

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 REGARDING PROCESS AND ROLE OF
COUNSEL ASSISTING**

Dated 23 April 2019

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1 The purpose of this matter is to raise matters of concern with the Inquiry regarding procedure. This memorandum will address funding and timeframes.

Funding

2 Counsel note that funding of legal representation for the former residents of Khak Khuday Dad and Naik remains insecure and unsatisfactory.

3 The evidence of the villagers is considered essential to the Inquiry, to meet its Terms of Reference. As the only non-military eyewitnesses to the events in question, it is crucial their evidence be taken and applied to test the evidence given by other witnesses. In counsel's view, witness briefs from our clients should be prepared in advance of interviewing New Zealand Defence Force witnesses, as the evidence of the villagers will be necessary to enable the Inquiry to properly cross-examine and test those witnesses.

4 Unfortunately, the position is that one year into this Inquiry, with seven months to go for the Inquiry to report, funding has still not been allocated for our clients to discuss matters with counsel, prepare their evidence or arrange to provide their evidence to the Inquiry. While we had expected that this work would be funded by the Inquiry's last recommendation in accordance with the request to prepare a chronology of events,¹ this has not come to pass.

5 The delay in allocating funding has significant flow-on effects on the ability of our clients to participate in the Inquiry, and for their counsel at a personal and professional level. Our clients are geographically separated and living largely below the poverty line. They cannot afford to bear in any respect the expenses of their continued participation, and in the absence of disbursements to fund their participation it will not be possible for them to continue.

6 As for counsel, as the Inquiry will be aware, we are private practitioners. Like all self-employed professionals, we have overheads that must be met including rent, office expenses, and staff salaries. To date, we have received one payment from the Department of Internal Affairs, and have an interim grant which fails to cover work completed to date. We have repeatedly, through sheer necessity, had

¹ Minute 8 at [16].

to meet expenses such as travel and interpreter costs or disbursements for our agent in Afghanistan from our own pocket, and to commit to significant amounts of pro bono work with no security of remuneration.

- 7 We also note our dissatisfaction with the process of allocating funding as administered by and between the Department of Internal Affairs (DIA) and the Inquiry. Throughout this process, we have been referred to six different officials within the DIA. Each time we must spend time briefing and explaining process to the new official.
- 8 There is no formal channel or process for counsel to engage directly with the Inquiry regarding their recommendations for funding to the DIA. That is despite the Inquiry's recommendation for funding for core participants being treated as essentially a binding recommendation by the DIA. Also, despite our request, there are also no internal review or complaint processes within either DIA or the Inquiry to deal with our funding concerns.
- 9 This flawed process has consequently taken a significant toll over the past year, particularly on Ms Manning who has borne the brunt of these burdens. Counsel are expected to keep their time available until the issuing of the Inquiry's report (now in December 2019), and have been awaiting information from the Inquiry about the procedure to take our clients' evidence, without any security of funding. We are required to make decisions about staffing, office space, and capacity to accept other instructions, with no insight into remuneration or what is expected from us by way of time commitment from the Inquiry.
- 10 Counsel, and again Ms Manning in particular, have in effect been on call for the past year, and are expected to remain on call for the remainder of this year. This has meant that Ms Manning has had to work significant overtime hours for the past year to meet her obligations in this and other cases. This is no longer sustainable, as counsel are unable to make decisions such as engaging interpreters, researchers or other clerks and juniors to assist, in the absence of funding. While we are being expected to effectively remain on standby by the Inquiry, we cannot expect other professionals to do the same with their own financial obligations to consider. This situation is untenable.

- 11 This unplanned approach to funding is unworkable as regards the remainder of 2019. We are now nearing the end of April. Apart from what is considered to be inadequate funding for Modules 1-3, no funding has been secured for counsel to take instructions or prepare briefs of evidence or will-say statements from our clients. Based on the current rate of progress for funding, we do not expect that any further funding will be allocated before late May/June. Unfortunately this funding is likely to be simply too late for our clients to participate in an Inquiry which intends to issue preliminary findings in October 2019.
- 12 We are unable to hold on to important research staff until then without funding. We cannot spend the time that is needed with our clients to take instructions on all of the numerous matters that require their instructions before September/October 2019.
- 13 We have consistently raised these concerns with the Inquiry and with DIA from the outset of the Inquiry, and we now formally advise the position is that it is unrealistic for this work to be completed in compliance with the Inquiry's reporting requirements. While we appreciate this is the first time the DIA has been tasked with arranging funding in this manner for an Inquiry, the approach to funding has been woefully inadequate.
- 14 We have been provided estimates of funding by DIA for Modules 1-3, only for those estimates to be reduced without explanation. This is particularly egregious when, after we explain in detail to the DIA why the proposed funding is inadequate, it is cut further on the Inquiry's initiative and recommendation.
- 15 Despite repeated requests, we have not been able to engage with the Inquiry regarding the work required and the funding needed to assist and represent the affected Afghan villagers, but are informed that our funding has been reduced following clarifications from the Inquiry to DIA (not communicated to us) about the work expected of us. The personal toll that this lack of security and failure to communicate has placed on Ms Manning in particular has been extreme, and has made our clients' continued participation almost untenable.
- 16 The Inquiry has chosen to adopt a process which is said to be fluid and iterative to preserve flexibility. As we have explained, however, the Inquiry's fluid

approach has direct consequences for funding of legal representation, in that the DIA cannot approve funding for work which has not been explicitly set down by the Inquiry. Counsel, however, are not able to preserve flexibility in the same way without being subjected to serious financial pressures flowing from the Inquiry's chosen process.

