in the matter of the Inquiry into Operation Burnham

FURTHER SUBMISSIONS OF COUNSEL FOR JON STEPHENSON FOR HEARING ON 21–22 NOVEMBER 2018

21 November 2018

LeeSalmonLong

Barristers and Solicitors

LEVEL 16 VERO CENTRE 48 SHORTLAND STREET

PO BOX 2026 SHORTLAND STREET AUCKLAND NEW ZEALAND

TELEPHONE 64 9 912 7100 FACSIMILE 64 9 912 7109

EMAIL: davey.salmon@lsl.co.nz SOLICITOR ON RECORD: DAVEY SALMON

FURTHER SUBMISSIONS OF COUNSEL FOR JON STEPHENSON FOR HEARING ON 21–22 NOVEMBER 2018

MAY IT PLEASE THE INQUIRY

Introduction

1. Mr Stephenson's position on the procedure of this inquiry has been canvassed in some detail in memoranda in response to Minutes No 3 and 4, filed on 15 August 2018 and 5 October 2018.

2. Since those submissions were filed counsel have received:

   (a) the Inquiry's "Procedural protocol for the review of classified information" circulated to the core participants on 9 November 2018 (**Review Protocol**);

   (b) the Inquiry's memorandum of understanding with the Office of the Inspector-General of Intelligence and Security (**IGIS MOU**); and

   (c) the comprehensive summaries of submissions filed on behalf of all Crown agencies represented in the Inquiry on 15 November 2018 (**Crown submissions**)

3. This synopsis:

   (a) sets out the specific orders Mr Stephenson seeks at the hearing on 21-22 November 2018;

   (b) briefly summarises the reasons for those orders (and in doing so provides high level responses to some matter discussed in the Crown submissions); and

   (c) provides a high-level summary of Mr Stephenson's responses to aspects of the Review Protocol.

4. Mr Stephenson is still considering the IGIS MOU and reserves his rights to make submissions on that matter separately.

5. For completeness, it is noted that this synopsis is intended to be read in conjunction with Mr Stephenson's earlier submissions. The fact that any particular aspect of the Crown submissions is not canvassed here shall also not be taken as any indication that Mr Stephenson accepts the Crown position on such matters.

Orders sought

6. Mr Stephenson seeks orders in relation to the production and disclosure of documents, the review process and security clearance and the Inquiry's processes for identifying and examining witnesses. The proposed orders are listed in sequence but without specific dates, which can be discussed, and may need to be revisited as the inquiry progresses.

7. Regarding production of documents and disclosure, Mr Stephenson seeks orders that:

(a) Any person providing documents to the Inquiry shall provide the Inquiry and all core participants (**all parties**) with a list of all documents which includes simple metadata for each document (eg. document ID, date, type, author, recipient, parent document ID) as well as:

(i) Particulars of any security classification;

(ii) Particulars of any claim to confidentiality or privilege as against the Inquiry or other core participants or the public (including terms of any confidentiality arrangements sought); and

(iii) Particulars of the reasons why the party believes the document should be withheld from some or all of the other core participants under s 22 of the Inquiries Act 2013 (**IA**).

(b) For documents which have already been provided to the Inquiry, core participants shall provide to all parties lists of those documents complying with 5(a) above.

(c) Mr Keith (or other suitable adjudicator) shall complete his assessment of any claims to privilege or confidentiality asserted directly against the Inquiry.

(d) Mr Keith and the Inquiry shall complete the process for review of the ongoing appropriateness of security classifications.

(e) Following completion of the review process, all persons providing documents to the Inquiry shall re-submit all lists of documents provided to the Inquiry and shall update claims to confidentiality, privilege and other reasons why documents should be withheld from some or all of the other core participants as necessary.

(f) Any challenges to claims to privilege or confidentiality, reasons for withholding documents from the other participants, or requests by non-Crown core participants for further disclosure by the Crown must be made by a date to be determined.

