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

SUMMARY OF CROWN SUBMISSIONS
FOR HEARING ON 21 AND 22 NOVEMBER 2018
15 November 2018

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MAY IT PLEASE THE INQUIRY: INTRODUCTION

1. These submissions are filed by the Crown to summarise the key points to be addressed at the hearing on 21 and 22 November 2018 (**the hearing**). They build upon the submissions on Inquiry Minute No.4 filed by the NZDF, and separately filed by other Crown Agencies, on 5 October 2018. They respond to the submissions made on Inquiry Minute No.4 by non-Crown core participants.

2. The NZDF will appear at the hearing as a Core Participant, and will supplement the Crown's submissions, but it is appropriate for the Crown to address, in a comprehensive way, the matters arising from Minute No.4 and the submissions of non-Crown core participants. The procedure adopted by the Inquiry and the Inquiry's process for handling classified information are matters of significant importance which engage whole-of-Crown interests.

Context

3. This Inquiry into Operation Burnham and related matters was established because of the public interest in an independent review of the events that are the subject of serious allegations by Mr Hager and Mr Stephenson and which impact the public reputation of the NZDF.[1] The Crown affirms its commitment to assisting the Inquiry and to providing, to the greatest extent possible, all relevant material to the Inquiry.[2]

4. The subject matter of this Inquiry is inherently sensitive: it relates to military operations, including the conduct of hostilities, by the NZDF as part of an international coalition in Afghanistan. Much of the documentation relevant to the scope of the Inquiry is marked with classifications to protect national security; other material is subject to the control of, or received on the basis of confidence from, New Zealand's international partners. Moreover, many witnesses who may be able to assist the Inquiry have legitimate claims to anonymity.

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1 Terms of reference at [3] – [4]

2 As set out below, the Crown's clear intention is to provide the Inquiry with all relevant material. However, the Crown's ability to do so is constrained to some extent by the consent of international partners.

5. The result is that the Inquiry, in order to fulfil its terms of reference in a fair and efficient manner, will need to adopt a bespoke procedure appropriate to the nature of the task and suitable to accommodate the unique constraints on the ability to disclose or publish substantial amounts of evidence.

6. By Inquiry Minute No.3, the Inquiry set out its preliminary views on how it should deal with relevant material that has been classified on national security grounds, including its powers in relation to challenges to classifications. The Inquiry analysed the classification system[3] and the powers to require release, production, and/or disclosure of classified evidence under the Official Information Act,[4] in court[5] and inquiry proceedings.[6] The Inquiry concluded that, under the Act, participants in inquiries do not have the right to obtain all relevant material produced by other participants, but that natural justice considerations may be relevant in determining what information ought to be disclosed.[7] In summary, it noted that:[8]

   6.1 In principle, the Inquiry is entitled to call for the provision to it of all relevant information whatever its status (s 20(a)(i) of the Inquiries Act 2013 (**the Act**));

   6.2 There may be some complications in relation to foreign sourced classified material;

   6.3 Documents provided to the Inquiry will not automatically be provided to all participants in the Inquiry because disclosure is a matter of discretion for the Inquiry under s 22(1)(a) of the Act;

   6.4 If the Crown claims that particular material is subject to a national security classification, the Inquiry can assess that claim with a view to determining whether the material should be withheld from disclosure to other parties, with the assistance of an independent person if

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3 Inquiry Minute No.3 at [3] – [5]
4 Inquiry Minute No.3 at [6] – [11]
5 Inquiry Minute No.3 at [13] – [15]
6 Inquiry Minute No.3 at [16] – [22]
7 Inquiry Minute No.3 at [21] – [22]
8 Inquiry Minute No.3 at [25]

necessary (ss 20(c) and 27 of the Act and s 70 of the Evidence Act 2006);

6.5 The fact that material is not disclosed to all participants does not mean that the Inquiry cannot take it into account, although natural justice concerns may arise in some circumstances.

The Inquiry sought submissions on its preliminary views.

7. Having received and considered submissions from a range of participants, the Inquiry issued Minute No.4 which set out the Inquiry's process for handling classified information and set out the Inquiry's proposed methodology:

7.1 **Classified information.** The Inquiry intends to protect all classified information in accordance with the Protective Security Requirements (**PSR**), subject to a review process set out in Inquiry Minute No.4. Pursuant to that process, an independent person (Mr Keith) will review classified material to test the claim to classification. If Mr Keith has doubts about the continued need for classification of the material, he will engage with the relevant agency to seek re- or de-classification of the material, or the provision of an unclassified redacted or summarised version of the material. If agreement cannot be reached, the Inquiry will determine the matter.[9]

7.2 **Inquiry methodology.** The Inquiry will adopt a methodology that is:

7.2.1 Mainly inquisitorial, with adversarial elements where appropriate. For example, witnesses will be witnesses of the Inquiry and will ordinarily be subject to questioning by the Inquiry directly or through counsel assisting, but cross examination by core participants may be allowed where appropriate. Where relevant evidence is not available to core participants (because classified), the Inquiry will consider facilitating participant engagement through the provision of summaries.

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9 In Minute No 4. At [27], the Inquiry states that it may, amongst other things, maintain the classification or re- or –declassify the material. As stated in the submissions of Crown agencies (at [7], we do not understand the

7.2.2 Substantially non-public, with most evidence gathering taking place in private. Some public hearings will be held, where appropriate, and all minutes and rulings of the Inquiry will be published.

7.2.3 Allowing anonymous evidence where appropriate to accommodate vulnerable witnesses and witnesses who have a legitimate need to preserve anonymity.

The Inquiry invited submissions on that minute.

8. In response to the Inquiry's invitation, submissions were filed by the New Zealand Defence Force, other Crown Agencies, Dr Wayne Mapp, the former residents of Khak Khuday Dad and Naik, Mr Hager, Mr Stephenson, and a collection of media entities.

9. The submissions reveal a stark divergence of view both as regards the Inquiry's approach to classified information and its proposed methodology. In broad terms, and subject to the submissions that follow, the Crown submits that the Inquiry's proposed procedure is sound. Below, the Crown addresses the key points at issue, in the following order:

9.1 The specific context of this inquiry: matters of state

9.1.1 The importance of protecting classified and sensitive information.

9.1.2 The significance of international partnerships.

9.1.3 Protection of the public interest a duty not a discretion.

9.2 Inquiry methodology

9.2.1 The open justice principle.

9.2.2 Process for review of classified information.

(a) Participation of non-Crown core participants in the review process.

Inquiry to mean it will ultimately be responsible for de- or re-classifying documents, but instead requiring

(b) Outcome of the review process.

(c) Special advocate(s) not required given review process and role of counsel assisting

(d) Security-cleared lawyers confidentiality ring unnecessary and undesirable.

9.2.3 Treatment of witnesses

(a) Evidence gathering in private.

(b) Cross examination.

(c) Disclosure of transcripts.

9.2.4 Process for producing lists / redactions / summaries

10. Before addressing each of these points, however, the Crown addresses some preliminary matters of inquiry procedure. In particular, any submission on Inquiry procedure needs to be understood in the context of the Inquiry's wide power to regulate its own procedure.

PRELIMINARY MATTERS

The Inquiry's power to regulate its own procedure

11. By s 14 of the Act, an Inquiry may conduct its procedure as it considers appropriate, subject to the terms of the Act and the terms of reference for the Inquiry. It is for the Inquiry to determine:[10] whether to conduct interviews, and if so, who to interview; whether to call witnesses, and if so, who to call; whether to hold hearings in the course of the inquiry, and if so, when and where hearings are to be held; whether to receive evidence or submissions from or on behalf of any person participating in the inquiry; 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. It may also, having taken into account certain criteria including the

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production and disclosure *notwithstanding* a classification marking

10 Section 14(4)

benefits of observing the principle of open justice, restrict public access to the inquiry and/or hold any part of the inquiry in private.[11]

12. The Act therefore confers on Inquiry Members a wide discretion to conduct their work as they consider appropriate, subject to statutory limits including: the need to act independently, impartially and fairly;[12] the principles of natural justice;[13] and the need to avoid unnecessary delay or cost.[14] As acknowledged in Inquiry Minute No.4, the need to avoid unnecessary delay or cost (in shorthand, to run the Inquiry efficiently)[15] may require the Inquiry to adopt a pragmatic rather than a legalistic approach to achieving fairness and natural justice. Such an approach is appropriate in the context of an inquisitorial, rather than an adversarial, process where the demands of fairness and natural justice apply differently from in an adversarial context,[16] and where the key statutory provision to ensure compliance with natural justice permits flexibility as to the procedure to adopt.[17]

