

Inquiry into Operation Burnham

Submission on behalf of Nicky Hager in relation to Public Hearing 4

Dated: 1 November 2019

Counsel: Felix Geiringer
Lambton Chambers
L3 / 101 Lambton Quay
PO Box 10-110
Wellington 6143
Tel: +64 22 0243402
Email: felix@geiringer.law

May it Please the Inquiry:

Introduction

1. These are the written submissions at the conclusion of the Inquiry's Public Hearing No. 4 on behalf of Nicky Hager.

Ultimate conclusion

2. Mr Hager submits that, based on the evidence that the Inquiry heard during Public Hearing 4, the Inquiry ought to conclude that:
 - 2.1. multiple senior members of the New Zealand Defence Force ("NZDF") deliberately misrepresented what they knew about the likelihood of civilian casualties during Operation Burnham to the New Zealand Government, to the New Zealand Public, and to other members of the NZDF;
 - 2.2. this was done for the purpose of avoiding greater scrutiny of their actions and to escape criticism, embarrassment, and damage to the reputation of them personally, the New Zealand Special Air Service ("NZSAS"), and the NZDF in general;
 - 2.3. these acts were part of a culture which was overtly hostile to anyone questioning their actions and which sought to minimise rather than confront any concerns;
 - 2.4. this included a one-eyed approach that irrationally favoured material which might support their preferred outcome and disregarded reliable information that did not;
 - 2.5. but it went beyond this into multiple acts of active

dishonesty; and

2.6. this culture appears to continue to exist in the present day.

Analysis of the evidence

3. In the limited time available to him, and conscious of the fact that the Inquiry will be guided by submission from its own counsel who led the cross-examination, Mr Hager does not intend to present a comprehensive review of the evidence in these submissions. He contends that most of what he would point to, to substantiate the above conclusions, will be material that the Inquiry will have already highlighted for itself or will have been highlighted by its legal advisors.
4. Instead, Mr Hager wishes to set out the factual matters he says are shown by the evidence which support the conclusions above, and highlight in more detail some aspects of the evidence which he believes are otherwise more likely to escape attention.
5. It is submitted that the NZDF has a duty to be upfront about things that go wrong during operations it conducts. First, this is because there are extremely serious legal duties that arise from issues such as potential civilian casualties. It is also because the NZDF's future actions are controlled in our democracy by political decisions. These are made directly by Government, but are ultimately determined by the will of the public.
6. The acts or omissions which Mr Hager says constitute the NZDF's dereliction with respect to these duties that have been established in evidence before the Inquiry are as follows:

6.1. briefing the Minister of Defence in a way that made the

Minister of Defence reasonably believe that the possibility of civilian casualties from Operation Burnham had been ruled out;

- 6.2. making public statements claiming that the possibility of civilian casualties from Operation Burnham had been thoroughly investigated and conclusively shown to be unfounded;
- 6.3. knowing at the time that 6.1 and 6.2 were done that their own intelligence reports from Afghanistan did not support these conclusions;
- 6.4. knowing at the time that 6.1 and 6.2 were done that the videographic evidence in their possession of the Operation as filmed from the Apache helicopter participating in the operation did not support these conclusions;
- 6.5. knowing at the time that 6.1 and 6.2 were done that public statements made by the International Security Assistance Force (“ISAF”) contradicted these conclusions;
- 6.6. failing to conduct an investigation of their own into the possibility of civilian casualties;
- 6.7. concealing the existence of a copy of the Initial Assessment Team (“IAT”) report from at least September 2011;
- 6.8. failing to follow up on known information such as the second ISAF investigation;
- 6.9. making internal statements to all members of the NZDF in relation the release of the book *Other People’s Wars*, which

- contradicted what they knew from 6.3-6.6;
- 6.10. reaching an agreement with Prime Minister Key that the Prime Minister would make the only public comments in relation to *Other People's Wars* and remaining silent while the Prime Minister proceeded to make comments which contradicted what they knew from 6.3-6.6;
 - 6.11. repeating the false public statements from 2011 in response to the *Collateral Damage* story on Native Affairs in 2014;
 - 6.12. agreeing with Minister of Defence Coleman a modification of the public comments to be made in response to *Collateral Damage* which failed to inform the public that the previous statements had been false and again minimised the possibility of civilian casualties;
 - 6.13. failing to engage with, and conduct their own investigations in relation to, the additional evidence that emerged through *Collateral Damage* including named Afghan villagers alleged to have been casualties of the Operation;
 - 6.14. again repeating false public statements after the release of the book *Hit & Run*;
 - 6.15. seeking to obfuscate the issues after the release of the book *Hit & Run* by alleging that they had conducted no operations in the area described in the book despite knowing that the book was describing Operation Burnham;
 - 6.16. when finally conducting its own investigation in 2017, doing so with a directed purpose of disproving allegations

in *Hit & Run* in an effort to discredit the book and its authors rather than attempting to ascertain the truth about what occurred during and after Operation Burnham;

6.17. advising the Government not to hold this Inquiry; and

6.18. making false claims before this Inquiry as to the need for documents to remain secret.

