

Office of the Attorney-General
Office of the Minister of Internal Affairs

Chair
Cabinet Government Administration and Expenditure Review Committee

Government Inquiry into Operation Burnham and related matters: extension to the final report back date and additional funding

Proposal

1. This paper seeks Cabinet's agreement to an extension to the final report back date for the Government Inquiry into Operation Burnham and related matters (the Inquiry), from 16 April 2019 to 31 December 2019.
2. This paper also seeks Cabinet's agreement to an increase of \$5.000 million to Vote Internal Affairs' appropriations to cover the costs associated with the extension and the work of the Inquiry.

Executive summary

3. On 9 April 2018, Cabinet endorsed the Attorney-General's decision to establish a Government Inquiry to examine the allegations of wrongdoing by the New Zealand Defence Force (NZDF) in connection with Operation Burnham and related matters. [CAB-18-MIN-0159 refers].
4. Cabinet delegated Power to Act to the Minister of Finance, the Attorney-General, and the Minister of Internal Affairs (the Ministers with Power to Act) to make decisions regarding any additional funding requested by the Inquiry. However, given the quantum of additional funding sought, the Attorney-General has consulted with the Minister of Finance and determined that Cabinet should make the decision. The prospect of additional funding being required by the Inquiry was acknowledged by Cabinet when the Inquiry was originally established.
5. On 13 April 2018, the Government Inquiry into Operation Burnham and related matters (the Inquiry) was established. Sir Terence Arnold (Chair) and Rt Hon Sir Geoffrey Palmer were appointed as members of the Inquiry.
6. The Inquiry commenced 16 April 2018 with an initial budget of \$2.000 million and a reporting date of 16 April 2019. On 20 December 2018, the Inquiry wrote to the Attorney-General requesting that the final reporting date be extended to 31 December 2019, and for additional funding of \$5.000 million which, if approved, would increase the total funding allocated to the Inquiry to \$7.000 million.
7. The work to date has been complex and time consuming and has included setting up arrangements for the security and management of the classified information provided, holding public hearings on the proposed procedure for conducting the Inquiry, engagement with core participants and other parties, and developing the procedural approach.
8. As a result of the work to date, the Inquiry has determined the extent and focus of the work required to deliver on its Terms of Reference. The additional time and funding requested is to cover: interviewing witnesses in New Zealand and overseas, providing legal assistance to specified individuals (as defined in the Inquiries Act 2013), securing legal and independent expertise (as required) and managing, reviewing and analysing the relevant documents.

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9. The Attorney-General, as appointing Minister under section 7(3)(b) of the Inquiries Act 2013, can grant the extension of time to the Inquiry. However, given that the extension of time and funding request are interrelated, the Attorney-General has determined that the extension of time is also a matter best decided by Cabinet.
10. Crown Law Office (Crown Law) and Department of Internal Affairs (the Department) officials have reviewed the Inquiry's request for an extension of time and for additional funding, and support the Inquiry's request.
11. It is proposed that the requested increase in funding, if approved by Cabinet, should come from the between-Budget contingency. The Inquiry is expected to conclude in December 2019 and requires full funding prior to budget decisions being confirmed in April 2019.

Background

12. Between late 2001 and 2013, the New Zealand Defence Force (NZDF) was deployed to Afghanistan. In 2010, the 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.
13. During 21 and 22 August 2010, NZDF forces took part in Operation Burnham with coalition partners (the Afghan Crisis Response Unit and the Armed Forces of the United States of America) in Tirgiran Valley in Baghlan Province. This was followed by a second mission to Tirgiran Valley on 2 and 3 October 2010 (Operation Nova).
14. In March 2017, Nicky Hager and Jon Stephenson published their book *Hit & Run*, which contained a number of serious allegations regarding the actions of NZDF personnel involved in the two operations. While NZDF has strongly denied these allegations, and has endeavoured to respond to them, they have had an impact on its reputation.

Establishment of the Inquiry and progress to date

15. On 9 April 2018, Cabinet endorsed the Attorney-General's decision to establish an inquiry to examine the allegations of wrongdoing by the NZDF in connection with Operation Burnham and related matters [CAB-18-MIN-0159 refers].
16. The Inquiry will seek to establish the facts in connection with those allegations of wrongdoing, examine the treatment by NZDF of reports of civilian casualties following Operation Burnham, examine the circumstances of Qari Miraj's transfer to the Afghanistan authorities, and examine issues relating to authorisation for the predetermined and offensive use of force within NZDF rules of engagement. It will report its findings and any recommendations to the Attorney-General.
17. Cabinet agreed an initial budget of \$2.000 million for the Inquiry and further noted that the Inquiry would likely require additional funding. Accordingly, Cabinet delegated Power to Act to the Minister of Finance, the Attorney-General and the Minister of Internal Affairs to make decisions about any additional funding needed.

