22 November 2018 - Commenced at 9.00 a.m.

I N D E X

SIR TERENCE: Good morning, everybody. I just wanted to check one thing. The submissions that we got from the Defence Force and I think the Crown, have they been published?

MS WILSON-FARRELL: The Hazel Armstrong Law, New Zealand Defence Force and counsel for Mr Stephenson, we haven't published those yet.

SIR TERENCE: Is everything up now?

MS WILSON-FARRELL: No, we haven't published those three.

SIR TERENCE: Is there any objection to those ones being published right away? (No objection noted). Okay, they can go on the website.

SUBMISSIONS ON BEHALF OF JON STEPHENSON
BY MR SALMON (Continued)

MR SALMON: Thank you for giving me time overnight to refine things. I think I'm essentially complete, unless you have questions, beyond a couple of closing observations in reply to the all of Crown submissions regarding security clearance which I take to make the point first that it's unnecessary to consider giving the other parties security clearance because there are adequate alternatives.

Obviously, that is a submission that's not accepted by Mr Stephenson and, respectfully, just not right and not consistent with the spirit of an open Inquiry into the specific matters here but also for the obvious reason that there are inherent difficulties in seeking to replace contradictors' cross-examination rights and contradictors' scrutiny with a more

compromised version. Without any disrespect to those involved, the more compromised version involves channelling possible cross-examination and instructions through Counsel Assisting.

In that respect, I don't think I went to the passage in *Badger* which is noted in submissions but is worth noting.

SIR TERENCE: Where is that?

MR SALMON: It is in the casebook put together by Crown Law, the bundle of authorities, tab 2. I don't need to go through it now, beyond noting that the tensions and difficulties of tendering questions and channelling them through other counsel were noted by Barker J as real and not as effective.

So, while it may be unnecessary from the perspective of a party that doesn't wish to face truly adversarial cross-examination to enable someone to do so, that is not, with respect, an appropriate reason to decline to engage in the obvious mechanism for curing the security concerns, which is security clearance.

And given that, unlike for example the English, one of the English authorities quoted in the all of Crown submissions I think in paragraph 80 of their submissions in which the concern was about anyone, any lawyers, outside of the executive material. In this case, we have multiple parties already needing security clearance who are external lawyers. Plainly, it is the type of material that can be seen by at least some lawyers. The simple question is why not one or two more? I think respectfully, the answer is there's no problem with that on the face of things.

SIR GEOFFREY: How long do you think it takes to get a security clearance?

MR SALMON: For someone like me possibly longer than for someone like you, Sir Geoffrey. Having spoken to my learned friends for the Inquiry, Counsel Assisting, it

can be done I think in a timeframe that's still shorter than the Defence Force is taking to finish sifting through its documents.

So, to the extent that that would take time, counsel's undertakings would be an early start. We have the unexplored question of how long it is going to take the Defence Force to finish going through its 13,000 documents, in the ordinary course of civil litigation I think most Judges would expect any normal litigation firm to do that in about a month but it's taking months for them to do it, presumably because of the nature of the security issues or whatever. Either way, it must be something that can be done faster than that to get security clearance processed.

But, in my submission, undertakings are satisfactory, and self-evidently so, given that they were adequate in the Stephenson case for the same war, similar issues. I don't have enough inside knowledge to know how long that will take when expedited but it must be, given the machinery Government would require at times, that it can be done in time.

Against that background and against the concerns about the tensions of seeking to channel necessary adversarial testing through someone other than an adversary, and given the limitations on that is acknowledged by the High Court in the *Badger* case, and given in particular the plainly and starkly different approach that the Defence Force has taken in the Stephenson trial with no harm done, no risks to security and positions taken that are flatly at odds with some of the concerns about international parties here, I would conclude by saying this, the costs concerns and efficiencies concerns are ones that can be, to use a Court term, case managed.

We have a Tribunal, an Inquiry panel, members of the panel who are more than capable of panel beating counsel into being efficient with cross-examination, into co-ordinating

approaches, if need be having adversarial cross-examination done through one counsel, there are a number of mechanisms that could be used, limiting time or topics and so on. And, of course, the fundamental cost question is one of budget allocated and that can be controlled through the blunt mechanism of funding.

So, respectfully, it would be an irrelevant consideration to limit the access of adversaries to a hearing because of costs if there are not to be funding pools allocated to them or if those funding pools can be controlled. In other words, the way to control that cost is to limit funding or time.

SIR GEOFFREY: There is no right of cross-examination in the statute but you're saying we should interpret it to give you one?

MR SALMON: If not to give an overt one. I don't say there's an absolute right in the statute, that's right, Sir, and there's not. What I do submit is that, as noted by the Law Commission, there is a spectrum, one can put it that way, of the extent to which an Inquiry might be at one extreme narrow focused and fairly closed and inquisitorial and at the other extreme, much closer to a public contested Inquiry.

I don't think it's contested generally that one moves further along to that end of the spectrum the more important public heated and public interest it is and in this case I think in particular where there is an executive decision to have an Inquiry to explore whether there has been a cover up. In other words, implicit in this is uncovering, pulling off the Band-Aid and seeing what's underneath.

I don't say that you are bound by the statute to allow cross-examination always or even often but that in this case the implications of natural justice, truth finding, due process and proportionality justify cross-examination. And

the arguments against it are ones of extent and secrecy which can be controlled with normal mechanisms.