7. Mr Hager submits that this dereliction has originated at several levels:

7.1. key senior NZDF officers were trying to avoid personal criticism for their actions (or inaction);

7.2. SAS-linked personnel were determined to protect their unit from criticism;

7.3. there was a general NZDF culture of hiding and downplaying bad news; and

7.4. meanwhile Ministers of the Crown did not want bad news coming out on their watch and therefore lacked motivation to go behind the assertions of the NZDF.

8. In other words, there were various motives and intentions for these different people.

9. A major part of the NZDF case has been to deny an intention to mislead.

10. Mr Radich, in opening submissions for NZDF, said that “There was no 'cover-up'. There was never any intention to mislead”. Peter Kelly used almost the same words, when he argued “Look, it was inaccurate, but it wasn't our intent to be misleading”

(September hearing transcript, p. 370); then “there was certainly no intent to be misleading with that particular statement” (p.371); and again “There was certainly... no intent to mislead” (p.372).

11. Intention is a private internal state and so difficult to prove and easy to deny. However, Mr Hager submits that consistent actions provide good evidence of intentions. The NZDF case doesn't boil down to one simple and easy to understand error. Rather, if it were to be accepted (and it is submitted that it is not rationally capable of being accepted) it amounts to extremely serious failures of competence from large numbers of the NZDF's senior management including more than one of its Chiefs extending over multiple years.
12. In this context, an important aspect of the evidence that came out during this public hearing is the unique nature of the allegations in relation to Operation Burnham. Allegations of civilian casualties were far from run of the mill as one or two witnesses tried to suggest. This significantly undermines the case that the NZDF put forward which requires the Inquiry to accept that these matters were so mundane and run of the mill that they kept forgetting that they were in possession of evidence contradicting their own briefings and public statements.
13. The following is from a cross-examination of former CDF Jerry Mateparae by counsel assisting, Ms McDonald:

Q. Am I correct that New Zealand have rarely, perhaps if ever, but certainly rarely, ever publicly been associated with allegations of civilian casualties before the issues surrounding Operation Burnham?

A. As far as I know, yes. They have....

Q. And does it also follow that any suggestion of the possibility of civilian casualties arising from an operation in which New Zealand was connected or associated would have been, and would be, certainly in your time as CDE, of considerable significance to the country, and particularly to Ministers and the Government?

A. Yes, and to the Defence Force.

(September hearing transcript, pp.25-26)

14. There had been no previous allegations of civilian casualties connected to the NZDF in Afghanistan. It was not credible that matters such as the ISAF press release or the IAT report would be so easily forgotten by NZDF officers when they made subsequent inconsistent statements. The clear intention of everyone concerned was to try to keep the NZDF's records clean.
15. On Friday 18 October 2019, Kevin Short answered a question from Mr Radich on the subject of cover-up. "I just can't believe it is thought of as a cover up," Mr Short replied. "There's two pieces that come to mind when I think of that." His first reason was the "professionalism and honesty of the cadre of very senior people in the New Zealand Defence Force." The second reason was a "Swiss cheese model, when a series of issues line up to cause a problem.... The cheese being when all the holes line up you get the result, I think, that we're seeing here and I put that down to just a series of wrong pieces of information, the change of staff, the times that's gone, our record keeping has ended up with us in the situation where we're at this Inquiry" (Public Hearing 4 transcript, p.1171).
16. This Swiss cheese model cannot explain the consistent misrepresentations made by the NZDF. Mr Short himself acknowledged one act of deliberate misrepresentation when

under cross-examination from Davey Salmon. He said, “I apologise if there is confusion about the location and it was used to divert or confuse the public” (Public Hearing 4 transcript, p.1163).¹

17. Mr Hager submits that one useful way to recognise deliberate concealment, as opposed to “just a series of wrong pieces of information, the change of staff” etc, is to create what he calls a “decision tree”. Such a document prepared by Mr Hager is attached as Appendix 1. The table in the appendix sets out a series of occasions when NZDF staff made decisions in the years since Operation Burnham. For each one, Mr Hager notes whether NZDF chose to be open about the possibility of civilian casualties, or chose not to investigate, to divert, and/or to deny.
18. If it was all just a misunderstanding, or series of mistakes, Mr Hager submits that one would expect at least several arrows in both directions. The appendix speaks for itself.
19. Although some actions may be genuine mistakes and oversights, the obvious conclusion is that NZDF staff did not want to admit civilian casualties had occurred on their operation and did unprofessional and dishonest things to try to avoid that. The final

¹ Note that Mr Short was himself an active participant in this deception over location, including as CDF, as seen in this August 2018 NZDF Special Inquiry Office document:
Q. Has CDF conceded that the Operation took place in the same location stated in the book, *Hit and Run*?

