UNDER	**THE INQUIRIES ACT 2013**
IN THE MATTER OF	**A GOVERNMENT INQUIRY INTO OPERATION BURNHAM AND RELATED MATTERS**

SUBMISSIONS OF COUNSEL ASSISTING ON MINUTE NO. 4

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Introduction

1. Procedurally, this Inquiry is likely to be the most complex ever held in New Zealand. As such the need to reach the appropriate balance of the competing considerations and interests when deciding on the best procedure to adopt will be of the utmost importance.

2. Importantly, this is a Government inquiry for the benefit of all New Zealanders. It is also an independent Inquiry. The public interest that exists in the Inquiry is a multi-faceted one. While the Inquiry's process should be as open as possible, and ensure the public has confidence that the process is rigorous and thorough, it is also essential to recognise the risk of public harm that can come through the inappropriate disclosure of sensitive classified information. This is an inquiry, not a piece of litigation where partisan views and parties define the issues and control the evidence. This will be a thorough Inquiry, and it is the Inquiry's duty to investigate the issues, not the parties.

3. As Counsel Assisting it is not our role to advocate for any particular course. Rather, this submission will discuss the competing interests, some of the procedural complexities and endeavour to identify some guiding principles the Inquiry members may wish to consider.

4. In 2017 the book *Hit & Run* was published by the authors Nicky Hager and Jon Stephenson. The book contains a number of serious allegations against New Zealand Defence Force (NZDF) personnel.

5. The book's focus is on NZDF participation in a series of military operations in Afghanistan. In 2010 a deployment known until recently as Operation Burnham was undertaken by NZSAS troops and other nations' forces operating as part of the International Security Assistance Force. Subsequent operations are also examined in the book.

6. In April 2018 the New Zealand Government announced the Inquiry into Objective Burnham and related matters. The Inquiry aims to establish the facts in connection with the allegations, examine the treatment by NZDF of reports of civilian casualties following the operation, and assess the conduct of NZDF forces.

7. As we have noted, procedurally, this Inquiry is unique, and will be one of the most complex in New Zealand's history. It will involve highly sensitive classified information which if wrongly disclosed could seriously harm New Zealand's security and international relations. It will involve vulnerable witnesses – such as Afghan nationals and whistle-blowers – who are likely to be in need of protection. All these considerations strongly favour closed evidence sessions. On the other hand, if the process adopted is unduly private and secretive, it could affect public confidence in the outcome.

8. While other countries have undertaken public inquiries into the activities of their armed forces while in service overseas, this is the first in New Zealand to do so as far as we are aware. It will involve consideration of events occurring almost a decade ago in a country on the other side of the world, and which in practical respects is not safely or easily accessible to the Inquiry. It will involve participation by Afghan nationals who may face very real threats to their security and safety, and who may not be able to appear personally at hearings.

9. Much of the material which is relevant to the Inquiry's work is currently subject to high level security classifications and is not publicly available. Some of that information was created by foreign governments or is subject to international obligations requiring their consent before it can be provided to the Inquiry. The process the Inquiry chooses to adopt could also have a material and adverse impact on the business of Government, its international relations and diplomacy.

10. The interests of the submitters are not all aligned. Indeed, the stated positions of the parties are divergent on most matters. The Government agencies are concerned that the Inquiry process could compromise New Zealand's security and international relations if classified information is made publicly available and therefore contend that a largely private/closed process should be followed. On the other hand, the authors and counsel for the Afghan villagers contend that the Inquiry should follow a largely open process, with public hearings and cross-examination, and a much more traditional adversarial process which resembles a court proceeding.