13. A pragmatic and efficient approach to inquiry procedure is fundamental to the Act. Indeed, s 3(1)(c) of the Act provides that a purpose of the Act is to enable inquiries to be carried out "effectively, *efficiently* and fairly" (emphasis added). That may particularly be the case for government inquiries which the Law Commission characterised as appropriate "where a quick and authoritative answer is required from an independent inquiry".[18] That language was adopted by the Attorney-General when introducing the Inquiries Bill in the First Reading[19] and is currently reflected in the Cabinet Manual.[20]

14. The emphasis in the Act on efficiency and the need for an inquiry to adopt a procedure that avoids unnecessary delay and cost derives from the Law Commission's recommendation for legislative change to bring about a change in culture to avoid the "costly and legalistic practices which have... dogged

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11 Section 15

12 Section 10

13 Section 14(2)(a)

14 Section 14(2)(b)

15 See s 3(c)

16 See Inquiry Minute No.4 at [62] – [65]. See also Lord Scott, writing extra-judicially, in *'Procedures at Inquiries – the duty to be fair'* L.Q.R. 1995, 111 (Oct) 596 – 616

17 Section 14(3). N.B. "using whatever procedure it may determine"

18 Law Commission Report 102, *A New Inquiries Act*, May 2008, Wellington at [2.29]

19 (12 May 2009) 654 NZPD 3133

many recent inquiries"[21]. Commencing its chapter on procedure, natural justice and participation in *'A New Inquiries Act'* the Law Commission noted:

> "4.1 Commissions of inquiry are free to regulate their own proceedings, subject to some statutory rules and the common law principles of natural justice. Decisions about procedure can be critical to an inquiry's ability to fulfil its function, but also influence its cost, efficiency and duration. A balance needs to be found between a process which:
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> - is responsible in terms of cost and time taken;
> - enables the inquiry to effectively carry out its task; and
> - adheres to the rules of natural justice.
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> 4.2 Current inquiry practice can be excessively legalistic, yet such formality is not always necessary to enable an inquiry to be effective or meet natural justice. Furthermore, a legalistic approach will tend to maximise cost and duration. The appointment of parties before an inquiry is particularly influential in engendering this approach. At present, commissions confer party status and identify other participants who obtain certain rights of appearance and representation. This can be a considerable constraint on their freedom to regulate their proceedings."

15. The Law Commission recommended moving away from the prescriptive rights conferred on 'parties' by the Commissions of Inquiry Act 1908 and their replacement by discretionary rights enjoyed by core participants.[22] Further, the Law Commission recommended flexibility over prescriptive rules or presumptions. It noted:

> "The appropriate question to be asked at the start of any inquiry is what process and forms of information gathering will be the most effective for the subject matter. It is by no means necessary to assume that full hearings are the best means, or that the same result cannot be achieved by alternative forms of investigation. Where, for example, generic policies and processes are being considered, this need not be carried out in open hearings. To gather and consider evidence, an inquiry could:
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> - write or talk to people who may be able to advise where information relevant to the inquiry might be obtained;
> - request written submissions or statements from relevant people about matters relevant to the terms of reference;
> - employ experts or consultants to produce written opinions about relevant issues;

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20 Cabinet Office *Cabinet Manual 2017* at [4.85]

21 Law Commission, *'A New Inquiries Act'* at [1.22]

22 Law Commission, *'A New Inquiries Act'* at Chapter 4.

> hold one-on-one or roundtable discussions with relevant people;
>
> request that witnesses meet with the inquirers to answer questions either formally or informally.
>
> 4.26 Thus, the manner in which evidence is collected can vary. Hearings should not be assumed in all cases. Subject to what we say about natural justice below, a new Inquiries Act should not grant any participants an automatic right to "appear and be heard". Furthermore, the Act should make it clear to inquirers that a wide range of processes can be adopted."

16. The recommendations of the Law Commission were largely adopted by Parliament. The objective to move away from "the legalistic and adversarial practices that have arisen with commission proceedings" was reflected by the Attorney-General in the First Reading of the Inquiries Bill.[23] At the Third Reading, the Minister of Internal Affairs, having noted that amendments had been made to "provide greater procedural flexibility and clarity", endorsed the Law Commission's view that the Inquiry should have discretion over its procedure, including on the question of whether to hold hearings and/or provide public access to documents.[24]

17. The arrangements under the Act therefore reflect Parliament's intention to confirm that inquiries are not courts and need not adopt court-like procedures. Instead, they have a wide discretion to set their own procedure. That reflects the common law tradition summarised by Lord Scarman in the Red Lion Inquiry as follows:

> "This is an inquiry, not a piece of litigation. It is not the sort of adversary-type confrontation with which we English lawyers are familiar in the criminal and civil trials of our country. This inquiry is to be conducted – and I stress it – by myself. This means that all the decisions have to be taken by me... First of all, it is I and I alone who will decide what witnesses are to be called. I also decide to what matters their evidence will be directed. There is in an inquiry of this sort no legal right to cross-examine, but I propose within limits to allow cross-examination of witnesses to the extent that I think it helpful to the forwarding of the inquiry, but no further. I also have to determine how witnesses will be examined, bearing in mind the inquisitorial rather than the adversarial nature of the Inquiry..."

18. To summarise: the language of the Act, the Parliamentary intent, and the common law tradition all support the view that an inquiry is master of its own procedure. Subject to the need to comply with the principles of fairness and

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23 (12 May 2009) 654 NZPD 3133

24 (22 August 2013) 692 NZPD 12763

natural justice, and having regard to the need to avoid unnecessary delay or cost, the Inquiry can conduct its work as it chooses. There is no presumption that hearings will be held or evidence given in public, though there are certain matters the Inquiry must consider before deciding to impose restrictions on access.

Procedure in a government inquiry: a recent example

19. There have been only a relatively small number of inquiries under the Inquiries Act 2013, and none concerning directly analogous subject matter or involving classified security information to the significant extent required in this Inquiry.

20. However, the recently reported government inquiry into the appointment process for a Deputy Police Commissioner is an instructive example of an inquiry's broad discretion when setting its own procedure.

21. While having a different scope and being concerned with sensitive material of quite a different nature to those in this Inquiry, relevant to the matters at issue in this hearing, that inquiry:

    21.1 held no public hearings but instead carried out all 44 interviews in private and did not allow participants to cross-examine interviewees;[25]

    21.2 made permanent orders under s 15 of the Act to prohibit access – including to participants - to all but six interview transcripts;[26]

    21.3 made permanent orders under s 15 of the Act to prohibit access – including to participants - to all written statements given to the Inquiry prior to or in lieu of an interview;[27] and

    21.4 made permanent orders under s 15 of the Act to prohibit access – including to participants – to unredacted versions of documentary evidence filed with the Inquiry.[28] Notably, however, the redacted versions of the documentary evidence were not available generally to participants during the course of the inquiry. The only material

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25 Minute No.2 of the Inquiry into the appointment process for a Deputy Police Commissioner

26 Minute No.5 of the Inquiry into the appointment process for a Deputy Police Commissioner

27 Minute No.5 of the Inquiry into the appointment process for a Deputy Police Commissioner

28 Minute No.2 of the Inquiry into the appointment process for a Deputy Police Commissioner

disclosed to participants was material that was required to be disclosed to comply with natural justice considerations.

22. That inquiry adopted this approach having formed the view that the restrictions on access were necessary to protect: (i) the privacy interests of the interviewees and others; and (ii) the free and frank provision of opinions and other evaluative material. It concluded that the public interest in disclosure of the material, and the demands of natural justice, were met through: (i) a detailed discussion of the facts arising from the underlying material in the final report; (ii) the opportunity for interviewees to comment on factual matters in the draft report; and (iii) the fact that open, redacted versions of underlying material were released.[29]

23. It was no doubt relevant to the choice of procedure that the inquiry was a government inquiry with a short timeframe for reporting. The initial reporting timeframe for the Inquiry into the appointment process for a Deputy Police Commissioner was 6 weeks, extended to 11 weeks. The procedure adopted was one that served the interests of natural justice while delivering upon the terms of reference in an efficient manner.

This Inquiry's power to regulate its own procedure: a duty to investigate?

24. This government inquiry was established by the Attorney-General to inquire into a matter of public importance, namely the allegations of wrongdoing by NZDF forces in connection with Operation Burnham and related matters. The Inquiry was given a provisional timeframe of 12 months to report. Both the terms of reference[30] and an accompanying media Q&A[31] anticipated the possible need to restrict access to material and/or parts of Inquiry proceedings, the media Q&A expressly noting that a government inquiry was chosen (as opposed to a public inquiry) to ensure that sensitive information could be included in a report to the Attorney-General without having to be released publicly. The Inquiry, in Minute No.4, has set out a procedure for investigating and reporting on the terms of reference efficiently and within the timeframe set by the Attorney-General.

