

**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 Following Public Hearing Number 2**

**13 June 2019**

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1. This submission is filed at the invitation of the Inquiry on behalf of the NZDF, as a core participant in the Inquiry. It addresses a number of issues arising from the public hearing for Module 2, held on 22-23 May 2019.

### **Presentations by Nicky Hager**

2. NZDF welcomes the contributions of all core participants and interested parties to enable the Inquiry to inquire into and report on the matters within its terms of reference. The NZDF has to date adopted a position of providing all relevant material that it has to the Inquiry without engaging directly with allegations made by others, on the basis that it has confidence in the Inquiry's processes and that the evidence the Inquiry receives speaks for itself.
3. However, the presentations made by Nicky Hager at public hearing 2<sup>1</sup> are of such a nature that NZDF does not see it as appropriate to leave certain points unanswered. The papers presented by Mr Hager at public hearing Module 2 are concerning to NZDF because their content is based substantially upon Mr Hager's personal views which are expressed often in extreme terms. Much of the content is not evidence and, to the extent that it is a submission, it is not evidence-based.
4. The content of the presentations made, and to be made, by NZDF to the Inquiry has been directed carefully by the Inquiry. A list of points to be covered has been expressed by the Inquiry and included in its hearing agendas and Minutes. This approach is entirely in order. NZDF's presentations, covering the points identified by the Inquiry, are, to the extent that they relate to matters of fact, evidence-based and, to the extent that they relate to matters of law, based upon relevant authorities. NZDF asks, at the conclusion of this paper, that similar direction be provided to Mr Hager in the future so that his presentations contain boundaries, not observed in his presentations at public hearing 2, in order to serve the Inquiry's fact-finding mandate.

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<sup>1</sup> The first presentation on 22 May 2019 (which was to be in response to presentations on military context and political context in Hearing 1) and the second presentation on 23 May 2019 (on rules of engagement, military doctrine and detention).

5. NZDF confines its response to the two presentations given by Mr Hager during public hearing 2 to four primary topics.

### **The nature and purpose of the presentations**

6. Mr Hager's first presentation ("the first presentation") was described in Minute 12 as being in reply to two presentations given during the Inquiry's first public hearing; the first by Sir Angus Houston on the nature of the Afghanistan conflict from a military perspective, and the second by Hon. Dr Wayne Mapp on the New Zealand Government's decisions in 2009 to deploy the NZSAS. However, the first presentation did not respond to those presentations. Instead, Mr Hager's views on other topics were addressed:

- (a) Mr Hager spoke of his book *Other People's Wars*, expressing a personal opinion that "years of incoherent strategy in Afghanistan followed".<sup>2</sup>

- (b) Mr Hager spoke, in critical terms, of the war in Iraq and expressed personal views about the motivations of former Prime Minister Rt. Hon. Helen Clark.

7. Similarly, Mr Hager expressed, in his presentation on the second day of public hearing 2 ("the second presentation"), a set of detailed personal views about the events on the ground during Operation Burnham; not, with limited exceptions, on issues concerning ROE military doctrine and detention as had been prescribed.
8. Mr Hager addressed, at some length throughout both presentations, his personal view that relevant information has been hidden or covered up; a point that is discussed below.

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<sup>2</sup> The NZDF notes Sir Angus Houston's relevant and evidence-based views, including his description of the relatively modest contribution by New Zealand and Australian troops in Afghanistan that required supplementation from other coalition assets but which, in time, became an effective component of the ISAF force; itself a significant undertaking by the world community. Sir Angus Houston, *Presentation to Operation Burnham Inquiry – public hearing Wellington 4 April 2019*, pages 2 and 14.

## A mistaken view of a cover-up

9. The central theme in the first and second presentations is the expression of a personal view that the NZDF has in some way withheld or covered up relevant information. It is a point expressed in various ways throughout the presentations, including phrases such as “keeping embarrassing things secret”,<sup>3</sup> “defending reputation meant that they ran this utterly disingenuous line”,<sup>4</sup> “NZDF attitude of hiding and denial”,<sup>5</sup> “hiding any information that does not suit it”,<sup>6</sup> “the NZSAS has airbrushed the civilian casualty problem away”,<sup>7</sup> “the SAS’s determination to hide and deny”.<sup>8</sup> Unfortunately, in a number of places the views descend into personal attacks. The NZDF does not respond in kind or on a point by point basis but makes a number of comments on points that cannot be left unanswered.
10. The first, and essential, point is that NZDF’s approach is the antithesis of that suggested by Mr Hager: nothing has been deliberately withheld from the Inquiry by the NZDF. NZDF has undertaken thorough searches to identify relevant documents in its possession and control and has made those documents available to the Inquiry without adjustment. It has participated earnestly in the process the Inquiry has put in place to enable certain previously classified documents to be released publicly with appropriate redactions (noting that all documentation released to date has been by agreement, contrary to Mr Hager’s assertion that NZDF has been forced to make the material available).
11. Further to the provision of relevant documentation, the NZDF has made all of its people available to give evidence and information to counsel assisting and to the Inquiry members. In doing so, the members of its Special Inquiry Office (“SIO”, created to facilitate the provision of information to the Inquiry) have only had contact with any NZDF members giving evidence to the Inquiry for limited purposes: the administrative aspects of their participation; to provide information about welfare and support services; or to identify, collate and

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<sup>3</sup> Nicky Hager, *module 2 presentation*, 22 May 2019, page 2.

