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 REQUESTING ORDERS AS TO PROCEDURAL MATTERS

Dated 19 November 2018

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I INTRODUCTION

1 This memorandum is filed in advance of the hearing on 21 and 22 November 2018 and in response to the Summary of Crown Submissions ("the Crown submissions") dated 15 November 2018. The purpose of this memorandum is to outline the submissions which Counsel will advance at that hearing, to introduce and explain the rulings and orders which Counsel for the Villagers request from the Inquiry in relation to procedural matters, and to respond to matters raised by the Crown in their submissions.

2 A number of complex legal issues have been raised variously in memoranda including the recent Crown submissions. There has been little time to prepare comprehensive submissions in response, and it is anticipated that it may be difficult to address all matters satisfactorily in the time available on 21 and 22 November. In counsel's view, it may indeed be premature to conclusively resolve certain aspects of the Inquiry's methodology, as much of it turns on logistical and practical circumstances which are being dealt with in the abstract. For reasons expanded upon below, it is submitted that the way forward at this stage is for counsel to work together to create pragmatic solutions to issues around confidentiality and classification, rather than moving directly to a constrained methodology based on an abstracted view of what may in fact be a worst-case scenario.

3 A proposed draft list of issues is annexed to this memorandum. Counsel for the Villagers submit that a list of issues is an appropriate means to address the matters outlined in the terms of reference for the Inquiry. By framing the factual and legal matters to be determined in neutral and all-encompassing terms, the parties are positioned in a less defensive position at the outset, and the purpose of the Inquiry as a fact-finding body is best served.

4 This memorandum will address:

4.1 The investigative obligation arising from the right to life;

4.2 Disclosure to date;

4.3 Procedures for classified information;

4.4 Methodology of the Inquiry;

4.5 Orders, rulings and directions sought from the Inquiry;

4.6 The implementation of a List of Issues.

II RIGHT TO LIFE

Origins of the Inquiry and nature of the dispute

5 Before moving to those points, it is helpful to outline the nature of our clients' interest in this Inquiry and the reasoning behind their position. This inquiry is highly significant to our clients. Our clients include the next of kin of the civilians who were killed during Operation Burnham, as well as those who were injured or had their property destroyed in Operations Burnham and Nova. The three named clients who were parties to the High Court judicial review proceedings include the father of Fatima, the three-year-old girl who was killed during Operation Burnham, and two brothers of Abdul Qayoom, who is alleged to have been captured, beaten, and executed. Throughout these events, our clients say they held non-combatant civilian status, and that there was no justifiable reason for them or their villages to have been targeted with such violence.

6 It has been over ten years since the events of Operation Burnham took place. To this day, our clients have not received any satisfactory explanation of these events. They faced silence until the publication of *Hit and Run*, after which they received denials which to them have been hard to comprehend. These public statements have included denials of the civilian casualties[1] or that NZDF forces were even operating in their villages, assertions that insurgents were killed,[2] that NZDF forces in the villages were under threat, and an acknowledgement that civilian

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1 Hon Wayne Mapp responded to reports of civilian casualties in April 2011, saying "That's been investigated and proven to be false" <https://www.tvnz.co.nz/one-news/new-zealand/am-satisfied-around-former-defence-minister-responded-asked-if-no-civilians-were-killed-in-raid-nz-sas?auto=5367211254001>; Also in April 2011, an NZDF press release stated that an ISAF investigation concluded that the allegations of civilian casualties were unfounded (NZDF Press Release, 20 April 2011); repeated in a 2017 statement (NZDF Media Release, 21 March 2017).

2 NZDF Press Release, 20 April 2011.

casualties 'may' have resulted from weapons malfunctions.[3] These accounts wholly contradict that given by our clients, which is that their villages were attacked by military forces, causing the deaths of six civilians, injuries to a further fifteen, and significant property damage, despite there being no insurgents or armed groups in their villages and no resistance offered.

7 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 indeed 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 framework:[4]

> The matter of public importance which the Inquiry is directed to examine is the allegations 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.**

8 Counsel take issue with the characterisation of the basis for the Inquiry in the Crown submissions for a number of reasons.[5] First, the Crown have stated that:[6]

> ... none of the cases relied on [by Counsel for the Villagers] support the proposition that a principle of international human rights law is to be applied without regard to IHL to deaths taking place during the conduct of hostilities in a situation of armed conflict.

9 Counsel wish to be clear that this proposition has not been advanced and is not intended to be advanced. Rather, it is submitted that international human rights law serves as the *starting point* for the this Inquiry, and that satisfaction of the investigative obligation and the other tasks before the Inquiry will involve consideration of both IHL and international human rights law. One is not exclusive of the other, as noted in the Gaza Flotilla Inquiry:[7]

> 62. The International Court of Justice has also repeatedly confirmed the continued application of human rights provisions in armed conflict. ...
>
> [...]
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> 63. As a result, it could be argued that the content of human rights law is informed by the specific provisions of international humanitarian law, and that *vice versa* international humanitarian law may make reference to human rights law. This 'renvoi approach' would

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3 NZDF Media Release, 27
4 TOR at [5] (emphasis added).
5 Crown submissions at [26]-[28].
6 Crown submission at fn 34.
7 *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident* Sir Geoffrey Palmer (Chair), July 2011 at [63]-[65].

> be applied "in the area of rights protected by both sources, *i.e.* in the area of overlapping." For example, when international humanitarian law allows for the detention of individuals, human rights law may be consulted to specify the conditions and the rights and duties of the involved State and the detainees in this situation. Conversely, when interpreting the right to life under human rights law during an armed conflict, recourse must be had to the principle of international humanitarian law which sanctions the killing of combatants. "It is thus not so much a matter of putting one source in the place of the other – which is the traditional meaning of the *lex specialis* rule – but rather of complementing both with each other in the context of a proper interpretation."
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> 64. In light of the above, it is important to stress that it is difficult to make generalized statements on the exact nature of the relationship between human rights law and international humanitarian law. Rather, the application of specific provisions of either legal area depends heavily on the factual context of the situation and has to be assessed accordingly. In any case, there cannot be gaps in the law. In line with the rationale expressed in the Martens Clause—now a part of customary law—it must be assured that minimum standards of humanitarian/human rights protection are observed at all times.
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> 65. We observe in this regard that there is significant overlap between many of the protections provided under international humanitarian law and their counterparts under human rights law. In particular:
>
> - Both international humanitarian law and human rights law prohibit any form of discrimination in providing protection.
> - Both prohibit murder / the arbitrary deprivation of the right to life.
> - Both prohibit any form of torture.
> - Both prohibit humiliating and degrading treatment.
> - Both require that detained individuals are granted due process rights with regard to their detention.

10 Robert Kolb identifies three approaches to the relations of IHL and international human rights law:[8]

10.1 The 'subsidiary' approach, whereby IHL applies in its specialised field of armed conflicts, and international human rights law applies in all situations:[9]

> Thus, one may say that HRL borders on all parts IHL and assures a humanitarian standard in all the cases where IHL does not apply. Once the borders of IHL are crossed, one ends up in the province of HRL assuring a subsidiary application of certain humanitarian standards. That is not to say that HRL applies only when IHL does not apply. We will see that both equally apply contemporaneously. However, a distinctive function of HRL is to remain the sole subsidiary body of applicable international rules when IHL is no longer applicable.

10.2 The 'renvoi' approach, whereby each of IHL and international human rights law inform the application of the other:[10]

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[8] "Human Rights and Humanitarian Law" *Max Planck Encyclopedia of Public International Law* Robert Kolb (March 2013) at [32]-[43].

[9] At [33]-[34].

[10] At [35]-[37].

> Such 'renvois' take place in the area of rights protected by both sources, ie in the area of overlapping. Such double protected rights are, for example, the right to life—against arbitrary deprival; the prohibition against inhumane and degrading treatment—assaults on physical and mental integrity; the rights against arbitrary arrest and detention (→ Detention, Arbitrary); rights related to judicial guarantees; rights related to the use of firearms by enforcement officials; rights related to medical assistance and ethics, etc.

10.3 The 'merger' approach, whereby IHL and international human rights law are 'merged' into a new body, 'human rights law in armed conflicts', combining aspects of IHL and human rights law.[11]

11 Undoubtedly, the approach to be taken in the New Zealand context will be a matter of significant debate. This issue need not be addressed now however, although to a certain degree it will be necessary to address such issues during the course of the Inquiry. At this stage, however, the issue can be kept simple: six people are alleged to have died and a further fifteen injured; what were the circumstances of their deaths?

12 The Crown have stated that "[t]his inquiry was not established... because new credible allegations of IHL violations emerged".[12] Rather, the Crown say that the purpose of the Inquiry is simply to address allegations which have had an impact on NZDF's reputation.[13] This characterisation is not, however, accepted.

13 With respect to the TOR, para 3 serves as a descriptive introduction to the purpose, noting the seriousness of the allegations, NZDF's denial, and the impact on NZDF's reputation. Para 4 then goes on to say that a Government Inquiry is in the public interest "[i]n light of these allegations". The purpose as stated is not directly tied to the reputational aspect, except in the sense that of the several matters raised, it is closest in proximity to para 4. It is clear that the scope of the Inquiry far exceeds matters relevant to NZDF's reputation. In relation to paras 6.4, 7.9 and 7.10, for example, the TOR expressly state that matters relating to the Rules of Engagement are to be considered "separate from the Operations".

