

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER

**A GOVERNMENT INQUIRY INTO OPERATION BURNHAM
AND RELATED MATTERS**

Submissions for New Zealand Defence Force in response to Minute No 4 of Inquiry

5 October 2018

Solicitor acting:

JENNY CATRAN

Crown Law

PO Box 2858

Wellington 6140

Tel: 04 472 1719

jenny.catran@crownlaw.govt.nz

Counsel acting:

PAUL RADICH QC

Clifton Chambers

PO Box 10731

Wellington 6140

Tel: 04 974 5951

paul.radich@cliftonchambers.co.nz

1. These brief submissions are provided on behalf of the New Zealand Defence Force (**NZDF**) in response to Minute No 4 of the Inquiry.

Procedure for dealing with classified information

2. The NZDF endorses the Inquiry's procedure, detailed in Minute No 4, for dealing with classified information and it supports the terms of paragraph 8 of the Memorandum of Counsel for the Government Communications Security Bureau, New Zealand Security Intelligence Service, Ministry of Foreign Affairs and Trade, and Department of the Prime Minister and Cabinet, of 5 October 2018.
3. The NZDF remains committed to providing all material, in particular that which is of NZDF origin, that may be relevant to the Inquiry irrespective of its security classification. In that respect the NZDF has now provided to the Inquiry the first tranche of classified material of NZDF origin to enable Mr Keith to begin his review.

Proposed inquiry process

4. Section 14 of the Inquiries Act 2013 (the **Act**) empowers the Inquiry to conduct its inquiry as it considers appropriate. In particular, in conducting the process, the Inquiry may forbid publication of material, restrict public access to the Inquiry, and hold the Inquiry in private.
5. This is affirmed at [14] of the Terms of Reference, which indicates that the Inquiry is entitled to take steps necessary to protect:
 - (a) New Zealand's interests relating to security, defence and international relations;
 - (b) the confidentiality of information provided to New Zealand;
 - (c) the identity of witnesses;
 - (d) fair trial rights; and
 - (e) against prejudicing other proceedings.
6. In determining the appropriate process, the Inquiry is bound by its Terms of Reference (s 14(1)(b)) and the principles of natural justice (s 14(2)(a)). Additionally, the Inquiry must take into account the principle of open justice; the

need for public confidence; the need to ascertain the facts properly; the need to protect New Zealand's security, defence and economic interests; privacy interests; fair trial rights; and any other countervailing interests (s 15(2)).

7. The sensitive nature of this Inquiry is such that a number of those countervailing interests are triggered, including the need:

- (a) to protect classified information so as to safeguard New Zealand's interests relating to security, defence and international relations;
- (b) to enable vulnerable witnesses to give evidence in a free and frank manner and without repercussion;
- (c) to protect the natural justice interests of participants, including the need to be aware of and have the opportunity to respond to adverse matters; and
- (d) to maintain public confidence in the process and outcome.

8. The NZDF endorses the Inquiry's provisional view that:

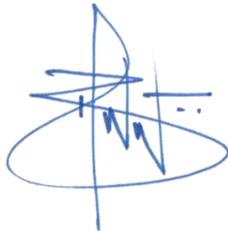
- (a) natural justice and open justice principles, while undoubtedly important, are flexible and less exacting in the context of an inquiry;
- (b) the need to offer complete confidentiality to witnesses so as to elucidate the facts and the need to preserve classified material strongly militate against a full public process;
- (c) the process should be substantially inquisitorial/investigative, conducted predominantly in private, but should incorporate adversarial characteristics to the extent that they do not jeopardise classified material or the safety of witnesses, and should involve public hearings where possible; and
- (d) witnesses will be treated as witnesses of the Inquiry and not of particular participants, but witnesses will be entitled to have their lawyers present, and participants will have an opportunity to frame questions or topics to be put to particular witnesses.

9. The NZDF considers that the Inquiry's proposed approach represents a considered and nuanced balancing of the peculiar issues that arise in this context.

10. Recognising the vulnerability, and ensuring the safety, of witnesses who are either past or present NZDF personnel is an important consideration for the NZDF. This is particularly important given the NZDF's practice of protecting the identities of NZSAS members and the consequential treatment of, and risks for, NZDF members, and their families, including in public fora, if protection is lost.
11. The NZDF has an interest also in the development of the Inquiry's proposed processes relating to the anonymity of witnesses and the treatment of their evidence.
12. It welcomes the opportunity to address these points further in oral submissions at the Inquiry's proposed hearing in November.

Draft allegations and narrative account

13. The NZDF acknowledges the Inquiry's request for it to provide any comment on the draft allegations and an unreferenced and unclassified narrative of the events at issue from its perspective. It is working in a focused way on that narrative and will provide it to the Inquiry and to core participants as soon as possible.



Paul Radich QC
Counsel for New Zealand Defence Force
5 October 2018