

UNDER

THE INQUIRIES ACT 2013

IN THE MATTER OF

A GOVERNMENT INQUIRY INTO  
OPERATION BURNHAM AND  
RELATED MATTERS

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MEMORANDUM OF COUNSEL FOR THE CROWN AGENCIES

10 May 2019

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**MAY IT PLEASE THE INQUIRY:**

1. This memorandum is filed on behalf of the Crown Agencies (including the NZDF) in response to Minute 14.
2. Minute 14 sets out the Inquiry's intended approach to gathering evidence from the Afghan villagers. In short, the Inquiry proposes not to take full, direct evidence from the Afghan villagers on the basis that it is not necessary or practicable.<sup>1</sup> The Inquiry will, however, ensure that the Afghan villagers' natural justice interests are affirmed.<sup>2</sup>
3. In the Inquiry's view, full evidence from the Afghan villagers is not necessary because "the book [*Hit & Run*], together with the transcripts, accounts and other similar material prepared by Mr Stephenson, are likely to provide the essential content of their narratives";<sup>3</sup> and not practicable because of the potential "physical or psychological risk"<sup>4</sup> to witnesses and the significant logistical complexities.<sup>5</sup>
4. The Inquiry has invited participants to provide written submissions on the proposed approach.

**Crown agencies' position**

5. One of the purposes of the Inquiry is to seek to establish the facts in connection with the allegations of wrongdoing on the part of NZDF personnel during the operation concerning Objective BURNHAM.<sup>6</sup> Ordinarily, the Inquiry would receive direct evidence from any witnesses to the events surrounding that operation. To the extent that the 21 former residents of Khak Khuday Dad and Naik represented by Mr Harrison QC and Ms Manning (the **Afghan villagers**) were witnesses to this event (which the Inquiry may determine in due course) they would be able to give direct evidence of the events at issue, assisting the Inquiry to fulfil its evidence-gathering function.
6. Furthermore, to the extent that the Afghan villagers' direct accounts are consistent or inconsistent with other evidence the Inquiry receives, including

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<sup>1</sup> Minute No 14 at [40].

<sup>2</sup> Minute No 14 at [31].

<sup>3</sup> Minute No 14 at [41].

<sup>4</sup> Minute No 14 at [15].

<sup>5</sup> Minute No 14 at [17] and [18]; for instance, the need for trusted intermediaries and translators.

<sup>6</sup> Terms of Reference at [6.1].

the account of the operation in *Hit and Run*,<sup>7</sup> this may assist the Inquiry in assessing the credibility and reliability of the evidence.

7. The Crown Agencies appreciate, however, that the Inquiry is in a difficult position. In response to the Inquiry's request for the Afghan villagers' details, to enable contact to be made, counsel for the Afghan villagers responded that:<sup>8</sup>
  - 7.1 flexibility is required to account for conflict in the region, inclement weather, and the time difference;
  - 7.2 intermediaries are required to facilitate contact with the Afghan villagers;
  - 7.3 a New Zealand- based interpreter is required;
  - 7.4 the use of intermediaries and interpreters not known to the Afghan villagers "is likely to result in the villagers refusing to talk out of fear"; and
  - 7.5 the presence of counsel is "necessary to ensure their trust and confidence in a foreign process with which they lack familiarity".
8. This position was reiterated in a memorandum of 23 April 2019, in which counsel for the Afghan villagers concluded that they were unable, in any event, to "confirm that it will be possible to prepare evidence from our client in advance of the Inquiry's reporting deadline".
9. The result of these memoranda is that, in order to take the Afghan villagers' evidence in the manner proposed by counsel for the Afghan villagers, the Inquiry would be required to use intermediaries and a New Zealand-based interpreter with an existing relationship with counsel for the Afghan villagers, and with significant involvement of their counsel. The Inquiry identified that it had "significant reservations" about this approach, as it cuts across the

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<sup>7</sup> See Memorandum of counsel for former residents of Khak Khuday Dad and Naik in reply to Minue 14 of the Inquiry, 3 May 2019, at [12].

<sup>8</sup> Memorandum of counsel for the Afghan villagers, 20 December 2018.

Inquiry's direction that "all witnesses will be the Inquiry's witnesses"<sup>9</sup> and jeopardises the reliability of the evidence-gathering process.<sup>10</sup>

10. The Crown Agencies acknowledge the Inquiry's view that the approach proposed by counsel for the Afghan villagers leaves the Inquiry with "no obvious way of taking [direct] evidence from Afghan villagers that involves both an acceptable level of risk and sufficient assurance of reliability". To the extent that this position shifts, however, such that it becomes possible for the Inquiry to directly take evidence from any of the Afghan villagers, in a reliable and safe way, and in accordance with the Inquiry's direction that all witnesses be the Inquiry's witnesses, the Crown Agencies would support the Inquiry doing so.
  
11. As it currently stands, the Inquiry has indicated its intent to receive evidence from the Afghan villagers by way of records of various statements made to Mr Stephenson, including audio and video recordings and transcripts of interviews.<sup>11</sup> The Crown Agencies, while noting that under ideal circumstances the Inquiry would take evidence from the individual villagers directly, consider that under the present circumstances it is open to the Inquiry to conclude that its proposed approach would fulfil the Afghan villagers' rights (for those designated as core participants) to give evidence "subject to any directions of that inquiry as to the manner in which evidence is to be given".<sup>12</sup> This is because the Inquiry has determined it *will* receive evidence from the Afghan villagers, albeit in the form of hearsay evidence. The Crown Agencies also note that the Afghan villagers are able to provide written, documentary and photographic evidence.
  
12. Although the Inquiry has significantly more flexibility than a court in the ways in which it may receive evidence, and is not bound by the rules of evidence relating to admissibility, an analogy can be made with the Inquiry's proposed approach and the receipt of hearsay evidence by a court in legal proceedings. Under s 18 of the Evidence Act, hearsay evidence is admissible in legal proceedings where:

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<sup>9</sup> Minute No 10 at at [28].

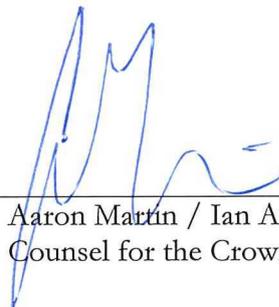
<sup>10</sup> Minute No 14 at [19].

<sup>11</sup> Minute No 14 at [25] to [29].

<sup>12</sup> In accordance with s 17(3) of the Inquiries Act.

- 12.1 the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
- 12.2 either:
- 12.2.1 the maker of the statement is unavailable as a witness; or
- 12.2.2 the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.
13. Crown Agencies consider the circumstances described in paragraphs 7 – 9 above are such that the Inquiry has essentially determined that the Afghan villagers are unavailable as witnesses and undue delay would be caused if the villagers were required to be witnesses (noting the requirement to avoid unnecessary delay or cost under s 14(2)(b) of the Inquiries Act). The Inquiry has also indicated that it will only rely on the transcripts of Mr Stephenson’s interviews if they are “reasonably comprehensive” and “robust”<sup>13</sup> – which the Crown Agencies understand to mean only if the circumstances relating to those hearsay statements provide reasonable assurance that they are reliable. The Crown Agencies appreciate that the Inquiry will treat any hearsay evidence with appropriate caution.
14. The Crown Agencies also support the Inquiry’s intention to keep its procedure under review, depending on the way in which the evidence emerges, in line with its iterative approach to procedure.<sup>14</sup>

10 May 2019



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Aaron Martin / Ian Auld  
Counsel for the Crown

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<sup>13</sup> Minute no 14 at [29].

<sup>14</sup> Minute No 14 at [41]

