under The Inquiries Act 2013

in the matter of a government inquiry into Operation Burnham and related matters.

MEMORANDUM OF COUNSEL FOR JON STEPHENSON

15 August 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

MEMORANDUM OF COUNSEL FOR JON STEPHENSON

May it please the Inquiry

1. This memorandum responds to the Inquiry's minute (no 3) of 19 July 2018, and certain matters raised in memoranda by other core participants.

2. In essence, Mr Stephenson agrees with the view expressed by counsel for the Villagers that a more traditional, adversarial, process is appropriate in the circumstances, in which the Villagers, Mr Hager and Mr Stephenson act as the notional plaintiffs, including because it is likely the most effective way to test evidence produced by the New Zealand Defence Force (**NZDF**).

Principles governing decisions about procedure

3. Under s14(1) of the Inquiries Act 2013 (**Act**), an inquiry has a discretion to conduct its inquiry as it considers appropriate, unless otherwise specified by the Act or in the terms of reference.

4. Under s14(2) of the Act, the Inquiry is expressed required to comply with the principles of natural justice as follows:

> In making a decision as to the procedure or conduct of an inquiry, or in making a finding that is adverse to any person, an inquiry must—
>
> (a) comply with the principles of natural justice; and
>
> (b) have regard to the need to avoid unnecessary delay or cost in relation to public funds, witnesses, or other persons participating in the inquiry.

5. To similar effect, as a government inquiry, the Inquiry is bound by the New Zealand Bill of Rights Act 1990 (**NZBORA**),[1] of which s27(1) affirms:

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

6. Section 27(1) is engaged because the Inquiry has the power to make determinations in respect of the rights, obligations and interests of others.[2] As the Court of Appeal affirmed in *Re Erebus Royal Commission (No 2)*:[3]

> [Findings by inquiries] may greatly influence public and Government opinion and have a devastating effect on personal reputations; and in our judgment these are the major reasons why in appropriate proceedings the Courts must be ready if necessary, in relation to Commissions of Inquiry just as to other public bodies and officials, to ensure that they keep within the limits of their lawful powers and comply with any applicable rules of natural justice.

7. This right to observance of natural justice is not absolute, but is limited by s5 of the NZBORA which provides:

---

[1] Inquiries Act 2013, s6(1) and (3); New Zealand Bill of Rights Act 1990 (NZBORA), s27(1).
[2] *Combined Beneficiaries Union v Auckland COGS Committee* [2009] 2 NZLR 56 (CA) at [61].
[3] *Re Erebus Royal Commission (No 2)* [1981] 1 NZLR 618 (CA) (aff'd in *Re Erebus Royal Commission (No 2)* [1983] NZLR 662 (PC)).

> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society

8. The Inquiry should adopt a rights-based approach to determining its procedure here. It should start from the position that participants have rights to the observance of natural justice which can only be overridden by measures which are prescribed by law, reasonable and *demonstrably* justified in a free and democratic society.[4] As the Law Commission has observed regarding the disclosure of national security information in court proceedings:[5]

> [Security] interests must really be of major importance to New Zealand and must truly be of a significant character to justify a limitation of such fundamental legal rights. In defining what information may not be disclosed, it ought to be remembered that, in certain circumstances, natural justice would otherwise require disclosure. In other words, there should be a strong reason not to disclose, and disclosure should remain the default position.

The principles of natural justice

9. Regarding the content of relevant principles of natural justice, s10 of the Act affirms in general terms:

> In exercising its powers and performing its duties under this Act, an inquiry and each of its members must act independently, impartially, and fairly.

10. The duty to act fairly incorporates the principle that where a person may be adversely affected by a decision, they should be informed and given a fair opportunity to respond. It is trite that what steps are required to comply with the principle will depend on the context. This principle is codified in s14(3) of the Act, which provides:

> If an inquiry proposes to make a finding that is adverse to any person, the inquiry must, using whatever procedure it may determine, be satisfied that the person—
>
> (a) is aware of the matters on which the proposed finding is based; and
>
> (b) has had an opportunity, at any time during the course of the inquiry, to respond on those matters.

