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Terms of Reference: Government Inquiry into Operation Burnham and related matters

Background

- [1] Between late 2001 and 2013, New Zealand Defence Force (“NZDF”) forces were operating in Afghanistan. In 2010, NZDF was operating as part of the International Security Assistance Force (“ISAF”). ISAF was authorised by the United Nations Security Council to train Afghanistan National Security Forces, to assist in rebuilding key government institutions and to support the Afghanistan government in combating the Taliban and restoring security.
- [2] On 21-22 August 2010, the NZDF forces took part in an operation with coalition partners (Afghan Crisis Response Unit and the Armed Forces of the United States of America) in Tirgiran Valley in Baghlan Province (“Operation Burnham”). This was followed by a second mission to Tirgiran Valley on 2-3 October 2010 (“Operation Nova”).
- [3] In March 2017, the book *Hit & Run* by Nicky Hager and Jon Stephenson was published, which contained a number of serious allegations against NZDF personnel involved in the Operations. While NZDF has strongly denied these allegations, and has endeavoured to respond to them, they have had an impact on its public reputation, which an independent review can address.
- [4] In light of these allegations, it is in the public interest that a Government Inquiry be established into Operation Burnham and related matters. The full spectrum of powers and duties set out in the Inquiries Act 2013 will therefore be available. The Attorney-General is the appointing Minister.

Purpose of the Inquiry

- [5] The matter of public importance which the Inquiry is directed to examine is the allegations of wrongdoing by NZDF forces in connection with Operation Burnham and related matters. Operation Burnham took place during a non-international armed conflict, and the applicable legal framework (including international humanitarian law) will be considered.
- [6] To this end, the Inquiry will:
 - 6.1. Seek to establish the facts in connection with the allegations of wrongdoing on the part of NZDF personnel during the Operations;
 - 6.2. Examine the treatment by NZDF of reports of civilian casualties following Operation Burnham;
 - 6.3. Examine the circumstances of Qari Miraj’s transfer and/or transportation to the Afghanistan National Directorate of Security;
 - 6.4. Examine the extent to which NZDF rules of engagement authorised the predetermined and offensive use of force, whether this was apparent to those approving the rules of engagement, and whether NZDF’s application of this aspect of the rules of engagement changed;
 - 6.5. Report its findings and any recommendations to the Attorney-General as appointing Minister.

Scope of the Inquiry

- [7] Having regard to its purpose, the Inquiry will inquire into and report on the following:
- 7.1. The conduct of NZDF forces in Operation Burnham, including compliance with the applicable rules of engagement and international humanitarian law;
 - 7.2. The assessment made by NZDF as to whether or not Afghan nationals in the area of Operation Burnham were taking direct part in hostilities or were otherwise legitimate targets;
 - 7.3. The conduct of NZDF forces in the return operation to Tirgiran Valley in October 2010;
 - 7.4. The NZDF's planning and justification/basis for the Operations, 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;
 - 7.5. The extent of NZDF's knowledge of civilian casualties during and after Operation Burnham, and the content of written NZDF briefings to Ministers on this topic;
 - 7.6. Public statements prepared and/or made by NZDF in relation to civilian casualties in connection with Operation Burnham;
 - 7.7. Steps taken by NZDF after Operation Burnham to review the conduct of the operation;
 - 7.8. Whether NZDF's transfer and/or transportation of suspected insurgent Qari Miraj to the Afghanistan National Directorate of Security in Kabul in January 2011 was proper, given (amongst other matters) the June 2010 decision in *R (oao Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445;
 - 7.9. Separate from the Operations, whether the rules of engagement, or any version of them, authorised the predetermined and offensive use of lethal force against specified individuals (other than in the course of direct battle), and if so, whether this was or should have been apparent to (a) NZDF who approved the relevant version(s) and (b) responsible Ministers. In particular were there any written briefings to Ministers relevant to the scope of the rules of engagement on this point; and
 - 7.10. Whether, and the extent to which, NZDF's interpretation or application of the rules of engagement, insofar as this involved such killings, changed over the course of the Afghanistan deployment.
- [8] The Inquiry may also make such recommendations as it considers appropriate.
- [9] The Inquiry has no jurisdiction to make determinations about the actions of forces or officials other than NZDF forces or New Zealand officials.

Conduct of Inquiry

- [10] In conducting its review, the Inquiry is expected to consider available:
- 10.1. evidence of relevant Government officials and NZDF personnel (including those who took part in Operation Burnham);
 - 10.2. evidence of Afghan nationals and/or other witnesses;
 - 10.3. relevant audio-visual material;
 - 10.4. NZDF reports, briefings, intelligence and operational documentation relating to the Operations;
 - 10.5. reports produced by ISAF, international organisations, Non-Governmental Organisations, or other parties in relation to the Operations; and
 - 10.6. any other evidence the Inquiry considers relevant to determining the issues within its scope.
- [11] The Inquiry may, if appropriate and after liaising with the relevant State, conduct Inquiry business (including interviewing witnesses and/or conducting site visits) outside New Zealand (having regard to the need to avoid unnecessary cost in relation to public funds).

Principles of Inquiry

- [12] In all of its work, the Inquiry shall act independently, impartially, and fairly.
- [13] The Inquiry, in common with all inquiries under the Inquiries Act, has no power to determine the civil, criminal, or disciplinary liability of any person. It may, however, make findings of fault or recommendations that further steps be taken to determine liability.¹
- [14] As further set out in the Inquiries Act, the Inquiry may, where appropriate, hold the Inquiry, or any part of it, in private. It may restrict access to inquiry information (including evidence, submissions, rulings, hearing transcripts and the identity of witnesses). Such steps may be taken in order to:
- 14.1. Protect the security or defence interests of New Zealand or the international relations of the Government of New Zealand;
 - 14.2. Protect the confidentiality of information provided to New Zealand on a basis of confidence by any other country or international organisation;
 - 14.3. Protect the identity of witnesses;
 - 14.4. Ensure that individuals' fair trial rights are protected;
 - 14.5. Ensure that current or future criminal, civil or other proceedings are not prejudiced; or for any other reason the Inquiry considers appropriate.

¹ Inquiries Act 2013, s 11.

- [15] After consultation with the appropriate or appointing Minister, and if the statutory criteria are met, the Inquiry may postpone or temporarily suspend the inquiry.

Appointments

- [16] The members of the Inquiry are Sir Terence Arnold KNZM QC and Sir Geoffrey Palmer KCMG AC QC PC.
- [17] Of the members Sir Terence Arnold shall act as Chairperson of the Inquiry.

Authority

- [18] The Inquiry is established as a Government Inquiry under s 6(3) of the Inquiries Act 2013.

Commencement of work and reporting requirements

- [19] The Inquiry will commence on, and may begin considering evidence on, dates to be confirmed.
- [20] The provisional reporting date for the Inquiry is no later than 12 months following establishment of the Inquiry.
- [21] Where appropriate, the Inquiry may issue recommendations prior to issuing its final report.