14 Similarly, it is submitted that the Attorney-General's media release and Q&A strike a more careful line than seems to be suggested by the Crown. This is to be

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[11] At [38]-[43].
[12] Crown submissions at [26.2].
[13] Crown submissions at [26.4].

expected, as it would have been improper for the Attorney-General to provide his views on the outcome of an independent inquiry he had just initiated. It is helpful to look more fully at the media release and Q&A, however, to demonstrate that the Attorney-General's position was far from unequivocal regarding the credibility of the allegations:

> **Media statement**
>
> It was the subject of the book *Hit & Run* by authors Nicky Hager and Jon Stephenson which contained a number of serious allegations against New Zealand Defence Force (NZDF) personnel involved in the operation.
>
> "In deciding whether to initiate an inquiry I have considered material including certain video footage of the operation," says Mr Parker.
>
> "The footage I have reviewed does not seem to me to corroborate **some** key aspects of the book *Hit & Run*.
>
> "The footage suggests that there was a group of armed individuals in the village.
>
> "However, **the material I have seen does not conclusively answer some of the questions raised by the authors**.
>
> "In light of that, and bearing in mind the need for the public to have confidence in the NZDF, I have decided in the public interest that an inquiry is warranted."
>
> Commissioning this inquiry does not mean the Government accepts the criticisms of the actions of SAS forces on the ground, although their conduct is squarely within the inquiry's purview and will be thoroughly examined.
>
> (emphasis added)

> **Media Q and A**
>
> Is this a vote of no confidence in the NZDF, the SAS or the Chief of Defence Forces?
>
> The inquiry has been set up to establish the facts and determine the truth as far as is possible. **Its findings have not been prejudged. Nor does it mean the Government accepts the criticisms of the actions of SAS forces on the ground, although their conduct is squarely within the inquiry's purview and will be thoroughly examined.** It will also examine the treatment by NZDF of reports of civilian casualties. It will be up to the inquiry to make findings on these matters.
>
> (emphasis added)

15 It is of course indisputable that new allegations of IHL violations emerged, first with the publication of *Hit and Run* and second with our correspondence to the Attorney-General and Prime Minister on behalf of our clients. Whether those allegations were credible such that an inquiry was required under law is obviously a matter which has been highly contested, primarily in the course of High Court litigation. In our submission, both presently and at the High Court, an independent inquiry was and is required under law due to the obligation on the state to investigate serious allegations of breaches of the right to life. It is also submitted that the credibility and seriousness of the allegations was demonstrated by the

overwhelming public response in support of an independent inquiry. This litigation was of course opposed by the Crown, and was ultimately withdrawn following the commencement of this Inquiry.

16 In discontinuing the High Court judicial review of the former Government's decision not to order an independent inquiry, it was anticipated that this Inquiry would be the independent inquiry our clients sought. It is submitted however that this can only be the case if it is accepted by the Inquiry that its purpose is to satisfy the investigative obligation under the right to life, with the consequent procedural obligations which follow. While it is of course not a relevant matter for the Inquiry, it is noted that the trajectory of this Inquiry in that regard will inform any decision whether to resume that litigation.

17 A further, related function of this Inquiry also follows the above. That is that in the course of its response to the allegations made regarding Operation Burnham, the NZDF has made serious allegations against our clients.[14] These include allegations that they were insurgents or combatants themselves, that they were engaging in hostilities, and that they were in effect responsible for the harm which was inflicted upon them. These allegations place the culpability for the loss of their loved ones at their feet, and concern accusations of serious wrongdoing including terrorist activity, which our clients find abhorrent. As such, their natural justice rights go beyond simply participating in the proceedings, but extend to their right to respond to allegations and clear their own names.

18 The fact remains that there is a very real *lis* between the participants to this Inquiry. This Inquiry is undoubtedly a step in the right direction, and our clients are grateful for the opportunity to at last seek the truth regarding the deaths of

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[14] Most significant of course is the recent NZDF narrative, dated 7 November 2018. Further examples include: in an internal email, Major-General Peter Kelly described the inhabitants of the villages as not "innocent civilians fleeing the area" but "hardened insurgents". He further stated "Throughout this mission the coalition forces engaged and killed nine insurgents who were positively identified carrying weapons, those being RPGs, AK47s and PKS machine guns". It was asserted that the "insurgents" were using civilian buildings as cover (NZDF Disclosure, 1st Tranche, Yellow Tab, Tab 19). Similarly, the document "Talking points for meeting with PM" states "During the op a large number of insurgents working in small groups attempted to outflank the force. These insurgents were engaged by coalition helos and aircraft." Further "The insurgents put non-combatants at risk by using the compounds as a base for their operations. Insurgents with machine guns and probable RPGs were clearly visible." (NZDF Disclosure, 1st Tranche, Yellow Tab, Tab 19).

their loved ones. It must be noted, however, that this Inquiry is some ten years too late, and attempts to instigate an independent inquiry have been strenuously resisted by the NZDF right up until this Inquiry was ordered.

19 For these reasons, this Inquiry concerns the intersection of international human rights law and international humanitarian law relevant to a non-international armed conflict, which is a developing area of law. It is submitted that it is necessary to establish a secure legal foundation for the factual inquiry to proceed. It is for this reason that we are requesting a ruling that this Inquiry is intended to satisfy the investigative obligation under the right to life obligation.

20 It is also necessary to determine at the outset the evidential threshold and onus which the Inquiry intends to adopt. As the Inquiry is the first of its kind in New Zealand, dealing with a range of complex factual and legal issues, sensitive evidence, and a large number of likely witnesses, it is necessary to determine what evidential processes will best suit this particular inquiry. Questions will include the burden and onus of proof, the methods by which evidence will be tested, credibility assessed, and information verified. A further issue will be the impact of the privilege against self-incrimination upon the evidence of both NZDF personnel and possibly other witnesses, in light of the allegations made against the villagers by the NZDF.

21 A proposed draft list of issues has been prepared, which outlines the matters which it is submitted must be addressed to satisfy the TOR and the investigative obligation. The list of issues is framed in neutral terminology, posing questions relating to legal and factual matters to be determined and endeavouring to encompass the matters outlined in the TOR, namely those in paras 6 and 7. This draft list is provided to initiate discussion, and the proposal has been raised previously with Counsel Assisting and counsel for the NZDF, although is the first draft that has been provided. Some issues may be more or less controversial, and some relate to facts in issue while others relate to legal definitions. In preparation of this draft list of issues, counsel have been guided by the principles outlined in *Jordan v United Kingdom* and related case law, which it is submitted provide the

framework for an inquiry focussed on the right to life.[15] As previously noted in our memoranda, the *Jordan* principles in essence require that an effective inquiry:

21.1 is triggered by the State of its own motion;[16]

21.2 is conducted by independent investigating authorities, capable of scrutinising the accounts of the parties and making an independent reconstruction of the events;[17]

21.3 possesses a sufficient mandate and powers that enable it to determine whether the force used was or was not justified in the circumstances, including the ability to compel witnesses, gather and secure evidence, and reach conclusions of fact;[18]

21.4 proceeds promptly, both in terms of initiation and progress;[19]

21.5 is subject to public scrutiny.[20] Related to this is the requirement that in all cases the next-of-kin of the victim must be involved to the extent necessary to safeguard their legitimate interests.[21]

22 It is submitted that the issues identified in this memorandum are necessary prerequisites to satisfy the investigative obligation of the right to life. Related to these issues are certain other procedural matters which counsel submit are necessary for the Inquiry to determine. These include the nature and degree of the involvement of next of kin, which counsel submits must be meaningful and ongoing throughout both the procedural and substantive parts of the Inquiry. Counsel also submit that discovery of documents relating to the right to life should

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15 *Jordan v United Kingdom* (2003) 37 EHRR 2; *Al-Skeini v United Kingdom* (2011) 53 EHRR 18; *McCann v United Kingdom* (1996) 21 EHRR 97; *Edwards v United Kingdom* (2002) 35 EHRR 487. See also Jason Beer QC (ed) *Public Inquiries* (OUP, 2011) at [6.07]-[6.21].

16 *Ergi v Turkey* (2001) 32 EHRR 18 at [82]; *Isayeva v Russia* (2005) 41 EHRR 38 at [210]; *Montero-Aranguren v Venezuela* (5 July 2006) Inter-Am Ct H R at [79].

17 *Kaya v Turkey* (1999) 28 EHRR 1 at [89]; *Jordan v United Kingdom* (2003) 37 EHRR 2 at [106]. See also *Edwards v United Kingdom* (2002) 35 EHRR 487 at [70]; *Isayeva v Russia* (2005) 41 EHRR 38 at [211]; *McKerr v United Kingdom* (2002) 34 EHRR 20 at [112].

18 *Jordan v United Kingdom* (2003) 37 EHRR 2 at [107]; *Kaya v Turkey* (1999) 28 EHRR 1 at [87]; *Güleç v Turkey* (1999) 28 EHRR 121 at [78].

19 *Jordan v United Kingdom* (2003) 37 EHRR 2 at [108]; *Ergi v Turkey* (2001) 32 EHRR 18 at [85]; *Kaya v Turkey* (1999) 28 EHRR 1 at [91].

20 *Jordan v United Kingdom* (2003) 37 EHRR 2 at [109].

21 *Jordan v United Kingdom* (2003) 37 EHRR 2 at [109]; *Güleç v Turkey* (1999) 28 EHRR 121 at [82].

be prioritised, including material such as eyewitness reports, photographic evidence, medical or autopsy reports, and other such materials as may have been collected from or prepared following the Operation as they relate to right to life obligations held by the State.

23 Our instructions are that the following casualties and deaths resulted from Operation Burnham. Of these casualties, 19 occurred in Khak Khuday Dad and a further two in Naik, and 15 were women or children.

Death

23.1 *[Name withheld]*, Khak Khuday Dad: struck in the head by shrapnel from helicopter fire as her mother carried her out of their house (Victim 1).

23.2 *[Name withheld]*, Khak Khuday Dad: hit by helicopter fire and shrapnel behind his house, he died more than nine hours after being hit without medical assistance (Victim 2).

23.3 *[Name withheld]*, Khak Khuday Dad: killed by small arms fire near where snipers were allegedly positioned (Victim 3).

23.4 *[Name withheld]*, Khak Khuday Dad: killed by small arms fire near where snipers were allegedly positioned (Victim 4).

23.5 *[Name withheld]*, Naik: killed by helicopter fire after being chased as he fled the village (Victim 5).

23.6 *[Name withheld]*, Naik: killed by helicopter fire after being chased as he fled the village (Victim 6).

Injury

23.7 *[Name withheld]*, Khak Khuday Dad: injured by the same helicopter fire that killed *[withheld]*. She was forced to travel six hours by horse for medical

treatment, suffers mental health problems and has not returned to live in the village (Victim 7).

23.8 *[Name withheld]*, Khak Khuday Dad: wounded by helicopter fire (Victim 8).

23.9 *[Name withheld]*, Khak Khuday Dad: wounded by helicopter fire (Victim 9).

23.10 *[Name withheld]*, Khak Khuday Dad: wounded along with her children by a rocket exploding beside her house (Victim 10).

23.11 *[Name withheld]*, Khak Khuday Dad: wounded by a rocket exploding beside her house (Victim 11).

23.12 *[Name withheld]*, Khak Khuday Dad: 10 years old, wounded by a rocket exploding beside his house (Victim 12).

23.13 *[Name withheld]*, Khak Khuday Dad: seriously injured as she left her house (Victim 13).

23.14 *[Name withheld]*, Khak Khuday Dad: seriously injured as she left her house (Victim 14).

23.15 *[Name withheld]*, Khak Khuday Dad: injured along with her children (Victim 15).

23.16 *[Name withheld]*, Khak Khuday Dad: wounded by a rocket exploding beside her house (Victim 16).

