UNDER **THE INQUIRIES ACT 2003**

IN THE MATTER **A GOVERNMENT INQUIRY INTO OPERATION BURNHAM AND RELATED MATTERS**

Hearing Commenced: 21 November 2018 at 10.00 a.m.

Inquiry Members:
Sir Terence Arnold QC - Chair
Sir Geoffrey Palmer QC

Counsel Appearing:
Ms K McDonald QC and Mr Andru Isac, Counsel Assisting the Inquiry
Ms D Manning and Mr S Lamain appear for the Villagers
Nicky Hager appears in person
Mr D Salmon and Mr D Nilsson appear for Jon Stephenson
Mr A Martin, Mr T Fisher and Mr I Auld appear for Crown Agencies
Mr P Radich QC and Dr S Sheeran appear for NZDF
Mr B Gray QC and Mr S Worthy appear for Hon Dr Wayne Mapp
Mr A Ringwood appears for the Media
Ms Hazel Armstrong appears in person with Mr F Drissner-Devine

Venue:
High Court
Wellington

TRANSCRIPT OF PROCEEDINGS

I N D E X

OPENING REMARKS

SIR TERENCE: Welcome everybody to this first public hearing of the Inquiry into Operation Burnham and related matters. My name is Terence Arnold and I am Chairing the Inquiry. Conducting the Inquiry with me is Sir Geoffrey Palmer QC.

The purpose of the hearing scheduled for today and tomorrow is to hear oral argument in relation to the processes we've set out in Minute No.4 for the handling of classified information and for the conduct of the Inquiry.

The core participants and other interested parties have had the opportunity to file written submissions in relation to the matters addressed in that Minute and a number of submissions have been received. Those submissions either have already been or will be posted on the Inquiry's website and so they will be publically available.

Despite the comprehensive nature of the written submissions, we thought it would be useful and necessary to have this public hearing for three reasons.

First, we accept that our decisions as to the Inquiry's processes are fundamental to the success of the Inquiry. Our ultimate objective is to get at the truth. The processes we adopt must give us the best opportunity to do so while accommodating other requirements and interests. This public hearing recognises the importance of the issue.

Second, we consider that core participants and other interested parties should have the opportunity to develop any particular aspects of their written submissions that they consider require development orally and to respond to or comment on points raised by other submitters, and it gives

us the opportunity to ask questions of submitters.

Third, we thought it would be useful for there to be a public airing of the issues relevant to the decisions that the Inquiry must make as to its processes for dealing with classified information and for conducting the Inquiry so as to assist in public understanding of the issues and what's at stake. We think it is important that the public have an understanding of the competing considerations that affect the decisions we will make.

We should note that the oral submissions given in the course of this hearing will be recorded and a transcript of them will be prepared. Subject to any issues of confidentiality that may arise, the transcript will be published on the website, probably during the course of next week.

We also note that we have had the opportunity to go through the written submissions that were filed in advance, so it will not be necessary for counsel to read through them in their entirety. Rather, we would encourage counsel to focus on the principal points that they wish to emphasise and on any points that others have made to which they wish to respond.

For the benefit of the public and the media, we will call on those who are appearing to announce themselves, and we will do that in the order in which people will be giving submissions.

So, if I could begin, please, with Counsel Assisting, could you announce yourself?

MS McDONALD: Good morning, Sir Terence and Sir Geoffrey, Kristy McDonald and I appear with Mr Andru Isac as Counsel Assisting.

SIR TERENCE: Counsel for Afghan villagers?

MS MANNING: Deborah Manning appearing for the villagers along with my junior, Simon Lamain.

SIR TERENCE: Mr Hager, you are appearing for yourself?

MR HAGER: Yes, Nicky Hager appearing for myself.

SIR TERENCE: Counsel for Jon Stephenson?

MR SALMON: Davey Salmon and Daniel Nilsson.

SIR TERENCE: Thank you. Counsel for the Crown Agencies?

MR MARTIN: E ngā kaiwhakatewhatewha, tēnā kōrua. Ko Martin ahau, kei konei māua ko Fisher mō te Karauna. May it please the Inquiry, Martin and Fisher for the Crown.

SIR TERENCE: Thank you. Counsel for the New Zealand Defence Force?

MR RADICH: Tēnā kōrua e rangatira, my name is Paul Radich and I appear with Dr Scott Sheeran for the New Zealand Defence Force.

SIR TERENCE: Counsel for Dr Mapp?

MR GRAY: Bruce Gray and Scott Worthy for Dr Mapp.

SIR TERENCE: Counsel for the media?

MR RINGWOOD: Alan Ringwood appearing for NZME, Stuff, TVNZ, Mediaworks, Radio New Zealand and Bauer Media Group.

SIR TERENCE: Thank you, Mr Ringwood. And Mrs Armstrong for Hazel Armstrong Law.

MRS ARMSTRONG: Appearing on my own account with my clerk, Felix Drissner-Devine. We have decided to sit here because he is not admitted. I was going to ask whether or not we could move forward even though he's not admitted to the bar?

SIR TERENCE: Yes, if there's some room there. Ms McDonald?

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SUBMISSIONS FROM COUNSEL ASSISTING ON MINUTE NO.4
BY MS McDONALD QC

MS McDONALD: A copy of our written submissions should be placed on your desk and it has been distributed to everybody appearing this morning and copies made available to the media.

I will turn to that now. 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 competing considerations and interests when deciding on the best procedure to adopt will, in our submission, be of the utmost importance.

Importantly, this is a Government Inquiry for the benefit of all New Zealanders. It is an independent Inquiry. The public interest that exists in the Inquiry is a multifaceted 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. It is not a piece of litigation where partisan views and parties define the issues or control the evidence. This will be a thorough Inquiry and it is the Inquiry's duty to investigate the issues, not the parties.

As Counsel Assisting, it is not our role to advocate for any particular course. Rather, the 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.

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 the New Zealand Defence Force personnel. 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.

In April 2018, the New Zealand Government announced the Inquiry into Objective Burnham and into 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.

As we've 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 security and international relations. It will involve vulnerable witnesses - such as Afghan villagers and whistleblowers - 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.

While other countries have undertaken public inquiries into activities in 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 considerations 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 the hearings.

Much of the material which is relevant to the Inquiry's work is currently subject to high level security classifications and is not publically 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.

The interests of the submitters are not all aligned, and that is clear from the submissions received. 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 security and international relations if classified information is made publically 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 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.

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 procedure it might adopt in relation to two issues. First, its handling of classified material; and secondly, the general procedures for taking evidence.

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, whistleblowers or government personnel require confidentiality or anonymity.

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

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.

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.

Turning then to the scope of the Inquiry and the Terms of Reference. The scope of this Inquiry's work has been set by the Terms of Reference. The terms make it clear that the central focus is in relation to three operations. First,

Objective Burnham which took place on 21-22 August 2010. Objective Nova which was a return operation to the Tirgiran Valley on 2 and 3 October 2010. And three, the transfer of the insurgent leader Qari Miraj by NZSAS to the Afghanistan National Directorate of Security.

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 Operation 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 their rules of engagement changed.

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.

The Inquiry has wide powers and broad discretion to determine its own procedures. The law on the subject was contained for many years in a 1908 Act. Following a Law Commission Report, 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.

The Law Commission also noted the unsatisfactory position which existed prior to the 2013 Act. Since 1990, there have been only five Commissions of Inquiry and the reasons for this were identified as expense, delay, formality and adversarial methods.

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.

Government inquiries, as this is, are intended to deal with more immediate issues where a quick and authoritative answer is required from independent inquirers and their practices, and their procedures distinguish them from a public Inquiry.

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. Under the 2013 Act, the Inquiry is empowered to conduct its work as it considers it appropriate, subject to the Act and the Terms of Reference. As noted 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, that is subject to the caveat that core participants can themselves give evidence and make submissions; 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.

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.

In short, 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 investigations in private. The potential for some private elements of this Inquiry are, in fact, expressly acknowledged within the Terms of Reference.

I turn now to say something briefly about the international context. 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.

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 anyway, have required private evidence sessions to deal with classified information and sensitive witnesses.

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 publically available.

It appears this approach has been adopted in part because a public process would make it virtually impossible for whistleblowers to make disclosures of wrongdoing. In other words, in order to get to the truth, the Inquiry has determined it needs to be held in private.

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 in its submission, ran for seven years, was hugely costly and ultimately widely criticised because of that.

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. He said this:

"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 publically because of national security confidentiality concerns.

...

When the Inquiry began, Commission counsel and I had little appreciation of how much information would be subject to national security confidentiality claims or how the Government would respond to my decisions about what could be disclosed publically. 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.

Numerous procedural challenges arose from the tension among three different, sometimes competing, requirements: making as much information as possible public, protecting legitimate claims to national security confidentiality, and ensuring procedural fairness to institutions and individuals who might be affected by the proceedings.

These procedural challenges greatly extended the time and resources needed to complete the Inquiry."

So, turning now to the competing interests at stake in this Inquiry. As noted, there are a number of competing public and private interests that must be considered here. Those interests are reflected in a range of submissions before you relating to the procedure the Inquiry might adopt.

First, the Afghan villagers. According to the book *Hit & Run*, the New Zealand Defence Force operation on 22 August 2010 resulted in the deaths and injury of 21 Afghan nationals

from two villages. Beyond that, Afghanistan has had a tragic history of conflict spanning centuries. Since 1979, a conflict has been virtually constant. International sources confirm that these conflicts have had a profound effect on the people who live there.

In relation to the Afghan villagers, the following non-exhaustive considerations arise:

First, there is the public interest in knowing what happened, to whom and how. 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 risk of retaliation or retribution.

In addition, it has 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 retraumatise those who have already suffered harm.

Thirdly, there is the practical question of access to Afghan witnesses to this Inquiry. Evidence via videolink may be required. Whatever arrangements are made will need to ensure the witnesses are not exposed to any undue risk to their personal safety given the current state of security in Afghanistan.

Then there is the classified material and information. 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. 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.

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 this Inquiry's work is information belonging to a foreign Government and it is in circumstances where reciprocal information sharing arrangements require the consent of the foreign Government to use or disseminate the information within the New Zealand context.

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 arrangement or understanding 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 a position of damaging the interests of New Zealand or the public by its conduct.

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 Military on overseas exercises is the tendency to over-classify or to resist reclassification or declassification where it is warranted.

Minute No.4 reveals that this Inquiry is alive to that 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 reclassified or declassified. Where that may not be possible, the suggestion in Minute No.4 is Mr Keith may be able to receive summaries of classified information to facilitate both public understanding of the evidence and participation by core participants in the Inquiry process.

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.

Beyond Mr Keith's work, the Inquiry's Minute also notes, correctly in our submissions, that it has the power under section 70 of the Evidence Act to make the final decision about confidentiality claims made by any Government agency in relation to classified material. 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 will be injurious to the public interest, will remain confidential.

Turning then to the journalists and confidential sources. Both Mr Hager and Mr Stephenson have said they have confidential sources with information relevant to the Inquiry's work. In order to do its work, it is essential for the Inquiry, and in the interests of 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 the Inquiry.

Given many of the sources appear to be either 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.

Whistleblowers. Similar considerations apply to whistleblowers. The process adopted needs to provide them with confidence that 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 with television cameras. Indeed, a process which of necessity involves the public identification of whistleblowers 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 wants the Inquiry to receive all relevant information in order to get to the truth, it is in the public interests that some degree of privacy is maintained for sensitive witnesses. Individuals with information of wrongdoing 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.

In addition to these diverse interests, are the interests of currently serving staff of the NZDF and the intelligence agencies. Their ability to perform their roles and their own personal safety may be seriously at risk if their identities are publically 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 are required to provide evidence to assist the Inquiry.

So, 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.

Minute No.4 acknowledges the importance of the principle of open justice. The principle is one of the considerations the Inquiry must consider when making an order to conduct a private process in terms of section 15 of the Act but there are features of this Inquiry noted in Minute No.4 which strongly pull against a fully public process.

First, there is the risk the Inquiry will not be able to get to the heart of the matter unless full confidentiality can be afforded to some witnesses. This was one of the factors acknowledged by the Chilcott Iraq Inquiry, noted by counsel for the Afghan villagers. The Inquiry's Witness Protocol there 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."

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.

Against the importance of an open and public process is the potential for very real harm both to New Zealand's State interest and for individuals if properly classified sensitive information is disclosed through the Inquiry process. Classified information which is mistakenly or improperly disclosed through the Inquiry at public hearings could have profound effects on New Zealand 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.

The competing tensions between openness on the one hand and harm from disclosure on the other reflect the multifaceted 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.

In determining the appropriate process, the Inquiry may be assisted by considering a counterfactual involving public or almost entirely public hearings.

In our submission, such an approach has significant risks. First, witnesses such as whistleblowers are unlikely to come forward. Secondly, the accounts to be given by sensitive witnesses are far less likely to be candid and complete. The Inquiry process will be significantly longer and will involve considerable added cost. The risks we have identified of inadvertent disclosure of classified information are not avoided. There is a risk that classified information subject to third party interests will not be made available to the Inquiry. And finally, overall, the ability of the Inquiry to receive all relevant material will be substantially diminished.

In the decision of *Conway v Rimmer* some years ago but subsequently recently approved in the *Al Rawi* decision which is noted in the written submission, The House of Lords made the following observation about the effect of a public interests immunity claim. There it was said this:

"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 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 documents in question would put the interests of the state in jeopardy".

In our 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 to refer to it in its report.

I will turn to the concept of flexibility. 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. 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.

Inquiries by their nature are very different creatures from traditional adversarial Court processes. As the Inquiry noted in Minute No.4, 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.

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. The difference in process also has significance in relation to another feature of adversarial hearings and that is 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 on its own forensic evidence gathering.

In contrast, however, in an Inquiry, the decision-maker's knowledge of the 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 publically 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.

Against these considerations, section 14(2) of the Inquiries Act provides that in making a decision as to the procedure or conduct of an Inquiry, it must first comply with the principles of natural justice and secondly, have regard to the need to avoid unnecessary delay or cost in relation to public funds, witnesses or other persons participating in the Inquiry.

Turning first to natural justice. The requirements in our submissions 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. 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 of section 14(3)(a) and (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.

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.

The second critical consideration which the Inquiry must have regard to when setting the procedure is the need to avoid unnecessary delay or cost to public funds. One party has suggested it may be necessary to hold both private and public hearings for witnesses who are likely to give evidence which is held to be classified. 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 in 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.

I want to turn now to the topic of modules or evidence sessions. On the ten discreet 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.

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.

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.

Finally, in our submission, the following general conclusions can be made. Evidence can be tested effectively through the Inquiry undertaking questioning, including cross-examination if required, supported by Counsel Assisting. In addition, the Inquiry is able to obtain the assistance of independent military experts in support of its examination of issues and information. It is not necessary to have a "one size fits all" approach to process. Elements of both traditional adversarial process and of an inquisitorial could be used where appropriate.

The relevant procedure elements and interests in different contexts may need to be balanced differently. This is particularly so in relation to classified information and sensitive witnesses. An iterative approach to procedure is called for, in our submission. There is a need to maintain flexibility to be able to modify process to deal with circumstances as they arise. 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 or core participants to undertake that role.

Core participants' participation in the fact finding process will be preserved through the ability to give evidence and make submissions, provide documents and provide topics or questions which they consider should be explored with witnesses in private hearing.

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 enable affected individuals or parties to respond to any matters

before the Inquiry's report is issued.

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 work. An overly public process, creates risk of significant harm to national security.

As the Inquiry pleases.

SIR TERENCE: Thank you, Ms McDonald. Before I call on Ms Manning, can I just raise one point that is relevant to this issue that hasn't emerged as yet, just to ask counsel to think about it.

The point is this, the Inspector General of Intelligence and Security announced some time ago that she was undertaking an Inquiry into the NZSIS and GCSB involvement in certain events in Afghanistan. And the first Term of Reference in her unclassified release concerns the knowledge, awareness or contribution of the GCSB and the NZSAS to New Zealand Defence Force operations in Afghanistan. One of the operations she refers to is what we know as Operation Burnham 22 August 2010 operation at Baghlan Province.

The Inspector General's investigations are required under her statute to be private and the subject matter of her Inquiry is, of course, relevant to our Inquiry as well. So, there is an issue as to the overlap between the two inquiries and how we handle that. We have, as I think we indicated in Minute No.4, entered into a protocol with the Inspector-General which is on the website but I just wanted to alert counsel to the fact that there is that dimension to this which we need to consider as well.

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SUBMISSIONS FROM COUNSEL FOR VILLAGERS ON MINUTE NO.4 BY MS MANNING

MS MANNING: Thank you for that. As discussed with Madam Registrar, I will sit this morning just for health reasons.

SIR TERENCE: That is fine.

MS MANNING: So, thank you very much for that, although I am told standing doesn't make too much of a difference to my stature.

In terms of my submissions today for the villagers, first of all I should convey a greeting from them from Afghanistan: "salaam alaikum" (peace be upon you). They are aware of the hearing commencing this morning and they are pleased that an Inquiry is being held into the events that so greatly affected them and their family members and their villages.

I just wanted to mention that at the outset because a theme of my submissions will be that this Inquiry should not lose focus from the people who were affected by Operation Burnham, in particular, and I will come back to that in terms of looking at, if you like, the competing considerations. I don't really like to think of them as competing considerations about the actions of the Defence Force and the effects on individuals. I don't think they should be seen as competing but as two sides of the same coin. I think it's very important that we are looking at both sides of that coin. And a concern that I do have is we're only looking at one side at the moment, that is from the NZDF perspective and I see very much as my role as counsel in this Inquiry for these core participants is to be reminding or being the voice for the people who were so greatly affected, in my submission.

In terms of my time, I understand I have two hours?

SIR TERENCE: Yes.

MS MANNING: So, in terms of a few housekeeping matters, we prepared some bundles that I believe have been handed up of authorities. Apologies for the somewhat erratic tabbing. We were using a Wellington printing service that we haven't used before. And apologies for the lack of a title page but we have done our best. So, I hope everybody here has those bundles of authorities.

In terms of our submissions that we filed earlier this week on Monday, may I just check, have they been published online? Have they gone up?

SIR TERENCE: No. There was a point to be clarified. You'd asked for confidentiality in respect of -

MS MANNING: Just the names.

SIR TERENCE: Either two paragraphs or just the names.

MS MANNING: Just the names, Sir, just in keeping with the previous -

SIR TERENCE: We will make an order for the names set out in paragraph, what is it?

MS MANNING: 23.

SIR TERENCE: Not to be published.

MS MANNING: I don't know what the technical capabilities are of Ms Wilson-Farrell but if it is possible to have those posted as soon as possible so our colleagues in the media are able to try and make some sense of what I'm saying, I think that would be very helpful, thank you for that.

MS WILSON-FARRELL: I can make that happen ASAP.

MS MANNING: Okay. So, if you are logged onto the Wi-Fi you should be able to have those submissions.

MS WILSON-FARRELL: We will need to make the redactions.

MS MANNING: I do realise that. Just a very small matter in terms of linguistics perhaps.

I have had the privilege to represent members of the Afghan community for many years and it was something I was corrected on which is we never refer to them as Afghanis because, as someone reminded me, that is their national currency. No-one here has done that but I just think it's important to Afghan nationals. And it's also a soft ”ah”, it's Afghanistan rather than Afghanistan.

I understand members of the community in Wellington are aware of this hearing and I am hoping they will come along because the Afghan community in New Zealand is aware of this Inquiry and are following the proceedings and they are grateful for matters being made available online.

In terms of my approach to this allocated time, I very much want to be as practical and pragmatic as possible. Bearing in mind that this Inquiry under the Inquiries Act is supposed to be efficient, effective and fair, my approach to these kinds of cases is to very much try and never lose sight of the practicals.

So, it may be helpful just to very briefly explain my approach and where I'm trying to come from in order to assist the Inquiry in this matter. As my friend Counsel Assisting outlined, this is the first time we've really dealt with, in effect, civilian oversight of the NZDF, that the matters raised are complex, they are matters of classified information, these are very tricky issues other jurisdictions have grappled with before us and over many years. We have seen a number of cases in The House of Lords and the UK Supreme Court.

In terms of my approach, it is informed on the five years on the *Zaoui* case which was the first time New Zealand dealt with classified information. Four of those five years was in dealing with classified information, in terms of obtaining

lists of information, seeking lists of information, of seeking summaries of material, of material being provided to us in a redacted or summary form, so it wasn't either/or, summary or redacted document.

The comments of Glazebrook J in the second Court of Appeal decision, I have the reference, it is referred in our memorandum of 10 August this year at paragraph 33, there were two matters that the Court of Appeal dealt with. One of them, Glazebrook J spent a bit of time looking at how classified information is, if you like, to be dealt with. And her comments very much informed that *Zaoui* process with the Inspector-General. I think it's always helpful to take learnings rather than trying to invent the wheel ourselves for the first time.

The approach there was that documents were listed, that questions could be asked about the documents. They were provided in summary form and they were also provided in a redacted summarised form. And then we were able to ask questions, clarifying questions, and it was an iterative process. That was very helpful and informative to that process.

Also, I was involved with the employment case mentioned in the Law Commission Report about the review in terms of how to handle national security information with Dr Harrison as well. My name was left off that judgment, I am not sure why, but we were also there considering matters of how do we deal with classified information in other proceedings.

Also, a recent case involving the holding of a passport by the Ministry of Internal Affairs under the Passports Act. There's relatively new provisions there about how to deal with classified information and a special advocate procedure there.

