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Hearing notes 21 Nov 2018

I have been researching and writing about the military for many years. I first sent an Official Information Act request to NZDF (then the Ministry of Defence) in 1983 or 1984, and have sent many hundreds more since. It was the early years of the OIA and one of the Ombudsman, John Robertson, who assisted and with whom I got on well, was a former Sec of Defence who knew weak excuses for withholding information when he heard them.

I have had 35 years experience of encountering excuses for withholding information and they have gradually got worse: that sensitive methods would be exposed and staff endangered (for routine military business), alliance relationships imperilled (by releasing info that those other nations don't mind releasing themselves) and, as in the "Crown" subm last week, there was the danger of the "jigsaw effect", an old chestnut also called the mosaic effect, the idea being that even innocuous information might when combined with other information be sensitive, so it has to be secret as well.

But there was almost never a genuine threat to nat sec; looking back the claimed sensitivity can be seen to be untrue. I often got info anyway, published it and no harm resulted. I have handled thousands of classified documents. I have worked closely with journalists and researchers in other countries, and often I have got information openly from there that was claimed to require secrecy in New Zealand.

I have written three books on military and security-related subjects, including a history of NZ in the Afghanistan War – 439pp and with over 1000 references – the only account like that in existence, part of which was reproduced in an anthology of New Zealand war writing. Each book has been privately welcomed by a pleasing number of senior staff, at the same time as the security people were trying to find my sources and have them punished.

In my experience, security people genuinely believe the security threats they warn of. It's the nature of their training and peer group that security always seems most important. It is not realistic to expect them to think that the public's right to know, or international law, or accountability might once in a while be more important than security.

I am therefore not surprised by the submissions received from the NZDF, intelligence agencies and related departments. But it is crucial that their priorities are not adopted as the Inquiry's priorities.

The key problem with the proposals in Minute No 4 is that the claimed need to protect classified information would come to dominate the process, justifying a closed and unfair process that would not provide the necessary scrutiny of NZDF's actions, the subject of the Inquiry

It is vital that security concerns are not treated as absolute – as necessarily most important – while other values such as openness and natural justice come second, to be fitted around the absolutes of secrecy as circumstances allow.

I want to begin by describing the information challenges confronting this Inquiry, as they are the challenges that must be solved by the process. I will follow that with proposals for the process to deal with the challenges.

A good starting point on the challenges is the NZDF Narrative that was released last week. It is a helpful doc for highlighting the magnitude and complexity of the task ahead. I won't discuss all the details, that's for later, but I'll note relevant things.

First, without explanation or apology, the Narrative quietly dropped the leading previous rebuttal of the book H&R by NZDF's leadership: the idea that it was not the same raid, that we had not written about an operation that NZDF was part of. NZDF was still using the “location” argument earlier this year to try to persuade the Labour-led Govt not to have an Inquiry.

But of course the narrative is about the same op that was first written about in the book: called “op B”, searching for two names insurgents whose family homes were in a small village (Abdullah Kalta and Naimatullah whose houses are marked a few 100 metres apart on the NZDF sat image as A1 and A3), SAS arrived in two large US Chinook helicopters, the snipers in a smaller third hc, the leaders not found there, an SAS trooper getting injured: obviously the same op. My point is: a rational process is systematic. It doesn't have major arguments like the “wrong location” one coming and going without explanation.

More important than this, the Narrative has almost entirely failed to engage on the main subject of this Inquiry, civilian deaths and injuries. It shows the challenge ahead of us. NZDF has had 18 months since the book was published (and years before that with rumours of a civilian tragedy) but there seems to have been zero effort by NZDF to investigate the well documented evidence of civilian casualties and reconcile that with their own version of what happened that night.

Instead, the Narrative shows NZDF trying to reframe the issue from being about civilian casualties to being whether there were any people with weapons in the village on the night of the raid, as if that will wash away the issue of civilian casualties. It seems it has made no approaches to AF govt sources (eg main official casualty list), and aid agency sources, or HR sources and UN sources, or hospital sources, or AF media sources, or wondered about the real villagers seen on New Zealand TV. Are they suggesting, implicitly, that parents made up a little child called Fatima who died in her mother's arms? I found out, after persistent OIA questioning and intervention of the Omb, that five NZDF post-Op B reports referred to the death of a child but somehow this doesn't make it into the NZDF Narrative. This is not responsible, and not what int'al law demands. Are they implying that the injured people shown on NZ TV were making it up? Did they think of getting medical records from the provincial hospital, which we quote in the book?