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29 Minute No.5 of the Inquiry into the appointment process for a Deputy Police Commissioner

30 Paragraph 14

31 Hon David Parker *"Approval for inquiry into Operation Burnham"* (press release, 11 April 2018) (https://www.beehive.govt.nz/release/approval-inquiry-operation-burnham). Media Q&A - third question.

25. Non-Crown core participants[32] submit that the starting point for this Inquiry is the right to life. They contend that the Inquiry is the means by which the Crown is required to satisfy its obligation to investigate suspected breaches of the right to life arising under section 8 of NZBORA and Art.2 of the ICCPR. As a result, it is suggested that the wide discretion that the Inquiry would ordinarily enjoy when determining its own procedure is constrained in this case. The Crown disagrees with that submission on the following bases:[33]

26. First, to the extent that an investigative obligation arose out of reports of civilian deaths during Operation Burnham, the operation took place in a situation of armed conflict. As such, any investigation would consider the conduct against obligations arising under International Humanitarian Law (IHL).[34]

26.1 A post-operation assessment was carried out jointly by ISAF and the Afghan Government which raised no concerns about compliance with IHL, and concluded that no further action be taken. Those steps satisfied any investigative obligation that may have arisen.[35]

26.2 This inquiry was not established because further evidence led to a reassessment of ISAF's conclusions or because new credible allegations of IHL violations emerged. Instead, the reasons for establishment are recorded in paragraphs 3 and 4 of the terms of reference:

> "3. In March 2017, the book Hit & Run by Nicky Hager and Jon Stephenson was published, which contained a number of serious allegations against NZDF personnel involved in the Operations. While NZDF has strongly denied these allegations, and has endeavoured to respond to them, they

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32 In particular the former residents of Khak Khuday Dad and Naik

33 For the reasons that follow, it is not necessary for the Crown to address the uncertain propositions that implicitly underpin the submissions of non-Crown core participants, namely: i) s 8 of NZBORA incorporates an investigative obligation; and ii) NZBORA applied to the conduct of a military operation in Afghanistan.

34 *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), Office of the United Nations High Commissioner for Human Rights, New York/Geneva, 2017at [20]. The Crown notes that while the Protocol has been prepared by experts, it is not legally binding. See also the UN Human Rights Committee's Draft General Comment 36 on Article 6 at [67]. To the extent that it is claimed that the procedural obligation of the right to life applicable in international human rights law has been applied directly to military operations (see the Memorandum of Counsel for former residents of Khak Khuday Dad and Naik at [21]), none of the cases relied on support the proposition that a principle of international human rights law is to be applied without regard to IHL to deaths taking place during the conduct of hostilities in a situation of armed conflict.

35 Minnesota Protocol at [21].

> have had an impact on its public reputation, which an independent review can address.
>
> 4. In light of these allegations, it is in the public interest that a Government Inquiry be established into Operation Burnham and related matters…"

26.3 Those reasons were reflected in the Attorney-General's media release announcing the establishment of the Inquiry:[36]

> ""In deciding whether to initiate an inquiry I have considered material including certain video footage of the operation," says Mr Parker.
>
> The footage I have reviewed does not seem to me to corroborate some key aspects of the book Hit & Run.
>
> The footage suggests that there was a group of armed individuals in the village.
>
> However, the material I have seen does not conclusively answer some of the questions raised by the authors.
>
> In light of that, and bearing in mind the need for the public to have confidence in the NZDF, I have decided in the public interest that an inquiry is warranted."

26.4 Thus, the Inquiry was not established because any legal duty to investigate had been triggered by new facts: the Attorney-General had not formed the view that there were reasonable grounds to suspect that a war crime was committed or that Operation Burnham involved suspected violations of IHL. Instead, the Attorney-General considered there to be a public interest in an independent review of the events that were the subject of serious allegations that had an impact on the NZDF's public reputation. That is not to say that a new investigative obligation could not *result* from this Inquiry. If, for instance, the Inquiry were to conclude that there *were* reasonable grounds to suspect that Operation Burnham involved violations of IHL, the Crown would need to consider carefully its domestic and international law obligations.

27. Secondly, the Inquiry's duty is to deliver on its terms of reference. No part of those terms of reference, and no part of the Attorney-General's announcement

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36 Hon David Parker *"Approval for inquiry into Operation Burnham"* (press release, 11 April 2018) (https://www.beehive.govt.nz/release/approval-inquiry-operation-burnham)

of the establishment of the Inquiry, suggest that the Inquiry's role or function is to meet the Crown's domestic or international law obligations to investigate suspected breaches of the right to life. If it were considered that that the Crown or New Zealand is under such an obligation in relation to the events at issue in this Inquiry, the means by which that duty to investigate is satisfied is a matter for the government of the day to determine. This Inquiry is under no obligation (and arguably has no power) to assume a function the government has not conferred on it through the terms of reference.

28. In the Crown's submission, the result is that the Inquiry's wide discretion under the Act to regulate its own procedure is unconstrained by any domestic or international law obligations in relation to investigation of breaches of the right to life. That said, the Crown considers that the procedure proposed in Inquiry Minute No.4 would, in any case, meet the standard for an effective investigation into a potentially unlawful death.[37]

THE SPECIFIC CONTEXT OF THIS INQUIRY: MATTERS OF STATE

29. This Inquiry is unique in the New Zealand context. It is tasked with investigating events that took place during the active conduct of hostilities in an armed conflict. As a result, the Inquiry will need to consider highly sensitive material and will need to do so in a way that does not prejudice New Zealand's interests. To avoid any suggestion that the Crown is seeking to use the issues of classification and partner equities as an excuse to hide material from public view, it is important to explain briefly the reasons why material is classified in the first place and why it is important to respect the confidences and need for consent of partners.

The importance of protecting classified and sensitive information

30. The identification and protective marking of material under the Government Security Classification System is based on a risk-assessment of how much damage or prejudice to New Zealand's national interests would result if the information was disclosed. This includes material where disclosure would be detrimental to New Zealand citizens, the New Zealand Government and government agencies.

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37 See the Minnesota Protocol at [33], which acknowledges that an effective investigation can involve justified restrictions on public access.

31. The unauthorised disclosure of classified information would, accordingly, be likely to cause damage of varying degrees of severity to national security and/or the defence, economic, foreign relations and political interests of the New Zealand Government, endanger the safety of New Zealand citizens, obstruct the maintenance of law and order, or impede the effective conduct of government in New Zealand.

32. The potential threat to national security goes further than the risks posed by the unauthorised disclosure of the content of that information (for example, disclosure of specific details of a document, email or phone call). The disclosure of such information could also inadvertently lead to the uncovering of the source of that information or a method used to produce it, for example, the identification of an intelligence officer or an informer whose safety would be compromised, the identification of communications that may be vulnerable to interception, or the tradecraft used to obtain or analyse the information, which would render methods ineffective in future. Risks also arise from the cumulative effect of disclosure of substantive information that is benign when considered in isolation, but which creates a 'jigsaw effect' when considered together, which would allow others to build a picture of capabilities, tactics, techniques, and procedures.

33. The classification system also covers information that needs to be protected because of other public interest concerns (beyond national security). For example, in order for the Prime Minister and Ministers to effectively carry out their role, they must be able to receive and rely on, with confidence, free and frank advice from their advisers. It is in the public interest for them to receive such advice. The advice is often provided under time pressures, and in many situations from confidential sources. Although the advice provides a clear message, there is often no time for the more careful drafting that would be required if the advice was to be disclosed out of context. This kind of information is classified because the disclosure of such information could prejudice the future supply of similar information or information from the same source. The disclosure of information may also undermine the

relationship of trust between the Ministers and their advisors so that the future provision of free and frank advice would be inhibited.[38]

The significance of international partnerships

34. As set out in the submission of MFAT in response to Inquiry Minute No.3, a substantial amount of material that may be relevant to the Inquiry's work is subject to a security interest of international partners, most notably the United States and NATO.[39]

35. Protecting national security also means safeguarding the confidence our international partners have in us as well as protecting the methodologies and sources used, given the potential consequences of those being made public. The legal frameworks governing diplomatic and consular relations, as well as the formal and informal practices which are applied in diplomacy, have evolved over time. In addition to formal treaties or arrangements, foreign governments and international organisations expect communications between government officials and other international partners to be conducted in confidence, as a matter of long-standing diplomatic convention and practice. Sometimes that expectation of confidentiality is explicit, but generally, it is also implicit, relying on a shared assumption of confidentiality.

