

10 August 2018

Submission concerning Inquiry Minute No. 3 on classified information

Dear Sir Terence and Sir Geoffrey,

Thank you for the opportunity to comment on the Inquiry Minute No. 3 on classified information. Overall, I agree with and support the proposals contained in the Minute. But a fair and effective process will depend on the details, so what follows is an effort to provide detailed information to inform specific decisions that need to be made.

Also, part of this letter bears upon the question of whether “foreign sourced” classified information can be used by the Inquiry and provided to the core participants. I strongly believe that the supposed difficulties surrounding this material are being created by the New Zealand Defence Force to try to minimise scrutiny of its actions during the Inquiry: obstruction dressed up as administrative necessity.

My comments fall into four parts:

1. Examples of similar overseas inquiries that can provide a guide for declassification of classified material during this Inquiry, both for public release and release to the core participants.
2. A detailed list of documents that similar overseas inquiries have seen fit to declassify and make available to the public.
3. A response to the NZDF's 21 June 2018 Public Information Folder and 18 July 2018 memorandum.
4. Detailed responses to points in your Minute No. 3, including on the availability of classified information from ISAF and the US military.

My 3 July 2018 letter to the Inquiry, in sections 2, 4, 6, 7 and 8, relates to the issues in your Minute. I request that those sections be read together with this letter.

I fully support the Memorandum sent around this morning on behalf of the Tirgiran villagers.

### **1. Examples of similar overseas inquiries**

Many troop-contributing nations in the Afghanistan and Iraq wars have had to face up to their troops being involved in civilian casualties. Inquiries in other countries provide a useful example for the New Zealand Inquiry. They provide precedents of how those inquiries dealt with classified information and also provide clear evidence that their decisions about declassifying information were agreed to or accepted by the coalition leaders (NATO and the US Department of Defence).

The nearest example of a civilian casualty inquiry is the current one in Australia, but since that is being conducted internally by the Australian Defence Force it does not help us with the classified material issues. However, three other good examples stand out:

A German inquiry into the widely-reported 4 September 2009 Kunduz civilian casualty incident, where a German commander approved air strikes on a group of people gathered around two petrol tankers, who were believed to be insurgents. Like the personnel in Operation Burnham, the German forces were working as part of ISAF and had support from the US combat aircraft that fired on the civilians (Inquiry report published October 2011). As far as I can tell, the report and many of its source documents are only available in German. Reference:

<http://dip21.bundestag.de/dip21/btd/17/074/1707400.pdf>

The British Baha Mousa Inquiry, concerning the 2003 death of a detained civilian (Baha Mousa) under the control of British troops in Basra, Iraq. While it is a different war, the inquiry was conducted under the British Inquiries Act 2005 – with decisions made about declassification of documents both for the public and core participants – and thus is similar to the present Inquiry (Inquiry report September 2011). Reference:

<http://webarchive.nationalarchives.gov.uk/20120215203912/http://www.bahamousainquiry.org/>.

The British Iraq Fatality Investigations, which investigated a series of suspicious deaths in Iraq. “The Iraq Fatality Investigations (IFI) is a form of judicial inquiry tasked with investigating the circumstances surrounding Iraqi deaths involving British forces,” the official website says. Six separate investigations have been concluded (between March 2015 and March 2017) and two more are still underway. Many documents were declassified and released to the public during these investigations that are equivalents (Intsums, Fragos etc) of the currently classified documents relating to Operation Burnham. Reference: <https://www.gov.uk/government/collections/iraq-fatality-investigations>.

In each case a wide variety of operational, policy and legal documents were declassified and made available to core participants and/or the public as part of the inquiry. Many of these documents originally had a Secret classification.

In the case of the Baha Mousa Inquiry, large numbers of previously classified documents were declassified, some for public release, some only for core participants (the same title is used). Where necessary, redactions were used. A Restriction Order (on release of the redacted passages) lists all the redacted documents in three categories:

1. 346 documents referenced in the Inquiry report
2. 453 documents available on the Inquiry website
3. 1327 documents available to the Core Participants during the course of the Inquiry.

Various of these documents were stamped “UK Eyes Only” or “UK/US Eyes Only”. This is obviously light years from the NZDF view that the number of documents that can be provided to core participants and the public is essentially zero. The importance of a fair and sound process, and the length of time since the operation (a similar length of time as the present Inquiry is from Operation Burnham) led to a pragmatic decision by the Baha Mousa Inquiry to release over 2000 previously classified documents.