The main thing missing from the NZDF Narrative is the focus of this Inquiry: civ deaths and injuries, the lack of giving medical and other aid, and the coverup, which I see the Narrative as part of. My point here is that NZDF is extremely reluctant to admit anything went wrong and, I believe, only a very rigorous process will get beyond the denials.

Reading the Narrative, and NZDF and crown submissions, there seems to be a fundamental misunderstanding as to what this Inquiry is about. It is treated as if the heart of the matter is investigating allegations against NZDF in the book Hit and Run, as if the principle at stake is damage to NZDF's reputation. But that is not the case. Speaking as one of the authors of Hit and Run, let me be clear: the book is about what happened to innocent people when those villages were attacked. It is about the civilian injuries, death and trauma, and the bizarre unwillingness to go back and give medical aid and support (which other troop contributing countries did routinely if their operations went wrong). Thus while in the NZDF staff's minds the Inquiry is about trying to clear their names, that it wrong. It is a petty way of viewing the situation. It is about what happened to innocents and New Zealand's responsibility to do something about that. That is where the Inquiry should be focussed.

Instead of facing up to civilian casualties, the Narrative expands its story about fighting insurgents -- all of them "new" insurgents, not the ones they had gone there to find. The Chief of Defence Force gave a powerpoint presentation explaining the operation soon after the book that included two

clashes with insurgents, shortly before 1am and at about 1.30am. Now the latest narrative, without explaining the change, has five separate clashes with supposed insurgents. All five were threatening enough to require launching attacks and killing people, yet in none of the cases was a single shot fired by any of these supposed insurgents (the lack of insurgents fire is omitted from the narrative). No shots were fired by the supposedly positively identified insurgents. No weapons were recovered from them either. None of their bodies were inspected either. No photos were taken. No intelligence was collected. No biodata was taken. No GPS was recorded. By anyone. This isn't normal. The building where the insurgents supposedly had their base of operations, with weapons inside, wasn't approached or searched during the operation, even though it was just across a field from the big parked US helicopters. I'll say this again: from the beginning of the op they supposedly saw armed insurgents with weapons around this building (a house), about 100m across a field from where the big hc were sitting, but for the next two and a half hours the SAS group, which was there to find, capture and kill insurgents, didn't go to that building. Why on earth not? The narrative is silent on this. The insurgents seen in that village had to be attacked by Apache hc, the narrative says, because they threatened the big US helicopters, one of which didn't land because of their presence. Yet the claimed insurgents were watched for twenty minutes moving around not far from the hc on the ground -- never firing a shot -- and then, two minutes before they were attacked, the second big helicopter landed just below them anyway. Nothing seems quite right. Sleepy insurgents everywhere who don't fire a single shot and then are shot and don't leave a trace. "More armed insurgents" were seen well outside the villages to the south, heading away from the NZ-led force, which seems to mean they were not participating in hostilities against the NZ-led force and so were not lawful to attack, but they were attacked by Apache attack hc too and the possible illegality of that is not seen as worthy of note. And much more in this vein. It reminds us how unhelpful generalised claims are when we can't check the sources.

In other words, the NZDF narrative – originating from the same organisation that ran the "wrong location" rebuttal for over a year – raises far more questions than it answers. It is as good an introduction as I can think of for why careful step by step processes are needed, with documentation scrutinised carefully and thorough provision for interrogatories, and also why, in the face of organised obfuscation, the input of core participants will be a vital contribution for finding the truth.

I now want to start the substance of my submissions.

The NZDF and sec agencies' submissions largely boil down to wanting a security-dominated process where their staff can give evidence in secret. The answer I want to give to this is largely **practical**. I will discuss key examples of why, once we look in detail at the information needed for this inquiry, it becomes clear that the demand for secrecy is wrong and unnecessary. I will first discuss these practical issues, and then move to practical proposals that will help the Inquiry achieve its objective of finding the truth.

1. Videos

First, a lot of the NZDF claims about Op B are based on just two items of information. The ordinary ground forces in Op B (the same ones we interviewed some of) did not see either the civilian injuries and deaths nor the possible hostile individuals with their own eyes. Instead surveillance from US helicopters and drones is NZDF's key evidence about what went on.

The narrative, and presumably the NZDF substantive submissions later, will rely greatly on the two pieces of US surveillance video: a relatively short edited video from the two Apache hc and a longer video from a surveillance drone.