11. While the Act is relatively new, the underlying principles have been considered in a number of decisions involving inquiries. In *Re Erebus (No 2)*[6] and *Campbell v Mason Committee*,[7] the Privy Council and High Court upheld applications for judicial review by applicants who had been the subject of adverse comments in reports of inquiries but who had not had a fair opportunity to respond to those allegations during the investigative process. Similarly in *Ah Chong v Legislative Committee*,[8] Cooke P refused

---

[4] This is the approach recommended by the Law Commission in *National Security Information in Proceedings* (IP38, May 2015) at [2.43].
[5] Law Commission *National Security Information In Proceedings* (P38, May 2015) at [6.9].
[6] *Air New Zealand Ltd v Mahon* [1981] 1 NZLR 618 (CA) [*Re Erebus Royal Commission*], aff'd in [1983] NZLR 662 (PC).
[7] *Campbell v Mason Committee* [1990] 2 NZLR 577 (HC)
[8] *Ah Chong v Legislative Assembly of Western Samoa* [2001] NZAR 418 (CAWS)

to strike out an application for review of the Western Samoan Commission of Inquiry into Polynesian Airlines which was advanced on similar grounds.

12. In this case, one of the main issues is the possibility that information might be disclosed to the Inquiry but withheld from the other participants on the ground withholding is necessary to protect national security or related interests. In this regard, court decisions addressing challenges to Crown decisions to withhold information and/or insist on closed procedures in civil proceedings are instructive.

13. In *Zaoui v Attorney-General*, Mr Zaoui had applied to the Inspector General for Intelligence and Security to review the Director of Security's decision to issue a security certificate. The Inspector-General had made an interlocutory decision about how the review should be carried out. In that decision, the Inspector General declined to release classified security information to Mr Zaoui or provide a summary of the information to him in the course of the review. Mr Zaoui sought judicial review of the decision. In upholding the application, Hugh Williams J observed:[9]

> The right of a person charged – or subject to a certificate – to know at least the outline of the allegations against them and the basis on which they are made is one of the most fundamental tenets of natural justice and should be implemented in Mr Zaoui's case as far as is possible consistent with the definition of "classified security information".

14. In *Secretary of State for the Home Department v AF*, the Secretary had issued control orders against the appellants, restricting their liberty, following closed hearings where classified information had been presented to special advocates but not the detainees. The House of Lords held the particular processes followed had been inconsistent with article 6 of the European Convention on Human Rights, which affirms the right to a fair hearing, principally on the basis the open material provided had contained only general assertions about the reasons for the control orders. Lord Philips gave the leading speech and emphasised:[10]

> [A] controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.

15. In *Al Rawi v Security Service*, various people detailed by foreign security forces brought civil claims against the Security Service, alleging it had been complicit in their detention. The Crown wanted a closed process involving special advocates. The UK Supreme Court held the High Court could not permit such a procedure in exercise of its inherent jurisdiction, on the basis it created a risk there would not be a fair trial and the plaintiff's rights to natural justice would not be respected. Any closed procedure involving

---

[9] *Zaoui v Attorney-General* [2004] 2 NZLR 339 (HC) at [172(a)(i)], (aff'd [2005] 1 NZLR 690 (CA)]

[10] *Secretary of State for the Home Department v AF* [2009] UKHL 28, [2010] 2 AC 269 at [59].

special advocates required express statutory authority. Lord Kerr observed: [11]

> The appellants' second argument proceeds on the premise that placing before a judge all relevant material is, in every instance, preferable to having to withhold potentially pivotal evidence. This proposition is deceptively attractive - for what, the appellants imply, could be fairer than an independent arbiter having access to all the evidence germane to the dispute between the parties? The central fallacy of the argument, however, lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial.

16. In *Bank Mellat v HM Treasury*, the UK Supreme Court narrowly decided that it had jurisdiction to adopt a closed procedure (6-3) and that it should adopt the procedure in that particular appeal (5-4). Lord Neuberger wrote the leading judgment. His Lordship held it was implicit in the statutory provisions that conferred jurisdiction on the Court to hear appeals from lower court judgments, which included appeals from closed judgments, that the Court could hear appeals using a closed procedure. This satisfied the *Al Rawi* principle. A closed procedure was adopted on the appeal out of an abundance of caution. In their judgments, all judges affirmed that a closed procedure represented a significant restriction on parties' rights to natural justice and should only be invoked if it was absolutely necessary.

