

UNDER THE  
IN THE MATTER OF

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

SUMMARY OF HAZEL ARMSTRONG LAW SUBMISSIONS  
FOR HEARING ON 21 AND 22 NOVEMBER 2018

DATED: 20<sup>th</sup> NOVEMBER 2018

**Introduction**

1. The allegations outlined in *Hit and Run* involve serious breaches of fundamental human rights by a New Zealand state actor during Operation Burnham actioned by New Zealanders. It 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.
2. The Terms of Reference at [5] the matter of public importance to which the Inquiry is directed to examine is the allegation of wrongdoing by NZDF forces in connection with Operation Burnham and related matters. We agree with the submission of Counsel for the Former Residents of Khak Khuday Dad and Naik dated 19<sup>th</sup> of November 2018, at [7], wherein it is said:

“It is submitted that the primary purpose of this Inquiry is to satisfy New Zealand’s investigative obligation under the right to life. It is further submitted that this is consistent with, and necessarily follows from, the purpose as set out in the Terms of Reference (“TOR”) to inquire into factual matters concerning Operation Burnham and the applicable legal frame work.”

3. The proposed limited release of evidence and the adoption of some closed-door procedure by the Inquiry as outlined in Minute 4 need to be reconsidered against NZBORA, International Law, and the need for public confidence in the inquiry. A full and public investigation is mandated by the right to life and international law guidance on best practice. Therefore, the public should have access to all evidence of the NZDF, subject to de-classification, redaction and summaries where necessary, and access to hearings, subject to witness and source confidentiality, for the public to assess the conduct in the NZDF and to have faith in the Inquiry.
4. The Inquiry’s assessment of the possible authorisation of our soldiers to act in a way contrary to the right to life is inherently relevant to New Zealand. It also has foreseeable impacts on New Zealand soldier’s mental health. Which in turn will impact on their families, and their communities within New Zealand.

**New Zealand Bill of Rights Act 1990**

5. In recognising the importance of open justice, the Inquiry highlights there is no presumption at Common Law that inquiries must be conducted by way of public process.<sup>1</sup> While Common Law may not recognise this presumption, it is submitted that this is mandated by the New Zealand Bill of Rights Act 1990.
6. NZBORA, s 8 mandates that no one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice. The right to life also sets positive obligations to investigate and prevent unlawful killings. The European Court of Human Rights' jurisprudence has set requirements for a domestic investigation into any unlawful killing. Article One of the European Convention on Human Rights concerns the right to life. It requires by implication of the right to life, that there should 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>2</sup> Principles for an effective investigation are outlined in *Jordan* as state instigation, independence, means, promptness and transparency.<sup>3</sup> *Jordan* states that the degree of public scrutiny required may well vary from case to case.<sup>4</sup>
7. 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.
8. The Crown submits that the Inquiry has no obligation and arguably no power to investigate suspected breaches to the right to life.<sup>5</sup> In *McKerr*, following the investigation into the killing of three unarmed IRA members suspected of acting to commit murder by the Royal Ulster Constabulary, the European Court of Human Rights stated:<sup>6</sup>

“The lack of independence of the RUC investigation, and the lack of transparency regarding the subsequent enquiry into the alleged police obstruction in that investigation may be regarded as lying at the heart of the problems in the procedures which followed. *The domestic courts commented that the inquest was not the proper forum for dealing with the wider issues in the case. No other public, accessible procedure, however, was forthcoming to remedy the shortcomings.*” (Emphasis Added).

The Court went on to find that the lack of transparency and effectiveness led to a failure to comply with the right to life and therefore there was a violation of the provision.<sup>7</sup> That Court did not seem to find arguments about the inappropriateness of the forum persuasive.

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<sup>1</sup> Minute No. 4 of Inquiry into Operation Burnham and Related Matters (14 September 2018), at [70].

<sup>2</sup> *McCann v United Kingdom* (1995) 21 EHRR 97 at [161].

<sup>3</sup> *Jordan v United Kingdom* (2003) 37 EHRR 2 at [105]-[109].

<sup>4</sup> At [109].

<sup>5</sup> Summary of Crown Submissions for Hearing on 21 and 22 November 2018 (15 November 2018), at [27].

<sup>6</sup> *McKerr v United Kingdom* (2002) 24 EHRR 20 (Section III, ECHR) at [158].

<sup>7</sup> At [160-161].

9. 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**

10. The Minnesota Protocol on the Investigation of Potentially Unlawful Death is the United Nations manual on effective prevention and investigation of extra-legal, arbitrary, and summary executions. It represents best practice. It requires that:<sup>8</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.*” (Emphasis Added).

### **Public Confidence**

11. Further, transparency is greatly needed for public confidence.
12. The European Court of Human Rights has highlighted the need for public scrutiny to enable public confidence in a domestic investigation. In *McKerr*, domestic investigations had several shortcomings, including:<sup>9</sup>

‘a lack of public scrutiny, and information to the victim’s family concerning the independent police investigation into the incident, including the lack of reasons for the decision of the DPP not to prosecute any police officer at that stage for perverting or attempting to pervert the course of justice’

13. In *Jordan*, the Court stated:<sup>10</sup>

*‘The Court would observe that the shortcomings in transparency and effectiveness identified above run counter to the purpose identified by the domestic courts of allaying suspicions and rumours. Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force. Lack of such procedures will only add fuel to fears of sinister motivations...’* (Emphasis Added).