A. No. As outlined by the former CDF at a press conference in March 2017, Operation Burnham was conducted in a village known as Tirgiran Village. This Village is some two kilometres south of Khak Khuday Dad Village and Naik Village. As far as NZDF knows, the authors have not resiled from their view in the book *Hit and Run* that it took place in those two villages – places NZDF never operated on. (September Inquiry bundle, p. 590.)

In opening the NZDF’s case to the Inquiry during this public hearing, Mr Radich conceded that the NZDF had known that *Hit and Run* described Operation Burnham since 22 March 2017 (see paragraphs [25] and [26]).

item, Short's very late concession about Fatima, is the exception that proves the rule. It serves to highlight the years of intransigence that stopped any NZDF person making this simple admission before then.

20. From 2014 and 2017, it had been progressively more ludicrous for NZDF to refuse to admit that the child Fatima had died and her relatives had been wounded. The failure to do so was not a mistake or Swiss cheese; it was “an attempt to prevent people discovering the truth about a serious mistake or crime”.²
21. Mr Hager notes that he is not alone in concluding that there were serious cultural accountability issues within the NZSAS. The Inquiry will recall the scepticism that Minister of Defence Jonathan Coleman expressed about the NZSAS culture in 2014, specifically about NZSAS actions in relation to Operation Burnham. This helps explain what the Inquiry has been encountering. The diary records say Coleman raised concerns about “SAS accountability” and spoke of “credibility erosion over time”. He said special forces were not fallible and that there was no question of their core skills, but in political judgment they lacked insight. The NZSAS also confused the desirability of having “a certain shielding” (presumably meaning operating in secret) with “unaccountability”. Coleman concluded “SAS credibility at risk” and – a clear sign of unhappiness with Blackwell – said “DSO – look at this position not being SAS.” Clearly Coleman did not think the NZSAS actions were honest mistakes. His views were “backed up” by the Secretary of Defence (SUPP bundle pp. 11 and 18).

² The Oxford English Dictionary's definition of “cover up”.

22. These diary records are important because we are used to hearing only laudatory statements about members of the NZSAS – as if, as Short suggested above, it wasn't possible that this cadre of senior people would be involved in a cover-up. The deception seen following Operation Burnham seems to trace particularly to the NZSAS and half a dozen past and present NZSAS officers: people who confused the necessary privilege of operational secrecy with an entitlement to hide things (actively and passively) when they wanted to avoid unwelcome news about the unit. Public Hearing 4 was a live demonstration of the NZSAS culture notably from witnesses Keating and Blackwell.
23. Mr Hager relies for his conclusions on the continuing efforts by NZDF witnesses to make inaccurate statements minimising the possibility of civilian casualties even as they presented their evidence to the Inquiry. In the course of answering Inquiry questions, several witnesses repeated the various incorrect claims about Operation Burnham set out below. The apparent intention was that, by repetition, the claims would come to be accepted by the Inquiry. They all point in the same direction: suggesting that NZDF has no responsibility for civilian casualties. Mr Hager submits that these claims are, themselves, part of an effort by NZDF to mislead others about Operation Burnham which continues to the present day.
24. The repeated claims were:
 - 24.1. civilian casualties were the result of rounds falling short due to a gunsight issue;
 - 24.2. there may have been, but there was “no evidence” of

civilian casualties;

24.3. that civilian casualties was no more than a possibility that could not be excluded; and

24.4. NZSAS was “categorically clear[ed]... of any allegations”.

25. Each of these claims dates back to the original ISAF IAT press release. Originally, NZDF acted as if the IAT report never happened, during the 2010-2014 total denial phase (“no way” there were civilian casualties; “unfounded”). Then the IAT findings were picked up and have been used as the basis of NZDF minimisation and denial since. However, the IAT report was only ever a quick assessment. It was superseded by the AR 15-6 investigation report within weeks. It represented only what could be known quickly in the first four days after Operation Burnham. It didn't even accurately represent what was known in the first four days: various of its facts, as reported by Parsons and elsewhere, were incorrect. It was never meant to be the last word, setting in stone the truth and being quoted for years after as the key source. Yet even in the recent hearings NZDF officers cited it to the exclusion of all the other evidence that existed then and has been found since.