So, for example, Sir, in the District Court where the Woolf Reform type proportionalities are embraced more readily, Judges will, in fact, limit time for cross-examination on multiple points. It's not ideal but it works and counsel get to the point quickly. In international arbitrations at times cross-examination time is severely limited, there are massive damages issues.

SIR GEOFFREY: None of the inquisitorial systems in the Civil Law countries permit it.

MR SALMON: No, and indeed they go their own way and common law Judges routinely criticise the process and point to the value of cross-examination in uncovering the truth. And if this were an Inquiry into a paper trail, then there would be very little to be gained from cross-examination, one could say, if it was more akin to a judicial review. In this case, however, there will be contested allegations by witnesses as to matters that are not simply a matter of documentary record and there will likely be allegations, there already are allegations of covering up, but there will likely be issues as to whether the complete documentary trail is available or even true.

And that makes it much more the type of Inquiry that requires some testing of witnesses and of their credibility and of their account of factual events.

Listening to Mr Hager who knows the facts much more than I possibly could at this point, there will be factual witnesses whose accounts will be contested both ways and there will be some who will be through interpreters and some who will be serving Military. That is exactly the type of evidence that our common law system has safeguarded the accuracy of through

requiring and enabling cross-examination, proper cross-examination.

SIR GEOFFREY: The common law system at trial has protected that. There isn't a common law system embedded in the Inquiries Act.

MR SALMON: No, there's not one embedded in the Inquiries Act but there is a reflection of those common law values in our principles recognised by the Courts of natural justice and how they are shaped or how they are reflected and the processes adopted by Inquiries. So, I would adopt the sentiments of Barker J in the *Badger* case, and indeed those comments of the Law Commission, in saying natural justice in these types of Inquiries will require, often require, such processes.

Now, the Inquiry may decide there are some witnesses where it's not necessary because they're essentially producing documents, the sort of affidavit of documents, decision-maker type evidence. That's one thing. But when the person has factual involvement in the issues, whether it's in the raids themselves or in the alleged cover up, that is the type of area where, respectfully, the platform of how disputed facts are resolved in this country, whether arbitration, Court or Inquiries, is that decisions can't be made without seeing the evidence tested.

So, you're right, Sir, and I accept that the Act doesn't require cross-examination but nor does it prevent it. The matter is one for you to decide whether it would assist you with the goals of this Inquiry. The submission from us is: the goals of this Inquiry are such that we are firmly at the far end of the spectrum. Indeed, this is probably the most extreme position on the spectrum of any Inquiry in modern times, more so than Erebus and more so than the Winebox. It will be one where factual evidence from witnesses will be contested and cannot be resolved on the documents.

So, if one accepts the proposition in the case law that there will be times when at least some cross-examination is almost necessary, we're in that case.

SIR TERENCE: In relation to whistleblowers and witnesses of that sort who want confidentiality, they would also have to be available for cross-examination, correct?

MR SALMON: Yes.

SIR TERENCE: And your argument would be that they would be cross-examined by, say, the Defence Force or the Crown or whatever, using the same sort of techniques as you described yesterday with screens and so on?

MR SALMON: Screens or exclusion of personnel. To take it to one extreme, if it's someone I'm cross-examining, hypothetically, I am not assuming I will get that right, hypothetically I am cross-examining and there is a concern that even my client not know who the person is, what their voice sounds like or certain material. The balance might be that I cross-examine that person, maybe even with a screen stopping me seeing them and with my client outside the room and of course the public excluded.

Reciprocally, and trusting the undertaking of a barrister and solicitor of the High Court, there might be a situation where Mr Radich cross-examines a source of Mr Stephenson who nobody else gets to see and for whose evidence the Defence Force and all client representatives are outside the room and in relation to which there is a clear demarcation of what, if any, material can be reported back to clients.

SIR TERENCE: One of the problems for us is that, as Mr Hager indicated yesterday, some sources may not be prepared to co-operate on that basis.

MR SALMON: Yes.

SIR TERENCE: So, what can we do about that, in your

submission?

MR SALMON: In my submission, the appropriate thing is to deal with those as they arise using your discretion, rather than to let the spectre of those possibilities control the entire process from the start. To put it another way, there might be one of those and the appropriate approach to them may be for the Inquiry to meet with them without anyone present.

SIR TERENCE: Just on that, do you accept that we could, in terms of our powers under the Act, have a confidential hearing of that sort? In other words, where the only people who meet the witness are the Inquiry and Counsel Assisting?

MR SALMON: For my part, and I don't speak for the other core participants -

SIR TERENCE: That's why I was asking.

MR SALMON: For my part, yes, I think that power exists on the face of things, I do. However, the point I'm seeking to make, is that the existence of that power and the fact that it might be appropriate to exercise it sometimes, should not control all the other situations when there are much more moderate ways of dealing with the mischief.

That's why I come back to, for my part I would advise Mr Stephenson to have absolute confidence in Mr Radich's undertaking were he to give one that he would not repeat what was said. I would advise Mr Stephenson to co-operate in a process where his source was encouraged to consider making himself available for cross-examination to assist this process and assist your fact finding on the basis that only Mr Radich was present, speaking hypotheticals.