(g) A hearing shall then be convened for the purpose of considering any challenges or requests made under [4(f)]. Core participants shall have a right to be heard at that hearing.

(h) Following the hearing convened under [4(i)], the Inquiry shall make such orders:

(i) under s 20 for the production of additional documents as it considers appropriate;

(ii) upholding claims to privilege, confidentiality or some other basis for withholding documents from some or all other core participants as it considers appropriate;

(iii) under s 22 of the IA that all documents which should not be withheld from the other core participants be provided to core participants, subject to such further directions as are necessary to preserve confidentiality and/or to ensure the core participants are provided with relevant material which enables them to participate effectively in the inquiry (e gists or summaries).

8. Regarding the review process and security clearance, Mr Stephenson seeks orders that:

(a) Claims to privilege or confidentiality which are made against the Inquiry directly shall be determined by Mr Keith (or another adjudicator) independently.

(b) For documents which are classified but provided to the Inquiry without any assertion of privilege or confidentiality against the Inquiry directly, or where such a claim has been rejected by Mr Keith, Mr Keith and the Inquiry shall determine the ongoing appropriateness of the classification of the information in the document.

(c) This review process shall be limited to documents marked SECRET or above.

(d) The review process will involve two steps: consideration by Mr Keith subject to review by the Inquiry.

(e) Counsel for core participants shall be permitted to apply for security clearance.

(f) The question of whether a core participant who is not represented by counsel with security clearance up to the necessary level could be dealt with by such a participant themselves seeking security clearance or instead by retaining a special advocate who has obtained the necessary security clearance;

(g) When considering whether to make orders under [5(i)], the Inquiry shall have regard to the recommended classification of the document and any security clearance obtained by counsel for core participants and/or the appointment of any special advocates.

9. Regarding the Inquiry's process for identifying, interviewing and taking evidence from witnesses:

(a) The NZDF shall supply a list of witnesses along with a summary of confidentiality concerns and proposed mitigation measures.

(b) All other core participants, and the Inquiry in relation to persons who have contacted the Inquiry directly, shall supply lists of witnesses along with a summary of confidentiality concerns and proposed mitigation measures to the core participants. The format of such lists, and the extent to which they are anonymised to protect the identity of sensitive witnesses, is to be determined in consultation with the core participants.

(c) Core participants shall notify the Inquiry of those witnesses it wishes to cross-examine, and the reasons for why they consider cross-examination of the relevant witnesses to be necessary and appropriate;

(d) The Inquiry shall determine the extent and terms of cross-examination to be permitted having regard to the usefulness of cross-examination in achieving the purposes of the Inquiry and enabling the Inquiry to fulfil its TOR, natural justice interests of core participants and the need to avoid unnecessary delay or cost. Core participants shall have the right to be heard in this regard.

Reasons for the orders sought

General principles

10. The purpose of the IA was not to introduce a framework under which all inquiries would follow an inquisitorial process, but was to ensure that all inquiries would have the flexibility to determine their own procedures and could implement procedures which were appropriate for their particular purposes and TOR.

11. The Law Commission expressly contemplated that in some cases, a more adversarial process involving public hearings and cross-examination of witnesses by participants is necessary for an inquiry to comply with relevant principles of administrative law. In its report which led to enactment of the IA the Commission observed (emphasis added):[1]

> We recognise that **some issues require the formality and processes currently associated with commissions**. Where large scale accidents take place, such as the Erebus plane crash in Antarctica, **public confidence will likely only be restored by a formal inquiry where evidence is heard and tested in a public hearing**. Any such inquiry is likely to be highly charged and will be required to take account of fiercely competing interests. Reputation and commercial interests, and **the integrity of government systems and processes can be at stake. In these circumstances, public hearings, with the examination and cross-examination of witnesses may be the only way that natural justice can be met**. The prestige that tends to accompany commissions can also be beneficial in reassuring the public that a matter of concern is being taken seriously.

