INQUIRY INTO OPERATION BURNHAM

SUBMISSIONS OF COUNSEL FOR JON STEPHENSON IN RESPONSE TO INQUIRY'S MINUTE NO. 4

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MAY IT PLEASE THE INQUIRY

Introduction

1. These submissions address the matters raised in the Inquiry's Minute No.4. That minute addressed:

   (a) The process for dealing with classified information;

   (b) The overall procedure of the Inquiry; and

   (c) The need to formulate a list of issues.

2. Mr Stephenson's clear views on these issues are that:

   (a) Only highly classified information should be required to be handled in accordance with the Protective Security Requirements (**PSR**); CONFIDENTIAL and RESTRICTED material can be safely managed by participants signing non-disclosure undertakings.

   (b) Government participants should be required to list and provide unclassified summaries of all highly classified information they have provided to the Inquiry.

   (c) Counsel should be permitted to apply for security clearance and if granted, receive classified information up to the level of that clearance and handle that information subject to the PSR.

   (d) Given the purpose and scope of this inquiry as defined in the terms of reference (**TOR**) and the wealth of knowledge and expertise in the possession of the villagers and authors of *Hit and Run*, a more adversarial approach is necessary if the Inquiry is to successfully investigate and report on the facts while respecting participants' rights to natural justice.

   (e) While there would be merit in preparing a list of issues, such a list would need to cover the full scope of the inquiry as defined in the TOR, which is not limited to the allegations made in *Hit and Run*.

3. It is acknowledged that some of these views are inconsistent with those of the Inquiry indicated in Minute No 4, and/or the views of some participants. Counsel welcome the allocation of a hearing for 21-22 November 2018 at which these issues can be discussed in more depth.

The process for dealing with classified information

4. In Minute No 4, the Inquiry indicated its views on the process for dealing with classified information by reference to two "fundamental principles": the need to handle classified information in accordance with the PSR, and the need to avoid fettering its powers under the Inquiries Act 2013 (**IA**). Counsel make five broad submissions in response.

5. First, it is acknowledged that the classification system plays an important part in protecting the security, defence and international relations of New Zealand and, to that end, information which is properly marked SECRET, TOP SECRET or TOP SECRET SPECIAL should be handled in accordance with the Government's Protective Security Requirements (**PSR**).

6. In respect of information marked CONFIDENTIAL or RESTRICTED, however, this information can be safely managed by core participants signing non-disclosure undertakings and/or the Inquiry making non-publication orders under s15 of the IA. It is clear these categories of information raise much lower risks.[1] Courts commonly require the discovery of highly sensitive and potentially damaging commercial information in civil proceedings, subject to confidentiality orders and/or undertakings.[2]

7. Second, it is agreed the Inquiry has the power to order the production of all relevant documents under s20 of the IA regardless of their classification, subject to the assertion of immunities and privileges under s27 of the IA.

8. In their memoranda of 10 August 2018 both the NZSIS/GCSB/DPMC and MFAT refer to the concept of foreign intelligence partner "*control*" over information supplied to New Zealand actors arising as "*a commonly understood element of international intelligence relationships*". It is respectfully submitted this concept is not found in any rule of statute law, common law or customary international law and is not, of itself, a basis for withholding information from the Inquiry. The Inquiry is a government Inquiry and has taken steps to ensure it can handle classified information subject to the PSR. It has confirmed it will exercise its powers under s20 of the IA to require disclosure of all relevant material in the possession of New Zealand actors "*in due course*". It is submitted the Inquiry should proceed to do so. If and when this is done, the holder of the information may assert any privilege they have under s27 of the IA.

9. Third, it is also agreed the Inquiry can re-assess and override classifications given to information when considering whether to disclose that information to core participants under s22 of the IA. Counsel have no objection to the appointment of Mr Keith to assist with this process. It is further submitted that:

    (a) Since upholding high classification is effectively a proxy for withholding the information from core participants who do not have security clearance, to ensure the rights of the core participants to natural justice are respected, those disclosing classified documents to the Inquiry should be required to produce a list of

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[1] This is plain from a comparison of the criteria for classification of information as TOP SECRET or SECRET as compared to CONFIDENTIAL or RESTRICTED. The latter requirements are worded much more generally and the expressed consequences of disclosure are less severe by several orders of magnitude. "Guidelines for Protection of Official Information" available at: https://www.gcsb.govt.nz/assets/GCSB-Documents/Guidelines-for-Protection-of-Official-Information-Wallchart.pdf

[2] See eg. *InterCity Group (NZ) Ltd v Nakedbus NZ* Ltd [2013] NZHC 2261 at [37] (ordering discovery of sensitive confidential documents) and *Commerce Commission v Air New Zealand Ltd* [2011] NZCA 64, [2011] 2 NZLR 194 at [46] (discussing confidentiality orders under s100 of the Commerce Act 1986).

classified documents similar to that in an affidavit of documents in civil proceedings, and include a short unclassified summary or "gist" of the contents of the document with the listing. That would enable participants to take effective instructions on matters arising in the Inquiry,[3] and raise any objection to the classification of the document(s) they may have. It is respectfully submitted that merely "considering" making a summary available (as suggested at [76] of Minute No 4) is not sufficient protection for the rights of core participants.

