

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 ROLE OF COUNSEL IN
CLASSIFICATION REVIEW**

Dated 8 November 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

I INTRODUCTION

1 This memorandum is filed further to Minute 4 of the Inquiry, to address matters arising from the appointment of Ben Keith. In Minute 4, the Inquiry stated:¹

To assist with the assessment of classification claims, the Inquiry has engaged a barrister, Mr Ben Keith, a former Deputy Inspector-General of Intelligence and Security. Mr Keith will provide advice to the Inquiry regarding matters of classification, including whether there are options such as redaction or summaries that could be considered by the Inquiry if documentary or other material cannot be disclosed. Mr Keith will review the classified material as it is provided to test the claim to classification. If he has doubts about the continued need for classification of any material, he will advise the Inquiry and the relevant Government agency or agencies. He will then discuss the matter with the relevant agency to see whether agreement can be reached in relation to the material. If no agreement is reached, the Inquiry will determine the matter. The Inquiry will give the relevant agency or agencies the opportunity to make submissions in relation to classification before it reaches a final view. It may also seek further explanations or take other procedural steps before determining the matter. A similar process will be followed in relation to proposed redactions or summaries that are disputed. While the Inquiry does not rule out any legitimate exercise of its powers, the main alternatives in terms of a ruling are (a) maintaining the classification (in which case it will consider whether the options of redaction or providing a summary are available) or (b) de- or re-classification of the material (which would likely result in wider availability, certainly in the case of de-classification).

2 The purpose of this memorandum is not to address the substantive elements of this approach, which will be dealt with at the hearing on 21-22 November, but rather to request further information regarding Mr Keith's role and best estimates of time frames of his process held to date. Currently, counsel have no idea of how many documents are under consideration by Mr Keith or any expected timeframes as to when advice will be provided to the Inquiry, and subsequent steps.

3 It is submitted that Mr Keith's process involving matters of classification should be clearly timetabled for the benefit of the core-participants. It is submitted that Mr Keith's role is an important one and will influence the ability for core participants (including the next of kin of victims) to effectively participate in the Inquiry. Furthermore, future timetabling matters concerning matters of disclosure and future hearing dates are directly impacted upon by this process.

4 While counsel are grateful for the explanation provided to date of Mr Keith's role in the Inquiry, aspects of his role are not clear and it is submitted that further information and transparency is required. This matter has been raised in

¹ At para 27.

communications with Counsel Assisting, and is now brought formally to the Inquiry's attention.

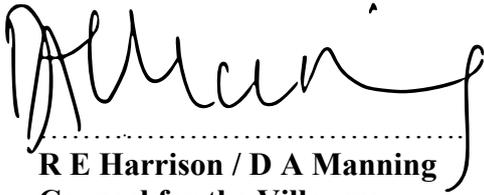
- 5 It is submitted that the approach taken to the review of classifications is central to the proper conduct of this Inquiry, and that participation of non-Crown core participants is essential to the effective and timely conduct of the review as well as the need for transparency in this important procedure.
- 6 At present, the approach adopted appears to largely exclude non-Crown core participants from the classifications review process. It is submitted that other core participants should remain involved in this process to the greatest degree possible however, and that there are a number of means to achieve this. These may include:
 - 6.1 Provision to core participants of all information relating to the appointment of Mr Keith and to the nature of his role and function, as well as an estimate of Mr Keith's proposed timeframe to complete this work. This information would include:
 - 6.1.1 How many documents is Mr Keith expected to review;
 - 6.1.2 What timeframe is Mr Keith expected to undertake this work within.
 - 6.2 Following Mr Keith's advice, we would seek a directions conference for the timetabling of further steps in this regard.
 - 6.3 Provision to all core participants of a list of documents (including information such as title, date, author, format, size, and classification status) subject to such redactions as are necessary at that stage.
 - 6.4 Participation of the non-Crown core participants by allowing them to nominate documents from the above list to be given priority in the declassification process.
 - 6.5 Provision to all core participants of open versions of memoranda filed by and to Mr Keith and the Inquiry in relation to the classification review

process, to allow other participants to provide input into this process as necessary.

- 7 Counsel are conscious that Mr Keith is likely to have a significant volume of material to review, and that he will be limited by practical constraints as to how quickly he can undertake his review. Permitting core participants to provide input on prioritisation will allow the process to be undertaken more efficiently, by streamlining the process and ensuring that key documents are reviewed at the outset. Matters of prioritisation of issues will be the subject of submission at the November hearing, however counsel wish to raise this suggestion now with the Inquiry.
- 8 It is submitted that it is appropriate for the Inquiry to release the requested information relating to Mr Keith's appointment, role and timeframes, to promote transparency and allow for greater understanding of the process. Counsel do not intend for this to be interpreted as the raising of concerns about Mr Keith's appointment. Counsels' position is simply that at present, little information has been provided regarding Mr Keith's role and his precise function vis-à-vis non-Crown core participants including, for example, whether counsel for non-Crown core participants are to be permitted to speak with Mr Keith before, during or after undertaking this review.
- 9 Counsel wish to have as much clarity as possible regarding time frames of proposed processes. Provision of a full list of documents will also allow the Inquiry and participants to better understand the volume of work before Mr Keith and the likely timeframes involved. Likewise, we request details of precisely how many classified/closed documents NZDF has so far delivered to the Inquiry, again to better understand the likely timeframes involved.
- 10 Given the time-sensitive nature of this request with the Inquiry's first hearing now imminent, Counsel respectfully request that the information noted at paras 6.1-6.2 be provided at the earliest opportunity and in advance of the scheduled hearing. This will allow counsel to make meaningful and practical suggestions at the November hearing regarding the conduct of the Inquiry in terms of disclosure and the setting down of hearings. Without this information, it is difficult to be practical

and to advise our clients regarding the conduct of the Inquiry and to prepare submissions for the November hearing. We propose to make submissions on the matters outlined at paras 6.3-6.5 at the hearing on 21-22 November, however it is submitted that the information outlined at paras 6.1-6.2 is required as a matter of urgency to enable preparation for the hearing.

Dated this 8th day of November 2018



R E Harrison / D A Manning
Counsel for the Villagers