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18. Cabinet noted that the costs of the Inquiry would be largely driven by the decisions that Inquiry members make in order to deliver on the Terms of Reference set by the Government but that the Inquiry is required to be fiscally responsible and operate in the same way as public servants, following appropriate guidelines [CAB-18-MIN-0159 refers].
19. At the time of the Inquiry's establishment several significant variables affecting the Inquiry's costs were unknown, including: the amount of information available, the time needed to investigate and deliver on the Inquiry's Terms of Reference, the time and costs associated with interviewing people in New Zealand and overseas, providing Crown funded legal assistance to core participants, and contracting independent expertise on specialist matters under consideration.
20. Cabinet authorised the Prime Minister, Deputy Prime Minister, and the Attorney-General to have Power to Act to appoint two Inquiry members, confirm their fees and finalise the Terms of Reference. Sir Terence Arnold was appointed as the Chair and Rt Hon Sir Geoffrey Palmer was appointed as the other member of the Inquiry.
21. The Minister of Internal Affairs is the appropriate Minister under the Act, responsible for the Department of Internal Affairs, which administers the Inquiry.
22. The Inquiry began on 16 April 2018. The Terms of Reference stipulate a provisional reporting date of up to 12 months following the establishment of the Inquiry, which makes the final report due by 16 April 2019.
23. Work to date has been complex and time consuming and has included setting up arrangements for the security of information provided, holding public hearings on the proposed procedure for conducting the Inquiry, engagement with core participants and other parties, and developing the procedural approach. Two barristers with experience in dealing with classified material have been engaged to review documents, identify opportunities for redacting, declassifying or providing unclassified summaries of protected information. This process has added complexity and time delay to the Inquiry's process.
24. On 20 December 2018, the Inquiry wrote to the Attorney-General seeking an extension to its final reporting date from 16 April 2019 to 31 December 2019, and for additional funding of \$5.000 million, which, if approved, would increase the total funding to \$7.000 million.
25. On 21 December 2018 the Inquiry issued its first ruling. In sum, the Inquiry determined that in general evidence will be given by witnesses in private and tested by the Inquiry members/counsel assisting the Inquiry (and not by counsel for the core participants). Further, it held that all classified material will remain confidential unless and until the Inquiry determines otherwise following its review process (such that this material is not currently being provided to the public or non-Crown core participants). The Inquiry also clarified in its ruling that it will hold a number of public hearings, as they wish to conduct as much of the Inquiry in public as reasonably possible. Details of the nature of the first public hearing have since been released. Counsel for the Afghan villagers wrote to the Attorney-General in February 2019 and raised a number of concerns with the Inquiry's ruling, relating to access to material and the ability to be present at all hearings and cross-examine witnesses. They asked the Attorney-General to amend the Inquiry's terms of reference to accommodate their concerns, or initiate a separate investigation. The Attorney-General decided against either course and notified counsel accordingly.

Inquiry's rationale for an extension of time and additional funding

26. The Inquiry had deliberately maintained a small establishment team until it was clearer about its processes, and the volume and nature of information to be considered. The Inquiry anticipated that additional capacity and capability would be needed once these matters had been clarified. The Inquiry now knows the scope of the required work and the evidential processes needed to meet the Terms of Reference and has developed its budget for the final stage of work accordingly.
27. The budget for the next stage of work includes:
 - \$0.411 million in fees for the Chair and member; and
 - \$4.589 million to cover the Inquiry's staff, legal and specialist fees, interview costs including translation and transcription, legal assistance for specified core participants, and other operating costs associated with the Inquiry.
28. The Inquiry made it a priority to confirm its approach and processes. The Terms of Reference left open the extent to which the Inquiry might hold its activities in private, or restrict access to Inquiry information (including evidence, submissions, rulings, hearing transcripts and the identity of witnesses). In considering its approach, the Inquiry has sought to balance a range of competing interests. It has issued a number of minutes outlining proposed processes, received written submissions on these, and has now heard all parties' oral submissions.
29. The Inquiry issued Ruling 1 (21 December 2019) confirming its procedural approach and reflecting the balance it seeks between protecting information and people, and meeting the principles of natural justice and open justice to the extent possible.
30. A summary of the work plan, and hence the broad types of expenditure, is set out below.

