

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER

A GOVERNMENT INQUIRY INTO OPERATION
BURNHAM AND RELATED MATTERS

Brief of Evidence of Timothy James Keating

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1. I am Lieutenant General (Retired) Timothy James Keating. I am the Chief Executive of New Zealand Health Partnerships Ltd.
2. I enlisted in the New Zealand Army as an Officer Cadet in 1982, graduating into the Royal New Zealand Infantry Regiment. I was posted to the New Zealand Special Air Service (NZSAS) in 1986 and served in the NZSAS, including as Commanding Officer, until 2001.
3. I have had a range of senior roles in the New Zealand Defence Force (NZDF) including Commandant of the Officer Cadet School in Waiouru (2001 - 2003), Special Projects Officer at Headquarters Joint Forces (2004 - 2005), Commander of the New Zealand Provincial Reconstruction Team in Bamyán Province, Afghanistan (2005), Assistant Chief of General Staff (2006 - 2007), Commander 2nd Land Force group (2007 - 2009), Deputy Chief of Army (2009 - 2010), Chief of Staff to Chief of Defence Force (2010 - 2011), Chief of Army (2011 - 2012), Vice Chief of Defence Force (VCDF) (2012 - 2014), and Chief of Defence Force (CDF) (2014 - 2018).
4. I have a Master's Degree in Strategic Studies from the US Army War College (2004) and a Postgraduate Diploma in Defence and Strategic Studies from Massey University (2006).
5. This year I was made a Companion of the New Zealand Order of Merit.

Native Affairs report

6. I understand that on 27 June 2014, Jon Stephenson contacted the NZDF to advise that he had information about an operation conducted by the NZSAS in Afghanistan in August 2010, now commonly referred to as Operation Burnham (the Operation), and to request a response from the NZDF on a number of questions.
7. I do not recall having any involvement in responding to these questions. I was in Australia from mid-afternoon on Sunday, 29 June 2014 until mid-afternoon on

Tuesday, 1 July 2014 at the change of command ceremony for the then Australian Chief of Defence Force. The then VCDF, then Air Vice Marshal Kevin Short, acted as CDF in my absence.

8. I understand that Commodore (Retired) Ross Smith, formerly my Chief of Staff, will give evidence about the questions raised by Mr Stephenson, the circumstances in which the NZDF's response was provided, and the basis for that response.
9. I am aware that the then Minister of Defence, The Hon. Dr Jonathan Coleman (Minister), received a briefing from the NZDF about the Operation on the afternoon or evening of Saturday, 28 June 2014. I do not recall having briefed the Minister. It is possible that I briefed him as I had not yet departed for Australia, but I am unsure. Sometimes I send a subject-matter expert to undertake briefings, in the first instance, but I simply cannot remember if I did so on this occasion.
10. If I did, in fact, meet with the Minister on Saturday, 28 June 2014, I would have briefed him on the basis of the August and December 2010 CDF's Notes to the Minister, which are in the Bundle at pp 163-169. As I recall, this is all the information I had personally reviewed about the Operation at the time.
11. The first involvement that I can recall with this matter was receiving a call from the Minister on the evening of 30 June 2014. I remember that I was at a formal dinner for the change of command ceremony in Australia when the Minister called. He was upset.
12. He said that his Military Secretary had given him a report prepared by the International Security Assistance Force (ISAF). He said that the report described an investigation, by an Incident Assessment Team, into allegations of civilian casualties arising out of the Operation (the IAT report). The Minister relayed that the assessment team had totally cleared the ground forces but had found a likelihood of civilian casualties. This was inconsistent with the NZDF's statement made on 20 April 2011, and repeated that night, that ISAF had investigated and found that the

allegations of civilian casualties were unfounded.

13. I immediately called my Chief of Staff, Ross Smith. I conveyed the conversation to him and asked whether we had ever seen the IAT report. I couldn't believe that the NZDF had the IAT report, without knowing it, and without having read it. Ross Smith didn't know either.
14. I needed to make sense of what had happened. I asked Ross Smith to put together a reading pack, including the IAT report and the August and December 2010 Notes to the Minister, that I could read immediately upon my return to New Zealand the next day.
15. On 1 July 2014, I flew back to New Zealand. I arrived in the middle of the afternoon and met with Ross Smith to collect the information pack so that I could read the IAT report ahead of my meeting with the Minister and Secretary of Defence. This was the first time that I had seen or read the IAT report.
16. The meeting with the Minister and the Secretary of Defence took place just ahead of the Defence Weekly Meeting scheduled for 4pm. I do not recall what we discussed at that meeting but I would have assured them that I had never seen the IAT report, that I hadn't known we had a copy of it at NZDF Headquarters, but that we would make inquiries. I understand that Ross Smith will give evidence as to the steps we took to ascertain when and how the IAT report ended up in the safe of the Director of Coordination, Chris Hoey.
17. By the time of my meeting with the Minister on the afternoon of 1 July 2014, he had already spoken to the media. I believe the Minister was asked some questions on his way to the morning caucus meeting. The Minister used that occasion to clarify the position on civilian casualties arising out of the Operation.
18. It was reported by the media that the Minister had acknowledged that "you probably can't rule out" civilian casualties caused by a gun that had not been properly slaved to