23.17 *[Name withheld]*, Khak Khuday Dad: injured along with family (Victim 17).

23.18 *[Name withheld]*, Khak Khuday Dad: injured along with family (Victim 18).

23.19 *[Name withheld]*, Khak Khuday Dad: hit in the back by shrapnel, which remains in his back today (Victim 19).

23.20 *[Name withheld]*, Khak Khuday Dad: injured by shrapnel as he was moving children to safety (Victim 20).

23.21 *[Name withheld]*, Khak Khuday Dad: traumatised and suffering from severe mental illness ever since (Victim 21).

24 For ease of reference and to preserve anonymity, the victims are referenced by number from the list above (e.g. "Victim 1"). It is requested the names and identifying details of our clients be withheld pursuant to s 15(1)(a)(iii) of the Inquiries Act 2013.

Sources of Law

25 In relation to the investigative obligation and the other matters canvassed in this memorandum, counsel rely upon the following sources of law and bodies of jurisprudence:

25.1 Domestic law including the Inquiries Act 2013, the Evidence Act 2006, the New Zealand Bill of Rights Act 1990, and the Terms of Reference for the Inquiry;

25.2 International Human Rights Law ("IHRL");

25.3 International Humanitarian Law ("IHL");

25.4 Customary international law;

25.5 The European Court of Human Rights ("the Strasbourg Court");

25.6 The higher courts of the United Kingdom;

25.7 Coronial inquests in New Zealand and in the United Kingdom (particularly Northern Ireland).

Procedural matters arising from the investigative obligation at this stage

26 For the reasons outlined above, it is submitted that a key focus of this Inquiry should be centred upon the satisfaction of the obligation to investigate possible breaches of the right to life with respect to the victims outlined above, and counsel seek a ruling to that effect. A key purpose of this Inquiry should be to determine conclusively the facts of Operations Burnham and Nova and the circumstances of the above-mentioned deaths (and also injuries and property damage), with a view to making recommendations and promote justice by providing to families a degree of closure and information which has been lacking.

27 Comparing the progress of this Inquiry with comparable overseas inquiries and inquests, it seems apparent that the scale of information which the NZDF and Crown Agencies seek to withhold from interested parties (including families and next of kin) is somewhat out of step with the conduct of comparable processes, which have seen fit to disclose publicly documents relating to the rules of engagement, intelligence reports, and other such material (albeit with redactions). This matter is addressed more fully below, however it is submitted here that the investigative obligation and natural justice rights would require as practical measures, at a minimum:

27.1 Names of personnel responsible for deaths;

27.2 Personnel files;

27.3 List of all persons identified as witnesses;

27.4 Provision of a chain of command diagram;

27.5 Statements from all personnel and witnesses 20 working days in advance of hearing;[22]

27.6 Consideration of anonymity measures with respect to witnesses;

27.7 Consideration of undertakings with respect to non-prosecution;

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[22] *Jordan v United Kingdom* (2003) 37 EHRR 2.

27.8 Preparation and disclosure of a comprehensive chronology of events relating to each death, with maps and other such descriptive material;

27.9 Identification of the cause and context of each death.

28 Considering the use of closed material procedures (addressed more fully below) in a case concerning allegations of complicity and torture by intelligence services abroad, the United Kingdom Court of Appeal noted:[23]

> If the court was to conclude after a hearing, much of which had been in closed session, attended by the defendants, but not the claimants or the public, that for reasons, some of which were to be found in a closed judgment that was available to the defendants, but not the claimants or the public, that the claims should be dismissed, there is a substantial risk that the defendants would not be vindicated and that justice would not be seen to have been done. The outcome would be likely to be a pyrrhic victory for the defendants, whose reputation would be damaged by such a process, but the damage to the reputation of the court would in all probability be even greater.

29 It is of paramount importance that the family and next of kin of those who lost their lives in Operation Burnham be *meaningfully* involved in the conduct of the Inquiry, including by provision of full information regarding the circumstances and events of Operation Burnham. A closed hearing, or one which the families and next of kin of the victims are not entitled to full information, would fail to achieve its purpose. Without full information or the ability to test the evidence, public confidence in the Inquiry and the NZDF and the trust of the families of those who died will be undermined.

Timeframe

30 As the Inquiry is aware, the provisional reporting date is 12 months from the establishment of the Inquiry. We are presently about seven months through this process. It is submitted that the 12-month timeframe needs to be squarely confronted. With five months remaining, it is clear that even the procedures planned at this time (including Mr Keith's review, disclosure, and preparation for hearing) are likely to take us beyond this timeframe.

31 This Inquiry is addressing matters of fundamental importance, and should not be rushed or subjected to unachievable timeframes which detract from the quality of the Inquiry's work. This is the first time that non-executive civilian oversight of

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[23] *Al Rawi v Security Service* [2010] 4 All ER 559 at [56], [2010] 3 WLR 1069.

the military has been seriously conducted in New Zealand. The issues before the Inquiry are novel, especially in the New Zealand context, involving complex matters of law relating both to the substantive questions the Inquiry will be determining, and to procedural issues such as the use of closed material procedures. The Inquiry has before it a large amount of information in relation to which confidentiality or classified status is asserted, and these issues will need to be fully considered.

32 It is submitted that the Inquiry should acknowledge that the 12 month timeframe is not feasible, and move to an expanded timeframe taking into account the volume of work before it. Counsel for the Villagers would be supportive of such a move. Unfortunately, we are not currently in a position to suggest alternative timeframes due to a lack of information about the disclosure undertaken by Crown and the expected timeframes for Mr Keith's review. It was for this reason that further information was requested in counsel's memorandum of 8 November 2018.

III DISCLOSURE TO DATE

New Zealand material

33 Counsel acknowledge the difficulties faced by other parties with respect to disclosure, including arising from the damage to NZDF Headquarters in Wellington in the November 2016 earthquake.[24] Respectfully, however, it is concerning that such difficulties have continued to plague Crown Agencies, given the passage of time since the earthquake and the pressing need for an organisation such as the NZDF to have in place strong record-keeping procedures and safeguards. The concerning implication is that of a lack of methodical storage of material relating to the Operation, until it was necessary to retrieve for the Inquiry. It is also of concern that arrangements to obtain material from overseas partners in any significant sense have begun only in response to the Inquiry, rather than following the events or even following the publication of *Hit and Run* and the consequent calls for an Inquiry.

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[24] Memorandum of counsel for NZDF dated 14 August 2018 at [5].

34 It is also apparent that this work has been undertaken only in response to the initiation of the Inquiry. While this is of course no criticism of counsel or those NZDF personnel presently involved in the Inquiry, it represents a failure by the NZDF to have met its obligations under the right to life to date. While this Inquiry is relatively new, the allegations are not, and this exercise of collating and preparing information relating to these events should have begun immediately after the Operation. Indeed, this collation should have begun *before* the Operation, in the sense that the NZDF should not be engaging in such actions if proper procedures are not in place.

35 For this reason, matters relating to record keeping procedures before and after the Operation have been included in the draft list of issues below. Counsel further seek orders clarifying the progress and nature of disclosure to the Inquiry, including:

35.1 Provision of a list of documents provided to the Inquiry;

35.2 Directions from the Inquiry regarding the nature of the information to be provided (including, for example, the matters outlined above at para 27);

35.3 Directions from the Inquiry for Crown Agencies to actively seek permission from international partners[25] to release information (classified and unclassified) to the Inquiry and to core participants, including family members of the deceased (with provision to counsel subject to undertakings as a secondary option if the former cannot be agreed upon);

35.4 Directions from the Inquiry for Crown Agencies to provide a copy of all requests to international partners for permission to disclose information to the Inquiry and participants.

35.5 A preliminary indication from the Inquiry as to whether and in what circumstances the Inquiry will itself seek additional information.

36 For reasons which are outlined in further detail below, it is submitted that these matters of disclosure should be timetabled and prioritised at this stage, prior to

[25] See Memorandum of Counsel for NZDF dated 18 July 2018 at paras 6 and 12.

finally determining other aspects of the methodology of the Inquiry, with a view to reassessing in early 2019 what procedural measures are necessary. Based on experience in cases involving classified material, the view of counsel is that a pragmatic and practical approach to discovery and disclosure between parties is likely to resolve the vast majority of the concerns raised by the Crown in their submissions.

US Material

37 It is understood that there are approximately 480 items of classified material relevant to the Inquiry which are held by the United States.[26] In April 2017, Counsel for the Villagers formally requested under the Freedom of Information Act all information held by the United States relating to Operation Burnham. To date, no response has been received beyond an acknowledgment of the request. Counsel can advise that specialist US counsel have recently been instructed on behalf of the villagers to pursue this request by Court proceedings.

IV CLASSIFIED INFORMATION

38 The primary procedural issue which is to be resolved at this juncture is the handling of classified information by the Inquiry, including whether material is to be provided to non-Crown core participants and the adoption by the Inquiry of a closed material procedure ("CMP"), special advocate procedure, public interest immunity, or any other process.

39 Crown counsel have placed significant emphasis in their submissions on the reasons why material is classified (in an abstract sense, rather than in relation to the material at issue) and the importance of maintaining the confidence of international partners.[27] The importance of these matters is not disputed. Neither is the submission that the Crown is under a duty (as opposed to having a discretion) to take steps to prevent disclosure of information where there is a risk that it will cause harm to national security, prejudice the conduct of international relations, or breach confidence. What *is* disupted, however, is the submission that these concerns cannot be managed and mitigated by anything less than a closed

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[26] Memorandum of Counsel for the NZDF dated 18 July 2018 at [12]-[13].
[27] Crown submissions at [29]-[38].

process excluding both the public and core participants, particularly when these concerns are advanced in the abstract.