And similarly, I would hope that counsel for the Crown would do the same reciprocally. If that doesn't work, we are

in a territory where it may be necessary for the Inquiry to talk to such people alone but my submission is not that that's impossible. It is that that is a last resort in this type of Inquiry. And so, we should respectfully, I think, begin with the presumption of full openness and public hearings and chip away at that to the extent necessary on a case-by-case basis, with the last resort, for legitimate concerns of whistle blowing or safety, being that degree of closed hearing but there are steps prior to a closed hearing that are adequate and done all the time.

I reflected on this overnight further after the exchange yesterday about the extent to which lawyers' undertakings and so on work and I made a submission they work routinely. I wanted to come back to this a little. Mr Hager talked about how unreal a number of the confidentiality claims are, how a number of things that are said to be inaccessible. My understanding from speaking with other counsel was that I would possibly not even be able to see the Terms of Engagement in the course of this hearing because they are secret and yet, there they are on the internet. That's just one example. The ISAF material that supposedly we can't see, that last time in Mr Stephenson's case we were just shown. These are reality checks.

SIR TERENCE: Yes but they are reality checks that we've set up a process to deal with.

MR SALMON: Correct, correct, but they are worth bearing in mind when considering the process I am submitting is appropriate, which is the normal process of relying on counsels' undertakings.

The two points I was going to make about that are, one, it is now eight years since these events and they are no longer hot, they are stale events and we are looking at them for reasons of public importance now that remain publically important but military secrets

about what was happening in Afghanistan eight years ago are truly stale now. They were stale at the time of Mr Stephenson's defamation trial three years later which is why the Defence Force gave open discovery of them. They are truly stale now, that's point one.

Point two is reflecting on the undertaking point, which is the point I reflected on overnight. As the Panel will know, we routinely give undertakings that prevent us from telling our clients about truly hot and vitally relevant contemporaneous material in takeover issues or in merger applications to the Commerce Commission where we lawyers are expressly prohibited from telling our clients something that's of huge commercial value to them right now and we honour that and it works.

Much as the words "military secrecy" sound glamorous, an eight year old battle is not. And so, if that system works for truly valuable information, information we're paying for, if we rely on solicitors' undertakings then, we can respectfully do so here with real confidence that the system that works in this democracy will continue to work.

And if it's going to be said that counsel's undertakings and my undertaking is not adequate by any counsel here, I think we should openly discuss it now. It is adequate and I would suggest it is adequate for my learned friends.

So, if I can conclude by wrapping that up and saying respectfully, these issues are publically important and require public attention now but they are not actually of great sensitivity in the large part. The points that are sensitive can be dealt with on a case-by-case sensitivity, rather than us being seduced by the Defence Force's wish to have a closed hearing effected by pointing to the few points of problems that might justify limited closed hearings, setting up strawmen or horror stories about how the hearing might have to be closed, separate hearings, separate times

for witnesses that are in public and those that are not, is, with respect, a distraction because we know from Court experience that these things just work. That in reality when one gets to the witness, sometimes the public leaves the gallery and sometimes they don't but they work and this is just like that.

So, rather than have the poison pill of occasional needs for proper secrecy control, my submission is the entire process can start from the proper constitutional presumption of openness with legitimate secrets being protected through the process that the Panel has identified, although we have submitted some glosses to that to ensure that other interests are recognised with proper levels of secrecy being considered once the Inquiry and counsel have had a chance to test whether that secrecy is needed. And, in particular, to understand whether it is truly right that nobody should be entitled to test it with cross-examination in an adversarial way.

In my respectful submission, the additional cost and time of that is trivial in the context of the issues and, most certainly, as the Inquiry will know given the financial allocations made, trivial compared to the amount that NZDF intends to spend protecting its position.

So, that balance which Mr Hager referred to is a very real point to keep in mind, the absence of any adverse contradictor of any sort where such resources are accumulated on the side of the all of Crown position is a problem and, in my respectful submission, is a problem that can be solved.

If there are ways of engaging with that in due course involving a discussion about how core participants' cross-examination might be channelled, might be run through a co-operative basis with one counsel seeking to be the proxy adversarial for each witness, that is a dialogue that Mr Stephenson for his part would be happy to be part of but it's one which, respectfully, can be done in the unusual way

as matters progress.

Unless it's of any assistance, those are my submissions, Sirs.

SIR TERENCE: Thank you very much Mr Salmon.

MR SALMON: On a point of housekeeping, I have this hearing at 2.15 and I will excuse myself over lunch. My thought was to the extent there are reply issues, given time is going to be wearing on, perhaps the appropriate thing is to reserve leave to core participants in reply to file a three page memorandum on any points of reply, rather than having a last minute oral reply, would that be acceptable?

SIR TERENCE: Yes, we would be happy to accept that but really just in relation to new matters that have arisen because we have got very full and helpful submissions. Yes, a short reply. Would seven days be enough?

MR SALMON: That would be fine, Sir.

SIR TERENCE: They will be due tomorrow week.

MR SALMON: My thought is that would be more helpful and limited than if we try to do it on the fly. The point on which I anticipate we would be of most help because plainly the Inquiry is fully across the substantive constitutional legal issues, is if there is discussion about mechanisms and the detailed mechanisms we've set out in that memorandum, that would be more helpful for you in print than on the fly.

SIR TERENCE: Yes.