11. Against these complexities, the purpose of this hearing is for the Inquiry to receive submissions from the parties in response to Minute No. 4. That minute sets out the Inquiry's preliminary views on the procedures it might adopt in relation to two issues:

11.1 Its handling of classified material; and

11.2 Its general procedures for taking evidence.

12. Minute No. 4 acknowledged the desirability of an open and public inquiry, but also observed that circumstances may not permit a fully public process. One such circumstance is where the Inquiry finds that information which is currently classified should remain classified and cannot therefore be made available to the public. Another is where witnesses need to give evidence on classified matters and cannot do so in a public setting. Yet another is where the interests of sensitive witnesses, such as the Afghan villagers, whistle-blowers, or Government personnel, require confidentiality or anonymity.

13. Because the procedure will necessarily be intricate and time consuming, cost and the completion time must weigh heavily in the procedural decisions that the Inquiry will take.

14. In our submission a balance is required. The Inquiry process should be public wherever possible. But against that, the Inquiry needs to proceed with great care because the consequences for individuals, and the risk of harm to the public interest by the improper disclosure of classified information are very real, and significant. A "do no harm" approach should govern the Inquiry's process.

15. In addition, while the core participants and public will have a keen interest in knowing the process which the Inquiry will adopt before its work begins in earnest, it is critical the Inquiry is agile, and retains flexibility in relation to its procedures. It needs to be able to adapt them to specific circumstances and issues as they arise through the course of the investigation. At present the Inquiry does not yet know all of the precise factual issues it needs to grapple with, and that will only become apparent once it has had an opportunity to engage with all relevant material and witnesses. How natural justice might be achieved in practice is best dealt with iteratively, and when the issues are known.

The scope of the Inquiry and the Terms of Reference

16. The scope of the Inquiry's work is set by its Terms of Reference.

17. The Terms make it clear that the central focus is in relation to three operations:

    17.1 Objective Burnham, which took place on 21-22 August 2010;

    17.2 Objective Nova, which was a return operation to the Tirgiran Valley on 2-3 October 2010; and

    17.3 The transfer of the insurgent leader Qari Miraj by NZSAS to the Afghanistan National Directorate of Security.

18. In addition to determining what took place during the Operations, the Inquiry is also charged with examining the treatment by NZDF of

reports of civilian casualties following Objective Burnham, and also the extent to which the NZDF rules of engagement authorised the predetermined and offensive use of force, whether that was apparent to those approving the rules, and whether NZDF's application of this aspect of the rules of engagement changed.

19. The scope of the Inquiry as determined by the Terms of Reference will require it to report on ten specific issues which relate to the Operations, Qari Miraj's treatment, the rules of engagement and Ministerial oversight.

Powers of the Inquiry to set its procedure

20. The Inquiry has wide powers and broad discretion to determine its own procedures. The law on this subject was contained for many years in a 1908 Act. Following a Law Commission Report,[1] new legislation was enacted in 2013 and this changed in important ways the powers and procedures of an inquiry. In particular, inquiries were provided with a wide suite of procedural choices. This change reflected the fact that each inquiry is different, and the procedural choices must depend on the circumstances.

21. The Law Commission also noted the unsatisfactory position which existed prior to the 2013 Act. Since 1990, there had been only five commissions of inquiry, and the reasons for this were identified as expense, delay, formality and adversarial methods.[2]

22. This Inquiry has been established as a Government, rather than a public, inquiry. The Law Commission's Report also noted the distinction between these two kinds of inquiry.[3] Government inquiries, as this is, are intended to deal with more immediate issues where a quick and authoritative answer is required from independent

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1 Law Commission *A New Inquiries Act* (NZLC R 102, 2008).

2 Law Commission *A New Inquiries Act* (NZLC R 102, 2008) at 4 and [1.18].

3 Law Commission *A New Inquiries Act* (NZLC R 102, 2008) at [2.29].

inquirers, and their practices, and their procedures distinguish them from a public inquiry.

