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 REPLY TO MINUTE 14 OF THE INQUIRY

Dated 3rd **May 2019**

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1 This memorandum of Counsel responds to Minute 14 of the Inquiry. For the avoidance of doubt, as with our previous memoranda and overall participation in the Inquiry, it is not merely on behalf of the three villagers currently designated as core participants. It is on behalf of the 21 villager clients for whom we advised the Inquiry we were acting at the outset ("our clients"). See further as to this aspect, paras 17 – 18 below.

2 The submission on behalf of our clients is that the proposed approach outlined in Minute 14 is both inappropriate and predicated on significant misapprehensions and errors. Those concerns aside, counsel have serious concerns about the feasibility of the Inquiry's suggested approach in terms of its reporting deadlines and natural justice obligations.

Objections to and concerns with suggested approach

3 We begin by addressing a number of the Inquiry's assumptions and conclusions in turn.

4 First, the proposed approach is based on apparently firm conclusions already reached by the Inquiry that the steps outlined are in the best interests of or necessary to protect our clients. In reaching these apparently firm conclusions, the Inquiry has not sought to ascertain our clients' position or views concerning these matters. While the Inquiry has repeatedly characterised our clients as "vulnerable" and therefore requiring additional protective measures, including to avoid re-traumatising them, this overlooks their own stated interests.

5 As the Inquiry is aware, our clients have consistently instructed us that they wish to be interviewed by the Inquiry and to tell their story. While the process can be difficult, interviews and evidence-gathering conducted in a culturally aware and respectful manner can in fact have a therapeutic impact on witnesses (for example, in the comparable refugee status determination context).

6 Secondly, para 17 of Minute 14 further notes the importance of establishing a relationship of trust as a prerequisite to obtaining reliable evidence. This overlooks, however, that such a relationship already exists between our clients

and various people willing to be involved, including counsel, the New Zealand-based interpreter and the Afghan agent (whose involvement is addressed below).

7 As counsel have previously proposed, this relationship of trust would allow us to gather and prepare briefs of evidence which may then be subject to testing by the Inquiry. It is simply not the case, however, that there is no practical means by which reliable evidence may be taken. The Inquiry ought – indeed is required – to attempt to obtain all relevant evidence, if thought necessary testing and discounting for any consequent unreliability. That is, rather than summarily discounting evidence from a particular source – particularly one as important as the villagers personally involved – at the outset, and consequently not directly receiving it all.

8 With respect to intermediaries, we note first that it is not necessary for multiple intermediaries to be used in the evidence gathering process. We do not know where this idea originates, but it is plainly incorrect. The New Zealand-based interpreter may communicate directly with the witnesses by audio-visual link, without any further intermediaries. It is common practice for the same interpreter to be used with clients and in turn by a court or tribunal (again, in the comparable refugee status determination context).

9 The role of the other individuals previously identified is twofold. With respect to the Afghan agent, it is more practicable and reliable for interviews to be organised by an individual who is able to be physically present with the witnesses, to provide them documents and maps, for example, and to communicate with them face-to-face. The Afghan agent speaks English, Pashto and Dari and is thus able to communicate with all involved directly. Multiple intermediaries are needed only to set up the initial contact. As many of the witnesses are located away from cellular coverage, it is often necessary for other intermediaries to make contact with them and request them to be present for an interview at a particular time and location. Questions and answers for interviews are not relayed through such channels, however.

10 Thirdly, the proposed approach is premised on the erroneous conclusion (or at least assumption) that it is not necessary to obtain full evidentiary accounts from

our clients, as the Inquiry has in *Hit and Run* "a full account of what the villagers and the authors' other sources say happened". The Inquiry notes that counsel have not indicated any aspect of the book that is said to be incorrect, and states that it would be surprising if we were to do so "given that the authors' account is based substantially on what the villagers said".

11 Based on this flawed assumption, the Inquiry concludes at para 41 that its legal obligation to take evidence from the (presently three) villagers who have core participant status is sufficiently met by reviewing the content of *Hit and Run* and also Mr Stephenson's materials (subject to further natural justice obligations which may rise). With respect, this conclusion (or assumption) is wrong for a number of reasons.

12 In the first place, this conclusion (or assumption) treats the villagers as having no new or correcting information to add to the specified existing sources. This is quite simply incorrect. Indeed, we informed Counsel Assisting on 4 April 2019 that our clients have new and correcting information to provide to the Inquiry, and that their accounts do not necessarily align with the work of the authors of *Hit and Run*.

13 Counsel are aware of details of *Hit and Run* which will be subject to correction by the villagers in the course of their evidence. The book was based on a wide variety of sources, of which our clients were only a small subset. The vast majority of our clients were never interviewed during the preparation of the book. As far as we are aware, only two of our clients who are designated as core participants were directly and personally interviewed by Mr Stephenson. Furthermore, both the purpose of the interviews conducted by the authors and the methods used by them or either of them may well differ from those of counsel and the Inquiry.