MR SALMON: With your leave, I will disappear over the lunch break and come back at the end.

SIR TERENCE: Yes, of course. All right, so we will reserve leave to parties to file a reply of no more than three pages by Friday the 30th of November at 5.00 p.m.

Mr Martin.

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SUBMISSIONS ON BEHALF OF CROWN AGENCIES
BY MR MARTIN

MR MARTIN: Good morning, Sir Terence Sir Geoffrey. The Crown Agencies are committed to assisting the Inquiry, which is what you would expect, and it is what you are entitled to expect.

The Crown Agencies have listened to the submissions that have been made and it's submitted there are two fundamental points of difference. The points of differential between the Crown and at least some of the other participants, and I note that having listened to Mr Salmon, he may not be asserting these two points of difference in the same way as other non-Crown participants. The two points are, firstly, does the Inquiry have the power to convene in private without core participants being present? I heard Mr Salmon accept that a power exists but I've also heard other non-Crown participants suggest that there is no power. That's the first question. The second question seems to be a fundamental point of difference, is the Inquiry's wide discretion constrained by a duty to investigate under the right to life?

I'll deal with the first fundamental point of difference and this is the question of whether the Inquiry has sufficiently wide discretion or power to conduct an inquisitorial process that includes in private sessions without core participants present? I'll come to this when I look at the Act shortly but it's clear from section 15(2) that the principle of open justice is an important consideration but it's not the only one and it's not a dominant consideration.

The way in which the Inquiry hears from witnesses and receives material is to be determined, it is submitted, on a case-by-case basis. In this instance because of the subject matter, it may well be that that is mainly in private.

So, I want to come to the Act at this point. I'm conscious that Mr Radich has filed written submissions which give an overview of a similar sort to the one that I'm about to embark on, and I am also conscious that both of you are well familiar with the legislation, so I'll touch on it in a global sense really just to position us for the points that I'm going to make which are locating the power that it is submitted this Inquiry has to convene in private and to receive documentation.

As I say, the important point I think here is that in private can mean with the exclusion of core participants. If necessary, in your discretion, all core participants.

So, by way of, as I say, a general overview, you have section 3, and in particular 1(c), which gives the purpose of the legislation as including the effective and efficient and fair conduct of Inquiries. Fair speaks to natural justice. Effective and efficient speaks to avoid delay and cost. I say those two things because they bring us fairly shortly to section 14(2) of the legislation which it is submitted is another part of the over-arching principles that apply in this legislation.

So, you have within section 14 the broad discretion and it is, on its face, a very broad discretion in 14(1).

And then in 14(2), you have the points I just touched on and they are mandatory.

Then you come to 14(3), adverse comment, clearly not a point where you will be able to meaningfully know what might be required in that regard but it is central in the scheme of the legislation.

And so, what it also does is provide a statutory

definition of sorts for the principles of natural justice for the purpose of this legislation and it is centred on adverse comment. I may come back to that when we're talking about what may be required in terms of natural justice.

It is submitted that these principles will inform the scope of disclosure and will inform the scope of public access and access by core participants to the process of the Inquiry.

I will just note before leaving section 14, section 14(4):

"An 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, and so on".

And obviously, you can decide whether to allow or restrict cross-examination.

SIR TERENCE: Just on that, one of the things that possibly puzzled me about this structure is the difference between interviews and witnesses. My assumption was that witnesses were essentially people who gave evidence on oath or affirmation. People interviewed were just people you interviewed but not on oath. Do you know, do you think that is the distinction that is drawn in the Act or is there some other -

MR MARTIN: The submission was going to be there must be some distinction intended and it does appear to be that, that an interview is not a hearing, if you like, it is something less formal and one would expect more private than this. And that would appear to be the intention of the legislation when it's read in its scheme, that you have a broad power to decide how you go about gathering your evidence, including by talking to people directly and in private.

SIR GEOFFREY: Because there are two really main types of Inquiry. Some have a mixture but the two main types are policy Inquiries where you wouldn't want to take

much evidence on oath. You would be talking to officials or experts and you never probably want to use them as witnesses. Whereas, where you're looking at conduct, you may need to have sworn evidence?

MR MARTIN: Yes. There will be a number of points, I suspect, through the presentation of my submissions where I simply defer to the Inquiry because it is submitted that you have a broad discretion about how you go about your business. The focus of my submissions will just be to tease out where that power is because it is submitted by other participants that it is much more constrained than it is submitted for the Crown is the issue.

I take that point that Sir Terence raises and it was the point I was going to make. Perhaps to illustrate it, all core participants, it seems from what I've heard, Crown and non-Crown, may have, it appears, witnesses they would want to provide evidence to the Inquiry in private, in the sense that we've just been contemplating, in a much reduced interview format perhaps and certainly with others excluded, including potentially other core participants.

And I say that whether it's the Afghan villagers, journalistic sources, NZSAS members, there are various ways in which these issues may arise. It obviously remains to be seen exactly how that plays out.

But the question we are dealing with upfront here is where is the Inquiry's power to receive evidence in the absence of core participants if it wishes to do so?

And so, leaving 14(4), the next question or the next part of the scheme I was going to come from is section 15 which it is submitted is central to the scheme in practical terms. I'm going to look particularly at subparagraph 1(b) and (c): subsection (b) restricts public access; subsection (c) hold the Inquiry or any part of it in private. It will be submitted

that those things must mean something different and are informed by the rest of the scheme.

