

Office of the Attorney-General

Chair, Cabinet

Request for Crown indemnity for expenses of legal representation – Hon Wayne Mapp

Introduction

1. This paper seeks Cabinet agreement, in principle, to the Crown providing an indemnity for the legal expenses (and disbursements) of the Honourable Wayne Mapp, capped at \$100,000, in relation to his involvement in the Government Inquiry into Operation Burnham and related matters (the Inquiry) from October 2018 until the Inquiry's completion in December 2019.

Cabinet Manual Indemnity process

2. The Cabinet Manual sets out a process whereby Ministers (and former Ministers, including those of previous governments) may be indemnified for legal costs incurred in the course of legal proceedings brought against them in their capacity as Ministers. Ministers may also be indemnified by the Crown in other cases.
3. Paragraph 4.38 notes it is a convention of government that Ministers should be indemnified by the Crown for any actions taken against them for things done or actions taken in the course of their ministerial duties. Paragraph 4.43 states that Ministers may be indemnified by the Crown for actions other than legal proceedings taken against them, such as where the Minister is the subject of a formal inquiry and requires legal advice and representation. However there is no absolute right to indemnity in such circumstances.
4. Paragraph 4.45 of the Cabinet Manual provides it is for Cabinet to decide in principle whether or not to indemnify the Minister's expenses; and if so, to decide whether the Crown will undertake the defence of the proceedings, meet the Minister's costs in retaining private counsel, or leave the Minister to handle the case privately as a personal expense. I note, however, that the statutory decision to give an indemnity must be taken by the Minister of Finance under section 65ZD of the Public Finance Act 1989, only if it is necessary or expedient in the public interest to do so.

The Government Inquiry into Operation Burnham and Related Matters

5. The Inquiry was formally established by way of Gazette Notice on 12 April 2018. The Inquiry focuses upon Operation Burnham (which occurred in

August 2010) but also covers Operation Nova (which took place in October 2010). Amongst other matters, the Inquiry will inquire into and report on:

- 5.1 New Zealand Defence Force (NZDF) 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;
 - 5.2 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;
 - 5.3 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; and
 - 5.4 The propriety of NZDF's transfer of a suspected insurgent to the Afghanistan National Directorate of Security in Kabul.
6. Dr Mapp was Minister of Defence at the time Operation Burnham took place.

Dr Mapp's request for an indemnity

7. Dr Mapp contacted the Office of the Attorney-General when the Inquiry was established, seeking an indemnification of his initial legal expenses in the sum of \$10,000 (excluding GST), to enable his counsel to undertake preliminary work in respect of his involvement with the Inquiry. On 10 September 2018 Cabinet agreed in principle to the request, and noted the real possibility of further requests from Dr Mapp (which would be assessed on their merits, as and when made). The Minister of Finance gave the indemnity under the Public Finance Act 1989 on 5 November 2018. This sum covered work undertaken by Dr Mapp's counsel (Bruce Gray QC and Peter Kiely) from April to September 2018.
8. Dr Mapp has requested indemnification of his legal costs from October 2018 until the Inquiry's conclusion in December 2019.
9. Further to a series of Minutes and rulings issued by the Inquiry, the extent of Dr Mapp's involvement with the Inquiry has become clear. It is substantial, and has involved, or will involve, the following:
 - 9.1 Providing submissions at the substantial 'Inquiry process' hearing (November 2018);
 - 9.2 Preparation for and appearing at public hearing/module 1 (April 2019); giving a non-classified presentation on New Zealand Government deployment decisions in relation to the NZSAS, including Cabinet decision-making processes and how decisions were made about specific operations at the time of the events;

