

UNDER THE  
IN THE MATTER OF

INQUIRIES ACT 2013  
A GOVERNMENT INQUIRY INTO OPERATION  
BURNHAM AND RELATED MATTERS

SUMMARY OF HAZEL ARMSTRONG LAW ORAL SUBMISSIONS

FOR HEARING 22 NOVEMBER 2018

DATED: 22<sup>th</sup> NOVEMBER 2018

**Introduction**

1. Hit and Run raises serious allegations of breaches of fundamental human rights against civilians by the New Zealand Defence Force.
2. The NZDF responded to the allegations and advised that SAS suffered a casualty, ground forces were at great risk, whilst not specifically addressed by NZDF, the situation has foreseeable impacts on New Zealand soldier's mental and physical health. Which in turn will impact on their families, and their communities within New Zealand.
3. This Inquiry is a matter of public interest to New Zealanders.
4. Hit and Run also contains serious allegations about the conduct of the NZDF following the alleged killing of unarmed civilians in misinforming the public and in covering up NZDF actions.

**New Zealand Bill of Rights Act 1990, s 8.**

5. The Terms of Reference state "[t]he matter of public importance to which the Inquiry is directed is to examine the allegation of wrongdoing by NZDF forces in connection with Operation Burnham and related matters. Operation Burnham took place during a non-international armed conflict, and the applicable legal framework (including international humanitarian law) will be considered."<sup>1</sup>
6. Within the applicable legal framework for the Inquiry's consideration for making decisions on both substantive and procedural matters, is the NZ Bill of Rights. s 8. The right not to be deprived of life mandates that no one shall

---

<sup>1</sup> At [5].

be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

7. We do not agree with the Crown submission that consideration of the right to life sits outside the Inquiry's role or function.<sup>2</sup>
8. As the NZDF is performing a public function, NZBORA applies.<sup>3</sup> The Inquiry can and should both examine and consider the actions of the NZDF through a NZBORA lens.
9. The right to life brings positive obligations to investigate and prevent unlawful killings. *McCann* says when applying the concept of the right to life, within a domestic jurisdiction, then there ought to be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the State.<sup>4</sup>
10. The case of *Jordan* establishes principles for an effective investigation which includes independence, means, promptness and transparency.<sup>5</sup>
11. *Jordan* states that the degree of public scrutiny required may well vary from case to case.<sup>6</sup>
12. It is submitted that serious allegations that could amount to war crimes in the killing of unarmed civilians by a state actor, and the allegation of misreporting the operation and a subsequent cover-up in New Zealand media require extra transparency for the investigation to be trusted.
13. Any incursion into a fully transparent process is an incursion into obligations stemming from the right to life and should be severely limited.

### **International Law Obligations**

14. The Minnesota Protocol on the Investigation of Potentially Unlawful Death is the United Nations manual on effective prevention and investigation of extra-

---

<sup>2</sup> Summary of Crown Submissions for Hearing on 21 and 22 November 2018 (15 November 2018) at [27].

<sup>3</sup> New Zealand Bill of Rights Act 1990, s 3. .

<sup>4</sup> *McCann v United Kingdom* (1995) 21 EHRR 97 at [161].

<sup>5</sup> *Jordan v United Kingdom* (2003) 37 EHRR 2 at [105]-[109].

<sup>6</sup> At [109].

legal, arbitrary, and summary executions. It represents best practice. It requires that:<sup>7</sup>

“Investigative processes and outcomes must be transparent, including through openness to the scrutiny of the general public and of victims’ families. [...] States should, at a minimum, be transparent about the existence of an investigation, the procedures to be followed in an investigation, and an investigation’s findings, including their factual and legal basis.”

15. We disagree with the Crown’s submission that the ISAF report satisfies international investigative obligations under the Minnesota Protocol art 21,<sup>8</sup> when that Protocol requires investigative processes and outcomes to be transparent; yet the NZDF has withheld the report in full from release under the OIA. The statement is especially hard to accept where Hit and Run contains allegations about the reporting by ISAF following the operation.<sup>9</sup>

#### **Transparency for Core Participants**

16. Further, transparency for the core participants is greatly needed for public confidence.
17. This submitter notes that she is not a core participant, but a member of the NZ public. We do not need to be in the room hearing all the evidence, but we do want counsel for the core participants to be in the room to hear the evidence, make submissions, and assist the Inquiry by providing the rigorous examination of the evidence that is needed.
18. We are submitting that greater access to evidence, by counsel for the core participants, than appears to be envisaged by the Inquiry, is warranted.
19. To illustrate the point, I wish to use an example that is familiar albeit in a different context. The Royal Commission into the Pike River Tragedy was not an Inquiry under the Inquiries Act 2013, but it was a Royal Commission that is of great public interest. Withholding information has been shown to undermine the credibility of that Royal Commission of Inquiry. The lawyer representing Pike River Mine families at the Royal Commission stated he was not shown video footage of the mine. Sonya Rockhouse stated that the families had not seen the footage. This led to concern amongst family

---

<sup>7</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death,(2016) United Nations Office of the High Commissioner for Human Rights (Geneva, 2017), art 32.