12. It is submitted this inquiry falls into this category. Operation Burnham was a significant incident, and the allegations made against the NZDF in respect of its conduct during the operation have seriously impacted public confidence in the NZDF. The inquiry will be highly charged and will have to grapple with fiercely competing views on what happened. There is a strong divergence of views between the Crown and non-Crown core participants.

13. Under the IA, the Inquiry has a range of discretionary powers relevant to procedure. It can decide:

(a) whether and how to conduct interviews, call witnesses, hold hearings, receive evidence and submissions, allow cross-examination (s 14);

[1] At [2.14].

(b) whether to forbid publication of evidence, submissions, names or rulings; restrict public access or hold the inquiry in private (s 15);

(c) whether to request information (s 20);

(d) whether to order that information provided to the Inquiry be provided to other persons (s 22).

14. These discretionary powers are not unfettered, however. In deciding whether and how to exercise them, the Inquiry must have regard to a number of factors, including:

(a) The IA;

(b) The inquiry's purposes and TOR;

(c) The Inquiry's duties to act fairly, independently and impartially and respect principles of natural justice;

(d) In respect of secrecy orders under s 15, the principle of open justice and the effect of secrecy on public confidence in the inquiry; and

(e) The need to avoid unnecessary delay or cost in relation to public funds, witnesses, or other persons participating in the inquiry.

15. Each of these factors is considered below.

The IA

16. Under the IA, the Inquiry has the jurisdiction to make each of the orders set out above. It is noted that the Villagers take a different view on the availability of a closed process. That issue is canvassed in their submissions, and is not discussed here.

17. The Inquiry's powers under ss 14 of the IA are described in general terms without reference to express mandatory relevant considerations.

18. The Crown has suggested that the enactment of s 14 carried with it the presumption that all inquiries should be governed by inquisitorial processes. That was never the Law Commission or Parliament's intention. The mischief which the IA sought to manage was the antiquated and confusing nature of the provisions in the old Commissions of Inquiry Act 1908 and the correspondingly costly nature of inquiries under that Act which was said to have precluded shorter, simpler inquiries. As noted above the Commission recommended that a more flexible legislative framework be introduced so that inquiries could (and indeed must) implement procedures which are appropriate for their particular purposes and TOR.

19. Accordingly, the IA allows an Inquiry to device processes that suit the particular circumstances at hand. For reasons discussed above, and further below, the subject of this inquiry is not a matter that is appropriately or effectively dealt with through a substantially inquisitorial process.

20. For the powers to impose limits on access to the inquiry under s 15 of the IA, contrary to the Crown's submissions, there is a presumption of openness. Unless and until orders are made restricting access, access is allowed, and the first mandatory consideration in restricting access is "benefits of observing the principle of open justice".[2]

21. The effect is that open justice is presumed. Any process adopted under s 14 will be open except to the extent that s 15 orders and made, and any such departure from openness must be justified. While, unlike its counterpart provision in the Inquiries Act 2005 (UK), s 14 does not expressly mentions public access, the scheme of ss 14 and 15 are similar to their English equivalents, in respect of which Sir Martin Moore-Bick, chair of the Grenfell Tower Inquiry, recently observed:[3]

> The principles of open justice apply with their full rigour to legal proceedings in the ordinary sense, but in my view they are also applicable to a public inquiry set up under the Inquires Act 2005 to investigate matters of public concern. That is particularly so where there are reasons for scrutinising in some detail the conduct of public officials and others whose actions may have contributed to a substantial loss of life. Section 18(1) of the Inquiries Act itself makes it clear that the Inquiry's proceedings are to be open to the public, who must be given a reasonable opportunity to attend the hearings and access to the evidence presented to it. There is power in section 19(1) to restrict attendances at the inquiry or the disclosure or publication of any evidence or documents provided to it, but only insofar as such restrictions are required by law or are considered to be conducive to the inquiry's fulfilling its terms of reference or are necessary in the public interest. The clear thrust of these sections is that all aspects of the inquiry must be open to public scrutiny unless there are strong reasons to the contrary.