A worrying pattern is emerging: whenever NZDF wants to justify its version of events it refers to claimed details on these two pieces of video, but when I have asked questions (under the OIA) trying to clarify the blurry NZDF claims about Op B, NZDF has argued that since the video came from the US military they can't possibly give me any information derived from what the video shows.

Thus, somehow, NZDF staff can give info that suits their story from the videos whenever it suits them, as in the Narrative and a separate NZDF attack on the book, both released last week, but when I ask for the same thing it is impossible to give it to me. There is, they have argued repeatedly, an unfortunate but unavoidable obstacle to having the NZDF's version of events tested and scrutinised.

This is totally unacceptable. They can't refuse us and then use the same info selectively in public when it suits them. I submit that a fair process means either everyone has the same access to sources like this, to check and analyse and find evidence, or they should not be used at all.

The shorter of these videos has already been used in an unsound way. As I described in an earlier submission, NZDF told the Inquiry in the first teleconference that that permission was required from the overseas partners (US Mil) before the video could be shown to anyone in NZ. Then it emerged that NZDF had been showing selective parts of the video to a wide range of people (officials, politicians etc) as part of uncontestable lobbying, without asking the US. NZDF had refused to let me and other parties see the video but showed it whenever it suited it in private screenings.

A video screening such as this is of course compelling, apparently providing real, first-hand proof and boosted by the seductive power of seeing secret materials that other people are not allowed to see. History provides many examples of this kind of selective, un-checkable intelligence, such as satellite pictures said to document weapons of mass destruction.

It is very important for the integrity of the Inquiry that evidence like this is not viewed by some participants and not others, potentially being given significance when it cannot be tested and challenged. It has to be part of a systematic evaluation of evidence.

The private screenings highlight the risk of uncontestable info undermining the Inquiry process. I note that NZDF 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.

I asked NZDF under the OIA for all its correspondence with the US mil seeking permission to publicise the video. **DOC 1** is the NZDF reply. We are supposed to believe that NZDF wrote in March 2017 asking for the video to be publicly releasable and then made no contact for eleven months until February this year when the US military refused to allow release of the video.

NZDF sees this reply as evidence for why the video cannot be released to core part and the public. I see it was evidence that it should not be left to NZDF to request this info from the US mil. As I wrote in earlier submissions, the Inquiry itself, or maybe the government ministers who ordered that the Inquiry occur, should contact the US agencies, explaining that they need the info for an

important official Inquiry.

The reason this is perfectly practical is that other countries have done the same and been given crucial US mil info to use openly. If they can, NZ can. It is clear already that this video will play a large part in NZDF's evidence, trying to prove that they primarily harmed dangerous insurgents. If we cannot check and scrutinise the NZDF's key evidence, the Inquiry is seriously compromised. To ensure good process, I request a decision from the Inquiry that the key video evidence will not be used in the Inquiry until all participants can view and analyse it.

But I think, with genuine effort, the videos will be able to be used fully in the Inquiry. A year before Op B the German mil in AF had a terrible civilian casualty incident, involving German forces calling in US aircraft attacks on supposed insurgents who turned out to be civilians. A key piece of the evidence for the following German inquiry was the cockpit audio from the US aircraft that made the attack. Now, according to what NZDF has told the Inquiry, it should have been impossible for that inquiry to obtain and release the audio as it was owned by the US military and under its control. But here is (**Doc 2**) a transcript of the US aircraft' cockpit audio, released to the German public as part of that important inquiry. It is chilling reading, with some crew jumping to conclusions that the crowd is insurgents and one crew member repeatedly saying that something doesn't feel right about it.

Again, if the German inquiry was able to get this material then so should NZ be able to. The legal arguments and international relationship arguments collapse if key info like this can in fact be obtained and made available.

2. Post-op docs

It is the same with the next important information source that NZDF claims cannot be shown to other core participants and the public. This is the original 2010 operational documents, for instance the post-operation reports, Battle Damage Assessment and intelligence updates. In this case, we face multiple claims about the need for secrecy. Like the video, they collapse under scrutiny.

Two main arguments have been used: national security (that releasing the info would do some grave harm to NZ) and that they are, anyway, foreign-controlled docs that can't be released without US and NATO permission, which was unlikely to be given.

The nat sec argument faces the same fundamental problem as for the video: other countries' inquiries into civilian casualties have released the equivalent documents to their core part and the public. I gave the Inquiry examples of the documents released during UK and the German civilian casualty inquiries.