And over the course of the past 15 years, I have been in contact and watching special advocate processes and

proceedings and in contact with colleagues in Canada and in the United Kingdom and I was privileged when I was working in Geneva to work very closely as a non-Governmental organisation with the Office of the High Commission of Human Rights where counter-terrorism spent quite a lot of time on how does this system deal with classified information. So, I was a part of international round tables about this, as well as the Law Commission Report.

And, finally, I was involved in a very lengthy matter that concluded a few years ago, it spanned many, many years involving confidential information to do with the foreign Government seeking extradition of a national here. And that, I was just refreshing my memory, the initial file I received was 75,000 pages approximately and the overall file was about 150,000 documents from NZ Police, MFAT and other agencies. And we had to spend a lot of time trying to prepare lists, trying to understand what was in the lists, categories, prioritisation and so on.

So, I mention that to indicate to the Inquiry that my approach is very much informed by these experiences and, in my submission, what really assists these cases, these complex cases involving sensitive information, classified information, information that's sensitive to a foreign Government, having a very practical approach is important. The devil is often in the detail, and so I think we can get lost perhaps by arguing things in the abstract too much instead of just rolling up our sleeves and start to get on with the work as Counsel Assisting is suggesting is often a very good way to start sorting out these issues.

I have also been in contact with senior counsel in Northern Ireland on the INQUEST cases that they hold there. Article 2 cases, right until after investigations, are a very big feature in Northern Ireland because of their history and, if you like, military deaths and police deaths. And so, cases

involving national security information is quite a strong, I don't want to say a cottage industry but quite a strong area of law in Northern Ireland, so I've been reaching out to colleagues there as well.

In terms of this morning, I would like to start with issues of discovery and I have been speaking with my friend, Mr Radich, overnight and this morning and I will come to that in a moment.

I also would like to just touch on a contextual matter for this Inquiry regarding the High Court litigation that the villagers brought, I think that is helpful for the members to be aware of that as we say that can inform an understanding of the Terms of Reference.

And I would also like to deal with a matter that was raised in our submissions regarding an approach we want to take regarding the information from the United States Defence Department regarding proceedings there.

I propose to focus on the list of orders or directions sought at the end of the submissions and to work backwards from there because my hope is that we will walk away at the end of these two days with, if you like, a programme of work or a roadmap of the way forward certainly over the next few months, if not longer.

My very strong submission is this is a process that has to be, if you like, closely case managed, closely timetabled, because we have a lot of work to do and I will come to the issue of the one year timeframe because I have a submission to make on that as well.

In terms of where to get started, in my submission, and I refer to this in my memorandum regarding the role of Mr Ben Keith. I have provided a memo to the Inquiry. I see that that's actually not online. It's now online? Okay, very good.

SIR TERENCE: Is this the memorandum dated 8 November, is

that the one?

MS MANNING: I will just have a look. That sounds like the right date, Sir.

And so, the reason for sending in this memorandum was I hoped to try and just get a sense of time scale and volume of material because, from the core participants' perspective, I am conscious we often feel like we're all the way up in Auckland, a number of us, we don't have visibility of what's going on, if you like. I'm sure there is a beehive going on in the Inquiry's office. I am sure there's a lot of work going on and a lot of things happening but, in my submission, it's not particularly visible or transparent what is occurring and that is something that, with respect, I would like to have addressed, in terms of moving forward, to have a better understanding of volume and scale of material and that is why prior to this hearing I wrote to my friends, Mr Martin and Mr Radich.

Mr Radich very helpfully responded to that in terms of volume and scale of NZDF material and that's why I suggest I would like him to address the Inquiry on that, with your leave. He's set it out in a memorandum that's been provided, in terms of what is the estimated number of documents that NZDF has at the moment relevant to this Inquiry because previously it had been estimated at 2,000 documents but now it's far greater.

So, I'm in your hands, Sirs, if you would like me to take you through the NZDF material or if you would prefer Mr Radich to deal with that? It will only take a minute or so. I have spoken to Mr Radich about this, he is happy to do that.

SIR TERENCE: I think it's better if you go ahead and say what you've got to say.

MS MANNING: Happy to do so.

SIR TERENCE: When Mr Radich is ready, he can address it.

MS MANNING: Thank you for that. Mr Radich, please feel

free to jump in if I've mucked up any of the matters on this.

My understanding from information provided from Mr Radich for the New Zealand Defence Force overnight, and it's outlined in his submissions which he will get to later, is that there is currently 17,400 items that have been identified as relevant to this Inquiry.

To date, NZDF have examined and catalogued 1,600 of those and 324 of those have been provided to the Inquiry. So, my understanding of that data is that to date the Inquiry has received just under 2% of relevant information identified by NZDF, and NZDF themselves have catalogued and examined about 9% of that material.

Comparing that to the MFAT advice via memorandum earlier, in I believe August or July, that is quite a difference in number. Just looking at the memorandum of 18 July 2018 filed with the Inquiry at paragraph 12, at paragraph 12 of that memo NZDF estimated there were over 2,000 items of classified material and, bearing in mind at that time volumes of unclassified material had been filed with the Inquiry, basically two Eastlight folders, I would estimate 1,000 pages there. As at the 18th of July, my understanding was that we were waiting on NZDF, if you like, to process or deal with 2,000 documents of classified information. That was the scale of the data. Now it seems it's far greater by a factor of eight and we're 17,000 items.

May I inquire, is this information known to the Inquiry? It's new information for myself.

MS McDONALD: I wonder if it might be helpful, I wasn't aware, Ms Manning hasn't discussed these issues with Counsel Assisting. It would be helpful perhaps if we had the opportunity to discuss this with her over the break and that might clarify matters?

SIR TERENCE: Yes, that probably would be useful. There is

no point in us getting into a question and answer session about something of that sort, the number of documents and all the rest of it. That is an issue that can be discussed between counsel, it seems to me.

MS MANNING: Sir, I appreciate that we can certainly discuss that with counsel but I am not sure that's going to take us very much further forward on the issue. My understanding, from speaking with Mr Radich, is that something I've been trying to ascertain is timeframes for lists to be prepared, best estimates of timeframes, how long things are going to take to be prepared and provided to the Inquiry. My understanding from my friend, is that the approach of the Defence Force is going to be dependent upon the approach taken by the Inquiry and decisions being made by the Inquiry. So, I'm not sure how a counsel discussion, by all means we can have that but, in my submission, this needs to come back squarely in front of the Inquiry to be considered because this Inquiry is dependent upon the relevant information being provided by NZDF.

As Ms McDonald's submissions refer, many matters should just perhaps best be left until - not left but will be best determined once the Inquiry is in possession of the relevant material. By the current rate of progress from NZDF, that seems that will be many years away potentially.

SIR TERENCE: Certainly, the number of documents and the speed with which they're provided is something that the Inquiry has an obvious interest in and we can inquire of Mr Radich in the course of his submissions as to where he's got to but you have two hours really to say what you want to say in support of your submissions about the two issues; the treatment of classified material and the procedure. And, of course, the scope

of the discovery is relevant to that but the argument really is one of principle and, to some degree, as you say, what is pragmatic, and those issues can be addressed. But we will take that up with Mr Radich when he makes his submissions.

MS MANNING: Thank you, Sir.

SIR GEOFFREY: I wonder if you realise that under section 22 of the Inquiries Act, that we can't make orders for general discovery?

MS MANNING: Yes, Sir, yes, I am aware of that, thank you, Sir.

With respect to best use of my time, I do consider this issue, in terms of the timetabling of these issues, is imperative and we are seeking clear directions from the Inquiry as to timetabling. We consider that this is not a matter that is to be left, with respect, for the Inquiry and the NZDF to sort out bilaterally because the provision of this information and transparency into the type of information, the metadata even, is directly relevant to the issues that we're trying to discuss because matters of, for example, closed material procedures, the approach is to look at what is the Inquiry lawfully entitled to do, and we have submissions about that.

And if we were to be wrong on what the Inquiry is lawfully empowered to do because we say closed material procedures, with respect, are not available to this Inquiry under the Inquiries Act. And even if we are wrong on that, there's still a separate question as to what should the Inquiry do. And it's very hard to have those discussions just in the abstract.

With respect, I am at a total loss to understand what is happening in this process with the provision of material to the Inquiry by the New Zealand Defence Force. It's not a case of things being off the rails but it seems as though

this process of material from the NZDF, with respect, is not on any rails. For that reason, I respectfully do request that the Inquiry, that we spend time over the next few days asking searching questions of NZDF and counsel, having discussions, we've got rooms that we can speak in, to talk about the categories of information, to try and find out their approach. That happens in the course of litigation to try and get some understanding of visibility and rationality into what is going on. It may be of these 17,000 documents, many of them is just email traffic so there's lots of duplication that comes down but we don't have that visibility.

I will just be urging the Inquiry to be asking the NZDF to be using this time that we're all here together, for counsel to be working together with an aim to have some clear timetabling directions by the end of this hearing process.

SIR TERENCE: All right, we understand the submission, thank you.

MS MANNING: Thank you, Sir. I see I have 10 minutes until the adjournment and I will use that adjournment to speak to my friend regarding the discovery matters and perhaps Counsel Assisting and so on.

We are also seeking, by way of clear directions or orders from this Inquiry, that this Inquiry is, a primary purpose or function is to satisfy New Zealand's investigative obligations under the right to life. We say that that issue needs to be squarely looked at and ruled upon before moving forward, in terms of deciding procedural matters.

And the reason for this submission, is that natural justice rights and other procedural rights flow from a right to life investigation. Particularly rights for the next of kin, in terms of participation, around in terms of requirements of transparency and open justice, and also in terms of outcomes from the Inquiry in terms of factual findings of responsibility in terms of whether or not deaths

were lawfully justified, and also in terms of approach.

So, the Courts have been very active in this area. Of course you are aware of this. So, they have been dealing with many cases, including military deaths and police deaths. And the leading case of *Jordan* involved the shooting of someone suspected to be an IRA soldier and there had been an inquest in Northern Ireland which was found to be inadequate. And one of the key points why it was considered to be inadequate, which has really stuck in my mind in terms of approaching this Inquiry and questions, was because there was a practising law in Ireland that police officers who were involved in a shooting to not appear at the inquest. There would be a statement that had been collected that would be available but they were not called to the right to life, if you like.

So, in our submission, the *Jordan* decision identifies the fact that the person directly responsible for the death must be identified and made available for the investigation or for the Inquiry. In my submission, this Inquiry should be as a key starting point, be starting with the deaths of the six Afghan nationals in the villages and that we should be prioritising this issue and that the Inquiry should be calling, as a priority, for information regarding the responsibility for or the factual matrix for each of those six deaths as a priority.

The best we know from the material we've been provided about these operations is the *Hit & Run* book and the most recent narrative from the NZDF. I am just going to find it too confusing to look at the various iterations of the NZDF statements about what has happened. So, it has been helpful for the Inquiry to ask for one account that we can refer to. It may be that the other accounts are going to be useful for some aspects of material reference but, for the purpose of the factual inquiries, it is helpful to have this one document. Although there are a number of matters in this

document that are unclear or vague and it would be helpful to know or to consider whether or not some clarification could be sought on these matters as we go.

I am minded of the approach in the Waitangi Tribunal which is setup as a rolling Royal Commission of Inquiry, as I understand. They have two key documents in their Inquiry process. The first is a list of issues and the second is a list of acknowledgments, as I understand. And so, that could be something worth considering, if we want to have a list of acknowledgments, in terms of what is agreed or acknowledged did occur because at the moment we are very far apart in terms of the issues that my clients wish this Inquiry to consider, which is the deaths of what they say to be six civilians or six individuals, and it's hard to marry that with the NZDF narrative which, from my account, there are nine deaths in that narrative, allegedly insurgents, and it would be helpful to know perhaps by way of an acknowledgment process whether it is known because it may be that it is not known. That would be helpful to know what we don't know, of those six deaths that we say occurred, how do they match across to the nine that the NZDF say they understood occurred; does that make sense?

SIR TERENCE: I understand the point, yes.

MS MANNING: Thank you. In terms of the right to life investigation, that is the reason we are asking for a ruling on this because we consider, with respect, that unless this is squarely confronted and dealt with, there is insufficient clarity of the legal basis on which this Inquiry is proceeding.

SIR TERENCE: At the end of the day we're required to meet the Terms of Reference that we have been provided with. They don't refer to this Inquiry in terms of an investigative obligation in terms of the right to life. Would we have the jurisdiction to declare that it was?

Isn't that really a matter for the Government, rather than us?

I suppose the next issue then is, if we go about the Inquiry in an appropriate way, it may well meet the requirements. Ultimately, that's not really a matter for us. We've got Terms of Reference and we're obliged to meet them.

MS MANNING: Thank you, Sir. In response to that point and perhaps I should have started with that point because the Terms of Reference is our touchstone document in this room. My submission is paragraph 5 clearly gets us there.

SIR TERENCE: That is the matter of public importance of the Inquiry, is that the paragraph?

MS MANNING: Paragraph 5 straight under the purpose of the Inquiry. Yes, the matter of public importance, yes:

"... in which the Inquiry is directed to examine the allegations of wrongdoing by NZDF".

And it goes on to say in the last sentence:

"Operation Burnham took place during a non-international armed conflict and the applicable legal framework, including international humanitarian law, will be considered".

And so, we say the applicable legal framework is the right to life.

SIR GEOFFREY: Ms Manning, the question of how you characterise this is one thing but it seems to me very clear that we are entitled to look at the issue in international humanitarian law.

Let me just read to you from the Handbook of International Humanitarian Law, third edition, Oxford University, press 2013 at page 1. This is what it says:

"The use of Armed Forces prohibited under article 2.4 of the UN Charter, States may resort to armed force

only in the exercise of individual or collective self-defence. Article 51 of the UN Charter is authorised by the Security Council".

Articles 39-42:

"International humanitarian law applies with equal force to all parties in an armed conflict, irrespective of which party was responsible for starting the conflict and IHL comprises the whole of the established law governing the conduct of armed conflict."

And one of the essential features of armed conflict law is you can't kill civilians.

Surely we get to the same point?

MS MANNING: Thank you, Sir. This is not a case of choosing IHL, International Humanitarian Law, or IHRL, International Human Rights Law. It is not a choice.

And yes, we do get to considerations of the rights of civilians, the obligations upon States to civilians, if they're injured, for example, protocol 2 deals with this. I have no difficulty with that but that doesn't exclude the right to life consideration.

SIR GEOFFREY: International Humanitarian Law is informed by the Universal Declaration of Human Rights and they all contain that, and this seems to me an expression of it?

MS MANNING: What we say is that the right to life applies to this Inquiry, to the events of Operation Burnham, and that there is an obligation upon the New Zealand State to effect their obligations under the right to life and that the right to life provides substantive rights to the next of kin, frankly. And they serve to inform the Inquiry when exercising your discretion for decisions, for example under section 14 regarding natural justice and making decisions regarding the

provision of material and so on.

And so, we say that, first of all, the right to life obligation exists in this matter, that we get to it through paragraph 5.

SIR GEOFFREY: Does that flow from international law or domestic law?

MS MANNING: You are one step ahead of me. I was about to say we have got also NZ Bill of Rights which also gets us there, in my submission, on this argument.

SIR TERENCE: Is this a convenient moment?

MS MANNING: Yes.

SIR TERENCE: We will take a 15 Minute adjournment. There's no need to stand, we will just walk out.

Hearing adjourned from 11.32 a.m. until 11.48 a.m.

MS MANNING: Mr Arnold, I didn't address the point that you made before I started regarding the Inspector-General Inquiry. That had also been on my mind and I was checking the Inspector General's Act just yesterday about this and I did see a provision for private hearings and it has been something I have been thinking over. I am not sure I have any particularly clear answers on that but I will make a comment on that when I come to discussing closed material.

SIR GEOFFREY: Ms Manning, could you approach the microphone a bit more closely? It is a bit difficult to hear up here.

MS MANNING: I am sorry, is that a bit better?

SIR GEOFFREY: Yes.

MS MANNING: In terms of the Inspector-General Inquiry, yes, that is something I have been giving some thought to

and I will make a comment on that when I talk about the closed material procedures but I am not sure I will have any firm answers on the issue.

SIR GEOFFREY: Thank you.

SIR TERENCE: Thank you.

MS MANNING: We were talking about right to life before the break. There was some discussion during the break between counsel about these disclosure matters and I will come to that in a moment but I will just cover off this right to life issue.

Looking at the submissions filed on the 19th of November, it might be helpful if I speak to those. In terms of these submissions, the right to life section starts at page 3, paragraph 5. I am just going to speak to these submissions.

SIR TERENCE: Yes, okay, thank you.

MS MANNING: I would just like to make a note as to paragraph 7, there's a small but important typo which is in the first line, "It is submitted that the primary purpose of this Inquiry", it should be "a primary purpose".

The submissions set out the inter-relationship between IHL law and human rights law and customary law. I don't propose to go any further on that, other than to just observe that the law of armed conflict is a developing area, particularly the law relating to non-international armed conflict.

The nature of warfare, and we know it is changing through the 20th Century and now into the 21st Century and we are having to grapple with the legal issues that arise, the nature of warfare arises particularly in non-international conflict and how it affects civilians. Because previously conflicts were far away from a town or far away from a village but now the nature of conflict is much more complicated and complex, so the law is having to deal with these issues and the

different areas of law, I think it's fair to say the consensus is we shouldn't be setting up the areas of law, humanitarian law and human rights law and customary law, as against each other or mutually exclusive but they're overlapping and it is a protective framework, in terms of a human rights approach, particularly for the rights of civilians.

And we say where we left off, we say paragraph 5 of the Terms of Reference gets us into the right to life area, along with the Bill of Rights.

I had indicated I just wanted to touch on the High Court litigation that was filed by the villagers prior to this Inquiry. I won't spend long. I am not sure if the Inquiry is aware of this material and certainly the pleadings in the material can be filed with the Inquiry. I am happy to do that if that's helpful.

SIR TERENCE: I think we've got the Statement of Claim, some material. I don't think we've got many affidavits that were filed.

MS MANNING: Certainly, thank you for that indication.

In essence, the purpose of the litigation was the villagers wanted to have an Inquiry into what happened to them to simplify it, and relied upon right to life arguments under the Bill of Rights and under ICCPR. And that litigation started in the middle of last year, in 2017, and was discontinued this year after the Attorney-General announced this Inquiry.

I wish to make this point, and I've raised it with my friend, the Deputy Solicitor-General, Mr Martin, that I would be raising this point with the Inquiry. It is accepted at the outset that the Inquiry is subject to the Terms of Reference and to the Inquiries Act, that's accepted, but I do think it is helpful to provide some context as to the immediate preceding events before the Inquiry was announced and after it was announced, which is that the High Court

proceedings were discontinued. And they were discontinued by way of a Joint Memorandum of Counsel drafted by Crown Law, advising the High Court, Mallon J, that the parties agree the Inquiry's establishment means there would be no practical utility in continuing to litigate the substance of the dispute between them.

And so, according to our Statement of Claim, the substance of the dispute was that the villagers wanted an Inquiry that satisfied New Zealand's right to life obligations and it was our understanding that this Inquiry was going to satisfy those obligations. That was the subject of our letters to the Attorney-General before he announced the Inquiry, suggesting Terms of Reference, that correspondence has been provided to the Inquiry.

I was just reflecting on this preparing for this hearing because something didn't sit quite right in my mind about the Crown saying that this Inquiry is not the right time for a right to life investigation or that it's for the Crown to decide and perhaps at the end we might find out that we ended up having a right to life investigation. In my submission, that is not a principled approach to this obligation. The New Zealand State has an obligation to promptly have a right to life investigation, that it should not be at the request and pleading of the victims or the next of kin, that it should be State initiated and, importantly, it should be prompt.

Now, here we are 10 years later after the events of Operation Burnham, perhaps we can say better late than never, but we say that this should be the fora to have this right to life investigation and that was the understanding that we were working on when the High Court proceedings were discontinued. Now, I appreciate that that is not a matter that this Inquiry can rule on but we did indicate in the submissions at paragraph 16 that our request for a ruling from the Inquiry on this matter is squarely sought by us and the

decisions this Inquiry makes may inform decisions about what to do with that litigation because my clients are very clear that they want their right to life investigation with the attendant natural justice rights and considerations that must be followed, not could be followed if feasible or if possible but must be followed as of right. And that's really the concern because while it is understood this Inquiry has a lot to do and may have timeframes imposed by the Minister responsible and so on, in my submission, those considerations need to be informed by the right to life obligation and even in some circumstances may need to bow to some of those considerations. And unless we have that security, we will forever feel like we are on the back foot and that is not satisfactory in terms of my clients trying to obtain natural justice in this Inquiry, with all due respect to the Inquiry, and it is not satisfactory also to be told, well don't worry, if it all goes well we might be able to tick all the boxes to satisfy the right to life investigation obligation.

We say a principled approach to this is that the New Zealand State must own up now promptly to its obligations for a right to life investigation and this is the appropriate vehicle to do so.

SIR TERENCE: So, you would say that New Zealand is already in breach of its obligation because it's not prompt?

MS MANNING: Yes, I would say that, Sir.

SIR TERENCE: And implicit in this, is that any other Inquiry undertaking, the ISAF and so on, doesn't reach its obligation?

MS MANNING: Yes, Sir, for a key reason of lack of transparency and involvement of the next of kin. ISAF has had no contact with my clients. In fact, something that's common after this operation is pieces of paper scattered with the equivalent of an 0800 number to telephone, this will be in my clients' evidence, they

tried to telephone that number the next day but no-one answered.

Turning back to the submissions, this is at paragraph 17. This leads into the point about, if you like, the differing considerations between the core participants. I have referred to the fact that I am resisting calling them competing considerations in a sense because I don't think we should have a framework where we consider the actions of the Defence Force with right to life and natural justice considerations to be in competition with each other. I think that we should be, as an Inquiry, seeing how the latter informs the former in terms of approach. They shouldn't be seen to be competing.

