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 IN RESPONSE TO INQUIRY MINUTE NO 3

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I INTRODUCTION

1 This memorandum responds to Inquiry Minute No 3, as invited. As before, this memorandum is presented on behalf of former residents of Khak Khuday Dad and Naik Villages ("the Villagers").

2 The position taken and approach urged on behalf of the Villagers in relation to the nature and process of, and role of core participants in, the Inquiry were outlined at some length in Counsels' earlier memorandum dated 4 July 2018. The Inquiry is respectfully referred to that memorandum and the points made therein, which are to be treated as incorporated in this response to Minute No 3 without express repetition.

3 In direct response to Minute No 3, this memorandum will address the following key points:

3.1 There is, in relation to disclosure of information accessed by the Inquiry to core participants, a fundamental distinction to be drawn between (i) "foreign-sourced material"[1] and (ii) non-foreign sourced material ("NZ-sourced material") which is alleged to be classified or confidential in the hands of a New Zealand entity such as the New Zealand Defence Force ("NZDF").

3.2 Having regard to the foregoing fundamental distinction, the NZDF claim[2] to confidentiality of NZ-sourced material which happens also to have been provided to NATO or NATO partners is strongly disputed. In particular, the Villagers do not accept that the "agreement" between the Government of New Zealand and NATO relied on by the NZDF either binds the Inquiry, or indeed in its own terms renders NZ-sourced material "subject to the control of" NATO, as the NZDF memorandum contends.

3.3 A significant topic which Minute No 3 fails to address is the natural justice entitlement of core participants other than the NZDF to a proper

[1] As Minute No 3 calls it.
[2] NZDF Memorandum of 18 July 2018 ("NZDF Memorandum"), paras 13, 21 – 23.

and adequate summary of all withheld or partly redacted documents (including audio and/or visual records or images), whether foreign-sourced material or NZ-sourced material. The Inquiry process going forward must therefore make full provision for proper and adequate summaries to be provided to core participants other than NZDF.

3.4 Further comments on the preliminary views expressed in Minute No 3, to the extent not otherwise addressed in this memorandum, including matters relating to the Schedule of Allegations.

4 Before addressing each of the foregoing key points in turn, it will be convenient to state the Villagers' position in response to the statement of the Inquiry's preliminary views as to the extent of its own powers and duties in respect of classified material, addressed at paras [16] – [24] and summarised at [25] of Minute No 3.

5 First, with reference to paras [13] – [16] of Minute No 3, it is accepted that s 27(1) of the Inquiries Act imports the provisions of subpart 8 of Part 2 of the Evidence Act 2006, and in particular s 70 of that Act in relation to disclosure in the course of the Inquiry of any "communication or information that relates to matters of State", as (inclusively) defined in s 70(2). The s 70(1) balancing exercise must be approached as imposing its own criteria and test, not importing or in any way dependant on Official Information Act criteria or for that matter the Government security classification system (as discussed in Minute No 3 at paras [3] – [10]).

6 Moreover, not only does s 70 of the Evidence Act require a balancing exercise in public interest terms, as identified. It also expressly contemplates that the party seeking to withhold documents or information on public interest grounds must apply for a "direction" to that effect. Procedural niceties to one side, this demonstrates that the onus is placed on the party seeking a direction in favour of non-disclosure, to persuade the decision-maker (here the Inquiry) that such non-disclosure is indeed required in the public interest.

7 Secondly, with reference to paras [17] – [18] of Minute No 3, the reference in s 20(c) of the Inquiries Act to the ability of an inquiry to determine whether a person "claiming privilege or confidentiality has a justifiable reason in maintaining the privilege or confidentiality" should be seen as incorporating each of those concepts as addressed in subpart 8 of Part 2 of the Evidence Act. That is to say, claims for protection of "privilege" relate to the privileges conferred by ss 54 – 59 of the Evidence Act, while claims to "confidentiality" relate to the (separate and distinct) matters addressed in ss 68 – 70 of the Evidence Act. It follows that disputed claims to "absolute" privilege are unlikely to feature in this Inquiry.