23. The Law Commission went on to stress that inquiries can be conducted in a wide variety of ways and that full public hearings are not always going to be the most effective or efficient way of achieving their aim.[4]

24. Under the Inquiries Act 2013 the Inquiry is empowered to conduct the Inquiry as it considers appropriate, subject to the Act and the Terms of Reference. As noted (at [43]) in Minute No. 4, the Inquiry may determine matters such as whether to conduct interviews and if so, who to interview; whether to call witnesses and, if so, who to call; whether to hold hearings and, if so, when and where the hearings will be held; whether to receive evidence or submissions from any person participating in the inquiry (subject to the caveat that core participants can themselves give evidence and make submissions);[5] whether to receive oral or written evidence or submissions and the manner and form of the evidence or submissions; and whether to allow or restrict cross-examination of witnesses.[6]

25. The Inquiry may also impose restrictions on access to the Inquiry, and it has a wide discretion to determine the extent to which, if at all, material which has been made available to it can or should be disclosed to any other party, or core participants.

26. Put simply, the Inquiry has wide powers to decide on a process that meets the competing needs and interests. It may conduct some or all of its investigation in private. The potential for some private elements to this inquiry are expressly acknowledged within the Terms of Reference.

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4 Law Commission *A New Inquiries Act* (NZLC R 102, 2008) at [2.32].

5 Section 17(3).

6 Section 14(4).

The international context

27. Maintaining an open process as far as possible, while acknowledging the need for private evidence sessions, is a balance which has been struck in many of the significant international inquiries of other countries which have dealt with the same or similar sensitive issues as those faced by this Inquiry.

28. Internationally there have been a number of Government inquiries into allegations of misconduct by military personnel serving overseas. All of those inquiries (according to our research) have required private evidence sessions to deal with classified information, and sensitive witnesses.

29. The current inquiry in Australia into the actions of its SAS Regiment and Commandos while in Afghanistan is being undertaken entirely in private. Even the terms of reference for the Inquiry are not publicly available. It appears this approach has been adopted in part because a public process would make it virtually impossible for whistle-blowers to make disclosures of wrong-doing. In other words, in order to get to the truth, the Inquiry has determined it needs to be held in private.

30. The international inquiries in other countries have also been marked by procedural complexity, diverse interests, delay and in some cases very significant cost. The Iraq Inquiry in the United Kingdom, as noted by the Crown, ran for seven years, was hugely costly and ultimately widely criticised because of this.

31. The Arar Inquiry in Canada – which involved both open and closed evidence sessions, and reviews of classified material, ended with a judicial challenge by the Crown against the Inquiry's proposed public report on the basis of concerns the report disclosed classified information. Another feature of the Arar Inquiry was the over-classification of material, and the Crown's approach to it, which itself

added to the cost and complexity of the inquiry process. Justice Dennis O'Connor, appointed to carry out the Arar commission of inquiry, made the following observations about the procedural issues he encountered:

> The process for a public inquiry needs to be flexible so that it can be adjusted as circumstances require. This was certainly the case with the Factual Inquiry, which presented a unique and difficult challenge: conducting a public inquiry involving a significant amount of information that could not be disclosed publicly because of national security confidentiality (NSC) concerns.
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> ...
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> When the Inquiry began, Commission counsel and I had little appreciation of how much information would be subject to NSC claims or how the Government would respond to my decisions about what could be disclosed publicly. We learned as we went. The process developed at the outset evolved and at one point, in April 2005, it became necessary for me to direct major changes in the way the Inquiry would proceed.
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> Numerous procedural challenges arose from the tension among three different, sometimes competing requirements: making as much information as possible public, protecting legitimate claims of NSC, and ensuring procedural fairness to institutions and individuals who might be affected by the proceedings.
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> These procedural challenges greatly extended the time and resources needed to complete the Inquiry.

The competing interests at stake

32. As noted, there are a number of competing public and private interests that must be considered. Those interests are reflected in the range of submissions before the Inquiry relating to the procedure the Inquiry might adopt.