I am also aware of the Law Commission Report into the purpose of inquiries, rather than civil litigation, because of course my clients could have filed proceedings, civil proceedings, for damages or breach of Bill of Rights and so on but the track that we're down and that they pursued with the litigation, is because of the hope that we could have, if you like, a fair collecting of all of the relevant information to be able to see what had happened and then decisions can be made from there about where do we go next. As we know, the Inquiry doesn't make findings of liability. It's just looking at the facts. It was considered that that was the proper course for the subject matter.

SIR GEOFFREY: How do you say this relates to the Law Commission Report on the Inquiries Act?

MS MANNING: The Law Commission Report at page 37 talks about features of inquiries and policy aspects, if you like, of inquiries. This is at page 37. This is in the Crown bundle under tab 5.

SIR GEOFFREY: I've got it.

MS MANNING: At page 37, we've got a number of factors set out there. I believe there are seven. This has been

adopted in that very helpful inquiries secondary text that the Inquiry referred to, it is almost duplicated actually, I am not sure who was looking at whose work first.

It talks about the purpose of Inquiry is to establish facts, so learning from events, but also we've got this therapeutic exposure of providing an opportunity for reconciliation and resolution by bringing protagonists face-to-face with each other's perspectives and problems.

So, rather than being defensive, shutting down, feeling accused, it's saying, well, actually what happened? And from my clients' point of view, they're saying, well, six of our family were killed, 15 were injured, please tell us what happened, please tell us which helicopter fired, please tell us which - confirm that an SAS sniper killed these two, please confirm that actually happened because we know it happened but it hasn't been acknowledged. And help us understand why this happened. And you say that we are insurgents perhaps, why is it that you think that because this is what we have to say about that. That would be a best possible outcome from this Inquiry.

SIR GEOFFREY: The difficulty that I have, Ms Manning, with your submission in relation to the Law Commission Report, which I had a fairly close involvement with, is that if you read the summary of that report at paragraph 4 it says:

"In addition, Royal Commissions and Commissions of Inquiry are costly. They tend to adopt legalistic procedures and have become constrained by the culture that is developed around them. As a result, the 1908 Act is used infrequently. Changes in both law and culture are required to enable inquiries to be as effective and efficient as possible so that their use is not deterred".

So, the recommendation was to replace that 1908 Act, so the new Act, it says at paragraph 6 on page 13:

"... should maximise flexibility and free inquiries from the procedural constraints and traditions that have dogged Commissions".

Now, those recommendations were accepted and enacted. The difficulty I see, is that your submission lacks nothing in industry, it shows a lot of research skill and I want to commend you on it, but the English cases that you call in support of it are actually not under our Act and the UK Act is different. And, in particular, the UK Act has rules under it which say that there can't be cross-examination unless the Chair authorises questioning by counsel.

So, you know, what would have helped us more, if I can say this, is precisely how you think we should proceed under an Act that gives us enormous flexibility as to the procedure that should be used.

I accept absolutely what you say about natural justice but there are many ways of satisfying natural justice. One of the difficulties - the policy difficulty that the Law Commission was addressing, was the fact that these inquiries took forever and cost an enormous amount of money. Now, this is only a Government Inquiry, it is not the top shelf. I mean, we have got to have a procedure here that will actually work and be efficient. I'm struggling to see how we can achieve that in the way that you are suggesting.

MS MANNING: Thank you for those comments, Sir. I absolutely echo the need for efficiency and that we don't want to be here for the next number of years. It's for that precise reason I have been taking the approach of trying to be pragmatic and to move things along to try and bring some practicality to this process. With all due respect, please don't lay the blame at the door of the villagers for delay in this

process in any way. We have been urging this Inquiry from our first memo to have timetabled directions for matters.

SIR GEOFFREY: How do you do timetabling orders in an Inquiry when it's an iterative process? This is not a Court proceeding.

MS MANNING: Thank you, Sir. I believe timetabling would assist by, for example, as an example, MFAT, counsel for MFAT and NZDF in their Memorandum of August said, I don't know what is not in publication, but they've had meetings with one international partner regarding the classified information and for the other that they hadn't had an opportunity. Now, there were two key international partners with information that is critical to this Inquiry. Four months in, with full knowledge that we would have to be engaging with both of those international partners -

MR MARTIN: Sorry to interrupt but I am wondering how much this is going into matters that are needing to be put on the public record at this stage?

SIR TERENCE: Thank you, Mr Martin. We do understand the point. What you're saying is that you feel matters have been drawn out and that is not your responsibility but the responsibility of others?

MS MANNING: Thank you, Sir.

SIR TERENCE: I think Sir Geoffrey's point though which he was asking wasn't really talking about what's happened in the past, it's really talking about going forward and the sort of process that we should adopt going forward.

And the fundamental point is that this is not a piece of litigation, it is an Inquiry. We are the fact finders and the investigators. That is our core job. We are trying to work out a mechanism that will enable us best to do that job

but we acknowledge immediately that your clients have a real interest in that and working out a means by which they can participate in a meaningful way is obviously important but it must be done in a way that enables us to move on and get to a solution.

Because, as you well know, the English Inquiries have gone on for a very long time and we're not going to be in that position.

MS MANNING: Thank you, Sirs. Just picking up on that point, yes, I quite agree, we do not want to be in the timeframes of the UK Inquiries and we urge this Inquiry to be thinking about the timeframe of the UK Inquests where the Coroners seem to have a very strong hold on these proceedings, very strict timetables on the sector State etc., and a very clear expectation of counsel to work together very closely and very effectively.

I do have to say that I have spent some time reading transcripts of these Coroner Inquest hearings over the past fortnight because I wanted to see how, in practice, the UK were dealing with these difficult issues. And it's clear, Lady Hallett in the UK London Bombings case, I don't want to lose time but she talked about, she thanks everybody in that Inquiry, how it was an open Inquiry and she acknowledges the burden that she placed on counsel to make it so. And, in my very respectful submission, there needs to be a change with however the Crown is managing its provision of information to the Inquiry, a drastic and dramatic change, because, with all due respect, it's just not good enough.

The Crown has been on notice at least since the High Court proceedings last year, nearly 18 months ago, that discovery and lists were an issue and we were asking for lists and discovery. This was not made known to the Defence Force for the first time when this Inquiry was established. They

knew at least one year before. It's been now many months down the track and we're 2% into the process. My brother is a tradesman and whenever things go wrong in a house, you know, you start to build, there's a big problem, there is a response that tradesmen say to any major problem, "anything can be fixed with time or money". So, if you want less time, it's more money; if you want less money, it's more time.

So, I don't know what the answer is to NZDF to fix whatever it is that's taking so long in their provision of material or cataloguing of material or going through their databases but I know in litigation that I have been involved in, that the Bench, Tribunal members, I've been involved in inquisitorial proceedings, they have said, "That is not my problem, Ms Manning, we have a timetable, make it happen", and I've had to collect teams of 20 law students working pro bono to go through things and make it happen. I had to increase my staff. Maybe that's an option, I don't know, but it is not the problem of this Inquiry that information is trickling through, with all due respect.

I know my friend will take you through the best efforts that are being made chapter and verse but, at the end of the day, we need to look at what is being achieved here. And my very real concern is that this information, this Inquiry is about factual information. That information is in the possession of not just NZDF but of overseas partners that we are trying to solicit co-operation from.

My experience in other proceedings is the nature of the requests New Zealand officials make to those overseas partners very much inform their responsiveness and what they do. And, with all due respect, my submission, based on experience, is this Inquiry needs visibility into the requests that are being made to those international partners. And, in fact, if we're not seeing rapid progress that's timetabled, for example a timetable could be made by

mid-December we need a response from these two overseas partners about whatever the certain matters are, in my experience of reading cases for many years, is diplomats will say we need a response by X date and then it moves up people's priority lists.

SIR GEOFFREY: The difficulty with that, Ms Manning, seems to me to be that if the Inquiry presses in the way that you suggest, it could easily not get the information that it requires and that could be closed down. Now, that's not something that we are wanting to bring about. This has to be approached with some understanding of Governmental processes and international diplomatic processes.

MS MANNING: Sir, I do understand that. I am factoring that into account also with these submissions.

In terms of the worry, the legitimate worry of international relations, it is accepted international relations are relevant to considerations of disclosure and so on. However, those worries do need to have a rational basis, otherwise New Zealand is at the mercy of irrationality.

The Glazebrook quote in the *Zaoui*, I would, if I may, like to go to that. It is not in the casebook unfortunately but it's set out, I am happy to just read the quote in my memo of 10 August 2018 at paragraph 33 where Her Honour states:

"It is not enough that a foreign Government or agency refuses consent to disclosure. Disclosure must also prejudice the entrusting of the information to the Government of New Zealand or meet one of the other criteria. In that regard, absent evidence to the contrary, it would have to be assumed that the foreign Government or agencies were acting reasonably. Therefore, if the information is of a type, for example, that those governments or agencies would be required to disclose" (in this case to Mr Zaoui) "in a similar judicial or quasi-judicial process in their own jurisdiction then one

would have thought disclosure in similar circumstances here would prejudice future information flows."

So, the point being, those foreign agencies would be required to provide that information in their own jurisdiction or elsewhere. It is not a rational basis for them to say we don't want to give it to you, New Zealand, because that would be an irrational basis. It is for that reason, and informed by practice, we are looking at utilising the US judicial system in this matter, which I refer to in my submissions, at paragraph 37 of my submissions.

SIR GEOFFREY: Yes, I saw that.

MS MANNING: My thinking in that approach, is that it is understood if the executive is communicating with the executive or on a diplomatic level, that there are pressures and considerations and all sorts of things that we may never get to be privy to. And so, I prefer to try and have a rational basis and see, well, what does the other arm of one of these foreign partners have to say about this, informed by the Glazebrook approach?

I am pleased to say the timeframes that I have been informed by counsel in the US are between two to four months to having some kind of response by way of a sworn list of documents that have been provided or withheld by the US Defence Force.

SIR GEOFFREY: The real point seems to me to be here that the Government's protective security arrangements, which I hope you will address us on, are something that is there. Now, if this Inquiry takes steps that cause difficulty in that regard, there will be consequences for this Inquiry about not getting information. That's the point I'm trying to get to you. That would be really unfortunate for the Inquiry. And so, blowing up the Government's protective security arrangements is not necessarily a very sound idea.

MS MANNING: Sir, I'm not suggesting that for a moment but I would have two comments to make to that.

The first is, I think it's helpful for us, my submission is we should not be having a binary way of looking at issues. Either we leave it all to counsel for MFAT and the NZDF or we blow international relations. There is a middle cause which could be saying to my friends, please report back at this next case conference about your enquiries because I know from experience, many years of experience, that cables will be sent out to say we have this case conference, we need a response, so we can at least have updates, so we can at least know action is happening, so we're not subject to being told that there have been no opportunity to consult with an agency which has happened which, in my respectful submission, falls well below the standard that should be expected when we have a clock ticking on this Inquiry.

SIR GEOFFREY: This is not a case. It is an investigation.

MS MANNING: That is understood, Sir, but we still need to have - we all need to work together in some way, shape or form. My submission is having a roadmap and we have stages so we know what stage are we in, what's happening at the next stage, checking in, what's happened, where are we at, then the next stage, what would be far more practically efficient than what we have at the moment.

For example, my friend is preparing a list of the classified documents. They said in their last memorandum that they are happy to do that and I am thankful for that. That could be timetabled.

MR MARTIN: Sir, would it be of assistance at some point soon if I gave a very short update on the communications that have been occurring with the parties?

SIR TERENCE: Yes, I was about to make the observation that in relation to some of the material that you're concerned about, we are in fact almost in the position

or perhaps in a position to say what has happened. So, maybe I'll ask Mr Martin to indicate what he can and that may enable you to move on.

MS MANNING: Thank you, Sir.

MR MARTIN: Sir, as noted in the Crown submissions of the 5th of October, the Ministry of Foreign Affairs and Trade have been in ongoing discussions with international partners to seek their agreement for the production of relevant partly controlled material to the Inquiry.

I will deal first with the US. We have had constructive discussions with the US Government about facilitating the Inquiry with access to relevant US originated material held by NZDF. The Ministry of Foreign Affairs and Trade received advice the US Government has no objections to New Zealand facilitating access for the Inquiry to US originated material relevant to the Inquiry. The position of the US Government in this regard takes account of the Inquiry's advice regarding its treatment of classified information. NZDF and MFAT will engage with the Inquiry separately about the logistical arrangements required to facilitate access.

And secondly, dealing with NATO, MFAT through the New Zealand Embassy in Brussels continue to engage with NATO to secure access for the Inquiry to NATO originated material. MFAT will continue to provide the Inquiry with updates on its engagement with NATO.

SIR TERENCE: Thank you.

MS MANNING: Thank you. I was just responding to Mr Palmer's comment about the appropriate way for this Inquiry to deal with material. I am not proposing that we put on adverse pressure and cause disruptions and so on. So, perhaps in that way, counsel for the villagers will be assisting this Inquiry because we can do that. We are permitted to take litigation and to

utilise the mechanisms set up in the US legal system to obtain information under the Freedom of Information Act. There is definitely a flourishing industry there regarding disclosure issues of military documentation in criminal trials and under the Freedom of Information Act.

So, it is with that in mind, from being advised that it was not fruitless, I am sorry I am perhaps not speaking clearly, from being advised it was not a fruitless excursion, that it may very well be fruitful for us to obtain information from the US Defence Force under the Freedom of Information Act litigation procedures, we have decided to take that course of action in order to be of assistance to this Inquiry. We can do that and we advise you that's what we're proposing to do, so you are aware that's what we're trying to do.

With regards to the advice and co-operation from others, one observation that I would make about that, is that we have been referred at points to, I believe, NATO having established processes for sharing information. I'm summarising. It would be very helpful to have access to those established processes because I'm sure New Zealand, we're not the first country that has been requesting information to be used in an Inquiry or in judicial processes and it would be very helpful just to be able to have full confidence, public confidence, transparency, if, in the course of those discussions or I don't know if they're negotiations, I don't know what's going on, if the decision-making that NATO or the US are making decisions based upon a rational basis, that that is also provided, that would be very helpful.

For example, if there was some kind of disclosure manual for governments involved in Inquiries, there may very well be some kind of protocol, for that to be provided to us, so

we can have confidence that we are getting full information and that we're being treated on parity with other nations.

SIR GEOFFREY: I am sorry, is that submission directed to the fact that New Zealand may not be being properly treated in these regards?

MS MANNING: International law, as I have learnt from you, is on the cusp of law and politics, international politics. And NATO is a state run agency and it is just starting to grapple with how does it publically face with its material and documentation. I have not been involved in NATO cases before. I have had the benefit of speaking with an academic in the UK who does work on NATO matters, who had worked in NATO. And so, there is more transparency being attempted by NATO about its processes which, in my submission, is a good thing.

And so, the direct answer to your question is, I don't know but I think that we should endeavour to know and to be really asking of the Crown when they are engaging with foreign partners to explain this is an Inquiry that was set up in order to assist and maintain public confidence in our Defence Forces. The Defence Forces are aware these are issues affecting its reputation and its conduct. So, we need to, in my submission, be ensuring the Crown is making every endeavour to get out every bit of information about the processes, so we can have confidence that we are getting all of the information and the basis on which it's being provided.

With respect, I do have a bit of concern that there seems to have been a bit of a to and fro. It's not quite clear to me from Mr Martin's advice but the to and fro that I was observing in the memorandum, was the Inquiry wants information from these partners, these partners want to understand the confidentiality arrangements and so they wanted to know what our confidentiality arrangements were before they provided the material. That's one way to do it.

Another way to do it is to say, well, what confidentiality requirements do you need because, otherwise, it's a bit of a game of poker. I am not quite sure on the analogy but it's like they may need this much, we don't know that, so then we overstate it and say we're going to give you this much in terms of the confidentiality needs. Do you see?

SIR GEOFFREY: But there are two elements to what you've just said. The first element relates to our foreign relations and securing information from other countries or other international organisations in this case. And the second is the Government's own protective security arrangements.

They do intersect, I think, but the difficulty is that how you go about getting the information is what we're all about here and that is not easy in this set of circumstances.

MS MANNING: That's understood. I see things often in terms of a scale and a sliding scale. In my submission, we're too far down this end of the scale. There is not enough transparency in the process. We've got two ends of a scale and it seems to me that we are suffering from binary approaches to a number of these issues.

I am about to move to this, I believe, regarding the issue of closed hearings and dealing with classified information. We're sort of given warnings that if the information is not closed, then harm could ensue in terms of our foreign relations, in terms of loss of intelligence information, in terms of safety and so on, if this information is in public hearings.

I will come back to this but I just want to make the point. The choice, in my submission, is not just between closed or public, it is somewhere in the middle.

And in terms of answering, Mr Arnold, your question about how do we move forward, my primary submission is we move forward by counsel working more proactively together and by

having the option for in-camera proceedings and for the Crown to get on with public interest immunity applications. It's accepted that public interest immunity is a duty. There is an obligation on the party if they have a document subject to public interest immunity to, in effect, alert to that and to have that dealt with. It's not a choice situation.

My submission is that if the Crown says that they have documents that are subject to public interest immunity, and my understanding from their memorandum of August is that they have identified possibly 50 documents in that category, they need to get on and start making those applications to this Inquiry. Those are some practical ways of moving this forward.

Just back to my submissions, this is at paragraph 20, I am just looking at the clock because I lost track of time with the adjournment break. Ms Wilson-Smith, are you able to tell me what time I have?

MS WILSON-FARRELL: I still have you with two hours concluding at 1.00 p.m.

MS MANNING: All right, thank you. Paragraph 20 talks about questions of evidential threshold and onus. We say these questions need to be considered and for that reason, in order again to try and be helpful to move things forward, I think this fits well with Ms McDonald's submission that she made regarding trying to establish modules, the modules of information. I disagree with perhaps saying there necessarily needs to be open or closed modules at this point but, regardless, I think we should be figuring out what are the modules for this Inquiry.

The common approach for Inquiries in New Zealand and overseas, without exception that I can see from my research, is that a list of issues is developed. I am aware that we have a list of allegations in order to deal with the Terms

of Reference but that's quite different to a list of issues.

And so, for that reason we are requesting that this Inquiry adopts a list of issues. We have proposed a working draft. We are aware that - this is not locking the Inquiry in, in any way. I take my friend Ms McDonald's point, that there needs to be some flexibility, things come in, things change, we need to accommodate. I have no issue with that but there needs to be a working list of issues.

We have provided that draft and we do request that the Inquiry adopts this approach because this will, in my submission, greatly help us to move things forward. We can start calling for submissions on some of the legal framework points, we can start trying to flush those out as early as possible, and it will also help inform the terms of discovery, I call it loosely discovery. It's accepted there is no general right to discovery, it's very clear in the Act, but the Inquiry of course can order, if you like, the equivalent to tailored discovery. My friend, Mr Martin, has acknowledged that there may be natural justice discovery. I did ask my friends if they could indicate how many documents do they think might be in this natural justice discovery, just to get us started, five documents, 20 documents, 50? My understanding is they feel as though they can't give that estimate without clearer indications from the Inquiry about what might form those considerations.

So, in my submission, confirming up a list of issues will help to move things along because then my friends could have a look at that and then make some estimates about natural justice discovery and then that could be, in my submission, prioritised.

So, that's the purpose of the list of issues. The proposed list there is by no means conclusive and on the flight down I thought of three more things to add but it's just to get the ball rolling. We could easily timetable this with

the view to have the list of issues, the working list of issues finalised for, let's say, the first half of February. That will give us time to circulate and discuss that and that could help provide a roadmap to say, all right, we have this issue, this factual issue, are we saying it needs to be dealt with in an open hearing or an in-camera hearing or how are we going to deal with that, so we can just start to structure things. Then it would also allow transparency for the non-NZDF participants and for the public because at the moment, with all due respect, I think there's a need for some outward facing mapping of where we're going through the course of this Inquiry.

SIR GEOFFREY: You can't really map effectively until you agree your procedure and that's what we're arguing about here.

MS MANNING: Indeed, and I would request how we talk about procedure is mapped. For example, in terms of the provision of lists and discovery, so we can then say, all right, it looks like it's going to take this long. We don't even have agreement on how we do our process.

Working through the submissions, just touching on paragraph 25, Mr Palmer, I want to pick up on a point you made about it would be of most benefit to the members of the Inquiry to have submissions on the New Zealand Inquiries Act. That is accepted. It is a new Act, however, and so I have just been trying to be helpful to try and learn lessons from overseas, accepting they're not binding upon us, but approaches can be very helpful to us.

So, at paragraph 25, those are some of the sources of law and jurisprudence and information that I think we should be looking at and drawing on. I notice my friends in their submissions are all doing the same. There's going to be debate amongst us about which Inquiry is more appropriate to rely upon than others but the short point is I think we're

all trying to grapple with how can we best deal with these tricky questions that we're dealing with for the first time.

SIR GEOFFREY: I take that point but it always seems to me that New Zealand lawyers like reading cases, they don't like reading statutes, and this is a statutory Inquiry.

MS MANNING: Indeed, all right, well, let me move along as quickly as I can to deal with that then.

In the time that I have here, let me address the issue about closed material proceedings or closed hearings. That's dealing with submissions starting on page 18 at paragraph 38.

SIR TERENCE: I wonder if we could just interrupt a moment and just clarify some terminology?

