

**UNDER**

**THE INQUIRIES ACT 2013**

**IN THE MATTER OF**

**A GOVERNMENT INQUIRY INTO  
OPERATION BURNHAM AND RELATED  
MATTERS**

Date of  
Minute: 10 July 2018

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**MINUTE No 1 OF INQUIRY**

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[1] The purpose of this Minute is to provide an update on progress, to make an initial designation of core participants and to make preliminary recommendations about funding for legal assistance.

**Update**

[2] The Inquiry has been engaged in a range of preliminary matters so as to get itself properly established. A Manager Secretariat, Ms Anna Wilson-Farrell, has been appointed. She will begin with the Inquiry as from Monday 16 July 2018. Her contact details will be advised when she is in place.

[3] Obtaining suitable premises has proved difficult. However, the Inquiry now has arrangements which will allow it to begin its work while a longer-term solution is implemented.

**Core participants**

[4] Under s 17 of the Inquiries Act 2013 (the Act), an inquiry may designate any person to be a core participant. In making this decision, the inquiry is directed to consider certain matters (s 17(2)). Every person who is designated as a core participant has the right to give evidence and make submissions to the inquiry (s 17(3)).

[5] The Inquiry designates as core participants the following:

- a) The New Zealand Defence Force (NZDF);
- b) Nicky Hager;
- c) Jon Stephenson; and
- d) \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, who were identified as AV1, AV2 and AV3 in Wellington Registry CIV-2017-485-000675 (the Afghan villagers).

Further designations may be made as the Inquiry proceeds.

[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.

#### **Recommendations as to funding for legal assistance**

[7] Under s 18 of the Act, the Inquiry has the power to make recommendations to the Department of Internal Affairs (DIA) as to funding for legal assistance. An inquiry is directed to take a number of considerations into account in making its decision (s 18(2)).

[8] The Inquiry has received applications for funding from Mr Stephenson and from the Afghan villagers (through Mr McLeod). Mr Stephenson seeks a funding recommendation to retain Davey Salmon and Daniel Nilsson of LeeSalmonLong. The Afghan villagers seek a funding recommendation to retain four lawyers, Dr Rodney Harrison QC, Deborah Manning, Richard McLeod of McLeod & Associates and Simon Lamain, as well as an interpreter, Adeb Ibrahim.

[9] We accept that Mr Stephenson and the Afghan villagers need funding for legal assistance. However, we propose to make only interim recommendations at this stage. The reason for this is that we are not yet in a position to determine precisely what process we will adopt for the inquiry. NZDF has suggested an investigative, inquisitorial approach and counsel for the Afghan villagers a traditional adversarial approach. We think it likely that the size and composition of the legal teams will be affected by the choice of process.

[10] Under s 14 of the Act, the Inquiry is empowered to determine its own procedure. In making its decision as to process, the Inquiry is required to comply with the principles of natural justice and have regard to the need to avoid unnecessary delay or cost in relation to public funds, witnesses, or other persons participating in the inquiry (s 14(2)). We wish to follow a process that will best enable us to get at the truth in an expeditious way while meeting our obligations of independence, impartiality and fairness (as required by s 10 of the Act).

[11] One of the factors that will be relevant to our process decision will be the extent of the relevant classified material - a situation where most of the relevant material is classified may require a different approach from one where most of the material is not classified.

[12] We consider, then, that before we make any decision about process, we need to understand, at least in general terms:

- a) how much of the information held by NZDF<sup>1</sup> relevant to the issues in the Inquiry is classified;
- b) how much of that classified material is subject to control by a foreign government or entity such that its consent will (or may be) required to permit disclosure to the Inquiry and/or to other participants.

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<sup>1</sup> This includes, of course, the NZSAS.

In addition, we need to determine what the Inquiry's powers in relation to classified material are, in particular where there is a challenge to the classifications, as foreshadowed by counsel for the Afghan villagers.

[13] Accordingly:

- a) We ask NZDF to give us an indication of:
  - i) how much of its material relevant to the issues in the Inquiry is presently classified; and
  - ii) how much of that classified material is subject to control by a foreign government or entity such that its consent to disclosure will or may be required.
- b) We will issue a minute next week setting out our preliminary views on the Inquiry's powers in relation to classified information, including its power to review classifications. We will then invite written submissions on the matters covered in the minute and, if necessary, have an oral hearing before reaching a final view as to the Inquiry's powers, which we will set out in writing.

[14] Once that has been done, we will issue a further minute setting out our preliminary views on the nature of the process we propose to follow and will seek written submissions on them. Again, if necessary, we will hear oral submissions as well. We will then determine what our process will be.