Witness work and public hearings

31. Noting that most witnesses require confidentiality, the Inquiry has determined that all witnesses will be witnesses of the Inquiry, such that in general evidence will be given in private before the Inquiry members and counsel assisting, and testing it will be carried out by the Inquiry members and counsel assisting. This is a significant task for the Inquiry.
32. The next phase of the Inquiry's work will involve several phases of witness interviews, including providing interpretation and transcription services.
33. The Inquiry has sought to incorporate open or public elements into its processes including further public hearings on particular issues, and hearing from some witnesses in open fora. These elements provide important counterweight opportunities for the work that needs to be conducted in private. The comprehensive nature of these up-coming hearings is evident from Minute 8 (11 February 2019), which deals with the first public hearing (to take place on 4 April 2019). The Minute explains that background papers and oral presentations will be given in relation to Afghanistan, the decision to deploy New Zealand forces to Afghanistan, and the location of the events of Operation Burnham.

Classified material and volume of material

34. Much of the material the Inquiry will deal with carries national security classifications. This factor presents unique challenges which have time and cost implications. For example, the Inquiry rents office space from the Department of Internal Affairs at a significantly lower rate than the private market rate, [REDACTED] [REDACTED] to store classified material and a standalone computer network to handle classified information.
35. Additional funding is also required to cover staff costs associated with managing, reviewing and analysing the relevant documents. The volume of information is much greater than originally estimated. For example, the NZDF has recently revised its estimate of the number of documents that could be relevant to the Inquiry from an original estimate of 2,000 documents, to a current estimate of 17,400.
36. In addition to NZDF's revised figures, other agencies have indicated a significant increase in the volume of documents the Inquiry should expect to receive. This will largely be classified material. Although uncertainty remains about actual quantities, the Inquiry will need to enhance its capability and capacity in order to manage this greater volume. There are also issues to be resolved relating to the provision of classified material requiring overseas partner consent.

Funding for legal assistance

37. Section 18 of the Inquiries Act allows for the Inquiry to recommend to the Chief Executive of the Department that funding be granted for legal assistance and expenses for specified persons determined by the Inquiry. In making this recommendation, the Inquiry needs to consider any hardship the person may experience if legal assistance is denied, along with the nature of their contribution and other matters relating to the public interest.
38. In July 2018, the Inquiry made a recommendation for interim legal assistance funding for two specified persons, and this interim funding was approved. The Inquiry has recently recommended funding for these same participants for them to prepare for, and participate in, the public hearings. These funding requirements are included in the current request for an increased budget.

Specialist assistance

39. The subject matter of the Inquiry is complex and all tasks to be performed have particular practical or logistical issues. Accordingly, the Inquiry is putting in place the legal and specialist services required and increasing secretariat staff to service the Inquiry. For example, an expert in geolocation techniques and the former Chief of the Australian Defence Force have been engaged to assist with the first public hearing.

Amending the final report date

40. As appointing Minister under section 7(3)(b) of the Inquiries Act, the Attorney-General has the power to amend the Inquiry's Terms of Reference, including its final reporting date.
41. However, given that the request for additional funding and an extension to the reporting time are interrelated, the Attorney-General has determined that both these matters are best considered by Cabinet.

42. Given the significant volume of classified material that is still to be assessed by the Inquiry and the amount of further investigation that may be needed, there is a risk that a further time extension may be required. Officials consider, however, that the Inquiry's request for an extended reporting time to 31 December 2019 is realistic.

Financial implications

Additional funding associated with the Inquiry and extension of the final report back date

43. As of 31 January 2018, the Inquiry had spent \$1.416 million of the originally approved \$2.000 million budget funded to the 16 April 2019 report-back.
44. The non-Departmental budget to cover the costs associated with the chair and member was fully spent by February 2019. This has been managed by a fiscally neutral adjustment through the March Baseline Update. The remaining Departmental expenditure to pay for the Inquiry's other costs is forecast to be spent by March or April 2019, depending on when expenditure is incurred.
45. The Inquiry has requested additional funding of \$5.000 million. The Department, Crown Law, and Treasury officials have assessed the request for additional funding and support the request as necessary to deliver on the Inquiry's Terms of Reference. Officials have worked with the Inquiry to ensure that the proposed budget for the Inquiry is reasonable and practical.
46. Accordingly, we seek approval for a total increase of \$5.000 million to Vote Internal Affairs appropriations in 2018/19 and 2019/20 to cover the costs of the Inquiry. It is anticipated that the next immediate phases of the Inquiry will involve resource-intensive hearings, witness interviews, information assessment and analysis and will incur the most cost.
47. The total estimated costs of the whole Inquiry (including expenditure to date) until completion are:

Item	Revised budget to December 2019 (\$million)
Chair and member fees	0.938
Staff costs	2.003
Interview costs	0.857
Legal and specialist fees	1.692
Counsel to assist specified persons	0.707
Initial set-up costs	0.235
Other costs (occupancy, ICT, reporting, overhead)	0.568
TOTAL	7.000

48. This estimated budget assumes that the Chair and member continue to work four and a half days per week until the conclusion of the Inquiry and the secretariat is staffed by seven Full Time Equivalents (FTEs) for the remainder of its duration (with the actual number of personnel fluctuating).
49. The budget further assumes:
- 49.1 legal and specialist services to support the Inquiry, including:
- two Counsel assisting the Inquiry full-time;
 - one special advocate and one special assistant with intelligence expertise;
 - two classified information specialists;

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- consultants on international humanitarian law, operational military expertise and military operations;
 - specialist advice regarding international human rights, geo-spatial imagery and local knowledge of Afghanistan, and
 - Counsel costs for the core participants designated by the Inquiry.
- 49.2 three phases of witness interviews including:
- a first phase of approximately 120 exploratory witness interviews by assisting Counsel over 80 days;
 - a second phase of approximately 80 detailed witness interviews by assisting Counsel over 50 days;
 - a final phase of approximately 80 formal witness interviews by the Inquiry over 65 days;
 - transcription and interpretation services for each phase of interviews; and
 - travel, venue, catering and accommodation costs for each interview.
- 49.3 occupancy and technology costs to house the Inquiry and to ensure the confidentiality of sensitive information, and
- 49.4 administrative support continues to be provided by the Department.

Financial implications for Vote Internal Affairs

50. Cabinet Office circular CO (18)2 requires that proposals for funding from the between-Budget contingency demonstrate that the proposal cannot be funded through reprioritisation, cannot be deferred until the next Budget, and should be supported with the same degree of information as a Budget proposal.
51. Under the Inquiries Act, the Department is the default department for the administration of inquiries. The Department has no standing baseline funding to support inquiries and cannot absorb the Inquiry's related costs. Accordingly, significant fiscal pressures and risks to the delivery of services in Vote Internal Affairs arise if funding is not provided for the additional cost of the Inquiry.
52. The Department, in consultation with Treasury, has considered and discounted the following sources of funding:
- reprioritising funding from within Vote Internal Affairs 2018/19 baseline - this is not viable as the Department is facing significant cost pressures in 2018/19 and outyears. The Department's Four Year Plan forecasts approximately \$268 million in cost pressures over the next four years. These cost pressures have been largely driven by increased demand for the Department's Crown-funded services and the required investment to meet service delivery expectations. Any further reduction of funding to existing activities would have a detrimental impact on outputs and outcomes; and
 - seeking new funding as part of Budget 2019 - this would be optimal if the timing aligned. However, the Inquiry is expected to conclude in December 2019 and requires full funding prior to budget decisions being confirmed.
53. Accordingly, we seek approval for a total of \$5.000 million increase to the Vote Internal Affairs appropriations in 2018/19 and 2019/20 to cover the costs of the Inquiry (based on an extended final report back date).

54. If the Inquiry's expenditure is lower than budgeted at the end of the Inquiry, the Department proposes that any underspend associated with the Inquiry be transferred to the centre.

Risks

55. Not approving the Inquiry's request for an extension and additional funding to the reporting time will prevent the Inquiry from fully examining a matter of public importance. If the Inquiry does not have the funding to fulfil its mandate, then the Inquiry's objective of getting to the truth will not be met.
56. Given the complexity of the task, the number of witnesses to be interviewed and the quantity of information to be reviewed there is a risk that further extensions of time and funding may be needed to meet the requirements of the Terms of Reference.

Consultation

57. This paper was prepared by the Department and the Crown Law Office. The Treasury was consulted during the preparation of the paper and the Department of Prime Minister and Cabinet was informed.