(b) Mr Keith and/or the Inquiry must consider each piece of information marked SECRET, TOP SECRET or TOP SECRET SPECIAL separately and determine whether that piece of information is properly classified. *En bloc* assessments of categories of documents, or all classified information within a document, are not appropriate.[4] Similarly, where classified information can be redacted, the unredacted parts of the document should be disclosed.

10. Fourth, counsel for the core participants should be given the opportunity to seek security clearance from the NZSIS. If clearance were granted, that would enable counsel to receive classified information under s22 of the IA (depending on the information and level of classification given) subject to a non-disclosure undertaking and/or an order under s15 of the IA. This would greatly facilitate the efficient running of the inquiry. If clearance were not granted, it could be possible to appoint special advocates to act on behalf of the core participants.

11. Finally, as the Supreme Court of the United Kingdom emphasised in *Bank Mellat v Her Majesty's Treasury,* it is incumbent on the Inquiry and counsel for the NZDF and other government agencies to avoid referring to classified information to the extent possible. In that case Lord Neuberger observed:[5]

> Advocates, perhaps particularly when acting for the executive, have a duty to the court as well as a duty to their clients, and the court itself is under a duty to avoid a closed material procedure if that can be achieved.

The Inquiry's overall process

12. In Minute No 4, the Inquiry summarised its views on process by reference to six factors: the status of an inquiry; the reality that classified and confidential information will be involved; the fact some witnesses will be vulnerable; the need to comply with the requirements of natural justice and respect the principle of open justice. Each of these factors is briefly addressed below.

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[3] Noting the test in *Secretary of State for the Home Department v AF* [2009] UKHL 28, [2010] 2 AC 269 at [59] that a defendant in civil restraint of liberty proceedings who is provided with gists of classified information must receive "*sufficient information about the allegations against him to take effective instructions in relation to those allegations*".

[4] By analogy with the approach required to be taken when considering whether to withhold official information mandated in *Kelsey v Minister of Trade* [2015] NZHC 2497, [2016] 2 NZLR 218.

[5] *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38, [2014] 1 AC 700 at [70].

The status of an inquiry, natural justice and open justice

13. It is acknowledged that inquiries have a different legal framework from court proceedings. However, that framework does not require an investigative approach to be taken in every case. It allows for formal procedures where appropriate.[6] All inquiries are different. Some will benefit from formal, adversarial processes because of their particular context.[7]

14. The primary function of most inquiries is to investigate and report on the facts. It is submitted there are real advantages in an adversarial model over an inquisitorial one in achieving this purpose.

15. Where there is a *lis* between core participants in an inquiry, the people who will be most familiar with the facts, and therefore best positioned to test the evidence of witnesses, will be the participants themselves. They will have relevant knowledge and experience. They also have an incentive to challenge the evidence of the other participants' witnesses to the fullest extent possible.

16. The importance of cross-examination to an inquiry's ability to investigate the facts was recognised in *Badger v Whangarei Refinery*.[8] In that case the High Court quashed a decision by an inquiry not to allow any cross-examination of witnesses by participants. The judge noted allowing cross-examination would assist the inquiry to analyse the different versions of events. The Court went on to say:[9]

> Knowledge that evidence-in-chief may be subject to cross-examination will tend to make the evidence-in-chief more succinct and relevant and will eliminate untenable generalities; [and] this Commission [of Inquiry] may well be concerned with attitudes of disputing parties as much as with the resolution of conflicts of evidence. Cross-examination can in some circumstances play a useful role in demonstrating the attitudes of various principal witnesses.

17. In addition to assisting in establishing the facts, formal processes such as cross-examination are important means of ensuring rights to natural justice are respected. It is clear such rights apply in a similar manner in inquiries as they do in court proceedings.[10]

18. In Minute No 4, it is suggested that the rules of natural justice can only apply in inquiries to require cross-examination where the Inquiry intends to make adverse comments about a person in its final report, to give the witness the opportunity to respond to those specific allegations only. It is respectfully submitted this approach is not consistent with the authorities.

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[6] Inquiries, like courts, have obligations to act independently, impartially and fairly (s10). While inquiries cannot determine civil, criminal or disciplinary liability, they can make findings of fault and recommend further steps be taken to determine liability (s11). Inquiries may request counsel to assist (s13). Inquiries have powers to call witnesses, hold hearings and allow cross-examination (s14). Failing to comply with certain orders by the Inquiry, and giving false or misleading information, are subject to criminal sanctions (s29) and the Solicitor-General may commence proceedings for contempt of inquiry (s31).