8 Thirdly, it is accepted that the effect of s 22 of the Inquiries Act is correctly summarised in para [21] of Minute No 3. It is therefore correct to conclude, in terms of s 22, that "participants in inquiries do not have the **right** to obtain **all** relevant material produced by other participants" (emphasis added). However, s 22 cannot be read or given effect to in isolation, as next argued.

9 Fourthly, it is noted that procedures are available by means of which access to disclosed documents may be limited. The High Court Rules, for example, provide for a process under which an affidavit of documents for discovery may state any restrictions proposed to protect the claimed confidentiality of any document, which may include limiting access and disclosure to specified persons.[3] A similar procedure might be adopted by the Inquiry to limit access and disclosure to core participants, or to counsel (where counsel have been instructed).

10 Fifthly and with respect, para [22] of Minute No 3 understates the force of "natural justice considerations"; and as a consequence, in para [25] c) and e) overstates the Inquiry's powers (and understates its duties) when concluding that (i) disclosure to participants of documents provided to the Inquiry "is a matter for the discretion of the Inquiry" and (ii) "The fact that material is not disclosed to all participants does not, of itself, mean that the Inquiry cannot take it into account, although natural justice concerns may arise in some circumstances".

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[3] High Court Rules 2016, rr 8.15 and 8.28.

11 Reverting to para [22], it is submitted that natural justice considerations are not only in play when a finding of fault or a finding "adverse to any person" is in contemplation. Thus it is not only in such cases that the Inquiry "must comply with the principles of natural justice [so] that the person affected is aware of the matters on which the proposed finding is based and has the opportunity to respond to them". That undoubtedly is an obligation imposed on the Inquiry pursuant to s 14(3); but it is not the only one.

12 In addition, s 14(2) imposes a duty to comply with the principles of natural justice in "making a decision **as to the procedure or conduct of an inquiry, or** in making a finding that is adverse to any person". Section 10 of the Inquiries Act further provides that, in exercising its powers and performance of its duties under the Act, "an inquiry and each of its members must act independently, impartially, and fairly". These duties are over-arching and necessarily qualify the discretion under s 22(1) of the Act.

13 Furthermore, there is an important human rights dimension to the entitlement of core participants such as the Villagers to full information, going beyond "common or garden" natural justice. In relation to the subject matter of this Inquiry, international law requires observance by the New Zealand State through the medium of the Inquiry of the procedural and investigative duties which form part of the **right to life**.[4]

14 These procedural and investigative obligations are a distinct aspect of the positive duty to protect the right to life. That duty requires states to investigate possible or suspected breaches, and to provide a remedy where a breach is proved.[5] In this context, the European Court of Human Rights has observed:[6]

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[4] Affirmed in this context by: New Zealand Bill of Rights Act 1990, s 8; International Covenant on Civil and Political Rights, 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976), art 6. See also European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5 (adopted 4 November 1950, entered into force 3 September 1953), art 2.

[5] See, for example: *McCann v United Kingdom* (1996) 21 EHRR 97 at [161]; *Edwards v United Kingdom* (2002) 35 EHRR 487 at [69]; *R (Middleton) v HM Coroner for Western Somerset* [2004] UKHL 10, [2004] 2 AC 182 at [2]–[4]; *Baboeram v Suriname* (1985) HRC (146/1983 and 148 to 154/1983) at [16]; *Herrera v Colombia* (1987) HRC (161/1983) at [10.3]; *Arevalo v Colombia* (1989) HRC (181/1984) at [10]; *Montero-Aranguren v Venezuela* (5 July 2006) Inter-Am Ct H R at [79].

[6] *Jordan v United Kingdom* (2003) 37 EHRR 2 at [103]. See also *Herrera v Colombia* (1987) HRC (161/1983) at [10.5].