40 A similar matter was addressed by the United Kingdom Divisional Court in *R (on the application of the Secretary of State for the Home Department v Assistant Deputy Coroner for Inner West London.*[28] This proceeding arose from a coronial inquest into deaths in the London bombings of 7 July 2005. The coroner, Lady Hallett (a member of the Court of Appeal), determined that she did not have the power to receive sensitive evidence from the security services in a closed hearing, where "closed" meant "in the absence of properly interested persons and their legal representatives".[29] The Court dismissed the review of Lady Hallett's ruling, in a decision which was not appealed. In her ruling, Lady Hallett observed that the concerns of the Crown regarding the disclosure of classified information may have been overstated:[30]

> I do not accept that the position is now as dire as Mr Eadie would have it. It seems the court in *Al Rawi* was faced with a similar argument. The court dealt with it at paragraph 68:
>
> > "We are conscious that in some cases where evidence which is relevant or even vital to the interests of one of the parties (often the Crown, but sometimes not), limiting the procedure to the classic PII exercise can lead to unfairness, and can even result in what may appear to most people to be the wrong outcome, because the exercise will often result in important evidence being withheld. However, as explained by Lord Woolf in ex parte Wiley [1995] AC 274, 306H-307B, even where a PII claim is upheld in respect of material, the effect can often be mitigated by summarising its relevant effect, producing relevant extracts or even producing it 'on a restricted basis'. More generally, the evidential Rules of exclusion, for instance in relation to material which attracts legal professional privilege or 'without prejudice' privilege, will often be to increase the risk of a 'wrong' outcome. But that is a risk inherent in any legal system with Rules, and indeed it is inevitable in any system with human involvement. The risk of a 'wrong' outcome can be said to be increased if a party is prevented from relying on oral or documentary evidence for failing to comply with court orders or Rules, or if a party cannot take a point because it was not raised in his statement of case, or even because it did not occur to his legal advisers."
>
> I do not accept that my ruling will amount to an abrogation of the inquisitorial function. On the contrary, I am satisfied my ruling is entirely consistent with that function as presently regulated by Parliament. I am still hopeful that, with full cooperation on all sides, most, if not all, of the relevant material can and will be put before me in such a way that national security is not threatened.

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[28] *R (on the application of the Secretary of State for the Home Department v Assistant Deputy Coroner for Inner West London* [2010] EWHC 3098 (Admin).

[29] At [1].

[30] Ruling of Dame Hallett, Coroner's Inquests into the London Bombings of 7 July 2005, Inner West London (Westminster) Coroner's Court, 3 November 2005 at 26-28. In her ruling, Lady Hallett is referring to the Court of Appeal decision in *Al Rawi v Security Service* [2010] EWCA Civ 482, [2010] 4 All ER 559, which was affirmed in *Al Rawi v Security Service* [2011] UKSC 34.

41 Lord Woolf similarly observed in *R v Chief Constable of the West Midlands Police, ex parte Wiley*:[31]

> If the legal advisers of a party, who is in possession of material which is the subject of immunity from disclosure, is aware of the contents of that material, they will be in a better position to perform what they should consider to be their duty, that is to assist the court and the other party to mitigate any disadvantage which results from the material being not disclosed. It may be possible to provide any necessary information without producing the actual document. It may be possible to disclose a part of the document or a document on a restricted basis. An assurance may be accepted by counsel. In many cases co-operation between the legal advisers of the parties should avoid the risk of injustice. There is usually a spectrum of action which can be taken if the parties are sensible which will mean that any prejudice due to non disclosure of the documents is reduced to a minimum.

42 Setting aside, for the moment, whether a closed hearing is available in the terms indicated, it is submitted that it is premature to determine at this time that a closed hearing is necessary. Rather, the focus at present should be for counsel for the core participants (Crown and non-Crown) and counsel assisting to work together to find practical solutions to issues of classified information and disclosure. This can be achieved, as it was in the West London Inquests and in the further examples below, by measures such as public interest immunity procedures, in camera hearings, undertakings as to confidentiality, and most importantly, summarising and gisting sensitive material.

43 While the Crown have raised concerns particularly with the provision of material subject to undertakings, none of the concerns they have noted are irresolvable.[32] Concerns relating to inadvertent disclosure and determining responsibility for such disclosure, for example, can be managed by the retention of documents in safe storage facilities, the use of numbered or named copies (and, as in the Terence Jupp Inquest below, printed on easily identifiable pink paper) and by the expectation the counsel will comply with their professional obligations.[33] In any case, such concerns arise in any proceeding relating to classified information, including under the closed procedure suggested. A 'confidentiality ring' already exists with the Inquiry, Counsel Assisting, Crown counsel, Mr Keith, and NZDF personnel – the question is simply who else ought to be within that ring.

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31 *R v Chief Constable of the West Midlands Police, ex parte Wiley* [1995] AC 274, [1994] 3 All ER 420 at 447.

32 Crown submissions at [78]-[81].

33 Including, for example, r 13.1 and 13.2 of the Conduct and Client Care Rules and s 4 of the Lawyers and Conveyancers Act 2006

44 The Crown have submitted that Counsel Assisting can perform "all the functions that a security-cleared advocate in a confidentiality ring can perform". Respectfully, however, this is disputed on the obvious basis that, while no concerns are raised regarding Counsel Assisting's rigour, ability or fidelity, the fact remains that they are not *advocates*, and occupy a very different role in the Inquiry from other counsel. This point is demonstrated quite simply by the fact that the Crown Agencies still envisage making submissions to Mr Keith regarding his review process, rather than turning that function over to Counsel Assisting. It is understandable that the Crown Agencies expect to rely on counsel to convey their position to the Inquiry, and it is this same interest which our clients have in ensuring counsel are present throughout the conduct of the Inquiry.

45 It may well be that, after these measures have been fully explored, the core participants are able to determine that their positions are not so far apart after all. What is a large gulf at the moment may narrow to only a small range of documents, with the consequence that the burden on Mr Keith will be eased, the Crown Agencies' concerns regarding disclosure can be managed in a way that is negotiated with them, and the non-Crown core participants' natural justice rights are met. This reflect counsel's experience in a number of proceedings involving classified information.

46 As a first step, it is submitted that the Inquiry should timetable the provision of unclassified lists of all material (classified and unclassified) to be provided by NZDF and Crown agencies, and the preparation of summaries of the classified material. It is noted that the Crown have no objection to the provision of such lists or summaries in principle.[34]

47 In its memorandum of 18 July 2018, the NZDF indicated there were over 2,000 items of classified material within the scope of the Inquiry which may be relevant to its work, of which eighty percent is subject to the control of a foreign government or international organisation. Of that eighty percent, around seventy percent is held by NATO, and thirty percent by the United States. From the twenty percent held by New Zealand (approximately 400 documents), there is a core

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[34] Crown submissions at [99]-[102].

bundle of over seventy documents. Counsel for NZDF further advise that there are approximately 50 non-classified documents with respect to which it intends to seek protection from public disclosure. It is not known to non-Crown core participants how much information has been provided to the Inquiry thus far.

48 A significant volume of information is expected to be before the Inquiry, and consideration needs to be given to the manner in which this is to be prioritised. It is our submission that at this time, consideration of the core bundle of seventy documents ought to be prioritised. The non-Crown core participants variously contend that this material should be provided to the core participants as a matter of natural justice, to satisfy the right to life and to enable cross examination. The Crown Agencies on the other hand contend that this material cannot be provided to non-Crown core participants owing to its classified status, and agree with the Inquiry's suggested approach of adopting what is essentially a closed material procedure.

49 Mr Keith has been tasked with reviewing the classified items, to assess whether they warrant classified status. It may well be, then, that both this core bundle and the greater bundle of 2,000 documents will be whittled down over time as more material moves into the open category. That aside, however, counsel express concern at what appears to be a very real possibility of over-classification, given the volume of documents which are asserted to be classified. This is addressed further below.

50 It is submitted that there are two separate but related questions that must be addressed: first, what is the Inquiry *empowered* to do; and second, what *should* the Inquiry do? We contest that the Inquiry has the lawful power to hold hearings based on closed material or special advocate procedures. Before addressing that, however, it is helpful to consider the approach taken in overseas jurisdictions in analogous inquests/inquiries.

Specific context in Inquiry

51 As the Crown have noted, this Inquiry is unique in the New Zealand context.[35] It is not, however, unique in the international context. As noted, the United Kingdom has had a number of similar inquiries, although the Crown have taken issue with the analogy on the basis that none of these inquiries were concerned with the "active conduct of hostilities".[36] While the use of this term is not explained in the Crown submissions, it is taken to refer to the Crown's position that Operations Burnham and Nova were active military operations, with soldiers encountering and engaging and engaging in hostility. This is not the starting point of the Inquiry, however, but is in fact one the very points in issue. The position of our clients and the position outlined in *Hit and Run* is that the villagers were civilians, who posed no threat and offered no resistance to an act of aggression by military forces. In light of this, the situation is more analogous to inquiries concerning treatment of civilians and prisoners in situations of armed conflict.

52 In any case, many of the inquiries in the United Kingdom have concerned the active conduct of hostilities, and it is not clear why the distinction is being drawn.[37] Whether the matter in issue is the conduct of hostilities or the treatment of prisoners in warfare, similar concerns regarding classified information, intelligence received from partners, and the like will inevitably be raised. It is not apparent why, for example, the situation would be different if one of our clients had also been arrested and detained during the course of Operation Burnham.

53 Finally, the Crown have pointed to the Litvinenko Inquiry as a better example "given it also dealt with sensitive intelligence material".[38] The Litvinenko Inquiry concerned an act of espionage, the poisoning with radioactive material of a former Russian national on British soil by Russian intelligence operatives. It would be expected that closed material there would relate, for example, to British and partner intelligence regarding the activities of Russian operatives on British soil. This information seems clearly of a different nature to the present inquiry, and it is not at all apparent what is exceptional about Operation Burnham such that the

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35 Crown submissions at [29].
36 Crown submissions at [50].
37 See, for example, the Iraq Fatalities Investigations.
38 Crown submissions at [51].

information at issue is more similar to Litvinenko than to other inquiries into military conduct.

54 The need for public interest immunity ("PII") or CMP should in practice be rare, and the volume of material small. INQUEST, a UK-based NGO, provided written evidence to the Joint Committee on Human Rights *Justice and Security Green Paper* explaining their experience and providing case studies of inquests involving classified and sensitive information:[39]

> 30) Coroners have nevertheless found themselves well able, within the current legal framework, to find pragmatic solutions that properly strike the balance between the need to protect sensitive material and the need to ensure openness and transparency (except in the very rare cases where RIPA material has been directly relevant to the circumstances of a death).
>
> 31) As indicated above, INQUEST and the ILG have a breadth of experience of inquests involving sensitive material. Our collective experience of sensitive inquests is almost certainly broader and deeper than any single body or organisation, including government departments. It is therefore significant that we have encountered just one case until now, involving RIPA material, where it has proved necessary to withhold critical disclosure from the representatives of the family of the deceased. That case, involving the death in April 2005 of Azelle Rodney (referred to below and in the Appendix) is now the subject of an inquiry under the Inquiries Act 2005. In any event, there is no case, including that one, where it has been necessary or appropriate to hold "closed proceedings" of the kind envisaged by a CMP.
>
> [...]
>
> 34) As illustrated by the case studies, save only for one case apparently involving directly relevant RIPA material, the current legal framework already provides a range of different measures that can be adopted in the exceptional cases where national security or the extreme sensitivity of the material merits them. A coroner, proactively or in response to an application, is able to judge the necessity for one or more of these measures on the specific circumstances of each case. As illustrated by the case studies, the measures include:
>
> (a) appointing a High Court judge as coroner;
>
> (b) the use of Public Interest Immunity (PII) certificates;
>
> (c) the power to hold part of the proceedings in camera under rule 17 of the Coroners Rules;
>
> (d) using enforceable confidentiality agreements;
>
> (e) adopting special measures for witnesses such as:
>
> (i) granting anonymity;

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[39] Joint Committee on Human Rights *Justice and Security Green Paper: Written Evidence submitted by INQUEST* at 64-65. INQUEST is an independent organisation specialising in advice regarding contentious deaths and their investigation. INQUEST co-ordinates the INQUEST Lawyers Group ("ILG") which is a national network of over two hundred lawyers who are willing and able to provide preparation and legal representation for bereaved families. ILG members have been involved in thousands of inquests into contentious deaths over the last thirty years. These range from inquests into deaths in custody and following other contact with state agents, such as police shootings, through to major disasters such as the Marchioness, Hillsborough, Zeebrugge and rail crashes, as well as the deaths of military personnel. Their expertise is set out at paras 1-6 of their Written Advice.