Human rights

58. It is alleged that NZDF personnel committed serious breaches of human rights law and international humanitarian law. The proposed extension to the reporting date and additional funding will enable the Inquiry to fully examine those allegations and determine the facts.
59. When determining the procedure it would follow (as set out in Ruling No.1), the Inquiry had specific regard to the principles of natural justice. These principles will continue to guide the Inquiry in its work.

Publicity

60. If Cabinet approves the Inquiry's request for time and additional funding, joint Ministers anticipate making a press release.
61. If the change to the current reporting date is agreed, the Attorney-General will amend the Terms of Reference by notice in the New Zealand Gazette.

Recommendations

62. The Attorney-General and the Minister of Internal Affairs recommend that Cabinet:
1. **note** that, on 9 April 2018, Cabinet endorsed the Attorney-General's decision to establish a Government Inquiry to examine the allegations of wrongdoing by the New Zealand Defence Force in connection with Operation Burnham and related matters;
 2. **note** that Sir Terence Arnold (Chair) and Rt Hon Sir Geoffrey Palmer have been appointed as members of the Inquiry;
 3. **note** that the original approved budget for the Government Inquiry into Operation Burnham and related matters was \$2.000 million with a final report back date of 16 April 2019 [CAB-18-MIN-0159 refers];
 4. **note** that when approving the budget for the Government Inquiry into Operation Burnham and related matters, Cabinet noted the likelihood of additional funding being required to deliver on the Terms of Reference set by the Government;

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5. **note** that the members of the Government Inquiry into Operation Burnham and related matters have written to the Attorney-General requesting:
 - 5.1 an extension of the final report date to 31 December 2019, and
 - 5.2 additional funding of \$5.000 million;
6. **agree** to extend the final report date for the Government Inquiry into Operation Burnham and related matters from 16 April 2019 to 31 December 2019;
7. **note** the key budget assumptions underlying the request for additional funding:
 - 7.1 the Chair and member work four and a half days per week with a secretariat staff of seven Full-Time Equivalents;
 - 7.2 three phases of interviews involving up to approximately 120 witnesses; and
 - 7.3 legal and specialist advice and services related to intelligence, classified information, operational military expertise and international human rights.
8. **note** the budget includes allowance for a specified person's legal costs to be paid by the Crown - as recommended by the Government Inquiry into Operation Burnham and related matters under section 18 of the Inquiries Act 2013;
9. **agree** to increase funding in Vote Internal Affairs in 2018/19 and 2019/20 to provide for the costs associated with the continued operation of the Inquiry and extension to the final report back date for the Government Inquiry into Operation Burnham and related matters;
10. **note** that the funding for the Government Inquiry into Operation Burnham and related matters extension is urgent, cannot be met from Vote Internal Affairs' baselines, cannot be deferred until Budget 2019, and is driven by the requirements of the Inquiry;
11. **approve** the following changes to appropriations to meet the costs associated with the extension of the report back date for the Government Inquiry into Operation Burnham and related matters, with a corresponding impact on the operating balance and net core Crown debt:

	\$million – increase/(decrease)				
Vote Internal Affairs Minister of Internal Affairs	2018/19	2019/20	2020/21	2021/22	2022/23 & Outyears
Multi-Category Expenses and Capital Expenditure: Support for Statutory and Other Bodies MCA Departmental Output Expense: Commissions of Inquiry and Similar Bodies	2.743	1.846	-	-	-

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(funded by revenue Crown)					
Non-Departmental Other Expense:					
Public Inquiries	0.090	0.321	-	-	-
Total Operating	2.833	2.167	-	-	-

12. **agree** that the proposed changes to appropriations for 2018/19 above be included in the 2018/19 Supplementary Estimates and that, in the interim, the increases be met from Imprest Supply;
13. **agree** that the expenses incurred under recommendation 11 above, be charged against the between-Budget contingency established as part of Budget 2018;
14. **agree in principle** to transfer from 2018/19 to 2019/20 any underspend in the above appropriations, with the final amounts to be transferred to be confirmed as part of the 2019 October Baseline Update, once audited accounts for 2018/19 are available; and
15. **agree** that any underspends associated with the inquiry will be returned to centre.

Authorised for lodgement

Hon David Parker
Attorney-General

Hon Tracey Martin
Minister of Internal Affairs

Proactively Released by the Crown Law Office