> *Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, strong presumptions of fact will arise in respect of injuries and death which occur. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.*

15 A key aim for this Inquiry must therefore be to fulfil these procedural and investigative obligations. The Inquiry possesses the requisite means, independence, and expertise to do so, with terms of reference sufficient to enable it to properly engage with this task. In that regard it should be noted that para 5 of the Inquiry's Terms of Reference requires the Inquiry to have regard to "the applicable legal framework (including international humanitarian law)"; see also para 7.1. Assistance may also be drawn in this context from *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*.[7]

16 With respect to the Villagers, they are next-of-kin and victims themselves of the alleged actions which are the subject of the Inquiry, and they have a clear and important interest in the proceeding, predicated on the right to life, which entitles them to full and active participation in the Inquiry. In *Jordan v United Kingdom* the European Court of Human Rights observed:[8]

> *[134] ... The previous inability of the applicant to have access to witness statements before the appearance of the witness must also be regarded as having placed him at a disadvantage in terms of preparation and ability to participate in questioning. This contrasts strikingly with the position of the RUC who had the resources to provide for legal representation and full access to relevant documents. The Court considers that the right of the family of the deceased whose death is under investigation to participate in the proceedings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in the events. Prior to the recent development in disclosure of documents, the Court is not persuaded that the applicant's interests as next-of-kin were fairly or adequately protected in this respect.*

17 The evidence of the Villagers themselves will relate to the central factual issues before the Inquiry, such as the conduct of Operation Burnham itself. On this basis, the Villagers must surely be entitled, to the fullest degree possible, to access to information relating to Operation Burnham insofar as it relates to the conduct of the Operation and to the circumstances of the deaths and injuries of them and their loved ones.

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[7] *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)* United Nations Office of the High Commissioner for Human Rights (Geneva, 2017)

[8] *Jordan v United Kingdom* (2003) 37 EHRR 2; see also *Güleç v Turkey* (1999) 28 EHRR 121 at [82].

18 Thus it is not only in relation to potential adverse findings or allegations of "fault" that core participants in the Inquiry are entitled to as full a measure of the observance of natural justice as is attainable in the circumstances. Furthermore, the statutory formula of "a finding that is adverse to any person" is not to be equated with a finding of "fault". In relation to the present Inquiry, for example, a finding that the use of force by New Zealand forces during Operation Burnham was justified by reason of the conduct of the Villagers (or some of them) on the night of the raid would be a finding "adverse" to the Villagers. Equally, a finding that key allegations in "Hit and Run" are untrue would be a finding adverse to the authors of that publication.

19 Reverting to the position of the Villagers, it is obvious that the Villagers collectively or individuals among them may be subject to allegations of wrongdoing in the course of the Inquiry. In earlier public statements the NZDF has already levelled allegations against the Villagers, including that they fired upon armed forces or were carrying weapons; that they were terrorists or were concealing terrorists; or that for some reason they were not to be dealt with as non-combatants. These various allegations are strenuously denied. If the often inconsistent accounts provided by the NZDF to date are to be properly addressed in the course of the Inquiry, the Villagers must be entitled to full access to the information said to support these claims, so as to be in a position to rebut them.

20 The ways in which the Inquiry's natural justice obligations are capable of implementation in practice in relation to the production of information in the hands of Government agencies and in particular the NZDF, either in primary form or by way of proper and adequate summary, are further addressed below. However – an observation based on previous experience – Counsel note that natural justice cannot be adequately provided by means of a "once and for all" exercise. It is, rather, and necessarily, an iterative (and sometimes somewhat tedious) process, for all involved.