Rounds falling short due to a gunsight issue

26. The idea that civilian casualties may have resulted from Apache “rounds falling short”, owing to “a gun that was not slaved correctly to its sight”, has been repeated so many times during the hearings (and earlier) that it could seem like established fact. The implication is that no one was to blame for any civilian casualties since, if there were any, they were caused by accidental

mechanical error. Tim Keating used this argument in his original March 2017 press conference, saying “The coalition investigation has said that if there were casualties, the fault of those casualties was a mechanical failure of a piece of equipment.” (September bundle p. 349)

27. This is a convenient explanation for NZDF. But it is not true. Its extensive repetition does not make it true.
28. The “rounds fell short” story came from the IAT report (prepared quickly over two or three days on 4-6 August 2010) and then in NZDF explanations after *Hit & Run*: notably the press conference PowerPoint, which presented a story about US aircraft firing at armed insurgents on a bare hillside. The public and media were left to assume that any rounds “falling short” had been aimed at that hillside but fell short into the adjacent village.
29. By gaining access to some of the weapon systems video and screenshots of more video, a different story is revealed. The reason for civilian casualties was that an Apache helicopter fired deliberately at an (apparently unarmed and possibly injured) man who was walking down among the houses of Khak Khuday Dad. A building and huddled people can be seen only about 10 metres away from him. It is immediately clear from this video that the inaccuracy of the helicopter cannon was not the reason for the casualties.
30. The man is seen near the crosshairs of the helicopter weapon system but the weapons explode behind him, the same sort of misfiring visible during attacks on the bare hillside earlier. This means that if the weapon had been firing accurately, that wouldn't

have stopped the casualties. The rounds would actually have exploded closer to the huddled people than they did. If anything, the mechanical error and “rounds falling short” (actually long) might have reduced the civilian casualties. But whether that is the case or not, the “rounds falling short” were not the main factor in the civilian casualties. This claim should not have survived seeing the video (as McKinstry, Keating, and others did).

31. The point is: the civilian casualties in Khak Khuday Dad were not caused by mechanical error. This is not true. They were caused by the decision to fire into a residential area. The Apache crew fired exploding cannon rounds at the man even though he was close to civilian homes. Civilians had been seen in the area. Screenshots released with the second AR 15-6 investigation report suggest that two further attacks (“passes”) followed the first attack on the man, again firing into the same residential area, including presumably the attack where rounds hit the roof of a house. As such the helicopter crews directly disobeyed their orders (including the Petraeus Directive) not to fire if there was a chance of civilian casualties. It was impossible for them to be even slightly sure that civilians were not present.
32. Also, this firing was only indirectly related to the firing on the bare hillside. This is relevant to the legal justification for the attacks. The Apache and AC-130 attack on the bare hillside occurred at 12.54 am but the firing into the village did not occur until 1.19 am. It was a separate attack in a very different location and so everyone concerned (including the JTAC and GFC) were obliged to assess afresh the civilian casualty risk before any further firing. If they did a fresh assessment (as they were obliged

to), it is difficult to understand how they could authorise firing into a civilian village (unless the assessment was so perfunctory they did not know that). If they did not do a fresh civilian casualty assessment, then the authorisation process was token and inadequate.

33. I note that Ms McDonald made a similar point in her cross-examination of Keating. She asked: "Q. Do you agree that they don't just show a few rounds from a mechanical slaving issue, but in fact show repeated firing near houses, do you agree they show that?" Keating replied "No". (September hearing transcript p.620.)
34. Further details of the 1.19 am attacks are relevant to this issue. First, they fired at a man who wasn't carrying a weapon. This is questionable in itself. It also raises serious issues of proportionality, since the justification for the Apache firing into a civilian area was to try to kill an unarmed man. Secondly, they tried to kill a man who was apparently wounded (which raises its own serious legal issues). Lastly, they fired into a civilian area where civilians were visible before and during the firing. This is a further clear breach of legal obligations. The 1.19 am attacks are the key civilian casualty incident that led to this Inquiry. The point of highlighting these issues here is that these are all facts known to anyone who has made any effort to look into what occurred on that day and who has watched the videos – as NZDF witnesses say that they have. Despite this, these NZDF witnesses continued to try to brush away responsibility for any civilian casualties by claiming the issue was a misfiring weapon.

May have been but “no evidence” of civilian casualties – just a possibility

35. The second minimising and denying line repeated many times by NZDF (including in the hearings) is that the IAT report said that rounds falling short “may have” resulted in civilian casualties but there was “no evidence”, or that it was no more than a “possibility”.
36. This is also not true. The claim mistakes evidence with cast iron proof. Within days of Operation Burnham there was considerable evidence of civilian casualties. News media, including the *New York Times*, reported that civilians had been killed and wounded (citing numbers, six or eight dead, that were very similar to later sources). A delegation of affected villagers visited the district governor. There was a public protest in a nearby town. NZDF local informers reported civilian casualties in detail. NZDF intelligence reports (notably PRT) named civilians killed and wounded. In confirmation of this evidence, the IAT (and NZSAS SNO) inspected the weapons video and saw the Apache firing into a civilian area that would explain the evidence of civilian casualties coming from other sources.
37. There was, thus, a lot of evidence. If it did not yet reach the standard of “proof”, then the obvious thing to do was to investigate more. As the Inquiry has found, there were standard ISAF nation procedures for dealing with this situation. NZDF could, for instance, have arranged a Shura/meeting with local leaders (at some suitable safe location). It could have asked for more detail from the informers. It could have invited a delegation

from the villages to come and meet. But, actually, whether it was to trigger its legal obligations to find and treat the wounded or fulfil more expedient counter-insurgency goals, there was plenty of evidence already.