22. These observations apply equally in respect of the New Zealand legislation. Sir Martin's comments are particularly apposite here, where the purpose of the Inquiry is to scrutinise the conduct of the NZDF in respect of operations that resulted in deaths, with the view to restore public confidence in that organisation. Public confidence cannot be promoted by secrecy. Sunlight is the best disinfectant.

23. Mr Stephenson accepts that some restrictions on public access will be necessary in this Inquiry, particularly as they relate to sensitive or vulnerable witnesses. However, all such restrictions must be individually justified, and be limited to what is strictly necessary.

24. In this context, he notes that he and counsel have personal experience with managing confidentiality concerns surrounding serving NZSAS witnesses in an open Court setting. As that experience shows, those concerns can be effectively addressed without undue restriction on public access to the process, and while allowing for effective cross-examination.

The Inquiry's purposes and the TOR

25. Mr Stephenson's central submission is that this Inquiry will not be able to achieve its purposes and fulfil its TOR effectively unless the orders sought are made.

---

[2] IA, s 15(2)(a).

[3] Grenfell Tower Inquiry, Chairman's ruling on applications by certain persons to withhold their manes from a list of core participants, 20 March 2018 (see https://www.grenfelltowerinquiry.org.uk/key-documents).

26. The main purpose of the Inquiry is to establish the facts regarding what happened during and after Operation Burnham. However, there are strong disagreements between the non-Crown and Crown core participants about those events. It will be essential that the Crown's evidence is interrogated as thoroughly as possible if the Inquiry is to find out the truth, particularly given the NZDF's clear interest in being absolved of any wrongdoing.

27. In this context the non-Crown core participants are the only effective contradictors to the Crown, due to their unique knowledge of and perspective on key matters relating to the relevant operations. Counsel assisting do not have the same experience or perspective and would play a different, complimentary role. As the High Court concluded in *Badger v Whangarei Refinery Expansion Commission of Inquiry*:

> Questions put either through counsel assisting or the Commission itself are not an effective substitute for crossexamination.

28. The High Court in *Badger* also endorsed the views of the House of Lords in the well-known case of *Bushell v Secretary of State for the Environment* that relevant factors which would point toward the need for cross-examination should include a consideration of:[4]

> the nature of the topic upon which the opinion is expressed, the qualifications of the maker of the statement to deal with that topic, the forensic competence of the proposed cross-examiner, and, most important, the inspector's own views as to whether the likelihood that cross-examination will enable him to make a report which will be more useful to the minister in reaching his decision than it otherwise would be is sufficient to justify any expense and inconvenience to other parties to the inquiry which would be caused by any resulting prolongation of it.

The approach to questions of cost and delay in this inquiry are addressed separately below.

29. Another important purpose of the inquiry is promoting public confidence in the NZDF by addressing and resolving the controversy around Operation Burnham to the extent possible, including by finding the facts and making recommendations. This is expressly recognised in the TOR. However, the public cannot have confidence in a substantially secret process which they know will not involve non-Crown core participants challenging the evidence of Crown witnesses, and where the process is substantially closed. Under the proposed process all members of the public would see of the Inquiry would be:

    (a) Evidence from fact witnesses who were not classified as "vulnerable";

    (b) Legal arguments;

    (c) Redacted submissions and Minutes of the Inquiry; and

    (d) A redacted final report of the Inquiry.

30. In this context the Crown has submitted the purpose of the Inquiry is effectively to clear the NZDF following the uncertainty about whether any

[4] *Bushell v Secretary of State for the Environment* [1981] AC 75 (HL)

civilians were killed during Operation Burnham in the ISAF report. Mr Stephenson strongly disagrees. The Inquiry is a holistic examination of the events during and after Operation Burnham. The Inquiry's purpose is not to clear the NZDF, but to establish whether the harm to its reputation as a result of the allegations against it has been justified. The Inquiry must implement a procedure which ensures that this will occur.