Obviously, I don't ignore subsection (2) which is important because before exercising the powers, you must take into account the criteria and they include at least four that are particularly relevant or five criteria that are particularly relevant to the work that you are doing. So, I don't ignore that but for present purposes we're looking to locate your power to exclude core participants from parts of your process if you wish to.

Looking at section 15(1)(b) and (c), however also informed by section 17(3), I think this is important because it effectively defines the rights of a core participant under this legislation:

"A core participant has the right to give evidence or make submissions to the Inquiry, subject to any directions of the Inquiry as to the manner in which the evidence is given and the submissions made".

Two points really follow. Firstly, that the right is to give evidence and make submissions; not, for example, to cross-examine and not to be present while other parties are giving their evidence. That is the first point.

The second point is, this is all subject to direction. That was contemplated and I should have noted on the way through that is contemplated in section 14(4), that's where you have those matters that you can determine and it includes the way in which submissions are provided and the way in which evidence is provided.

Having gone to section 17, we come back to section 15(1)(b) and (c), and the submission is that you may hold your process in private, excluding core participants, provided you take account of the criteria in subsection (2), and they are weighty criteria and may at times be intention, open justice, public confidence, ascertaining the facts

properly and avoiding prejudice to security defence and so on. Some weighty matters undoubtedly but you do have the power, and it is a broad discretion, to hold private sessions excluding core participants.

You have the ability when we come to look at documentation to, for example, as you have indicated you will, use an independent person under section 20 to look at whether there is a justifiable reason for privilege or confidentiality.

It is important in this regard, and we are talking about documentation now, that section 22, as other participants I think have all acknowledged, ensures that you must not make orders for general discovery. So, there is the ability there to make specific orders for disclosure of material to other parties, other participants. All of that informs the scope of your disclosure and how you gather your evidence.

One last scene setting point is just to note section 27 which relates to immunities and privileges. This is where section 70 of the Evidence Act might come in. It hasn't arisen yet. It may not arise but effectively that introduces an exclusion really for evidence that satisfies - once a balance has been performed under section 70, it may be that some evidence does not come before the Inquiry but the point and the problem, from the Inquiry's point of view and from everyone's point of view in terms of getting to the bottom of things, is that material might be excluded. It might be out of your reach. And that would not necessarily -

SIR TERENCE: Sorry, just take me through that again? I lost the thread of that. So, you're saying that under - as a result of section 70?

MR MARTIN: Section 27 takes you into section 70 of the Evidence Act, the public interest immunity provision in the Evidence Act. I am not saying it arises yet but if it did arise and if there was justification in the

public interest for material to be protected, it wouldn't come before you is the difficulty. That is why there is a need to have, it is submitted, a private process of the kind that you are indicating you will have.

SIR TERENCE: I see.

MR MARTIN: You want to avoid section 70 arising if it you can, as I think -

SIR TERENCE: So, you're not saying the Inquiry is not entitled to get, say, top secret material? The issue is the basis on which it holds it?

MR MARTIN: Yes.

SIR TERENCE: And treats it and essentially to whom it discloses it?

MR MARTIN: Exactly.

SIR TERENCE: The answer you would say is to no-one?

MR MARTIN: If you choose, yes.

SIR TERENCE: Okay.

MR MARTIN: Where that takes us, I think, is that the question that was posed at the outset, is there a power? It is clearly located in the Act and it doesn't only extend to evidence gathered in person, it also extends to your documentation.

It follows that the Inquiry has express statutory power to interview witnesses, hear evidence, receive documents, in the absence of core participants, that is in private, subject to sections 14(2) and 15(2).

What I was going to come on to say though, is that none of this is a closed material procedure, what's been mentioned particularly in Ms Manning's submissions. The term closed Court or closed material procedure is, it is submitted, an act in this context. I will just explain briefly why. A closed material procedure which you find in this country in, for example, the Passports Act and the Immigration Act,

applies in litigation about the legal rights and obligations or liabilities of a subject person and they can, under that legislation, be excluded from the Court process.

The Inquiries Act, section 11(1), says that the Inquiry has no power to determine civil, criminal or disciplinary liability of any person. I don't say that there aren't weighty matters before this Inquiry but, importantly, this Inquiry's role is not to determine civil, criminal, disciplinary liability in a way that a Court might.

The Inquiry is not conducting a trial, it's not affecting rights and liabilities in the same way as a Court.

SIR GEOFFREY: And its findings bind no-one.

MR MARTIN: Indeed, yes. And this is an important point because it sits at the centre of the scheme and the purpose of Inquiries such as this. And I take it a step further, the Inquiry doesn't have any parties to exclude. It has a broad discretion to include people and documents in order to do its job. This is bringing us back to the overall purpose, if you like, fairness, natural justice, absolutely, but also efficient.

So, conceived in that way, it is submitted, and I won't labour this point but it's conceived, I'm saying that a closed material procedure is materially different to what this Inquiry is, it is submitted quite rightly, considering an order to engage with the subject matter of this Inquiry.

SIR TERENCE: Under the closed procedure under the Passports Act in the Immigration context, the hearing will take place. The person concerned will be excluded, as will his or her lawyer?