I submit that if it doesn't hurt the nat sec of Germany or Britain, it is a fake arguement to claim it will hurt nat sec in NZ. I note that the NZDF subms have not attempted to answer this practical argument.

“Crown” subm only argues that the foreign Inquries differ from NZ's, for instance having more time and resources. But that is irrelevant to whether the operational documents relating to the civilian casualty incidents were able to be released. They were.

I want to go through just a few of documents that the German and British inquiries have seen fit to declassify and make available to the public:

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 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.

ANOTHER foreign-controlled DOC.... 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 is was an attack on insurgents.** Again, this was released declassified to the public. (**doc**)

The British Baha Mousa Inquiry, concerning the 2003 death of a detained civilian (Baha Mousa) under the control of British troops in Basra, Iraq, an inquiry conducted under the British Inquiries Act

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. (**doc**)

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.(**doc**)

The British Iraq Fatality Investigations, which investigated a series of suspicious deaths in Iraq.

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

Document mod-83-0000375: "MX Report". **Marked "Secret –** rel MCFI, For Intelligence Lead Purposes Only". **A Human Intelligence report with only the name of the intelligence source redacted**. (**doc**)

Document mod-83-0000370: FRAGO operation orders **marked Secret**. This **a very detailed operation plan, including specific roles and objectives for the different unit**s.

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**. (**doc**)

Summary

In each inquiry 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.

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 Baha Mousa Inquiry released over 2000 previously classified documents.

Large numbers of 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.

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.

A word about ROE as well: I have already given the Inquire a copy of the ISAF rules of engagement from the 2000s when ISAF was established. Standard format, by number. Also, eg Germany, released deails of the most secret but relevant part, as seen with Document 128 provided to the Inquiry earlier that discusses the attack-related Rules of Engagement "ROE 421-424 (hostile intent / hostile act against ISAF / PDSS)" relevant to the German-directed aircraft attacks.

Here is a copy of the attack-related Rules of Engagement, numbered in the 420s. This is likely to be the very secret ROE that NZDF has referred to during the Inquiry. I found it in a NATO document last night (*www.act.nato.int/images/stories/budfin/rfp016046.pdf*). Most supposedly secret information can be found somewhere.

And an important point to note about these is that the operational documents most needed will not add up to huge numbers. Key operational docs will be in the dozens, not hundreds, meaning there are no great logistical or time barriers to declassifying them for the NZ Inquiry.

Also NZSIS and GCSB ones, we don't need the secret bits (methods, names of informers or US surveillance systems): just what NZ knew about the known insurgents targets and civilian casualties. It is not a secret that NZ collects intelligence.

In 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.

Foreign-controlled docs

The other main NZDF argument made for withholding Op B operational docs was that they are foreign-controlled docs that can't be released without US and NATO permission.

As I noted in my 15 October letter to the Inquiry, this claim has turned out to be factually untrue. I challenged this from the start, quoted NATO information officer but NZDF stuck to the line as long as they could. This is a warning about their attitude to the Inquiry.

The NZDF's 28 May 2018 memorandum: that a "vast majority" of its material would be available only to people with appropriate security clearances. It claimed **"much of the information does not belong to the NZDF."**

NZDF Aug memo: said **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.**

On 25 September 2018, NZDF delivered its **bundle of "classified material that is subject to the control of the NZDF"** to the Inquiry. It appears that based on their own incorrect view of their control over their own documents, they had left out most or all of the operational docs created by

NZDF personnel in Afghanistan.

FINALLY: MFAT report in **Oct confirming what I had reported from NATO.**

All around world AF troop contributing nations have treated docs they created while working in ISAF as their own docs. There was no basis for the NZDF position, which rang false from the start. But they stuck to it for months, delaying giving the vast majority of their Op B docs to the Inquiry.

With this obstacle removed, there is now no good reason why most or all operational doccuments of this long past operation, where the NZ forces left years ago, cannot be made public to make possible an effective, fair and open process.

Hearings

Minute No 4 states at paragraph 79 "We acknowledge the importance of open process and the need to maintain confidence in the Inquiry's work.... Despite this… all or most of the evidence-gathering activities will have to occur in private."

But I submit that as for documents, so too for evidence from witnesses (ie secret hearings are only justifiable if much of content is highly classified.) If there is no need for most or all of the NZDF documents to be kept secret, there is therefore no good argument why secret hearings are needed for witnesses to talk about substantially the same facts and details as in the documents.

Or put another way, it seems to me that unless it is found that much of the NZDF documentation has to remain secret, there is no reason to design a process based on secret hearings.