its sight in a coalition helicopter. It was also reported that the civilian casualties were not caused by New Zealand troops. I refer to the media reports at pp 243-252 of the Bundle.

19. Although I do not specifically recall, I believe that in the following days I would have briefed the Minister again on the outcome of Ross Smith's inquiries that had been agreed upon during the meeting with the Minister on 1 July 2014, including interviewing Rian McKinstry and seeking to track the arrival into the NZDF of the IAT report.

Hit & Run

20. I was in Iraq with the then Minister of Defence, The Hon. Gerry Brownlee, on 21 March 2017, the day of the launch of *Hit & Run: the New Zealand SAS in Afghanistan and the Meaning of Honour*. That night I spoke briefly to then VCDF, Kevin Short. I do not recall exactly what we discussed; I would imagine that he provided an overview of the allegations made against the NZDF and he explained the proposed response.
21. I realise now that, in the NZDF's initial response of 21 March 2017, we repeated the 20 April 2011 statement that "the [ISAF] investigation concluded that the allegations of civilian casualties were unfounded". With all that was going on, I did not pick up on that at the time.
22. Despite being overseas, I considered it imperative to get clarity on the veracity of the allegations made in *Hit & Run*. I asked the Director of Legal Services, then Colonel Lisa Ferris to gather as much information as possible about the Operation. I refer to the Bundle at p 269; this is an email from Lisa Ferris to Brigadier Evan Williams, on 22 March 2017, at 8:41am, conveying my request.
23. I also made a number of requests for information to my Chief of Staff, Ross Smith, who made a record of it in his notes from the time; see the Bundle at p 275, where he records on 23 March 2017 that the team had a "huddle" regarding "H+R" [*Hit & Run*]

so as to “work share” about meeting the “RFI” (requests for information) that I had made.

24. We were able to obtain quite quickly, from NATO, a classified copy of the Air Weapons Team (AWT) video footage and accompanying audio from the Operation.

26 March 2017

25. I returned from Iraq on Saturday, 25 March 2017. The following morning, on Sunday 26 March 2017, I spent some time perusing the reading pack that had been prepared for me.
26. I cannot remember its exact contents but I believe it contained, at a minimum, the August and December 2010 CDF Notes to the Minister, the IAT report, a synopsis and analysis of *Hit & Run*, and the talking points used by VCDF in briefing the Prime Minister, The Rt. Hon. Bill English, on 22 March 2017.
27. Between 12pm and 3pm, I was briefed by the Ground Force Commander of the Operation, together with VCDF, my Chief of Staff, the Director of Legal Services, the Commander of Special Operations, and the Chief Adviser of Defence Public Affairs.
28. I met with the Minister of Defence at 3pm, before briefing the Prime Minister at 4pm. I refer to the Bundle, at pp 279-285, for a copy of my briefing notes. The briefing comprised an overview of the intelligence which led to the Operation, a detailed analysis of the conduct of the Operation, an analysis of the relevant legal framework, and footage from the AH 64s. On the subject of civilian casualties, I explained to the Prime Minister that (at p 281):

The operation has been subject to an International Security Assistance Force (ISAF) investigation team headed by an ISAF Brigadier General and supported by a team including an ISAF Legal Officer as well as Government of the Islamic Republic of Afghanistan representatives from the Ministry of Interior and Ministry of Defence.

...

The investigation team concluded that civilian casualties may have been possible due to the malfunction of an air weapon system, as was made public by ISAF on 29 August 2010.

29. I reiterated that message at the end of my briefing (at p 285):

[The ISAF] report concluded CIVCAS may have occurred by gunship - ground forces operated lawfully.

30. That evening we put out a new statement in response to *Hit & Run*; NZDF had not made any comment after the initial response on the night of the book launch a few days earlier. We wanted to communicate NZDF's position which was, by this point, more considered and informed.

31. The statement, which is in the Bundle at pp 287-288, identifies a number of inaccuracies in *Hit & Run*, before acknowledging that:

The ISAF investigation determined that a gun sight malfunction on a coalition helicopter resulted in several rounds falling short, missing the intended target and instead striking two buildings.