36. The conduct of international relations depends on the trust and respect that states place in one another. Without the ability to provide information to partners in confidence, to receive and hold such information, and to exchange free and frank views with international partners, New Zealand could not conduct its international relations effectively and in its best interests. It is therefore of the utmost importance that New Zealand maintains the trust and confidence of its international partners. Any disclosure of information received from international partners in confidence, without their consent or acceptance, would put at risk New Zealand's reputation as a trusted international partner. Such disclosure is likely to have a prejudicial effect on New Zealand's ability to seek and receive information from international partners in the future. Any action by New Zealand that undermines the confidence of international

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38 The Crown notes that s 9(2)(g) of the Official Information Act also recognises that it is in the public interest to restrict disclosure of this category of information, in order to maintain the effective conduct of public affairs.

39 As confirmed in the same memorandum, NZDF-originated material generated by NZDF in the course of its ISAF deployment does not fall within this category.

partners would undermine New Zealand's ability to expect the same protection of information shared with international partners on the basis of reciprocity.

37. New Zealand's foreign partnerships are an essential part of the ability of NZDF, GCSB and NZSIS to perform their functions effectively including in the interests of New Zealand's national security. For example, in February 2016, the First Independent Review of Intelligence and Security in New Zealand reported that for every intelligence report the NZSIS provides to a foreign partner, it receives 170 international reports. Similarly, for every report the GCSB makes available to its partners, it receives access to 99 in return.[40] As set out in the Ministerial Policy Statement on Cooperation of New Zealand intelligence and security agencies with overseas public authorities:[41]

> "New Zealand gains significant value from international intelligence sharing and cooperation arrangements, particularly within the current climate of global and transnational threats. Through foreign intelligence partnerships and other cooperation, GCSB and NZSIS are able to draw on a much greater pool of information, skills and technology than would otherwise be available to them. Close and reliable relationships with overseas public authorities help GCSB and NZSIS to prioritise and focus their limited resources on the areas most important to New Zealand, while having access to resources that would not normally be available."

38. Similarly, in his opinion on Operation Burnham dated 9 April 2018, in the context of considering NZDF's reasons for refusing to provide information, due to the confidence of its partners which had not consented to its release, the Chief Ombudsman recognized that small countries such as New Zealand can be net recipients of intelligence and security-related information from other countries.[42]

Protection of the public interest is a duty not a discretion

39. Because the public disclosure of certain material, or the giving of certain evidence in public, might cause harm to national security, prejudice the conduct of international relations, or breach a condition of confidence on which that material was received, the Crown is under a duty to seek to avoid those consequences. That point warrants some emphasis: where such risks arise, the Crown *must* take steps to prevent disclosure of the information even

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40 Hon Sir Michael Culle, Dame Patsy Reddy, *Intelligence and Security in a Free Society. Report of the First Independent Review of Intelligence and Security in New Zealand* (29 February 2016).

41 Ministerial Policy Statement *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities* (September 2017)

42 Peter Boshier *Chief Ombudsman's opinion on OIA requests about Operation Burnham* (9 April 2018) at page 9.

if to disclose would be to the Crown's advantage or convenience in the particular litigation or inquiry. As Bingham LJ said, when discussing common law public interest immunity in *Makanjuola v Commissioner of Police of the Metropolis*[43]:

> "Where a litigant asserts that documents are immune from production or disclosure on public interest grounds he is not (if the claim is well founded) claiming a right but observing a duty. Public interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish. It is an exclusionary rule, imposed on parties in certain circumstances, even where it is to their disadvantage in the litigation. This does not mean that in any case where a party holds a document in a class prima facie immune he is bound to persist in an assertion of immunity even where it is held that, on any weighing of the public interest, in withholding the document against the public interest in disclosure for the purpose of furthering the administration of justice, there is a clear balance in favour of the latter. But it does, I think, mean:
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> (1) that public interest immunity cannot in any ordinary sense be waived, since, although one can waive rights, one cannot waive duties..."

INQUIRY METHODOLOGY

40. The appropriateness of the Inquiry's proposed methodology needs to be considered in light of the specific public interest considerations traversed above and having regard to the Inquiry's broad discretion to direct its own procedure.

The open justice principle

41. The non-Crown core participants and the media entities resist the Inquiry's proposed "substantially non-public"[44] process. In their view, it is at odds with the principle of open justice,[45] and it is not defensible in circumstances where the United Kingdom's Iraq Inquiry was able to proceed with an express "commitment to openness",[46] notwithstanding the national security concerns

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43 [1992] 3 ER 617, at 623

44 Inquiry Minute No.4 at [7].

45 Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik of 5 October 2018 at [20.5], [22] and [34]; Nicky Hager 5 October 2018 submission at [3.9.1]; Memorandum of Counsel for Jon Stephenson of 5 October 2018 at [34]; Media Entities' 5 October 2018 submissions at [8] and [66].

46 The Iraq Inquiry *Protocol: Hearing Evidence in Public and Identifying Witnesses* at [1]; see also The Iraq Inquiry *Protocol: Witnesses Giving Evidence to the Inquiry* at [2] and [3].

at stake.[47] They invite the Inquiry to reframe its proposed process so that the starting point is one of public access to the Inquiry.[48]

42. The Crown submits that the starting point for considering these submissions is the Act. Contrary to the statutory frameworks in comparable jurisdictions which often include an express requirement of public access to inquiry proceedings and information,[49] the Act does not include a requirement for public access or any presumption of public access. Indeed, at the Third Reading of the Inquiries Bill, the Minister of Internal Affairs noted that:[50]

> "although inquiries should be as open as possible, there will be cases where their purposes are better served without formal hearings and where witnesses can speak freely without fear of public exposure. The bill provides that an inquiry can set out its own access regime, including the circumstances in which access to evidence, documents, and hearings may be restricted."

43. As such, the Act preserves the common law tradition relating to inquiries and reflects the Law Commission's recommendation that inquiries should have wide discretion to determine their own procedure to meet the interests and demands at play in the specific circumstances of the particular inquiry.

44. That said, s 15 of the Act provides that before making any restrictions on access to an inquiry, the inquiry must take into account a series of criteria, including the benefits of observing the principle of open justice. The Media Entities contend that "Parliament has accordingly put the importance of open justice front and centre in this context".

45. The Crown accepts that, in the context of an inquiry tasked with ascertaining the truth and maintaining/restoring public confidence, the principle of open justice is a relevant consideration to which the Inquiry should attach significant weight. But it would be wrong for the Inquiry to elevate the principle of open justice above the other mandatory considerations set out in s 15(2) which may weigh against public access to inquiry proceedings, including the protection of New Zealand's security, defence, and economic interests, the privacy interests

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47 Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik of 5 October 2018 at [40] and [46]; Media Entities' 5 October 2018 submissions at [32].

48 Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik of 5 October 2018 at [41] and [46]; Media Entities' 5 October 2018 submissions at [32] and [51].

49 See, for instance, s 18 of the UK Inquiries Act 2005

50 (22 August 2013) 692 NZPD 12763

of any individual, and the need for the inquiry to ascertain the facts properly. The need to consider all factors is important in circumstances where the terms of reference for this Inquiry affirm the Inquiry's statutory right to hold the Inquiry in private and to restrict access to evidence, submissions, rulings, hearing transcripts and the identity of witnesses, in order to protect witnesses and New Zealand's security, defence, and international relations interests.

46. Moreover, the principle of open justice is flexible and inherently qualified. As Lord Toulson noted in his judgment in *Kennedy v Charity Commission*:[51]

> "The application of the open justice principle may vary considerably according to the nature and subject matter of the inquiry. A statutory inquiry may not necessarily involve a hearing. It may, for example, be conducted through interviews or on paper or both. It may involve information or evidence being given in confidence. The subject matter may be of much greater public interest or importance in some cases than in others. These are all valid considerations but, as I say, they go to the application and not the existence of the principle…
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> …
>
> It has long been recognised that judicial processes should be open to public scrutiny unless and to the extent that there are valid and countervailing reasons. This is the open justice principle.
>
> …
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> The principle has never been absolute because it may be outweighed by countervailing factors. There is no standard formula for determining how strong the countervailing factor or factors must be."

47. The consequence is that it is not a breach of the principle of open justice to conduct certain parts of the inquiry in private if that is necessary and appropriate in the circumstances. It is also clearly not a breach of the requirements of the Act, provided the Inquiry has had regard to the benefits of observing the principle of open justice.