There is a secondary argument to be addressed as well, about NZDF and NZSAS pers being put at risk personally if they appear in non-closed hearings. First, I suggest that this greatly exaggerates the threats compared to everyone else in NZ. It is too obviously convenient when they prefer not to be scruinised. New Zealanders are far more likely to die because of disclosure of information about domestic violence than information about an historic military operation. NZSAS were happy to name Willie Apiata when it suited them and then send him back to AF.

For example, in JS's defamation case against NZDF, SAS witnesses appeared in open hearings talking about their experiences in AF and were cross examined, sitting behind screens and with agreements about not being filmed . If they could do it then, they can do it now.

It is not uncommon for legal proceedings to receive sensitive information, such as vulnerable witnesses in criminal justice proceedings or issues of violence in family proceedings. Solutions are found to make it work and they can be to manage the relatively the minor risk to NZSAS and other witnesses as well: most, no problem, some, don't use names and, at most, don't allow to be filmed and/or have them sit behind a screen from media. But we should keep a sense of proportion.

Yes, the villagers will need sensitivity and a handful of whistleblowers, whom NZDF has said it is seeking convictions, need special care. But there is no good reason why NZDF staff need secret hearings. They are public servants and other public servants have to front up to inquiries.

As I said in my submission on Minute No 4, QUOTE: Without actually saying it directly, the draft Witness Protocol seems to be saying – without explanation or justification – that all NZDF staff will be heard in closed hearings from which core participants are excluded. If this is not the case, it would be good to hear. But if this is what is proposed, no single move could reduce the credibility

and likelihood of success of the Inquiry more. It would be a huge procedural victory for NZDF. I think this is a make or break issue for the Inquiry. QUOTE

There are also obvious issues about how the Inquiry can hope to get NZDF-supplied witnesses to feel able to contradict the NZDF's narrative for Op B. I request the Inquiry issue an order that NZDF should play no part in preparing witnesses, including not offering them NZDF lawyers as "support". If witnesses want legal representation, presumably there could be provision for them to apply to the Inquiry for costs for independent legal representation, possibly with the expense passed on by the Inquiry to NZDF (in the Baha Mousa inquiry, for instance, military witnesses had their legal expenses paid by the British Ministry of Defence).

All NZDF should do is provide addresses so that the Inquiry letter(s) can be send directly to a widely defined set of past and present staff (the breadth and parameters agreed with the Inquiry and core participants). There should also be letters requesting appearances by personnel who played particular roles in the events covered by the Inquiry. The Inquiry letters could include a quote from the current Chief of Defence Force instructing the past and present staff to act with integrity and tell the truth – including (indeed, especially) where their recollections are not the same as the official NZDF narrative. This is how a government organisation genuinely cooperating with the Inquiry would act.

The letters to all relevant staff should offer them the option of appearing confidentially if they wish, possibly under the Protected Disclosures Act. This is important as potential witnesses could fear consequences including criminal charges if they say things to the Inquiry without permission of their past or present employers.

It is essential that non-NZDF core participants can question the past and present NZDF staff. In the Baha Mousa inquiry, the commissioners questioned first and then, following this, core participants were allowed to question as well.

In summary: almost whole NZDF/"Crown" position is based on an unrealistic view of the degree of secrecy required for the information at issue. If it is not actually threatening national security, then their arguments cease to be relevant. In that case, the most effective and least costly and time consuming approach is to be open.

To summarise what information the Inquiry most needs:

First, and perhaps most important, is information about the deaths, injuries, loss of homes and possessions and other harms that occurred in the two villages. This is an essential part of the Inquiry, from which everything else flows. The information is largely not secret and, while some names and other details should not end up on the Internet to avoid risks back in Afghanistan, it does not require secret hearings.

Second is information about NZDF's knowledge of the civilian casualties and other harms, information about what steps NZDF took to investigate what had happened and details of why it offered no medical or other aid. Contemporary NZDF documents and NZDF witnesses will provide information about this. But this is not sensitive information about methods and capabilities either.

Third is information about the preparations and conduct of Operation Burnham itself and other relevant operations. NZDF holds most of the information on these matters and it will not be realistic to expect the vulnerable sources from the book *Hit & Run* single handedly to disprove the NZDF position in the absence of us being able vigorously to test the NZDF information and source materials. I predict that the key disputed issues will come down to only a few dozen main

documents, originating from NZDF personnel and no longer requiring any security classification. They will be about time, place and event, not sensitive methods and capabilities (although NZDF will claim the latter). Just as most of all or these documents do not need to be classified, so too logically for evidence from witnesses about the same subjects.

