

UNDER THE

Inquiries Act 2013

IN THE MATTER OF

**a Government Inquiry into Operation Burnham and
related matters**

**MEMORANDUM OF COUNSEL FOR FORMER RESIDENTS OF KHAK
KHUDAY DAD AND NAIK AS TO WITHDRAWAL FROM THE INQUIRY**

Dated 18th June 2019

Solicitor:

Richard McLeod
McLeod & Associates
Barristers & Solicitors
59-67 High Street
Auckland
Phone: (09) 379 6585
Email: richard@mcleodlaw.co.nz

Counsel:

R E Harrison QC
PO Box 1153
Auckland 1140

Telephone: (09) 303 4157
Facsimile: (09) 358 0814
Email: rehqc@xtra.co.nz

Deborah Manning
Barrister
PO Box 5423, Wellesley St
Auckland 1010

Ph (09) 302 2599
Email: deborahmanning@xtra.co.nz

- 1 This memorandum is filed further to Minute No 16 of the Inquiry. Counsel must now advise the Inquiry that our firm and express instructions are that our villager clients collectively no longer have confidence in the Inquiry and consequently withdraw with immediate effect from their role as core participants in the Inquiry. This is a decision that has not been taken hastily by our clients, but taken shape over a period of many months. It can be said to have been foreshadowed in their prior communications through Counsel with the Inquiry. We set out the reasons for our clients' decision below.

Background

- 2 Our clients have endeavoured to place their views and wishes squarely before the Inquiry from its inception, beginning with Counsels' first Memorandum of 29 May 2018. From the outset, including at the first tele-conference with Sir Terence Arnold QC on 29 May 2018, our clients have expressed their expectation that they would be permitted, indeed required, to prepare briefs of evidence and to participate fully in the Inquiry.
- 3 This expectation included their receiving all relevant information about themselves and the events of Operation Burnham as it related to them and the destruction of their villages; proper acknowledgement and recognition of those who died; identification of those responsible for the deaths; and detailed consideration of the circumstances of the deaths and injuries of their loved ones. These expectations reflect the minimum standards which international jurisprudence relating to the right to life confirms are necessary for a state to meet its obligations to the families of those who have died.
- 4 Regrettably, however, our clients have come to see themselves as consistently marginalised throughout the Inquiry process. Their personal concerns over their marginalisation have been persistent and steadily increasing. Counsel clearly stated our clients' disillusionment with the Inquiry process in their memorandum to the Inquiry dated 29 April 2019, where we advised;

12. We are left in a state of some confusion regarding proper channels of communication with the Inquiry, and the role of counsel assisting. We have been consistently raising concerns held by our clients regarding the Inquiry process and the need for proper channels of communication. **The strain of involvement**

in this process for our clients is considerable given the financial, logistical and security issues they face, and we must record their longstanding and increasing disillusionment with this process. As mentioned in our last memorandum, this seems to be linked to the Inquiry taking a fluid and iterative approach, which has left gaps in other respects. (emphasis added)

- 5 Our clients' problems with the conduct of the Inquiry centre around a number of areas of concern. These are set out below, in no particular order.
- 6 Our clients have a longstanding mistrust of the New Zealand State authorities and Western governments more generally. That is completely understandable. They are aware of many instances where injustice and worse has been experienced at the hands of the Western authorities and the affected Afghani civilian population have been left without redress or support. Minute No 14 of the Inquiry acknowledges that trust is essential to obtaining reliable accounts.¹
- 7 Despite that, our clients were willing to believe that New Zealand might just be different in their case, firstly given the publication of *Hit and Run* and the commitment of the authors, Messrs Hager and Stephenson, to tell their story and secondly, through having obtained legal representation. Although wary, our clients were prepared to be involved with the Inquiry process. They hoped that the truth of what happened to them in August 2010 and related events would finally be told and they would be fully involved in the Inquiry.
- 8 However, since the Inquiry was announced in April 2018, our clients have faced a series of decisions by the Inquiry – large and small – which they consider to have marginalised them from the Inquiry process. Decisions taken by the Inquiry (including Ruling No 1 and Minutes 14 and 16) have demonstrated the dismissive approach of the Inquiry towards our clients, and have served to confirm their original scepticism regarding the New Zealand authorities and their legal processes.
- 9 Our clients are adamant that they should have access to the allegedly exculpatory video footage of the attack on their villages. They are confident that there can be no information on this footage – if genuine – that justifies the death, injury and destruction meted out to them and others and to their villages. They

¹ At [17].

consider the lack of concern and engagement by the Inquiry in relation to this critical matter (for example, in not disclosing the nature of inquiries (if any) that have been made with relevant agencies to release this footage for their viewing) to be wholly inadequate.