<sup>8</sup> Summary of Crown Submissions for Hearing on 21 and 22 November 2018 (15 November 2018) at [26.1].

<sup>9</sup> *Report of Peter Boshier, Chief Ombudsman’s Opinion on OIA Requests About Operation Burnham (2018).*

members of other material which they believed they had not been shown. Speaking of the previously unseen footage five years after the Royal Commission, Sonya Rockhouse said:<sup>10</sup>

'[w]ho knows what difference it might have made, I'm not sure... [R]ight from the beginning, they were telling us there was a raging inferno, everything would be dust and there would be all this structural damage [...] and when you see that in the drift, it's just about the complete opposite.'

8 years later the families of those killed at Pike are still campaigning for justice. A Supreme Court decision ruled that the actions of state agents were unlawful<sup>11</sup>; and the Government has had to spend a further \$36m on re-entering the mine, with the possibility of yet a further public inquiry to come.

20. Those affected will keep on pursuing avenues available until they get the answers they need. This Inquiry if transparent could satisfy this hunger for information. If it does not, the questions will remain.

#### **Procedure**

21. We reinforce Counsel for the media entities' submission that if:

summaries, redactions or de-classification of classified material would not disclose sensitive classified content; and or

texts of interviews and transcripts of evidence or appropriate summaries which witnesses do not seek confidentiality and not dealing with classified material,

then there is no compelling reason why the media should not be able to access these. Nor is there compelling reason why the wider public should not be able to access these. This is necessary to meet the obligations under the right to life, international law, and public confidence.

22. We are concerned at the decision to not hold a programme of both private and public hearings of evidence from witnesses of fact. The reliance on logistical difficulties and impracticalities to avoid the necessarily complex task of holding both public and private hearings means that the Inquiry is giving less weight to public interest.

---

<sup>10</sup> Interview with Sonya Rockhouse, Morning Report "Pike Families' Lawyer Doubts Drift Footage Was Provided to Inquiry" (2 May 2017) RNZ <RNZ.co.nz>, from 2 minutes 20 seconds.

<sup>11</sup> Osborne and Rockhouse v WorkSafe NZ [2017] NZSC 175.

23. We appreciated your direction to counsel to read the Inquiries Act. In particular s 15(2). We submit that the Inquiry's balancing of these interests should be reconsidered. We agree with Counsel for the Former Residents' submission that " the right to life, natural justice rights of the participants, and public interest militate in favour of a public process in this Inquiry."<sup>12</sup> Their submission aptly quotes from the Court of Appeal decision *Fay, Richwhite & Co Ltd v Davidson*:<sup>13</sup>

"Public confidence in the Commission, and the very purpose of constituting the Commission, could be substantially impaired or thwarted if all the truly important evidence and all the truly important submission were heard in private."

24. We agree that the hearings where there is classified information or confidential and vulnerable witnesses should not be open to the public; but if needed they can be in camera with counsel present. The public can be satisfied knowing counsel for core participants can cross examine. Where those interests are not at issue there should be general public access.

25. Appropriate weight could be given to these considerations by adopting Counsel for the Former Residents' submitted approach of a presumption of publicity subject to exceptions only where strictly necessary.<sup>14</sup>

26. We support Counsel for Mr Stevenson's submission that the villagers and Messrs Hager and Stephenson are the people outside the NZDF who are most familiar with the underlying facts and best positioned to challenge the official account through cross-examination.<sup>15</sup>

27. We further support the assertion that cross-examination will also inevitably be required to ensure respect for rights to natural justice. This would re-enforce a public perception of a fair Inquiry.

## Conclusion

28. NZBORA and international right to life jurisprudence, international law obligations, and public confidence mandate the proposal that the inquiry's procedure needs to be reconsidered to allow for greater public transparency.

---

<sup>12</sup>Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik in Response to Inquiry Minute No 4 (5 October 2018), at [83].

<sup>13</sup> [1995] 1 NZLR 517 at 524 per Cooke P.

<sup>14</sup> Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik in Response to Inquiry Minute No 4 (5 October 2018), at [46].

<sup>15</sup> Submissions of Counsel for Mr Stevenson in Response to Minute no. 4 (5 October 2018), at [36-37].