- 17 As noted, after discussions of some weeks and months with DIA, we have now formally submitted a request for further funding and await the Inquiry's recommendation and DIA's decision on that request. We note however our dissatisfaction with being required to, in effect, seek approval for funding from the body responsible for making procedural decisions directly affecting our clients' natural justice rights and factual findings, and with the process as a whole. We are endeavouring to advocate for our clients' procedural and substantive rights with the Inquiry which appears to be an area of marked contest, yet at the same time are relying on the Inquiry for recommendations as to funding. We wish to record our concerns that the approach taken to date seriously jeopardises both our clients' and their counsels' ability to continue to participate in this Inquiry.

Timeframes

- 18 A further, and related issue, is timeframes. The Inquiry has indicated that it will begin interviewing witnesses from 1 May 2019, and we understand that we will be contacted soon regarding the procedure for the taking of our clients' evidence. The Inquiry has also indicated that it intends to provide its preliminary findings (possibly in a public forum) in October 2019, and issue its final report in December 2019. We are a year into this process, with approximately five months to a reporting of preliminary findings and then a further two months to conclusion.
- 19 Regrettably, the failure to allocate funding and consequently to begin the process of taking our clients' evidence for a year poses significant risks for our clients' and our own involvement. This concern was directly raised with the Inquiry on 5 April 2019 at the beginning of Module 1.

- 20 To take instructions from our twenty or so clients (all former villagers) and to prepare briefs of evidence for them involves numerous and significant logistical hurdles which the Inquiry is likely to be unfamiliar with. Our clients are separated in different towns and regions, often with no cell phone coverage or internet. In many cases, it is necessary to use multiple levels of intermediaries to make contact. It is necessary for our agent and our clients to travel to meet each other at a safe location, and it is often not possible for them to meet for long periods due to security concerns, thus necessitating repeated trips. This involves significant expense to arrange travel for many people on many occasions.
- 21 At times, it is not possible to contact our clients at all, as recently when the main highway was closed for many weeks by snow and no other form of contact could be made. Finally, our clients are impoverished and must work for a living, and are unable to afford to meet travel expenses themselves or to take significant time away from work.
- 22 All of the above means that the taking of instructions and the providing of information about the Inquiry is not a simple process which can be done at short notice or under urgency. Trips can take weeks to prepare, and can be prevented or postponed for all manner of logistical reasons. The need for repeated trips means that the process will inevitably be drawn out.
- 23 Against the possibility that the Inquiry considers that some or all of the foregoing difficulties could be addressed by communicating and dealing directly with our clients as witnesses or potential witnesses, we would point out that (i) doing so would seriously undermine our clients' right to legal representation as core participants and (ii) the logistical difficulties of adopting that course would be considerably greater than the Inquiry could possibly anticipate.
- 24 Counsel have been consistently raising the need to prepare briefs or will-say statements from our clients and to consult and take instructions from our client on various Inquiry matters. We have raised our concerns regarding logistical barriers from the outset, including in our first memorandum to the Inquiry on 29

May 2018.² As noted above, despite explaining these concerns and outlining the need for funding to communicate with and take instructions from our clients to the DIA on will-say statements/briefs of evidence and other Inquiry matters, the funding proposals from the DIA have been reduced twice in April 2019. These funding reductions have occurred directly because of recommendations from the Inquiry and without consultation with counsel, despite the Inquiry being repeatedly requested to engage with counsel about these matters and the Inquiry being repeatedly advised we require funding for our role.

- 25 We do not consider that other core participants in this Inquiry are subject to similar constraints in being able to access and instruct their counsel. As legal counsel we have professional obligations with regards to communication with our clients amongst other things, and we are concerned that the Inquiry has failed to fund this. As stated above, we have informed the Inquiry of these matters on numerous occasions, and now feel compromised in our ability to meet our professional duties and troubled about our clients' ability to access justice in this process.
- 26 These concerns have grown more pressing and urgent over time, and we are now at a stage where we must record that we cannot confirm that it will be possible to prepare evidence from our client in advance of the Inquiry's reporting deadline. To be clear, this means we cannot confirm our clients' ability to be ready and available to speak with and engage with the Inquiry in advance of the Inquiry's reporting deadline.

Dated this 23rd day of April 2019



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R E Harrison / D A Manning
Counsel for the Villagers

² Memorandum of counsel for former residents of Khak Khuday Dad and Naik, dated 29 May 2018 at [2] and [18]-[19]. This was also raised by counsel at the November 2018 procedural hearing, at the hearing for Module 1, in counsel's bid for funding to the DIA beginning in August 2018, and consistently with Inquiry and DIA staff throughout the Inquiry, including with counsel assisting the Inquiry.