A useful addition to the Baha Mouse Inquiry approach would be accompanying any redaction with a description of the reason for that redaction, as occurs under the Official Information Act.

The documents released to the public as part of the German Kunduz incident inquiry notably include various examples of ISAF and NATO documents, which NZDF has implied would be difficult or impossible to release as part of the current Inquiry. I include below various examples of declassified “ISAF” and “NATO/ISAF” documents. Many of these are classified “GEHEIM”

(Secret), but declassified to “Offen” (Open). The German equivalents of Top Secret, Secret and Confidential are Streng Geheim, Geheim, and VS-Vertraulich. Some are stamped “Nur Deutschen zur Kenntnis”, in effect German Eyes Only. A further classification “VS - Nur Fur Den Dienstgebrauch” seen on various documents (from before declassification) equates to Restricted.

## Summary

If Germany and Britain were able to declassify military documents and provide them to the public and core participants to enable fair and robust inquiries, then so can New Zealand.

A large number classified documents were declassified for the inquiries, including ones that clearly came from foreign partners. The claimed obstacles and difficulties are able to be overcome.

Note that the Baha Mousa Inquiry distinguished between release to the public and release to the core participants. The numbers (364+453+1327) show the scale of the information provided to the core participants.

## **2. A detailed list of documents that similar overseas inquiries have seen fit to declassify and make available to the public**

The following are examples of documents declassified in the three inquiries. They appear to cover many of the types of documents that are likely to be in the NZDF classified bundle and that are important for the public and core participants to see.

### German incident inquiry:

Document 60: Transcript of the F-15 fighter cockpit audio from during the air attack. Only US aircraft code names redacted. This document is in English. Note this information would have belonged to US Air Force/ISAF and was passed to the German military for the Inquiry. The Inquiry released it to the public. It is equivalent to the Operation Burnham Apache video.

Document 99: First incident log entries straight after air attack. Raw data off ISAF HQ Regional Command North JOCWatch database (JOC is presumably Joint Operations Command). This document is in English. It shows the first incorrect reporting that it was an attack on insurgents. Again, this is an example of ISAF records provided to the inquiry and released declassified to the public.

Document 56: Headed “NATO/ISAF”, PRT Kunduz (Provincial Reconstruction Team), this chronology is headed “Description of the Incident” (this and the following Kunduz documents are in German).

Document 54: Report of “Fact finding mission”, written by “Deputy Chief CJ2, HQ ISAF” (J2 indicates joint intelligence staff). Again, this is an ISAF-controlled document but it was provided for the inquiry and was declassified by the military or inquiry.

Document 55: “HUMINT report number 2 to PRT Kunduz liaison officer”, dated the day before the air attack. This document was classified “Geheim” (Secret) but was then declassified with light redactions.

Document 73: A letter from the chief of staff at ISAF Headquarters to a German Rear Admiral arguing for there not being an unclassified version of the Kunduz inquiry report. It is an ISAF

document, released by the Inquiry.

Documents 78 and 125: Internal German military emails, the first attaching a list of “air strike alleged victims” and the second headed “ISAF/Luftangriff” (Air assault), two of many Restricted emails released by the Inquiry.

Document 127: A Restricted letter to the German Chancellor concerning initial IAT (Incident Assessment Team) conclusions about civilian casualties caused by the airstrike.

Document 128: ISAF report (“DEU EinsKtgt ISAF”) about an initial legal analysis of the Kunduz incident, dated the day of the incident. Discusses the attack-related Rules of Engagement “ROE 421-424 (hostile intent / hostile act against ISAF / PDSS)” (PDSS stands for “Persons with Special Designation”). Partially redacted.

#### Baha Mousa Inquiry (BMI)

Document MOD049310: British military directive on Humint (Human Intelligence) Operations. Designated “Secret UK Eyes Discretion”, “BMI downgrade” to Restricted and released to public on Inquiry website with minor redactions.

Document MOD043344: British commander individual mission statements (pp. 12-26 within longer redacted document). Originally Secret.

Documents MOD 052913, MOD016982 and MOD050773: POW handling documents. One originally Secret, two Restricted. All unredacted.

Document MOD030791: A British military operation order called a “FRAGO” (fragmentary order, ie a specific operation within the larger Operation Salerno). Marked Secret. The first three pages are the operation order then, after some redacted pages, pp.12-19 are “Target Packages” picturing the target buildings.

Document MOD16156: Another FRAGO, the operation order on “Law, Order, Detention and Internment”. Restricted, unredacted.