The Afghan villagers

33. According to the book *Hit & Run*, the NZDF operation on 22 August 2010 resulted in the deaths and injury of twenty-one Afghan nationals from two villages. Beyond that, Afghanistan has had a tragic history of conflict spanning centuries. Since 1979 conflict has been virtually

constant. International sources confirm that these conflicts have had a profound effect on the people who live there.

34. In relation to the Afghan villagers, the following (non-exhaustive) considerations arise:

34.1 There is the public interest in knowing what happened, to whom, and how.

34.2 There is a very real risk that some or all of the witnesses will be vulnerable and in need of some kind of protective measures. Involvement in this Inquiry by Afghan nationals should not put them at risk or cause them harm. Engagement with the Inquiry could expose Afghan nationals to risks of retaliation or retribution. In addition, it is to be expected that children, young people and adults exposed to the trauma of war are likely to suffer from various psychological effects, including post-traumatic stress disorder. It is essential that the process adopted by the Inquiry does not re-traumatise those who have already suffered harm.

34.3 There is the practical question of access for Afghan witnesses to the Inquiry. Evidence via video-link may be required. Whatever arrangements are made will need to ensure that the witnesses are not exposed to any undue risk to their personal safety given the current state of security in Afghanistan.

Classified material and information

35. As counsel for the Government agencies have noted, there are obvious concerns about the implications of the Inquiry process on national security and international relations.

36. All governments need to be able to protect highly sensitive and appropriately classified information from public disclosure. Indeed,

the public disclosure of some sensitive information is likely to seriously undermine the security of New Zealand. For instance, New Zealand's intelligence gathering methods and know-how, and military capabilities, are all matters which some foreign actors may wish to learn in order to further their own interests at the expense of New Zealand's.

37. In this case, an added dimension is that New Zealand relies heavily on intelligence from foreign governments in relation to matters of national security. Some of the information relevant to the Inquiry's work is information belonging to a foreign government, in circumstances where reciprocal information sharing arrangements require the consent of the foreign government to use or disseminate the information within a New Zealand context.

38. If foreign sourced information is disclosed by the Inquiry without the consent of the Government which supplied it, there is likely to be a breach of treaty arrangements or understandings in place governing information sharing with the New Zealand Government. That would be very damaging to the public interest, because a likely result would be the curtailment of information sharing relevant to our own security. The Inquiry ought not place itself in the position of damaging the interests of New Zealand, or the public, by its conduct.

39. Of course, these concerns only arise in relation to documents and information which remain classified. One common experience in the international inquiries which have examined the role of the military on overseas exercises is the tendency to over-classify, or to resist re-classification or de-classification where it is warranted.

40. Minute No. 4 reveals that this Inquiry is alive to this risk, because it is proposed that Mr Ben Keith, the former Deputy Inspector-General of Security and Intelligence, will undertake an independent review of the classified information the Inquiry receives to assess whether some or

all of it can be re-classified or de-classified. Where that may not be possible, the suggestion in Minute No. 4 is that Mr Keith may be able to prepare summaries of classified information to facilitate both public understanding of the evidence and participation by core participants in the Inquiry process.

41. A draft protocol has been prepared which sets out a process for Mr Keith's work, which is intended to ensure a review and check of classified materials, so that, as far as possible, material which should be in the public domain is in the public domain.

42. Beyond Mr Keith's work, the Inquiry's Minute also notes, correctly in our submission, that it has the power under s 70 of the Evidence Act 2006 to make the final decision about confidentiality claims made by any Government agency in relation to classified material.

43. These proposed mechanisms can give the public confidence that any material which can responsibly be made available through the Inquiry process will be made available, while other material, the publication of which would be injurious to the public interest, will remain confidential.

Journalists' confidential sources

44. Both Mr Hager and Mr Stephenson have confidential sources with information relevant to the Inquiry's work.

45. In order to do its work, it is essential for the Inquiry, and in the interests of the all concerned, including the journalists, that information known to those sources is made available directly to the Inquiry. It is those sources which, after all, are the basis for the allegations in *Hit & Run*, and a central reason the Government has called for this Inquiry.

