

11 March 2019

Dear Sir Terence and Sir Geoffrey,

I understand that some discussions occurred as a result of my meeting with Inquiry staff last week (and other developments). I am hoping these talks may help to get the Inquiry back on the rails. To that end, I am writing now to explain my view of what is needed for this Inquiry to be able to carry out its job effectively and to maintain public credibility.

### **Background**

I have found the Inquiry to date disorganised and to be making decisions that favour the interests and concerns of NZDF over the interests and concerns of the other core participants. I have also found the Inquiry's attitude to me inexplicably dismissive. This was epitomised by Ruling No 1. The Inquiry had asked core participants to make submissions on the Inquiry process. I spent weeks researching similar overseas inquiries and preparing proposals for things that would provide a fair, effective and open process; a process reflecting good practice in other countries. Ruling No 1 ignored the proposals I made entirely, adopting not a single one but adopting most proposals from NZDF.

At the same time, the Inquiry has acted in heavy-handed way that discouraged my main sources from being willing to participate, seriously damaging the possibility of a process that hears all sides. I was shocked by the careless actions that caused these very vulnerable sources to lose confidence in the Inquiry. The Inquiry has also ignored pleas that it recognise and redress the obvious inequalities of power between different parties to the Inquiry and instead, through most of its decisions, has made the structural inequality worse not better.

Finally the Inquiry appears to have believed that setting up three token public hearings (the "modules"), which do not even address the main substance of the Inquiry, was a fitting way to involve the non-NZDF core participants and the public.

These actions had already sapped my confidence in the Inquiry. But then last week I discovered that the plans may be even more prejudiced against me and the villagers than I had imagined.

When I met with the Inquiry staff on Wednesday, 6 March 2019, it dawned on me that the intention expressed in Ruling No 1 has been to cut the non-NZDF core participants almost entirely out of the process. Early in the Inquiry there was talk of "opening submissions", which naturally implied that there would be more substantive submissions following – the kind of process one would imagine from a fair and open process. I have prepared for months on this basis. But now it appears that the commissioners have been thinking they won't bother with public hearings and a process of submissions and evidence from the core participants at all.

If this is correct, then I believe you may as well save money and write the final report exonerating the NZDF and minimising the civilian casualties now. Because that is where it would end up. It would also set a long-remembered record for bad process.

But it is not too late to put the process back on the rails. Ruling No 1 was almost entirely devoted to saying how core participants and the public would *not* be involved in the Inquiry. It was silent on how core participants and the public *would* be involved (except the patronising modules). So there is still time to set up a decent process that does not only suit NZDF.

### A fair process

Here are some minimal proposals of what a fair process would look like (without any genuinely sensitive information being revealed).

1. There would be proper public hearings (not modules) where core participants present their submissions and evidence in detail on all the issues covered by the Inquiry. Experts nominated by the core participants could be included at this time.
2. These hearings would occur at different stages of the Inquiry: opening submissions (as mentioned earlier in the process), main substantive submissions and closing submissions.
3. The opening submissions could be before interviews begin with witnesses, so they can assist the commissioners with their questioning. The substantive hearings, which would be the main time the public sees the Inquiry in action directly relating to Operation Burnham and the other operations, would occur over several days to give the time required for each core participant to cover the subject properly. Closing submissions would ensure new developments could be responded to and overview concluding comments made.
4. The Inquiry would adopt processes that, to the maximum extent possible, assist the core participants to prepare for and participate fully in the hearings. This includes, for instance:
  - a) improving the system for reviewing document security classifications (particularly providing lists of all documents to core participants and allowing them to propose priorities for the reviewing);
  - b) ordering that core participants can ask written factual questions of NZDF and get prompt replies;
  - c) providing core participants with redacted copies of the transcripts of all witnesses (at an absolute minimum);
  - d) providing an independently prepared written description, minute by minute, of the Apache helicopter and ISR drone footage (including in each case the position data, times when weapons are fired and details of numbers of weapons expended) – a much improved equivalent of the one-sided analysis of the video that was already provided (without problems of security classifications) by NZDF; and
  - e) ensuring that the core participants receive this information in time to prepare properly the main substantive hearings.
5. The Inquiry would produce a full timeline of Inquiry hearings and sessions, and update the timeline each time there are changes, so everyone involved knows where they stand.
6. The Commissioners asked core participants to provide a List of Allegations many months ago (which I carefully did at the time) and then in keeping with the general disorganisation this idea appears to have been quietly dropped again. The Inquiry would reinstate the List of Allegations and, as the counsel for the villagers have been urging, a List of Issues, so we have a clear structure to

follow.

I once again want to state my absolute willingness to cooperate constructively in the Inquiry. This has been my express intention since the Inquiry began. However, as described, it does not feel like this has been returned. I feel shut out of the Inquiry and I have lost almost all confidence in the Inquiry, which was the last thing I wanted.

Yours sincerely,

Nicky Hager