Document MOD052362: “Operation Telic: Intelligence and Security Directive.” (Op Telic was the British deployment to Iraq in 2003). “Secret UK EYES Only”, downgraded to Restricted, now on Inquiry website. The document is half redacted, but has the “Intelligence Support” section visible, including subsections on HUMINT, Interrogation, SIGINT (Signals Intelligence) and IMINT (Imagery Intelligence).

#### Iraq Fatality Investigations (IFI)

Document mod-83-0000374: INTSUM (Intelligence Summary). Marked Secret, then “Restricted Investigations”, then released on IFI website. A typical example of an Intsum.

Document mod-83-0000368: “INTSUM0159”, April 2007, marked “SECRET – rel MCFI” (releasable to Multinational Coalition Forces Iraq) . A long INTSUM describing events during a military operation. Minor redactions of names and an unrelated operation.

Document mod-83-0000372: “SINCREP1393C” (a Serious Incident Report) on incidents during an operation. Marked Confidential, no redactions.

Document mod-83-0000375: “MX Report”. Marked “Secret – rel MCFI, For Intelligence Lead Purposes Only”. An Human Intelligence report with only the name of the intelligence source redacted.

Document mod-83-0000099: “Guidance for Opening Fire for Service Personnel”. Restricted. Unredacted.

Documents mod-83-0000370 and mod-83-0000323: FRAGO operation orders, marked Secret and “Secret UK/US Eyes Only”/Restricted respectively. The first is a very detailed operation plan, including specific roles and objectives for the different units, and second is mostly legal instructions for “Public Order” operations by occupying forces, including discussion of the Rules of Engagement.

Document mod-83-0000386: A Royal Military Police investigation report on a civilian shooting incident. All names redacted except RMP author.

Document mod-83-0000298: Rules of Engagement for Multi-National Division (South-East), the British forces in Iraq. Detailed, numbered, rules of engagement for the deployment. This is one of the documents that NZDF has refused to release about Op Burnham, claiming crucial operational security risks, yet here is the document on the Iraq Fatality Investigations website.

## Summary

Other inquiries have declassified a wide range of operational, legal and policy documents during the inquiry processes and released considerable amounts of this material to the public. It is clear from the Baha Mousa Inquiry figures above that its core participants saw many more documents than those made public. The types of documents made public include:

Operation Orders (FRAGOs), INTSUMs, SINCSUMs, HUMINT reports, Military Police investigation reports, Commander mission roles, Policy documents (intelligence, legal, POW), Incident reports, Incident investigation reports, internal military emails on incidents, Rules for Opening Fire, and Rules of Engagement.

There is also the US Air Force cockpit audio, which so strikingly contradicts many of the NZDF claims about what information can be seen by the Inquiry participants and public.

I hope that the Inquiry will use these overseas examples as a guide to what can reasonably be released to the core participant and/or public.

### **3. A response to the NZDF 21 June 2018 Public Information Folder and 18 July 2018 memorandum.**

#### **Public Information Folder**

The NZDF's 18 July 2018 memorandum states that the Public Information Folder “represents the extent of publicly available and unclassified information held by NZDF on matters relating to the inquiry”. An examination of the Folder reveals a) how few documents have been released (nearly all of them created in the period since publication of the book *Hit and Run*); and b) that a lot of publicly-available documents have been overlooked in preparation of the Folder.

The memorandum continues: “Most of the material in the bundle comprises classified documents

that have been redacted in accordance with the Official Information Act.”. This is not the case. Most of the material in the bundle is unreferenced and unsubstantiated assertions prepared in response to the book – including the Q&A in NZDF’s “Operation Burnham Information Pack”, speech notes and the OIA responses – or information that was already public and unclassified.

## **What is in the Public Information Folder**

The NZDF Public Information Folder contains only 25 documents, as follows (where a set of emails is taken as one document). Documents dating from before launch of the book are in bold:

Operation Burnham powerpoint, NZDF press conference, 27 March 2017

**Printout showing five photographs**

**Medal citation Serviceman F, undated**

**Medal citation Serviceman A, undated**

NZDF briefing for Minister of Defence 30 March 2017

NZDF Minute “NZDF MP Final Report: Ill-treatment of a Detainee”, 6 September 2017

NZDF Minute “Preliminary Investigation into Allegation of Detainee Mistreatment”, 4 October 2017

Dot point brief for CDF, 23 March 2017, with annexes:

VCDF Talking points 22 March 2017;

**Briefing to the Minister of Defence “Operation Watea: HQ ISAF Civilian Casualty Investigation on Operation Burnham”, 25 August 2010;**