14. Withholding information has been shown to undermine the credibility of previous Royal Commissions of Inquiry. The lawyer representing Pike River Mine families at the Royal Commission stated he was not shown video footage of the mine.<sup>11</sup> Sonya Rockhouse stated

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<sup>8</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>9</sup> *McKerr*, above n 6, at [157].

<sup>10</sup> *Jordan*, above n 3, at [144].

<sup>11</sup> Morning Report “Pike Families’ Lawyer Doubts Drift Footage Was Provided to Inquiry” (2 May 2017) RNZ <RNZ.co.nz>.

that the families had not seen the footage.<sup>12</sup> This led to concern amongst family members of other material which they believed they had not been shown.<sup>13</sup> Speaking of the previously unseen footage five years after the Royal Commission, Sonya Rockhouse said:<sup>14</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 that in the see that in the drift, it’s almost the complete opposite.’

This shows an example of increased uncertainty into the public confidence in the findings of an investigation where there was a perception of a lack of transparency. This should be avoided in this Inquiry.

15. To withhold information of Government action from the public greatly risks undermining the purpose the Inquiry to investigate in the public interest.

## **Application**

### **a. Evidence**

16. The requirements for transparency of factual basis for an investigation’s findings in the Minnesota Protocol and transparency set out in the right to life must allow for a default position of access to information. 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 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.<sup>15</sup> 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.

### **b. Procedure**

17. We are concerned at the decision to not hold a programme of both private and public hearings of evidence from witnesses of fact.<sup>16</sup> The reliance on logistical difficulties and impracticalities gives less weight the right to life and the purpose of public interest. We submit that the Inquiry’s balancing of these interests should be reconsidered. We agree with Counsel for the Former Residents’ submission at [83]:

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<sup>12</sup> Morning Report.

<sup>13</sup> Morning Report.

<sup>14</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>15</sup> Submission by Media Entities in Relation to Proposed Procedure of Inquiry (5 October 2018), at [59].

<sup>16</sup> Minute No 4, above n 1, at [80].

“The right to life, natural justice rights of the participants, and public interest militate in favour of a public process in this Inquiry.”

The submission aptly quotes from the Court of Appeal decision *Fay, Richwhite & Co Ltd v Davidson*:<sup>17</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.”

18. We disagree with the Crown’s submission that the ISAF report satisfies international investigative obligations under the Minnesota Protocol art 21, 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.<sup>18</sup> The statement is especially hard to accept where *Hit and Run* contains allegations about the reporting by ISAF following the operation.
19. Considering the ECHR’s desire for a transparent process as set out in *McKerr*, even if the Inquiry has no Common Law obligation for the inquiry to be conducted in an open manner, a lack of transparency in this investigation may not meet procedural obligations under the right to life as affirmed under NZBORA.
20. We agree that the hearings where there is classified information or confidential and vulnerable witnesses should not be open to the public; where those interests are not at issue there should be general public access. The Inquiry’s approach to substantially non-public approach appears to give less weight to the right to life, international law, and public confidence considerations than we believe is appropriate. 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>19</sup>
21. It is of further concern if the issues relating to transparency of evidence as set out above are not met, as it would seem that there would be no ability for the public to access and assess the credibility of evidence. This would completely cut across the Minnesota Protocol’s requirement for transparency in an investigation’s basis in fact, and will not assure the public of the Inquiry’s credibility.
22. We support Counsel for Mr Stevenson’s submission that the villagers and Messrs Harger 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>20</sup> We further support the assertion that cross-examination will also inevitably be required to

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<sup>17</sup> [1995] 1 NZLR 517 at 524 per Cooke P.

<sup>18</sup> *Report of Peter Boshier, Chief Ombudsman’s Opinion on OIA Requests About Operation Burnham (2018)*.

<sup>19</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>20</sup> Submissions of Counsel for Mr Stevenson in Response to Minute no. 4 (5 October 2018), at [36-37].

ensure respect for rights to natural justice.<sup>21</sup> This would re-enforce a public perception of a fair Inquiry.

## **Conclusion**

23. NZBORA and international right to life jurisprudence, international law obligations, and public confidence mandate the proposal that the inquiry's disclosure of evidence and procedure needs to be reconsidered for greater public transparency.
24. We have noted the orders sought by Counsel for Former Residents at [89]. We endorse these orders as they are consistent with the thrust of our submission, which is that the right to life is the appropriate starting point consistent with the Inquiry's Terms of Reference

Hazel Armstrong Law

20<sup>th</sup> November 2018

Hazel Armstrong Law is a law firm specialising in health and safety, accident compensation and employment law.

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<sup>21</sup> At [38].