Fourth, is a probably much larger body of documentation from the weeks and years since Operation Burnham, the years of the cover up. They will be communications and other reports that bear upon what NZDF and others knew about civilian casualties and other matters, what they reported within NZDF and to the government and why they did not offer assistance to the victims as, over the years, the story of the events repeatedly reached the news media. I expect this will include hundreds of documents, including many emails, PR documents and other documents that are organisationally or politically sensitive but not operationally sensitive, ie that do not need special protection in the Inquiry.

Finally, there are intelligence reports from other agencies and the capture-kill documents (eg Joint Prioritised Effects List) that will be claimed to be very sensitive. I predict that redactions and summaries will be sufficient to protect legitimate secrets.

NZSAS and military intelligence documents can sound very sensitive. But the types of information described here do not imperil New Zealand in 2018. It is reasonable to make process plans on the assumption that by far the majority of the key information will be able to be released to the core participants and/or public (like the overseas inquiries). Genuinely classified documents should be handled as an exception, not as the basis of the process.

Response to Minute 4 on protecting our sources

Already put one off. Only a few key sources in New Zealand.

3.6.1 There is another issue that affects the Inquiry. I informed the counsel assisting recently that, against my urging, one of my sources had decided not to appear before the Inquiry. This was due to the person not feeling confident that they could remain anonymous. For a knowledgeable insider to decide to appear before the Inquiry they must weigh a number of factors, including the potential harm to themselves and their families but also the good they think they can do by appearing. People who bother to be sources are usually thoughtful and intelligent people. We can expect decisions on the Inquiry process to receive media publicity (as with “Public shut out of NZSAS inquiry” following posting of the Minute No. 4) and if the Inquiry appears to be unfair or ineffective, in a potential witness' opinion, they will be less likely to want to take a personal risk.

Now I want to move to some practical suggestions for the most effective, just and open processes possible.

What core participants bring to the Inquiry

It could seem that the Inquiry process will consist of the commissioners hearing and testing the witnesses for each “side”. But it is likely that many of the sources in the book will not be willing or able to come before the Inquiry. One key source has since died and another, as mentioned, decided he did not feel safe being involved. When they agreed to help with the book, they did not commit themselves to take any further risks. Huge issues of inequality arise, since NZDF can order any

number of witnesses to appear. On some issues, there could conceivably be numerous witnesses backing up the NZDF narrative (with no risk of retribution and harm) and few or none present to substantiate the evidence of the book's sources.

This is not about the truth of the facts presented in the book. It is simply a reality of the situation. This is why I argue that a crucial part of reaching the truth will come from minutely scrutinising the NZDF narrative and the evidence for their position. But this will require a deep body of knowledge: how does Abdul Faqir's story differ from Abdul Khaliq's. Was there one person called Abdul Qayoom killed in Op B or was it two people killed with the same name (a little PR attack that NZDF released in time for this hearing said we'd made a mistake, there was only one Abdul Qayoom killed – apparently unaware that two Afghan "John Smiths" had indeed died, coming from different families with totally different stories.) Or knowing there are three Mohammad Iqbals in the story, and noticing the contradictions about which weapons were claimed to be found where, and whose houses were burnt down. Or which NZDF denial happened when. Or what's normal and what's not in rules of engagement.

The best available option for this role is the non-NZDF core participants, all of whom have personal experience and knowledge of these subjects. There's no surprise in this, considering we're the ones who bothered to write a book, and represent the villagers and in both cases have kept researching since. This inquiry doesn't have teams of research staff. Allowing us to play the fullest possible role will assist the Inquiry enormously. It would satisfy the requirements of fairness and natural justice as well, and increase public confidence in the process. If we are shut out, except for offering suggestions blind from the outside, the inequality is heightened and the prospects of an effective process are reduced.

The current process proposals in Minute No 4 provide the core participants (non-NZDF ones) with a considerably less solid role than the other core participant, NZDF, in the process. The Minute says we might be given redacted and summarised material "if feasible and appropriate" (paragraph 23), and paragraphs 8 and 77 suggest that it "might be possible" for us to "suggest areas of inquiry or specific questions to be put to witnesses". But the key point is that this is about closed hearings in which we are not allowed.

Note that there are no "might be possibles" or "if feasibles" in the proposals relating to NZDF secrecy. Again, security is treated as absolute and the rights of others as secondary, to be incorporated as circumstances allow.