**Briefing to the Minister of Defence “NZSAS operation in Baghlan Province August and September 2010, 10 December 2010.**

**Briefing to the Minister of Defence “CRU and NZSAS operations in Baghlan Province August and September 2010, 13 December 2010.**

Synopsis of the book *Hit and Run*;

Previous media reporting;

“Civilian Casualty Procedures: Afghanistan August 2010”, undated (2017 or 2018)

Briefing Note for Prime Minister and Minister of Defence, 29 March 2017

Brief notes for Prime Minister on Operation Burnham, 29 March 2017

Talking Points for Prime Minister and Minister of Defence on release of further OIA material, 23 February 2018

NZDF letter to chairman US Joint Chiefs of Staff, 31 March 2017

Compilation of emails on NZDF reaction to launch of *Hit & Run*, 21 March – 5 April 2017

Major General Peter Kelly email to all Army staff, “Message from CA – Allegations relating to *Hit and Run*”, 27 March 2017.

Chapter 4, NZDF Law of Armed Conflict Manual (draft)

**NZDF Code of Conduct card**

Compilation of NZDF emails from 31 March – 20 June 2017 on management of OIA responses

Internal NZDF messages on book *Hit and Run*, 21 March 2017 – 15 June 2018

## **Conclusion**

Out of 25 items, besides one page showing five photographs and perhaps some unreferenced powerpoint slides, the number of operational documents from 2010 and 2011 is zero.

Only seven documents are from before the launch of *Hit and Run* in March 2017 (the documents in bold): the sheet of photographs, two medal citations, three Minister of Defence briefings and the general NZDF Code of Conduct card.)

The majority of documents from after the launch of *Hit and Run* (such as the Q&A handout, speech

notes and OIA answers) consist of NZDF trying to justify its actions relating to Operation Burnham and related events, not producing evidence.

The amount of unclassified information that NZDF has provided to the Inquiry beyond what it had already released during the previous 16 months (since launch of the book) is zero.

The number of documents that NZDF has reassessed eight years after the operations and declassified for the Inquiry is zero.

### **What is not in the Public Information Folder**

Leaving aside the main omissions – all the documents that should have been declassified – the NZDF has forgotten to include the following 84 documents, which are already public, in the Public Information Folder.

Information NZDF had provided to Parliament: There are 65 Questions for Written Answer about Op Burnham on the Parliamentary website from between 28 April 2017 and 24 July 2017. Some of these are important and useful for the Inquiry.

Official Information Act requests: NZDF replies to me dated 7 May 2018, 12 April 2018 and 30 May 2018 were left out of the folder, as were 15 other requests not yet answered.

Internal NZDF messages to staff: The NZDF's Yellow tab #24 does not include the Tim Keating email to staff appended to my last letter as Appendix 9, which was sent specifically to staff related to Op Burnham.

### **The NZDF's 18 July 2018 memorandum**

The attitude seen in the Public Information Folder continues in the NZDF's 18 July 2018 memorandum: a) its proposal, at paragraph 6, that over 50 currently unclassified military documents it holds should all be withheld from the core participants and public; and b) the suggestion in paragraphs 12-13 and 21-24 that 80% of the relevant material is “subject to the control of a foreign government or international organisation ('classified material of partners')”, with the clear implication that none of this material can be provided to the core participants and the public either.

Thus, after not providing any new documents in the Public Information Folder beyond what had already been dragged out of it before the Inquiry, the NZDF proposes that no information should be declassified and provided to the public and core participants during the Inquiry either. They are not conceding a single document. I hope it is self evident what this indicates, especially from an organisation accused of wrong doing and cover up.

When compared to the information provided during the foreign inquiries, it looks like an attempt to control and minimise the Inquiry processes by providing only secret, non-contestable evidence and depriving the Inquiry of the core participants being able to scrutinise and test NZDF's claims. As I noted in my last letter, every person or organisation accused of wrongdoing would appreciate this privilege, but it is totally inappropriate. The precise steps needed to allow an open inquiry process might not all be clear yet, but NZDF claims about the necessity of secrecy appear false and self serving.

## **4. Detailed responses to points in your Minute No. 3**

Overall, as stated above, I agree with and support the analysis and proposals contained in the Minute. They are compatible with the procedure for decision making and sharing of information proposed in paragraphs 7.1 – 7.43 of my 3 July 2018 letter to the Inquiry, which I hope you can adopt.

