

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

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

Date of Minute: 11 February 2019

MINUTE No 8 OF INQUIRY

Introduction

[1] In Ruling No 1, dated 21 December 2018, the Inquiry indicated that it proposed to hold a number of public hearings or modules on particular topics and that a minute would be issued prior to each hearing. This Minute deals with the first of these public hearings, which is to take place in Wellington on 4 April 2019.

Module 1

[2] The hearing will have two elements:

- (a) First, two papers by way of general background will be provided to the Inquiry one week before the hearing so that they can be made publicly available. These are described in [3] – [4] below.
- (b) Second, several presentations (written and oral) will be given, as described in [5] – [10] below.
- (c) It is the Inquiry's expectation that there will be some relevant Cabinet material publicly available before the hearing.

General background papers

[3] The first of the general background papers will be provided by the Ministry of Foreign Affairs and Trade and will deal with Afghanistan. It will provide a brief overview of Afghanistan's recent history, its geography, its people (including their ethnic, cultural, and religious characteristics) and its government; an overview of New Zealand's relationship with Afghanistan (including an outline of the United Nations' Security Council Resolutions after 9/11 relating to Afghanistan); a short summary of the development of the measures that were taken by the international community; and an overview of the security situation in Afghanistan – how that has changed since 2001 and the current risks.

[4] The second background paper will be provided by the Department of the Prime Minister and Cabinet in conjunction with the New Zealand Defence Force (NZDF)¹ and will outline the Cabinet decisions concerning the deployment of New Zealand forces to Afghanistan after 9/11 (including how the decisions were made and their parliamentary approval). It will also provide an overview of the involvement of New Zealand forces with Afghanistan since 2002 including the objectives that were set for the deployments and the nature and extent of any changes over time. This relates to the original deployment of the NZSAS and the Provincial Reconstruction Team.

Oral presentations

[5] There will be a number of presentations which will be both written and oral. The first two will be by way of background and will be descriptive in nature.

- (a) First, Air Chief Marshall Sir Angus Houston AK, AFC (Ret'd), formerly the Chief of the Air Force and later the Chief of the Defence Force in Australia, will describe the nature and history of the conflict in Afghanistan from a military perspective, the counter-insurgency strategy that was developed (COIN) and the role of provincial reconstruction teams and of special forces operations in

¹ And with the Ministry of Defence if relevant.

that strategy. He will also describe the background to, and composition of, the International Security Assistance Force (ISAF) and outline its structure.

- (b) Second, Hon Dr Wayne Mapp, who was the Minister of Defence when the Government decided to re-deploy the NZSAS to Afghanistan in 2009, will describe the process leading up to the decision, including the considerations that were taken into account and the steps that were taken to implement it.²

These presentations will occupy the morning of the hearing. The members of the Inquiry may ask follow-up questions of Sir Angus or Dr Mapp, but neither will be cross-examined on their presentations. Core participants may make written comments on these presentations up to two weeks after the hearing.

[6] The afternoon of the hearing will deal with the location of the events on 21/22 August 2010 (i.e. Operation Burnham). The Inquiry wishes to understand the competing versions as to where the events at issue occurred. To this end, this segment will begin with the authors presenting their understanding of location. We assume that the Afghan villagers take the same view as the authors on issues of location, but if that is not correct, they will have an opportunity to identify any points of difference with the position as outlined by the authors. Following that, NZDF will give its presentation on location. We envisage that the authors and the villagers will have 1.5 hours between them for their presentation(s) and NZDF 1.5 hours for its presentation, although this time allotment can be adjusted if there are significant differences between the authors and the villagers as to location.

[7] The Inquiry asks that the presentations address the following places, all of which have been named in public submissions to the Inquiry and/or in public statements by core participants:

² The question of arrangements for the handing over of anyone detained by the New Zealand forces to Afghan authorities will not be dealt with in any detail at this hearing. That issue will be the subject of a later hearing.

- (a) Tirgiran;
- (b) Naik;
- (c) Khak Khuday Dad;
- (d) Khakandy;
- (e) Beidak.