(ii) giving evidence from behind a screen;

(iii) taking evidence by video link from another location;

(iv) when using video also using voice fragmentation and picture blurring;

(v) protecting witnesses arrival and departure, using special entry and exit routes;

(vi) giving witnesses or evidence codenames to protect confidentiality;

(f) the provision of safes in court for each of the interested persons to store bundles of sensitive documents;

(g) using separate bundles for sensitive material, where the evidence is printed on easily identifiable coloured rather than white paper with each page named for specific interested parties;

(h) prohibitions on the removal of coloured papers from the courtroom with the Coroner agreeing extended court opening hours to allow lawyers to work on the material;

(i) all coloured pages being returned to the owner of the sensitive material at the end of the inquest;

(j) the provision separate computers (with coloured screens) for the recording of in camera sessions, and an agreed set of rules for those sessions;

(k) the use of special personnel such as MoD police at the Coroner's Court each day to guard papers and ensure security;

(l) the attendance of a security adviser in court at all times to assist in resolving any emergency security issues; and

(m) the preparation of gist documents of the most sensitive material that can be shared with the family, (their lawyers being provided with the material underlying the gist document on strict undertakings).

35) These are not, as the Green Paper suggests, "*ad hoc* solutions" but coherent, practical measures developed under the current legislative framework which balance the need for protection of sensitive material whilst ensuring proper participation of families in inquests and openness and transparency more generally.

55 These case studies include:[40]

55.1 Inquests into the deaths of Diana, Princess of Wales and Dodi Al Fayed, involving significant amounts of evidence regarding the work of the Security Intelligence Service, whereby:

> A number of current and former SIS agents were given anonymity. Their witness statements were securely stored and only accessed by members of the legal teams and their clients. When they came to give evidence, the court convened in camera and the court was cleared of members of the public, and access was limited to a pre-agreed list of lawyers and properly interested persons. The families of the deceased were entitled to attend should they have wished to. The witnesses gave evidence in open court, but entered and left the court through the judge's entrance, having been brought into the building discreetly so as not to

[40] Joint Committee on Human Rights *Justice and Security Green Paper: Written Evidence submitted by INQUEST* at 69-75.

> be identified by the public entering or leaving. Mr Tomlinson [a former member of the SIS] gave evidence by video link from an undisclosed location known only to the Coroner's solicitor. Full transcripts of all the evidence including that of the SIS witnesses was placed on the website of the inquest.
>
> These practical measures, approved by the SIS and the Foreign Office, ensured that the evidence was fully explored in front of the jury and the properly interested persons, without compromising national security or the safety of individual agents.

55.2 Inquests into the deaths of 14 service personnel who died when a Nimrod reconnaissance aircraft crashed in Afghanistan. Again involving matters of national security:

> The coroner was determined to hear all evidence pertinent to the case and the majority of the inquest was open to the public. The Ministry of Defence made a single PII application in relation to background material in which counsel for the families was present. A summary of the PII application was given to the families after that hearing. The families participated fully in the inquest hearing and were able to question key witnesses through counsel and, on occasion, themselves directly. The families have commented that they were grateful to the coroner for the "fearless and impartial" manner in which he conducted the inquest and the respect that he showed to the families.

55.3 An inquest into the death of Jean Charles de Menezes. This inquest involved sensitive information regarding police practices in response to suicide bombers, international assistance they had received in that regard, and undercover and surveillance operations. INQUEST noted:

> The inquest managed to deal effectively with highly sensitive evidence and the protection of witnesses, whilst remaining largely open and accessible to all.
>
> This was done, firstly, by appointing a High Court judge as coroner who would be able to consider Public Interest Immunity (PII) applications by the police in respect of highly confidential policies and documents. National security issues were clearly central to the subject matter of the inquest, most importantly the Metropolitan Police strategy for dealing with suicide bombers. Where needed, the coroner granted PII in relation to certain documents. However, he ruled that many of the documents could be provided to the legal teams, upon strict undertakings as to confidentiality, not making copies and keeping the material secure, etc. On that basis the family's lawyers were permitted to see highly sensitive documents, and to question witnesses based on that material. In relation to the most sensitive material, a gist document was prepared summarising the material that could be shared with the family, and their lawyers were provided with the material underlying the gist document, again on strict undertakings.
>
> Where discussion in open court touched upon the contents of any such protected documents, agreements were reached in the absence of the jury and the public as to what could be explored and, although some aspects were regarded as too sensitive to be investigated publicly, overall a reasonably fair public exploration of the issues was allowed whilst national security and other policing concerns were protected.
>
> Secondly, suitable arrangements were made for the protection of witnesses. There were over 40 police officers who worked in highly sensitive anti-terrorist operations or covert surveillance whose witness evidence was required at the

> inquest. They were all granted anonymity by the coroner as a result. They gave evidence from behind a screen in court, and careful provision was made at the venue for their arrival and departure, to protect their identities. The inquest was nevertheless able to hear evidence from those witnesses. The jury, the family, one of their supporters and the lawyers were all permitted to see the witnesses giving evidence, so as to assess their demeanour (the police having carried out police checks on the family members and their chosen supporter beforehand). This was done without any risk or compromise to the identity of any of those witnesses, whose anonymity has been maintained despite the huge attention from media organisations.

55.4 An inquest into the death of Terence Jupp, a Ministry of Death scientist who died while conducting experiments relating to 'dirty bombs' (bombs which use conventional explosives to scatter radioactive material). It was accepted that disclosure of the results of his tests to criminals or terrorists would be "catastrophic" to national security. Despite delays resulting from such concerns, an inquest was eventually initiated:

> However, eight years after his death, the inquest into Mr Jupp's death did successfully take place. The Coroner held that one of the issues to be decided was whether the extreme sensitivity of what Mr Jupp was doing led to his safety being compromised and the jury, therefore, needed to know exactly what he was doing. In his view it was essential that the jury and all properly interested parties, including the family had full access to sensitive materials which touched on national security. As a result, key parts of the four week inquest were held in camera under Rule 17 of the Coroners Rules. The family and the inquest jury had to sign confidentiality agreements. They were then able to see any of the sensitive documents and to hear all of the sensitive evidence without exception.
>
> Other practical arrangements that allowed the coroner to protect the interests of national security whilst conducting the inquest included: the use of cipher lists for the chemical names; safes in court supplied by the MoD for each of the interested persons to store their 7,000 page bundle of sensitive documents; bundles printed on easily-identifiable pink rather than white paper with each page named for specific interested parties; prohibitions on the removal of pink papers from the courtroom with the Coroner agreeing to extended court opening hours to allow lawyers to work on the material; and all pink pages returned to the MoD at the end of the inquest. There were separate computers (with pink screens) for the recording of in camera sessions, and an agreed set of rules for those sessions. MoD police were at the Coroner's Court each day to guard papers and ensure security and a security adviser was in the court at all times to assist in resolving any emergency security issues that arose.
>
> By adopting these measures the coroner enabled the jury and the interested persons, including the family, to see and hear all the evidence so that the inquest was a comprehensive examination of what had occurred. The jury delivered a critical narrative verdict. For eight years Mr Jupp's family had unanswered questions, and the inquest finally provided some explanations about what went wrong and why. They felt the inquest had been a fair and thorough inquiry, the jury had assessed the evidence correctly and were satisfied by recommendations made for improvements.

56 Further examples are provided in the attached document. What can be seen from these examples is that even in cases involving highly sensitive national security

information, practical measures are available which negate the need for a closed material procedure and ensure the meaningful participation of families and counsel. In the present case, such measures might include:

56.1 The use of in camera proceedings;

56.2 Public interest immunity procedures;

56.3 Summarising and gisting sensitive material for the public;

56.4 Provision of material to counsel subject to undertakings as to confidentiality;

56.5 Use of secure computers to view classified material, and storage of such material in approved facilities.

57 The concern raised here is that by beginning with a starting point of closed material procedures, it becomes tempting for understandably cautious participants to place as much material into that category as possible. It is submitted, however, that such procedures, if available at all, should be a last resort only. As noted by the Court of Appeal in *Al Rawi*:[41]

> ... it is a melancholy truth that a procedure or approach which is sanctioned by the court expressly on the basis that it is applicable only in exceptional circumstances none the less often becomes common practice.

Public Interest Immunity

58 It is submitted that classified material should be dealt with at first instance by a PII procedure, rather than a closed material procedure. In *Al Rawi v Security Service*, the United Kingdom Supreme Court noted that[42]

> unlike the law relating to PII, a closed material procedure involves a departure from both the open justice and the natural justice principles.

59 In Minute 4, the Inquiry stated:[43]

> The Inquiry has the power, by virtue of s 27 of the Inquiries Act 2013 and s 70 of the Evidence Act 2006, to assess classification claims in relation to particular information. We will not agree to any process or requirement that has the effect of limiting our ability to exercise our statutory power.

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41 *Al Rawi v Security Service* [2010] EWCA Civ 482, [2010] 4 All ER 559 at [69].
42 *Al Rawi v Security Service* [2011] UKSC 34 at [14].
43 Minute 4 at para 5(b).

60 In the draft *Procedural protocol for review of classified information / claims to withhold information from disclosure*, the Inquiry further noted:

> As set out in Minute No 4 at [5] and [21], the Inquiry has the power under s 27 of the Inquiries Act 2013 and s 70 of the Evidence Act 2006 to assess claims to withhold particular information from public or other disclosure. As also set out, the Inquiry will deal with classified information in accordance with protective security requirements unless the information is declassified or disclosed by agreement, or an order for disclosure is made.