As I understood what was being talked about in a lot of the English cases, it was a process by which evidence would be given in a civil proceeding in circumstances where usually the plaintiffs don't have access to the material and can't attend that part of the hearing. So, that part of the hearing is conducted in the presence of the Judge with the defendant and his or her lawyers basically present, so that sort of one-sided process. That, of course, is not what we're talking about at all.

MS MANNING: That is the *Al Rawi* -

SIR TERENCE: Sort of situation.

MS MANNING: - sort of situation. So, that is not just what is being considered in the UK cases.

Very briefly, how the UK has dealt with sensitive information, national security information and so on prior effectively to 9/11 was through public interest immunity. And then we get to 9/11 and that's where we see, through Canada actually, processes that they were dealing with in the Immigration area, they developed special advocate procedure. That was then drafted into the UK and so, since that time through the course

of 2004-2005 and onwards, we've seen a growth, if you like, into what is known as closed material procedures. That's a situation where you've got information that it's alleged to be touching national security intelligence information and so on, that needs to be heard in closed hearings with the use of the special advocate system. That's what we're talking about there. That's used not just in civil proceedings in the UK, it has grown and has been subjected to a lot of public debate. Some legislation has failed in the UK twice known as the secret inquest proposals where 2009 approximately the UK Government, in response to these article 2 cases, was trying to introduce effectively closed hearings and they were known as secret inquests and the Government was defeated. There was some legislation passed. It has had some effect but my short point about that, is that the statutory framework in the UK is particular to the UK, in that it has had the benefit of great public discussion and Parliamentary consideration and legislation, Parliamentary intent.

And so, what happened is from 2004 onwards, these closed material procedures were basically proliferating. I think they've ended up in about 20 contexts of employment, parole hearings, all sorts of places. And then we got the Case of *Al Rawi* which was the trying to get some damages for his treatment. We had a situation where the Court said, actually, we will not read in without Parliamentary instruction, if you like, through statute a closed material proceeding, go and use public interest immunity. That's the overview.

So, the situation of the New Zealand Inquiries Act is that we haven't had nearly the level of that debate about closed material procedures but we do know about them. We know

about them from a number of cases, as referred to in the Law Commission Report and my submissions, *Zaoui* and *Dotcom*. A number of pieces of legislation have directly considered an important closed material procedures, and I put those in my submissions, that includes the Passports Act and the Immigration Act.

In terms of the statute, those provisions, those special advocate or closed material procedures are not in the Inquiries Act, despite Parliament knowing about them and introducing it into other legislation.

What Parliament did, on the recommendation of the Law Commission, this is not a situation where in some pieces of legislation sections go through that no-one bothers to look at, they've been drafted and no-one has talked about them. The issue of privileges and immunities was greatly considered by both the Law Commission in both readings in Parliament. And the Inquiries Act deals with that through section 27 which takes us straight to section 70 of the Evidence Act which takes us to public interest immunity which says also that it needs to be dealt with as a civil proceeding and that deals with the *Al Rawi* distinguishing issue because that was a civil proceeding.

But, in my submission, I think we can get very distracted by looking at the nature of the *Al Rawi* case by saying we're a different creature to that because we actually need to look at the underlying questions, constitutional questions, rule of law questions, that the Court was looking at in *Al Rawi*.

SIR TERENCE: Well, the Court was looking at what was an adversarial process, a traditional common law trial process. And, for the reasons the Court explained, they thought the process, the closed procedure, was fundamentally inconsistent with the principles which underlie the adversarial process. But we are not involved in an adversarial process, we're involved in

a different sort of process and while it is helpful to look at those English cases dealing with traditional litigation, they don't answer the issues that we have to deal with. They may provide some light but they don't - in fact, in *Al Rawi* itself, one of the Lords said if you have issues of this type, the way you should deal with them is through an outfit such as the Investigatory Procedures, whatever it is, which doesn't pretend to be all things in a traditional adversarial context.

So, I accept the force of what you say about those English authorities but we are in a particular context.

MS MANNING: Thank you. A response to that, and going back to the statute, so in terms of *Al Rawi*, what the Court was concerned with, in terms of their reasoning, how did they get to where they got, which was without statutory authority you can't ask us to introduce a closed material procedure using special advocates. They said the statute doesn't say you're going too far. The Courts have allowed for public interest immunity. How they got there for their reasoning is through the two strands of natural justice and open justice. And, in my submission, both of those strands underpin the considerations that this Inquiry has under the Inquiries Act.

SIR TERENCE: That is right, they do, but both are flexible concepts, must be interpreted in context and we have a particular context. And if, as a result of the process we're going through, the Inquiry feels that some classified material cannot be disclosed, under the Act we are entitled to devise a mechanism to deal with that. I mean, in terms of taking it into account in our actual process, testing it, which we can do through Counsel Assisting and so on.

MS MANNING: I sense that I'm not pushing on an open door here, in terms of the submission about what the Inquiry is permitted to do, lawfully permitted to do, but it is my submission that the Inquiries Act does not give you the power to have closed material procedure in the nature of closed hearing and special advocates.

So, I don't wish to exacerbate the Inquiry by going further on that.

SIR TERENCE: Let me understand though, what you're really saying is that we couldn't utilise a special advocate if we thought that would be helpful?

MS MANNING: For the purpose of closed hearings.

SIR TERENCE: Well, closed hearings -

MS MANNING: It could be used for the discovery process but not for the immunity process. So, we say this Inquiry, in terms of its methodology, should be looking at discovery first and sorting that out and doing that properly and not letting it trickle throughout the process, and timetable that as best as we can. There's always the odd exception of the odd document that needs to come in. As best as we can, get all the documents out on the table.

For the Crown to make its public interest immunity applications, if that's necessary. We have Mr Keith's process that needs to be talked about and we say that it may be permissible, according to the *Al Rawi* reasoning, to have that assisted by a special advocate or someone representing the interests of the core participants.

That is a different question to whether or not this Inquiry is lawfully permitted to hold closed hearings. As I indicated at the outset this morning, there's two approaches to this issue of closed hearings. One is regarding whether or not the Inquiry has the lawful authority. We say the

Inquiries Act doesn't give you the lawful authority because it doesn't say it. It's not there and it's a breach too far to say it's part of your implied powers because that cuts across the other considerations in the Act, in terms of natural justice and openness, and that this Act gets us to deal with those considerations through section 27 and section 70 of the Evidence Act. That is our submission.

SIR TERENCE: So, to go back to my earlier question, if we conclude that certain material is properly classified at the highest level so that it should not be disclosed and there is a witness who we want to speak to to give evidence about that, if we examine that person, with the assistance of Counsel Assisting, in the presence of no-one else, is that a closed hearing? And you say we're not entitled to do that, is that correct?

MS MANNING: Yes, that's the position but, as Lady Hallett -

SIR GEOFFREY: Where in the Act does it say that?

MS MANNING: The Act says that - well, with respect, the question is where does the Act empower you to do it?

SIR GEOFFREY: The Act sets out a whole range of considerations that have to be balanced.

SIR TERENCE: Let me follow this up logically.

MS MANNING: Just take a moment to look at section 15 of the Act which is regarding the Inquiry's powers to restrict public access and to hold the Inquiry or any part of it in private.

We say, as set out in the submissions, that, yes, the public can be excluded from some aspects but that doesn't include interested parties, and by way of shorthand I will say the core participants. We say that the core participants must be considered, they are not part of the public and that we are part of private in section 15(1)(c).

SIR TERENCE: If there is this top secret information and we want to question somebody about, either that has to

occur in the presence of representatives of all the core participants or we have to refuse to consider the evidence at all pursuant to the line of Inquiry?

MS MANNING: The starting point is public interest immunity.

SIR TERENCE: Yes but I'm assuming we've looked at that.

MS MANNING: Assuming we've looked at that, as an exclusionary rule we say we know it's not ideal but in matters of these issues, this should be rare. And certainly, our examples from overseas looking at similar subject matter to this Inquiry because this is not the first time we've had investigations into actions of the Military, and I've given you examples there of someone killed from a dirty bomb and from military operations in Afghanistan, none of this is new, and terrorist bombings in the London underground. They have been able to manage this process practically through a range of means that is set out in my submissions which are practical and effective, such as undertakings by counsel, there is a list of things, use of in-camera, counsel undertakings, summaries logistics.

It is not a situation where the Inquiry will never get to hear relevant information. It's just about how is it heard while balancing natural justice and open justice considerations?

SIR GEOFFREY: So, you're saying natural justice means you have to be at all hearings, is that it?

MS MANNING: We're saying that natural justice means that the interested parties need to be at all hearings and that they can be held in-camera, yes.

SIR GEOFFREY: How do you reconcile that with section 15(1)(c), "hold the Inquiry or any part of it in private"?

MS MANNING: How do we interpret it?

SIR GEOFFREY: That includes core participants, does it?

MS MANNING: With respect, my submission is no. Private includes the core participants. That's referring to an in-camera process, such as Family Court hearings are heard in private. I deal with this in submissions at paragraph 72 looking at the distinction between public and private. I have some authorities there but it's well understood in New Zealand that private hearings can be held and it's interchangeable in-camera.

I've just got an eye on the clock. I'm nearly finished.

SIR TERENCE: We'll stop at 1.00. Can you finish within 15 minutes, unless you can negotiate with Mr -

MS MANNING: I have already traded some time. If that's acceptable to the Inquiry, perhaps I can spend the lunch hour just seeing if there are any points -

SIR TERENCE: If you can trade some time, do it. It's up to you two.

MS MANNING: Thank you.

SIR TERENCE: Do you want to take up the last couple of minutes or finish now?

MS MANNING: I wonder if this is a good moment to pause and I will just collect my thoughts and come back after lunch.

SIR TERENCE: We will start again at 2 o'clock.

Hearing adjourned from 1.00 p.m. until 2.00 p.m.

MS MANNING: Good afternoon. I don't have too much further to go, thank you, and so my colleagues are happy to let me have this time.

SIR TERENCE: Right.

MS MANNING: 10-15 minutes, I would say. If I may just

address you on ways to manage sensitive information, this is in my submissions, and then I'll just also touch on the list of issues and then finally look at the orders or directions that we are seeking in terms of moving things forward.

So, in terms of my submissions, paragraph 51 on page 23, just a point to touch on. I don't think I will spend much time on it. My submission is it should go into the list of issues, which is that the Crown have talked about Operation Burnham, in particular being seen as the active conduct of hostilities. In my submission, this is not accepted and is, in fact, one of the points in issue and this is something that should be considered as a point in issue, were these villagers actually engaging in hostility?

Regardless, it's not clear why that distinction is being drawn, if indeed it is, because, as per my discussion with Sir Geoffrey earlier, really civilians are entitled to certain protections in the law of armed conflict, so I don't think there's any divergence of views on that point there.

Moving forward to paragraph 54, I have found it very helpful to look at the work of NGO and lawyers group in the UK known as INQUEST. If I may ask you to turn to tab 42 of the bundle filed this morning, there's a report prepared by INQUEST that was considered as part of considerations of changes being made to legislation in the UK, equivalent I think to a Select Committee process.

SIR TERENCE: Can you give us the reference again?

MS MANNING: Tab 42, page 1237 of the bundle.

SIR TERENCE: This is the Joint Committee on Human Rights?

MS MANNING: That's right. It seems there was a Bill that was passed with the Justice and Security Act 2015 and as part of that it is the Joint Committee on Human Rights considering it and written evidence was submitted for that.

This submission from INQUEST, in my submission, is helpful to those of us here in New Zealand looking at how do we deal with sensitive information in the context of right to life investigations involving deaths in the context of military deaths and national security information.

Understanding who is INQUEST is helpful, page 57, paragraph 5. There is a national network of over 200 lawyers and they have a publication that they circulate. It seems like a very active group in the UK.

Their members have been involved in thousands of inquests and they talk about the range of inquests from deaths in custody to major disasters, as well as military personnel, highly sensitive and they talk about some examples, including the London bombings and others. That establishes who they are.

This submission is objecting to the introduction of closed material procedures in inquests. The Government had tried, I believe, twice before unsuccessfully to introduce these provisions. The basic point that INQUEST is saying, is that inquests have been held into these very difficult matters and the process is the Coroners had been able to manage information in a way that doesn't require closed material procedures.

There's one exception, which is a case known as RIPA cases involving active surveyors which we don't have in this context here.

If I may take you to page 63 of the report, paragraph 30, they say:

"Coroners have found themselves well able within the current legal framework to find pragmatic solutions that properly strike the balance between the need to protect sensitive material and the need to ensure openness and transparency with that RIPA exception".

And then they go on to talk about how deep their knowledge

is. And then they go on to provide case studies.

Over the page at paragraph 34, they talk about some of the measures that can be adopted in the exceptional cases where national security or extreme sensitivity merits. They are listed there in terms of their framework about the High Court Judge, Coroner, use of public interest immunity certificates, being able to hold proceedings in-camera, using enforceable confidentiality agreements and adopting special measures for witnesses, and the list goes on over the page about special safes, coloured paper being used, separate computers and so on.

The final one under M, preparation of gist documents of the most sensitive material that can be shared with the family, their lawyers being provided with the material underlying the document on strict undertakings.

My friend, counsel for Jon Stephenson, will talk about the measures taken in the Stephenson litigation, the defamation case against the Ministry of Defence, where these measures were adopted and there was no need for those material procedures in that case. It was dealing with very similar material to the material that this Inquiry has.

So, there is New Zealand precedent for what we're submitting is the appropriate course of action for this Inquiry to protect aspects of natural justice and open justice.

Paragraph 35, these are not ad hoc solutions but practical measures developed under the legislative framework which balances the various needs.

Just a few pages along at page 69, that's 1,251 of the bundle, my submission is it's very helpful to look at some of the case studies of the more high profile cases that they have been involved with. The first is dealing with the death of Princess Diana which was highly sensitive information involving national security. Their point is all of these

proceedings were able to be held in open session or in-camera sessions. The point is they didn't need closed material procedures that were closed to the interested parties. The cases involve Princess Diana and her death.

The *Nimrod* case, which was the death of 14 service personnel killed crashing over Afghanistan. Over the page there at paragraph 55, they state that the Coroner was determined to hear all evidence pertinent to the case and the majority of the Inquest was open to the public. MOD, Ministry of Defence, made one public interest immunity application in relation to background material which counsel for the families were copied and a summary of that application was given to the families after that hearing. The families participated fully in the Inquest hearing and were able to question key witnesses through counsel and on occasion directly. The families commented they were grateful to the Coroner for the manner in which the Inquest was conducted and for the respect that was shown to the family.

The next case down is Jean Charles de Menezes, that is the person who was shot and killed in Stockwell Underground Station by the Metropolitan Police. This was a highly sensitive case, if I may summarise because it was to do with how the police operated shoot to kill policy involving approaches to terrorist threats and so on.

At paragraph 58, you can see the Inquest managed to deal effectively with highly sensitive evidence and the protection of witnesses while we manage largely open and accessible to all. They talked about, in 59, the measures that were taken.

If you see in 59, public interest immunity applications by the police were made as national security issues were central:

"Where needed, the coroner granted public interest and immunity in relation to certain documents. However, he rules that many of the documents could be provided to the legal

teams, upon strict undertakings as to confidentiality, not making copies and keeping the material secure, etc. On that basis the family's lawyers were permitted to see highly sensitive documents, and to question witnesses based on that material. In relation to the most sensitive material, a gist document was prepared summarising the material that could be shared with the family, and their lawyers were provided with the material underlying the gist document, again on strict undertakings".

Gisting is a common term in the UK now. In New Zealand we say summaries but it's gisting, give us the gist, give us the summary of the document.

"Where discussion in open court touched upon the contents of any protected documents, agreements were reached in the absence of the jury and the public" and so on and so forth.

Arrangements are made for the protection of witnesses and bearing in mind there was also a huge public interest in this case.

I don't propose to go through all of the cases but I think that gives a very real flavour of the nature of the sensitivity of the material and the way that measures could be taken to manage those interests and concerns that have worked effectively.

You will see throughout this that reference is made to the families being provided information because it recognises part of a right to life investigation obligation that the next of kin should be meaningfully involved.

The only other case of the remaining three is the case of Terrence Judd who died in August 2002 while working as a scientist for the Ministry of Defence because he was making dirty bombs and it looks like he suffered fatal burns when an experiment went wrong. That clearly is highly sensitive information about dirty bombs being developed and managed in

the UK, yet there was a public right to life investigation into that and the family had full access to the sensitive materials.

The point of all that, is to say that our submission that closed hearings are not available to this Inquiry will not prejudice the work of this Inquiry. There are other measures that can and should be adopted by this Inquiry in order to meet the natural justice rights of the core participants and my clients being the next of kin and in terms of meeting obligations of open justice. We say that the starting point for all decisions about consideration of providing material or the openness of hearings, the starting point, as dictated in the Act and according to common law, is that it must be open. And the onus is upon the party wishing to have anything less than open to justify that to the Inquiry and it must have a rationale and sound basis.

My closing points are, what are we asking for this Inquiry to do for this Inquiry moving forward? If I may ask you to refer to paragraph 89 of the submissions, page 38. We are not sure of the terminology to be adopted by the Inquiry, rulings or directions, but we are asking for decisions to be made. I am just going to get my Inquiries Act in front of me.

In terms of legal issues, we're asking for two rulings. The first at 89.1 is that the primary purpose or function of this Inquiry is to satisfy the right to life obligation for the six individuals who died and also for the further 15 who were injured in terms of risk to their life.

And the second is that the Inquiry is not permitted to conduct closed material procedures or closed hearings with the effect of excluding core participants and their counsel. The starting point is open hearings and that in-camera or private hearings are to be considered to manage such concerns.

My next submission about those two orders sought, is

really made with the greatest of respect and caution to the Inquiry. It's also made knowing that we do have some time, we have issues of time of discovery and so on to be worked through. My submission is that if the Inquiry is not minded - either way, either the Inquiry can rule favourably on these questions or may decide to go against us, or a further option would be to refer these questions of law to the High Court under section 34 of the Inquiries Act. That doesn't mean that this Inquiry must pause if that occurs. The section allows the Inquiry to continue or to adjourn and my submission, trying to be practical and pragmatic, is that we have a lot of water to go under the bridge in terms of material being provided to the Inquiry, it seems at least some months, and it may be a course of action open to the Inquiry would be to refer these matters to the High Court for consideration moving forward.

The next request is at 89.3 regarding discovery. Essentially, I don't want to go over my submissions again but we're asking for, again, a practical approach to be taken that is timetabled to try and avoid drift and also to ensure the greatest transparency possible. For that reason, we have made a number of suggested orders there involving open material. We understand the open material has been provided but I am not sure if that is still the case in light of my friend's working endeavours that I am sure he will address you on but it may be that there is some material that has been found since the second tranche was filed. I'm sure he will address us on that if we can expect some further reading.

We also submit that it should be timetabled that there should be lists provided of the material and that counsel for NZDF have indicated that they are willing to do that by way of their memorandum filed for this proceeding. And so, we say that's very good that they're willing to do that but that must be timetabled. And by the end of these two days we

should, as a matter of having some discipline to these proceedings, have a timetable for that exercise or at least have a timetable of checking in one week or two weeks about when will those lists be prepared.

And, again, my submission is we shouldn't be getting caught too much out in terms of perfection. Yes, they must be accurate but even for the sake of getting 90%, let's just get that out. If there's 10% of stuff, let's get things moving.

There is something known as the 80/20 rule which is the last 20% of a project takes 80% of the time and so. Perhaps we need to be looking at whether we apply the 80/20 rule for lists and discovery to just try and get things moving a bit better.

My friend, Mr Salmon, will deal with issues of discovery I think a little bit more than I in terms of timetabling and transparency into that process, to ensure that the most transparency is given in terms of who has prepared those lists of documents, what actually do they represent and so on.

Our submission also at 89.3.3 is, again, an effort to be practical and try and move things forward, is please let's prioritise discovery in relation to the right to life obligation for the six who have died, for Fatima, the little girl who died, that there's no question that she could have been an insurgent, can we have the disclosure relevant to those deaths and then for those 15 who were injured. And then perhaps from having those lists, core participants could nominate documents to have priority in the declassification process with reasons.

Finally, we have asked as a top priority for certain documents to be prioritised in this process, including guidance cards issued to NZDF personnel. There is a very helpful website, a UK website on the Iraq fatalities investigations. It was a, sort of, super Coronial process

set up after the Baha Mousa case into right to life investigations for the death of Iraqi nationals by UK Military personnel. There's been about a dozen of them. It is a bit of a treasure trove, this website, because for each right to life investigation there's a report, there's methodology and there's the documents and the evidence that the Coroner has relied upon. So, it's common to see the guidance card. It's a summary of the rules of engagement, under what circumstances can you shoot and so on and so forth. There's intelligence reports on that website, there's all sorts of things.

We also ask for the ISAF report to be prioritised and the video footage of the operations. We ask for considerations of that material to be prioritised also and not to be lost in the queue of the 17,000, it should be in the top 5, not somewhere in the middle, and for that to be transparent in terms of the consideration of the material to reflect the priorities of the core participants.

We also ask at 89.4 that we are able to propose questions of the NZDF and other agencies and that they are to be responded to.

We also have the Official Information Act but that is a much slower process and I'm sure Mr Hager can speak to this. It would just be of great benefit if we are able to formally propose questions through the conduit of this Inquiry and, subject to any directions of the Inquiry, that would be very helpful.

At 89.5, we ask that assuming that we get to the point that there has been what we would call adequate discovery, tailored discovery, and interrogatories and gisting and so on, just to ensure that there will be sufficient time for us to be able to consider these before any hearings.

I do have to say that this is from bitter experience of waiting for documents and gisting, even for some years, to be only given some days to be able to turn them around. And

we just ask that it's clearly understood, in terms of fairness, we certainly won't be asking for the amount of time we've waited to get the documents but we do ask for a fair amount of time to be able to consider the documents in a meaningful way.