48. The Crown questions the non-Crown core participants' comparison of the proposed process to that adopted in the Iraq Inquiry in the UK. That inquiry was a non-statutory inquiry. Given the common law position that an inquiry may determine its own procedure, it is unclear why the exercise of procedural discretion by one inquiry to meet the specific interests and demands arising in that inquiry should affect the exercise of procedural discretion by another

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51 *Kennedy v Charity Commission* [2014] UKSC 20 at [110], [113], [125].

inquiry which is established in different circumstances. Nonetheless, it is relevant to note that despite that inquiry's "commitment to openness", the Iraq Inquiry:

48.1 allowed evidence to be heard in private and witnesses not to be identified where that was necessary to protect national security and international relations interests, and to ensure witnesses' welfare, personal security and freedom to speak frankly;[52]

48.2 proscribed the cross-examination of witnesses;[53] and

48.3 permitted the government to make the ultimate decision as to whether sensitive information could be disclosed.[54]

49. A range of similar restrictive measures have been imposed in inquiries under the UK Inquiries Act, including, for example, the Baha Mousa Inquiry,[55] and the Al Sweady Inquiry.[56] Notably, these restrictions have been made in a statutory context that contains a statutory presumption in favour of public access to the inquiry.

50. Moreover, despite the comparisons made by non-Crown core participants between those UK inquiries and this inquiry, there is a fundamental distinction to be drawn: neither the Iraq Inquiry, nor the Baha Mousa Inquiry, nor the Al Sweady Inquiry was concerned with the active conduct of hostilities by a military force in an armed conflict. Although the Baha Mousa and Al Sweady inquiries related to the UK armed forces, the focus was not on the conduct of hostilities but allegations of mistreatment of prisoners in custody. Similarly, the Iraq Inquiry was not focused on the conduct of hostilities but instead addressed the intelligence, planning for, and the policy related decision-making underpinning the Iraq war. Further, it is relevant to note the timeframes and budgets of the UK comparators relied on by the non-Crown core participants: the Iraq Inquiry took 7 years at a cost of £13.1 million; the Baha Mousa Inquiry took more than 3 years at a cost of £13.5 million.

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52 The Iraq Inquiry *Protocol: Witnesses Giving Evidence to the Inquiry* at [3], [5], and [15].

53 The Iraq Inquiry *Protocol: Witnesses Giving Evidence to the Inquiry* at [14].

54 The Iraq Inquiry *Protocol: The Iraq Inquiry and Her Majesty's Government Regarding Documents and Other Written and Electronic Information* at [15].

51. If the Inquiry *is* to look to UK comparators, the Litvinenko Inquiry into the poisoning of Alexander Litvinenko by Russian state operatives is arguably a better source, given it also dealt with sensitive intelligence material. That inquiry was held primarily in closed session with disclosure of the majority of evidence prohibited by order of the inquiry.[57]

52. The Crown submits that the Inquiry's indication that the process is likely to be "inquisitorial and substantially non-public"[58] does not amount to a denial of the principle of open justice; on the contrary, the Inquiry has acknowledged "the importance of open process and the need to maintain public confidence in the Inquiry's work – as a general proposition, the more open the process, the easier it is to maintain public confidence in it".[59] It also envisages that some of the evidence will be given in public session.[60] As a result, the Inquiry's proposal for a "substantially non-public process"[61] is a realistic *application* of the open justice principle to the particular circumstances of this inquiry, where there is highly sensitive material at stake and witnesses requiring protection.

53. In concluding its submissions in this section, the Crown addresses the submission of non-Crown core participants that a substantially non-public process will undermine public confidence in the Inquiry. Public confidence in an inquiry is multi-factorial and does not depend on maximizing the public-facing nature of an inquiry. Arguably the most important element in maintaining public confidence is to ensure an effective inquiry which delivers on its terms of reference within a reasonable timescale. Inquiry Members will be familiar with examples of public inquiries that, on account of a cumbersome procedure, took far longer to report than was expected, thus undermining public confidence in the work. The Iraq Inquiry is a case in point: the UK Public Administration and Constitutional Affairs Select Committee Report on the Iraq Inquiry concluded that:[62]

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55 See Submissions for the NZDF on Minute No.3 at [26(a)]

56 See Submissions for the NZDF on Minute No.3 at [26(b)]

57 http://webarchive.nationalarchives.gov.uk/20160613090356/https://www.litvinenkoinquiry.org

58 Inquiry Minute No.4 at [7].

59 Inquiry Minute No.4 at [79]; see also [8] where the Inquiry affirmed "the need to hold public hearings where possible, to preserve public confidence in the Inquiry".

60 Inquiry Minute No.4 at [90].

61 Inquiry Minute No 4 at [7](b).

62 'Lessons still to be learned from the Chilcot Inquiry', March 2017 at [31]

> "The Iraq Inquiry took far longer to conclude its work and to publish its findings than was intended. This is a matter for regret, especially for the men and women who were killed or injured in the conflict, and for their families. The protracted process has also undermined the very public confidence the Inquiry was established to strengthen, as well as undermining confidence in the Inquiry itself. For some, the delays have left the impression that the Chilcot Inquiry was a device to delay proper scrutiny and to obscure who should be held accountable. Others have suggested the sheer scope of the Inquiry's terms of reference made its length inevitable. We agree that, in future, there must be a much clearer setting of expectations at the outset of an inquiry, but PACAC has concluded that further lessons can and must be learned about how to prevent such unacceptable delays in future inquiries. The Cabinet Secretary indicated that the Government would consider further the question of how the Iraq Inquiry could have been carried out more quickly. We urge that this assessment is concluded as a matter of urgency and its findings reported to Parliament, so that both Government and Parliament can take the necessary steps to ensure that future Inquiries, particularly those with comparable scope and scale to the Iraq Inquiry, do not experience such unacceptable delays."

54. In determining its procedure in a manner which maintains public confidence, the Inquiry must have regard to the need to carry out its work efficiently, to answer the questions set by the terms of reference in a reasonable timeframe, and to avoid unnecessary delay or cost.

Process for review of classified information

55. The Crown's understanding of the process for review of classified material was set out in paragraphs [6] – [8] of the memorandum of the Crown Agencies dated 5 October 2018. Since that memorandum was filed, the Inquiry has issued a draft 'procedural protocol for review of classified information / claims to withhold information from disclosure' (**the Draft Protocol**) which sets out in more detail the approach described in Minute No. 4.

56. The Crown has some concerns in relation to the process contemplated in the Draft Protocol. In particular, the Draft Protocol appears to proceed on a presumption of disclosure. That is, it appears to suggest that disclosure of *all* material will be required unless the test in s 70 of the Evidence Act 2006 is met. That is inconsistent with the fact that under the Act participants in inquiries do not have the right to obtain all relevant material produced by other

participants[63] and that disclosure to participants is a matter for discretion of the Inquiry.[64]

57. For the reasons outlined above, the starting point in any decision regarding the Inquiry's procedure is s 14 of the Inquiries Act. Where the Inquiry is considering imposing restrictions on access to inquiry documentation, the factors listed in s 15(2) must also be taken into account.[65] Section 15 empowers the Inquiry to hold the inquiry, or any part of it, in private and to restrict access to inquiry information (including evidence, submissions, rulings, hearing transcripts and the identity of witnesses).

58. It follows that, in deciding whether to order disclosure of documentation received by the Inquiry to other participants under s 22 and /or restrict public access to this information under s 15, the inquiry members must take into account the overarching principles of fairness, natural justice, and the need to avoid unnecessary cost or delay (s 14(2)) as well as the factors set out in s 15(2) of the Act. In that regard, an inquiry's powers under ss 14, 15 and 22 of the Act are different from, and substantially wider than, its power under s 70 of the Evidence Act 2006. An inquiry is entitled, as occurred in the Inquiry into the appointment process for a Deputy Police Commissioner, to restrict access to inquiry information, by both other participants and the public, for a wide range of reasons that do not involve a public interest balance required by s 70.

59. The Crown submits that the Inquiry could, and should, exercise its powers under ss 15 and 22 of the Act to restrict access to all classified material, save for that material that, on its face, would be desirable to have disclosed to specific individuals in the interests of natural justice. Mr Keith should be concerned only with that material.

60. That approach would comply with the interests of natural justice but would also avoid the need for a time consuming and resource intensive review process over what is likely to be a large number of documents that are of peripheral interest to the Inquiry's terms of reference or which do not directly engage the non-Crown core participants' interests.

