

UNDER THE

Inquiries Act 2013

IN THE MATTER OF

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

**MEMORANDUM OF COUNSEL IN REPLY FOR FORMER RESIDENTS OF
KHAH KHUDAY DAD AND NAIK**

Dated 20 December 2018

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 6 of the Inquiry, and in compliance with the Inquiry's order at para 27 of that Minute. Annexed to this memorandum is a list of Afghan nationals represented by McLeod & Associates, including their names, gender, Afghan identification numbers and connection to the events at issue.
- 2 The Inquiry has also requested direct contact details for these individuals. Such contact is difficult, however, owing to the circumstances of our clients in Afghanistan. Many do not have any direct means of contact at all. Those individuals who do have phones change phone numbers frequently, and are often out of contact for prolonged periods of time for various reasons. For this reason, counsel have relied upon intermediaries to facilitate direct contact with the clients.
- 3 In essence, the process adopted has been to use a New Zealand-based interpreter to contact either the client (if direct contact is feasible) or a third party in Afghanistan. The third parties used have varied on occasion depending on availability, however all are trusted and independent individuals. These third parties have then been able to facilitate contact, either by relaying messages between counsel and the clients, or by travelling to the clients so that counsel may communicate directly using the third party's phone.
- 4 As may be appreciated from the above, making contact is a complex process. It must usually be arranged days in advance, so that the New Zealand interpreter may arrange for the clients or the third party to be available, or so that messages can be relayed back and forth. The time difference must of course be taken into account, and individuals may need to travel for contact to take place. On occasion, it may be impossible to arrange contact within a short time frame, where the client or the third party is simply unavailable (as happened recently, for example, where two clients were working in a coal mine and could not be contacted for over a week).
- 5 Finally, security concerns will often hinder contact, as individuals may be unable to travel for prolonged periods or a local conflict may cut off communications. On occasion, the sudden presence of Taliban in an area will render it too dangerous to make contact, as the risk associated with talking to Westerners is too great.

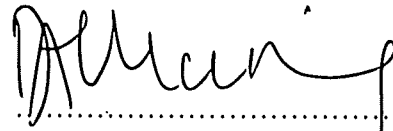
- 6 For these reasons, it is not possible to provide direct contact details for the majority of our clients, and where it is possible it is likely to be impractical. The contact details may become quickly outdated and will be frequently unreliable. Most importantly, however, it is unlikely that any individuals will be willing to talk to Westerners, unless the contact is made through familiar channels and they are assured of their safety. Direct contact using an unknown interpreter is likely to result in individuals refusing to talk out of fear.
- 7 For this reason, it is submitted that the most appropriate and practical way to arrange direct contact is through the use of our New Zealand-based interpreter, who may facilitate direct contact or contact through third parties as the situation requires. As our clients are familiar with he will be in a better position to allay concerns they may have.

It will of course be necessary for funding to be allocated for to perform this work, which will be a matter for the Inquiry to consider.

- 8 Counsel further request notice in advance of any contact with our clients, and request that any contact with our clients is made with the presence of their counsel. While it is accepted that they will be the Inquiry's witnesses, it remains that they are represented by counsel and wish to have counsel present. This will be necessary to ensure their trust and confidence in a foreign process with which they lack familiarity. Our clients are in a vulnerable position and have been placed under stress and pressure in the past where third parties have requested information from them, and they have for this reason requested that counsel be with them for any engagement with the Inquiry.
- 9 Counsel note the Inquiry's order at para 26 of Minute No 6 that the publication of the names and any particulars likely to lead to the identification of the victims is

prohibited. A further order in the same terms is sought pursuant to s 15(1) of the Inquiries Act prohibiting publication of the names and any particulars likely to lead to the identification of our clients, and any third parties who are used to communicate with them. Interim orders are further sought that the same details are to be kept confidential to the Inquiry and to Counsel Assisting.

Dated this 20th day of December 2018



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