We also ask at 89.6, again in terms of trying to move things along, for identification of individuals who were holding key positions during Operation Burnham, in particular, and we've set out who they may be there in the following paragraphs. So, any individual responsible for causing or contributing to the death or serious injury. I've already taken us to the *Jordan* case where the police officer who did the shooting of the suspected IRA man needed to actually be made available for it to be an adequate investigation.

We have identified the Joint Tactical Air Controller, the Commanding Officer, the Ground Commander and the responsible Ministers and other persons in key rules of activity, just being clear about who is going to be expected to be heard from. Again, that that is transparent.

Looking at the narrative that's come out from the NZDF last week, we would also add to that list the person holding the role of LEGAD, I presume that's legal adviser, and the ground assault teams and the snipers. It seems, from my reading of the document, there were two SAS snipers.

Following that, a list of all other proposed witnesses for the Inquiry, bearing in mind once we have those names under the right to life matters have been conducted elsewhere and in Northern Ireland, I'm trying to find judgments to provide to the Inquiry. Personnel files are called routinely for military personnel who are part of the right to life investigation to see, for example, if there's been any other killings or unlawful killings attributable to that person that's considered to be an important part of the right to life

investigation and so, we would be seeking to do that also.

And also, just adding to these requests, is for directions about a list of issues to be devised and for that to be timetabled.

Just also in terms of transparency, we also ask that for any documents that are filed with the Inquiry, that an open memo is also prepared so that core participants are aware, for example, that 300 documents have been filed on a particular date and any other information that's able to be made available at that time. That would greatly assist in terms of transparency. That is a matter we've raised with Counsel Assisting previously and so it would be very helpful if a direction could be made to that effect, that when anybody in this Inquiry files material with the Inquiry, that an open memorandum or a redacted memorandum is made available to others in this Inquiry and for the public.

Looking at my notes, that's all I have, thank you, Sir Terence and Sir Geoffrey, unless I can be of further assistance.

SIR TERENCE: Thank you, Ms Manning.

Mr Hager, Ms Manning has taken a bit of your time but you have at least an hour and a half.

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SUBMISSIONS BY MR HAGER

MR HAGER: Can you hear me clearly? The three main speakers for this afternoon are juggling the time between us but I don't think I will use up my two hours anyway.

SIR TERENCE: Okay.

MR HAGER: Thank you very much for the opportunity to be here. When I walked in, I looked around the room and saw piles of folders here and folders there, and then my own little plastic sleeve of documents. I am not a lawyer.

SIR GEOFFREY: That may be an advantage.

MR HAGER: I'd like to begin by slightly introducing myself by way of explaining what I hope I will be able to bring to the process over the coming months. And, forgive me, I'm going to read quite a lot of what I want to say today because I want to be very precise about it.

I've been researching and writing about New Zealand Military for most of my life. I first used the New Zealand Official Information Act writing about Inquiries of Defence Force, then Ministry of Defence in 1983 or 1984, just after the Act came in. I've used it many hundreds of times since with the New Zealand Defence Force. I've handled very large quantities of materials obtained, Defence documents obtained under the Official Information Act and received from people within the Defence Force. I am very accustomed to having the materials.

In the early years, I got on well with the then Ombudsman John Robertson who assisted me in various of my Official Information Act complaints and with him I got on very well. As a former Secretary of Defence, he was very good at knowing

a weak excuse for withholding information when he heard it. I've had 35 years since then of experience of encountering people putting up reasons for why it's imperative that information not be released when, in fact, those reasons were not very strong.

Perhaps there was sensitive methods that would be exposed and staff that would be endangered, when in fact it was routine military information that was released all around the world or alliance relationships imperilled, where I knew this was information our allies routinely gave to our own citizens and, as in the Crown's submission, there was the danger of the "jigsaw effect", an old chestnut which is also called the mosaic effect, which is the idea that even innocuous information can imperil the state when added to other information, so maybe that should be secret too.

But there's almost never been a genuine national security threat. New Zealand is lucky to be a country where we don't have many grave threats to the nation which is what a top secret document looks at. Looking back through all the claimed sensitivity I've seen over time, there have been sensitive documents but it's a rarity.

I often got the materials which were refused to me anyway in New Zealand and overseas, published them and no harm has resulted. And I worked closely with researchers and journalists in other parts of the world and frequently the materials I was refused in New Zealand were easily obtainable there and because we're so closely allied with those countries they would be the same or equivalent documents.

I have written three books about military and security-related subjects, including a history of New Zealand in the Afghanistan War, 400 and something pages, over 1,000 footnotes, the only account of its type in existence, part of which was reproduced in the anthology of New Zealand war writing.

Each of my books, just by way of contrast, have been warmly greeted by quite a pleasing number of senior staff in agencies concerned and invariably received by hostility in investigations of my sources by the security people in those agencies.

In my experience, security people genuinely believe the security threats that they speak of. It is the nature of their training and their peer group that security always seems most important. It is not realistic to expect them to think that the public's right to know or international law or accountability might once in a while be more important than security. I am, therefore, not surprised by the submissions received from the NZDF, the intelligence agencies and related departments but it's crucial that their priorities are not adopted as the Inquiry's priorities.

The key problem, as I see it, with the proposals in Minute No.4 is the claimed need to protect classified information would come to dominate the process, justifying a closed and unfair process that would not provide the necessary scrutiny of NZDF's actions which is the subject of the Inquiry.

It is vital that security concerns are not treated as absolute, as necessarily most important, while other values such as openness and natural justice come second, to be fitted around the absolutes of secrecy as circumstances allow.

I want to begin by describing the information challenges confronting this Inquiry, as they are the challenges that must be solved by the process. I will follow that with proposals for the process to deal with those challenges.

A good starting point on the challenges is the NZDF narrative that was released last week. It is a helpful document for highlighting the magnitude and complexity of the task ahead. I won't discuss all the details, that's for later, but I will note relevant things.

First, without explanation or apology, the narrative

quietly dropped the leading previous rebuttal of the book *Hit & Run* by NZDF's leadership. The idea that it was not the same raid, not an operation that NZDF was part of. NZDF was still using that location argument earlier this year trying to persuade the Labour-led Government not to have an Inquiry.

But, of course, the narrative that they have written now is about the same operation that was written about in that book. As we said, it was called Operation Burnham. It was searching for two named insurgents whose families homes were in a small village, Abdullah Kalta and Naimatullah, whose houses are marked a few hundred metres apart on the NZDF satellite images as A1 and A3. But the SAS arrived in two large Chinook US helicopters, the snipers arrived in the third smaller helicopter, the leaders were not found there and the SAS trooper got injured. It was obviously always the same operation. My point is a rational process is systematic. It doesn't have major arguments like wrong location, coming and going without explanation.

More important than this, the narrative has almost entirely failed to engage on the main subject of this Inquiry, civilian deaths and injuries. It shows the challenge ahead of us.

The NZDF has had 18 months since the book was published and years before that with rumours of civilian tragedy but there seems to have been zero effort to investigate the well documented evidence of civilian casualties and reconcile that with their own version of what happened that night. Instead, the narrative shows NZDF trying to reframe the issue being about civilian casualties to being about whether there were people with weapons in the village on the night of the raid, as if that will wash away the issue of civilian casualties. It seems it has made no approaches to the Afghanistan Government sources, e.g. the ones that use the main official casualty list that we use and have confirmed, and aid agency

sources who have written about the same incident or the Afghanistan Human Rights sources who have written about the issues or the UN who have written about it or the hospital sources who have records of the people who were injured or the Afghanistan media sources or they don't appear to have wondered about the real villagers seen on New Zealand TV. Are they suggesting perhaps that the parents made up a little child called Fatima who died in her mother's arms?

I found out, after persistent OIA questioning of the Ombudsman, that five of the NZDF post Operation Burnham reports referred to a death of a child but somehow this doesn't make it into the NZDF narrative. I don't believe this is responsible and it is not what international law demands. Are they implying that the injured people shown on New Zealand TV were making it up? Did they think of getting medical records themselves from provincial hospitals, the ones we quote in the book? The main thing missing from the NZDF narrative is the focus of this Inquiry, civilian deaths and injuries, and the lack of giving medical and other aid, and the cover up which I see the narrative as part of. My point here is that NZDF is extremely reluctant to admit that anything went wrong and I believe only a very rigorous process will get beyond the denials.

Reading the narrative and the NZDF and Crown submissions, there seems to be a fundamental misunderstanding as to what that Inquiry is about. It is treated as if the heart of the matter is investigating allegations against NZDF as if the principle at stake is damage to NZDF's reputation but that is not the case.

Speaking as one of the authors of *Hit & Run*, let me be clear, the book is about what happened to innocent people when those villages were attacked. It is about civilian injuries, death and trauma and the bizarre unwillingness to go back and give medical aid and support which other contributing

countries did routinely if their operations went wrong.

Thus, while in the NZDF staff's minds the Inquiry is about trying to clear their names; that is wrong. It is a petty way of viewing the situation. It is about what happened to innocents and New Zealand's responsibility is to do something about that. That is where the Inquiry should be focused.

Instead of facing up to the civilian casualties, the narrative expands the story about fighting insurgents, all of the "new" insurgents, not the ones they went to find. Shortly after our book came out, the Chief of Defence Force gave a PowerPoint presentation explaining the operation which included two clashes with insurgents shortly before 1.00 a.m. and at about 1.30 a.m. This latest narrative, the one that arrived last week, without explaining the change, now has five separate clashes with supposed insurgents. All five were threatening enough to require launching attacks and killing people, yet in none of the cases was a single shot fired by any of these supposed insurgents. The lack of insurgent fire is omitted from the narrative. No shots were fired by the supposedly positively identified insurgents, no weapons were recovered by them either, none of the bodies inspected, no photos taken, no intelligence collected, no biodata taken, no GPS was recorded by anyone. This isn't normal. The building where the insurgents supposedly had their base of operations with weapons inside wasn't approached or searched during the operation, even though it was just across the field from the big parked US helicopters. Can I repeat this again? From the beginning of the operation, they supposedly saw armed insurgents with weapons around the building, a house about 100 metres across the field from where the big American helicopters were sitting. For the next two and a half hours, the SAS troopers who were there to find, capture and kill insurgents didn't go to that building. Why on earth not?

The narrative is silent on this.

The insurgents seen in that village had to be attacked by Apache helicopters because they threatened the big US helicopters, one of which didn't land at first because of their presence. Yet these supposed insurgents were watched for 20 minutes, moving around not far from the helicopters on the ground, still not firing a shot, and then two minutes before they were attacked and killed the big second US helicopter landed below them anyway, in front of them. Nothing seems quite right in the narrative.

Sleepy insurgents everywhere who don't fire a single shot, and then are shot themselves and don't leave a trace.

There were "more armed insurgents" seen well outside the villages to the south heading away from the New Zealand-led force well out of range which seems to me they were not participating in hostilities against the New Zealand forces, so were not lawful to attack but they were attacked by the Apache helicopters too and the possible illegality of this is not seen as worthy of note. And much more in this vein.. In other words, it reminds us how unhelpful generalised claims are when we can't check the sources.

What I'm saying is, the NZDF narrative, originating from the same organisation that ran the "wrong location" rebuttal for over a year, raises far more questions than answers. It is as good an introduction as I can think of for why careful step-by-step processes are needed, with documentation scrutinised carefully and thorough provision for interrogatories, and also why, in the face of organised obfuscation, the input of core participants will be a vital contribution for finding the truth.

Now I want to start the substance of my submissions. The NZDF and security agencies' submissions largely boil down to wanting a security dominated process where their staff can give evidence in secret. The answer I want to give to this

is largely practical. I will discuss key examples of why, once we look in detail at the information needed for the Inquiry, it looks clear that the demand for secrecy is wrong and unnecessary. I will first discuss these practical issues and then move to the practical proposals that will help the Inquiry achieve its objective of finding the truth.

First, the subject of the videos, information about Operation Burnham. A lot of the NZDF claims about Operation Burnham are based on just two items of information. The ordinary ground force Operation Burnham, the same ones we interviewed, did not see either civilian injuries and deaths nor the possible hostile individuals with their own eyes. Instead surveillance from US helicopters and drones is NZDF's key evidence about what went on. The narrative, and presumably the NZDF substantive submissions later, will rely greatly on the two pieces of US surveillance video, a relatively short edited video from two Apache helicopters and a longer video from a surveillance drone.

A worrying pattern is emerging. Whenever NZDF wants to justify its version of events, it refers to claimed details on these two pieces of video. When I have asked questions so far under the Official Information Act to clarify the blurry NZDF claims about what went on, NZDF has argued the video came from the US Military so they can't possibly give me any information derived from what the video shows. Thus, somehow NZDF staff can give information that suits their story from the videos whenever it suits them, as in the narrative and a separate NZDF attack on the book, both released last week, but when I ask for the same thing it is impossible to give it to me. There is, they've argued repeatedly, an unfortunate but unavoidable obstacle to having NZDF's version of events tested and scrutinised. It is totally unacceptable. They cannot refuse us and then use the same information selectively in public when it suits them. I

submit that a fair process means that either everyone has the same access to sources like this to check and analyse and find evidence or they should not be used at all.

The shorter of these videos has already been used in an unsound way. As I described in an earlier submission, NZDF told the Inquiry in the first teleconference that permission was required from overseas partners in the US Military before the video could be shown to anyone in New Zealand. Then it emerges that NZDF had been showing selective parts of that video to a wide range of people, officials, politicians etc., as part of its uncontestable lobbying without asking the US. They refused to let me and other parties see their videos but showed it whenever it suited them in private screenings. A video screening such as this is of course compelling, apparently providing real first-hand proof, boosted by the seductive power of seeing secret materials other people are not allowed to see. This provides many examples of this kind of selective uncheckable evidence, such as satellite pictures said to document weapons of mass destruction.

It is very important for the integrity of the Inquiry that evidence like this is not viewed by some participants and not others, potentially being given significance when it cannot be tested and challenged. It has to be part of systematic evaluation of evidence.

SIR TERENCE: I should just make the observation that nobody is suggesting that material of this sort can be put in and not tested. Of course, part of the function of the Inquiry and Counsel Assisting is to test the evidence, even if it's evidence which is classified. So, there will be a process of testing. There will be a process of checking things against other material. It's the sort of meticulous work you're talking about. So, the Inquiry fully intends to do that and will have the expert assistance in that.

So, what we're really talking about is what processes and procedures we should follow and, in particular, in relation to the sensitive material.

Now, I know you have a strong view about the possibility that some of the sensitive material should be made available more widely and should be disclosed, so we've got a process to deal with that. And if you have particular comments about that process, that would be helpful to us.

MR HAGER: I do.

SIR TERENCE: Perhaps the other thing I should mention, just while I've interrupted you, so that you can get to it at some point, an issue for us, as you know, is how we deal with people who wish to give evidence only confidentially. I know you have views about that and that would help us as well.

MR HAGER: Thank you. On the subject of sensitive witnesses, I have prepared a document which I gave to Counsel Assisting which I assume you've seen?

SIR TERENCE: Yes, I think I've got a copy of that.

MR HAGER: It is a one page document.

SIR TERENCE: That is the conditions document?

MR HAGER: Yes. To answer your point, this is a fair point and thank you for raising it. I don't want to give an answer which sounds offensive but my belief is that it makes a great difference who gets to see the information.

It is in no way thinking we don't have powerful crystal minds at work on this but if somebody is trying to get away with hiding things, they are going to be in a stronger position showing it to people who don't know the geography from hundreds of pouring over maps, who don't know the competing narratives in their head of exactly who ran up behind which house and who lived in what house and who was in the house nextdoor and what

was claimed to have happened. To see with different eyes what's on that video will make a massive difference, I know it will. This is what I bring to this forum, is that I've spent my life researching things and I know that my uninformed eyes see a fraction of what my later informed eyes see. It is the case of anyone who works in this area which is why if it ended up being that you two and the two Counsel Assisting, all wise and intelligent people, are the only ones that get to see that, it will have much less value than if you have people who have been working on it and are steeped in the detail. I believe this very strongly. That is my representation. It is not a criticism, it is just a reality of how our eyes and minds work.

SIR TERENCE: Just on that, I mean, there is another option too that we have to bear in mind, and that is we can access military expertise, for example, from overseas and so on. So, there are ways where we can flesh out our own knowledge and skills as well.

MR HAGER: Thank you. And my argument is, I think there are ways around this and I am urging, rather than resting on the idea of don't worry, it's okay, we can look at it ourselves, that there is a strong enough, in fact a fundamentally crucial enough need to try to include other people in that particular information, that it is worth finding ways to make it work. I think there will be ways to make it work. You can bring in an American expert and they don't know which side of the valley is which, who ran where and what these people hear, how to reconcile these people who ran up behind their houses there called the insurgents with the people that ran up behind the houses we wrote about that weren't insurgents, they don't know the background. They can probably give very good insights into what a

helicopter does and how it communicates with the ground and a whole lot of stuff like that which I recommend you know which will be very useful. In fact, I know someone who's going to be offering to present information to you who will give very good information on that but it won't solve the problem I am talking about. We are at the real heart of some of the issues here with those particular sources of information and the ability to scrutinise it and take two such separate stories and reconcile them.

SIR TERENCE: Thank you.

SIR GEOFFREY: Mr Hager, just before you resume, there's just one question I'd like to put to you. The Inquiry has been going for a while now and one of the things we've been doing is studying extensively your voluminous and well researched writings on all these issues.

MR HAGER: Thank you.

SIR GEOFFREY: I appreciate you've been doing this for years and you have a certain expertise in it, I grant you that, but you have arrived at the conclusion, it seems to me, that there's a cover up here by Defence. That's not a given. You know, we can't assume that. We have to look and see whether that is so.

MR HAGER: I couldn't agree more, I couldn't agree with you more, yes. I have reached that conclusion. You are not at the point of reaching that decision at all, of course not. Yes, I agree.

As I was saying, private screenings for some people and not others highlights the risk of uncontestable information undermining the Inquiry process.

I asked NZDF under the OIA for all its correspondence with the US Military seeking permission to publicise the video. The first document I brought you is the NZDF reply

which I have copies of. Most of the documents I will be referring to today are ones which have been in previous submissions I have written. There's one which I handed around to the other counsel but the media haven't seen them.

This is an interesting document because this is the - I asked the Defence Force to show the correspondence asking for not the video where there was at one stage only one video known about, not asking for that video to be given to the Inquiry which will happen automatically but it could be made available to the public. What happened is, the Defence Force wants us to believe that they wrote a letter in March 2017 asking for the video to be publically releasable and then made no contact again for 11 months until February this year when it says the US Military

refused to allow release of the video.

NZDF sees this reply as evidence for why the video cannot be released to core participants or the public. I see it as evidence that it should not be left for NZDF to request this information from the US Military. The Inquiry itself or maybe the Government Ministers who ordered the Inquiry occur should contact the US agencies, explain what the information is needed for, that it's for an important official Inquiry.

The reason this is perfectly practical is other countries have done the same and been given crucial US Military information to use openly as part of their own Inquiries. If they can, New Zealand can.

It is clear already this video will play a large part in NZDF's evidence, trying to prove that they primarily harmed dangerous insurgents. If we cannot check and scrutinise NZDF's key evidence, the Inquiry is compromised. To ensure process, I request a decision from the Inquiry that the key video evidence will not be used in the Inquiry until all participants can view it and analyse it. But I think, with

genuine effort, the videos will be able to be used fully in the Inquiry because it will be possible to get them. A year before Operation Burnham the German Military in Afghanistan had a terrible civilian casualty incident, involving German forces calling in US aircraft attacks on supposed insurgents who turned out to be civilians. A key piece of the evidence for the following German Inquiry was the cockpit audio from the US aircraft that made the attack. Now, according to what the NZDF has told the Inquiry, it should have been impossible for the Inquiry to obtain and release audio as it was owned by the US Military and under its control. But here it is, I have it here today, a transcript of the US aircraft's cockpit audio released to the German public as part of that important Inquiry because it was so important that they could see what was going on. It's chilling reading with some crew jumping to the conclusions that the crowd was insurgents and one crew member repeatedly saying something didn't feel right to him and he wasn't listened to.

Again, if the German Inquiry was able to get this material, then so should New Zealand be able to. The legal arguments and international relationship arguments collapse if key information about this can in fact be obtained and made available.

It is the same with the next important information source that NZDF claims cannot be shown to other core participants and the public. This is the original 2010 operational documents, for instance post operation reports, the battle damage assessments and intelligence updates. In this case, we face multiple claims about the need for secrecy. Like the video, they collapse under scrutiny.

Two main arguments have been used: national security, that releasing the information would do some grave harm to New Zealand; and that they are, anyway, foreign controlled documents that can't be released without US and NATO

permission which was unlikely to be given.

SIR TERENCE: Mr Martin indicated earlier that the US had given permission to make this material available and that does include the videos. So, the Inquiry will be accessing that. The issue is, how much more broadly that material can be shown and that depends on some further steps that we have to take but we will access the material.

MR HAGER: Thank you, I understood that.

The national security argument, I am referring to arguments for non-release to anyone other than the Inquiry, that is what I'm talking about again.

SIR TERENCE: But that is a process that - I mean, there is a process in place to determine that and really, what we're looking at is whether that process is an appropriate and defensible one. So, that's really what we're inviting you to talk about. I mean, we're not going to make a decision now or as a consequence of this on the general availability of material that is classified but we accept the need to have a process to evaluate claims of classification and disclosure claims.

Is it your position that that process that we've outlined is unsatisfactory in some way or could be improved?