- 9.3 Preparation for and appearing at public hearing/module 2 (May 2019); giving a non-classified presentation regarding the Government's process for approving rules of engagement and policy approvals on detention, New Zealand concerns about detention in Afghanistan at the time, discussions with international partners and bodies about these issues, and the detention policy approvals by Cabinet;
 - 9.4 Giving evidence under oath to the Inquiry over the course of several days (with a substantial number of documents being put to him for review in advance);
 - 9.5 Reviewing the preliminary findings issued by the Inquiry (anticipated to be October 2019) and making submissions at a public hearing on those findings.
10. Dr Mapp has required, and will require, significant legal assistance at each of these stages. The Inquiry has not made a recommendation that the Department of Internal Affairs grant funding for legal representation for Dr Mapp to enable his participation in the Inquiry (but has made recommendations for other specified parties), so the Cabinet Manual indemnity process is the only realistic option. Further, this is the more appropriate route, given his involvement with the Inquiry relates squarely and solely to his former role as Minister of Defence.
 11. Given the nature of the issues that are being considered by the Inquiry, and Dr Mapp's particular knowledge and involvement in those matters, I consider that Dr Mapp's request is reasonable. Dr Mapp's involvement with the Inquiry is clearly related to his previous duties as Minister of Defence. The Inquiry has called, and is calling, substantially upon him to contribute both to the public modules and the classified evidence-gathering sessions. He will have a natural justice right to consider and respond to the provisional findings when issued. I have thus formed the view that indemnification of his legal expenses is appropriate. Providing a total cap to cover all of his legal expenses from October 2018 to December 2019 will avoid further indemnities being sought, and reflects the fact Dr Mapp's counsel have taken a responsible approach to billing to date (both with hourly rates and writing-off their time). An overall cap of \$85,000 for legal costs (plus GST) and \$15,000 for disbursements is in my view a reasonable sum. Crown Law has settled the basis on which the fees will be charged and would continue to receive and review counsels' invoices.
 12. There will be no need to indemnify Dr Mapp against a potential award of costs or damages as they cannot be ordered by the Inquiry.
 13. Should Cabinet agree with my recommendations in principle, the Minister of Finance will make the statutory decision whether to give the indemnity under section 65ZD of the Public Finance Act 1989.
 14. I do not anticipate any other former Ministers seeking indemnities.

Financial Implications

15. The amount to be provided to the former Minister of Defence to cover his legal expenses and disbursements is \$100,000, plus GST.
16. It is proposed that Cabinet agrees that these expenses are met from Vote Defence Force.
17. This will not have an impact on the operating balance as it will be met from within Departmental baselines.

Consultation

18. I have consulted with the Prime Minister and the Minister of Finance on the views I have reached on this matter, in accordance with the Cabinet Manual. I have also consulted with the Minister of Defence.

Proactive Release

19. This paper will be proactively released as per Cabinet Office Circular CO (18) 4, on Crown Law's website. Proactive release is subject to redaction as appropriate under the Official Information Act 1982.

Recommendation

20. I recommend Cabinet:
 - 20.1 **Note** former Defence Minister Hon Wayne Mapp seeks indemnification for his legal costs relating to his involvement with the Inquiry from October 2018 until the Inquiry's conclusion in December 2019;
 - 20.2 **Note** the Cabinet Manual provides that Ministers and former Ministers may be indemnified by the Crown for actions taken against them for things done or decisions made in the course of their ministerial duties;
 - 20.3 **Note** the Cabinet Manual provides that indemnification may be sought for actions other than legal proceedings including where Ministers and former Ministers are the subject of a formal inquiry and require legal advice and representation, but there is no absolute right to an indemnity in such circumstances;
 - 20.4 **Note** that Dr Mapp has particular knowledge of, and was involved in, certain matters that will be considered by the Inquiry, which stem solely from his previous duties as Minister of Defence;
 - 20.5 **Agree**, in principle, that the Government should meet Dr Mapp's legal expenses from October 2018 until the Inquiry's conclusion in December 2019, under the Cabinet Manual provision, capped at \$85,000 (excluding GST) plus \$15,000 disbursements;

- 20.6 **Note**, however, that the statutory decision to give the indemnity will be taken by the Minister of Finance under section 65ZD of the Public Finance Act 1989; and
- 20.7 **Agree**, if the indemnity is given, that these legal expenses should be met from Vote Defence Force.

Hon David Parker
Attorney-General