38. Thus the “no evidence” argument was and is an insincere excuse. NZDF had enough evidence to set in motion processes aimed at helping those who were wounded or had lost loved ones. Any lack of evidence created a requirement to investigate further, not to do nothing. Later, the dead and wounded were named publicly and, in some cases, pictured and interviewed. Fatima's parents appeared in the New Zealand media and her photo has been published many times.
39. However, NZDF staff, led by Keating, continued to say “no evidence”, “not corroborated”. Keating was still doing it after all these years in the September 2019 Inquiry hearings.
40. The unsoundness of the “no evidence” claim was pointed out by Ms McDonald in cross-examination of Keating. Her questioning and Keating's persistent denials went as follows:

Q. When you said in this press statement, on page 309, ... that this investigation concluded that this may have resulted in civilian casualties, but no evidence of this was established. Do you not think that was fairly disingenuous, given what you knew at that time? You were trying to suggest that it wasn't true; that there weren't civilian casualties, weren't you, when you said that? That's what you meant?

A. To this day, we don't know if there were civilian casualties, and in fact all the material evidence that we have to date doesn't provide, you know, me the evidence of civilian casualties.

Q.Well, there were a number of ways you could have made your

point, perhaps, I suggest to you, Mr Keating, by saying there may have been civilian casualties.... I'm suggesting to you that this statement was clearly intended to suggest to the New Zealand public that there was no evidence of it. No evidence of civilian casualties. Didn't happen. Unfounded. Not right. That's what you were trying to tell people, wasn't it?

A. ...I've stood up publicly, at a press statement, and said civilian casualties may have occurred.

Q. But there was no evidence of it. That's what you said?

A. Yes. I've talked about and I've given a description of Apache rounds falling on houses, but we have no evidence of casualties.

(September hearing transcript, pp.556-557)

NZSAS was "categorically clear[ed]... of any allegations"

41. The third line repeated in the hearings was that the IAT cleared the TF-81 (NZSAS) personnel of any responsibility for civilian casualties. The claim is that US helicopters may have harmed some civilians but that NZSAS personnel played no part in any civilian casualties. Once again, it takes the state of knowledge when the IAT report was completed (26 August 2010), only four days after the operation, and sets it in stone as though no further evidence relating to the NZSAS role could or did emerge thereafter.
42. We now know that the NZSAS troops were involved with the civilian casualties in six ways:
 - 42.1. First, **failing to find and aid the wounded** (immediately or afterwards).

42.2. **Killing a civilian when the NZSAS sniper shot the “armed insurgent”** at 1.25am. In NZDF's November 2018 unclassified narrative this man was described as “armed insurgent.... identified as presenting a threat by the GFC”. However, it now appears that he was not armed, as we had stated in the book. No convincing case has been made that this person was directly participating in hostilities nor that he posed an imminent threat to the heavily armed and armoured SAS contingent. The Petraeus Directive instructed that unless they were certain he was not a civilian, firing was prohibited.³

42.3. **The New Zealand JTAC and GFC authorising US air attacks that caused civilian casualties.** As McKinstry said in the September hearing: “the JTAC was very responsible for ensuring that the aircraft were cleared to engage targets from the perspective of making sure that the threat was real and for ensuring that there were no collateral damage issues before engagement occurs” (September transcript, p. 249). Keating called it “seeking permission from the JTAC” (September transcript p.641). When the official story was that any civilian casualties were caused by a mechanical error, it was perhaps easier to assume that the JTAC and GFC had no responsibility. But now we know the Apache fired directly into a residential area, the details of the clearance given need much greater scrutiny. Did the JTAC

³ Mr Hager asks the Inquiry to release the victim's name, and the names of the other casualties, as part of its findings out of respect to the victims and to enable the public to match the findings of the Inquiry with evidence that has been presented elsewhere including in *Hit & Run*.

ask for details of where and how close to houses the firing would occur? Did he ask about sightings of civilians? The only unclassified information is that he said "Clearing the FR5 with the caveat that there's no collateral damage" (September hearing p.233.) If this was the extent of his discussion, it is unforgivably perfunctory; in fact, negligent. If that was the extent of it, then the JTAC and GFC had played no meaningful part in the decision making, since the Apache crews already knew they weren't supposed to have collateral damage. The JTAC and GFC were supposed to check and make a judgement call before giving permission for the attack. There's no sign in the public documents/video that they did so or that any judgement they made was sufficient.