17. In his reasons, Lord Neuberger placed particular emphasis on counsel's duties to avoid referring to classified material if possible:[12]

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

18. His Lordship went on to emphasise that where it is necessary to refer to classified material, both counsel and the court should consider whether a closed hearing is required or if lesser restrictions on the use of the material would suffice, as follows:[13]

> if the appellate court decides that it should look at closed material, careful consideration should be given by the advocates, and indeed by the court, to the question whether it would nonetheless be possible to avoid a closed substantive hearing. It is quite feasible for a court to consider, and be addressed on, confidential material in open court. If such a course is taken, the advocates and the court must obviously take care in how they refer to the contents of the closed material, and sometimes a brief closed hearing will be necessary to set the ground rules. Sometimes, the closed material will be so sensitive or so difficult to refer to elliptically, that such a course will be impracticable. However, it should always be considered, as it is plainly less objectionable to have a brief closed procedural hearing to discuss the possibility than to have a closed hearing which considers substantive issues. …

---

[11] *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 at [93].
[12] *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38, [2014] 1 AC 700 at [70].
[13] At [71].

> [If] the court decides that a closed material procedure appears to be necessary, the parties should try and agree a way of avoiding, or minimising the extent of, a closed hearing. This would also involve the legal representatives to the parties to any such appeal advising their clients accordingly, and, if a closed hearing is needed, doing their best to agree a gist of any relevant closed document (including any closed judgment below).

19. Finally in *Belhaj v Director of Public Prosecutions*, the UK Supreme Court considered whether the procedure in the Justice and Security Act 2013 (UK), introduced following the *Al Rawi* decision, which exempted "proceedings in a criminal cause or matter", applied to an application for judicial review of decisions not to prosecute. The majority held it fell within the criminal proceedings exemption and could not apply. While the issue was a narrow one of statutory interpretation, both the majority and minority judges emphasised that closed procedures raised particular natural justice issues which required close scrutiny. Lord Lloyd-Jones observed:[14]

> I readily accept that to hold a closed material hearing is a restriction of the common law principles of open justice and natural justice. As this court made clear in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700 (per Lord Neuberger PSC, at paras 2-4, with whom Baroness Hale, Lord Clarke, Lord Sumption and Lord Carnwath JJSC agreed), a closed hearing offends the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society, and, by denying a party a right to know the full case against him and the right to test and challenge that case fully, is even more offensive to the fundamental principle of natural justice. While these principles may, exceptionally, be required to yield if justice cannot otherwise be achieved, claims that adherence to these principles is not attainable in particular circumstances will always require the most intense scrutiny.

20. While these cases do not concern inquiries, it is submitted the same principles apply in this context. As expressly stated in s14 of the Act and as affirmed in *Re Erebus*, *Campbell* and *Ah Chong*, inquiries are required to comply with the same principles of natural justice. As noted in *Re Erebus,* the reports of inquiries can have hugely significant consequences for participants. Furthermore, one of the main purposes of inquiries is to determine the facts as fully and fairly as possible. As Lord Kerr cautioned in *Al Rawi*, evidence which is not subjected to informed challenge may positively mislead, which may cause an inquiry, just as a court proceeding, to miscarry.

The principle at work in this Inquiry: Cross-examination

21. The second limb of the principle of a right to be heard is that a fair opportunity to respond to adverse findings must be afforded. In the present case, a distinct issue arises as to whether participants should have the right to cross-examine other key witnesses in the inquiry. This issue was considered in *Badger v Whangarei Refinery Expansion Commission of Inquiry*.[15]

22. In *Badger,* the Commissioner had made a decision at the commencement of the inquiry that no cross-examination would be permitted, to save time. Barker J concluded that this blanket ban was unlawful, observing:

---

[14] *Belhaj v Director of Public Prosecutions* [2018] UKSC 33 at [40].
[15] *Badger v Whangarei Refinery Expansion Commission of Inquiry* [1985] 2 NZLR 688 (HC). See also the Law Commission's discussion of the relevant principles in *A New Inquiries Act* (R102, May 2008) at [4.45].