MR HAGER: I am coming to some items on that but, to be honest, what I was doing now, was I was shifting what has up until now been a private discussion into a public discussion about these things. I'm laying out some of the arguments which I appreciate have been taken on board, yes. I won't labour it, in other words, fair enough.

I want to just say what the arguments are for being able to release things which, to the core participants and the public, I know will be ferociously opposed by the Defence

Force because we do have an opportunity to say in public now before it becomes a negotiation with Ben Keith and submissions and the rest of it.

My central argument is the same as with the video, which is that in overseas Inquiries identical documents or near identical documents have been able to be released. I want to run through a few and give out copies to the media as I do it.

Starting with the German Inquiry. I have given the transcript from the aircraft that did the damage.

Another document like that is the first incident log entries that came straight after the attack which shows the first incorrect reporting that was an attack on insurgents.

The next document on my pile is a human intelligence report, which was "UK eyes only" secret document, downgraded as part of the Baha Mousa Inquiry to Restricted and then released to the public on the Inquiry website with only minor redactions.

Or another one which was a very detailed operation plan, including the specific roles and objectives of different units called a FRAGO, Fragmentary Order, that was again marked secret.

Of course, the obvious points I'm making is that looked at in theory, looked at in kind of hypothetical terms, these are the kind of documents which don't normally reach the public but which when it came to it these Inquiries found were perfectly fine and served the Inquiries themselves to have it available.

The next one on my list was a document which I assume the Defence Force are going to resist. Deborah is suggesting I hand them to the media at the end.

I will run through some more. Various intelligence reports, secret intelligence reports, very much like the ones which will be sitting in the prime bundle of only a few dozen

which we want from the post operation period of Operation Burnham and Operation Salerno.

There are human intelligence reports because all countries do human intelligence. That's not a secret they do that, with only the name of the intelligence source redactedon operational plans. A detailed set of rules of engagement, detailed numbered rules of engagement for a particular deployment. This is one of the documents NZDF is resisting releasing in this case, claiming security risks but here it was as a document to the Iraq Fatality Investigations website.

Various of these documents are stamped "UK eyes only" or "UK/US eyes only". It is obviously light years from the view NZDF has put up until now where it's argued the case that public and core participants should get zero currently classified documents.

I want to say a word about Rules of Engagement and handout one other document. Rules of Engagement are going to be one of the important issues here. They sound like the very serious things that shouldn't be released but I have various copies of New Zealand Rules of Engagement from different periods and I wanted to explain what they look like. It's not like they make up a new set of rules each time. In fact, there's a huge predictable set of numbered things. So, you might have number 1024 which is yes, you can use riot control gear or something like that. Every mission from any allied country which is a US ally which will use Rules of Engagement where they have to do riot control as part of their operations where they're going has the 421-424, whatever it is, riot control here Rules of Engagement. They are very standardised.

So, when I was preparing for this last night, I found what probably NZDF would regard as the most secret part of what it didn't want to release in terms of the Rules of Engagement which is the Attack Rules of Engagement, the

precise wording of when they are allowed, entitled to attack and kill other people and who they can attack, which is a document I haven't shared before and I have some copies of, I will make it available to the media and other parties to have that, which I found on the NATO website, which is a very important principle that we should remember.

When people say something is absolutely totally out of bounds and secret, as a researcher I can say normally you can find it somewhere in the world. They usually aren't that secret. We're hiding it only from ourselves or our public, it's not really from the world or potential adversaries.

SIR GEOFFREY: Mr Hager, open source investigation is a well-known technique in this sort of instance and this can be carried out by anyone and is being carried out by us. You can research the websites of the world and find out all sorts of things.

MR HAGER: Good, I'm sure. I was making this point because Rules of Engagement, I anticipate will be an area where I anticipated would be an area where there was a demand for secrecy and actually even on that one, an outlier of what you might regard eight years later as a secret, there isn't a lot to keep secret there.

Basically, what I'm saying is if the German and British Inquiries were able to declassify military documents and provide them to the public and all participants to ensure fair and robust Inquiries, then so can New Zealand.

The other NZDF argument withholding Operation Burnham documents was that they are foreign-controlled documents that can't be released without US and NATO permission.

As I noted in my 15 October letter to the Inquiry, this claim turned out to be factually untrue. I challenged this from the start and quoted a NATO Information Officer I contacted on the question but NZDF stuck to the line as long as they could. I believe this is a warning about their

attitude to the Inquiry. In other words, if things had been going slowly, one of the things that went slowly was they stuck to their guns on the argument that they didn't have to release most of their documents. It began in the 28th of May 2018 Memorandum from Defence that said the vast majority of its material would be available only to people with the appropriate security clearances and claimed "much of the information does not belong to NZDF". Its August memo said all the "documents and communications that NZDF prepared during the ISAF Operation and as part of that operation's activities" are subject to the control of NATO. This wasn't correct either.

On 25 September it delivered its first bundle of "classified material that is subject to the control of the NZDF" which appears to have been based on their incorrect view of their control over their own documents, none of the documents were prepared in Afghanistan. It wasn't until October that MFAT finally confirmed what I had written about already, which was reported from NATO that those documents weren't actually belonging to other countries, they were New Zealand's to do what they liked with.

All around the world Afghanistan troop contributing nations have treated documents they created while working in ISAF, that's the coalition of Afghanistan, as their own documents. There was no basis for the NZDF position, which ran false from the start, but they stuck to it for months, delaying giving the vast majority of their Operation Burnham documents to the Inquiry. With this obstacle removed, there is now no good reason why most or all operation documents of this long past operation, where the New Zealand forces left years ago, cannot be made public to make a fair and open process.

I want to move on to hearings. Minute No.4 states at paragraph 79, "We acknowledge the importance of open process

and the need to maintain confidence in the Inquiry's work... Despite this ... all or most of the evidence gathering activities will still have to occur in private".

But I submit that as for the documents, so too for the evidence from witnesses, i.e. if secret hearings are only justifiable - secret hearings are only justifiable if much of the content is highly classified. If there is no need for most or all of the NZDF documents to be kept secret, there is therefore no good argument why secret hearings are needed for witnesses to talk about substantially the same facts or details as in the documents. Put another way, it seems to me unless it is found that much of the NZDF documentation has to remain secret, there is no reason to design a process based on secret hearings.

What I would argue is required, is the equivalent of redactions. That there may be pieces of hearings, like pieces of documents, and that that can be negotiated but that otherwise the ultimate process will work.

As a secondary argument that has to be addressed, NZDF and NZSAS personnel supposedly being put at risk personally if they appear at non-closed hearings. First, I suggest this greatly exaggerates the threats compared to everyone else in New Zealand. It is too convenient and they prefer not to be scrutinised. New Zealanders are far more likely to die because of disclosure of information about domestic violence than information about an historic Military operation. NZDF were happy to name Willie Apiata as a SAS operator and then send him back to Afghanistan. Let's not forget that.

Mr Salmon will talk about Jon Stephenson's defamation case where SAS witnesses appeared in open hearings talking about their experiences in Afghanistan and got cross-examination. If they can do it then, they can do it now.

Yes, in contrast the villagers will need some

sensitivity but not secrecy for their evidence. And a handful of whistleblowers who the NZDF have said it is seeking convictions, need special care. But there is no good reason why NZDF staff need secret hearings, they are public servants and other public servants have to front up to Inquiries as well.

As I said in my submission on Minute 4, "Without saying it directly, the draft Witness Protocol seems to be saying - without explanation or justification - that all NZDF staff will be heard in closed hearings from which core participants are excluded. If this is not the case, it would be good to hear. But if this is what is proposed, no single move could reduce the credibility and likelihood of success of the Inquiry more. It would be a huge procedural victory for NZDF. I think this is a make or break issue for the Inquiry".

There are also obvious issues about how the Inquiry can hope to get NZDF-supplied witnesses to feel able to contradict the NZDF's narrative for Operation Burnham. I ask the Inquiry issue an order that NZDF should play no part in preparing witnesses, including not offering them NZDF lawyers as "support". If witnesses want legal representation, presumably there can be provision for them to apply to the Inquiry for costs for independent legal representation, possibly with the expense passed on by the Inquiry to NZDF. In the Baha Mousa Inquiry in Britain, Military witnesses had their legal expenses paid by the Ministry of Defence.

All NZDF should do is provide addresses so the Inquiry letters can be sent directly to a widely identified defined set of past and present staff, the breadth and parameters agreed with the Inquiry and core participants. There should also be letters requesting appearances by personnel who have played particular roles in events covered by the Inquiry.

The Inquiry letters should include a quote from the

current Chief of Defence Force instructing the past and present staff to act with integrity and tell the truth, including and especially where their recollections are not the same as the official NZDF narrative. This is how a Government organisation generally co-operates with an Inquiry.

The letters to all relevant staff should offer them the option of appearing confidentially if they wish, possibly under the Protected Disclosures Act. This is important because potential witnesses could fear consequences if they say things to the Inquiry without permission of their past and present employers.

I also believe it is essential that non-NZDF core participants can question the past and present NZDF staff. In the Baha Mousa Inquiry, for example, the Commissioners questioned first and then following this all participants were allowed to question as well.

In summary, almost the whole NZDF/Crown position is based on an unrealistic view of the degree of secrecy required to the information at issue. If it is not actually threatening national security, then their arguments cease to be relevant. In that case, the most effective and least costly and time consuming approach is to be open.

So, I just want to summarise what information the Inquiry needs. In the course of that, I will answer your question about the overlap with the Inspector-General's information.

First, perhaps most importantly, information about the deaths, injuries, loss of homes and possessions and other harms that occurred in the two villages. This is an essential part of the Inquiry from which everything else follows. The information is largely not secret and, while some names and other details should not end up on the internet to avoid risks back in Afghanistan, it does not require secret hearings.

Second, information about NZDF's knowledge of the

civilian casualties and other harms, information about what steps NZDF took to investigate what had happened and details of why it offered no medical or other aid. Contemporary NZDF documents and NZDF witnesses will provide information about this but it is not sensitive information about methods or capabilities either. In other words, the usual reasons for withholding don't apply.

Further information about the preparations and conduct of Operation Burnham itself and other relevant operations. NZDF hold most of the information on these matters and it would not be realistic to expect the vulnerable sources for the book *Hit & Run* single-handedly to disprove the NZDF position in the absence of us being able to vigorously test the NZDF information and source materials.

I predict the key disputed issues will come down to only a few dozen named documents originated from NZDF personnel and no longer requiring security classification. They will be about time, place and events, not sensitive methods and capabilities, although NZDF will likely claim the latter.

Just as most or all of these documents do not need to be classified, so too logically evidence from witnesses about the same subjects.

Fourth, probably a much larger documentation from the weeks and years since Operation Burnham, the years of cover up, as I would see it. They will be communications and other reports that bear upon what NZDF and others knew about civilian casualties and other matters, what they reported within NZDF and the Government and why they did not provide assistance to the victims as over the years the story of the events repeatedly reached the news media. I suspect there's hundreds if not thousands of documents including emails, PR documents and other documents organisationally or politically sensitive but not operationally sensitive, i.e. that do not need special protection of the Inquiry either.

Finally, there are intelligence reports from other agencies, capture-kill documents, sensitive ones that designat who can be killed or can't, claimed to be sensitive. I predict redactions and summaries will be sufficient to protect the sequence.

Here I want to come to the subject which Sir Terence raised which is about how we overlapped against the Inspector-General's parallel investigation into Operation Burnham. Perhaps implicit in that question is the idea that since she's doing it, maybe that will handle the SAS and GCSB parts of the Inquiry which I understand. I can see the economy in that but I'd like to argue at least in part against that idea.

That's by looking again at the detail of the information we're talking about. I could imagine that there would be two parts. If you have an SAS or GCSB person before you, I can imagine there will be two parts to what they would say. The first will be context. I work in this kind of job, I do this kind of thing, I deal with human intelligence, I write these kinds of reports. That's a context which is legitimate methods and procedures and it plainly needs protection.

But then there's the intelligence reports which are relevant to this Inquiry. I have been told in reasonable detail from people who have seen them what's in those intelligence reports and I want to explain what's there now because this will help to clarify some of the issues.

What I am told there, I haven't seen them with my own eyes but the people who have read them, for example, with the SAS there will be SAS reports saying - they won't say we spoke to informer Mohammed, they are quite well sanitised, as they call it, but it will say a certain date, we believe that the insurgent group based in such-and-such a place, these are the named insurgents we believe were involved in the Tim O'Donnell attack. That is one kind of thing which is about issues, they

are secrets of insurgents in Afghanistan. They are not New Zealand secrets which will cause damage to New Zealand. They're already written about in the book, in fact. Or there will be SAS reports saying spoke to, we believe which means spoke to one of our secret paid informers or whatever, we believe or we've heard or it is said that this person died and that person died and these people are angry because their husband or father died or whatever and this insurgent was in this place and that place, which again are facts and details of what went on in the village but they are not the methods and secrets of the SAS.

I would like to draw that distinction. Some people would insist documents, intelligence documents, wow, terrified, terrified, can't ever release them but I believe the content of those which is relevant to the thinking and planning and state of knowledge of the New Zealand Defence Force and decision-makers makes that useful information and is not classified in the same way as the methods and procedures. The same with the GCSB. I have handled a reasonable number of GCSB reports and they would need sanitising. Normally at the top they have the codings of the types of interception equipment that was involved, the particular satellite, this station, some other codes of information which if you know them you can read some of the information, and then it has a block of text, "Qari Miraj phoned such-and-such at this time and said we had a really good attack but a girl died etc., etc." So, we've got two parts of this. We have the details of the secret procedures but then you have some claimed facts, a state of knowledge of the New Zealand Defence Force and others who read those reports that came in about what was what.

I would argue that the stated belief about, what I'm really coming to is if those reports are coming in the following days and saying there was a little girl killed, this

person was killed, that named person was killed, this named person was killed, this is crucial information which can be separated from the formats and the secret parts of the reports that they're coming in on. That's what I would argue.

So, the reason I would argue not to leave it to the Inspector-General and say it is a security Inquiry, is there will be original source information which was informing the state of knowledge about what they were going into and whether they were likely to find insurgents or civilians etc. and then stated knowledge afterwards that they weren't deciding to go back and help people who were injured and dead or help the families of the people who were dead.

SIR TERENCE: I should make it clear that that's not what the protocol was suggesting, that we would leave that part of the Inquiry to the Inspector-General. Rather, it was recognised that we are conducting an independent Inquiry which happens to cover some of the same ground and we wanted a mechanism to enable us to share information while pursuing our own independent inquiries.

So, for example, I think an example is given in there, a witness may speak to the Inspector-General, the same witness may speak to us and part of that might be simply getting them to confirm the evidence they'd earlier given and then we would build on that, to the extent required for our particular Inquiry. So, it's not a matter of leaving it to the Inspector-General.

MR HAGER: Okay.

SIR TERENCE: It is really a matter of utilising it and building on it.

MR HAGER: Thank you, I understand. In summary, what I was saying is SAS and Military intelligence documents and SIS and GCSB documents can sound very sensitive but the types of information described here, in fact the types

of information which are needed here do not imperil New Zealand in 2018.

It is reasonable to make process plans on the assumption that by far the majority of the key information will be able to be released to the core participants and/or the public, like the overseas inquiries, and generally classified documents can be handled as an exception, not as the basis for the process.

I want to say a few words about protecting our sources. I have already said -

SIR TERENCE: How much longer are you going to be, do you think?

MR HAGER: A wee while yet. Do you want a break?

SIR GEOFFREY: It is the usual time.

MR HAGER: I am very happy for that.

SIR TERENCE: We will take a 15 minute break and we will start again at 3.45.

Hearing adjourned from 3.30 p.m. until 3.45 p.m.

SIR TERENCE: Do you think you'll be finished by maybe 4.15?

MR HAGER: Yes, I will be. We've negotiated timing and Mr Salmon is happy with that amount of time.

SIR TERENCE: Thank you.

MR HAGER: I now want to move to some practical suggestions of the most effective just and open process as possible. This largely, unsurprisingly, is what core participants can bring to the subject of the Inquiry.

You've already, Sir Terence, raised some of this, so I will skip over some of what I have to say. It's about the role that we can distinctively play. It could seem that the Inquiry process will consist of the Commissioners hearing and

testing the witnesses for each side but it is likely that many of the sources in the book will not be willing or able to come before the Inquiry. One key source has since died, another, as I explained elsewhere, decided he didn't want feel safe being involved. When they agreed to help with the book, they did not commit themselves to take any further risks. Also, there are huge issues of inequality that arise here. Since NZDF can order any one of its witnesses to appear but it can try and get our ones convicted if they find out who they are.

On some issues there could conceivably be numerous witnesses backing up the NZDF narrative with no risk of retribution or harm and few or none present to substantiate the evidence of the book's sources.

This is not about the truth of the facts presented in the book. It is simply a reality of the situation. This is why I've argued that a crucial part of reaching the truth will come from minutely scrutinising the NZDF narrative and the evidence of their position. But this will require a deep body of knowledge; how does Abdul Faqir's story differ from Abdul Khaliq's story. Was there one person called Abdul Qayoom killed in Operation Burnham or were there two people killed with the same name? One of the documents the NZDF put out last week says we made a mistake and there was only one Abdul Qayoom killed but it was a common name. There were three Mohammads in the book, one the parents of one of the casualties, one himself and another one killed. There were different stories of all of them. Mohammad is a common name in New Zealand as well.

We are noticing the contradictions about which weapons were claimed to be found where, whose houses were burnt down or which NZDF denial happened when, what's normal and what's not in the Rules of Engagement.

The best option available, I have been arguing, is to use us, the core participants, the non-NZDF core

participants, all of whom have personal experience and knowledge of these subjects. Given the Inquiry doesn't have teams of research staff, we can help to bring expertise to the process. Allowing us to play the fullest possible role will assist the Inquiry to do its own work. It would also satisfy the requirements of fairness and natural justice as well, and increase public confidence in the process. As long as, as I've argued, the information can be made available to us, there is no obstacle to this.

The current process proposals in Minute No.4 provide the core participants with the considerably less solid role than the other core participant NZDF. The Minute says we might be given redacted and summarised material "if feasible and appropriate". And suggests "it might be possible" for us to "suggest areas of the inquiry or specific questions to be put to witnesses". But that there are no "might be possibles" or "if feasibles" in the proposals relating to NZDF secrecy. Again, security is treated as absolute and the rights of others as secondary, to be incorporated as circumstances allow.

The Minute says at paragraph 77 its proposals do not mean "that core participants will have no ability to influence the Inquiry's evidence-gathering processes" but if these proposals were adopted, core participants would not be present to notice inconsistencies in evidence, omissions and nuances, to ask questions on issues that arise, to probe witnesses and challenge unnecessary secrecy or assess the credibility of witnesses.

Compared to the core participants' evidence, all of which will be open to NZDF, much of the NZDF's evidence will be hidden or obscured. This would be unfair in a process that's already inherently unfair in terms of unequal resources.

I believe this would be an unnecessary thing because it

will be classified material needlessly dominating the thinking.

I will give an example of something which hasn't been raised. In the case of the Baha Mousa Inquiry, the Civilian Casualty Inquiry in Britain, large numbers of previously classified documents were declassified, some for public release, some only for core participants. There is no equivalent of that in the current process and I argue that there should be.

For example, the numbers meant there were 346 documents referred to in the Inquiry report, there were 453 documents available on the Inquiry website but there were 1327 previously classified documents which were made available to the core participants in the course of the Inquiry to help the Inquiry.

The current proposals here don't have that. As I say, it would be aided by allowing us to have access to the information. I am proposing there are plans which use the core participants and give them special access to information which otherwise might not be made public and not be able to be scrutinised in that way.

I believe that they should include core participants having access to all but very highly classified documents. And with a few properly highly classified ones, redactions and summaries can be used.

Also, there might be information that needs protection for non-national security reasons, such as public employees' names, including in the Military but these could likely be provided to core participants under a non-disclosure agreement. This was, for instance, the case in the Baha Mousa Inquiry where nearly all names were provided to the core participants.

As discussed more below, the need for an effective, efficient and fair process requires that core participants

be allowed to read all written evidence and be present for all oral evidence of the NZDF staff, past and present.

Also, non-NZDF core participants are currently given a limited role in the classification review process, whereas NZDF and other agencies are to be consulted as of right on any possible declassification, agreement with them is sought and if agreement cannot be reached the agency can make submissions. This is obviously unfair. An equivalent process is required where, for any documents that may be withheld, redacted or summarised, consultation occurs with the non-NZDF core participants, agreement is sought and if agreement cannot be reached then the core participants can make submissions.

I promise we will act quickly and will not be the ones who hold up the process.

As part of this, which I think has been agreed to just not happening yet, I request all core participants be provided with a full list of all classified documents as soon as possible, including the title, originating organisation and date. This will enable us to recommend which documents are the highest priority for the classification review process. Prioritising that is vital for an efficient process.

Many of the problems with the current proposed process will be best solved by strengthening the role of the core participants. In particular, the core participants should, here's my list:

Have access to all classified and reclassified information confidential or below, and redacted versions and summaries for all documents secret and above.

Be involved in the classification review as proposed.

Be given lists of NZDF and other official documents, including enough information in each case to know which documents is: title, date, type, so we can state the priorities.

Have the right to ask interrogatories and have them answered promptly, i.e. obtaining information held by NZDF as well as documents.

Be present for all witnesses and other hearings, with provision for a witness to present any very sensitive information separately to the Inquiry but not, I say definitely not suggesting that there needs to be two sets of parallel hearings which are obviously clumsy and expensive but the equivalent of a redaction. Where, for example, if someone was explaining the background of the context of their secret operations, how they do it, we might leave the room. When they discuss the stuff which is relevant to the Inquiry but not secret, we can return.

