Force (CDF) (2014 - 2018).
5. I have a Bachelor of Science from the University of Otago (1980) and a Masters in Strategic Studies from Victoria University of Wellington (2009).
6. In 1998 I was made a member of the New Zealand Order of Merit.

30 June 2014 press release

7. Shortly after 4pm on Friday, 27 June 2014, the Senior Media Adviser (SMA) at Headquarters NZDF, Geoff Davies, received a call from Jon Stephenson seeking comment on an NZDF operation in Afghanistan. The tenor of Mr Stephenson's call is summarised in the SMA's email of 5:33pm, which is in the Bundle at page 203:

He alleges the raid in question was a reprisal raid for the death of LT Tim O'Donnell earlier in the month.

He also told me that he has solid information that six civilians, including a three-year-old girl, were killed in the raid, and 15 wounded. (He cites his sources as including a district governor, a provincial governor, a former member or members of the NZSAS, a former NZDF officer who was in the PRT at the time, a doctor who treated the wounded, and an international NGO who interviewed victims.)

He was at pains to emphasise that there is no suggestion that New Zealanders were responsible for any harm to civilians - that occurred because of the helo gunsight malfunction - but that SAS soldiers blew up an arms cache and two houses during the raid.

On the phone he gave me a deadline of Monday for a response but I note that isn't restated here.

8. Mr Stephenson sent an email to Geoff Davies at 4:35pm, which is in the Bundle at p 193, as a follow up to his call. I understand that the email contained three attachments: an International Security Assistance Force (ISAF) press release of 29 August 2010, which is in the Bundle at p 195; the NZDF press release of 20 April 2011, which is in the Bundle at p 197; and the United Nations Assistance Mission in Afghanistan Annual Report of 2010, the relevant extract of which is in the Bundle at 199.
9. The 20 April 2011 NZDF press release, which is in the Bundle at p 197, stated that:
 - the NZSAS, together with Afghan National Security Forces and other coalition elements, conducted an operation against an insurgent group;
 - the operation was conducted as part of the wider ISAF mission to improve the security of the Afghan people and to protect the New Zealand Provincial Reconstruction Team in Bamyan province;
 - the operation was approved by both the Afghan Government and ISAF;
 - nine insurgents were killed;
 - allegations of civilian casualties were investigated by an ISAF joint assessment team; and
 - the investigation concluded that the allegations of civilian casualties were unfounded.
10. Mr Stephenson's 4:35pm email posed the following questions:
 - (1) Does the defence force stand by its attached statement?
 - (2) Specifically, does it stand by the statement that nine insurgents were killed?
 - (3) If so, can it confirm that the SAS was responsible for those nine deaths, or can it rule out being involved directly in the nine alleged deaths?
 - (4) Can the defence force comment on the ISAF media release that refers to the possibility that[,] due to a gun sight malfunction of US helicopters, cannon rounds fell short and hit two houses that were not a target, but where civilians may have been hiding?
 - (5) Given its involvement in this raid, what steps has the defence force taken to ensure that the allegations of civilian casualties have been carefully checked?
 - (6) Is it correct that Prime Minister John Key personally approved New Zealanders involvement in the raid on Tirgiran?

11. Mr Stephenson sent a further email to Geoff Davies at 11:33pm GMT, which is in the Bundle at p 205, providing further information:

You will see that, in the questions I sent earlier, I have referred to the name of the village that was raided as "Tirgiran" (there are alternative spellings, including "Tergeran").

Multiple sources and documents make it clear to me that the raid which the NZDF referred to as occurring in the Tala wa Barfak district of Baghlan is in fact referring to the village of Tirgiran (which is in the Tala wa Barfak district). However, it would be helpful if the NZDF could confirm that this is the village referred to in its press release.

...

Also, please note that it would be helpful to have your response by late Sunday. That is, two full days from the time I sent my questions. I am very keen to give the NZDF perspective on this issue. The sooner I get your response, the more time I have to do that.

12. I received this email exchange from a Major on Saturday, 28 June 2014, at 10:46am, (see the Bundle at p 210) with the following remarks:

You will note that this is a complex, historical and potentially classified matter. As such we recommend that this matter is referred for OIA processing.

It is requested that you approve this course of action and advise if you require me to forward this information to [Press Secretary] at the Minister's office immediately given the subject matter and reference to the Prime Minister. Or, if you are comfortable with us contacting her first thing on Monday.

13. I responded by email, on Saturday, at 11:33am (see the Bundle at p 210):

Agree nature of the questions are complex and that an OIA response is best course of action.

Let [Press Secretary] know we have a series of questions from Stephenson and that we will process them as an OIA. You can pass the questions, for info, to [Press Secretary] on Monday.