I will address a few of the issues discussed in the Minute, the most important of which is the availability of classified information from ISAF and the US military. The Minute sought further submissions on this subject.

### **Availability of classified information from ISAF and the US military**

First, it is worth setting out in plain language what is being talked about. Between 2001 and 2013 a succession of NZSAS and New Zealand Provincial Reconstruction Team personnel served in Afghanistan under their New Zealand commanders but also under the ultimate command of the US military or the International Security Assistance Force. Mountains of documents were created during these years. Very roughly, the NZDF documentation falls into two types: the usual New Zealand military communications and reports about its own business: personnel, intelligence, operations, logistics and so on; and the formal reporting and communications to and from the ISAF and US military hierarchies.

I wrote asking about this distinction and got the following reply from Mattias Eichenlaub at the NATO Headquarters press office: “The answer to your question depends on the type of report,” he wrote. “Let me give you an example. A report written by New Zealand forces in Afghanistan and sent directly to the New Zealand Ministry of Defence or army headquarters is a national document....” By contrast, “A paper written using the ISAF classification system and for the ISAF chain of command – such as the report of a well dug by New Zealand’s Reconstruction Team that was sent to the ISAF Regional Command – should be in NATO’s archives.” (Mattias Eichenlaub, email, 22 July 2018.)

This differs from NZDF’s description of where these lines are drawn. It’s 18 July 2018 memorandum, paragraph 23, says “documents and communications that the NZDF prepared during the ISAF operation and as part of that operation’s activities are subject to the control of NATO”. This is obviously very much wider than documents “written using the ISAF classification system and for the ISAF chain of command”. How foreign-sourced documents is defined is thus very important.

I am not suggesting that an email from the NATO press office is the last word on this. My point is that NZDF has provided no documents or other evidence to substantiate its assertions about the secrecy required for foreign-sourced documents and about what constitutes foreign-sourced information. As such the suggestion that 80% of the classified materials fall into this class, and that this information is somehow impossible to provide to core participants and the public, is only a vague claim.

A better starting point is considering what the German Kunduz inquiry managed to obtain, declassify and make public about a German operation under ISAF control and that had assistance from US Air Force aircraft (ie exactly the types of documents NZDF says are impossible). If it was possible for them, it will be possible for the present Inquiry. The idea that disclosure to the core participants and public is problematic seems to be based largely on the NZDF’s unsubstantiated claims.

New Zealand troops went to war in Afghanistan for many years. The New Zealand public paid for it all. New Zealanders died and were injured, and killed and injured other people. The New Zealand

Government is accountable for the actions of its personnel there. The records created during those years were produced by New Zealand personnel and came home with them into NZDF archives. The NZDF suggestion that all the “documents and communications that NZDF prepared during the ISAF operation [ie its part in the war] and as part of that operation's activities” are subject to the control of NATO totally lacks credibility. I do not believe it is true.

Everything so far in this Inquiry suggests that the NZDF cannot be relied upon to give unbiased advice on this kind of subject. This is so important to the process that the Inquiry should find out the facts about this independently. It could, for instance, approach people involved in the German inquiry.

A most likely outcome is that all NZSAS and Provincial Reconstruction Team documents from the course of their work in Afghanistan can in fact be provided to the Inquiry by NZDF without the need to seek permission from NATO and the US military, except formal reporting and communications to and from the ISAF and US military hierarchies. (Note, also, paragraphs 8.3-8.6 of my 3 July 2018 letter about NZDF widely sharing the US Air Force weapon system video, when it suited it, without seeing the need to seek permission from the US.)

Some important documents clearly will be under the control of NATO and the US military. Two examples are the weapon system video and ISAF Joint Assessment Team initial report on civilian casualties during Operation Burnham. Some NZSAS documents before and after Operation Burnham will probably fall into this class. But that is hardly the end of the matter.

The implication of the NZDF submissions has been that if information is controlled by a foreign partner, the security classifications are set in stone and it will not be possible to provide the information to core participants or the public. We should not accept this assumption. As described earlier, the German inquiry was given the US Air Force cockpit audio, ISAF HQ Regional Command North incident report logs and other NATO documents, all almost fully declassified. Neither “national security” nor “controlled by a foreign partner” trumped the public interest in release. As for Germany, so for New Zealand, the weapon system video and the rest.

Whatever the true proportions of New Zealand controlled documents vs ISAF/US controlled documents, there is good reason to assume that NATO and the US military will cooperate with the Inquiry and approve use of documents they control. Both have strong policies about investigating civilian casualties (as they should since this is required by international law) and both hopefully feel indebtedness to New Zealand for years of deployments to Afghanistan. Or to put it another way, if approached directly, there is no way that NATO or the US military would want to obstruct a civilian casualty inquiry. I believe they simply need to be asked, at the right level by the right people.

