

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

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

Date of Minute: 12 March 2019

MINUTE No 9 OF INQUIRY

Introduction

[1] Following the issue of Minute No 8 dealing with the first of the public hearings, the Inquiry has received memoranda dated 26 February 2019, 5 March 2019 and 7 March 2019 from counsel for the Afghan villagers and letters dated 13 February and 11 March 2019 from Mr Hager. The memoranda of 26 February and 7 March 2019 and Mr Hager's letter of 13 February 2019 address, in particular, the location element of the first hearing; the memorandum of 5 March 2019 and Mr Hager's letter of 11 March 2019 address the programme of public hearings more generally.

[2] We begin with the issues raised in relation to the first hearing (Module 1).

Module 1

[3] The 26 February 2019 memorandum raises two points:

- (a) First, counsel say that the papers and presentations requested by the Inquiry represent a one-sided, government-based perspective on the matters in issue.
- (b) Second, counsel indicate that it will not be possible for them to consult with the Afghan villagers and prepare a presentation on

location addressing the matters raised by the Inquiry in time for a hearing on 4 April 2019.

In the 7 March memorandum, counsel for the Afghan villagers seek an adjournment of Module 1 in light of the difficulties they identify in relation to addressing location.¹

[4] We deal with each point in turn.

The question of perspective

[5] We agree that it would not be right for the Inquiry to operate a process which resulted in the presentation of a one-sided, government-based perspective on matters in issue in the Inquiry. But, of course, that is not what Module 1 involves.

[6] The purpose of the papers and presentations (other than those relating to location) is to provide background in relation to matters that are, from the perspective of the Inquiry's Terms of Reference, not contentious.² For example, it is not part of our remit to consider whether it was a good idea for the Government to send troops to Afghanistan, either in 2001 or in 2009. However, the Terms of Reference do require us to consider the "justification/basis" for the Operations at issue "including the extent to which they were appropriately authorised through the relevant military chains of command, and whether there was any Ministerial authorisation of the Operations".³ Against that background, we thought it important that the public understand what led to the decisions to deploy New Zealand troops to Afghanistan being made in the first place. To facilitate this, our expectation is that Cabinet papers relevant to the initial decision in 2001 to deploy New Zealand troops and the subsequent decision in 2009 to re-deploy the NZSAS will be publicly available prior to the hearing, perhaps with some redactions.

¹ Counsel also raised the issue of funding for Module 1, which had not been addressed at the date of the memorandum. We understand that counsel have now been advised of the funding arrangements for Module 1.

² Government Inquiry into Operation Burnham Terms of Reference <www.operationburnham.inquiry.govt.nz>.

³ Terms of Reference, cl 7.4

[7] Similarly, the conflict in Afghanistan is of a particular type – it is a non-international armed conflict.⁴ We thought it important that the public have a general understanding of what that involves from a military perspective because that informs issues that are clearly relevant to the Inquiry’s Terms of Reference (such as rules of engagement and international humanitarian law).

[8] To the extent that matters arise in the course of these papers and presentations that are directly relevant to the particular issues that the Inquiry must consider, they will be addressed in detail in subsequent modules rather than in Module 1. To give two examples:

- (a) the content of international humanitarian law in a non-international armed conflict will be the subject of detailed consideration in Module 3; and
- (b) issues surrounding the detention of captured persons will be addressed in detail in Module 2.

[9] We do not accept, then, that a “one-sided perspective on the matters in issue” is being presented in Module 1.⁵ That said, to meet one of counsel’s concerns we are arranging a presentation which will give an Afghan civilian perspective on the conflict and its impact. As the presenter is unavailable in early April, that presentation will be incorporated into Module 2.

Location

[10] Both counsel for the Afghan villagers and Mr Hager question the need for any presentation on location. They say it is now accepted by the authors that they misplaced the location of what has become known as Operation Burnham, so that there is now no dispute about where it occurred. As a result, counsel for the

⁴ Terms of Reference, cl 5.

⁵ Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik in response to Minute No 8 of the Inquiry (26 February 2019).

villagers submit, a hearing dealing with location is “a distraction and an inefficient use of Inquiry resources”.⁶

[11] We accept that there is now no dispute about the location of Operation Burnham. However, we are in the unusual position of having a detailed account in *Hit & Run* of what the villagers and other sources say happened during Operation Burnham, in particular, the conduct of the ground and air forces and its effect on the Afghan inhabitants and their property. We need to understand where within the agreed location particular events are said to have occurred, given that the annotated images in the book are incorrect. As things stand, this is simply not clear to us. The purpose of seeking the detail referred to in paragraphs [7]–[8] of Minute No 8 was to enable us to obtain the necessary understanding. As a matter of logic, it seemed to us necessary that we have a clear statement from the authors and from New Zealand Defence Force (NZDF) of the precise locations of the events at issue in relation to Operation Burnham at the first public hearing.