[7] Law Commission *A New Inquiries Act* (R102, May 2008) at [2.14].

[8] *Badger v Whangarei Refinery Expansion Commission of Inquiry* [1985] 2 NZLR 688 (HC)

[9] At [705].

[10] *Campbell v Mason Committee* [1990] 2 NZLR 577 (HC) and *Fay, Richwhite & Co Ltd v Davison* [1995] 1 NZLR 517 (CA).

19. The Minute refers to *State Services* and *Re Erebus* only. However, in *State Services*, the Court of Appeal acknowledged there was "nothing approaching a *lis*" between the participants in that inquiry which was established to inquire and report on the organisation, staffing and methods of control and operation of state departments.[11] In *Re Erebus*, Lord Diplock also made clear he was only describing the principles of natural justice "that [were] germane to this appeal".

20. In *Badger*, the Court acknowledged that cross-examination on more than those matters which the inquiry anticipated might be the subject of adverse findings about participants could be warranted to uphold the requirements of natural justice on the facts of the case. The Court concluded:[12]

> I am of the clear view that the Commission was in error to make a blanket ruling at the outset of its inquiry that there could be no cross-examination of witnesses by parties. At the stage it made its ruling, the Commission could not possibly know whether matters would become relevant, which would directly *or indirectly* impinge on the reputation or conduct of an individual or organisation *or whether matters would arise whereby natural justice would require the right to cross-examine.*
>
> (emphasis added)

21. Also of significance, the Court expressly addressed a submission that to allow cross-examination would cause unnecessary cost and delay. The Court held that to the extent there was a conflict between rights to natural justice and cost and delay, this should be resolved in favour of natural justice.[13]

22. Finally regarding the principle of open justice, it is significant that under the IA, the default position is for access to evidence or submissions presented to the Inquiry, subject to any order made under s15 imposing restrictions.

23. The Inquiry has observed "there is no presumption at common law that inquiries must be conducted by way of a public process". It is respectfully submitted that this proposition no longer holds true given the enactment of legislation such as the Official Information Act 1982 (**OIA**) and the New Zealand Bill of Rights Act 1990 (**NZBORA**).

24. In particular, the OIA presumptively applies to all documents created by the inquiry or received in the course of the inquiry.[14] Furthermore, s14 of the NZBORA affirms that everyone has the right to freedom of expression, which includes the right to receive information and opinions. The Grand Chamber of the European Court of Human Rights has recently held that the equivalent right in article 10(1) of the European Convention on Human Rights includes a positive right to receive information held by public bodies in certain circumstances.[15] The right in s14 can only be subject to limits which are prescribed by law and are reasonable and demonstrably justified.

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[11] *Re Royal Commission on State Services* [1962] NZLR 96 (CA)
[12] At 704.
[13] At 705.
[14] IA, s32.
[15] *Magyar Helsinki Bizottsag v Hungary* (Application no. 18030/11, GC), 8 November 2016.

Classified information

25. Counsel do not agree that the relevance of classified information to the inquiry means the Inquiry should prefer a more "inquisitorial" approach. That would amount to compromising the Inquiry's ability to investigate the facts and respect participants' rights to natural justice for the sake of convenience.

26. As addressed above, classified information can be managed safely and in a manner which permits an adversarial approach to fact-finding. For information classified CONFIDENTIAL or below, this can be disclosed to participants subject to undertakings. For information classified SECRET or above, counsel could obtain security clearance and/or special advocates could be appointed for core participants. Counsel and the Inquiry also have obligations to minimise reference to classified material to the extent possible.

Confidentiality and vulnerable witnesses

27. The Inquiry will hear from a large number of witnesses. Each will have a different interest in keeping their identity confidential. Some, for example well known Ministers or public officials or serving NZDF personnel who are giving evidence which is consistent with the official narrative, will have limited if any interest. Others, such as NZDF "whistleblowers" or Afghan forces or villagers, may have much greater interests, fearing serious consequences in their employment or risks to their safety or even life if they are identified. Still others may be vulnerable to the process of cross-examination by reason of their background and circumstances.

28. It is acknowledged this spectrum of interests that will need to be taken into account by the inquiry when making decisions about procedure. However, concerns about confidentiality should not be regarded as precluding a more adversarial style process, including cross-examination by counsel and/or core participants who are security cleared and/or who have signed confidentiality undertakings. It is acknowledged that concerns about the impact of cross-examination on certain vulnerable witnesses is in a different category. It is submitted that whether and how vulnerable witnesses should be cross-examined should be dealt with on a case by case basis.