### **Not relying on NZDF to arrange access to foreign-sourced information**

The NZDF memorandum serves as a warning. I am concerned that NZDF has assumed a major role in approaches to NATO and the US military about the Inquiry's access to information. In an environment of a cover up, and the type of advice seen above, we cannot expect NZDF to negotiate the access to information for core participants and the public achieved by the German and British inquiries. Left to NZDF, the unsurprising result will be that everything has to remain classified.

I urge that this role be taken off NZDF before more time is wasted. A direct approach by the Inquiry, or if necessary by the Prime Minister or appointing Minister, will be more effective. Once a high-level commitment is obtained to assist the Inquiry, another agency such as MFAT could pass on requests from the Inquiry and ensure they are replied to. In the meantime I request that the Inquiry obtain copies of the NZDF correspondence with NATO and the US military authorities to

date concerning information for the Inquiry, and share this information with all participants.

## **Section 70**

In paragraph 14, you note that “A judge may also give any directions that are necessary to protect the confidentiality of, or limit the use that may be made of, any communication or information that is the subject of a s 70 direction....” I suggest that the clause “or limit the use that may be made of” may usefully provide the basis for sharing otherwise classified documentation with core participants. This could include rules limiting their use and specific undertakings to be made by core participants about obeying these rules.

## **Paragraph 19**

I support the Inquiry or an independent person making decisions on declassification. However, it would matter tremendously who the independent person was (in particular, that they were independent) and that they had the confidence of the core participants. New Zealand is a small country, where inevitably many “security” experts will have loyalties or ties to the NZDF. I request that any selection of an independent expert for this role is done in consultation with the authors and counsel for the villagers.

## **Special advocate for material in respect of which the national security claim was upheld**

I hope it is clear from the overseas inquiries described above that national security is much less of an obstacle to releasing documents than it might initially have appeared. However it is always possible that access to some foreign sourced material may be blocked. In that case, I support the idea of an independent person producing summaries.

## **Natural justice**

The Minute says at paragraph 24 that there should be little problem with classified material being disclosed to the Inquiry but that “Disclosure beyond that may be problematic.” As this letter has argued, disclosure to the core participants is essential to the integrity of the Inquiry. Moreover, the claims that led to the idea it may be problematic can and should be challenged.

Paragraph 22 acknowledges that “Natural justice may become relevant here”. I submit that natural justice needs to be front and centre in the process. The NZDF alleges that our villager sources were not telling the truth, that their relatives and neighbours were not innocent victims but dangerous insurgents. It has said directly that Jon Stephenson's and my work was incorrect; that we were writing about a different raid than the one they went on and that the key facts in our narrative are wrong. For the survivors and authors, it is vital that the core participants have the opportunity to scrutinise and test every piece of evidence. This is also essential for finding the truth. I do not think the truth can reliably be found in a one-sided process.

## **Paragraph 27**

This paragraph refers to GCSB, NZSIS, MFAT and DPMC being given an opportunity to comment on your Minute. Can the other parties please have an opportunity to see these comments?

## **Paragraph 25 Summary**

a) I agree

b) I have argued that the complications are partly invented and anyway can be overcome.

c) I agree

d) I agree

e) Natural justice concerns have to be central. From the beginning of this process, NZDF has argued for a closed, one-sided process where it can present its arguments and claims without them being contested by the other parties. It has made most progress in avoiding accountability for its actions in Operation Burnham and related activities when it has been able to brief decision makers in private, and almost no progress arguing its case out in the sunlight. Its advice about security classifications appears to be a tactic for achieving closed interactions with the Inquiry as well. The practical answer is declassification, as in the overseas inquiries I described above.

These comments are of course not suggesting that the Inquiry cannot do a critical examination of closed evidence. But there are good reasons why court cases have two sides, discovery, exchange of evidence etc. The counsel for the villagers and Jon Stephenson, and Jon and I, have spent years on these issues and know the minute details. We can play a hugely helpful role in the process as long as we are not cut out by the device of secrecy. This is why I believe these issues around classified information, addressed in your Minute and our responses, are crucial to the success of the Inquiry.

Yours sincerely,

Nicky Hager

Annexes: seven sets of documents from overseas inquiries, corresponding to the list of declassified documents in section 2 above, accompany this letter.