MR MARTIN: Yes.

SIR TERENCE: But there will be a Crown lawyer present and the practice is to have a special advocate, is it?

MR MARTIN: Yes, the practice is to have one in the passports jurisdiction which is the only place where this has been

used, the Immigration context hasn't arisen, to my knowledge, but there have been two passport cases and a special advocate has been drafted onto the statutory scheme, if you want to put it that way. But you're right, not only the subject person but their counsel excluded from the classified material. Special advocate used in that process because you don't have the benefit in that process, the Court doesn't have the benefit of Counsel Assisting, and nor is there a review mechanism there. The Immigration context, it does provide for a special advocate in the statute.

Having made those comments about the difference, the fundamental difference, including the fact that the Inquiry has its own purpose and has got a discretion to include, so it isn't like a closed material procedure where someone is being excluded from a Court proceeding that affects them. It is submitted that it is important to interpret the word "private" in section 15(1)(c) in that non-adversarial statutory context. That was really why I raised the closed material references, just to distinguish them and to bring us back to the purpose and non-adversarial statutory context in which you're working.

As I mentioned, you can cross-check this interpretation back to the purpose of the Inquiries Act by looking at whether this is going to enable you to carry out your processes effectively, efficiently and fairly.

I come to why this is of importance to the Crown, why it's submitted to be important particularly for Crown agencies. I won't be going into the material in the written submissions already filed in any detail at all but I did want to take you to paragraph 37 of the Crown's submissions.

There, it is noted that New Zealand's foreign partnerships are an essential part of the ability of agencies to perform their functions effectively, including in the

interests of New Zealand's national security.

There's reference there to a review undertaken by The Honourable Sir Michael Cullen and Dame Patsy Reddy, and it notes that in February 2016 for every intelligence report the NZSIS provides to a foreign partner, it receives 170 international reports. Similarly, for every report the GCSB makes available to its partners, it receives access to 99 in return.

And then we go on to set out in the submissions there, which I won't read, I will take as read, an important passage from the Ministerial Policy Statement on cooperation of New Zealand and security agencies with overseas public authorities. I think the key point being that we gain significant value from these co-operation arrangements. So, in this regard -

SIR TERENCE: The Ministerial Policy Statement, is that issued under the Act?

MR MARTIN: I will check and answer that question for you, Sir.

The final point I was going to make in this context and why this is important, was really just to note again, with respect, the important submissions that Counsel Assisting the Inquiry, Ms McDonald, made in relation particularly to the potential for harm to the public interest. This was set out at paragraphs 55-60 of her submissions and especially it is submitted it is helpful to look again at paragraph 58 where Ms McDonald sets out the counterfactual if you were to embark upon a process involving public or almost entirely public hearings.

She notes important points. Whistleblowers, if there were any, are unlikely to come forward. Accounts to be given by sensitive witnesses are far less likely to be candid and complete and so on. I will leave you to read through those but they are, it is submitted, important points.

That brings me to perhaps the practical part of this first question that I've been addressing. The Crown invites the Inquiry to make an order under section 15 in relation to all classified material, that order being subject to variation or cancellation if that is appropriate at the end of the classification review process with Mr Keith. That order would provide certainty as to the status of classified information and, in particular, the ability of third parties to access that information becomes clear pending the completion of the review process.

And the certainty is important for, it is submitted, two reasons. It will assist international partners to understand the legal basis on which the documents are to be held by the Inquiry, again pending the outcome of a review process. And secondly, it will ensure that all classified material received by the Inquiry will be excluded from the definition of Official Information at the conclusion of the Inquiry process, unless the order is varied at the conclusion of the review process.

So, the important aspect of that is we are seeking this order to facilitate the provision of information to the Inquiry in order to assist, and it is accepted that the order you make now may be subject to variation after review but it is submitted that as a starting point, as a practical starting point consistent with your need to progress things in an efficient manner, that is a step that is both practical and useful for the Inquiry to take at this juncture.

I might just finally say a few points on this topic before moving to the second question which is essentially the right to life question.

Mr Salmon in his submissions indicated that to some extent there could be a, sort of, surrogate agency role for a special advocate. It is submitted that is not how that could work in practice because, importantly, where a special

advocate gains access to classified information, their ability to communicate with people who aren't in that role must then become quite constrained necessarily. This is to avoid inadvertent disclosures which are one of the real concerns with the sort of confidentiality ring approach that has also been suggested.

What you want to avoid is putting people in a situation, counsel in a situation where they have an invidious situation in terms of their relationship with their own client.

SIR TERENCE: How do you see this as different from the commercial confidentiality arrangements because they are commonplace?

MR MARTIN: Importantly, and I know my friends take an issue with this, but importantly the subject matter is different in terms of the implications for the public interest of New Zealand and those international relationships which I have just mentioned, and that is a significant point of difference.

But the other important point here, in practical terms, is that you have other ways to achieve and avoid the problem. Importantly, Counsel Assisting and the review process help you to do that.