[15] Against this background, we propose to make interim recommendations in relation to funding for legal assistance until the question of process has been resolved. Accordingly, we recommend funding for two legal representatives for Mr Stephenson and two for the Afghan villagers for the purpose of resolving the issues of classification and process referred to above. Once the decision as to process has been made, we will consider the question of recommendations for funding for legal representation further.

[16] To avoid any misunderstanding, we should indicate that the Inquiry has no power to incur expenditure. It is for that reason that the Inquiry makes recommendations as to funding to DIA. The question of rates of remuneration is for DIA, but presumably legal advisers will be compensated on no worse a basis than counsel assisting. Counsel should contact Russell Browning at the DIA in the first instance: Russell.Browning@dia.govt.nz.

### **Timing**

[17] We ask that NZDF file a memorandum indicating how much of the material relevant to the issues in the Inquiry is classified and how much of that classified material is foreign government or entity material requiring consent for disclosure. A general indication of the amount of material will be sufficient, rather than a precise quantification. We ask that the memorandum be filed with the Inquiry by 5 pm on Wednesday 18 July 2018.

[18] We will issue the minute dealing with the inquiry's powers in relation to classified information next week. It will identify the date by which those parties who wish to make written submissions on the matters covered in the minute should do so.

### **NZDF unclassified material**

[19] As noted at the teleconference of 29 May 2018, NZDF indicated that they would provide all relevant unclassified material to the Inquiry by 26 June 2018. The NZDF subsequently filed a bundle of unclassified documents, with additional bundles for other participants should the Inquiry order that they be discovered to them.

[20] This presumably reflected the fact that the Act draws a distinction between a participant's disclosure of documents to an inquiry and the discovery of those documents to other participants in the inquiry – compare s 20 with s 22. An inquiry may not make orders for general discovery (s 22(1)(b)) but it may order that particular documents be disclosed to other participants in the inquiry (s 22(1)(a)).

[21] We consider that the unclassified material filed with the Inquiry should be disclosed to the other participants and order accordingly.

### **Other matters**

[22] There are two further matters to be addressed. First, the Minute issued by the Chair on 30 May 2018 following the 29 May teleconference noted that Mr Radich QC had raised an issue as to the scope of the Inquiry. The Minute noted that it would be helpful to receive any comments on the Schedule of Allegations prepared by Counsel Assisting and annexed to their memorandum of 24 May 2018 as soon as possible as they may go to the question of scope. While we understand that there has been some work on that, in the absence of decisions about funding it has not been completed. Accordingly, that issue will be held over until the question of process has been resolved.

[23] Second, the Inquiry intends to publish minutes, rulings and such like on its website to the fullest extent possible so that interested members of the public will have some understanding of what is happening. The Inquiry will, as a matter of course, not publish such material until after 5 working days have elapsed from the date of issue to allow parties the opportunity to raise any objection they may have to publication. If an objection is raised, the Inquiry will hear submissions and make a determination as to publication.

### **Summary**

[24] To summarise, in this Minute the Inquiry has:

- a) Made a preliminary determination as to core participants (see [4]-[6] above);
- b) Made interim recommendations as to funding for legal assistance to allow the core participants to make submissions on:
  - i) The Inquiry's powers in relation to classified material, in particular, challenges to classification;

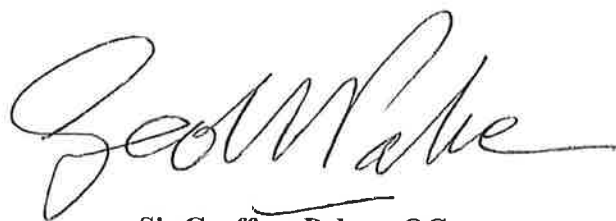
- ii) The process that the Inquiry should follow, whether substantially inquisitorial or substantially adversarial (or some combination of the two);

The Inquiry will determine the classified material issue first and then resolve the question of process (see [7]-[16] above);

- c) Ordered that copies of the unclassified material filed with the Inquiry by NZDF be provided to the other core participants (see [19]-[21] above);
- d) Deferred seeking comment on the Schedule of Allegations prepared by Counsel Assisting (see [22] above);
- e) Advised core participants that it proposes where possible to publish the minutes, rulings and such like that it issues on the Inquiry website to facilitate public understanding of its work. The parties will be given 5 working days to object to publication (see [23] above).



**Sir Terence Arnold QC**



**Sir Geoffrey Palmer QC**

**Parties:**

Richard McLeod for the Afghan Villagers  
Mr Radich QC for New Zealand Defence Forces  
Mr Hager  
Mr Stephenson