46. Given many of the sources appear to either be past or present members of the intelligence agencies, or NZDF, they are likely to have concerns about their reputation, careers, and livelihoods, should their identity become public. These concerns and those expressed by the journalists indicate that a process is required which provides appropriate safeguards for confidential sources to engage with the Inquiry in a manner which will not compromise their personal position. Anonymity may well be a requirement if these people are to come forward.

Whistle-blowers

47. Similar considerations apply to whistle-blowers. The process adopted needs to provide them with confidence they can come forward and be frank with the Inquiry about what they know. This is unlikely to be consistent with an adversarial process, or one which is undertaken under the watchful gaze of Government agencies or television cameras.

48. Indeed, a process which of necessity involves the public identification of whistle-blowers, and exposes them to cross-examination by Government agencies would be very likely to discourage them from coming forward. In this respect, if the public want the Inquiry to receive all relevant information in order to get to the truth, it is in the public interest that some degree of privacy is maintained for sensitive witnesses. Individuals with information of wrong-doing are far more likely to come forward, and give full and frank accounts, if they are afforded privacy in relation to their communications with the Inquiry.

NZDF and security and intelligence agency personnel

49. In addition to these diverse interests are the interests of currently serving staff of the NZDF and the intelligence agencies.

50. Their ability to perform their roles, and their own personal safety, may be seriously at risk if their identities are publicly revealed. Protective measures including confidentiality may be required to ensure their operational effectiveness is not compromised, or their careers brought to a premature end simply because they were required to provide evidence to assist the Inquiry.

The importance of an open and public process as far as possible

51. A process which is as public as it can be given the unique circumstances and challenges presented by this inquiry is essential to maintaining public confidence in the Inquiry and its report.

52. Minute No. 4 acknowledged the importance of the principle of open justice.

53. That principle is one of the considerations the Inquiry must consider when making an order to conduct a private process in terms of s 15 of the Act.

54. But there are features of this Inquiry (noted at [73] of Minute No. 4), which strongly pull against a fully public process:

54.1 There is the risk the Inquiry will not be able to get to the heart of the matter unless full confidentiality can be offered to some witnesses. This was one of the factors acknowledged by the Chilcott Iraq Inquiry, noted by counsel for the Afghan villagers. That Inquiry's witness protocol noted:

> As much as possible of the Inquiry's hearings will … be in public. But for witnesses to be able to provide the evidence needed to get to the heart of what happened, and what lessons need to be learned for the future, some evidence sessions will need to be in private.

54.2 The second significant factor, common to all of the analogous international inquiries, is the likelihood that whatever the ultimate extent of classified information, there will be some

important material that is likely to remain classified, and which cannot be made public.

Potential for harm to the public interest

55. Against the importance of an open and public process is the potential for very real harm both to New Zealand's state interests, and for individuals, if properly classified sensitive information is disclosed through the Inquiry process.

56. Classified information which is mistakenly or improperly disclosed through the Inquiry at public hearings could have profound effects on New Zealand's security and international relations. It is not an exaggeration to say that the Government's ability to deal with hostile international forces would be seriously harmed by the loss of intelligence information from the Country's partners, and New Zealanders put at risk.

57. The competing tensions, between openness on the one hand and harm from disclosure on the other, reflect the multi-faceted nature of the public interest. Just as public confidence in the Inquiry process may be affected by an unduly private process, so too will public confidence in the Inquiry be lost if its procedures do not adequately protect national security and international relations.