61 Section 70 of the Evidence Act provides:

> **70 Discretion as to matters of State**
>
> (1) A Judge may direct that a communication or information that relates to matters of State must not be disclosed in a proceeding if the Judge considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information.
>
> (2) A communication or information that relates to matters of State includes a communication or information—
>
> (a) in respect of which the reason advanced in support of an application for a direction under this section is one of those set out in sections 6 and 7 of the Official Information Act 1982; or
>
> (b) that is official information as defined in section 2(1) of the Official Information Act 1982 and in respect of which the reason advanced in support of the application for a direction under this section is one of those set out in section 9(2)(b) to (k) of that Act.
>
> (3) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

62 In essence, s 70 allows for information to be assessed by the Court prior to disclosure to other parties, to determine whether the public interest in such disclosure is outweighed by the public interest in withholding that information. Based on the outcome of that assessment, the Court may direct that the information not be disclosed.

63 Similarly, the Supreme Court in *Al Rawi* summarised the PII process as follows:[44]

> **[145]** I would accept the submission made by Ms Rose that the following principles correctly state the approach to PII as it has stood until now. (i) A claim for PII must ordinarily be supported by a certificate signed by the appropriate minister relating to the individual documents in question: see *Duncan v Cammell Laird & Co Ltd* [1942] 1 All ER 587 at 593, [1942] AC 624 at 638 per Viscount Simon LC. (ii) Disclosure of documents which ought otherwise to be disclosed under CPR Pt 31 may only be refused if the court concludes that the public interest which demands that the evidence be withheld outweighs the public interest in the administration of justice. (iii) In making that decision, the court may inspect the documents: see *Science Research Council v Nassé,*

[44] *Al Rawi v Security Service* [2011] UKSC 34 at [145].

> *BL Cars Ltd (formerly Leyland Cars) v Vyas* [1979] 3 All ER 673 at 674, [1980] AC 1028 at 1089–1090. This must necessarily be done in an ex parte process from which the party seeking disclosure may properly be excluded. Otherwise the very purpose of the application for PII would be defeated: see the Court of Appeal judgment [2010] 4 All ER 559 at [40], [2010] 3 WLR 1069. (iv) In making its decision, the court should consider what safeguards may be imposed to permit the disclosure of the material. These might include, for example, holding all or part of the hearing in camera; requiring express undertakings of confidentiality from those to whom documents are disclosed; restricting the number of copies of a document that could be taken, or the circumstances in which documents could be inspected (eg requiring the claimant and his legal team to attend at a particular location to read sensitive material); or requiring the unique numbering of any copy of a sensitive document. (v) Even where a complete document cannot be disclosed it may be possible to produce relevant extracts, or to summarise the relevant effect of the material: see *Ex p Wiley* [1994] 3 All ER 420 at 447, [1995] 1 AC 274 at 306–307. (vi) If the public interest in withholding the evidence does not outweigh the public interest in the administration of justice, the document must be disclosed unless the party who has possession of the document concedes the issue to *g* which it relates: see *Secretary of State for the Home Dept v MB, Secretary of State for the Home Dept v AF* [2007] UKHL 46 at [51], [2008] 1 All ER 657 at [51], [2008] 1 AC 440 per Lord Hoffmann.

64 It is accepted that clear and convincing grounds must be shown before an objection on the ground of public interest immunity should be allowed to prevent a party from getting at the truth.[45]

65 At present, the draft *Procedural Protocol* contemplates that Mr Keith will report to core participants, and may seek further submissions from participants on matters of disclosure. It is submitted, however, that it is necessary for counsel to be actively involved in such a process, and to make submissions as of right regarding the conduct of the balancing exercise. A special advocate may be of assistance at this stage to ensure participants' interests are properly represented.

66 It is submitted that, for reasons outlined below, a closed material procedure as envisaged by the Crown Agencies is not available to this Inquiry. As such, it is submitted that if NZDF wishes to withhold material from disclosure to core participants, it must rely at first instance on the PII procedure.

Special Advocate Procedure

67 It may be the case that as a part of the PII procedure a role could be usefully performed by a Special Advocate. *Al Rawi* noted, however, the limitations of such procedures overcoming these problems:[46]

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[45] *Brightwell v Accident Compensation Corporation* [1985] 1 NZLR 132 (CA) at 139 per Cooke J.
[46] *Al Rawi v Security Service* [2011] UKSC 34 at [36]-[37]. See also *Al Rawi v Security Service* at [41].

> **[36]** Can all of these flaws be cured by a special advocate system? No doubt, special advocates can mitigate these weaknesses to some extent and in some cases the litigant may be able to add little or nothing to what the special advocate can do. For example, this will be the case where the litigant has no knowledge of the matters to which the closed material relates and can give no instructions which will enable the special advocate to perform his function more effectively. But in many cases, the special advocate will be hampered by not being able to take instructions from his client on the closed material. A further problem is that it may not always be possible for the judge (even with the benefit of assistance from the special advocate) to decide whether the special advocate will be hampered in this way.
>
> **[37]** The limitations of the special advocate system, even in the context of the statutory contexts for which they were devised, were highlighted by the Joint Committee on Human Rights in their report on *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation* (HL Paper 64, HC Paper 395) (26 February 2010) in the context of the Prevention of Terrorism Act 2005 and cases heard by the Special Immigration Appeals Commission. This report was based on the first-hand experience of those who have acted as special advocates. As the Court of Appeal noted ([2010] 4 All ER 559 at [57], [2010] 3 WLR 1069), it is the committee's view after five years of operation that the closed material procedure (with special advocates) operated under the statutory regimes is not capable of ensuring the substantial measure of procedural justice that is required. In its earlier report, *Counter-Terrorism Policy and Human Rights (Nineteenth Report): 28 days, intercept and post-charge questioning* (HL Paper 157, HC Paper 394) (30 July 2007), the committee had concluded (para 210):
>
> > 'After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as "Kafkaesque" or like the Star Chamber. The Special Advocates agreed when it was put to them that, in the light of the concerns they had raised, "the public should be left in absolutely no doubt that what is happening ... has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system." Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them.'

68 In the event, however, that PII is established with respect to evidence which is of relevance to the Inquiry, it is submitted that two options will exist which will not breach the rights of other participants:

68.1 First, the Inquiry may decline to take that evidence into account, consistent with s 70 of the Evidence Act, although the information may be considered in other ways;[47]

68.2 Second, the Inquiry may direct that the material be summarised or gisted for use in the Inquiry, to overcome any public interest in withholding the material.

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[47] *Al Rawi v Security Service* [2011] UKSC 34 at [145]; *R v Chief Constable of the West Midlands Police, ex parte Wiley* [1995] AC 274, [1994] 3 All ER 420 at 447.

69 It is under the second option, as part of the PII procedure, that the use of a special advocate procedure could also be considered.

V METHODOLOGY OF INQUIRY

Meaning of 'closed' in relation to core participants

70 Section 15 of the Inquiries Act provides:

> **15 Power to impose restrictions on access to inquiry**
>
> (1) An inquiry may, at any time, make orders to—
>
> (a) forbid publication of—
>
> (i) the whole or any part of any evidence or submissions presented to the inquiry:
>
> (ii) any report or account of the evidence or submissions:
>
> (iii) the name or other particulars likely to lead to the identification of a witness or other person participating in the inquiry (other than counsel):
>
> (iv) any rulings of the inquiry:
>
> (b) restrict public access to any part or aspect of the inquiry:
>
> (c) hold the inquiry, or any part of it, in private.
>
> (2) Before making an order under subsection (1), an inquiry must take into account the following criteria:
>
> (a) the benefits of observing the principle of open justice; and
>
> (b) the risk of prejudice to public confidence in the proceedings of the inquiry; and
>
> (c) the need for the inquiry to ascertain the facts properly; and
>
> (d) the extent to which public proceedings may prejudice the security, defence, or economic interests of New Zealand; and
>
> (e) the privacy interests of any individual; and
>
> (f) whether it would interfere with the administration of justice, including any person's right to a fair trial, if an order were not made under subsection (1); and
>
> (g) any other countervailing interests.
>
> (3) If the instrument that establishes an inquiry restricts any part or aspect of the inquiry from public access, the inquiry must make such orders under subsection (1) as are necessary to give effect to the restrictions.

71 It is submitted that the starting point for this Inquiry must be one of open justice, and that a clear legislative basis must exist for any departure from that principle. This legislative basis is found in s 15(1) and (3), and in the TOR at [14]:

> As further set out in the Inquiries Act, the Inquiry may, where appropriate, hold the Inquiry, or any part of it, in private. It may restrict access to inquiry information (including evidence, submissions, rulings, hearing transcripts and the identity of witnesses).

However, this particular term of reference merely adopts, and does not expand or elaborate on, the statutory provisions.

72 It is submitted that the distinction between "public" and "private" which is drawn in s 15 and in the TOR relates to the general public on the one hand, and the Inquiry and core participants on the other. In essence, it is submitted that the "public" category does not include core participants or their legal representatives, and that restrictions against public access do not have the effect of excluding core participants.

73 A clear distinction can be drawn between a private hearing which excludes the general public (which is permissible in certain circumstances) and one which excludes properly interested parties. The implications in terms of natural justice and open justice in the latter are far more significant.

74 In *Bank Mellat v HM Treasury*, the United Kingdom Supreme Court observed:[48]

> [2] The idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society. However, it has long been accepted that, in rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgment which is only available to the parties. Such a course may only be taken (i) if it is strictly necessary to have a private hearing in order to achieve justice between the parties, and, (ii) if the degree of privacy is kept to an absolute minimum—see, for instance *Independent News and Media Ltd v A (by his litigation friend, the Official Solicitor)* [2010] EWCA Civ 343, [2010] 3 All ER 32, [2010] 1 WLR 2262, and *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 2 All ER 324, [2011] 1 WLR 1645. Examples of such cases include litigation where children are involved, where threatened breaches of privacy are being alleged, and where commercially valuable secret information is in issue.
>
> [3] Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully. **A closed hearing is therefore even more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the court can look at evidence or hear arguments on behalf of one party without the other party (the excluded party) knowing, or being able to test, the contents of that evidence and those arguments (the closed material), or even being able to see all the reasons why the court reached its conclusions.**

75 In *Al Rawi v Security Service*, the Supreme Court observed:[49]

> [27] It is one thing to say that the open justice principle may be abrogated if justice cannot otherwise be achieved. As Lord Bingham of Cornhill said in *R v Davis* [2008] UKHL 36

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[48] *Bank Mellat v HM Treasury* [2013] UKSC 38, [2013] 4 All ER 495 (emphasis added).
[49] *Al Rawi v Security Service* [2011] UKSC 34 at [27].