Fairness and natural justice

31. The key principle of fairness and aspect of natural justice that is engaged in this context is the fair hearing principle (*audi alteram partem*). This is reflected in s 14 of the IA. The Supreme Court of the United Kingdom described the values underpinning this principle in *Osborn v Parole Board* as follows:[5]

> There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested. As Lord Hoffmann observed however in *Secretary of State for the Home Department v (AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269, para 72, the purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision. At least two other important values are also engaged.
>
> The first was described by Lord Hoffmann (*ibid*) as the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken. …
>
> The second value is the rule of law. Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions (see eg Fuller, *The Morality of Law,* revised ed (1969), p 81, and Bingham, *The Rule of Law* (2010), chapter 6).

32. So understood, the fair hearing principle is about more than giving a person who may be *adversely* affected by a decision or report the opportunity to be involved in the decision-making process. It is about involving the *subjects* of decisions in the decision-making process, ensuring their mana is respected, and improving the integrity of the decision-making process overall by ensuring that the decision-maker involves those who have helpful and constructive contributions to make.

33. In the present case Mr Stephenson has co-authored *Hit & Run*. The book includes allegations against the NZDF. The NZDF, however, alleges that Mr Stephenson's account is wrong. This inquiry is the process established for the purpose of examining Mr Stephenson's allegations. Natural justice demands that he be given the opportunity to confront those who will give evidence against him and that he be involved in the Inquiry's process, which was precipitated by his own work.

[5] *Osborn v Parole Board* [2013] UKSC 61.

34. Mr Stephenson accepts that some Crown witnesses will also be key subjects in the decision-making process, and may also have interests in in being able to confront witnesses who give evidence against *them*, subject to countervailing interests of privilege, confidentiality, privacy and security. This is why the proposed orders sought are reciprocal and apply to both Crown and non-Crown core participants.

Delay and cost

35. The Inquiry was established on 11 April 2018. Under the TOR the provisional reporting date for the inquiry is one year after it was established, ie 11 April 2019.

36. While the Inquiry may have regard to the impact of adopting counsel's proposed orders on the timeframe for the inquiry, it must take a holistic approach. While measures such as cross-examination may take more time in the short-term, if they assist the Inquiry to establish the truth, make recommendations and promote public confidence in the NZDF, they will have significant benefits in the long term.

37. With regard to the provisional reporting date, that date should not be viewed as a hard deadline justifying not taking steps, or contracting the time available for steps, which are essential for the Inquiry to deliver on its TOR and/or respect natural justice. As the High Court said, reaching a similar view in *Badger v Whangarei Refinery Expansion Commission of Inquiry* (emphasis added):

> I can have little regard for the reporting date which was imposed on the Commission. It is well known that several Commissions in recent times have had to seek an extension of time. In my view, once my decision has been delivered, this present Commission would be totally justified in applying for a realistic extension of time. **The present state of administrative law is such that emphasis is placed on natural justice; compliance with its requirements frequently is time-consuming**.

38. A similar approach should be taken here with regard to cost. While participants should not be required to take steps which are truly unnecessary, at the other end of the spectrum, the Inquiry should not be deterred by short-term costs in taking steps to ensure it is able to achieve its purposes and fulfil its TOR, and ensure respect for natural justice.

39. The Crown have attempted to emphasise the fact this is a government inquiry and so should be conducted quickly and cheaply. However, there is no material difference between government and public inquiries for the purposes of procedure under the IA. In addition, the NZDF has reserved $2,000,000 to put toward its costs for the inquiry, not including costs for external counsel. This shows the Crown is both able to pay, and has anticipated having to pay, the costs associated with a lengthy and thorough inquiry whose main purpose is to get at the truth. Funding has also been made available for the core participants.

Response to the Review Protocol

40. The Review Protocol sets out the Inquiry's intended approach to reviewing security classifications of information on documents provided to the Inquiry

by the Crown. Counsel make the following submissions in response to the Protocol.