> The law is that the Commission must comply with natural justice; subject to that overwhelming requirement, cross-examination is within its power to permit or not. I cannot escape the view that, in the circumstances of this case, controlled cross-examination must be allowed. The Commission must remain master of its own procedure; it should be alert to keep cross-examination within reasonable bounds. The prime instance where cross-examination will be necessary to satisfy the demands of natural justice is when the reputation of a third person or organisation is in issue.

23. In response to submissions that allowing cross-examination would be wasteful of the commission's resources, the Judge noted that "convenience and justice are often not on speaking terms" and determined:

> The present state of administrative law is such that emphasis is placed on natural justice; compliance with its requirements frequently is time-consuming.

24. This approach is consistent with s14(2) of the Act, which provides that the Inquiry "must comply with the principles of natural justice" but need only "have regard to the need to avoid unnecessary delay or cost".

Powers of the inquiry

25. Against this backdrop, counsel agree with the Inquiry's preliminary conclusions about the general scope of its powers to order disclosure and provision to other participants in the inquiry. In particular it is agreed that:

    (a) The Inquiry may require the disclosure of any information to it regardless of the security classification of that information pursuant to s20(a) of the Act.

    (b) The Inquiry is not obliged as a matter of law, but has a discretion, to determine whether to provide information it receives to the other participants pursuant to s22(1)(a) of the Act.

    (c) Participants in an inquiry have the same immunities and privileges as if they were appearing in civil proceedings and the provisions of subpart 8 of Part 2 of the Evidence Act applies to inquiries pursuant to s27 of the Act, and these may be invoked in relation to decision-making under s20(a) and s22(1)(a) of the Act.

26. As for the Inquiry's jurisdiction to order a closed procedure where information is disclosed only to special advocates, it is noted this is not expressly provided for in the Act, unlike in the Justice and Security Act 2013 (UK). While such a procedure may potentially be permissible in exercise of the Inquiry's general discretion as to its procedure, it is submitted the Inquiry would need to be satisfied the procedure was contemplated by Parliament as discussed in *Al Rawi* and *Bank Mellat.* Since no party has requested such a procedure be adopted in this case, this issue is not addressed in any further detail in these submissions.

27. It is acknowledged that even if a closed procedure is not adopted, participants in particular the NZDF will want to disclose information to the Inquiry with restrictions placed on wider disclosure to the other participants. It is submitted such requests would need to be determined with reference to s22(1)(a) of the Act, as well as s27 and relevant principles of confidentiality, privilege and/or public interest immunity.

28. Regarding public interest immunity, it is submitted that the common law principle has been codified by s70 of the Evidence Act 2006, which 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.

29. Section 70(1) would be engaged where there is evidence establishing a risk that, if the information were disclosed beyond the inquiry, it would prejudice the security, defence or international relations of New Zealand. Similarly, if information has been obtained from foreign partners in circumstances of confidence, it is accepted that s69 of the Evidence Act would apply.

30. However, mere engagement of ss69 or 70 is not the end of the analysis. Both sections require that the public interest in withholding the information be balanced against the countervailing public interest in the information being disclosed, including the natural justice interests discussed above.

31. In this regard, it is also highly relevant that the Inquiry can direct that information be provided to participants subject to conditions. In particular, the Inquiry could:

(a) provide the information to participants under s22(1) subject to directions as to confidentiality under s22(2) of the Act and/or s52(4) of the Evidence Act 2006; or

(b) provide the information to counsel only, subject to an undertaking as to non-disclosure.

32. As Asher J observed in *InterCity Group (NZ) Ltd v Nakedbus Ltd*:[16]

---

[16] *Intercity Group (NZ) Ltd v Nakedbus NZ Ltd* [2013] NZHC 2261 at [37].