So, you have the ability to, if you wish, direct Counsel Assisting to undertake the contradictor role and to do so strongly if you consider that's required. You have that. You have the role of reviewing the classified material that Mr Keith would perform. So, what you don't, it is submitted, need, is a special advocate firstly because that's not going to add anything more to what I've just described in terms of those roles, the reviewer and the Counsel Assisting, but you also don't need to add the additional risk and tension in the client relationship of having counsel come into a confidentiality ring. The risks of that, in terms of this Inquiry, it is submitted, are not justified in particular

because of the problems it will then create for the Inquiry in terms of doing its job, getting the information it needs quickly and efficiently. So, you've got a discretion here but it's not a procedural step which it is submitted will assist you in achieving the purpose of your Inquiry.

I do note for completeness, I think, Sir Terence, you might have had this in mind yesterday when you were raising the point with Mr Salmon, I just note paragraph 80 of our written submissions which is where the UK authorities, which are obviously not determinative here but they are persuasive, talk about the difference between the kind of commercial context and the reasons why a confidentiality ring, even in those sorts of cases in the UK, are inappropriate.

The three things that are named are the risk of inadvertent disclosure; the risk that if inadvertent disclosure did take place that the source might be unknown and suspicion might fall on the innocent; and thirdly, the decision of who goes into the ring and who would have to remain outside it, which in itself adds a level of complexity which isn't going to be helpful for your purposes.

SIR GEOFFREY: There's not been a lot of discussion in these hearings so far about the Ministry of Defence as compared with the NZDF. You're putting submissions here for the Crown, as I understand it?

MR MARTIN: Yes, Sir.

SIR GEOFFREY: And that covers, in the agency sense, the Department of Prime Minister and Cabinet, the SAS, the GCSB, the Ministry of Foreign Affairs and Trade and Defence as well?

MR MARTIN: And NZDF, yes, Sir.

SIR GEOFFREY: And the Ministry of Defence?

MR MARTIN: Potentially, Sir, yes.

SIR GEOFFREY: In all these agencies there is this view, it must be so or you wouldn't be putting it to us, this

is a whole of Government submission you're making. What are the real issues behind that submission, in terms of protecting this material? That's what I want to get at. We've heard a lot of submissions that really no harm will come from the disclosure of much of this.

MR MARTIN: That gets ahead of the actual process that we need to undertake.

SIR GEOFFREY: Yes.

MR MARTIN: We don't know. We don't know how much material is going to be withheld. We anticipate that there will be a significant amount of that. When I say withheld, not from you but material that the Crown is striving to get before this Inquiry that will assist the Inquiry but which it may not be possible to disclose more broadly.

We don't know until we've had the review process that you're contemplating and so we can't get ahead of ourselves and say there will be this much and these will be the reasons. We accept entirely that it needs to be scrutinised. We accept the point Mr Hager made that there is a difference between, if you like, the facts which may be able to be known in all kinds of ways and matters such as methods and other elements that are part of the classified nature of the material. They may tell you how the material was gained by New Zealand.

So, facts that may on their face be quite innocuous, it may be difficult for that to be disclosed to others because that simply talks about methods and so forth. We don't know until we do the review exercise.

SIR GEOFFREY: Is it fair to characterise your submission in this way: that the Inquiry needs to proceed on an iterative basis and look and see, as the material comes in, before it decides what can be given out and what can't?

MR MARTIN: Yes, Sir, and I take it one step further and say

because of your purpose, you want to be able to do that in an efficient way and you're not going to, it is submitted, be able to do that by invoking confidentiality rings or additional layers of people whose roles are difficult to define because what you want to do is get this information, have it reviewed by your review process, decide how much of it needs to be provided for natural justice purposes, and we can return to that point if it's helpful which is, it is submitted, focused on what is required to allow people to respond to potential adverse comment.

So, there are questions there that we can't answer now. There is a limit to how far you can take it in the abstract. The process, it is submitted, that the Inquiry is looking to embark on is calibrated in order to achieve the purpose of your Inquiry, including natural justice and an efficient process.

Just perhaps to close that point off, at paragraphs 29-38 of the Crown's written submissions we do set out in more detail the sort of risks that are engaged and the Crown is concerned about. So, coming back to your question, Sir Geoffrey, what is the Crown's concern, if you like, it is set out in those paragraphs and I won't spend more time on those.

There is a question that arises or will arise and again can't be answered now in the abstract, which is this question I suppose of what an adverse comment might be. It's down the track but it does start to govern the assessments that will need to be made about how much of this information needs to be available to people in order for them to respond for the purposes of section 14(3). I simply note the point for present purposes, which is that's going to require some form of criticism of someone ordinarily, rather than simply that an allegation that may have been made or published might not be accepted by the Inquiry. That doesn't necessarily imply

any criticism of the person or the journalist who's made the allegation and published that. There will be all kinds of reasons for a difference.

So, I just note that natural justice in practice is going to be quite an important, I suppose, setting for you in terms of how, once you have reviewed the information, you decide how much of this needs to be available to various parties or participants in order to allow that kind of response to occur. Again, can't answer it in the abstract but it is relatively narrow.

SIR TERENCE: There's something that I want to understand about the Crown position. In relation to the classified material, you seek an order that is subject to effectively the review process, so it treats everything that we're given as confidential, subject to going through a review process which may result in the confidentiality order effectively being removed from that document or class of document or whatever.

But you argue that in terms of reviewing the material, the focus should be on that material that natural justice would require should be disclosed in some form. And the natural justice that you're talking about is in the sense that you just described, if the material might lead to an adverse finding in relation to someone, then natural justice would require either its release or gisting or something, some process?