SIR GEOFFREY: Mr Hager, the prime difficulty with the Commissions of Inquiry Act 1908 was that it had parties to it who had certain rights and that was one of the reasons why it wasn't an effective instrument for Inquiries.

The Inquiries Act has core participants who are different. They are not inquirers, they are participants. There is a big difference.

MR HAGER: I understand the difference and I'm not actually talking about rights, except for, you know, natural justice rights and openness rights. I'm offering our participation at this moment essentially in terms of effectiveness and ability to do the job. I'm not claiming a right to do that. I am saying I think it would be most effective and useful for the Inquiry.

SIR GEOFFREY: Well, I get the impression that you think we can't do it and you will be able to do it. That's the burden of your submission, as I hear it.

MR HAGER: No, I don't. What I said, and I will say it again, which is not an insult or in any way a slight, is that we have been studying these issues for years. I mean,

the minute detail of Operation Burnham and the maps and the people and the complicated people's names that all sound like each other and the rest of it, which means that in a relatively short time period without endless research staff we can bring expertise and eyes which the Inquiry won't otherwise have. That is in no way a reflection that you can't do it but you can do it better with the help of us.

SIR GEOFFREY: I have been involved with Military Inquiries before and you are able to get evidence from people about it. You can get expert evidence if you need it. And I just don't see how the way you're submitting to us really stacks up with the way the Act is written.

MR HAGER: Thank you. As far as I understand, the Act allows you to have whatever process you would like to determine.

SIR GEOFFREY: That's right.

MR HAGER: I am recommending what I think will be an effective and fair one. That's all I'm saying. I am not demanding, I am suggesting.

SIR GEOFFREY: Thank you.

MR HAGER: To finish my list, I also would ask that we're given copies for transparency's sake of all correspondence between New Zealand officials and officers and foreign organisations to provide transparency in the negotiations over access to foreign sourced information.

I am not requesting this as a favour to us. I believe that the NZDF's best hope of maintaining what we see as a cover up is closed processes and the best hope of finding the truth, in an environment of active hiding and evasion, is to make full use of whoever is available which includes the core participants and, where appropriate, the public.

There is another compelling argument to be made as well,

which is that it's very important there is public confidence in the Inquiry and there will not be the same public confidence if it is seen to be secret.

I will jump a bit. I want to talk about the need for a step-by-step approach. I am concerned, one of my concerns as I arrived here today is that it is already seven months into the Inquiry, through no fault of most of the people involved, and there is a risk there will now be pressure to rush things. There are hints of this pressure in the Crown's submissions where it mentions timeliness and delays. But it is vital for fairness and effectiveness that there is a careful step-by-step process.

First, we need the NZDF documents, assisted by the review of security classifications. We need lists of all the documents, so we know what we haven't been given. We need equal rights as NZDF to comment on and challenge the security classification and release decisions. We need time to analyse the documents released to us and ask for more.

Then during that process and after it, we need the questioning/interrogatories. It is a vital part of the process. We need time to analyse each set of answers and then ask more questions. I believe it will prove to be as important as the documents.

All of this has to happen before the substantive hearings. Also, time must be allowed to analyse all the documents and interrogatories prior to substantive hearings. This is not a demanding request. It is just normal, systematic process.

I endorse the request for there to be a timetable as part of your process decisions so we know what's coming up and everyone is on the same page with it.

What I'm saying is, it's vital that NZDF can't drag its feet, for instance, on producing the classified materials using up the time and then we have a hurried and compromised

process.

I am just about finished.

I just want to make a comment about what was called the Crown position in the Crown submissions. This is a critical comment. I am unimpressed that the NZDF, MFAT, intelligence agency submission is called "comprehensive" and "whole of Crown". The whole of Crown would care about Government accountability and integrity. It would place high priority on international law obligations. But these are virtually absent. Where is the rest of the public service? The submission is almost entirely a defence of secrecy, based on an exaggerated view of the sensitivity of the information at stake. Did any of those agencies check for themselves whether NZDF was improperly hiding things before backing up the NZDF position to keep things as secret as possible and doing it in such a forthright way?

It is eight years since the operation. It is several years since the troops came home. It is exactly the appropriate time for proper scrutiny.

I note that the Crown submission emphasises the idea that the Inquiry is needed because of the book's allegations that impact on the NZDF's reputation. But let me repeat, it was not a book and it is not an Inquiry about attacking the NZDF or harming its reputation. It is about what happened to innocent people when those villages were attacked. It is about civilian injuries, death and trauma and the bizarre unwillingness to go back and give medical aid and support. I do not understand why the Government agencies involved are not helping in this as much as they can.

It is actually more important that we think about the reputation of New Zealand. Can we investigate our wrongs against people in other countries openly and honestly? Or will the process be defeated by NZDF's obsession with not wanting to admit it makes mistakes and gets things wrong like

everybody else does.

SIR GEOFFREY: But, Mr Hager, the Crown represents the whole of the New Zealand Government, doesn't it?

MR HAGER: That is the point.

SIR GEOFFREY: The Defence is part of that, it's not all of it. You can't have five or six different positions in front of us from the New Zealand Government, surely?

MR HAGER: I was objecting to the idea that whole of Crown is only promoting one half of the picture of what's needed in this Inquiry. That was all. Because there are other parts but possibly I don't understand the conventions.

Just to complete. This is the first Inquiry like this in the history of the NZDF. The opportunity is unlikely to come again for a long time.

I believe NZDF and the Crown submissions are being incredibly short sighted when they urge for openness to be minimised and other parties beside themselves to be largely excluded. This is placing no value on this rare opportunity to look hard at our Military's overseas operations, to show the public it can be done openly and fairly and hopefully to improve the NZDF.

I urge everyone involved to take a longer look, not the current short-term defensiveness on behalf of NZDF.

To the Commissioners, please listen to us on the process. This Inquiry did not arise from the NZDF scrutinising its own actions and fronting up with concerns, which is what happened in Australia when their Military was concerned about various leaders that setup the Inquiry there. The NZDF leadership had years to do the right thing about Operation Burnham and it did not. It was us, the authors and counsel for the villagers, who have raised this. But not as some attack on NZDF, as a real world issue about harming innocents and a shameful cover up. The Government decided to have an Inquiry

because lots of New Zealanders were concerned about this. Plenty of people inside NZDF are too. I know, I'm hearing from them.

In the context of lawyers from NZDF, lawyers from SIS and GCSB, and lawyers from MFAT, with the Deputy Solicitor-General appearing to speak on their behalf, it would be possible to take seriously the incorrect claims about all the information being extremely sensitive and the necessity of a closed process. But with a wider view, imagining for instance that we are looking back from the future at how we handled this opportunity, it is obvious that the Inquiry process should be solidly built on fairness, openness and effectiveness, with any residual needs for secrecy fitted around those absolutes of good practice, as circumstances allow.

SIR TERENCE: Thank you, Mr Hager.

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SUBMISSIONS OF COUNSEL FOR JON STEPHENSON
BY MR SALMON

MR SALMON: I will endeavour to be done by 5.00.

SIR TERENCE: You shouldn't feel pressed if you want more time.

MR SALMON: Might I clarify at the same time, my understanding from Counsel Assisting is it's not anticipated there is likely to be time for replies?

SIR GEOFFREY: That's correct.

MR SALMON: I ask because I have distributed a piece of paper in an attempt to be helpful to my panel and my friends but which has not been provided to my friends early enough to give them time to talk to me about it. In the normal course, I'd leave it sitting there and see what they say in reply which I won't have a chance to do. In theory, I am appearing in the Court of Appeal at 2.15 tomorrow which I will get replaced in if there's any chance of a reply here. If there's not, you won't notice me gone but I won't ask for a decision now but just note that.

What I've handed up, I am not sure if you've had a chance to look through it at all?

SIR TERENCE: No, we haven't.

MR SALMON: I will tell you what it is. I am mindful of timing, much of it can be allowed to sit there and be looked at against the backdrop of what I will try and make oral submissions on now by way of points of principle to help inform what's proposed here.

Having received the Crown's 39 page summary of the further submissions on Friday, our view was what would be most

helpful to you is to have presented some practical suggestions of how this Inquiry might balance what seemed to be common ground considerations but balance them in a way that my client is comforted by.

When I say common ground considerations, it seems clear that, to use my learned friend Ms McDonald's submissions this morning, this hearing and this Inquiry should be as open as it can safely be. It also seems common ground that normal principles of natural justice apply, whatever they might implicate for a hearing of this nature by way of rights of audience, rights to give evidence and possibly rights to cross-examine and see documents.

There seems to be common ground those factors are material and that costs and time is material but most of all I am sure we'll agree that it's important that one, the Inquiry get to the truth; and two, that the public sees enough sunshine shone on this that there is public confidence in the outcome.

What I've endeavoured to do is set out some suggestions of how my client considers this Inquiry could be run, having quite a unique perspective on the tasks in front of you.

I say that not because he ought to know what it's like to be on an Inquiry or to be a Judge or a lawyer but because he has already litigated a case about 2010 alleged war crimes by the NZSAS in the Court immediately above us, in which the same SAS personnel, or at least an overlapping sense, were engaged and were called as witnesses and in which the same types of public interest concerns about confidence were in play.

And his experience of that, and unfortunately Mr Nilsson and I were counsel for him there which is why I'm here again now, our experience of that is that all of these concerns can be dealt with by normal mechanisms employed by the Courts and mechanisms that are available to you, Sirs.

So, I'll come to that experience briefly, not to tell

a war story but to give an indication of the types of mechanisms, and this reflects a discussion I've had briefly with Counsel Assisting, the types of mechanisms, many proposed by NZDF, which enabled natural justice to be met while keeping an efficient process and while enabling counsel at least to see witnesses and documents. I will come to that as well.

If I can perhaps first summarise the nature of this written submission and then tell you where I will go off page and where I won't.

This synopsis is not intended to capture everything we've written before and it's not intended to teach this panel how to suck eggs on natural justice or openness or the principles relating to that.

What it is intended to do first and foremost is set out what we propose are appropriate orders to deal with three linked but not completely overlapping concerns. One of them is the concern that we all must have, that you, the panel, the Inquiry, receive all of the relevant material from the relevant parties.

The second, is the concern that generally applies, that this hearing be as open as possible and that only real and proper claims for confidence or public interest security are accommodated.

And thirdly, the concern, and I want to touch on this because Sir Geoffrey had the exchange with Mr Hager just now which I understood, where understandably there is a risk that any of us might sound as if we lack confidence in this process which is not the case.

But there is the third and overlapping concern about the importance and value that can be added by adversarial cross-examination in a case such as this.

One of the other points I will interpolate on orally, is to develop, one, some comments and submissions on why

openness and the principles surrounding openness are not linked to the adversarial process but to separate interests in open justice that equally apply here.

And two, why adversarial cross-examination adds value to a process where otherwise the parties who are cross-examining lack certain advantages that an adversarial party has. That is not for a moment to suggest that there aren't multiple issues on which, as Sir Geoffrey has identified, the Inquiry can call relevant evidence, Military expertise and so on, but experience for Mr Stephenson has shown that there are points on which, having direct instructions from someone such as that and being able to take an adversarial position in cross-examination on very similar issues to this, resulted in points being identified that, reluctantly I must submit, may simply have been missed. Indeed, as I will come to in the Stephenson file, were missed even by me in the first trial which was a hung jury and not identified until leading into the second trial.

So, I will try and engage the concern which I anticipated and understand from Sir Geoffrey that we not seek to stand in place of the existing structures the Inquiry has which will, without doubt, adequately explore most of the areas.

Against that background, the orders sought are set out from the bottom of the first substantive page of the submissions and set out proposals through the following two pages of ways in which the material said to be justified security classification will be properly screened and considered and made available without the risk of overly broad claims to secrecy simply getting through.

Again, that is not to second guess the ability of the Inquiry to second guess claims but, as we know from our time as practising lawyers, our ability to judge secrecy is always partly informed by what we are told about context by whoever gets to speak on the issue. So, a client may persuade her

or his lawyer that a document is sensitive in ways that hearing from a contradictor could be shown not to be right. So, a degree of caution and care there is built into that proposed formula.

Given the timing, I won't go through it item by item because it may be that much of it is agreed be to be sensible. It is intended to be a practical gloss on the existing process to help deal with the mischief that otherwise documents will be unseen.

Then at paragraph 8 a set of proposals regarding the review process and security clearance, orders sought regarding how Mr Keith's process will work and, in particular, a proposal that counsel for the four participants be permitted to apply for security clearance, which seems to me respectfully to be a tidy solution for the alleged concern to the NZDF about security. These now eight year old stale documents can be seen by persons with appropriate security clearance. If we pass that clearance, then it would seem safe to see them. If not, well that will be a problem and embarrassment for individual lawyers but that would seem to be a mechanism to deal with the concerns about security which would protect both parties and give the core participants confidence that at least their lawyers could see documents.

As I'll come to in the Stephenson case, this is more protection for NZDF than was sought in the Stephenson case, in which in some cases counsel undertakings were either impliedly or expressly considered satisfactory. In other cases, documents, the nature of which are now said to be so, so sensitive they cannot be seen by any of us, were simply given to us in open discovery; ISAF reports, documents that supposedly engage these international interests.

SIR TERENCE: Just on the clearance for counsel idea, I thought there had been some discussion of that in the English authorities and the same problem was raised

about it as with special advocates, that it creates a problem for counsel?

MR SALMON: Yes, that's right.

SIR TERENCE: And the obligations to the client?

MR SALMON: I will address that now, I was going to come to it later. You are right, Sir, that's identified by the English Courts. I say a couple of things about it.

It seems accepted from the exchanges between Sir Geoffrey and Mr Hager that there will be some cross-examination on key points but it might not be by contradictors, it might be by Counsel Assisting. The point that flows from that first and foremost is that contradiction immediately exists, in that there will be the contradiction between holding information and speaking about it, to at least some degree that contradiction exists.

Counsel Assisting will not have the duty of disclosure to, in my case, Mr Stephenson if they were fulfilling that role but they will need to talk to him because the proposal from NZDF and the proposed structure as it stands is they will be surrogate agents for Mr Stephenson's cross-examination. So, they would need to speak to him and try and work out what questions he would need asked, doing exactly the same careful stepping around the no-go areas of confidence that I would have to do. I understand the English cases to make that point but we would have that problem here anyway.

The third point, and I think the biggest problem with the submission from the Crown, is simply the reality of practice. I would say four out of five commercial cases now involve the giving of undertakings by counsel in which counsel cannot tell a client about some secret recipe, a formula, financial matter, data of some sort, and it works. We know it works because we do it all the time. I don't think it's disrespectful to anyone, I know no-one is meaning it to be disrespectful to me, I have never yet until now had anyone

doubt that that is an adequate mechanism for dealing with such concerns. We are lucky to live in a culture where I have absolute confidence in the lawyers sitting around me that if they gave such an undertaking to my client it would be honoured, and I can say from the bar that I have that absolute confidence. I don't understand any of my learned friends to be saying otherwise about me and I would be surprised if they did. The NZDF, I submit, would not because it has previously trusted myself and Mr Nilsson and the process worked.

So, it can work and those concerns are ones that are at odds with New Zealand practice and at odds with, frankly, the budget we have to work with. Yes, Sir, they do make that point but I think it should not be controlling. For my part, I am happy as counsel to undertake the same accommodation of those issues that I have to for any commercial case.

SIR TERENCE: Okay, thank you.

MR SALMON: Then one regarding the taking of evidence at paragraph 9. All I will say here to add to what's been said already, is we respectfully, I think, can do well to keep in mind that there will be very different types of interests and confidence at play here. There will be some persons who are worried about their personal safety in a country a long way from here. I dealt with one of those in the defamation case Mr Stephenson brought. In that case, there was no problem with us seeing him or the Judge who saw him. There was a problem with any reporter that might identify him because he was scared for his life. That is one type and there may be some others.

There will be some whistle blowers who will be concerned about identifying details within NZDF and the types of identifying details might be quite nebulous or odd to us but they will be real, he smokes or she doesn't drink or whatever it might be, they will need some form of accommodation. But

there's a distinction to be made between those types of confidentiality concerns here and those of informants from abroad. There will be permutations between those and other types, such that we can't design a cookie cutter approach, that there was all of them now and respectfully I think the appropriate thing is to have enough flexibility built in that the Inquiry can accommodate the needs of, for example, some of Mr Stephenson's sources who will be allergic, irreparably allergic to any identifying details reaching the ears of Government for reasons that will be obvious.

Similarly, there will be some who will simply not want their names broadcast and those can be accommodated on a case-by-case basis and, respectfully, my expectation is they will be worked through pretty constructively and quickly as they arise because the actual examples can be easily dealt with.

So, noting that Mr Stephenson had concerns relayed to him about different types of concerns, I just foreshadow that my sense is they're better dealt with on their merits at the time but -

SIR TERENCE: Well, I mean, I see the force of that but, on the other hand, we do have to have a bit of a sense of how we might deal with it.

So, to take your example, a source who wants complete confidentiality and, in particular, complete protection from his or her identity being known to Government sources, I mean how would one, on your view, handle such a witness? How would the Inquiry, I mean it's clear from our proposal how we had in mind to deal with that sort of person but on yours how would it work?

MR SALMON: Certainly. If I can take a mirror image version of what we agreed to outright with the Military serving SAS Officers, for example, in the defamation trial which was literally one floor up.

The NZDF concern was their identity not be known to Mr Stephenson and other members of the public. Thus, on the expectation that voices were unrecognisable, otherwise it would have migrated further, a screen was put in place before they came out which only we, the Crown's lawyers, the Judge, the Registrar and the jury could see. And they would speak from behind that screen with code names that I did not know the translation for, Colonel B, Major G, but with the public there. And the cameramen who were present throughout that trial, there was someone who filmed the entire trial but for these moments were asked to turn their equipment off, they didn't even leave the room. It worked. One could be more stringent if there was a need but these were the active serving soldiers on the ground and their Commanders who we were told deserved the utmost level of security and we protected it.

SIR TERENCE: So, in this case, there may be, for example, people of an intelligence background or something like that. The nature of their evidence may well identify who they are. So, how is that dealt with?

MR SALMON: Sir, it's a good question. The question would be which parts of their evidence and to what extent identifies who they are. If there was a true concern that pertinent evidence that was essential to the Inquiry but non-essential to other parties would identify, that would be one thing. If it was essential but so sensitive that it risked life, limb or career, you would have the power to say this is an exception and Mr Salmon must leave this room while that part is talked about. But that would be the intrusion upon openness and rights of contradiction that's necessary to meet the mischief, rather than throwing the baby out with the bath water.

SIR TERENCE: Thank you.

MR SALMON: Respectfully, I think that will happen less than

we think with the relevant witnesses who were there. With some exceptions, I was surprised by how candid those witnesses are once they are away from the line up or standing parade. The issue might be more acute with those whistleblowers, those with recognisable voices either from public or other context and so on. But, again, without wishing to take up your time envisaging every possible permutation, the simple point is, having dealt with them in apparently at the time very sensitive areas so easily, there will be mechanisms for doing it.

If it's insolvable, then it would be legitimate for the Inquiry to say this is an exception but it would be an exception borne out of safety or identifiable fact specific sensitivities, rather than a general adoption of NZDF's, I have to say, constantly changing view of what is sensitive, based on whether it's useful or not. I don't make that submission lightly but that is a hard borne perception of the way disclosure of documents are given by NZDF. I agree with Mr Hager on that.

That sets up a framework, I guess, of how we might see the competing interests being balanced, subject of course to the overriding discretion the Inquiry has to continue to regulate its processes to ensure a continued balance.

Can I briefly address a couple of observations about those different components that feed into today's debate, getting everything that's relevant from NZDF being a different question from being able to cross-examine NZDF, being a different question from openness.

The first point, and this is fleshed out in these submissions, it's built on an earlier one, is that it's not accepted that the Crown is right to say that there's some presumption against an open and properly contested process. Quite the opposite.

At paragraph 11 of these written submissions the Law Commission's passage is quoted on the importance for particularly large scale high public interest hearings for a proper testing in a public hearing. That's not to take issue at all with Sir Geoffrey's observations about the new statutory basis. This is commenting on this statutory basis. Is the Law Commission, as I read it, effectively recognising that the discretion available to an Inquiry, in a context where it needs to have regard to the Bill of Rights, natural justice and open justice concerns, will increasingly indicate an open hearing where public confidence needs it and where the issues are sufficiently serious.

So, the following few paragraphs expand upon why, in our submission, it is not right to say that there is some presumption against openness or presumption of a closed, narrow, inquisitorial approach.

The next point is perhaps the most significant, in my submission, and it's this, one of the issues, one of the allegations in *Hit & Run*, and this is the characterisation from the Inquiry in Counsel Assisting's summary, one of allegations made, recorded a number of times, is that there has been a cover up, and it's absolutely right that while Mr Hager has concluded that there is one, the Inquiry is entering into this with an open mind, as Sir Geoffrey said.

But public confidence requires that that, along with the other allegations, be properly considered. And that makes it particularly dangerous, in my respectful submission, to allow internal personnel from within NZDF to undertake a screening process of documents and to decide which ones will be "relevant", and to decide which ones are classified, and to have that decision or view on classification treated as presumptively right.

That, respectfully, is a natural justice issue at the very front end of this Inquiry that is responsible to bring

to the panel's attention.

If there is concern, and there is, and if there is a need to inquire whether there has been a cover up, and there is, then it must be at odds with that not to properly test whether NZDF has provided all documents and is properly claiming sensitivity or secrecy, especially given its prior form.

