

15 October 2018

Further submission concerning Inquiry Minute No. 4

Dear Sir Terence and Sir Geoffrey,

Since sending my submission on Minute No. 4 on 5 October, I have received new information that I hope will be useful for your deliberations.

Context

As I noted in my submission (paragraphs 2.7 and 2.8), when NZDF delivered its bundle of “classified material that is subject to the control of the NZDF” to the Inquiry on 25 September 2018, it contained only about 150 documents, apparently including few or none of the Operation Burnham documents prepared by NZDF personnel in Afghanistan. As such, NZDF had unilaterally decided that any documents it produced while operating as part of the wider ISAF operation were legally under the control of NATO.

The issue of “partner-controlled” information, where NZDF defined the “vast majority” of relevant information as partner-controlled, risked seriously limiting the potential for an Inquiry process that was open, just and effective. If NZDF's position was correct, it would have been harder for the Inquiry to re/declassify the documents and make them available to non-NZDF core participants and the public. Evidence from NZDF personnel would accordingly have had the same problems.

As noted in my submission on Minute No. 3, NATO official Mattias Eichenlaub contradicted the NZDF position: “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,” he wrote. 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.) But NZDF did not accept this. It stuck to its preferred definition of partner-sourced information in its submissions to the Inquiry and used it as the basis for selecting the bundle of information provided to the Inquiry on 25 September.

New developments relevant to the Inquiry process

First, MFAT staff have checked with NATO and received the same advice as was given by Mattias Eichenlaub. The Crown Agencies memo of 5 October 2018 states “NATO has confirmed that NZDF-originated material generated by NZDF in the course of its ISAF deployment is not covered by the *Agreement between the Government of New Zealand and the North Atlantic Treaty Organisation on the Security of Information* and therefore is not subject to NATO consent”. This is a very important breakthrough for being able to have an open, just and effective Inquiry process.

The new information I can provide on this subject comes from an NZDF response to an Official Information Act request that arrived this week, which is attached [**NZDF OIA response, 10 October 2018**]. It relates to a list of 22 key Operation Burnham documents that was released by NZDF earlier this year at p.7 of another attached OIA response [**NZDF OIA response, 13**

February 2018] and placed on the NZDF website the following month (Operation Burnham Information Pack). This is a list of the reports produced by NZDF personnel after Operation Burnham that, NZDF said, informed its briefings to the Minister of Defence. It comprises post-operation intelligence reports and updates, CDF briefings, “storyboards”, the Battle Damage Assessment and so on. The OIA response disclosed that five of these reports mention the death of a child. They are key documents for the current Inquiry.

The reason I am writing to you now is that the OIA response received a few days ago replies to a series of questions about the 22 post-operation documents. It states that:

“None of the documents listed carry an ISAF letterhead. They are marked with their respective titles and intended recipients within the NZDF and New Zealand Government.”

“Each document is addressed to the relevant individual/s within the NZDF or the New Zealand Government.”

“None of these documents were sent to ISAF Headquarters.”

In other words, none of these 22 key documents are partner-sourced nor subject to NATO consent. Under the NATO rules confirmed by MFAT, as above, they are New Zealand documents subject to the control of the NZDF. They, and many similar documents, should have been supplied to the Inquiry on 25 September 2018. This will hopefully now happen rapidly. This helps open the way for an Inquiry process that is not dominated by secrecy.

The 10 October 2018 OIA response also provides information about the security classifications of this set of key documents. All 22 documents were originally classified “Secret” and, it says, “the current classifications are the same as the original classifications”.

Eight years after the operation, the documents still have the same security classification, suggesting that no review of the security classifications has occurred since they were created. There is every prospect that an independent review of these documents' security classifications will lead to many or all being re/declassified. They are the New Zealand equivalents of the British and German documents (intelligence reports and updates etc.) that overseas civilian casualty inquiries decided could be fully declassified or declassified with comparatively minor redactions. Again, this is promising for enabling an Inquiry process that is not dominated by secrecy.

Yours sincerely,
Nicky Hager