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63 Inquiry Minute No.3 at [21]

64 Inquiry Minute No.3 at [25(c)]

65 Notably, the terms of reference refer expressly to the provisions of s 15 at para [14]

61. On that basis, Mr Keith would consider the Crown's claim to confidentiality under s.20(c) of the Act only in relation to documents that the Inquiry has already determined it may, on the face of it, be desirable to have disclosed. The process would be as follows:

61.1 Mr Keith would consider whether the Crown has a justifiable reason for claiming confidentiality over the material. In practical terms:

61.1.1 for New Zealand-controlled information, Mr Keith will consider whether the disclosure of the information would prejudice the security or defence of New Zealand, or the Government's international relations; and

61.1.2 for foreign-controlled information, he will consider whether, in addition, disclosure would risk the provision of information on a basis of confidence from overseas governments or organisations in the future.

61.2 If Mr Keith considers that the Crown has a justified reason for claiming confidentiality, he will consider whether the public interest in disclosure outweighs the interest in maintaining the confidentiality. In doing so, he will:

61.2.1 consider the extent of the factors in support of disclosure or publication of the material, taking into account the fact that the principles of natural justice and open justice apply differently in an inquisitorial process.

61.2.2 Balance the factors in support of disclosure against the public interest in maintaining the confidentiality, giving due weight to the Crown's assessment of the harm that disclosure would cause.

61.3 If Mr Keith considers that the factors in support of disclosure do not outweigh the public interest in maintaining confidentiality, he may still explore with the relevant Crown agency the possibility of providing a redacted or summarised version of the document that will meet that public interest in disclosure, if feasible and appropriate.

61.4 If Mr Keith considers that the public interest in disclosure outweighs the public interest in maintaining confidentiality, he *must* explore with the relevant Crown agency the possibility of providing a redacted or summarised version of the document that will satisfy the public interest in disclosure (including any demands of natural justice).

61.5 If Mr Keith cannot reach agreement with a Crown agency on the form in which any classified material should be disclosed, the matter will be considered by the Inquiry (having received submissions from the Crown) which may make an order for disclosure of a redacted or summarised version of a document, or the document itself, or decide not to order the disclosure of the document in any form.

61.6 As set out in the submissions of the Crown Agencies dated 5 October 2018, the Crown respectfully requests the Inquiry to provide the Crown with reasonable notice before making any such order to allow the Crown an opportunity to take appropriate steps to mitigate the risks that may arise from the proposed order.

62. As set out above and as contemplated in the Draft Protocol, the Inquiry may wish Mr Keith to advise on where the public interest lies between disclosing and withholding classified information. Out of an abundance of caution, the Crown notes that Mr Keith's former roles as Crown Counsel at Crown Law and as the Deputy Inspector-General of Intelligence and Security may give rise to a need for the Inquiry and Mr Keith to consider whether there are any potential conflicts of interest for Mr Keith in carrying out that function. This may include considering how any potential conflicts can be appropriately and transparently managed, whether in relation to any specific material, categories of material, or more generally.

63. The submission by Media Entities in relation to the proposed procedure of the Inquiry highlights the role of s 15 of the Act in regulating access to material held by the Inquiry. In the submissions of Crown Agencies dated 5 October, the Crown highlighted the need for a *permanent* order under s 15 for any material: i) which Mr Keith considers is justifiably confidential;[66] and ii) in

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66 Memorandum of the Crown Agencies at [8.2.1]

relation to which the Inquiry considers the public interest in withholding the material should be upheld.[67]

64. Having considered the submissions of other participants, the Crown invites the Inquiry to make an order under s 15 in relation to all classified material, subject to variation or cancellation, if appropriate, at the end of the classification review process envisaged at paragraph [27] of Inquiry Minute No.4. That order would provide certainty as to the status of classified information, in particular the ability of third parties to access that information, pending the completion of the review process. That certainty is important to the Crown for two reasons: first, it will assist international partners to understand the legal basis on which documents are held by the Inquiry pending the outcome of the review process; secondly, it will ensure that all classified material received by the Inquiry will be excluded from the definition of "official information" at the conclusion of the Inquiry process, unless the order is varied at the conclusion of the review process.

65. Although the NZDF has thus far provided classified material to the Inquiry without the need for such an order, the Crown's ability to provide further material (particularly material in which there are partner equities) will be enhanced, and potentially expedited, if such an order is made.

66. The Crown reiterates its clear intent to provide all relevant information to the Inquiry and is working with international partners to ensure their consent to produce all relevant partner material to the Inquiry. It remains possible, however, that the Crown will not secure partner consent for some particularly sensitive material to be produced without guarantees of confidentiality. If these circumstances arise, the Crown will need to make an application under s 70 of the Evidence Act to exclude material from the Inquiry or agree an alternative arrangement to ensure the Inquiry may access the relevant information consistently with the permission that can be obtained in the circumstances.

Participation of non-Crown core participants in the review process

67. The non-Crown core participants submit that there is scope for their involvement in the review process conducted by Mr Keith. The submissions

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67 Memorandum of the Crown Agencies at [8.3.3]

range from a request for non-Crown core participants to have the right to make submissions on declassification and/or to appoint special advocates to make submissions[68] to a request for a comprehensive list of classified material reviewed in the classification review process.[69]

68. The Crown opposes the proposal for non-Crown core participants to make submissions during the classification review process, either by counsel or through a special advocate. Such a process is likely to be inefficient and cause unnecessary cost and delay to the Inquiry's process. Moreover, it is not clear that the participation of non-Crown core participants would be appropriate or serve the interests of the Inquiry. The Act does not envisage core participants taking any role in the review of documents by an independent person under s 20(c) of the Act. Further, in the event that the Crown and Mr Keith disagree on the protection properly to be provided to material, the Inquiry is capable of forming its own view of where the public interest lies between withholding or disclosing the material, taking into account the interests of natural justice as they operate in the inquisitorial context of the Act.

69. Having considered the submissions of other participants, the Crown is open to the proposal that the Inquiry should maintain a comprehensive document management record in order to keep track of the material that has been provided and reviewed. However, there will need to be a document-by-document assessment of what information can be provided on the list; in some cases, even disclosing the title of the document or the originating source may compromise classified information.[70]

The outcome of the review process

70. The non-Crown core participants contend that, once the review is complete, documents that are considered to be "restricted" or "confidential" should be disclosed. In their view, documents in that category pose minor security risks

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68 Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik of 5 October 2018 at [33]; Nicky Hager 5 October 2018 submission at [2.16].

69 Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik of 5 October 2018 at [3.5]; Nicky Hager 5 October 2018 submission at [2.16] and [2.17]; Memorandum of Counsel for Jon Stephenson of 5 October 2018 at [9](a).

70 The Crown understands that core participants may have access to the Inquiry's document management record. It is of the view that participants seeking to obtain those documents listed in the record other than through the Inquiry's established process would cut-across the Inquiry's procedure.

that can be managed by way of non-disclosure undertakings.[71] Documents that remain "secret" and "top secret" should be provided in a redacted or summary form, as of right,[72] rather than "if feasible and appropriate".[73]

71. The Crown submits that this approach would not accord with two propositions, arising from Inquiry Minutes No.3 and 4, namely:

71.1 that participants in inquiries do not have the right to obtain all relevant material produced by other participants, but that natural justice considerations may be relevant in determining what information ought to be disclosed;[74] and

71.2 that Mr Keith's role is not to determine whether the documents have been subject to the correct level of classification (such as "top secret", "secret", "confidential", or "restricted"), and to re- or de-classify accordingly.[75] Rather, the review process enables the Inquiry to ascertain, for purposes of s 20 of the Inquiries Act 2013, whether there is "justifiable reason" for maintaining the asserted privilege or confidentiality.

72. If a claim to confidentiality arising out of classification of material is justified, the Inquiry will not order the disclosure of that material to non-Crown core participants. However:

72.1 There may be circumstances where natural justice *demands* the disclosure of a summary or redacted version of a classified document. Whether this will be necessary can only be determined on a case-by-case basis and the Crown submits the Inquiry's analysis in Minute

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71 Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik of 5 October 2018 at [3.5]; Nicky Hager 5 October 2018 submission at [2.11] and [2.12]; Memorandum of Counsel for Jon Stephenson of 5 October 2018 at [10].

72 Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik of 5 October 2018 at [31]; Nicky Hager 5 October 2018 submission at [2.15]; Memorandum of Counsel for Jon Stephenson of 5 October 2018 at [9].

73 Inquiry Minute No.4 at [23].

74 Inquiry Minute No.3 at [21] – [22]

75 See further: Memorandum of Counsel for the GCSB, NZSIS, MFAT, and DPMC of 5 October 2018 at [6] and [7].

No.4 is correct as to how the interests of natural justice apply in an inquisitorial context under the Act.[76]

72.2 Where natural justice does not demand it, the Inquiry may still – where feasible and appropriate – consider providing summaries and redacted versions of classified documents to support engagement by non-Crown core participants in the Inquiry process.