> it is not uncommon for these sorts of confidentiality restrictions to be in place in commercial proceedings. By and large cases can be run in a manner which accommodates such restrictions. A set of confidential briefs, or portions of briefs, can be prepared on different coloured paper, and a specific confidential bundle can be provided. If necessary, the Court can be cleared when confidential material is traversed. The judgment can be written to avoid disclosure of the sensitive material. Arrangements of this type are often seen. Should there be any severe practical problems that arise, the Court has the ability to revisit orders that have been made.

33. Similar restrictions are often imposed by the Commerce Commission when conducting investigations under the Commerce Act 1986, for example, in restrictive trade practice investigations to protect the Commission's lines of questioning.[17] In that context the Court of Appeal has cautioned that the use of confidentiality orders must be *strictly necessary* and the duration and scope of any order should be kept under review.[18]

34. Consistent with a human rights approach, when exercising its discretion under s22(1)(a) to provide information to participants and countervailing claims to confidentiality or public interest immunity, the Inquiry is required to give very careful consideration to whether disclosure could be accommodated by conditions or disclosure to counsel subject to undertakings. As discussed in *Bank Mellat*, restrictions on access to information should be matters of last resort.

This inquiry

35. In its report which led to the Act being enacted, the Law Commission observed:

> 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

36. This inquiry falls squarely into this category of case for which more formal processes are appropriate. The Inquiry has been set up to inquire into allegations of serious wrongdoing by NZDF forces in Afghanistan. Its purposes include not only establishing the relevant facts but also determining fault and attributing blame and assessing facts as against legal principles, including principles of human rights law, international human rights law and international humanitarian law.[19] The inquiry is likely to be highly contested by the core participants.

---

[17] Commerce Act 1986, s100; as to which see Graham Taylor *Judicial Review A New Zealand Perspective* (3 ed, LexisNexis NZ Ltd, Wellington, 2014) at [10.07].
[18] *Commerce Commission v Air New Zealand Ltd* [2011] NZCA 64, [2011] 2 NZLR 194 at [46].
[19] Terms of Reference at 7.1, 7.8.

37. Mr Stephenson has spent a considerable amount of time and effort investigating the matters at issue. In the course of his work he has formed views about what happened and recorded some of these views in the work *Hit and Run* [and in public statements]. As far as disclosure of information is concerned, it is inescapable that the Inquiry's report, when published, will contain findings which will affect his reputation.

38. For these reasons, it is submitted that all relevant information should be disclosed to Mr Stephenson, with information withheld only where this is reasonable and can be demonstrably justified, and in which case "counsel only" arrangements will be appropriate.

39. Counsel proposes the following process for determining issues as to disclosure:

    (a) First, all participants provide all relevant information to the Inquiry and notify any claims to confidentiality, privilege, public interest immunity or other reason why the information should not be disclosed to any of the other participants, including identifying any partial restrictions on disclosure which the participant would accept are appropriate (provision to participants subject to conditions, provision to counsel only subject to undertakings, whether a gist can be provided).

    (b) Then, the Inquiry performs its own review and:

        (i) determines any claim to confidentiality, privilege or public interest immunity asserted directly against the Inquiry (if any are made);

        (ii) determines what information can be disclosed to the other participants and subject to what conditions.

    (c) If the Inquiry determines that information should be withheld from participants or their counsel, further consideration should be given to whether a "gist" of the information can be provided to the other participants. Unless there are truly exceptional circumstances, a gist should be provided.

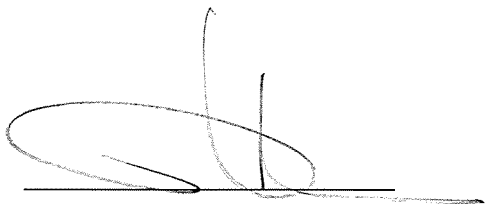
    (d) Finally, the Inquiry provides all participants with a list of documents which identifies where documents have been withheld and on what basis.

40. It is respectfully submitted that a closed procedure involving disclosure to special advocates only would not be in the interests of justice, as it prevents the proper testing of NZDF evidence based on the unique knowledge and perspectives held by the other core participants.

Oral hearing

41. Counsel suggest that an oral hearing be convened to further address matters of procedure prior to the commencement of the substantive inquiry.

Dated 15 August 2018



D M Salmon / D Nilsson
Counsel for Jon Stephenson