<sup>4</sup> *ibid*, page 3.

<sup>5</sup> *ibid*, page 4.

<sup>6</sup> *ibid*, page 4.

<sup>7</sup> *ibid*, page 6.

<sup>8</sup> *ibid*, page 2.

provide factual information and material to the Inquiry. The SIO and its internal and external lawyers do not have contact with any of the NZDF members giving evidence to the Inquiry on matters related to their evidence. As the Inquiry has said in Ruling No. 1, the witnesses are its witnesses and NZDF has taken the view that it is essential that the witnesses speak to counsel assisting and Inquiry members uninfluenced in any way by others within or on behalf of the NZDF.

12. The role of members of the SIO, when it comes to evidence to be given to the Inquiry by NZDF members, is limited to making administrative arrangements for the witnesses to speak with counsel assisting or the members of the Inquiry, as the case may be. Significant lengths, from a practical and information technology perspective, have been gone to, to ensure that communications between counsel assisting and Inquiry secretariat staff on the one hand and NZDF witnesses on the other (including the provision of supporting documents) can be transmitted to and from NZDF witnesses without anyone else within the NZDF having access to them.
13. The NZDF's objective is to properly assist the Inquiry by providing all that the Inquiry needs to reach conclusions in accordance with its terms of reference; to enable the Inquiry to get to the truth.
14. Secondly, on this point, Mr Hager has referred to the NZDF "employing a small army of PR staff to control information reaching the public"<sup>9</sup> and has referred to the job description of the NZDF Director of Public Affairs. The NZDF Director of Public Affairs is not involved with the NZDF's participation in the Inquiry. There is only one person within the NZDF's SIO that has any form of communications role: the SIO's Strategic Liaison Advisor whose role includes facilitating communications between the Inquiry and NZDF personnel regarding administrative aspects of their participation in the Inquiry's processes, on the basis outlined above. The role is undertaken professionally and its holder is not in a position to influence the terms of information released.

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<sup>9</sup> Nicky Hager, *module 2 presentation*, 22 May 2019, page 2.

15. Thirdly, it is said that the document prepared by NZDF, entitled NZDF unreferenced account of events at issue<sup>10</sup> (referred to here as “the Narrative”) “highlights key falsehoods”.<sup>11</sup> As has been explained in paragraph 11 above and in the introductory paragraphs of the Narrative itself, NZDF personnel with relevant knowledge were consulted to provide as accurate an account as possible, but the NZDF personnel who participated in Operation Burnham were not interviewed to produce or contribute to the Narrative – because they are the Inquiry’s witnesses and there must be no potential for anything they say to the Inquiry to be influenced. Accordingly, when requested by the Inquiry to produce an account of the events,<sup>12</sup> the Narrative was prepared faithfully based upon the material available to NZDF at the time including documents, video footage, photographs, records and interviews from a prior investigation, not all of which is able to be released publicly. It is the NZDF’s best understanding of the events as revealed by the relevant documentary and video evidence. However, these events are a matter for the Inquiry to consider based on all the evidence available to it.
16. Fourthly, it is said in the first presentation that military officers and lawyers for the NZDF have misled the Inquiry and the public. These are the most serious of allegations. They are denied firmly. In the event that an NZDF lawyer was aware of any information to suggest the Inquiry or the public was being misled in any way, they would have professional, ethical, obligations to disclose the information or to withdraw. There is no basis for them to do either of those things.

#### **Mr Hager’s opinions on the events of Operation Burnham**

17. The first and second presentations give Mr Hager’s personal view of events during Operation Burnham. Terms such as “I would argue”, “I suspect”, “I believe”, “I am told”, and “apparently” are used throughout the documents.
18. This approach is to be contrasted with accounts given based upon recorded evidence – documentary and video – and the evidence the Inquiry will gather directly from relevant participants under oath.

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<sup>10</sup> Lodged with the Inquiry on 7 November 2018.

<sup>11</sup> Nicky Hager, *module 2 presentation*, 22 May 2019, page 4.

<sup>12</sup> Minute No 4 of Inquiry, 14 September 2018 at [11] and [94].

19. NZDF is confident that, as the Inquiry has said, it will “get at the truth” of the matter<sup>13</sup> and does not engage in kind with the opinions expressed in the first and second presentations. However, some of the more extreme comments cannot be left as they are:

(a) Mr Hager has levelled inappropriate allegations against the NZSAS Ground Force Commander. Matters related to those allegations will be addressed in Module 3. Suffice to say for now that the Ground Force Commander authorises engagement in accordance with the rules of engagement and international humanitarian law.