[12] We should emphasise that this segment of the hearings is not intended to cause embarrassment to the authors or anyone else. As is apparent from the corrections made to date, there have been errors by both the authors and NZDF in their accounts of what happened. As far as the authors are concerned, the barriers of culture and language, and the difficulties of precise location in challenging terrain and by means of techniques that are unfamiliar to villagers (such as satellite imagery and maps), are obvious. Against this background, it would not be surprising if there were errors in the account in the book. At this stage, our interest is no more than ensuring that we have a clear understanding of where it is said that particular events took place.

[13] Counsel for the Afghan villagers made the further point that the detail that the Inquiry seeks in relation to location cannot be provided without a full briefing of the Afghan villagers, and that cannot be completed before the hearing date given logistic and other difficulties.

⁶ Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik regarding Proposed Public Hearings (5 March 2019).

[14] As Minute No 8 indicates (at paragraph [6]), our expectation was that the authors would have the primary responsibility for the non-Crown core participant presentation on location and the Afghan villagers would simply comment if they had anything to add. The reason for this is that the authors' investigative work underlies *Hit & Run*, and that investigative work involved discussions over several days with the villagers about location.⁷ We remain of the view that this is the most appropriate approach at this stage. To the extent that we seek to understand the methodology underlying the identification of the locations discussed in the book, we do not expect that the villagers will have significant information to add to what the authors will have to say.

[15] That said, we note that because the Inquiry is returning to the issue of location in Module 2, there will be an opportunity for input from the villagers then. Moreover, given the iterative nature of the Inquiry's investigation, it is likely that there will be opportunities for input from the villagers on issues relating to location at a later stage, as more information emerges and the factual issues become clearer.

[16] It is relevant in this context to note that the Inquiry anticipates that both Mr Stephenson and Mr Hager will give evidence, in private, about the events at issue in the Inquiry. The Inquiry understands that Mr Stephenson is preparing a narrative on the basis of his investigative work, which he will present to the Inquiry. Mr Hager has continued with his investigations into the matters at issue since the publication of *Hit & Run* and is, we understand, prepared to supplement what is in the book and to share the results of his further work with us. Given that the investigative process is an iterative one and our knowledge is evolving, it seems likely that one or more follow-up sessions will be necessary. Lest there be any doubt about it, we should make it clear that we wish to obtain as much assistance as we reasonably can from both authors and do not seek to limit their individual presentations to us, subject only to the requirement that they are relevant to the matters set out in the Terms of Reference.

[17] In light of what we have said above, we see no need for an adjournment of Module 1 and decline the application accordingly.

⁷ See *Hit & Run* at p 56.

Modules 2 and 3

[18] Counsel for the Afghan villagers make a number of complaints about Modules 2 and 3. First, they complain that there is an inequality of information as between the Crown and non-Crown parties. Reference is made to the rules of engagement, which are presently classified and so are known to NZDF but not to non-Crown core participants.

[19] We make three points about this:

- (a) First, the purpose of the hearing concerning rules of engagement is not to consider their precise application to the events at issue. Rather, it is to examine the role of rules of engagement in modern warfare, and in particular in a conflict such as existed in Afghanistan; how they are made; how New Zealand troops such as the SAS are educated in them; how compliance with them is monitored; and how breaches of them are dealt with. The precise content of the particular rules applicable to Operation Burnham is not vital to this.
- (b) Second, and despite the point just made, we asked the classification reviewers to give priority to reviewing the relevant rules of engagement, in the hope that we would be in a position to determine under s 70 of the Evidence Act 2006 whether they should be disclosed, in whole or in part, prior to Module 2. To the extent that disclosure is appropriate in terms of s 70, our intention is that it will occur well before the hearing.
- (c) Finally, we were told at the Inquiry's public hearing about process that rules of engagement relevant to operations in Afghanistan are available over the internet. If correct, that is obviously of relevance to the review process. But apart from that, it appears that there are relevant open source materials to which non-Crown

core participants have access and on the basis of which they can prepare and make meaningful submissions.

[20] Counsel for the Afghan villagers make two further complaints, which we address together. They complain that the Inquiry has not published a list of issues and that the proposed public hearings do not envisage a role for the villagers in relation to the application of the legal framework to the conduct of Operation Burnham and to the other events at issue.