14 To date no funding has been allocated by the Inquiry for counsel themselves to proceed with client interviews (and statements). In those circumstances it is not clear in any event why the Inquiry would expect by now to have received clarification from counsel, of matters which are likely to require correction or amplification. In that context it is noted that the previous judicial review

proceedings (*AV1 v Attorney-General*) were conducted on the basis that publicly available information (including *Hit and Run*) was sufficient to trigger the State's investigative obligation. No funding was allocated at that time for further investigatory work compiling the villagers' accounts.

15 With respect to the *Hit and Run* authors' materials, both the Inquiry and counsel are effectively operating blind. At this stage, the Inquiry appears to be proceeding on the hopeful assumption (which we dispute) that Mr Stephenson's material will be sufficient to avoid what would otherwise be a need to receive evidence from our clients (including but not limited to the three currently designated core participants). With all due respect, so to proceed will (we predict) ultimately result in a breach by the Inquiry of its primary duty to inquire fully, as well as a breach of natural justice in terms of a failure fully and properly to hear from our clients.

16 The Inquiry's proposal (para [37]) to convey to our clients (those who are core participants) "provisional factual findings that it feels able to make as the Inquiry progresses", this "on a basis of strict confidentiality" (if achievable), rather than proceed (even at that late stage) to take or at least contemplate taking our clients' evidence in full, cannot be seen an adequate substitute. We reiterate that our clients (as eye witnesses and indeed the victims of Operations Burnham and Nova) have further important and relevant information to be provided. Their evidence should be taken in full, as indeed the Inquiry intends to do for other core participants, including the New Zealand Defence Force witnesses.[1]

17 Finally, we note that the Inquiry has referred to the fact that only the three named individuals are core participants and the consequence that only those three have the right to provide evidence. The designation of those three was only ever a matter of convenience, however, and the Inquiry noted at the time:[2]

> [6] Mr McLeod's memorandum in support of the Afghan villagers' request for funding indicates that he acts for 21 villagers from Khak Khuday Dad and Naik who claim to have been affected by the operations at issue. For the moment, we have designated the three who have been identified. As we have said, that does not prevent others from being designated later.

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[1] Minute No 14 at [39].
[2] Minute No 1 of the Inquiry, 10 July 2018.

18 It is submitted that all of our clients had a direct and significant involvement in the matters in question and equally, stake in the outcome of the Inquiry; and consequently are entitled to be designated as core participants. Accordingly, we now request all of the villagers referred to in our previous memorandum of 20 December 2018 are designated as core participants.[3]

Feasibility of suggested approach

19 Setting aside these more fundamental concerns, counsel have a number of practical concerns with the suggested approach.

20 First, while the Inquiry has proposed to put matters to our clients to meet its natural justice obligations as they arise, it is not apparent whether funding will be allocated in advance for this purpose. In light of past experience with funding through this process, it is typically a protracted process. It will not be possible to require work from counsel or our clients (noting that there are significant expenses and disbursements required of them, to meet travel expenses and interpreter fees) if funding is not secured in advance, unless the Inquiry intends to operate with an additional minimum four weeks or so buffer to allow funding processes to take effect before work can begin, to allow the necessary interactions with the Department of Internal Affairs and the Inquiry to take place.[4]

21 Further, it will not be possible for counsel to urgently set aside other work or to decline to accept other instructions in the interim, on the basis of such an uncertain process. Counsel would in essence be expected to remain available and on-call on an unpaid basis from now until the Inquiry's report is issued. This is not practicable or reasonable to expect of counsel, and the result may be that counsel are simply unavailable at a given point when the Inquiry determines input is needed. Again, counsel have been warning of this repeatedly. The same

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[3] We note that further clarification has been requested regarding that memorandum and that is in progress, but also that there is no funding currently allocated for work not directly related to Modules 1-3 to enable us to properly respond.

[4] As noted in our memorandum of 23 April 2019, the current approach to funding is unclear and unsatisfactory.

also applies to our clients who have work commitments and other responsibilities which cannot be dropped and changed at a moment's notice.

22 We emphasise we are only asking for reasonable periods of notice, as would happen in any other similar context. Should any of this have a consequent impact on the Inquiry's current reporting deadline, it will be a product of factors beyond both our clients' and their counsels' control.

23 Finally, while the Inquiry has noted its preliminary intention to rely on Mr Stephenson's material in lieu of evidence from our clients, it has not indicated whether it intends to provide this material to our clients. It is submitted that as a matter of natural justice, our clients are entitled to view this material, and in particular any material which refers to them or which is derived from their evidence.

24 Any transcripts, recordings or notes from interviews with our clients should also be provided to them as a matter of natural justice, both generally so they are aware what material is considered by the Inquiry to fulfil its obligations to take their evidence, and specifically to enable them to respond to any matters arising from that material. We note that the wide range of dialects and languages in Afghanistan and the cultural context frequently renders translation unreliable, and it is in counsel's view essential that any recordings and transcripts are checked by our own clients' interpreter, for accuracy.

25 For this reason, we request an order from the Inquiry directing that when this material is received by the Inquiry as indicated at para 26 of Minute 14, a copy is to be provided to counsel for the villagers.

Dated this 3rd day of May 2019

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