The Minute says (paragraph 77) its proposals do not mean "that core participants will have no ability to influence the Inquiry's evidence-gathering processes," but if these proposals were adopted, core participants would not be present to notice inconsistencies in evidence, omissions and nuances, to ask questions on issues that arise, to probe witnesses and challenge unnecessary military secrecy, or to assess the credibility of witnesses. In proposing questions to the Inquiry, we would largely have to guess. Compared to the core participants' evidence, nearly all of which would be open to NZDF, much of NZDF's evidence would be hidden or obscured. This would be unfair in a process that is already inherently unfair. I think this is all about classified material needlessly dominating the thinking.

Given the already existing inequalities of power and resources for different parties to the Inquiry, non-NZDF core participants should have the same or more rights and involvement than NZDF. But non-NZDF core participants would have fewer rights and less involvement under the proposed process.

In contrast, 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:

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

The current NZ proposals for handling classified information appear to make no distinction between what is allowed to be provided to the public and what can go to the core participants. In contrast, 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.

There is no good reason why core participants should not have access to all sorts of materials that are not able to be released to the general public. I have decades of experience handling sensitive information in a responsible way; the lawyers are subject to well established rules concerning privilege. Rather than the binary public/secret categories in the Minute, there should be three categories like the UK inquiry: 1. public, 2. core participants and Inquiry only and, for what are likely to be very few of the key documents, 3. Inquiry only.

This should include core participants having access to all but very highly classified documents (and for the few properly highly classified ones, redactions and summaries can be used). Also, there will be information that needs some protection for non-national security reasons, such as New Zealand public-employees' names (including military), and these could likewise be provided to core participants under a non-disclosure agreement. This was, for instance, the case in the Baha Mousa inquiry, where nearly all names were provided to core participants (but not phone numbers and addresses) As discussed more below, the need for an effective, efficient and fair process requires that core participants be allowed to read all written evidence and be present for all oral evidence of NZDF staff (past and present).

Non-NZDF core participants are currently given a limited role in the classification review process, whereas NZDF and other agencies are to be consulted as of right on any possible declassification, agreement with them is to be sought, and if agreement can not be reached the agency can make submissions. This is obviously unfair. An equivalent process is required where, for any documents that may be withheld, redacted and/or summarised, consultation occurs with the non-NZDF core participants, agreement is sought and if agreement can not be reached then the core participants can make submissions.

As part of this process, I request that all core participants be provided with a full list of all classified documents as soon as possible, including the title, originating organisation and date. This will enable core participants to recommend which documents are the highest priority for the classification review process, prioritising that is vital for an efficient process.

Many problems with the current proposed process – which undermine the fairness, natural justice and effectiveness of the Inquiry – will best be solved by strengthening the role of the non-NZDF core participants. In particular the non-NZDF core participants should:

- have access to all classified and reclassified information confidential or below, and redacted versions and summaries for all documents Secret and above.
- be involved in the classification review as proposed
- be given lists of NZDF and other official documents (including enough information in each

case to know what the document is: title, date, type) so we can state priorities and needs, and tell the Inquiry about apparrernt omissions.
- have the right to ask interrogatories and have them answered promply (ie obtaining information held by NZDF as well as documents)
- be present for all witnesses and other hearings, with provision for a witness to present any very sensitive information separately to the Inquiry (but rarely, as a challenge-able exception, with redacted versions and summaries of this provided to core participants.)
- be allowed to cross examine witnesses
- be given lists of all NZDF and other agency New Zealand personnel involved with Operation Burnham and related matters; and be able to suggest which ones should give evidence.
- generally, be consulted on the selection of witnesses to be called by the Inquiry.
- be given copies of all correspondence between New Zealand officials/officers and foreign organisations, to provide transparency in the negotiations over access to claimed "foreign-sourced" information.

This is requested not as a favour to us. I believe that the NZDF's best hope of maintaining the cover up is closed processes and that the best hope of finding the truth – in an environment of active hiding and evasion – is to make full use of the core participants and where appropriate the public.

There is another compelling argument to be made: it is very important that there is public confidence in the Inquiry, and there will not be if it is seen to be secret.

Response to Minute on information protocol

My predictable comment is that the process should be even handed. Wherever NZDF or other agencies are given the right to comment on proposals concerning what information will be releases, the other core participants shou1d have the same right.