One of the Inquiry members raised this issue during the September hearings:

SIR GEOFFREY: Sir Jerry, could I just ask you this, the nature of this operation, it was a JTAC who would call in the fires, and the JTAC was of course a New Zealand SAS officer, is that right?

A. Yes.

SIR GEOFFREY: And so the question of where those fires went, there was some New Zealand responsibility in that regard, was there not?

A. Yes.

(September hearing transcript p.77.)

42.4. **The New Zealand JTAC and GFC authorising US air attacks on two men walking away from the villages well to the south.** As described in the book, the father and brother of the known insurgent Naimatullah (Mohammad Iqbal and Abdul Qayoom) left Naik when the foreign forces arrived and walked away to the south. Neither was active in the insurgent group. As such, they posed no threat to the Operation Burnham forces and nor were they directly participating in hostilities. They were killed by helicopter weapons at 1.23am. Unless the JTAC and GFC were certain they were not civilians, firing was prohibited. NZDF was not “cleared” of responsibility for civilian casualties here; it was just never admitted to or investigated.

42.5. **New Zealand forces not approaching the suspected victims' families and arranging ex gratia payments.** Given that the US forces appear to have followed proper procedures in other ways (notably the IAT then follow-up AR 15-6 investigation) – and that they participated in Op Burnham in support of a New Zealand-led operation – it seems reasonable to assume that they were leaving compensation matters to NZDF. It seems that they assumed that the New Zealand forces would handle the standard negotiations and any payments. But no such negotiations or payments appear to have occurred.

42.6. **Failing to investigate the NZDF involvement in civilian casualties.** The US forces only investigated their own staff's actions (in the AR 15-6 investigation); it was NZDF's responsibility to investigate its own actions and obligations.

Counsel assisting, Mr Isac, noted “a national investigation is usually... undertaken under the national command of the country whose armed forces were suspected of having caused civilian casualties” (September hearing transcript p. 210). Based on the brief AIT assessment, it might have appeared that only the US forces had an obligation to investigate. However, as more evidence came in this ceased to be tenable. Just as the US AR 15-6 investigation only covered US personnel, so too a New Zealand investigation was required for the New Zealand personnel. This is all the more so since NZDF “owned” the mission and area of operations/battlespace.

43. Thus, NZSAS was not “categorically clear[ed]” of wrongdoing in any of these cases. It just never acknowledged any issues and never investigated them. In this way NZDF has never faced up to most of what happened during Operation Burnham. An organisation which claims to place such importance on integrity and honour could be expected to investigate these matters itself long ago. Mr Hager submits that the various repeated claims discussed in the preceding pages are a continuing “attempt to prevent people discovering the truth about a serious mistake or crime”; in other words, another aspect of the cover-up that continues into the present.

Further obfuscations during September and October hearings

44. Like the IAT-related claims discussed above, a series of other claims were used by witnesses in the hearings to try to undermine the book and other evidence of civilian casualties. Here are some

examples.

45. Keating, for example, was questioned on 19 September about photos in the book correctly showing the Kalta and Naimatullah compounds (ie questioning his press conference statements about NZDF operating in a different area to the claims in the book.) Keating refused to admit the point. He said “Look, I'm not going to be specific here” and then claimed the book “has photos of people in Iraq” (September hearing transcript, p.577). This implied that photos in the book, said to be of people in Afghanistan, were really photos of people in Iraq. This had never been suggested anywhere before and is not true.
46. In a similar vein, Keating was challenged by counsel assisting Ms McDonald on his “no evidence” claim. He replied, “there's a possibility civilian casualties may have occurred, but they couldn't find any evidence of the casualties themselves, and in fact, I believe that the villagers later retracted their statements to the Governor.” To the best of Mr Hager’s knowledge, this is also untrue. Mr Hager submits that this is an assertion which Mr Keating has invented. This is precisely the same tactics – now on display for the Inquiry – seen in Keating's March 2017 press conference when he focussed on the location. It is also the same approach as when he claimed the book said NZDF had “deliberately killed... women and children” (September hearing transcript, p.546). It is words as diversions: spraying around claimed faults with the book and with the evidence of civilian casualties like an octopus spraying ink in the water.

47. Another example is a story that Parsons raised during the hearings:

My understanding that the ISAF investigation had cleared the allegations of civilian casualties was reinforced by two additional matters. In my discussions at IJC I learnt that the two females who were said to be injured and receiving hospital treatment were in fact military aged males; and that the suggestion that some "sisters" may have suffered casualties was likely to be a veiled reference to Kalta and Nematullah.

(September hearing transcript, p. 271 and, in another form, in September bundle, p.104.)