This investigation concluded that this may have resulted in civilian casualties but no evidence of this was established.

...

The NZDF reiterates its position that New Zealand personnel acted appropriately during this operation and were not involved in the deaths of civilians or any untoward destruction of property.

27 March 2017

32. The following afternoon, on 27 March 2017, I held a press conference. My speech notes from the press conference are in the Bundle at pp 289-295.

33. In the press conference, we discussed:
- a. the context for the Operation and, in particular, the need to ensure the security of the New Zealand Provincial Reconstruction Team, the Afghan people, and coalition forces operating in Bamyán province;
 - b. the intelligence-gathering and planning of the Operation;
 - c. the conduct of the Operation; and
 - d. the nature of the ISAF investigation into allegations of civilian casualties.
34. Addressing the issue of civilian casualties, the Director of Defence Legal Services, then Colonel Lisa Ferris, explained (at p 294):
- [I]nformation, received after Operation Burnham indicated that civilian casualties may have been possible. The International Security Assistance Force was required to assess all allegations of possible civilian casualties ... In doing so ISAF stood up an investigation team... The investigation team concluded that civilian casualties may have been possible due to the malfunction of a weapon system... The investigation team also concluded that members of the NZSAS appear to have complied with the ISAF commander's tactical directive, the rules of engagement, and accordingly the law of armed conflict.
35. After the press conference I participated in a "Question and Answer" session, the transcript of which is in the Bundle at pp 297-309. In that session, on the subject of civilian casualties, I reiterated that there may have been civilian casualties caused by rounds falling short as a result of a mechanical malfunction, but that the claims had not been corroborated.

Notes to Minister

36. On 29 and 30 March 2017, I submitted two Notes to Minister Brownlee describing the legal framework for undertaking an internal Defence Force inquiry. I refer to the Bundle, at pp 311-324 and 325-329, for these Notes. In summary, the legal position is that:
- a. where an allegation is made against foreign service personnel, there is no statutory authority to conduct an investigation;

- b. where an allegation is made of unlawful conduct on the part of NZDF personnel, the relevant jurisdiction is a disciplinary investigation under the Armed Forces Discipline Act 1971 (AFDA);
- c. the allegation of unlawful conduct must be investigated unless it is considered to be “not well founded”;
- d. having regard to the content of *Hit & Run*, the intelligence and operational material available to me, the rules of engagement, and the IAT report, I was satisfied that the allegations were “not well founded” and, therefore, that no further action was required under the AFDA.

3 and 4 April 2017

- 37. On the morning of 3 April 2017, I briefed the Prime Minister again. My recollection is that I used the same written briefing from the 26 March 2017 briefing, but provided updates verbally where appropriate.
- 38. The Prime Minister conducted a post-Cabinet conference on 3 April 2017, a transcript of which is in the Bundle at pp 333-343. The Prime Minister:
 - a. stated that he had reviewed the intelligence and operational material on the Operation, the rules of engagement, the IAT report, and the video footage of the Operation;
 - b. acknowledged the possibility that there may have been civilian casualties as a result of a misfire from a coalition helicopter;
 - c. found that the allegations of war crimes and misconduct by NZDF personnel had no substance to them; and
 - d. determined that there was no basis for ordering an inquiry.
- 39. The Prime Minister reiterated these points during Parliamentary Question Time on 4 and 5 April 2017, transcripts of which are in the Bundle at pp 347-350.
- 40. On the morning of 4 April 2017, I met with VCDF, Kevin Short, the Director of Legal Services, Lisa Ferris, and the Director of Coordination, Chris Hoey. Up until this point,

it felt as though we had been operating in a “pressure cooker”; scrambling to make sense of everything. Now, with the pressure relieved to some extent, I wanted to gain more clarity. The purpose of this meeting was to shift gear from “what we know” to “what *more* can we know”. Even though the Prime Minister had decided not to conduct an inquiry, I still wanted to do further fact finding, to ascertain if there was anything I was missing. I wanted to leave no stone unturned.

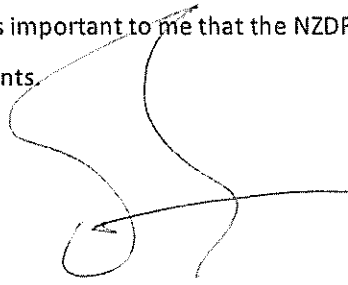
Significance given by NZDF to location errors in Hit & Run