58. In determining the appropriate process, the Inquiry may be assisted by considering a counter-factual involving public or almost entirely public hearings. In our submission, such an approach has significant risks:

    58.1 Witnesses such as whistle-blowers are unlikely to come forward;

    58.2 The accounts to be given by sensitive witnesses are far less likely to be candid and complete;

58.3 The Inquiry process will be significantly longer and will involve considerable added cost;

58.4 The risks we have identified of inadvertent disclosure of classified information are not avoided;

58.5 There is a risk that classified information subject to third party interests will not be made available to the Inquiry;

58.6 Overall, the ability of the Inquiry to receive all relevant material will be substantially diminished.

59. In *Conway v Rimmer*[7] (approved recently in *Al Rawi v Security Service*), [8] the House of Lords made the following observation about the effect of a public interest immunity claim:

> It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it. With regard to such cases it would be proper to say, as Lord Simon did, that to order production of the document in question would put the interest of the state in jeopardy.

60. In this Inquiry, the outcome contemplated in *Conway v Rimmer*, where public interest immunity trumps the public interest in the effective administration of justice, is entirely avoided, because the Inquiry will receive the classified information it needs. The security concerns will not compromise the ability of the Inquiry to have access to all relevant information. Rather, the issue will be the extent to which the Inquiry is able to disclose any of that information, if at all, to core participants, or refer to it within its report.

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7 [1968] AC 910 (HL) at 940

8 [2011] UKSC 34 at [142]

The need for flexibility

61. As O'Connor J in the Arar Inquiry noted, flexibility is essential in an inquiry as complex as this one. Indeed, while the Inquiry will need to make a decision about the course it proposes to follow from this point, it will be impossible for it to chart the procedural course through to the end of its work. It is simply not possible to do so when it has not been able to engage with the evidence – both documentary and from witnesses – and therefore does not have a full understanding of the natural justice issues it may need to contend with.

An inquiry is different from an adversarial court process

62. The submissions filed by the core participants reveal a tension between an inquisitorial approach, where the Inquiry controls the fact finding process, and a traditional adversarial court-like process, where the core participants control that process.

63. Inquiries by their nature are very different creatures from traditional, adversarial, court processes. As the Inquiry noted in Minute No. 4, at [45], a public inquiry undertakes an investigation. To do so the inquiry is itself empowered to undertake the necessary fact finding work; it may require the provision of evidence and information from any source or person directly. In this way, it is the inquiry which controls the fact finding process rather than the interested parties. This approach underscores the independence of the investigation, which is not reliant on the parties to provide the relevant evidence.

64. By contrast, in traditional litigation between parties, the decision maker acts like a referee, and is reliant on the parties to gather and then present all of the evidence. Unlike an inquiry, a court is generally unable to undertake its own factual investigations or gather evidence independent of the parties.

65. This difference in process also has significance in relation to another feature of adversarial hearings: the ability of parties to cross-examine witnesses. When it is the parties who determine the witnesses and evidence coming before the decision maker, cross-examination *by the parties* is seen in common law jurisdictions as an important mechanism for uncovering the truth. This is because the parties and their advocates are likely to be aware of information which is not available to the Court before a hearing, and which may be relevant to the Court's assessment of the witnesses. Cross-examination enables the parties to show the decision maker that a witness' evidence may not be reliable or credible, based on information known only to the party from its own forensic evidence gathering.

66. In contrast, in an inquiry the decision maker's knowledge of relevant facts and background information is not confined to what the parties choose to make available. In this Inquiry, where some classified material might never be publicly available, the value of party cross-examination as a forensic tool is significantly diminished, and the responsibility for testing the evidence is placed on the Inquiry instead. Here, it is likely to be the Inquiry itself which holds the relevant and important information which will be used to test and illicit the facts from witnesses.

Mandatory considerations when determining inquiry procedure

67. Against these considerations, s 14(2) of the Inquiries Act provides that in making a decision as to the procedure or conduct of an inquiry, it must:

67.1 comply with the principles of natural justice; and

67.2 have regard to the need to avoid unnecessary delay or cost in relation to public funds, witnesses, or other persons participating in the inquiry.