48. The second part is mere speculation, but the first part can be checked and was incorrect. Hospital records obtained during research for the book *Hit & Run* document that two women from Khak Khuday Dad, Amir Begum and her daughter Hafiza, were treated at the Baghlan provincial hospital after Operation Burnham. It is another example of unsubstantiated stories being used to discredit the idea of civilian casualties.

49. Mateparae also used this story in the hearings:

There's the investigation that goes out to look for 20 people who were injured, including two women who were supposedly in the hospital, and they were found to be military aged males.

(September hearing transcript, p.42.)

50. The point here is not that these stories were incorrect, but the use to which they were being put. NZDF witnesses are continuing to repeat false stories for the purpose of obfuscating the true position on civilian casualties.

Claim of multiple false allegations of civilian casualties

51. Mr Radich's opening submissions for NZDF stated that, "Fictitious or exaggerated claims of civilian casualties following ISAF operations were not uncommon." This claim was picked up in the evidence from various present and former NZSAS witnesses (indeed there's a resemblance between the following statements that suggests the evidence was written or at least closely coordinated by NZDF).
52. McKinstry: "I was cautious about the allegations. I was familiar with false or exaggerated claims of civilian casualties and damage to property being made by Afghan people in the past. It is a well-known Taliban "Information Operation" tactic," (September hearing transcript, p.189).
53. Parsons: "I am referring here to 'information operations' conducted by the Taliban; the Taliban were known for disseminating exaggerated or false reports about civilian casualties," (September hearing transcript, p.316).
54. Karl Cummins: "I was familiar with the insurgents' use of "Information Operations" in counterinsurgency warfare; it was not unusual for insurgents to spread misinformation, including exaggerated Battle Damage Assessments, in an effort to turn the local population against the Coalition. In that context, it was difficult to believe the allegation," (September hearing transcript, pp.412-413).
55. The obvious purpose of these statements is to cast doubt on the evidence of civilian casualties and to justify the NZSAS officers not taking that evidence seriously. However, this supposed

specialised awareness about NZSAS experiences in Afghanistan turned out itself to be exaggerated or false, as seen in the following cross-examination of Cummins by Davey Salmon:

Q. One of the themes that seems to come through in the account we're hearing is that civilian casualty allegations are often false and so, to some degree, there was nothing new here, and that was the view your team took. Is that a fair way to put it?

A. Civilian casualties were often discussed or encountered throughout the operations in Afghanistan.... as I remember it, relatively commonplace to have allegations of civilian casualties made after, in this case ISAF or Coalition, operations.

Q. But actually, in real terms, allegations like this against the NZSAS or the NZDF were very unusual, weren't they? There really are no other occasions where there have been, in recent times, allegations of civilian casualties that have had the attention or the nature of this, are there? Or can you point me to others?

A. Not that I recall sitting here, no.

Q. So we're not really living in a world where incorrect allegations of civilian casualties were routinely made against New Zealand's SAS or the NZDF, are we?

A. No, not that I recall specific ones, no -- of this nature, no.

Q. And similarly, we haven't had other ISAF reports into civilian casualties that New Zealand Defence might have been involved in, have we, in recent times?

A. Not that I'm aware of.

Q.for present purposes, we can agree that this is the biggest and most prominent and most serious allegation of civilian casualties involving New Zealand in modern times?

A. Again, sitting here, I believe that to be the case.

(September hearing transcript, pp.428-429)

56. See also the exchange between Ms McDonald and former CDF Jerry Mateparae set out above.

Contrasting approach to helpful / unhelpful evidence

57. Mr Hager submits that there is a pattern of behaviour where any information detracting from the civilian casualties is seized upon, but evidence of civilian casualties from the book and other sources is attacked and disputed in every way possible.
58. For instance, Parsons says he believed his own “fleeting” misreading of the IAT report, which coincidentally fitted exactly with what an unknown American officer told him (incorrectly) at the same time as he misread the IAT report. Back in Wellington, DSO Kelly and DDSO Cummins immediately believed Parsons' new information above all other sources of evidence. So too did the new acting NZSAS CO McKinstry. Kelly briefed CDF Mateapare and drafted the briefing for ministers and they all believed the Parsons story as well, without asking for any check or follow-up.
59. Counsel assisting Mr Isac put to Parsons:

I suggest to you that what really happened here is ... that you knew that New Zealand were concerned about the possibility of civilian casualties, and that that was a big deal back here. And that you went into theatre and you were taking over. And whether you saw, read, or were told about that IAT report, whatever the position was, that when you sent that email back to New Zealand on the 8th of September you wanted then to shut down any suggestion of civilian casualties, and that you thought that that report would probably never see the light of day, and that you were actually giving New Zealand what you thought they

wanted to hear. No problem. Nothing to see here. No issue for New Zealand or NZDF.

(September hearing transcript, p.305. Parsons replied that this was “completely incorrect”.)