- 10 In that vein, our clients are aware that their Counsel have been trying for over a year to achieve engagement from the Inquiry regarding the provision of their evidence. The issuing of Minute 14 on 29 May 2019 caused a significant breakdown in confidence in the Inquiry for our clients, as it indicated the Inquiry was quite prepared to make findings about the events of Operation Burnham without ever attempting to make contact with them or to hear from them (either directly or through briefs of evidence).
- 11 Even though not expressed as a final ruling, the issuing of Minute 14 unfortunately can be seen as the final straw for our clients, as it illustrated what little weight and value their accounts, personally stated, would be afforded by the Inquiry. In sum, at that point our clients lost what remaining confidence they had with the Inquiry.
- 12 Against that background, the fact that the Inquiry through Minute 16 is now proposing to reverse its approach, by wanting to speak to those who are potentially able to travel to Kabul, has not changed our clients' view, or lessened their disillusionment. The fact that the Inquiry was contemplating never to hear from our clients in person demonstrated to them just how irrelevant they are to the focus of the Inquiry; and this is not acceptable to them. The issuing of Minute 14 confirmed their already-held concerns about the Inquiry not being sufficiently interested in wanting to hear from them the truth of what happened during the events of Operation Burnham. It should not have been for them to have to plead with the Inquiry for the opportunity to provide their account.
- 13 It is also of concern to our clients that the Inquiry does not wish their Counsel to be present during the process proposed by Minute 16. They have previously experienced serious problems dealing with Westerners, and have clearly and consistently stated their request for their Counsel to be (electronically) present with them (Memorandum of Counsel for former residents of Khak Khuday Dad

and Naik in Reply to Correspondence from Inquiry and Minute 15, para 2; Memorandum of Counsel for former residents of Khak Khuday Dad and Naik dated 20 December 2018, para 8).

- 14 Our clients have also lost confidence due to the delays in the Inquiry process as concerns information being provided by the New Zealand Defence Force (“NZDF”) and other agencies. Our clients note that they first started legal proceedings nearly two years ago, and that relevant information is only now being disclosed after prolonged attempts to prevent disclosure. They are simply tired of these delays and the lack of controls over the NZDF. To our clients, this also speaks to a lack of effectiveness by the Inquiry as regards the NZDF.
- 15 Finally, our clients are unhappy about the level of secrecy and closed hearing processes proposed for the Inquiry. They object to the secrecy that is being afforded to the participation of the NZDF and others. They are particularly upset that they will not fully know what is being alleged against them and consequently cannot adequately respond to what they consider will be incorrect and/or misleading information about them. They have also lost any confidence that the process is able to treat them fairly because of this secrecy.
- 16 Our clients (and others) have suffered enormously due to the events of and following Operation Burnham in August 2010. They are displaced from their now deserted villages and live below the poverty line. They live with daily suffering brought about by the actions of the New Zealand State. It has now been nearly ten years since their lives were devastated by Operation Burnham and its aftermath. They have attempted to engage (through legal counsel) with the New Zealand authorities for some years. They have tried to participate constructively in the Inquiry for 14 months. However, our clients have reached the point that they can no longer tolerate and justify to themselves the personal and financial toll that this takes on their lives and families, to continue their participation in this Inquiry.
- 17 The personal and financial toll includes our clients needing to taking time off from itinerant work, for example in coal mines, which means a loss of income to a household budget which is already below the poverty line. They then need to

travel to be in a position to engage with counsel, and any travel in Afghanistan involves risk and danger, including travel within Kabul.

- 18 Overall, for the foregoing reasons our clients have independently reached the decision that they no longer have confidence in the Inquiry and therefore no longer are in a position where they are willing to participate in the Inquiry process any further.
- 19 We note that right to life obligations under state and international law explicitly provide that the State cannot leave right to life investigations to the initiative of the next of kin, either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures. Our clients have quite simply been worn down by the approach of the New Zealand authorities, including the Inquiry.
- 20 We therefore formally notify the Inquiry that the former residents of Khak Khuday Dad and Naik we represent, including those who have been designated as core participants, now withdraw from involvement with the Government Inquiry into Operation Burnham and related matters, with immediate effect.
- 21 Notwithstanding that advice, Counsel and instructing solicitors continue to represent our clients. Any further communications that the Inquiry may wish to address to our clients (for example, in order to meet obligations under s 15 of the Inquiries Act) may be forwarded to Counsel, who will endeavour to obtain instructions thereon.

Dated this 18th day of June 2019



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R E Harrison QC / D A Manning
Counsel for the Villagers