68. Turning first to natural justice, the requirements in our submission are a fair process leading to an impartial decision. Beyond those important but basic requirements, parties to an Inquiry have no greater expectation in relation to inquiry procedure. Natural justice in this context does not confer on the parties a right to a particular procedural decision, or outcome.

69. The Act is clear that the natural justice requirements for adverse findings are highly flexible, and a matter of discretion for the Inquiry, subject to the requirements at s 14(3)(a)-(b) of the Act. What is required before an adverse finding can be made is that the person at risk is aware of the matters on which the proposed finding is based, and has had an opportunity to respond to those matters.

70. Beyond those observations, there are a number of ways natural justice can be met in the context of a process which is likely to involve private aspects, and which is inquisitorial in nature. As we have said, it may be unhelpful to prescribe what those mechanisms are at this point in time. The decision as to which process is best should be made when the Inquiry is seized of all relevant material.

71. The second critical consideration which the Inquiry must have regard to when setting its procedure is the need to avoid unnecessary delay or cost to public funds.

72. One party has suggested it may be necessary to hold both private and public hearings for witnesses who are likely to give evidence which has been held to be classified.

73. In our submission, successive hearings where the same witness is required to give evidence in both open and private sessions will result in unnecessary delay, prolixity and cost to public funds. It will also, as the Inquiry noted at [80] of its Minute, result in a distorted and

incomplete public picture of the evidence because only part of the witness' evidence will be available to the public.

Use of modules or evidence sessions

74. Of the ten discrete issues identified in the Terms of Reference which the Inquiry is directed to investigate and report on, a number may be capable of partly public hearings.

75. The Inquiry could consider addressing the issues identified in the Terms of Reference in modules, identifying those areas for each where private sessions may be required, and fixing its procedure in relation to each module discretely. Summaries or redacted material might enable core participants such as Messrs Stephenson and Hager, and the Afghan villagers to participate in subsequent open hearings by giving any relevant evidence they wish to provide, and making submissions.

76. Even if some elements of the hearing process are by necessity carried out in private the parties can still influence the fact-finding process. This can be done in a variety of ways. For example, providing names and sources who have important information, suggesting issues to be raised with witnesses, and in appropriate cases, providing documents which they consider are relevant to be put to witnesses.

Submissions on approach to Inquiry procedure generally

77. In our submission, the following general conclusions can be made:

77.1 Evidence can be tested effectively through the Inquiry undertaking questioning – including cross-examination if required – supported by counsel assisting;

77.2 In addition, the Inquiry is able to obtain the assistance of independent military experts in support of its examination of the issues and information;

77.3 It is not necessary to have a "one size fits all" approach to process. Elements of both a traditional adversarial process and of an inquisitorial could be used, where appropriate.

77.4 The relevant procedural elements and interests in different contexts may need to be balanced differently. This is particularly so in relation to classified information and sensitive witnesses.

77.5 An iterative approach to procedure is called for. There is a need to maintain flexibility and to be able to modify process to deal with circumstances as they arise.

77.6 While effective party participation is an important factor, it is the Inquiry which will be in the best position to ascertain the facts, and it will have unrestricted access to all relevant information, both open, and classified. The Inquiry itself is then well placed to test the evidence, and is not reliant on counsel for core participants to undertake that role.

77.7 Core participant participation in the fact finding process will be preserved through the ability to give evidence, and make submissions, provide documents and by providing topics or questions which they consider should be explored with witnesses in a private setting.

77.8 Where natural justice requires it, further measures and processes can be put in place at a later stage to ensure compliance with the requirements of the Act and to enable affected individuals or parties to respond to any matters before the Inquiry's report is issued.

78. If the balance of considerations is struck too far one way or the other, the work of the Inquiry is likely to be compromised and the public interest adversely affected. A completely private process risks

undermining public confidence in the Inquiry's findings. An overly public process risks creating significant harm to national security.

Dated 21 November 2018

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