

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 RESPONSE TO MINUTE NO 8 OF THE
INQUIRY**

Dated 26 February 2019

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- 1 This memorandum is filed further to Minute No 8 of the Inquiry, addressing the first public hearing scheduled for 4 April 2019. This memorandum addresses several concerns counsel hold regarding this hearing, including the practicability of preparing in time and the scale of the work involved.

Background papers and presentations

- 2 Counsel hold serious concerns with the papers and presentations requested by the Inquiry at paras 3-5 of Minute No 8. Respectfully, these papers all represent a regrettably one-sided perspective on the matters in issue. They include papers by the Ministry of Foreign Affairs and Trade (MFAT), the Department of Prime Minister and Cabinet (DPMC) and the New Zealand Defence Force (NZDF), and presentations by a former Chief of Defence Force from Australia and the former Minister of Defence who was the responsible Minister for the very events at issue.
- 3 These papers and presentations are from a wholly military and government-dominated perspective, to the exclusion of civilian and human rights perspectives. While the New Zealand Government considers itself qualified to provide an overview of Afghanistan, and an Australian Air Chief Marshall has been requested to speak to “the nature and history of the conflict in Afghanistan from a military perspective”, no non-governmental, Afghan or human rights voice is present.
- 4 Unfortunately, this speaks to a theme of the marginalisation of Afghan voices, including those of our clients, and a denial of their interest in matters which should in fact have them at the centre. If the Inquiry is seeking to gain an understanding of Afghanistan and the conflict, it is absolutely essential that speakers include Afghan nationals who can speak to the those matters from the perspective of locals and civilians, and experts who can speak to the human rights dimension of the conflict in Afghanistan. The speakers and authors proposed, while highly qualified in their respective fields, do not represent a balanced perspective.
- 5 Counsel have sought to engage with the Inquiry on this matter, and have received positive indications regarding the proposal to have this perspective at the first

module hearing. Counsel are happy to work with the Inquiry to develop this proposal further, on the understanding that any such speaker will need to be appropriately engaged, remunerated and supported by the Inquiry. We have made initial enquiries as to potential relevant contributors and are happy to discuss this further with the Inquiry.

Afternoon hearing regarding location

- 6 While the purpose of the afternoon of this hearing is described as being to understand the competing versions as to where the events at issue occurred, the Inquiry has requested a considerable volume of information at paras 7-8 of Minute No 8. These questions include the identification of relevant structures and the “chronology of activity” at each named location.
- 7 Such a task requires significant time even without the logistical problems faced by our clients. To be requested to provide a “chronology of activity” at each named location for this upcoming hearing is a substantial volume of work and goes to matters at the heart of this inquiry. It is a significant task in and of itself, severely compounded by the logistical difficulties we set out below.
- 8 Our clients’ situation, is such that the Inquiry’s request cannot practicably be complied with in the timeframes given. Our clients are largely illiterate, and require the assistance of an interpreter to provide instructions. The nature of the Inquiry’s request is such that an interpreter will need to be physically present with them to assist them in using a map, and to interview them with us or on our behalf.
- 9 Counsel have engaged an agent to undertake this work, and had indeed begun work of a similar nature in advance of the Inquiry’s request over January and February 2019. Our agent has been unable to progress this work for several weeks however, owing to a combination of security problems and heavy snow preventing our clients from travelling to meet him. Such travel is extremely difficult, and it is not unusual for weather, security problems or financial pressures to prevent progress for weeks or months at a time.

- 10 There are significant challenges for us to even brief the agent due to infrastructure restrictions affecting accessibility to both the internet and cellular phones. The ability to even operate the provided satellite map is challenging in this context and we are still ascertaining if it is even possible. It is likely we will need to have pdf printable maps and images provided by the Inquiry that our clients work from in order to move this issue forward.
- 11 We have requested from our agent a timeframe and estimate of costs for the work requested, and will update the Inquiry accordingly when we have that information. The reality, however, is that it will not be possible to complete this work before 4 April 2019. As set out below, it is unlikely we will even be able to secure timely funding for the agent and to date the current briefing and work undertaken by the agent has been advanced by counsel.
- 12 It is regrettable that we were not consulted during the preparation of this upcoming hearing, as it would have been possible to advise at that time of these difficulties. Before hearing module one was announced we were not contacted by the Inquiry, its staff or by Counsel Assisting, in contrast with the consultation which presumably occurred between the Inquiry or Counsel Assisting and the speakers listed at para 5 of Minute No 8.
- 13 Counsel welcome further contact from the Inquiry regarding the above matters. We note that we have had an initial conversation with Mr Jaspers in which we outlined our concerns and advised we had this Memorandum being prepared for the Commissioners. In the interim, however, counsel must advise that it appears it will not be possible to comply with the Inquiry's request in the time given.
- 14 We also note that while we are grateful for the Inquiry's direction in Minute No 8, we continue to be without funding to undertake any work for the Inquiry. After receipt of Minute No 8, we contacted the Department of Internal Affairs to be advised there has been a personnel change regarding funding and we were required to engage with a new official. We last spoke to this person on 25 February, but we understand that no procedures have been established for us to

receive or obtain funding. We have suggested an interim grant be immediately established to allow us to commence work and engage with the Inquiry.

Dated this 26th day of February 2019


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D A Manning
Co-Counsel for the Villagers