[8] For each of these places, the Inquiry seeks submissions from each core participant as to the following:

- (a) A visual depiction of where each named location falls on a map and/or satellite image;
- (b) The coordinates for each named location, where possible;
- (c) The geolocation of relevant structures at each location, such as buildings (indicating to whom those buildings belonged), any flags erected following Operation Burnham, helicopter landing zones and similar relevant information;
- (d) The chronology of activity at the locations in [7];
- (e) The methodology by which each location was identified. This should be done (to the extent possible) in a manner appropriate for a public audience, in particular where methodologies may have developed or altered over time.

[9] In order to facilitate its own understanding as well as that of other core participants and members of the public (including the media), the Inquiry asks core participants to present their submissions both orally and in writing and by reference to photographs, satellite imagery, maps and geolocation techniques. To assist these presentations, the Inquiry will provide a large-scale satellite image where the

information listed above can be annotated by each core participant for use in the hearing.

[10] The Inquiry asks that both the oral and written presentations use clear and consistent keys and descriptors.

[11] The Inquiry has retained Mr David Napier, an expert in geolocation techniques and satellite analysis, to assist with issues of location. He will attend the hearing and observe the presentations. Subsequently, he will provide a report to the Inquiry based on open source and commercially available satellite material and will present it at the second hearing in late May. That report will be made available to core participants one week in advance of the hearing. They will be given an opportunity to make oral comments on his presentation at the hearing and may provide written submissions on it within two weeks of the hearing.

[12] Core participants should feel free to contact the Inquiry's Secretariat if they are uncertain as to what the Inquiry seeks or wish to obtain further information about the hearing.

Funding

[13] In Minute One, dated 10 July 2018, the Inquiry identified core participants and made interim recommendations for the funding of legal assistance. In that Minute, the Inquiry confirmed that it would consider the question of recommendations for further funding once the decision as to process had been made.

[14] Section 18(1) of the Act provides that recommendations as to legal assistance may be made at any time. It is, therefore, open to the Inquiry to make one or more recommendations over the course of its examination. This assists in enabling core participants to engage with the Inquiry, in different ways and at different times, as its work unfolds. A phased approach to funding recommendations, in which recommendations are linked to specific pieces or phases of work, helps to ensure that an appropriate balance is achieved between the

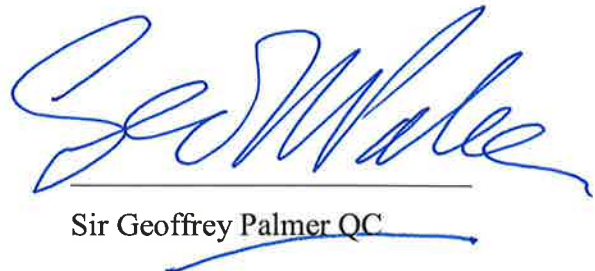
Inquiry's authority to regulate its procedure (ss 14(1), 14(4) and 17(3)) and the expectations as to fairness, expediency, independence, and impartiality (ss 14(2) and 10).

[15] The Inquiry recommends that the Department of Internal Affairs grant funding to core participants, to enable their participation in the public hearings. For the avoidance of doubt, this recommendation relates exclusively to the series of public hearings, as covered in this Minute and any future Minutes issued by the Inquiry. The Inquiry may consider further requests for funding at later dates, for other key tasks or phases.

[16] The Inquiry recommends that funding for legal assistance be provided to the Afghan villagers, who are represented by Dr Rodney Harrison QC and Deborah Manning, and Mr Stephenson, who is represented by Davey Salmon and Daniel Nilsson of LeeSalmonLong. This funding is to enable the core participants to attend hearings, prepare for and make presentations at the hearings, and make submissions to the Inquiry following the hearings. Presentations and submissions are to be made, as is the case for other hearing participants, in accordance with any procedural directions made by the Inquiry (for example, directions as to format, topics, length, and submission deadlines).



Sir Terence Arnold QC



Sir Geoffrey Palmer QC

Parties:
Mr McLeod for the Afghan Villagers
Mr Radich QC for the New Zealand Defence Force
Mr Hager
Mr Salmon for Mr Stephenson