> at [28], [2008] 3 All ER 461 at [28], [2008] 1 AC 1128, the rights of a litigating party are the same whether a trial is conducted in camera or in open court and whether or not the course of the proceedings may be reported in the media. It is quite a different matter to say that the court may sanction a departure from the natural justice principle (including the right to be present at and participate in the whole or part of a trial). *Scott v Scott* is no authority for such a proposition. How can such a step ever satisfy the requirements of justice? And if the court does have the power to deny a litigant this fundamental common law right, in what circumstances is it appropriate to exercise it? These are the questions that lie at the heart of this appeal.

76 Lord Dyson concluded that a closed material procedure was the antithesis of a PII procedure, and that such a procedure would be likely to operate in favour of the holder of the information and to the disadvantage of the other party.[50] Lord Dyson stated the adoption of such a procedure in that case may well be the "thin end of the wedge"[51], and that any move towards a close material procedure must be by Parliament, rather than the courts.[52]

77 It is instructive to note that Parliament has seen fit to enact such procedures in the Immigration Act 2009 and in the Passports Act 1992.[53] The Inquiries Act, however, despite being enacted after those Acts, contains no such express provision. The courts have never been required in New Zealand to consider the lawfulness of a special advocate procedure other than arising under express legislative powers, as in the *Zaoui* and *Dotcom* litigation no objection was raised to such a procedure.

78 In *Secretary of State for the Home Department v Assistant Deputy Coroner for Inner West London*, the question related to the distinction between a private hearing and a closed hearing. The Court stated the issue: [54]

> [1] ... The issue relates wholly or mainly to the construction of r 17 of the Coroners Rules 1984, SI 1984/552, which provides:
>
> > 'Every inquest shall be held in public: Provided that the coroner may direct that the public be excluded from an inquest or any part of an inquest if he considers that it would be in the interest of national security to do so.'
>
> [2] The dispute centres on the words 'the public' in the proviso. Do they include properly interested persons and their legal representatives who are participating in the inquests? Or are they limited to members of the public in a wider sense, meaning all those who are

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50 At [41]-[42].
51 At [44].
52 At [48].
53 Immigration Act 2009, ss 33–42, 240–244, 252–271 and 325; Passports Act 1992, s 29AA (inserted by the Passports Amendment Act 2005, s 24); Terrorism Suppression Act 2002, s 38; Telecommunications (Interception Capability and Security) Act 2013, ss 101-113; Health and Safety at Work Act 2015, s 162.
54 At [1]-[2].

> not 'properly interested persons'? In the latter case, once the public in the wider sense had been excluded, the hearing would continue in camera, but with all properly interested persons and their legal representatives able to attend and participate.

79 This decision raised similar concerns to those before the Inquiry presently:[55]

> Although potentially relevant to the issue, the material would attract public interest immunity (PII). The concern of the security service is that, if the coroner is prohibited from taking such material into consideration, particularly in relation to preventability, there is a risk that she will reach a conclusion on less than full information and, for example, the security service may be subjected to criticism which may be unjust in the light of the contents of the PII material. The case for the security service is that this risk would be avoided if part or parts of the inquests were to take the form of a closed hearing from which all but the security service and their legal representatives and counsel to the inquests and those instructing them were excluded. The coroner could then consider the material but be circumspect in her references to it in her final decision. The problem with that, say the properly interested persons who oppose the present application, is that there would be a decision based at least in part upon material which they will not have seen, which decision would lack intelligible reasoning. Although they are properly interested persons, they would not be accorded full participation or be provided with a transparent explanation of the decision which the inquests are intended to produce.

80 The Court accepted the coroner's submission that she was unable to hold a closed hearing. While the particular case turned to a large degree on matters of statutory interpretation, it is helpful to note the Court's further observation. The Court further held:[56]

> ... Experience of similar problems in other areas of litigation in recent years disposes me to the view that, to a considerable extent, material in respect of which PII is rightly claimed can often be produced in a redacted, summarised or gisted way without risk to national security so as to enable properly interested persons and their legal representatives to participate effectively in the proceedings. I accept, and it is the premise upon which this case has been conducted, that there will remain an area of sensitive material which is not suitable for disclosure. I am unable to quantify it. The coroner, when she made her ruling, had not seen it. Nor have we. If our expectations prove to be too sanguine, there may be difficulties ahead. It is not for us to predict them or to prescribe solutions. However, I do consider it necessary to refer to the final sentence in the above passage of the coroner's peroration on this issue.

81 It is submitted that caution should be exercised in excluding properly interested parties from hearings or from receiving evidence, in the absence of clear legislative authority to do so. Bearing in mind the strong natural justice rights engaged in this Inquiry and the principle of open justice, it is submitted that such clear and express authority is not present under the Inquiries Act, and that the Inquiry is not empowered to exclude core participants from hearings.

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[55] At [5].
[56] At [32].

82 Rather, the Inquiries Act envisages a process under which such matters are dealt with in accordance with more orthodox principles of evidence law. In s 27, the Act provides for the application of privileges and immunities as would otherwise exist under the Evidence Act, including public interest immunity and s 70 of the Evidence Act. Such procedures are perfectly able to meet the needs of the Inquiry, particularly through use of in camera hearings, undertakings by counsel, and other practical measures, while preserving the rights of the participants in accordance with established principles. The Law Commission noted in its report *A New Inquiries Act* that public interest immunity should be applied consistently before inquiries:[57]

> **Matters of state**
>
> 9.71 Section 70 of the Evidence Act 2006 puts the present doctrine of public interest immunity (also known as Crown privilege) into statutory form. The presumption is that matters of state are to be disclosed, subject to a judicial discretion to make an order against disclosure on the basis of certain public interest criteria. The clause is a counterpart to s 69: whereas s 69 applies to private confidential information, s 70 applies to information whose confidentiality is important to the state or to the effective conduct of public affairs.
>
> 9.72 Again, we consider that this provision should apply before inquiries, to ensure the privilege is consistently applied. As inquiries are set up by the Executive, it is in a position to consider the extent to which public interest immunity should be waived, as this may be essential if an inquiry is to achieve its purpose.

83 The present Inquiry requires a different approach from what was considered in *R (Persey) v Environment Secretary* and *R (Howard) v Secretary of State for Health.*[58] Those inquiries concerned matters which did not raise right to life obligations, and were initiated under a different legislative framework. While the Inquiry is correct to observe that the decision as to a public or private process depends upon the circumstances of the particular inquiry,[59] it is submitted that the circumstances of the present Inquiry are not such that a closed material procedure should be considered permissible. Rather, the right to life, natural justice rights of the participants, and public interest militate in favour of a public process in this Inquiry. In *Fay, Richwhite & Co Ltd v Davison*, the Court of Appeal

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[57] Law Commission *A New Inquiries Act* (NZLC R102) at 9.71-72.

[58] *R (Persey) v Environment Secretary* [2002] EWHC 371 (Admin), [2003] QB 794; *R (Howard) v Secretary of State for Health* [2002] EWHC 396 (Admin), [2003] QB 830.

[59] Minute 4 at [70].

acknowledged that a Commission of Inquiry was entitled to see as dominant principles relating to open justice:[60]

> 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 submissions were heard in private.

84 The Court further noted (in relation to the former Act):[61]

> Section 4 suggests that an inquiry will normally be conducted in the same way as Court proceedings: in public. So do the terms of reference. They appear to be drawn on the premise that in the ordinary course the proceedings will be in public. This is to be expected where it can fairly be said that the Commission was established "not as a matter of private information for the Executive Government, but for public information and confidence": *Bretherton v Kaye* [1971] VR 111 at p 125 per Gillard J. Nonetheless the terms of reference confer specific power to sit in private or to exclude particular persons from the hearing. The power so conferred is plainly a discretionary one. And so reduced to its essentials, the only issue in the case now before the Court is whether the Commission is shown to have erred in law in the exercise of his discretion: whether he has acted on a wrong principle, or has taken into account irrelevant considerations, or has failed to give proper weight to relevant considerations, or has exercised it in a wholly unreasonable way.

85 This Inquiry, while possessing the power to regulate its own procedure, is of course subordinate to its legislation, and lacks inherent jurisdiction. Where an alternative procedure is envisaged by the legislation, and the CMP runs counter both to the legislative framework and to the jurisprudence outlined above, it is submitted that the Inquiry is not empowered to adopt a CMP.

86 It is further submitted that this approach is consistent with the observation that this Inquiry is not pursuing a purely adversarial or inquisitorial model.[62] The fact that *Al Rawi v Security Service* is in the context of civil litigation does not alter the underlying principles in this case. As noted in *R (on the application of the Secretary of State for the Home Department v Assistant Deputy Coroner for Inner West London*:[63]

> [24] I accept that an inquest is by definition an inquisitorial process and is different in kind from adversarial civil and criminal litigation. The task of a coroner is to investigate and to produce answers to the questions posed by the scope of the inquest. It is usual for a coroner to do so on the basis of full information. Mr Eadie submits that these features of inquests in general call for an approach to construction which strives to ensure that a coroner is able to act on full information. In so doing he emphasises the need to ensure that inquests are effective. However, the fact that inquests are inquisitorial does not

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60 *Fay, Richwhite & Co Ltd v Davison* [1995] 1 NZLR 517 at 524 per Cooke P.
61 *Fay, Richwhite & Co Ltd v Davison* [1995] 1 NZLR 517 at 329 per Hardie Boys J.
62 Minute 4 of the Inquiry at [76].
63 *R (on the application of the Secretary of State for the Home Department v Assistant Deputy Coroner for Inner West London* [2010] EWHC 3098 (Admin) at [24].

> diminish their context as essentially judicial procedures which are governed by the principle of open justice except to the extent that that principle is limited by statutory provision. The inquisitorial context is a factor but it is not determinative as to construction.

87 It is also of relevance that witnesses for the Inquiry have the same immunities and privileges as if they were appearing in a civil proceeding, as noted by the Inquiry.[64]

88 The purpose of this process, as noted above, is to ascertain first what the Inquiry is *able* to do, and second what it *should* do. In relation to the first question, it is submitted that CMP is not available under the Inquiries Act. In relation to the second question, it is submitted that it is *desirable* that CMP not be adopted by the Inquiry, and that the application of orthodox and established principles of evidence law will best advance the truth-seeking function of the Inquiry and protect the natural justice rights of the participants.