60. Cross-examining Kelly the next day, counsel assisting Ms McDonald asked him:

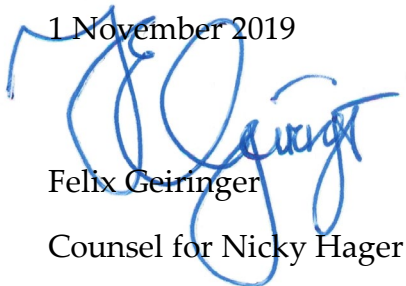
“[D]on’t you think that you displayed a remarkable lack of curiosity, given everything else, given all the other information you knew, when you got Chris’ email? You didn’t ask him, are you sure? How can that be? What’s the explanation? How did ISAF determine there were no civilian casualties? Did you ask those questions?”

(September hearing transcript, pp.375-376. Kelly replied: “To your first question, no.”)

Conclusion

61. As above, these submissions are not intended to be a comprehensive review of the evidence from Public Hearing 4. Mr Hager’s role in that hearing was limited. However, Mr Hager has set out the conclusions he believes the Inquiry can properly make on the evidence it has heard, and he has highlighted some of the evidence he says supports those conclusions. Mr Hager’s position is that the NZDF has never been upfront about Operation Burnham and that its deliberate efforts to mislead were on display for the Inquiry during these most recent hearings.

1 November 2019



Felix Geiringer

Counsel for Nicky Hager

Appendix 1: Operation Burnham decision tree

Decision No.	Description	← OPENNESS or DENIAL →
1	News of civilian casualties emerged within days, but no NZDF investigation was initiated	→
2	NZDF was obliged to find and assist wounded, but did not try (during or after the Operation)	→
3	NZSAS officers assumed that civilian casualties' news was Taliban propaganda	→
4	NZSAS intel reports concluded almost no civilian casualties but PRT intel reports concluded "several"	→
5	ISAF press release came one week after the Operation, but NZDF did not follow up with ISAF about the second report until 2017	→
6	ISAF press release came one week after the operation, but NZDF didn't publicly acknowledge it until 2017	→
7	McKinstry saw the video but says he saw no evidence of civilian casualties	→
8	Parsons wrote quick-glance email and colleagues instantly accepted it without checking	→
9	NZDF says it used Parsons' no civilian casualties claim for years after, without checking what IAT report said	→
10	Kelly knew Parsons had only seen a fragment of the report but did not inquire further	→
11	NZDF claimed IAT report said no further action was required, but it called for a fuller inquiry	→

Decision No.	Description	← OPENNESS or DENIAL →
12	A second, fuller ISAF investigation was publicly announced, but no one in NZDF sought a copy	→
13	Blackwell obtained the IAT report but didn't share it	→
14	Steer circulated a statement to all NZDF which contradicts the IAT report and no one who had read that report corrected it	→
15	Blackwell says he considered that the IAT report contained no evidence of civilian casualties	→
16	2014 <i>Collateral Damage</i> : NZDF does not investigate or correct previous public statements	→
17	2014 <i>Collateral Damage</i> : Blackwell does not provide IAT report to Minister	→
18	2014 <i>Collateral Damage</i> : Coleman said there was “no evidence” that civilians harmed	→
19	IAT report was in the safe, annotated, but apparently no one knows who annotated it	→
20	2017 <i>it & Run</i> : NZDF again said civilian casualties unfounded	→
21	2017 <i>it & Run</i> : NZDF did not investigate the allegations before repeating their denials	→
22	2017 <i>it & Run</i> : Keating said it was not an operation the NZSAS conducted	→
23	2017 <i>it & Run</i> : Keating used location error to lobby government against having inquiry	→
24	2017 <i>it & Run</i> : Keating said “may have” been civilian casualties but it was “not corroborated”	→
25	2017 <i>it & Run</i> : Keating public briefing omitted helicopter firing into the village	→

Decision No.	Description	← OPENNESS or DENIAL →
26	aving delivered the denials at one press conference, Keating refused any other interviews	→
27	2017: Keating did “due diligence” on issue, but only gathering evidence against the book and made no effort to check and attempt to verify the details set out in the book	→
28	April 2018: NZDF produced “analysis” of book, finding 100% errors	→
29	April 2018: NZDF urged Labour-led government not to hold inquiry	→
30	Inquiry: NZDF claimed that all its documents must remain secret	→
31	Inquiry: every piece of NZDF evidence and legal argument backed up its denials	→
32	Inquiry: NZDF did not admit fuller ISAF investigation until it was released despite them	→
33	Inquiry: Blackwell did not come forward and NZDF didn't think to ask him	→
34	Inquiry: Despite conducting a “thorough” enquiry, no one in NZDF apparently thinks to look at the log book for the safe until asked by Sir Terence	→
35	Inquiry: CDF Kevin Short admits, in last minutes of hearing 4, “it appears” child killed in the operation	←