41. The Inquiry has asked the NZDF to address “the significance given to the location errors when addressing publicly the allegation that civilian casualties resulted from the Operation”.
42. At the outset, the location errors in the book were significant to the NZDF because they tended to discredit the entire account. To be clear, our concerns about the book’s treatment of location went well beyond the *name* given to the village in which the Operation took place. The geo-reference points provided in the book, together with the orientation of the river, the layout of the buildings, and the description of the topography within the narrative, were at odds with what we knew about the valley in which the Operation was conducted.
43. That is not to say that I used the location issues as a diversion; to the contrary, I refused to be diverted by a narrative that did not make sense alongside what I knew of our Operation. In my public statements I wanted to be clear that all I could speak to was what the NZDF knew to have happened in the early hours of 22 August 2010. I did not want to be drawn into, or distracted by, the book’s alternative narrative which, with all its fundamental inaccuracies, simply made no sense to me.
44. As the days went on, however, we set to one side the geographical discrepancies. For instance, I refer to the Bundle, at pp 325-329, which is my Note to the Minister of 30 March 2017. In that Note I say, at paragraph [12], “[in making my decision], I have set aside any inaccuracies of location”.

45. Instead of seeking to rebut the book, I was motivated to gather more information so that we could evaluate, with greater precision, the allegations of wrongdoing. To that end, I took a number of steps:
- a. On 31 March 2017, I wrote to General Dunford, the Chair of the US Joint Chiefs of Staff to request declassification of the AWT video footage and accompanying audio so that it could be released to the New Zealand public. A copy of that letter is in the Bundle, at pp 331-332.
 - b. On 4 April 2017, I wrote to General Pavel, the Chair of NATO, to request a copy of the full IAT report, on our understanding that we only had the summary of it. A copy of that letter is in the Bundle, at pp 345-346.
 - c. In mid April 2017 I directed that all material relevant to the Operation / *Hit & Run* - including correspondence, media releases, media articles - be consolidated into a single record so that we could ensure consistency in the future. I refer to the Bundle at p 351; this is an email from the Director of Coordination, Chris Hoey, on 18 April 2017, at 10:02am, advising of this step.
 - d. In mid April 2017, I directed the New Zealand Defence Attaché (DA) in the Middle East to travel to Afghanistan to check whether there was any other material relating to the Operation remaining in ISAF headquarters. I refer to the Bundle at p 353; this is an email from Brigadier John Boswell to me, on 19 April 2017, at 8:40am, confirming that the DA had been advised.
 - e. In early May I established a fact finding team to gather more information. I refer to CDF Directive 27/2017: Due Diligence Task, on pp 355-359 of the Bundle, which records that:
 - i. *Hit & Run* had made allegations of unlawful conduct;
 - ii. although the NZDF had a volume of information, a more complete set of information is required regarding the allegations of civilian casualties and property damage; and
 - iii. I established a fact-finding team, comprising three NZDF personnel, to gather information, including from Major General Zadalis, who had conducted the ISAF investigation, and to undertake a due diligence examination of the information.

- f. On 21 December 2017, I wrote again to General Pavel, the Chair of NATO, to request the release of a redacted version of the IAT report. A copy of that letter (without its classified enclosure) is in the Bundle, at p 367.
46. The due diligence exercise I directed resulted in a number of outcomes:
- a. Following a meeting with Major General Zadalis, who conducted the ISAF investigation and who wrote the IAT report of 26 August 2010, Brigadier Motley reported back, in an email of 24 May 2017, at 1:23pm, (which is in the Bundle at pp 361-365) that:
 - i. the ground forces were not a factor in any potential civilian casualties; and
 - ii. if there were any civilian casualties, the likely cause was a malfunction in helicopter gun sight.
 - b. The NZDF obtained confirmation that the IAT report in our possession, despite being titled as an "Executive Summary", was in fact the full report.
 - c. The NZDF became aware for the first time of a further investigation conducted domestically by the United States into a discrete issue arising out of the Operation, namely, whether the AWT video had been wrongfully edited by their forces with an intent to mislead the IAT or shape their report. The investigation concluded that the editing was undertaken in accordance with Standard Operating Procedures for the management of limited recording devices and storage capacity. The editing was completed before the IAT asked to see the footage, and was not intended to mislead. The NZDF received a copy of the classified AR15-6 report on this investigation in May 2017. In June 2019 a redacted, unclassified version of this report was released by the US Government in response to a private request under their Freedom of Information Act, and it was published on the Inquiry's website on 1 July 2019. A copy of the publicly available, redacted version of the AR15-6 report is in the Bundle at pp 89-162.
 - d. The NZDF was provided with the video footage from the unmanned aerial vehicles which captured approximately seven hours of footage before, during, and after the Operation.
47. Until my retirement from NZDF in 2018, I strived to gain as much information as

possible on Operation Burnham because it was important to me that the NZDF was as clear and open as possible on the relevant events.



Timothy James Keating

12 September 2019

Date