II A DISTINCTION MUST BE DRAWN BETWEEN "FOREIGN-SOURCED MATERIAL" AND "NZ-SOURCED MATERIAL"

21 This point scarcely needs elaboration. Whether appropriately to be utilised or not, the "security classification" summarised at para [3] – [12] of Minute No 3 addresses primarily if not exclusively "foreign-sourced material". As the Minute notes in para [12], the NZDF claims that most of the relevant classified material is subject to a claimed security interest by foreign Governments or agencies and/or international organisations. However – and crucially for present purposes:

> *This includes material **originally generated by NZDF** as part of the NATO International Security Assistance Force operations at issue and material generated by the United States Government"*

22 As the Minute emphasises at para [11] a), it is critical that material be properly classified in the first instance. As the party to the Inquiry asserting that the public interest requires that relevant material not be disclosed, at least to other core participants, NZDF needs to categorise at the outset which of the material in question it accepts is NZ-sourced material (or "material originally generated by NZDF"), and which is "foreign-sourced material".

23 The public interest evaluation in respect of the two different categories is likely to be significantly different. In particular, issues such as alleged prejudice to the future entrusting of confidential information by foreign Governments or agencies or international organisations to the New Zealand Government cannot arise as such, in relation to NZ-sourced information.

24 To take one obvious and fairly critical example, the NZDF's own general Rules of Engagement (referred to at para 20 of the NZDF Memorandum) and any specific Rules of Engagement developed by NZDF for Operation Burnham, un-redacted, are essential information for all participants in the Inquiry. The NZDF should not be permitted to shelter behind claims of public interest or arguments that the status of that information has changed because it has been "shared" with NATO or other foreign Governments, to resist disclosure.

III NZDF CLAIMS TO CONFIDENTIALITY OF NZ-SOURCED AND FOREIGN-SOURCED MATERIAL BASED ON THE NATO AGREEMENT

25 The NZDF Memorandum places reliance at paras 13 and 21 – 23 on an agreement between NATO and the New Zealand Government "on the security of information" said to be dated 3 October 2007. Counsel has obtained a copy of an agreement between NATO and the New Zealand Government done at Brussels on 31 May 2007, and entered into force for New Zealand on 8 (not 3) October 2007. A copy of this agreement ("the NATO Agreement") will be provided to the Inquiry together with this memorandum.

26 The NZDF Memorandum asserts at para 6 that it holds over 50 **unclassified** items of material, including correspondence with the US Government and NATO respectively, which it proposes to provide to the Inquiry but "for which it is likely to seek protection from public disclosure". Presumably, the "public" for NZDF purposes is intended to include core participants other than NZDF. At paras 12 – 13 of the NZDF Memorandum, the NZDF propounds a category of documents which it calls "classified material of partners", alleged to be "subject to the control of a foreign government or international organisation". Of this category around 70% is alleged to be subject to the control of NATO.

27 In relation to the classified and unclassified material claimed to be "subject to the control of" NATO, the NZDF position appears to be that disclosure must be resisted because required by the NATO Agreement. That is to say, NZDF argues both that "the **documents and communications that the NZDF prepared** during the ISAF operation and, as part of that operation's activities, are subject to the control of NATO" (para 23), and that the process of seeking approval from NATO is likewise governed by the NATO Agreement.

NZ-Sourced Material

28 The NZDF contention that NZ-sourced material created by the NZDF but then provided to NATO (or indeed to some other "partner") is information which the NZDF is unable to disclose to the Inquiry, or at any rate to other core participants, because "subject to the control of NATO", is rejected for two main

reasons. First, the NATO Agreement does not form part of New Zealand domestic law and/or imposes no domestic legal obligations on either the Inquiry or the NZDF. Secondly and more fundamentally, the NATO Agreement, properly interpreted, does not in any event apply to NZ-sourced material and thus does not purport to place such material "under the control of NATO".

29 Developing the second point, the primary requirement imposed on the parties and in particular New Zealand is, under Article 1(i), to "protect and safeguard the information or material **of the other Party**" (emphasis added). Thus in relation to New Zealand, the requirement imposed is to protect and safeguard the information and material **of NATO** as the "other Party". This interpretation is confirmed first, by the references in Article 1(ii) and (iv) to "such information or material" – referring back to Article 1(i) - and secondly, by the reference to "the exchanged information or material" in Article 1(iii). The subsequent references in Articles 2(i), 3 and 4 to "information or material exchanged" necessarily also refer back to and are in support of the limited scope of protection established by Article 1.

