



Government Inquiry into Operation Burnham

Progress Report No 4

An update on Public Hearing Module 2, the provision of information to the Inquiry and other issues

Public Hearing Module 2

The Inquiry held [Public Hearing Module 2](#) on 22 and 23 May 2019 in Wellington. An expert witness opened the presentations by providing a perspective on how the conflict in Afghanistan has affected the lives of people who live there, with particular reference to health, child mortality and education. The witness also described how post-traumatic stress disorder had affected people and how this was treated. This will be published on the Inquiry website once redactions relating to the confidentiality order issued at the hearing are finalised.

Nicky Hager, co-author of the book *Hit & Run*, presented a response to the presentations in [Public Hearing Module 1](#) (held on 4 April 2019). Mr Hager's presentation included a critique of the New Zealand Defence Force (NZDF) public relations strategy in relation to the activities of its forces in Afghanistan. He also commented on the NZDF narrative supplied to the Inquiry describing the events of 21/22 August 2010, i.e. Operation Burnham. His presentation can be read [here](#).

Kevin Riordan, Judge Advocate General of the Armed Forces, outlined the history and purpose of Rules of Engagement (ROE), how ROE must reflect applicable international law and New Zealand domestic law, and how they are developed and approved. Read his presentation [here](#).

Brigadier Lisa Ferris, Director of NZDF Legal Services, described the training delivered to New Zealand forces on the law of armed conflict and ROE, and how training is delivered in a conflict zone. She also described how ROE operate in the context of international operations, such as in Afghanistan. This presentation can be read [here](#).

Day 2 opened with a combined presentation by Crown agencies, which covered the detention of people by New Zealand forces in Afghanistan. The presentations by international law expert [Dr Penelope Ridings](#), [Heath Fisher](#) from the Ministry of Foreign Affairs and Trade, and [Brigadier Ferris](#) examined international conventions, the arrangements between the New Zealand and Afghanistan governments on how detainees would be treated, and how detention operations were conducted by New Zealand and Afghan forces.

Former Minister of Defence, the Hon Dr Wayne Mapp, described the evolution of ROE in the Afghanistan conflict, his concerns in relation to detention issues, and what New Zealand forces did to help improve the treatment of detainees generally. Read his presentation [here](#).

Nicky Hager detailed his concerns about the New Zealand ROE applying in Afghanistan, and outlined his view that ROE were breached by New Zealand special forces during Operation Burnham. Read his presentation [here](#).

Counsel for Jon Stephenson, co-author of the book *Hit & Run*, covered legal issues around detention, in particular, the international and domestic legal obligations of New Zealand forces to ensure people detained during combined operations with Afghan forces were not subject to torture or other ill-treatment. Read the presentation [here](#).

A third public hearing will be held on 29 and 30 July 2019. Read the agenda [here](#).

Latest disclosure of classified documents

The Inquiry has committed to a programme of work to ensure public disclosure of as much relevant material as possible, particularly in advance of public hearings. These will be disclosed in accordance with the Inquiry's [protocol](#) for reviewing classified documents.

The Inquiry recently published further tranches of documents on [7 May 2019 and 17 May 2019](#), following the disclosure of Cabinet documents on [26 March 2019](#).

The latest material disclosed includes advice to the Minister of Defence on the detention of individuals in Afghanistan, NZDF documents relating to arrangements for detainees, and other relevant issues.

In addition, the Inquiry published material relating to Operation Burnham—specifically the events under investigation by the Inquiry on the night of 21/22 August 2010—and the ROE governing New Zealand forces in Afghanistan. Issues relating to detention and ROE were the subject of presentations at Public Hearing Module 2 on 22 and 23 May 2019. The documents can be found [here](#).

Over the coming months, further documents are expected to be published on the Inquiry website, including additional material on Operation Burnham and the Joint Prioritised Effects List.

Provision of information

The Inquiry is nearing the end of the process of obtaining all relevant information from various government agencies. This has been complex and time-consuming, involving a large volume of material requiring review and analysis.

The Ministry of Defence has now completed the provision of its material, filing a statutory declaration to this effect.

Government Communications and Security Bureau (GCSB) and the New Zealand Security Intelligence Service continue to provide material to the Inquiry.

As noted in [Progress Report No 3](#), the Inquiry was recently informed of a repository of classified material generated or received by NZDF personnel that is held by GCSB. The Inquiry is now working with GCSB to focus on documents that are most relevant to its work.

The Inquiry is interested in a range of relevant documents held by Crown agencies which are either authored by overseas partner agencies or contain information sourced from them. Obtaining consent from overseas partners has been an important part of the overall process of receiving relevant material.

The overseas partners are New Zealand's international partners in the Afghanistan conflict or international organisations – the United States, the North Atlantic Treaty Organisation (NATO), and the United Nations (UN).

The Ministry of Foreign Affairs and Trade (MFAT) has been leading the process of obtaining consent for some tranches of material.

MFAT is expecting a response from the UN Mission in Afghanistan shortly on a recent request. This relates to information the UN may hold in relation to the various operations under examination by the Inquiry, including information on any investigations the mission carried out into the events of 21/22 August 2010.

Discussions are also continuing with NATO regarding a second tranche of documents. This includes material referenced in the Crown Law opinion provided to NZDF in November 2010 in relation to issues surrounding the detention of persons by Afghanistan authorities. This opinion was part of the recent tranche of previously classified material published by the Inquiry on 7 May 2019.

In addition, on behalf of the Inquiry, MFAT has recently requested from the United States Department of Defense a second tranche of documents and has made inquiries in relation to the possible existence of further specific material not in the possession of any New Zealand agency.

Taking evidence from Afghan villagers

The Inquiry has been carefully considering its approach in relation to taking evidence from Afghan villagers, as set out in [Minute No 14](#). Following further submissions from core participants and the Crown, [Minute No 15](#) asks counsel for the Afghan villagers to respond to earlier requests from the Inquiry in relation to details about their clients, concerning their locations.

Comparative analysis of public accounts of Operation Burnham

The Inquiry has published an [interim analysis](#), based on publicly available, unclassified material, relating to what occurred during Operation Burnham and Operation Nova.

The details of these operations, and other matters in the Inquiry's Terms of Reference, remain under the Inquiry's consideration. The interim analysis document describes the public accounts given by the authors of *Hit & Run* and the NZDF, identifying areas where the public accounts align or appear to be reconcilable, and areas where they appear to diverge.

The public accounts compared in this document have been drawn from *Hit & Run*, memoranda and submissions made to the Inquiry (which have been published on the Inquiry's website), [NZDF's presentation](#) at the Inquiry's Public Hearing Module 1 and documents published on the NZDF website. The document also refers to [previously classified documents](#) that have been published on the Inquiry's website as a result of its process for reviewing classified information.