

**UNDER
IN THE MATTER OF**

**THE INQUIRIES ACT 2013
A GOVERNMENT INQUIRY INTO
OPERATION BURNHAM AND RELATED
MATTERS**

**OPENING SUBMISSIONS FOR NZDF AT SEPTEMBER HEARING
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1. NZDF personnel did nothing other than to report faithfully what they understood about the allegations of civilian casualties arising out of Operation Burnham.
2. For several years after the Operation, they had a genuine, reasonably-held belief that, following a joint ISAF/Afghan investigation into the prospect of civilian casualties, the investigators had concluded that there were none.¹
3. Once they had read the report prepared by the ISAF Incident Assessment Team (**IAT report**) and realised that their understanding of the IAT report's conclusions was not right after all, their reporting was corrected; with one exception in 2017, which was due to a momentary oversight.
4. There was no 'cover up'. There was never any intention to mislead. That is not to say that there were no missteps along the way; looking back, with the benefit of hindsight, there are certainly things that might have been done differently and lessons to be learned. But these missteps do not relate to the actions of New Zealand troops on the ground, who were and are held in extremely high regard, and they do not comprise a 'cover up'. Nothing could be further from the truth.
5. The evidence you will hear over the next few days will explain the relevant events which, by way of introduction, are these.
6. The day after Operation Burnham was conducted, reports began to emerge of civilian casualties and of significant damage to property. Fictitious or exaggerated claims of civilian casualties following ISAF operations were not uncommon. Spreading misinformation about casualties caused by coalition troops was a well-known and effective insurgent strategy. Nevertheless, the allegations were taken very seriously.

¹ The report of the International Security Assistance Force (ISAF) entitled Incident Assessment Team Executive Summary, 26 August 2010: CIVCAS Allegation During TF-81 Level II Deliberate Detention Op in Tigiran Village, Talawe Berfak District, Baghlan Province, RC North.

7. The prospect of civilian casualties was concerning to everyone involved. The principle of distinction is fundamental to international humanitarian law. In going to Afghanistan, the entire ethos of the NZSAS was to protect civilians; to win the hearts and minds of the Afghan people, and to act with integrity and honour. They achieved this through countless missions in Afghanistan, many of which were nothing short of heroic.
8. As soon as the allegations of civilian casualties came to light, an ISAF/Afghan Incident Assessment Team, headed by Brigadier General Zadalis, was established. The team conducted a thorough investigation into the allegations. The NZDF participated openly in that investigation, by providing information, answering questions, and reviewing footage from coalition aircraft.
9. While reviewing that footage, it became apparent to the Incident Assessment team and to the NZDF that there was a gun sight malfunction on one of the AH 64s, which caused several rounds to fall short, inadvertently striking two buildings. Until this moment, the NZSAS troops had no knowledge (and no way of knowing) of that malfunction or of rounds impacting a building.
10. The NZDF was aware of ISAF's press release of 29 August 2010, in which these mechanical issues and the possibility of civilian casualties were acknowledged. The NZDF's internal communications, and briefings to the Minister, at that time were consistent with the ISAF press release.
11. Although the NZDF was very keen to have a copy of ISAF's classified IAT report, its various requests were declined.
12. At last, on 7 September 2010, the NZDF received what it understood to be a direct account of the findings that were made in the IAT report. The NZDF's Senior National Officer (**SNO**) - though not permitted to read the full report, as it had not yet been cleared for release to New Zealand - was able to see the paragraph of the IAT report described as the key finding.
13. The paragraph he was permitted to see conveyed a conclusion that there had been no civilian casualties. Through its use of acronyms, the SNO understood - as any reasonable reader in his boots would have -

that the paragraph applied to both air and ground forces. In fact, it applied only to the latter. But there was no way of knowing that from the terms of the paragraph alone.

14. Had he been able to read the entire IAT report, he would have appreciated its actual conclusion. That report remains classified, however its conclusions have been reported elsewhere,² namely:
 - a. that all engagements appeared to be in accordance with the rules of engagement and with the Tactical Directive;
 - b. but that civilian casualties were possible as a result of the errant rounds from one of the AH 64s.
15. So here was New Zealand's SNO reaching an entirely reasonable understanding, in the circumstances, that the IAT investigation had concluded that there was no way that civilian casualties could have occurred. He drafted an email to the Director of Special Operations, relaying what he had read.
16. Up until that point, the NZDF had been taking steps to get to the bottom of the allegations: talking to people; receiving and analysing intelligence reports; and reviewing footage. The email from the SNO, conveying the conclusions of the IAT investigation was, to those concerned, understood to be the conclusive outcome on the issue. It superseded media reporting. It superseded intelligence reports. It superseded earlier email chains. It superseded the ISAF press release. It superseded all previous information on the matter. The matter was closed.
17. It became the NZDF's genuine understanding of the bottom line; the most definitive word. It formed the basis of briefings to CDF, the Minister of Defence and the Prime Minister. This was what the NZDF understood, so this is what it told the press following a One News item on Operation Burnham in April 2011.