30 That the NATO Agreement, overall, is concerned with protection (by New Zealand) of information exchanged or shared under the NATO umbrella, other than information or material which New Zealand itself provides to NATO, is further confirmed by Article 5, which states that (emphasis added):

> *Prior to the exchange of any classified information or material between NATO and the Government of New Zealand, the responsible security authorities shall reciprocally establish to their satisfaction that the **recipient party** is prepared to protect **the information or material it receives**, as **required by the originator**.*

31 It is not disputed that in theory, NZ-sourced material could by reason of its content be the subject of a claim of confidentiality such that its disclosure should not be directed in the public interest. However, that is an entirely different matter to the present NZDF contention that its hands are tied – and presumably, those of the Inquiry as well – in relation to NZ-sourced material provided to NATO or other NATO partners, because such information or material is "subject to the control of NATO" as a direct consequence of the NATO Agreement. The Villagers submit that the latter contention is plainly wrong and should be rejected outright.

Foreign-Sourced Material

32 In addition to the points earlier made concerning the limited effect so far the Inquiry is concerned of the Nato Agreement, it is emphasised for the Villagers that claims that the Nato Agreement protects foreign-sourced material from disclosure need to be very carefully scrutinised, and indeed justified by the NZDF.

33 In this respect, reliance is placed on the following observations of Glazebrook J in *Zaoui v Attorney-General*:[9]

> *It is trite, too, that, for information to be classified security information, it must satisfy both para (a) and para (b) of the definition. For example, it is not enough that the information might lead to identification of the operational methods available to the SIS, it must also prejudice the security or international relations of New Zealand or meet one of the other criteria in para (b) of the definition.* ***It is not enough that a foreign Government or agency refuses consent to disclosure. Disclosure must also prejudice the entrusting of information to the Government of New Zealand or meet one of the other criteria in para (b). In that regard, absent evidence to the contrary, it would have to be assumed that the foreign Governments or agencies were acting reasonably. Therefore, if the information is of a type, for example, that those Governments or agencies would be required to disclose to Mr Zaoui in a similar judicial or quasi-judicial process in their own jurisdiction, then one would not have thought that disclosure in similar circumstances here would prejudice future information flows.*** *The same applies if the information is classified only because of its immediate source rather than because of its content, as is suggested may often be the case in the affidavit of Mr Buchanan, sworn 30 October 2003 at para 15.*
> *(emphasis added)*

34 Among the many issues which need to be addressed in this context are (i) identification and indeed disclosure of any "agreed common standards" as contemplated by Article 1(ii); (ii) identification and disclosure of any "framework of the co-operative activities and ... decisions and resolutions pertaining to these co-operative activities" referred to in Article 1(iii); (iii) identification and disclosure of any agreed "Separate Administrative Arrangements" brought into existence under Article 4; and (iv) identification and disclosure of the New Zealand "domestic requirements to give effect to the present Agreement" referred to in Article 6.

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[9] *Zaoui v Attorney-General (No. 2)* [2005] 1 NZLR 690 at [74].

IV THE NATURAL JUSTICE ENTITLEMENT OF CORE PARTICIPANTS OTHER THAN NZDF TO A PROPER AND ADEQUATE SUMMARY

35 As noted in para 3.3 above, a significant topic which Minute No 3 fails to address is the natural justice entitlement of core participants other than the NZDF to a proper and adequate summary of all withheld or partly redacted material (including audio and/or visual records or images), whether foreign-sourced material or NZ-sourced material.

36 A proper and adequate summary of all (justifiably) withheld or partly redacted material being an aspect of natural justice (and the right to life), reliance is placed in this context on the arguments advanced in paras 10 - 19 above.