In the normal course, we will hear some evidence about history and so on but NZDF has, without any evidence, asserted that it has international obligations that prevent wider disclosure. We have heard from Mr Hager on that. In my experience, it's been they come and go like the wind.

It is seeking to assemble, and I have spoken to my learned friends this morning after the exchange with Ms Manning, it is not having lawyers screen for relevance but having internal NZDF personnel screen documents for relevance. That cannot be safe.

It's doing so in a context where there is no reason to assume either way that there is or is not a continued cover up but there is a need to assume that we will need to make sure that safeguards are in place.

Thirdly, I am not for a moment going to start suggesting there's a discovery jurisdiction here because there's not but there is the jurisdiction for you to seek these documents which is being done. But an important incident of normal Court discovery is that lawyers involved in discovery provide a vital protection against misuse and breaches of discovery obligations. We effectively now have to certify lists of documents that we believe proper inquiries are being made before we file a list of documents in the High Court. That ethical obligation means a lot. I've seen it in practice and it can mean a lot.

So that, when Mr Isac's client provides a list of documents, I know that an ethical senior lawyer is confident this has been pressed. I have utmost respect for my learned

friends to my left and I know that they will follow their duties properly but equally, as I am about to come to, I know that the NZDF has failed to give complete discovery the last time I litigated against them on the same issues that we are looking at now.

So, I point to those in particular as reasons why, respectfully, it's appropriate to slow down in accepting the all of Crown submission. The all of Crown approach and the NZDF approach naturally assumes not a litigant behaviour but we respectfully cannot assume that in an Inquiry where one of the points to be investigated by you is whether that is a safe assumption.

That is an important recalibration, in my respectful submission, of the way in which documents will be assimilated and I will come back to that briefly when I talk about the discovery experience in Stephenson.

So, that's one point. Another to make about the nature of the issues here which relate to openness is this. I heard the point taken in exchanges earlier today about the difference between a Court proceeding and openness and adversarial processes there and those in an Inquiry. If I might just briefly engage in those.

I was reading the Supreme Court's, Sir Terence's recent decision in the *Erceg v Erceg* case about just how hard it is to suppress details from a public hearing now and the importance of open justice. I won't read it out again but it's right. The question is whether that is somehow diluted in an Inquiry or whether, like in a Court proceeding, it's a Bill of Rights backed, public interest backed, concern about openness. Respectfully, I would say that's, in fact, applied equally to an Inquiry here.

So, while the Courts protect the openness of their hearings, occasionally by reference to the existence of an adversarial approach, in fact that is a passing reference.

I will come to a case or two that makes that clear. The question of whether parties get access is a separate question from openness. The Crown respectfully at times is conflating those two issues.

The first contraction that happens and the shrinking of fully open justice is when the public cannot be reported to about a case but can still be in Court. I am simplifying here. The second is to exclude the public. The third is to exclude the clients. And they never exclude the lawyers but the reason for that is, of course, that in excluding the lawyers it ceases to become adversarial and there is a fundamental breach of natural justice but that is a natural justice point, not an open justice point.

The openness concerns, in my respectful submission, that underlay the decision *Erceg v Erceg* apply equally here. I would say if the Crown says they don't, why is that? It's not that the Inquiries Act presumes confidence. The Inquiries Act, in fact, allows the making of confidentiality orders in no different way to which the High Court can make confidentiality orders. The presumption is openness and it must be open and expressed wording given the terms of the Bill of Rights.

I noted in the casebook for Ms Manning, which is the one with the blank front, some interesting comments about this, in the *Bank Mellat* case in which, and this is the large white volume, I am not sure if you need to go to it, I will just note it, the *Bank Mellat* case begins about halfway through, and there are no tabs but there are page numbers, at page 984. At page 990, *Bank Mellat v HM Treasury*, Supreme Court, it is the lower pagination pages, page 984. Again, this bears upon openness and the difference between an open and a closed hearing.

If you could turn, Sirs, to page 909 of the pagination, 501 of the judgment, there are general observations there

about open justice and natural justice. And the rare occasions in which the public and press are excluded which is done, one, only if one is strictly necessary to have a private hearing in order to achieve justice and two, the degree of privacy is kept to an absolute minimum and then the examples that you, Sirs, will know. But then going on to develop the even greater concerns about natural justice when interested parties are excluded.

Of course, we are not in a party versus party case here, as Sir Geoffrey pointed out, but we are in a natural justice context where those parties have the right to hear the allegations made against them and to contest them. So, while it is not as extreme as the Court context, and I accept Sir Geoffrey's comments to my learned friend, to Mr Hager perhaps, however we describe a lay litigant in an Inquiry, the point is rightly made that they're not parties but it is not respectfully, I think, right to say there is not a public policy concern about excluding them, that's not separate from the open justice concerns and not separately engaged by natural justice concerns. So, those overlapping openness and natural justice concerns are being, in my respectful submission, conflated and should not be.

SIR GEOFFREY: I wonder, Mr Salmon, whether you think the Attorney-General could have ordered under the Inquiries Act a private Inquiry?

MR SALMON: He certainly could have directed it in a fairly clear way. I haven't looked to consider whether that would be ultra vires or whether it would be completely private. It might be that he could. He hasn't, of course, Sir.

SIR GEOFFREY: No.

MR SALMON: It is an interesting question and I will reflect on it and see what Mr Nilsson thinks as he flicks through the Act which, for reasons I can't understand,

he's not doing yet. Oh, apparently I have the Act! It is however always the junior's fault.

So, the second passage in there, it is a good question, Sir, I will think about that.

The next point is on paginated page 1003, page 514 of the judgment, this is again one of those points that highlights the difference between the Court context and the Inquiry context is one that doesn't always mean more looseness and less care, it can go the other way.

This is paragraph 70 where it says in the third line down:

"My third point is that any party that is proposing to invite the Court to take such a course that one is closed should consider very carefully whether it really is necessary to go outside the open material in order for the appeal to be fairly heard. If the advocate or one of the parties invites the Court to look at the closed judgment on the grounds it may be relevant to the appeal, it is very difficult for the Court to reject the application at least without looking at the closed judgment which involves the initiation of a closed material procedure which should be avoided if at all possible. This puts an important onus on the legal representatives of the party asking the Appeal Court to look at closed material. An advocate acting for a party who wants a closed hearing should properly consider whether the request is one which should or even can properly be made and advise the client whether such a course is necessary or appropriate. Advocates, perhaps particularly when acting for the executive, have a duty to the Court as well as a duty to their clients and the Court is itself under a duty to avoid a closed material procedure if that can be achieved".

Now, the reason for that duty applying to counsel which we can debate for a long time or whether it is a duty to the Court or an ethical one, it doesn't really matter. I am not

suggesting any impropriety at all by my learned friend to my left. The point I'm making more is the Court controls those issues and expects something from counsel that is a protection that applies in the Court, that further amplifies the presumption of openness and protects against inadvertent or deliberate use of said confidentiality for other purposes. But also, that reluctance to allow closed hearings if at all possible is one that, in my respectful submission, further underscores the appropriateness of a more fine-tuned approach to confidentiality concerns such as were proposed than the baby going out with the bath water that the NZDF proposed.

Another point which I'll just note is covered in the written submissions I have handed up this afternoon. I refer to the Inquiry's ability under the Inquiries Act to devise processes to suit the particular circumstances at 19. But then moving to open justice, I quote from Sir Martin Moore-Bick, the Chair of the Grenfell Tower Inquiry:

"The principles of open justice apply with their full rigour to legal proceedings in the ordinary sense, but in my view they are also applicable to a public Inquiry setup under the Inquiries Act 2005 to investigate matters of public concern. That is particularly so where there are reasons for scrutinising in some detail the conduct of public officials and others whose actions may have contributed to a substantial loss of life. Section 18(1) of the Inquiries Act itself makes it clear that the Inquiry's proceedings are to be open to the public, who must be given a reasonable opportunity to attend the hearings and access to the evidence presented to it. There is a power to restrict attendances" which is the case in the Inquiries Act here.

SIR GEOFFREY: We don't have a section 18 of our Inquiries Act, do we?

MR SALMON: No, we don't, Sir. Unfortunately, I forget why but we do have a Bill of Rights Act.

SIR GEOFFREY: I can't remember why we have that myself.

MR SALMON: Mr Nilsson will look that up as well.

I think, on any view, the proper interpretation of the Inquiries Act as written is that the ability to order parts in private against the back of the Bill of Rights, is the same as what Sir Martin Moore-Bick is summarising there.

So, that quote goes on to say, while there's power under 19 to restrict attendances it is "only insofar as such restrictions are required by law or are considered to be conducive to the Inquiry's fulfilling its terms of reference or are necessary in the public interest. The clear thrust of these sections is that all aspects of the Inquiry must be open to public scrutiny unless there are strong reasons to the contrary".

And so, I come to a further and brief point which engages with Sir Geoffrey's question about the Attorney-General's ability to direct confidence. And it's this, when a decision is made in our modern democracy with an operating assumption of open justice against the Inquiries Act and Bill of Rights Act and against a Law Commission Report recording that major Inquiries will be public, when the Attorney-General orders that Inquiry with an esteemed panel and with this level of attention, a decision is, in effect, being broadcast that this should be an Inquiry in which some light is shone wherever possible to satisfy public concerns as to ensure that justice is seen to be done.

And so, it is right that the Inquiry has broad powers to cut the cloth to suit each particular witness and each particular document but it's not right for my learned friends to seek to have the existence of those powers be the tail that wags the dog in the whole process. The presumption constitutionally and politically, the presumption in ordering an Inquiry such as this, rather than the GCSB type

ones or rather than the Reserve Bank ones announced recently which are just an internal Inquiry with no such public rights, the presumption is this is going to have a public shining of sunlight is the best -

SIR GEOFFREY: What do you say about the Inquiry that's just been completed on the appointment of a policeman where there were no public hearings, no right of cross-examination and nothing of that sort?

MR SALMON: Perhaps, given the limits on time, Sir, and the context, I can't say too much about it and having not read it beyond being able to understand why concerns have been expressed about the scope of the Inquiry, I can understand and I have seen concerns expressed by Louise Nicholas in the press. I'm not really equipped enough to comment more than that but I do make the submission here that the intention must have been that there would be a substantial amount of public hearings because this type of Inquiry was ordered and it is wrong for the Crown to say there is some presumption of narrow, speedy or an inquisitorial processes.

Against that background and against the submission that openness is presumed, I then seek to turn to a couple of key concerns that I've heard expressed or propositions I've heard you express to my friends that I think I can possibly help with briefly.

The first is Sir Geoffrey's question about the risk that if there is too much openness there might be some political or executive step taken to prevent the Inquiry looking into certain areas. I understand the concern but, respectfully, I think my submission on that would be that's not a consideration that regard should be had to because the Inquiry is designed to look past temporary political expediency and so on and to look at the actual merits of the issues with which the Inquiry is tasked.

SIR GEOFFREY: Yes, but the Government's protective security arrangements are not something that we can change. We can look at the documents, we can do all those sorts of things, but we can't rip that process apart. That's a Government policy of great importance and it's lived a long time.

MR SALMON: Yes, I don't disagree with that at all, Sir. My submission is not that it should be ignored or ripped up. My submission is it should be tested and not be used as a shield to proper inquiry. That's all.

I'm not for a moment suggesting it be ignored, Sir. The way we've put it in these written submissions is it is an a priori point to discover what the true security provision is and then to look at what should be shown to the Panel and then look at what should be shown to any of us.

The working assumption I have made in writing, the latest submission is that no-one is suggesting you should not get to see those documents, whatever they are. I think there was a suggestion I read earlier, in early documents, that that might not be the case but if that's the operating assumption, that's a good start.

As I'll come to, testing some of those things without for a moment suggesting we had more muscle or brains than we do, testing of those sometimes is assisted by wider evidence and also by people who have sources such as Mr Stephenson who are able to say when there is withholding.

The next point to deal with briefly is the question of costs and efficiency. With respect, those are legitimate concerns and one, for my part, that I would embrace but some perspective is needed and some caution about again the tail doesn't wag the dog here.

It is true that lengthy drawn out Winebox style cross-examination becomes very expensive, especially if the lawyers involved are being paid. It's not right though that

that needs to happen here if cross-examination is allowed. We know from all sorts of experiences that the Courts and Inquiries can allow cross-examination but controlled. It can be limited in time or by topic. It can be on the basis that parties have to co-operate to appoint one lawyer to cross-examine a particular witness, all because, as the Woolf Reforms showed in England, there's always a balance between natural justice and procedural rights on the one hand and costs on the other but mechanisms exist to allow scrutiny and checking of that within reason without an explosion.

So, for my part, I am not submitting that this Inquiry should become another Winebox. It should not. And that's not to be critical of that one but rather, to say that's the type of old dinosaur Inquiry that Sir Geoffrey was concerned about. But there are multiple ways in which cross-examination can be focussed, contained and kept concise.

SIR GEOFFREY: But you know the UK Act doesn't permit it unless the Inquiry orders it can happen. That's the regulations that are passed under the 2005 Act as they stand now.

MR SALMON: Yes, and we don't have that, so I think you have the Act to allow cross-examination.

SIR GEOFFREY: We have the ability to allow it but we also have the ability not to allow it.

MR SALMON: Yes. As you will anticipate, I will of course rely on Barker J's comments in the *Badger* case, to the effect that there are some cases of which it would just be almost necessary as a matter of natural justice. It is a matter for you Sirs whether that's right.

A separate point I want to make is whether it will assist you, which in my submission it will, to have some true contradictor cross-examination. I will come to why in a moment but if I can round up on costs.

The next point on costs is, of course, the Panel has already indicated it will have the evidence tested and it does intend there to be cross-examination of some sort, so that's going to happen. And that cost, in terms of hearing time, for someone asking the questions already existed.

And so, it's a little bit of a strawman for the Defence Force or the Crown to say it's going to add a lot of cost if a different person does it. Again, with control and responsibility, we ripped through eight Defence Force witnesses in Mr Stephenson's defamation trial in about four days, three serving soldiers in about an hour and a half, it can be done. Responsible counsel can get through it. If it's going to be done anyway and especially if there's no funding for me to do it, it really isn't a cost for the Inquiry to be concerned about to give a contradictor a chance.

The next point in that is, I'm mindful of the concern about the Defence Force's candour and openness generally and that one of the issues for the Inquiry is whether it has been complicit in a cover up, is that if costs were a true concern, it's useful to bear in mind that one of the parties here, as Mr Hager noticed, is part of the all of Crown but one of the parties here has a reported $2 million budget excluding its external lawyers for dealing with this. That's the party that right now is looking at which documents the Inquiry gets. That's something worth keeping in mind when gauging whether a little bit of extra Court time is an appropriate natural justice concession or true finding concession for some of the interested parties who may well have something to add in cross-examination.

I'll come to the cross-examination point, if I may. The first point about cross-examination, is that there is a difference between having a proper contradictor and Counsel Assisting. I don't mean that in any sense disrespectfully

to my learned friends but it's something that partly drove what Barker J was talking about in *Badger* but it's this: when responsible and highly competent counsel, such as my learned friends, are operating as Counsel Assisting, they will be mindful of the balance needed in that role to assist you and to ensure that this process respects the natural justice interests of all parties.

That is a role that is sometimes intentioned with a true contradictor who sometimes needs to get stuck into a witness, it just is. Again, without wishing to dredge up the Winebox, there is a problem when Counsel Assisting becomes the prosecutor default in an Inquiry because it has natural justice implications. I mean this as a compliment to my learned friends, I've seen Mr Isac cross-examining recently and he's better at it than me, there are ways in which a Counsel Assisting will have to be cautious and approach cross-examination that do not bind a proper contradictor and the Courts see the value in having a contradictor. As Barker J said in *Badger*, the reasons why are real.

So, I mean that not as a criticism at all but as an observation about how value can be added. And also, by way, I guess, of putting a gloss on Mr Hager's submission which might have been taken as saying there was some things the Inquiry or its Counsel Assisting weren't up to doing, which is not the submission I understood him to be intending to make and nor the one I make, but rather, there are different angles that can be brought by different parties and the Courts for hundreds of years now have recognised the truth finding value of having a true contradictor.

And that's the next point. The Courts and Inquiries do not allow cross-examination because the process is adversarial, which is a linked point to the one earlier made about the reasons why we have openness, the reasons why we have adversarial. Although the right to cross-examine is a

component of the adversarial system, the case law shows, and the observations about its employment in Inquiries where there aren't contradictors and it's not adversarial, shows there is independent value in cross-examination for finding truth.

So, we allow cross-examination in our system and value it, not just because it's a limb of or facet about the adversarial system but because it helps penetrate evidence that might be false.

The simple point and one that we know from experience, is that leading a witness is simply not as reliable as cross-examining him. And friendly fire is simply not as effective as cross-examination.

SIR GEOFFREY: Mr Salmon, I conducted an Inquiry in New York for the United Nations where there was no cross-examination and no public hearings. It turned out fine.

MR SALMON: Yes and, Sir, I'm confident that that will be right, I have no reason to argue with you on that. There may be different facts there. There may be different issues there. There may be different law of course as well.

But in this case, and I have just time to talk about Mr Stephenson, I'll just skip over it but perhaps I will speak about that now because normally I consider this evidence from the bar but of course I'm dealing with NZDF saying there are all these confidentiality concerns with no evidence, so if you will bear with me for a moment, I'll deal with it briefly.

That was a defamation case. There was a jury there. There were no withholdings of documents at all in that case. Some were not to be seen by my client but Mr Nilsson and I saw them all. The jury saw and heard it all. The jury saw and heard every witness. Again, as I mentioned before, this

wasn't some disconnected stale matter. This was the same SAS and the same Afghanistan and the same year and this was actual troops on the ground and, most importantly, it was, I think, three years after the alleged events, not eight. And the Defence Force wheeled those witnesses out and gave us all of the documents, so we thought. The hearing went efficiently and swiftly, undertakings were kept to, there no problems.

I mentioned before I think but I'll mention it again, this included the provision, this is after the hearing I think as well but the provision to us of ISAF documents with no undertakings at all, which lines up with what Mr Hager has said, which is often these documents are available and can be found and floated around, which is not to suggest the Panel won't find them but rather to suggest when the Defence Force says, "The Rules of Engagement are highly classified and you can't see them, Mr Salmon", I am fascinated to hear Mr Hager can find them on the internet and they're just out. There's a problem there if the Defence Force are wanting me not to see those and I haven't seen them yet.

I find moments like that interesting, that there might be an issue around my access to the Rules of Engagement and yet they're on the internet. But the Stephenson case shows that, in fact, these expressed concerns are not always invoked by the NZDF.

So, that worked. There was cross-examination. It was adversarial, it was efficient and it involved the ability to unpick various witnesses with a client down the back giving instructions. He could not always see the witness but he could give instructions on what they've said.

More particularly, and again from the bar, in the most unusual week I've ever had in Wellington, we would have his sources approach us in the bar up the road after Court and say, "That's not true, they're telling you this, mention Colonel Blah". Actual people, I saw them. And we would do

it and it worked. And so, witnesses had some very unpleasant times that respectfully could not have happened if there hadn't been the chain of trusted journalists with trusted sources, and their sources are not ones who will approach the Judge. That was an experience that opened my eyes a little bit to Defence.

The coda to that, though, is after a hung jury, things moved on and Mr Stephenson sought to go to a second trial. Parts of this are on the record and I think I can deal with it pretty briefly. In the course of rebriefing for the second trial, and because again of the particular involvement of someone who had slept in ditches for six months writing the article in Afghanistan, one of the witnesses had to acknowledge in a brief that he had perjured himself in the first trial, actual just flat out acknowledgment, because he had. And also, a number of documents came out that were simply withheld from discovery the first time round. And this is why I don't for a moment suggest that there is a competence issue around finding these. I hadn't known to ask for them in the first trial but the pulling on threads, the intense adversarial process and a client who knew people and had sources, many of whom would never talk to me, meant threads could be pulled on.

I find myself in the unusual position of adopting Mr Hager's comments in Court, and saying this is a situation where great care is needed before accepting NZDF's word that truth has not been a casualty of war, and proper testing of the quality of material that's provided and its extent is appropriate. It fooled me the first time and it fooled me in a way that could well have controlled that first trial and when it came out, well the matter settled.

So, I don't say any of that lightly. It's not the sort of submission I would normally make and I'm now at 5 o'clock but that is why, in my respectful submission, there are things

that persons in a position such as Mr Stephenson who has done enough in a dangerous place that actual soldiers come and talk to him, he can bring something to this hearing and if he has to do it through lawyers, he will. And if he has to do it unfunded, he will. But he believes that he can add something by doing so that will assist you and that it can be done with the efficiency with which it was done in the High Court.

It's about on 5 o'clock and I won't be much time at all tomorrow, if that's acceptable to you.

SIR TERENCE: Thank you, Mr Salmon. Tomorrow we're going to start at 9.00, is that all right with everyone? The reason for that is, for those who are from Auckland, we wanted to give people time to get back reasonably before midnight or something.

MR SALMON: Right. Well, we're probably on the cheap flight late anyway. Unless you're planning on having replies, I will excuse myself, with your leave, for a brief period in the afternoon but if there are to be replies, as I say, it would be useful to know because I will have someone else do it.

SIR TERENCE: Well, we hadn't planned on replies but we can review it.

MR SALMON: Shall I assume that you're not having replies for the time being?

SIR TERENCE: Yes.

MR SALMON: Which I think is what Sir Geoffrey wants to hear and I will nip off to my other hearing, if that won't be a problem for you, Sirs?

SIR TERENCE: That's fine. All right, thank you counsel and Mr Hager, it's been a most informative day from our point of view. We will retire and see you at 9 o'clock tomorrow.

Hearing adjourned at 5.00 p.m.