73. The Crown submits that, understood in this way, the Inquiry's proposed procedure for dealing with classified material is sufficient to ensure compliance with the principles of fairness and natural justice.

Special advocate(s) not required given review process and role of counsel assisting

74. Non-Crown core participants have suggested that Mr Keith or another person might be appointed as a special advocate to represent their interests in relation to classified information.[77] For the reasons set out above, the appointment of a special advocate is unnecessary to ensure compliance with the principles of fairness and natural justice.

75. To repeat: these are inquisitorial not adversarial proceedings. The Inquiry Members are conducting an inquiry, not a trial and the Inquiry is prohibited by the 2013 Act from determining any person's civil or criminal liability. In the UK's Litvinenko Inquiry, Sir Robert Owen – in refusing an application for the appointment of special advocate – noted that it would be "wholly exceptional" to appoint a special advocate in an Inquiry constituted under the UK Inquiries Act 2005, "bearing in mind in particular the inquisitorial nature of an Inquiry" and "the role to be played by Counsel to the Inquiry".

76. The Crown submits that the same reasoning applies in this case. Counsel assisting have been appointed and they will have access to all the information before the Inquiry. Their role is to present and test evidence to the Inquiry in a fair and impartial manner, ensuring that the interests of all participants are properly protected and represented. Where necessary, counsel assisting may take the role of contradictor, cross-questioning or cross-examining witnesses

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76 Inquiry Minute No.4 at [60] – [66]

77 Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik of 5 October 2018 at [32] – [33]; Memorandum of Counsel for Jon Stephenson of 5 October 2018 at [10]

on the basis of information provided by other participants. The non-Crown core participants will be able to indicate to counsel assisting the issues they wish to be explored in closed hearings.

77. A special advocate would be in no better position than counsel assisting in communicating with the non-Crown core participants: neither a special advocate nor counsel assisting would be able to reveal to core participants or their open lawyers anything of what transpired in closed session or any of the classified material.

Security-cleared lawyers confidentiality ring unnecessary and undesirable

78. Alternatively, non-Crown core participants contend that their counsel should be given the opportunity to seek security clearance from the NZSIS and to then receive classified information subject to an undertaking of confidentiality.[78]

79. The Crown submits that the proposal is unnecessary and undesirable. It is unnecessary because the Inquiry's process ensures that the principles of natural justice will be met. It is undesirable because lawyers-only confidentiality rings are inappropriate where matters of national security are involved. While not determinative, persuasive UK authorities illustrate the relevant concerns.

80. In *Competition and Markets Authority v Concordia International RX (UK)* [2018] EWCA Civ 1881, the UK Court of Appeal confirmed that while lawyers-only confidentiality rings may be appropriate to protect commercially sensitive information, they have "no place in relation to material protected by public interest immunity". The Court affirmed the reasons given in *AHK v. Secretary of State for the Home Department* [2013] EWHC 1426 (Admin) for why the use of a confidentiality ring was inappropriate in such cases, namely: (i) the risk of inadvertent disclosure; (ii) the risk, if inadvertent disclosure did take place, that the source might be unknown and suspicion might fall on the innocent; and (iii) the problem of how to decide who could safely be admitted to the ring, and who would have to remain outside it. The Court also endorsed Lord

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78 We note that, while NZSIS is responsible for vetting candidates for security clearance, clearances are granted by a sponsoring Crown agency (generally the agency employing an individual), which is then responsible for managing that security clearance (for example, revoking the clearance if it becomes apparent that the individual is no longer suitable to hold it)

Mance's critique of confidentiality rings in *Somerville v Scottish Ministers* [2007] UKHL 44:

> "It involves disclosure to another party's ... counsel of material which the public interest may require should not be disclosed to anyone other than the Scottish Executive. It puts counsel in an invidious and unsustainable position in relation to his or her client. In this respect the observations in R v Davis at 1993 1 WLR, pp 616H–617H per Lord Taylor of Gosforth CJ; R v Preston at 1994 2 AC, pp 152H–153D , per Lord Mustill; and R v B & G at 2004 EWCA Crim, para 13 , per Rose V-P are relevant, although made in a criminal context. As in this case, such a procedure may also put counsel into a position where he or she is uncertain what it is permissible to disclose or say when making submissions to the court about PII."

81. The Crown submits that it would be undesirable to create a lawyers-only confidentiality ring in this Inquiry. A security-cleared advocate within a confidentiality ring would not be entitled to discuss any of the confidential material with his or her client and would be placed in exactly the invidious position deprecated by Lord Mance. Counsel assisting are capable of performing all the functions that a security-cleared advocate in a confidentiality ring can perform.

Treatment of witnesses

82. The non-Crown core participants challenge two aspects of the Inquiry's proposed procedure for gathering evidence from witnesses.

Evidence-gathering to take place in private

83. The first criticism is of the Inquiry's indication that much of its evidence-gathering activities will occur in private.[79] The non-Crown core participants say that, while a private process may be appropriate in hearing the evidence of some witnesses – for instance, "whistleblowers" – not all witnesses need or want to give evidence in private.[80] The decision should be made on a case-by-case basis.[81]

84. The starting point is the Act which makes clear that interviews and hearings may be conducted in private. The Government Inquiry into the appointment

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79 Inquiry Minute No 4 at [79].

80 Nicky Hager 5 October 2018 submission at [3.4.3] and [3.4.4]; Memorandum of Counsel for Jon Stephenson of 5 October 2018 at [27] and [28].

81 Memorandum of Counsel for Jon Stephenson of 5 October 2018 at [28]; Media Entities' 5 October 2018 submissions at [66](e).

process for a Deputy Police Commissioner is a recent case where all evidence, including oral evidence, was gathered and considered in private.

85. The Crown accepts that such an approach would be impermissible in a conventional judicial process and the result is that it would be extremely difficult to manage evidence of the nature that is before this Inquiry in a conventional court process. As Lord Brown observed in *Al Rawi*:[82]

> I have reached the reluctant conclusion that, by their very nature, claims of the sort advanced here, targeted as they are principally against the Intelligence Services, are quite simply untriable by any remotely conventional open court process. The problems they raise, of oral no less than documentary evidence, are just too deep-seated to be capable of solution within such a process...
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> [C]ases of this kind, necessarily involving highly sensitive security issues, should go for determination by some body ... which does not pretend to be deciding such claims on a remotely conventional basis.

86. As set out above, a fundamental feature of an inquiry under the Act is precisely that it may consider matters of public importance in a flexible, non-adversarial manner, deciding for itself the process that is appropriate to do so. The Inquiry's proposal for hearing much of the evidence privately is permitted by the Act and is necessary in a context involving highly sensitive security issues and vulnerable witnesses.

87. That said, the Crown accepts that a case-by-case evaluation of the requirements of each witness may be appropriate. The Crown does not understand the Inquiry to have ruled out public evidence taking sessions. There may be circumstances in which public evidence sessions are appropriate (for instance where a witness wishes to give evidence publicly). In determining what is required in each case, the following considerations from s 15(2) of the Act are likely to be relevant:[83]

87.1 Does the principle of open justice require this witness to give evidence in public or can the principle be met through alternative means?

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82 *Al Rawi v The Security Service and others* [2011] UKSC 34 at [86].

83 The Inquiry may also draw some assistance from the Iraq Inquiry *Protocol: Hearing Evidence in Public and Identifying Witnesses.*

87.2 Will hearing this evidence in private undermine public confidence in the proceedings of the Inquiry?

87.3 Will the taking of evidence in private assist the Inquiry to ascertain the facts properly:

87.3.1 If the witness's identity is not currently known to the Inquiry (so the witness is not compellable) is the witness more likely to come forward if evidence is to be given in private?[84]

87.3.2 If the witness's identity is currently known (and therefore the witness is compellable) is he or she more likely to be more candid when giving evidence in private?

87.3.3 Will the Inquiry be capable of properly testing the truth of evidence given in private?[85]

87.4 Would the matters on which the witness will give evidence or the identity of that witness, if revealed in public, prejudice the security, defence or economic interests of New Zealand?

87.5 Are there legitimate privacy interests that need to be protected? If so, can those interests be protected by measures short of requiring the evidence to be given in private?

87.6 Are there any other relevant considerations, for example the existence of health issues or fears about safety that will influence the quality of evidence given publicly?