14. I understand that, later that day, the Office of the Minister of Defence was advised about Jon Stephenson's questions and that the Minister of Defence received a briefing from someone at the NZDF. I did not participate in that briefing and I have no knowledge as to who was there or what was said.

15. Although our view on the Saturday had been to respond to Mr Stephenson under the Official Information Act 1982, in order to give us time to ascertain the facts, it seems that we decided to meet his original timeframe of Monday, 30 June 2014. I cannot recall the reason for this change in approach.

16. As you can see in the email of 30 June 2014, at 12:46pm, (in the Bundle at p 213) to the Minister's Office, I approved the following statement:
- The NZDF stands by its statement made on 20 April 2011 and will not be making further comment.
17. I believe I was asked to approve the draft statement because then CDF Tim Keating, was in Australia for the change of command ceremony.
18. The reason I approved the statement, affirming our press release of 20 April 2011, is because the 20 April 2011 press release was consistent with CDF Sir Jerry Mateparae's Note to the Minister of 10 December 2010, which is in the Bundle at p 163.
19. In my mind, despite the ISAF press release which reported that there may have been civilian casualties, the subsequent Note to the Minister carried greater weight. It was drafted in consultation with people who were close (in time and geographically) to the events in question; its contents would have been fact-checked; and it was signed off by the CDF (who, incidentally, had been in Afghanistan during the operation).
20. I had no reason to question the veracity of the Note to the Minister; it amounted to contemporaneous, formal reporting, and I had not been presented with any evidence to the contrary.
21. I don't have any record of the statement being provided to Jon Stephenson but understand it to have been issued in the afternoon of 30 June 2014.

Native Affairs

22. At 8:35pm, on Monday 30 June 2014, I watched Jon Stephenson's report, *Collateral Damage*, on Native Affairs. A copy of the transcript of the programme is in the Bundle at p 215. I took notes at the time; see the Bundle at p 235.
23. At some point after the programme had finished, I received a call from CDF Tim Keating, who was in Australia at the time. The CDF told me that he had just received a call from the then Minister of Defence, The Hon. Dr Jonathan Coleman (the **Minister**).
24. The CDF relayed to me that the Minister was frustrated. He told the CDF that his Military Secretary had brought over a bundle of documents from NZDF, one of which was the ISAF Incident Assessment Team's report of 26 August 2010 (**IAT report**). This is a point that Chris Hoey addresses in his affidavit.
25. From my notes of my call with the CDF, which are in the Bundle at p237, I can see that the Minister relayed to the CDF that, although the IAT report totally cleared the ground forces (i.e. the NZSAS contingent), the Minister said it had concluded that there was a likelihood of civilian casualties. This was at odds with the statement in our 20 April

2011 press release that the ISAF investigation “concluded that the allegations of civilian casualties were unfounded”.

26. My stomach sank; I was thinking “how did I not know we had this report?”
27. The Minister asked for a briefing the following morning.

Steps taken to clarify the facts

28. I saw the IAT report for the first time on 1 July 2014, ahead of the briefing with Minister Coleman at 8:30am.
29. I recall attending the briefing with the Vice Chief of Defence Force (**VCDF**) Kevin Short. We would have explained to Minister Coleman that we had never seen the IAT report before and that we didn’t even know NZDF had a copy of it.
30. The notes that I took during that meeting, at p 239 of the Bundle, record, among other things, that the Minister:
 - a. asked us to contact Rian McKinstry, who was the Senior National Officer in Afghanistan when Operation Burnham was conducted, to ask him what he knew about the IAT report and how he had interpreted it;
 - b. raised the issue of SAS accountability; and
 - c. requested more formal briefings in these types of matters in the future.
31. I can see from the NZ Herald story of 1 July 2014, at p 243 of the Bundle, that after the briefing, the Minister set the record straight. He accepted that, although New Zealand soldiers were not implicated, “you probably can’t rule out” civilian casualties as a result of a malfunctioning gun sight on a coalition helicopter.
32. After meeting with the Minister, I contacted Peter Kelly, who was the Director of Special Operations (**DSO**) when Operation Burnham was conducted, and Rian McKinstry, to ask them to meet with me the following day.
33. I can see from my notes, in the Bundle at p 240, that I collated some material for the CDF to peruse upon his return to New Zealand, including the IAT report and the three Notes to the Minister from August and December 2010. The CDF would have asked me to do this.
34. My notes indicate that the CDF arrived back in New Zealand in time to attend a private briefing with Minister Coleman and the Secretary of Defence, ahead of the scheduled Defence Weekly Meeting at 4pm, on 1 July 2014.
35. On 2 July 2014, at 9am, I met with Peter Kelly. My notes from that meeting, which are in the Bundle at p 253, record that Peter Kelly:

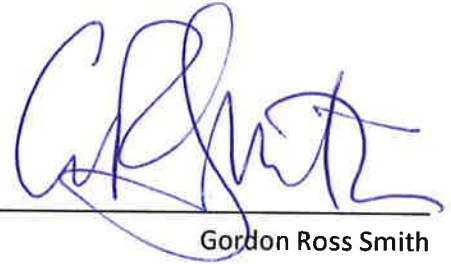
- a. categorically stated that he had not seen the IAT report;
 - b. was aware that the SNO had been verbally briefed at the time that ground force activities were conducted in accordance with Rules of Engagement and the Operation Plan; and
 - c. wondered whether the IAT report may have come in to NZDF headquarters via another channel, for example, through the legal team.
36. I can see from my notes, which are in the Bundle at p 255, that I contacted Defence Legal Services at 10:27am to request that they search for the IAT report.
37. At 9:35am, on 2 July 2014, I met with Rian McKinstry, who had flown down from Auckland for the purposes of this meeting. My notes, at p 254 of the Bundle, record that Rian McKinstry:
- a. had not seen the IAT report until the DSO sent it to him on 1 July 2014;
 - b. had never seen a copy of the IAT report in theatre;
 - c. had received a verbal briefing that the ground forces (including the SAS) were not responsible for any civilian casualties;
 - d. had asked New Zealand staff, when he departed theatre, to keep a look out for the IAT report;
 - e. had searched for, but was unable to find the IAT report; and
 - f. had no idea how the IAT report got into the safe of Chris Hoey, the Director of Coordination.
38. I have no further notes from this period of time. I would have reported these matters back to CDF to be relayed to the Minister. I then had no further involvement.

Hit & Run

39. The book *Hit & Run: The New Zealand SAS in Afghanistan and the Meaning of Honour*, co-authored by Nicky Hager and Jon Stephenson, was launched at 5:15pm on 21 March 2017. Neither Mr Hager nor Mr Stephenson gave us any advance notice of the launch.
40. I remember that evening was hectic. By the time we had picked up some copies of the book, and realised that the book contained a number of very serious allegations directed at the NZDF, there were not many people left in the office.
41. I took some notes on the night of 21 March 2017, which are in the Bundle at p 258:
- untrue, nothing new, authors were challenging the integrity of NZDF;
 - we must hold ourselves up because our integrity and professionalism in war is exemplary and second to none in this space; and
 - the allegation that we are war criminals is unpatriotic.

42. I imagine I was making a note of a phone call I received. It could have been from CDF, who was in Iraq with the Minister of Defence, but I simply don't recall, and my notes don't provide any clarity on the issue.
43. We were scrambling to read the book so as to understand exactly what was being alleged. We were really not in a position to respond in a considered manner at that point in time. I would have expected the authors to have afforded us the opportunity to reflect on, and respond to, the allegations.
44. There was considerable pressure to make a statement that night. As I recall, we thought the most prudent way to proceed, in circumstances where we didn't have all the information in front of us, was to take a position that was consistent with what we had said in the past.
45. I have made a note in my diary, which is in the Bundle at p 259, to check all previous press releases. My recollection is that someone did do that; the search of the online database of press releases pulled up the 20 April 2011 statement. That statement then formed the basis of our initial response to *Hit & Run*, which is in the Bundle at p 267.
46. Unfortunately, the search of the online database did not show NZDF's response to Jon Stephenson of 30 June 2014, or the related media coverage at the time, because they were not technically press releases. Unfortunately, our minds were not cast back to the Native Affairs report and the subsequent discovery of the IAT report.
47. If we had had the Native Affairs programme, and the IAT report in mind, we certainly would not have repeated the statement that the ISAF investigation "concluded that the allegations of civilian casualties were unfounded". While it was correct for the NZDF response to say that New Zealand personnel conducted themselves in accordance with the applicable rules of engagement, it was incorrect to reassert that the ISAF investigation "concluded that the allegations of civilian casualties were unfounded".
48. What I can say without hesitation is that, although our statement was incorrect, it was not deliberate. We ought to have remembered the Native Affairs programme and the IAT report, but we didn't. So many things happen in the Office of the CDF in the course of each and every day; that does not excuse our oversight but it does go some way towards explaining it.

49. I understand that Air Marshal Kevin Short, who was VCDF at the time, will give evidence about NZDF's response in the days following the launch of *Hit & Run*, including his briefing to the Prime Minister on 22 March 2017; and that Lieutenant General Tim Keating, who was then CDF, will give evidence about the steps he took upon his return to New Zealand on 25 March 2017.



Gordon Ross Smith

10/9/18.

Date