The crown agencies rejected the idea of the Inquiry itself declassifying documents but it is entirely appropriate that it does so, especially considering that NZDF has neglected to do this itself. The NZ rules governing security classifications require routine reclassification, but it is clear that all the NZDF docs have been left with the same classifications as when they were created up to eight years ago. If the Inquiry declassifies the documents, it will reduce the burden of document handling problems and open them up properly to core participants and the public.

The need for a step by step approach

I am concerned that it is already seven months into the Inquiry, and there is a risk that there will now be pressure to rush things. There are hints of this pressure in the crown submission where it mentions timeliness and delays.

But it is vital (for fairness and effectiveness) that there is a careful, step by step process.

First we need the NZDF documents, assisted by the review of security classifications. We need lists of all documents so we know what we haven't yet been given. We need equal rights as NZDF to comment on and challenge the security classification and release decisions. We need time to analyse the documents released and ask for more.

Then during that process and after it, we need the questioning/interrogatories. It's a vital part of the process. We need time to analyse each set of answers and then ask more questions. I believe it will

prove to be as important as the documents.

All of this has to happen before the substantive hearings. Also time must be allowed to analyse all the documents and interrogatories prior to substantive hearings. This is not a demanding request. It is just normal, systematic processes. I endorse the request for a timetable as part of the process decisions.

It is vital that NZDF can't drag its feet, for instance on producing the classified materials – using up the time – and then we have a hurried and compromised process.

A brief point about NZDF

I refer the Inquiry to a recent article I wrote in N&S (**doc**), conveying the views of several unhappy present and former staff about NZDF orgnisational culture, and also a feature in the Sunday Star-Times this weekend which I wasn't involved in (**doc**). Both discuss NZDF's cover up culture in relation to complaints of sexual abuse but have distinct similarities to the Operation Burnham cover up. I believe a bonus of the current Inquiry, if rigorously undertaken, will be to help the more decent people gain influence within that organisation.

On "crown" position: I am unimpressed that the NZDF-MFAT-intelligence agency submission is called "comprehensive" and "whole of crown". The whole of crown would care about government accountability and integrity. It would place high priority on international law obligations. But these are virtually absent. Where is the rest of the public service? The submission is almost entirely a defence of secrecy, based on an exaggerated view of the sensitivity of the information. Did any of those other agencies check for themselves whether NZDF was improperly hiding things, before backing its wishes to keep things secret in such a forthright way?

It is eight years since the operation. It is several years since the troops came home. It is exactly the right time for proper scrutiny.

I note that the crown submission emphasises the idea that the Inquiry is needed because the book's allegations impact on the NZDF's reputation. But let me repeat: it was not a book and it is not an Inquiry about attacking the NZDF or harming its reputation. It is about what happened to innocent people when those villages were attacked. It is about the civilian injuries, death and trauma, and the bizarre unwillingness to go back and give medical aid and support. I do not understand why the government agencies involved are not helping in this as much as they can.

It is actually more important that we think about the reputation of New Zealand. Can we investigate our wrongs against people in another country openly and honestly? Or will the process be defeated by NZDF's obsession with not wanting to admit it makes mistakes and gets things wrong?

Conclusion

This is the first inquiry like this in the history of NZDF. The opportunity is unlikely to come again for a long time.

I believe NZDF and the "crown" submission are being incredibly short sighted when they urge for openness to be minimised and other parties besides themselves to be largely excluded. This is placing no value on this rare opportunity to look hard at our military's overseas operations, to show the public it can be done openly and fairly, and hopefully to improve the NZDF.

I urge everyone involved to take a longer view, not the current short-term defensiveness on behalf of NZDF.

To the commissioners: please listen to us on the process. This Inquiry did not arise from NZDF scrutinising it own actions and fronting up with concerns. The NZDF leadership had years to do the right thing about Op Burnham and did not. It was us, the authors and counsel for the villagers, who have raised this – but not as some attack on NZDF, as a real world issue about harming innocents and a shameful cover up. The government decided to have an inquiry because lots of New Zealanders were concerned about this. Plenty of people inside NZDF are too.

In the context of lawyers for NZDF, lawyers for the SIS and GCSB and lawyers for MFAT, with a deputy solicitor general appearing to speak on their behalf, it would be possible to take seriously the incorrect claims about all the information being extremely sensitive and the necessity of a closed process. But with a wider view, imagining for instance that we are looking back from the future at how we handled this opportunity, it is obvious that the Inquiry process should be solidly built on fairness, openness and effectiveness, with any residual needs for secrecy fitted around these absolutes of good practice, as circumstances allow.