(b) It is said in the first presentation that reports of civilian casualties received shortly after the events of Operation Burnham were “airbrushed” away by NZDF.<sup>14</sup> In saying this, Mr Hager is referring to several documents that have been released publicly through the Inquiry process (on a redacted basis and in accordance with the Inquiry’s disclosure process) which provided intelligence updates in the days and weeks following Operation Burnham.<sup>15</sup> It is said that, while early intelligence reports refer to potential civilian casualties or harm, successive reports refer to those killed or injured, mainly, as insurgents.

In fact, the intelligence updates recorded raw information from various sources; the reliability of which was still to be tested.<sup>16</sup> As was said in the Crown memorandum that was filed alongside this tranche of released documents:<sup>17</sup>

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.

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

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<sup>13</sup> Minute No 1 of Inquiry, 10 July 2018 at [10].

<sup>14</sup> Nicky Hager, *module 2 presentation*, 22 May 2019, page 6.

<sup>15</sup> See redacted documents relating to Operation Burnham published on the Inquiry’s website on 7 May 2019.

<sup>16</sup> The Taliban was known to disseminate false claims of civilian casualties, as mentioned by Sir Angus Houston in his presentation to the Inquiry on 4 April 2019, *Presentation to Operation Burnham Inquiry – public hearing Wellington 4 April 2019*, page 13.

<sup>17</sup> Memorandum of Counsel for the Crown, 6 May 2019 at [4] – [6].

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”.

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.

The short point is that the reports become more accurate, not less accurate, over time. Over the course of the weeks that followed Operation Burnham, a greater range of information was received. ISAF, with Afghan involvement, conducted a joint investigation, concluding that civilian casualties may have been possible due to a gunsight malfunction on one coalition aircraft. As information reported from sources in the earlier updates was able to be tested, a more accurate picture emerged: the picture expressed subsequently in the Narrative.

(c) One example might be taken of the dangers of expressing opinions based upon unverified information. Mr Hager’s first presentation said:<sup>18</sup> The declassified document number 13 reports that two Local Nationals (possibly linked to this operation) are at PEK Hospital” ... We have details of those two women in hospital in Hit and Run. Why didn’t the NZSAS go and see them; check what happened and offer help? Why wasn’t this in the Narrative? Because this key contribution to the Inquiry is a PR job”.

An assessment team did visit the hospital. Classified information provided to the Inquiry indicates the details of the team’s finding, which does not align with Mr Hager’s assessment above.

### **Mr Hager’s view on rules of engagement**

20. The second presentation on the rules of engagement is introduced with a comment from Mr Hager that he does not “pretend to be an expert on this”; a fair caveat in the face of the evidence the Inquiry has received and will receive from those who are in a position to claim expertise.

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<sup>18</sup> Nicky Hager, *module 2 presentation*, 22 May 2019, page 6.

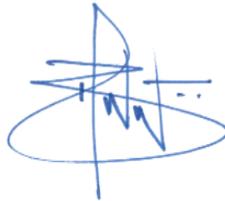
21. However, despite the caveat, Mr Hager spends a number of pages expressing his views on the application of ROE. The issues for the Inquiry involve the application of ROE A – the use of force in self-defence against a hostile act or demonstration of hostile intent – together with ROE H – the use of force against individuals, forces or groups directly participating in hostilities in Afghanistan against the legitimate Afghan government. The NZDF has said from the outset that the ROE were applied faithfully and with good cause and the Inquiry will consider that position carefully.
22. NZDF does wish to raise a point in relation to the comment in the second presentation that ROE I is something that “New Zealanders would be likely to have problems with”. ROE I reads:

Actions which could result in incidental casualties and collateral damage are permitted if the action is essential for mission accomplishment and the expected incidental casualties and collateral damage are proportionate to the concrete and direct military advantage anticipated.
23. The ROE expresses the principle of proportionality, a fundamental principle of international humanitarian law. This, perhaps, is the nub of the matter. However unfortunate it may be, in an armed conflict, death that occurs in accordance with international humanitarian law is not unlawful.

**Points in conclusion**

24. NZDF welcomes the full participation in the Inquiry’s processes of all core participants and other interested parties. Presenting evidence and submissions appropriately ensures that the Inquiry is equipped with all relevant information to get to the truth of the matter and to respond appropriately to the issues raised in its terms of reference.
25. To ensure that presentations are evidence or authority-based and that they deal directly with the subject matter of a particular public hearing, the NZDF would appreciate the Inquiry providing specific directions to each party who is to speak at its future public hearings, including Mr Hager, about the points the Inquiry wishes them to address.

26. Finally, the NZDF would appreciate an opportunity, at public hearing 3, to make oral submissions for 30 minutes in response to the presentations that were made at public hearing 2.



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