VI ORDERS SOUGHT

89 For the above reasons and for those set out in our previous memoranda, counsel seek from the Inquiry the following rulings, orders or directions:

89.1 That a primary purpose or function of this Inquiry is to satisfy the investigative obligation of the right to life in relation to the six individuals who lost their lives in Operation Burnham, and by analogy in relation to the further fifteen individuals who were injured,[65] and that the *Jordan* principles outlined above are therefore applicable;

89.2 That the Inquiry may not conduct a closed material procedure which has the effect of excluding core participants and their counsel from proceedings;

89.3 That discovery should be ordered and prioritised in certain respects, namely:

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[64] Inquiries Act 2013, ss 20(c) and 27(1); Minute 4 of the Inquiry at [44].

[65] *Shortland v Northland Health Ltd* [1998] 1 NZLR 433 at 444–5; *Seales v Attorney-General* [2015] 3 NZLR 556 at [164].

89.3.1 Inspection of all open material available to NZDF to be completed by 14 December 2018;

89.3.2 Lists of all open and classified and confidential material held by NZDF, MFAT, DPMC, GCSB and NZSIS as of 31 December 2018 are to be provided to all participants, subject to such redactions as are necessary for the time being to maintain confidentiality or classification until such time as these issues have been resolved but including information such as title, category, format, date, author, and size, with appropriate listing protocol;

89.3.3 Prioritised discovery in relation to the right to life obligation, encompassing all information relating to the six individuals identified above who are alleged to have lost their lives, and pertaining to the circumstances of their deaths, and by analogy in relation to the further fifteen individuals who were injured;

89.3.4 Core participants are to be able to nominate documents from the list of documents to have priority in the declassification process.

89.3.5 In relation to the above, we request as a top priority the rules of engagement and aide-memoires (including, for example, guidance cards issued to NZDF personnel), the International Security Assistance Force Investigation and the video footage of the Operations.

89.4 That the non-NZDF core participants be permitted to propose formal written questions of the NZDF and other Government agencies for the purposes of the Inquiry. Such questions are to be responded to promptly, subject to any contrary direction by the Inquiry.

89.5 That adequate discovery (including declassification of documents) and interrogatories will be completed and sufficient time allowed to analyse the results before beginning hearings.

89.6 Identification of those individuals subject to the jurisdiction and powers of the Inquiry who were or are in key positions in relation to Operation Burnham who, owing to their role in the Operation, need to be available for examination, with orders to compel testimony if necessary. Such persons may include, for example:

89.6.1 Any individual responsible for causing or contributing to death or serious injury during Operation Burnham;

89.6.2 The NZDF Joint Tactical Air Controller operating during Operation Burnham;

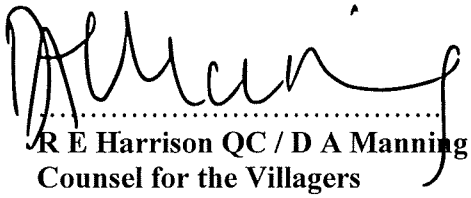
89.6.3 The Commanding Officer and Ground Commander of Operation Burnham;

89.6.4 The responsible Cabinet Minister or Ministers;

89.6.5 Other such persons in key roles of responsibility;

89.7 Preparation of a list of all other proposed witnesses for the Inquiry.

Dated this 19th day of November 2018



R E Harrison QC / D A Manning
Counsel for the Villagers

PROPOSED DRAFT LIST OF ISSUES

Legal framework

1 Does the right to life and in particular its associated investigative obligations apply in relation to Operation Burnham ("the Operation"), and if so in what respects? What are the legal sources of that right (e.g. customary international law, international human rights law, or domestic law)?

2 In the context of a non-international armed conflict, who qualifies as a "civilian"? What legal rights and protections does having that status entitled the citizen to?

3 In what circumstances and/or in what situations in a non-international armed conflict could a civilian be considered to lose that protective status?

4 Under what circumstances and/or in what situations is a civilian in a non-international armed conflict considered to have directly participated in hostilities?

5 Under what other circumstances or in what other situations can a civilian be said to otherwise be a "legitimate target"?

6 To what extent did the NZDF abide by the foregoing standards for the safety and protection of civilians in the course of the planning and carrying out of Operations Burnham and Nova?

7 What are New Zealand's obligations with respect to prisoners in a non-international armed conflict under the Convention Against Torture and international humanitarian law?

8 Did the NZDF rules of engagement (or any version of them) governing the deployment of NZDF forces and personnel for the purposes of the Afghanistan deployment and the Operation in particular authorise the predetermined and offensive use of lethal force against specified individuals (other than in the course of direct battle)?

9 Further to Question 8, was it apparent or should it have been apparent to:

9.1 The NZDF who approved the relevant version(s); and

9.2 Responsible Ministers;

that such force was or was not authorised?

10 Further to Question 8, what written briefings were provided to Ministers relevant to the scope of the rules of engagement regarding the authorisation of such force?

11 Did the NZDF's interpretation or application of the rules of engagement in relation to Question 8 change over the course of the Afghanistan deployment, and if so to what extent.

Pre-operational planning, intelligence and training

12 What was the NZDF justification or basis for embarking on each of Operations Burnham and Nova?

13 What intelligence or pre-operational materials were available regarding the civilian status (or otherwise) of Afghan nationals in the area(s) of the Operation?

14 Were paid informants used for intelligence gathering in preparation for the Operation?

15 What precautions (if any) were taken by NZDF and the NZDF personnel involved to determine whether Victims 1-21 were civilians? Were any feasible precautions not taken?

16 What precautions (if any) were taken to determine whether Victims 1-21 were directly participating in hostilities? Were any feasible precautions not taken?

17 What training was provided to personnel regarding compliance with international humanitarian law and international human rights law?

18 Were Operations Burnham and Nova appropriately authorised through the military chains of command?

19 Who was involved in the preparation and planning of Operations Burnham and Nova (including state actors, forces, and individuals)?

20 Did Operations Burnham and Nova each receive Ministerial authorisation? If so which Cabinet Minister or Ministers were involved and what was the nature and extent of the ministerial involvement in each case?

21 Further to Questions 16-19, did all briefings or other material provided for the purpose of such Ministerial authorisation appropriately and accurately reflect the nature and degree of involvement of civilians in Operations Burnham and Nova, and were the military chains of command and civilian government properly apprised of all matters of which they ought to have been aware?

Conduct of operation

22 What were the events of Operations Burnham and Nova? Prepare a factual reconstruction of the conduct of the Operations, moving in a chronological manner through all events which can be ascertained.

23 In relation to each of the Victims 1-21 above (and particularly in relation to Victims 1-6), were they:

23.1 Civilians;

23.2 Directly participating in hostilities; or

23.3 Otherwise legitimate targets?

24 Further to Question 22, did the NZDF consider each of Victims 1-6 to be:

24.1 Civilians;

24.2 Directly participating in hostilities; or

24.3 Otherwise legitimate targets?

25 In relation to Question 24, has the NZDF's position changed between Operation Burnham and the present?

26 If it is considered that any of Victims 1-21 were not civilians or were directly participating in hostilities or were otherwise legitimate targets, what was the alleged and actual degree and quality of involvement which they had in hostilities?

27 What steps were taken by NZDF to minimise civilian casualties during the conduct of Operation Burnham?

28 In relation to Victims 1-6, what was the cause of death and the circumstances of their death for each person, and in particular addressing:

28.1 Who died;

28.2 The precise location of their death;

28.3 The timing of their death;

28.4 The cause of their death;

28.5 The circumstances of their death;

28.6 Whether medical assistance was rendered.

29 In relation to Victims 7-21, what harm did they suffer and what was the cause of such harm?

30 What was the geographical "area of Operation Burnham"?[66]

31 In relation to Victims 1-6, were these deaths justifiable in terms of *Jordan v United Kingdom*?

32 In relation to Victims 7-21, were the injuries suffered by each of them justifiable (by analogy) in terms of *Jordan v United Kingdom*?

33 What role did NZDF personnel play in Operations Burnham and Nova?

34 What property damage occurred during Operations Burnham and Nova?

35 During Operations Burnham and Nova and each of them did the NZDF comply with the applicable rules of engagement?

36 During Operations Burnham and Nova and each of them did the NZDF comply with international humanitarian law?

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[66] TOR at 7.2.

Knowledge of events

37 In relation to each of Victims 1-21, does the NZDF accept that death and/or harm occurred as alleged?

38 In relation to Question 37, has the NZDF's position changed between Operation Burnham and the present?

39 What was the extent and nature of the NZDF's knowledge of casualties (civilian or otherwise) during Operation Burnham?

Post-operational conduct

40 What was the extent and nature of the NZDF's knowledge of casualties (civilian or otherwise) following Operation Burnham?

41 What steps were taken to gather all relevant evidence relating to casualties, for example eye-witness reports, autopsies and similar material?

42 At what point did the NZDF become aware that there were or may have been civilian casualties following Operation Burnham?

43 Was all information relating to the possibility or actuality of civilian casualties appropriately relayed through the relevant military chains of command, and if so, when?

44 What (if any) information was provided to Ministers in relation to civilian casualties, and when?

45 What steps were taken following Operations Burnham and Nova to review the conduct of each of the Operations?

46 What actions were taken and conclusions reached by the International Security Assistance Force ("ISAF") investigation into each of Operations Burnam and Nova?

47 What was the role of and part played by the NZDF in relation to the ISAF investigation?

48 What information did NZDF receive in the years following each of Operations Burnam and Nova about civilian deaths and injuries and damage of civilian property and what did it do in response to that information?

49 Did the NZDF comply in relation to Operations Burnham and Nova with the investigative obligations arising out of the right to life, or under the Armed Forces Discipline Act, or otherwise?

Treatment of Qari Miraj and other individuals subsequent to the Operation

50 What were the circumstances of the tracking and capture, and subsequent transfer and/or transportation of Qari Miraj to the Afghanistan National Directorate of Security?

51 Was the transfer and/or transportation of Qari Miraj proper, given (amongst other matters) the June 2010 decision in *R (oao Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445?

52 What information did NZDF subsequently receive concerning interrogation, mistreatment and/or torture of Qari Miraj, and what steps were taken in response to such information?

53 Did the NZDF engage in or assist in (whether in terms of intelligence, planning, direction, or in actual conduct) the targeted killings of individuals as alleged in *Hit and Run*, including:

53.1 Alawuddin;

53.2 Qari Musa; and

53.3 Abdullah Kalta?

54 Further to Questions 8 and 53, were any such targeted killings lawful, with reference to the relevant terms of engagement and international humanitarian law.