The Inquiry's conclusions on procedure

29. The Inquiry has indicated that witnesses will be witnesses of the Inquiry and no participant will have a right to cross-examine any particular witness (at [77]-[78]). It has also indicated it will follow the Witness Protocol in Appendix 1 of Minute No 4 (**Draft Protocol**) when gathering evidence.

30. The Draft Protocol distinguishes between "sensitive" and "other" witnesses. Sensitive witnesses are defined as witnesses who will only provide evidence to the Inquiry under circumstances of confidence (at 1.1).

31. The Draft Protocol does not provide for cross-examination by core participants. For sensitive witnesses it notes questioning will be undertaken by the Inquiry or counsel assisting (at 13.1). For other witnesses it notes a "similar ... process" will be followed (at 25). In Minute No 4 the Inquiry has

noted "there may be circumstances where [it] considers it may be assisted" by cross-examination (at [76]) but this is not reflected in the Draft Protocol.

32. The Draft Protocol makes only limited reference to disclosure of evidence to core participants. It appears the categorisation of a witness as either a sensitive or other witness will affect whether and how their evidence is disclosed. For sensitive witnesses it appears the Inquiry is only considering "some level of disclosure" which is "necessary to meet the requirements of natural justice" (at 16). For other witnesses interviews and evidence will generally be available subject to non-publication orders (at 26).

33. The Inquiry has noted that "all or most of its evidence gathering activities will have to occur in private" (at [79] of Minute No 4). It is not clear what is meant by "private". This could include limiting access to core participants and their counsel, or could permit disclosure to core participants and counsel subject to undertakings and protections to ensure the PSR are respected for highly classified information, but restricting access to the media and/or public at large.

Response to the Inquiry's conclusions

34. The Inquiry's proposed process would significantly inhibit its ability to investigate and report on the facts and to discharge its obligations to respect core participants' rights to natural justice.

35. As things stand, the core participants have no guidance as to whether and when cross-examination will be allowed. The current position appears to be a ban on cross-examination other than in undefined exceptional circumstances, which it is inconsistent with *Badger*.

36. Mr Stephenson's position is that cross-examination of certain key witnesses by the core participants is essential if the Inquiry is to succeed in one of its primary purposes of establishing the facts. The villagers and Messrs Hager and Stephenson are, by a significant margin, the people outside the NZDF who are most familiar with the underlying facts and are best positioned to challenge the official account of what happened in Operation Burnham and related matters. As the Inquiry has acknowledged, there is a *lis* in this case between the NZDF on the one hand, and the villagers and authors on the other.

37. To that end Mr Stephenson has spent the better part of the last 17 years investigating New Zealand's role in Afghanistan. He is uniquely positioned to test the credibility and conclusions of key NZDF witnesses. With the greatest of respect to the eminent and learned members of the Inquiry and counsel assisting, it would simply not be possible for the Inquiry or counsel assisting to obtain the same depth of specialised knowledge and experience necessary to test the evidence of those witnesses. Feeding through subjects for cross-examination or potential questions without any ability to put those questions to the witnesses or ask follow-up questions would not achieve the same results.

38. Cross-examination will also inevitably be required to ensure respect for rights to natural justice. As the High Court stated in *Badger*, the inquiry should not take too narrow an approach in defining what is necessary for this purpose. Mr Stephenson has made a number of very public claims

about what occurred in Operation Burnham in *Hit and Run* and other media appearances covering most if not all of the matters in the TOR.

39. Mr Stephenson proposes that the Inquiry with counsel and core participants agree on a category of key witnesses whom the core participants will be permitted to cross-examine (subject to the protections discussed above to protect classified information and confidentiality). It is suggested this category would necessarily include high-ranking NZDF personnel and other members of the executive responsible for authorising and executing Operation Burnham and related events. Counsel suggest that the scope of this category be further discussed at the hearing scheduled for 21-22 November 2018.

40. On the private nature of the hearings, it is acknowledged that restrictions on access which are necessary to ensure highly classified material is handled in accordance with the PSR may be appropriate. Subject to this, core participants and their counsel should be permitted to be present during hearings. Where issues of confidentiality arise, consideration must be given to whether measures short of excluding core participants and their counsel would safely manage the risk. It is submitted in most cases the giving of undertakings will be sufficient. Witnesses may also give evidence from behind a screen.

List of issues

41. The Inquiry has requested comment on the list of issues attached as Annex 2 to Minute No 4. Counsel acknowledge there is utility in preparing a comprehensive list of issues to help guide the inquiry. However, it is submitted this list should cover the full scope of the Inquiry as defined at [7] of the TOR. That scope is not limited to the allegations in *Hit and Run*.

42. To the extent comment is sought on the specific list of allegations in Annex 2, Mr Stephenson is content to repeat the comments made in paragraphs [20]-[22] of his letter to the Inquiry of 29 May 2018.

Dated 5 October 2018

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