[21] Counsel for the Afghan villagers have provided a draft list of issues,⁸ which we will take note of in carrying out our work.⁹ However, the Inquiry does not consider that publication of a general list of issues is necessary, particularly given the evolving nature of our investigations. We make the obvious point that the scope of the Inquiry's work is determined by its Terms of Reference, which are reasonably detailed and link in the allegations in *Hit & Run*. Counsel Assisting prepared a summary of those allegations at an early stage and provided it to core participants. It was later annexed to Minute No 4 for comment, and some comment was received.¹⁰

[22] Furthermore, the purpose of Modules 2 and 3 is to seek presentations and submissions from experts and core participants on important legal issues raised by the Terms of Reference. The points which we see as being raised are set out in the material distributed to presenters and core participants. We have deliberately left the non-Crown core participants with the freedom to focus on those elements of the legal matters at issue in the hearings in the way that they think best. Depending on what emerges from the hearings, we may well seek further submissions on those or

⁸ See the annexure to Memorandum of Counsel for the Former Residents of Khak Khuday Dad and Naik requesting Orders as to Procedural Matters (19 November 2018).

⁹ The Inquiry noted in Ruling No 1 at para [79](c)(iv) that core participants could suggest topics and lines of questioning for the Inquiry to pursue in questioning witnesses. The factual questions posed in counsel's draft statement of issues are most helpful in that context.

¹⁰ In particular, Mr Hager provided an "allegations list" with his letter of 5 October 2018. The allegations list commented on, and suggested modifications to, counsel assisting's summary of the allegations from *Hit & Run* as set out in their memorandum of 24 May 2018 and annexed to Minute 4 as Appendix 2. Mr Hager's comments are helpful to the Inquiry.

other issues. If so, appropriate notice will be given. This is a further reflection of the fact that the investigation is an iterative process.

[23] It is correct that that the public hearings do not envisage a role for the non-Crown core participants in relation to the application of the legal framework to the detail of the events at issue. Rather we wish to obtain an understanding of the relevant legal principles and tests that are generally applicable. We make three points by way of explanation of this:

- (a) While the Inquiry may make findings of fault and give recommendations that steps be taken to determine liability, we are not permitted to determine the civil, criminal or disciplinary liability of any person,¹¹ nor do we have jurisdiction to make any determinations about the actions of forces or officials other than those from New Zealand.¹² Consequently there are some complexities in relation to the application of legal principles to the events at issue.
- (b) More significantly, we are conducting an investigation, most of which has to be conducted in private for reasons we have already explained in earlier Minutes and in Ruling No 1. It will not therefore be possible or appropriate for us to hear argument from participants as to how the law is to be applied to the facts in the same way that would occur in litigation in a court setting.
- (c) Finally, as will be apparent from what has already been said, our primary focus is on finding the facts. As we have said, we have the advantage of a book setting out the account of the non-Crown core participants, which will, we anticipate, be explained and supplemented by evidence from Mr Stephenson and Mr Hager. To further assist us in our fact-finding process, Counsel Assisting are conducting preliminary interviews of relevant NZDF personnel and


¹¹ Inquiries Act 2013, s 11.

¹² Terms of Reference, cl 9.

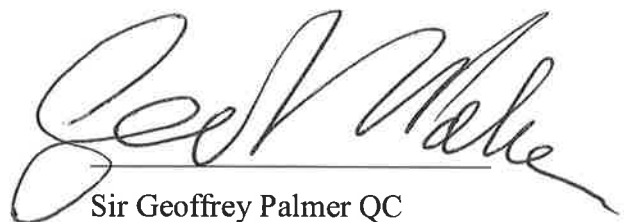
others, as foreshadowed in the Witness Protocol. We will take evidence on oath from many of those interviewed. In addition, the Inquiry has assembled a team of people with relevant skills and experience to analyse both open source material and the classified and unclassified documentary material provided by NZDF and other Crown parties. We are confident that this work is robust and will enable us to get at the truth.

[24] Concern has been expressed that the Inquiry will not be able to get at the truth and will result in a “whitewash”. This concern is misplaced. We made our decisions as to process exercising our best judgment in light of the various relevant considerations. We are confident that, utilising its intended processes, the Inquiry has the capacity to, and will, get at the truth, whatever that may be.

[25] Finally, we note that we will be issuing further minutes in relation to Modules 2 and 3 in due course, as well as a minute to deal with several outstanding issues.

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Sir Terence Arnold QC

A handwritten signature in black ink, appearing to read 'Geoffrey Palmer', with a large, stylized flourish above it and a small mark below the signature.

Sir Geoffrey Palmer QC

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