

30 November 2018

Reply comments following 21-22 November 2018 hearing

Dear Sir Terence and Sir Geoffrey,

Thank you for this opportunity to make reply comments in written form.

1. An inquiry is not a court case I understand the commissioners' comments about this being an inquiry not a court case. I want to make clear that I think the maximum possible number of documents should be shared with core participants because it is in the best interests of the Inquiry – for both fairness and effectiveness – not because of some “discovery” obligations. Likewise, it will be very worthwhile for the Inquiry to order that there can be written questioning of relevant agencies by core participants, in the manner of interrogatories, but again in the best interests of the Inquiry, not because of some interrogatory obligation in court procedures.

2. The Inquiries Act gives all the discretion needed to have the best possible process In the same vein, overseas inquiries demonstrate what is possible, such as substantial release of previously highly classified documents without harming the public interest and substantial release of further documents only to core participants. But it is not the precedents that empower the Inquiry to do likewise, it is the fact that the New Zealand Inquiries Act gives such wide discretion to the commissioners to choose your own process.

3. Request for an order permitting written questioning of NZDF on matters relevant to the Inquiry I believe that focussed questioning will assist the Inquiry greatly, including because a lot of important information is not necessarily set down clearly documents. I request that the Inquiry issue an order permitting written questioning of NZDF by core participants on matters relevant to the Inquiry. This questioning would ideally begin now, to assist progress, but certainly would need to continue after documents have been reviewed and made available to participants. The aim of careful questioning is that precise facts can be established, contradictions in accounts can be resolved, and incomplete and incorrect claims can be identified. It is inherently a gradual process, best done in writing. I had been attempting this using the OIA but NZDF has refused to answer questions for months claiming it would prejudice the Inquiry.

4. Exaggeration of security threats I want to draw attention to the way that various counsel in the hearing spoke about the risks surrounding the classified information. We heard emotive statements about “highly sensitive materials”, “profound” harm to security, “endanger[ing] the safety of New Zealand citizens”, “jeopardy” and “very real harm” to state interests. Counsel for the crown agencies quoted an intelligence review on how much intelligence New Zealand receives from overseas agencies (as if this was at risk from the Inquiry) and counsel assisting said “It is not an exaggeration to say that the Government's ability to deal with hostile international forces would be seriously harmed by the loss of intelligence information from the Country's partners, and New Zealander's put at risk.”

5. However, the Inquiry had already stated in Minute No 4 that it would follow the standard protective security requirements, which should have provided the reassurance NZDF and other agencies sought about handling of sensitive documents. The issue had been settled. These statements therefore seem overblown and alarmist. New Zealand is in no risk of losing access to

foreign intelligence and breaking its alliance connections by the work of this Inquiry. Many of the key official documents, once reviewed, are likely no longer to require security classifications because they do not pose a threat to anyone.

6. Avoiding an inquiry that cannot resolve key issues I am not concerned about the Inquiry reaching false conclusions. As I wrote in my first submission, I believe the government has set up an excellent inquiry, including the people involved. Instead the main risk to the Inquiry is, I submit, that it finds it cannot reach firm conclusions on some of the key issues within a reasonable period of time. This risk is increased because there appears to have been inaccurate reporting about what happened in Op Burnham from the very start (ie documents may not resolve the disputed facts) and because NZDF seems to be engaged in a kind of passive resistance (for instance, taking a 10 months out of a planned 12 month Inquiry just to provide documents, when it was known from day one they would be needed).

7. The possibility of not being able to reach clear conclusions is the context of my comments in the hearing about the Inquiry making best use of the knowledge and energy of the core participants. It is not, as Sir Geoffrey asked, because I doubt the commissioners' ability to do the job. It is that there is a large and complex job to be done in a relatively short time. I submit that all constructive contributions should be embraced and incorporated into the process. Thus while the Inquiry will take or leave anything that core participants put before them and will reach their own conclusions, it makes sense to utilise these contributions as much as possible. This argues for including core participants to the maximum extent possible, through access to information, involvement in the classified information review process, opportunity for written questioning of NZDF, presence in hearings, cross examining witnesses in hearings and so on, as in my submissions.

8. When counsel for the crown agencies proposed “largely a passive role” for core participants, I see this as representing NZDF as it attempts to avoid scrutiny. No surprise there. However, I was confused why the Inquiry's own counsel assisting presented proposals at the hearing for a closed, secrecy-dominated process that were more or less identical to those of NZDF and intelligence agencies. Their proposals at paragraph 77.7 largely exclude core participants except as passive submitters. This is far away from what overseas inquiries have done to provide open and fair processes. I urge you to maximise an open and inclusive process.

