

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER

A GOVERNMENT INQUIRY INTO OPERATION  
BURNHAM AND RELATED MATTERS

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**Memorandum for New Zealand Defence Force on the Inquiry's Comparative Analysis of  
public accounts of events during Operations Burnham and Nova of 16 May 2019**

**17 May 2019**

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#### MAY IT PLEASE THE INQUIRY:

1. On 16 May 2019, the Inquiry transmitted to the New Zealand Defence Force (NZDF) and other core participants in the Inquiry into Operation Burnham and related matters a document entitled 'Public account of Events during Operation Burnham and Operation Nova given by the New Zealand Defence Force and the authors of *Hit & Run: A comparative analysis*' ("Interim Comparative Analysis").
2. The Interim Comparative Analysis was transmitted mid-afternoon on 16 May 2019 by means of a covering email which noted that the document would be published on the Inquiry website today and invited core participants to make written comments on the document if they wished to do so.
3. While regretting the short timeframe given to consider the Interim Comparative Analysis, the NZDF nevertheless thanks the Inquiry for it and wishes to make the following comments:
  - a. The Interim Comparative Analysis, being based on publicly available material – which constitutes only a small subset of the overall material before the Inquiry – and released at this stage of the Inquiry's proceedings, is necessarily (i) an incomplete and (ii) interim account.
    - i. Through its procedural decisions as to how it intends to conduct its work, the Inquiry has recognised that a good deal of the information relevant to the events falling within the Inquiry's Terms of Reference is, for various reasons, classified and unable to be disclosed publicly.<sup>1</sup> The Inquiry has before it substantial material provided by the Crown, including some 1,600 items from the NZDF. The Inquiry's public account comparative analysis refers to only 15 NZDF items. The NZDF notes that any account of events drawing on publicly available material only is incomplete.
    - ii. As noted in the Inquiry's Progress Report No 3, the Inquiry's reporting date is 31 December 2019. The Inquiry's series of public modules is continuing, with two days set aside next week in which the NZDF, alongside other core participants and the Crown

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<sup>1</sup> Inquiry Minute No 4 at para 73 and Ruling No 1 at para 19.

agencies will make submissions as requested by the Inquiry on matters relevant to its Terms of Reference.

- b. Further to the general points raised above, regarding the substantive content of the Interim Comparative Analysis, the NZDF notes that, in attempting to summarise NZDF accounts, it appears in a number of places to mischaracterise them. While not an exhaustive list, the following examples are provided to illustrate this point:

- i. Paragraph 17 of the Interim Comparative Analysis states: “NZDF says weapons and ammunition were detonated near A1 **causing a fire in A1**” (emphasis added); and paragraph 31 states: “NZDF says the fires were accidental, **resulting from an unattended cooking fire in A3 and debris from the destruction of insurgent weapons falling on the roof of A1**” (emphasis added). Both paragraphs provide a footnote reference to the presentation made by the NZDF at the Public Hearing Module 1. As that presentation, available on the Inquiry’s website, shows, the NZDF has not purported to determine the cause of those fires conclusively, but rather, stated only their most likely cause. The ground forces did not know about the fires; it was not until after their departure that the ISR RPA detected “hot spots” at A1 and A3.<sup>2</sup> Moreover, while Paragraph 17 is listed under the heading ‘Areas where the public accounts of the NZDF and the authors broadly align’, the NZDF notes that the fact that the authors claim a building was ‘blown up’ (suggesting a deliberate action) while the NZDF has said a fire at this building was most likely caused by a controlled detonation of seized munitions that took place some 25 metres from the building (and thus accidental) shows this is not an area of broad alignment.
- ii. Paragraph 7 states that the “Ground Force Commander (GFC) was responsible for the conduct of the operation, including providing clearance for the any engagements”. NZDF notes that this characterisation is an over-simplification of the legal and factual situation which NZDF expects would be further considered by the

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<sup>2</sup> NZDF Presentation a Public hearing Module 1, p 9.

Inquiry.

- iii. Paragraph 24 states that *"...in a previously classified document disclosed on the Inquiry's website, which was prepared the day after the operation, the NZSAS assessed that it was likely the targets were at the locations and left when they heard the helicopters arrive."* As the Counsel for the Crown Agencies stated in a memorandum filed on 6 May 2019 to accompany the release of the document referred to by the Inquiry in paragraph 24 of the Interim Comparative Analysis:

*"4. The nature of a Special Forces operation like Operation Burnham is such that a post-operation reporting process was undertaken to obtain a complete account of the operation.*

*5. This process involved multiple documents from different sources, only some of which are included in this release. Individual components of the reporting process may contain intelligence from a single source that would not necessarily be known to others involved in the same operation, or details that are updated over time as more information is collected and processed. For this reason, the documents are often headed as "updates" or will frequently refer to events in terms such as "likely", or "possible", or "unconfirmed".*

*6. In isolation, the documents that the Inquiry has selected to be released in this second tranche form only part of the overall account, and should not be taken as a complete and verified representation of the facts of Operation Burnham. The redacted documents should be read together with this memorandum".<sup>3</sup>*

- c. Further, the NZDF notes that the headings of certain paragraphs in the Interim Comparative Analysis contain, or are based upon factual premises that remain disputed, or have not yet been determined conclusively by the Inquiry. For example, paragraphs are titled "How many civilians were killed in the operation?" (paragraph 46) and "How many civilians were injured in the operation?" (paragraph 47), though the question of whether civilian deaths or injuries occurred during the operation has not yet been determined.
4. Notwithstanding the limited timeframe, the NZDF appreciates the opportunity to comment on the Interim Comparative Analysis. It would be obliged if the Inquiry would note, in the introductory paragraphs of the Interim Comparative

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<sup>3</sup> Para 6

Analysis (or elsewhere as the Inquiry considers appropriate), that the document presents an interim analysis of the publicly available, unclassified material on Operation Burnham, and that the details of the Operation and other matters in the Inquiry's Terms of Reference remain under the Inquiry's consideration and will be addressed further in the Inquiry's subsequent public hearings, including those scheduled for next week on 22-23 May.

A handwritten signature in blue ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

Paul Radich QC  
Counsel for New Zealand Defence Force  
17 May 2019