² The IAT report is a NATO classified document so its contents cannot be disclosed. However, the United States has recently declassified its "Findings and Recommendations, AR 15-6 Investigation" into Operation Burnham (**AR 15-6 report**), which affirms the IAT report's conclusions at pp 6 and 8, respectively.

18. Similarly, when the issue arose again in the context of Jon Stephenson's Native Affairs report in June 2014, the NZDF stood by its statement of 2011. It had, at that point in time, no reason and no basis to do otherwise.
19. Had the NZDF known that, in fact, the IAT report had gone on to say that there may have been civilian casualties as a result of the misaligned sight on the helicopter gun – then it would have said that instead.
20. It certainly was not in New Zealand's interests not to tell it as it was. The possibility of civilian casualties as a result of the errant rounds was not within New Zealand's control or responsibility. There was no advantage to the NZDF in concealing that possibility. There was nothing to be gained. So there was no cover up. No wordsmithing. No side stepping. There was only a genuine ongoing endeavour to tell it as it was understood to be.
21. It was on 30 June 2014 - the night of the Native Affairs programme - that the NZDF became aware of the actual conclusion of the IAT report.
22. On the day of the programme, the Minister of Defence's military secretary, an NZDF personnel, took a bundle of documents from an NZDF safe to the Minister's office to brief him on Operation Burnham, in case of media interest following the programme. Unbeknownst to all those who had been involved with this issue within NZDF, the final document in the bundle was the IAT report itself. It was read within the Minister's Office and brought to the attention of the NZDF after the Native Affairs programme had finished.
23. The following morning, after meeting with the Vice Chief of Defence Force and the Chief of Staff, the Minister explained to the media that, while no civilians were killed by New Zealand soldiers, you couldn't rule out the possibility of civilian casualties as a result of a gunsight malfunction on coalition aircraft. He set the record straight.
24. In light of these events in 2014, it is regrettable that - when the subject of Operation Burnham came up again in 2017 - the NZDF's initial response was incorrect.

25. *Hit & Run* was launched at 5.15pm on 21 March 2017. The NZDF had not been approached for comment during the drafting of the book. The Chief of Defence Force, and Minister of Defence, were in Iraq at the time. That night, the Vice Chief of Defence Force and a team absorbed the book as quickly as they could. They were in no position to prepare a substantive response. But they needed to say something quickly – the pressure was on to make a statement within an hour of the book being released. So, those in the office that night searched the catalogue of prior media statements. The IAT report itself was not seen in the first instance. No one on deck at that time brought it to mind. Nobody immediately drew the connection between the story in the book and the Native Affairs report from some years before.
26. By the following morning, after substantive efforts had been made to gather all relevant information, it was understood that the operation described in *Hit & Run*, although described in materially different terms, must have been the operation addressed in the IAT report. After that connection was made, and the IAT report was brought back to mind, NZDF openly acknowledged the possibility of civilian casualties arising out of Operation Burnham.
27. The facts will be recounted in detail over the next few days by 12 witnesses. A high-level summary of the points they will cover is as follows:

Colonel Rian McKinstry, MNZM

28. Rian was the Senior National Officer (**SNO**) in Afghanistan when Operation Burnham took place. He will give evidence of the understanding gained following the operation of the prospect of civilian casualties. He was keen to obtain clarity. He participated openly and fully in the IAT inquiry and learned that, if there had been civilian casualties, then it was due to an accident beyond the control of the New Zealand Forces.

Brigadier Christopher Parsons, MNZM, DSD

29. Chris Parsons took over from Rian McKinstry as SNO on 7 September 2010. On a visit to ISAF Joint Command Headquarters that day, he was able to see, briefly, that paragraph in the IAT Report which said that no civilian casualties could have occurred. Understanding this to

relate to the operation as a whole, he relayed the point to the NZDF through its Director of Special Operations (**DSO**). Having only recently been able to see the whole IAT report, he now knows his understanding of the IAT report's outcome at the time, which he relayed to NZDF, to be incorrect. But he recorded faithfully what he had understood.

Major General Peter Kelly, ONZM, MNZM (Retired)

30. Peter Kelly was the Director of Special Operations (DSO) during Operation Burnham. He briefed the CDF based upon communications he received and assisted in drafting the CDF's notes to the Minister in 2010, based upon the communications received from Rian McKinstry and Chris Parsons and from which he understood the bottom line to be that no civilian casualties had occurred.