9. Appeals for economy and timeliness as excuses for minimising the process As with the overblown statements about security, I was struck by how often the advocates of a closed process raised the argument of time and cost (“efficiency”). This seems particularly rich considering which parties have held up the process so far. Please do not be influenced by this. An open, fair and inclusive process can be efficient and, I strongly believe, is most likely to lead to the Inquiry fulfilling its responsibility of finding the truth and doing so while maintaining the confidence of the public.

10. Sir Geoffrey said during the hearing that he must keep an open mind on whether, as we claim, there has been a cover up over Operation Burnham. I agreed with him. However this Inquiry *is* looking into a *possible* cover up. As such it will require much more determined probing and precision than some other sorts of inquiries. For this reason, to ensure the Inquiry is able to reach clear conclusions, I urge that you take no notice of the various, more or less subtle, appeals from the NZDF and allied agencies for a once-over-lightly process.

11. Right to life Counsel for the crown agencies, in arguing against Right to Life being one of the guiding principles for the Inquiry, said that one possibility was that the findings of the Inquiry could “trigger” a subsequent right to life investigation. This is unsound in two ways. Firstly, there are already sufficient grounds to trigger a right to life investigation. Second, the suggestion of a second,

later investigation could only be made by a party with (relatively) unlimited public funds. It is unreasonable to assume that villagers in a war-torn country could find the resources (and hope) to sustain them through a second investigation.

12. It appears, incredibly, that NZDF has made no efforts, right up to the present, to find out about the deaths and injuries of women, children and civilians farmers caused by an operation commanded by its officers. It told me under the OIA it had not sought or followed up the Afghan government official list of casualties. There is no sign that it has approached the International Organisation for Migration, quoted in *Hit & Run*, which interviewed locals, confirmed they were civilians and gave aid after Operation Burnham. Nor did it approach the United Nations Assistance Mission in Afghanistan (UNAMA) which reported on civilian casualties from the raid. And so on.

13. Yet NZDF then saw fit to state in April this year “Villagers were not attacked and killed by either ground forces or air assets” (Tim Keating's 105 errors in book *Hit and Run* document, released by NZDF in days before hearing). The claims that there are no grounds for a right to life approach should be considered with this determined lack of investigation in mind.

14. NZDF witnesses Details were presented during the hearing about the NZSAS personnel who appeared in public (behind a screen) and were cross examined during Jon Stephenson's defamation case. In response, Mr Radich argued that the Inquiry hearings were different because they would involve more confidential information. But he conflates two different issues. The issue with the NZSAS personnel was about their personal safety. If they could appear safely in open court in the defamation case, they can do the same in an Inquiry hearing. It is a separate issue whether or not some of their evidence would need to be heard in private.

15. Some suggested measures to help move along the process Assuming Ben Keith has begun work, the documents he is starting with are likely to be those that NZDF provided in its first bundle(s), when it was still claiming it did not control any of the operational documents from Operation Burnham. While some of these documents may be interesting, I suspect that mostly they do not get to the heart of the disputed issues. For the sake of efficiency, it would be a pity if Mr Keith and David Johnstone spent their time on these documents in the coming months before NZDF hands over the full body of material. Therefore, I suggest that NZDF be asked to forward the following documents to them immediately as a priority for review: the 22 post-operation documents listed on the final page of the Operation Burnham information pack: (http://www.nzdf.mil.nz/downloads/pdf/public-docs/2018/op_b_information_pack_v2b.pdf) and their equivalents for the other operations listed in paragraph 12(a) of Minute No. 6.

16. In the same spirit, I suggest that NZDF be required to share with other parties (including Ben Keith and David Johnstone) the full details of the sets of keyword search terms they have used to identify information to provide to the Inquiry. These are important for determining the thoroughness of the provision of information. Informing other parties may allow gaps or other issues to be identified. It would be sensible not to wait for months before realising any deficiencies in the keyword searches.

17. Finally, I suggest that NZDF be asked to produce a version of its narrative with references identifying the NZDF document(s) or other sources upon which each piece of information is based, so it can be cross referenced with the documentary sources as they become available. I presume that, after months of preparation, referencing the document will be a relatively simple piece of work.

Yours sincerely,