37 More directly in respect of the obligation to provide an adequate summary, the Inquiry will derive substantial guidance from *Zaoui v Attorney-General,* both in the High Court[10] and in the Court of Appeal.[11] In the High Court, Williams J held that Mr Zaoui was entitled to a summary of all undisclosed classified material, observing:

> *However, that classified security information [not made available to Mr Zaoui] can be bowdlerised so as still to comply with the definition of "classified security information" that "cannot be divulged" but is still informative as the basis for the Certificate. That would appear to be indicated if not required by the "fairness" and "equally" requirements of s 114A(c). Evidence suggested overseas jurisdictions achieve that objective in their summaries of "classified security information".*

38 There was no appeal against that ruling of Williams J, but in the Court of Appeal Glazebrooke J noted that:

> *... what is absolutely protected from disclosure is classified security information and not documents containing classified security information. It may thus be that, in some cases, what should be released is the document with the passages of classified security information deleted.*

39 The Villagers therefore submit that an appropriate procedure to be followed in respect of information and material the subject of a claim that it is classified or otherwise confidential will be for the Inquiry to direct that:

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[10] [2004] 2 NZLR 339 at [106].

[11] *Zaoui v Attorney-General (No. 2)* [2005] 1 NZLR 690 at [14] – [15] per Anderson P; at [73] per Glazebrooke J. The issue did not arise on further appeal to the Supreme Court: *Zaoui v Attorney-General (No. 2)*, above at [14] [2006] 1 NZLR 289.

39.1 All such information and material is to be provided in unredacted form to the Inquiry;

39.2 Redacted copies of all documents found to be classified or otherwise protected by confidentiality, and to be not disclosed (applying the s 70 balancing test), are nonetheless to be provided to all core participants, with redactions made only as strictly necessary;

39.3 A list of all documents and material found to be protected from disclosure as classified or confidential is to be provided to all core participants, identifying all redactions and providing a summary of the reasons for redaction;

39.4 An unclassified summary or summaries of the withheld classified or otherwise confidential material is to be provided to all core participants.

40 It is only after completion of the foregoing steps that it will be appropriate for the Inquiry to address the adoption of a Special Advocate style procedure or the involvement of some other independent person or body.

V ADEQUACY OF OPEN DISCLOSURE

41 With respect to the open disclosure provided by NZDF, it is noted that the list appears to be incomplete. Counsel are aware that some OIA responses to requests made by Mr Hager and by the Human Rights Foundation of Aoteroa New Zealand are absent from the materials provided by NZDF. For example, there appear to be very few internal emails and correspondence (such as those relating to OIA requests) and no information relating to the NZDF Public Affairs staff or to the 65 Parliamentary Written Questions relating to the Operation which Counsel have identified. It is also essential that the requests which generated OIA responses also be provided.

42 The material provided to date gives rise to a concern that a narrow view of relevance has been taken by NZDF in its selection of material.

VI LIST OF ALLEGATIONS

43 A further point is noted with respect to the proposed Schedule of Allegations, a matter which has been held over until issues of process are resolved.[12] Counsel note that numerous allegations have been made against the Villagers by the NZDF, such as that they were insurgents, were carrying weapons, or in some way engaging in conduct preventing them from being considered non-combatants. It is submitted that an analogous schedule of allegations with respect to the Villagers will need to be prepared by NZDF with the assistance of the other participants and Counsel Assisting, as their conduct has been placed at issue.

VII CONCLUSIONS

44 It is submitted that the matters raised in this memorandum concern plainly critical questions of observance of natural justice, Inquiry procedure, disclosure of information, and the content of the Schedule (or Schedules) of Allegations. For this reason an oral hearing is requested so that these and any other issues arising can be addressed to best advantage.

Dated this 10th day of August 2018

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[12] Inquiry Minute No.1, dated 10 July 2018, at [22].