41. First, as a preliminary point, the Protocol does not appear to contemplate that participants might assert claims of privilege or confidentiality in respect of documents containing classified information against the Inquiry itself, or set out a process for determining such claims. This possibility was raised in the Crown's recent submissions. If such claims are made, they should be determined exclusively by Mr Keith or another independent adjudicator through a separate preliminary procedure. This will ensure the Inquiry is not influenced by information that it might ultimately decide should be excluded.

42. Second, the Protocol does not delineate between review of the ongoing appropriateness of the level of security classification of information on the one hand, and determination of claims to privilege or confidentiality or claims that information be withheld from other core participants on the other. These are different concepts which require separate consideration.

43. The ongoing appropriateness of security classification is an *a priori* issue. Security classification should inform, but not be determinative of, whether a claim to privilege or confidentiality in respect of the information is upheld. The question of classification must be considered first so that the Inquiry can consider questions of privilege or confidentiality on a proper footing. While it is acknowledged the Inquiry with Mr Keith's assistance cannot "change" the security classification of a document, it can indicate whether it considers the level of classification to be appropriate. This can then inform its analysis of the distinct questions of privilege, confidentiality and/or disclosure to other core participants. These are distinct questions because under the IA and Evidence Act 2006 and in accordance with principles of natural justice, they must incorporate an analysis of whether the (appropriately classified) information can be provided to others subject to protective measures such as undertakings.

44. It is submitted the Inquiry should amend the Protocol to make clear that the purpose of the review process is for the Inquiry, with the assistance of Mr Keith, to indicate whether it considers that security classifications remain appropriate.

45. Third, the Protocol appears to assume that the Crown will seek to withhold all classified information provided to the Inquiry from the other core participants by invoking s 70 of the Evidence Act 2006 (presumably by analogy under s 22 of the IA) and bolts on a procedure for determining claims to privilege under s 70 to the process for reviewing the ongoing appropriateness of security classifications. This is not a lawful assumption to make. This is because, as the Supreme Court of the United Kingdom observed in *Bank Mellat*:[6]

> An advocate acting for a party who wants a closed hearing should carefully consider whether the request is one which should, or even can properly, be made and advise the client whether such a course is necessary or appropriate. Advocates, perhaps particularly when acting for the executive, have a duty to the court as well as a duty to their clients,

[6] *HM Treasury v Bank Mellat* [2013] UKSC 38 at [70].

> and the court itself is under a duty to avoid a closed material procedure if that can be achieved.

46. Given these obligations, it is incumbent on the Inquiry to implement a procedure which does not incentivise excessive claims that documents should be withheld. The Inquiry could comply with this obligation by requiring all parties to advise in their lists of documents which documents they are seeking to withhold from the other participants, and by separating out the processes for reviewing the ongoing appropriateness of classifications and for determining objections to claims that documents be withheld (as discussed above).

47. Fourth, even if circumscribed as submitted above, the proposed process for reviewing the appropriateness of classifications would cause unnecessary delay for core participants and cost in relation to public funds. It is submitted the Protocol should be further amended in two ways:

    (a) First, the Inquiry should decline to review the ongoing appropriateness of classifications of documents marked CONFIDENTIAL or RESTRICTED. It should proceed on the assumption that unless some other specific ground for withholding these documents is raised, they may be provided to core participants subject to undertakings under s 22 of the IA. This will greatly reduce the scope of the task of the Inquiry and Mr Keith.

    (b) Second, the Inquiry should require that Crown participants provide evidence to support the ongoing classification level of information classified SECRET or above at the time the information is provided to the Inquiry. Mr Keith can then proceed to review the appropriateness of that classification using that information and make a recommendation to the Inquiry which will make a final decision. The result would be a simple two-step process: review by Mr Keith, subject to a cross-check by the Inquiry. The Inquiry would then determine any objections to claims of privilege or confidentiality in the information at a later date, following a contested hearing.

Dated 29 May 2019

_____

Davey Salmon / Daniel Nilsson
Counsel for Mr Stephenson