88. In addition, the Inquiry must also have regard to its statutory obligations to act fairly and efficiently and to avoid unnecessary delay or cost. If a fair evidence gathering process can be conducted publicly or privately, the more efficient process is likely to accord with the Inquiry's statutory obligations. In most cases, the suggestion of a hybrid option, whereby some of the witness's evidence is given publicly and some of the witness's evidence is given

84 This is clearly a relevant consideration for "whistleblowers", as discussed in Inquiry Minute No.4 at [57].

85 This may be particularly pertinent as regards anonymous witnesses.

privately,[86] is likely to be both undesirable from an efficiency perspective and unfeasible from a national security perspective: it may be difficult for Crown witnesses to demarcate readily which aspects of their account are classified and unclassified, especially when assisting the Inquiry by answering questions.

89. To reiterate, the Crown submits the Inquiry is right to consider that, provided the process is conducted fairly, a process of private interviews and hearings is likely to be suitable for much of the evidence relevant to the Inquiry. That said, decisions on whether to take evidence in public or private can be assessed by the Inquiry on a case by case basis.

Cross-examination of witnesses

90. The second criticism made by non-Crown core participants is the Inquiry's provisional direction that witnesses will generally be questioned and tested by the Inquiry alone, with core participants permitted to provide topics to the Inquiry and to undertake cross-examination in certain circumstances.[87]

91. The non-Crown core participants consider that cross-examination by the non-Crown core participants, who are "uniquely positioned to test the credibility and conclusions of key NZDF witnesses", is "essential".[88] They allege that the Inquiry's position is inconsistent with *Badger v Whangarei Refinery*:[89]

> 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.

92. The Crown submits that the non-Crown core participants have misunderstood the Inquiry's position as set out in Inquiry Minute No.4 and have overstated the effect of *Badger*.

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86 Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik of 5 October 2018 at [45]; Media Entities' 5 October 2018 submissions at [37] and [38].

87 Inquiry Minute No 4 at [76] and [77]; reiterated in Appendix 1: Witness Protocol at [13] and [19].

88 Memorandum of Counsel for Jon Stephenson of 5 October 2018 at [36] and [37]; see also Nicky Hager 5 October 2018 submission at [3.10.5].

89 *Badger v Whangarei Refinery Expansion Commission of Inquiry* [1985] 2 NZLR 688 (HC); Memorandum of Counsel for Jon Stephenson of 5 October 2018 at [35].

93. Under the Act, the decision whether to permit cross-examination is a matter for the Inquiry. There is no right to cross examination and *Badger* did not have the effect of creating one. The *ratio* of *Badger* was encapsulated at 705:[90]

> "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."

94. At its highest, the effect of *Badger* is that in certain circumstances, cross-examination may be required as a way of upholding a person's right to natural justice. But natural justice may also be met by other means: "natural justice only requires cross-examination where no other effective means for controverting factual material has been made available to an aggrieved party".[91]

95. In *Badger*, the Whangarei Commission of Inquiry made a blanket ruling proscribing cross-examination for reasons of convenience and expedience. In this case, it is clear that the Inquiry has not made such a blanket ruling. To the contrary, the Inquiry indicated that, in general, witnesses will be questioned and tested by the Inquiry, but contemplated that it may need core participants' counsel to assist with cross-examination,[92] and it has indicated that it will invite core participants to suggest topics, specific questions and sequences of questions, to be pursued with particular witnesses.[93]

96. As well as leaving open the possibility of cross-examination in appropriate instances, the Inquiry has enabled other effective means of controverting adverse material, including by allowing core participants to suggest topics or questions to the Inquiry to put to the witnesses. Although the Court in *Badger* found that questions put through the inquiry were not an effective substitute for cross-examination,[94] the context there was materially different. The Whangarei Commission of Inquiry was not required to consider issues of national security, the potential for "whistleblowers", or vulnerable witnesses;

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90 *Badger v Whangarei Refinery Expansion Commission of Inquiry* [1985] 2 NZLR 688 (HC) at 705.

91 *Badger v Whangarei Refinery Expansion Commission of Inquiry* [1985] 2 NZLR 688 (HC) at 699; see also 702: "The cases show that cross-examination by the parties does not need to occur if its advantages are gained otherwise". It is not necessary for the Crown to address the question of whether *Badger* applies to an inquiry held under the Inquiries Act 2013. Arguably, it does not.

92 Inquiry Minute No.4 at [76].

93 Inquiry Minute No.4 at [77].

94 *Badger v Whangarei Refinery Expansion Commission of Inquiry* [1985] 2 NZLR 688 (HC) at 703.

its decision to proscribe cross-examination was, as indicated above, guided by reasons of convenience and expedience.

97. It is trite that the demands of natural justice are contextual. Given the national security interests and other values at stake in this Inquiry, the principle of natural justice cannot require cross-examination of every witness; it must be flexible enough to accommodate other ways of testing the veracity of evidence. In the vast majority of cases, the Crown submits that the principle of natural justice will be satisfied by providing adverse material arising out of interviews and/or oral evidence to affected parties for comment, as envisaged in Inquiry Minute No.4.[95] In rare cases where cross examination is required to meet the demands of natural justice, the Inquiry's proposed procedure allows for it.

Disclosure of transcripts of evidence

98. The Inquiry's preliminary view is that transcripts of evidence will not be publicly available; core participants, however, may have access to transcripts of evidence of witnesses who do not seek confidentiality and who are not dealing with classified material.[96] Non-Crown core participants consider that the Inquiry's position is unduly restrictive,[97] and consider that the Inquiry should provide, as of right, transcripts of evidence, redacted transcripts of evidence, or a summary of the evidence.[98]

99. The Crown does not oppose the proposal for transcripts of evidence to be shared more generally. Where evidence is provided in a closed hearing, the interests of open justice may be served by the production of a redacted transcript or summary. Similarly, where the Inquiry considers – having conducted an initial interview with a witness – that core participants may usefully contribute to lines of questioning by counsel to the inquiry and/or carry out cross-examination at a hearing, it may be appropriate for redacted or summarised 'will say' statements to be shared with core participants in advance of the hearing to facilitate their engagement.[99]

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95 Inquiry Minute No.4 at [90]

96 Minute No 4 of Inquiry at [8] and [90].

97 Media Entities' 5 October 2018 submissions at [70].

98 Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik of 5 October 2018 at [44]; Media Entities' 5 October 2018 submissions at [70].

99 See Inquiry Minute No.4 at [76]

100. Provided transcripts and/or selected 'will say' statements are in a form that protects the identity of witnesses who are granted anonymity, and protects all classified information, the Crown considers that it may be appropriate to share them more widely. Having regard to the submissions of the Media Entities, the Crown notes that if transcripts or selected 'will say' statements are shared with core participants in a suitably redacted form, there would be no objection to their wider dissemination to the media.

101. The Crown does not, however, go so far as to say that the provision of transcripts or 'will say' statements is required by law. It is a matter for the Inquiry's discretion and it may be relevant to consider the extent to which a process of redacting, summarising and distributing transcripts and selected 'will say' statements would cause unnecessary delay to the Inquiry's work. Bearing that in mind, the Crown submits that the Inquiry should exercise its discretion judiciously to require redacted or summarised transcripts only where it is desirable for natural justice reasons to do so.

Process for producing lists /redactions / summaries

102. As set out above, the Crown does not oppose the production of a comprehensive unclassified list of classified material; the disclosure of unclassified redacted or summarised versions of classified material; or the disclosure of redacted or summarised versions of transcripts and 'will say' statements. However, it is important to establish a clear process for approving any unclassified versions of classified material.

103. As the originator of a document is best placed to judge where risks lie in the disclosure of any list, or redacted version or summary of a document, and will be responsible for any engagement with international partners who hold an interest in the material, it is vital that the Crown is involved in this process. The Crown submits that the following process is appropriate:

103.1 In respect of redacted versions or summaries of classified documents, the Crown will be provided with an opportunity to propose a redacted or summarised version. In respect of the will-say statements and the unclassified list of classified material, the Inquiry will propose a draft for consideration and consultation with the relevant Crown agencies;

103.2 In respect of drafts proposed by the Inquiry, the Crown agencies consider the proposal and consult where necessary with international partners and revert to the Inquiry with a further draft, justifying any further restrictions proposed;

103.3 The Inquiry considers the Crown draft and engages with the relevant agency to discuss any disagreement with the redactions proposed.

103.4 Where disagreement is not resolved following discussions with the relevant agency, the Inquiry will determine the matter by reference to:

103.4.1 the requirements of natural justice, in the context of the inquisitorial process proposed by the Inquiry; and

103.4.2 the factors listed in s 15(2) of the Inquiries Act.

103.5 Where, at the end of this process, the Inquiry decides to release information subject to an objection by the relevant Crown agency, the Crown respectfully requests the inquiry to provide the Crown with reasonable notice before making any such order to allow the Crown an opportunity to take appropriate steps to mitigate the risks that may arise from the proposed disclosure.

15 November 2018

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