Lieutenant General Rt Hon Sir Jeremiah Mateparae, GNZM, QSO, KStj (Retired)

31. Sir Jerry Mateparae was CDF at the time of Operation Burnham. He viewed the operation from Camp Warehouse in Kabul, as it was taking place. He will speak about his briefings to the Minister in August and December 2010, based upon information he had received from Peter Kelly. He will also explain the NZDF's approach to civilian casualty investigations in the context of partnered operations.

Colonel Karl Cummins

32. At the time of Operation Burnham, Karl Cummins was Deputy Director of Special Operations. He was privy to the email communications from the SNO following the operation. After a 20 April 2011 story on the operation went to air on One News, he was involved in drafting a press release which, amongst other things, and based upon the 2010 communications on the point, referred to allegations of civilian casualties as being unfounded. The use of the term "unfounded" wasn't a case of wordsmithing: it was thought by all concerned at the time to be accurate, based upon their understanding of the IAT outcome.

Rear Admiral Jack Steer, ONZM (Retired)

33. At the time the One News story went to air, Jack Steer was the Vice Chief of Defence Force and was acting as CDF because the then CDF, Lieutenant General Rhys Jones, was out of the country. Having liaised with Karl Cummins, he approved the press release, believing, at the

time, that it was factually correct and being resolute in his endeavour to be accurate.

Colonel Mike Thompson

34. On 7 September 2011, Mike Thompson, then the Deputy Chief of Staff in the Office of the Chief of the Defence Force, received and placed into his safe a copy of the IAT report. At this distance it is not known how the report came to New Zealand or who gave it to him to place in the safe.

Lieutenant General Rhys Jones, CNZM (Retired)

35. Rhys Jones, as the CDF at the time, was in Gallipoli when the One News story aired and the press release in response was prepared and had no involvement with those, or any related, events. There is little that he can add to assist but he will be here to answer any questions.

Commodore Ross Smith, RNZN, MNZM

36. Ross Smith was Chief of Staff in the Office of the CDF when the Māori Television "Collateral Damage" item, presented by Jon Stephenson, went to air in 2014. He will explain the exchanges with Mr Stephenson in the days before the item went to air and the reason NZDF responded that it stood by its 20 April 2011 press release. He approved the statement because the then CDF, Tim Keating, was overseas at the time. It, like communications leading up to it, was based on the former CDF Mateparae's briefing to the Minister in December 2010 which, in turn, was based on communications from the SNO at the time. It was regarded as the most accurate source.
37. The IAT report was unearthed on the day of the "Collateral Damage" report, as a result of which NZDF's position was corrected publicly the following day.
38. Unfortunately, as Ross Smith will explain, the corrected position was lost sight of – but only temporarily – three years later when *Hit & Run* was published; a stance that was not in any way deliberate.

Captain Christopher Hoey, RNZN (Retired)

39. It was Chris Hoey who, in 2014, found the IAT report in the safe (which he had inherited from Mike Thompson), in the course of the search for

material for the Minister on the day of the Native Affairs programme. Chris Hoey's evidence has been given by affidavit affirmed on 23 August 2019.

Air Marshal Kevin Short

40. Kevin Short was the VCDF when the Native Affairs programme aired. In the absence of Lieutenant General Tim Keating, he briefed the then Minister of Defence, Hon Dr Jonathan Coleman, the following morning, following which the Minister addressed the media and was able to portray the IAT outcome accurately.
41. He was in the same situation in 2017 when Hit & Run was published. CDF Keating was in Iraq with the then Minister of Defence, Hon Gerry Brownlee. He will describe the pressurised environment in which, that night, they needed to read the book and make an initial statement. They found the 20 April 2011 press release, assumed it to be correct, not appreciating at the time that the allegations in Hit & Run arose out of the same operation as had been the subject of the Native Affairs story, and so did not immediately bring to mind the IAT report.
42. As a result, the initial response was, regrettably, at odds with the Report's conclusions but he was able to provide clarity the next day when briefing the Prime Minister.

Lieutenant General Tim Keating, CNZM (Retired)

43. Tim Keating, who was in Australia when the Native Affairs programme went to air in 2014 and when the initial press release was issued, liaised with the Minister over the programme while he was away and, in person, on his return.
44. Tim Keating was in Iraq when Hit & Run was released in 2017. From there, he did not pick up on the inaccuracy of the initial response. While he was in Iraq, and in the days, weeks, and months following his return from Iraq, he embarked upon a comprehensive information-gathering process.
45. Tim Keating will explain the public statements he made on his return to New Zealand, and his ongoing briefings to the Minister and to the Prime Minister.

46. He will speak of his absolute motivation to gather as much information as possible so as to understand and to be able to explain publicly exactly what occurred.
47. The notion that the NZDF was involved in some form of cover up, and that its CDF at the time was at the helm of it, simply could not be further from the truth. The opportunity to address the relevant sequence of events is welcomed by each of the people from whom you will hear.

Dated: 16 September 2019



Paul Radich QC and Lucila van Dam

Counsel for NZDF