MR MARTIN: Yes.

SIR TERENCE: Is that an accurate summary of the position?

MR MARTIN: It is, Sir, and I think at least two points follow from it. One, you're quite right with respect to say there's the summarising and there's the redaction part of that which could, in fact, be quite important in terms of being able to facilitate, if you like, release or disclosure of material meaningfully to other

participants.

Secondly, there is that importance of section 14(3) definition of natural justice which is reasonably narrow in terms of what people need to be able to respond to. That's one of your mandatory considerations here. Mr Keith can help you to get to a point where you make those sorts of positions and that is the reason why I mention it. It's a long way away from what other participants have been submitting for which is essentially that all material, virtually all material, must be made available to everyone. That cuts across your statutory scheme, in my position.

SIR TERENCE: Just to be clear, there can't be any limit, can there, or do you say there is, a limit on the Inquiry's power to order disclosure of material? In other words, it's not limited to circumstances in which natural justice considerations in the sense you describe arise?

In other words, under the statute our power is broader than that, isn't it?

MR MARTIN: I think that must be right, subject to section 14(2), 15(2) and potentially to the application of section 70 of the Evidence Act.

SIR TERENCE: So, your proposal is then a pragmatic one? This is a quick and direct - well, the quickest and most direct way at getting at the stuff that really matters in terms of other core participants knowing about it? Why do you propose a limited structure, one that is more limited than the powers we have?

MR MARTIN: All that is being proposed in the section 15 order we're seeking, is that on the face of it you protect those documents to begin with on a prima facie basis, if you like, to maintain the current protection that is attaching to it.

SIR TERENCE: We are pretty close to that anyway.

MR MARTIN: Yes.

SIR TERENCE: We've said we will hold them in accordance with the protective security requirements which essentially has the same result.

MR MARTIN: Yes.

SIR TERENCE: So, making a formal order that is subject to change is pretty much where we've got to. But what interests me is the suggestion that the focus should be on those documents that natural justice, in the sense you describe, would require disclosing either as documents or in some other form. In other words, we don't really go through a review process in relation to other material and consider whether the classification is justified and all that sort of thing?

MR MARTIN: I wouldn't go so far as to say pragmatic, but it's certainly a submission that says this is the way to achieve the efficient Inquiry that you want to achieve because what you're doing is basically saying: what are the documents or the class of documents that we are obliged to provide to core participants in order to satisfy our obligation under 14(3), let's focus on those, except it is a matter for you and your discretion how you draw those lines. And so, it's not suggested the Crown can dictate what those bounds will be, it is for the Inquiry members. But by focusing on that category, you get a prima facie group of documents to start with that you can then engage with and consider in the terms of the process we have set out in the submissions to best achieve section 14(3) at the same time that you advance the other objectives that are in 14(2).

SIR GEOFFREY: But we've heard submissions, strong submissions, that in order to satisfy natural justice they have to have all the documents or most of them,

they have to have cross-examination, they have to be able to engage in all of that. Now, that view of natural justice seems a much more expansive one than the one you're advancing.

MR MARTIN: Yes. My submission is the definition effectively of natural justice for the purposes of this legislation is in 14(3) which is why I start there. I am not saying that you are constrained to the point, as Sir Terence is asking me, you're not constrained to go beyond that, you have this broad discretion in 14(1). However, that is the explanation for starting it. There is a big difference between what the Crown is submitting and what other participants are submitting.

At that point I might move, Sirs, to the second question. It is a proposition that is submitted that the Inquiry is not tasked with satisfying any investigative obligation arising from the right to life and one hasn't been triggered.

There's two main submissions that I'll deal with in this section. Firstly, that the duty is not triggered and that it's not part of the Terms of Reference of this Inquiry to undertake that sort of investigation. It is submitted that the Inquiry was not established because of any legal duty to investigate has been triggered. Post operation assessment was carried out jointly by ISAF and the Afghan Government which raised no concerns about compliance with international humanitarian law and concluded that no further action be taken. Those steps confirmed that no investigative obligation had arisen.

I will make a correction, if I may, to the Crown's written submissions. Paragraph 26.1, page 11, the words there "satisfy any investigative obligation that may have arisen", I think those words should really read "confirmed that no investigative obligation arose". It's a fine point. It is submitted that that is still the position as far as

New Zealand's duty to investigate is concerned, subject to the Inquiry's findings in due course.

On this point, if I could take you to the NZDF narrative at page 14, you don't necessarily need to go to the document, I can read it out. There is a paragraph under the heading, "NZDF responses to the *Hit & Run* book", it says:

"After the publication of *Hit & Run*, the NZDF engaged further with international partners and managed to obtain additional information. This information has confirmed the conclusions that the NZDF reached at an earlier stage; that no civilian casualties were caused by the NZSAS".

The reason why I mention that, is that there is a role for this Inquiry which includes assessing the credibility of serious allegations but there is not at present any basis for reasonable suspicion or that there's a credible allegation of war crimes by New Zealand forces. It is a matter that lies ahead of this Inquiry to look into the allegations that have been made.

I want to come to the suggestion by Ms Manning that the judicial review application brought by the villagers is in some way a relevant context to this issue. That is the idea of a legal duty to investigate under the right to life. Ms Manning touched briefly yesterday on the fact that there has been a judicial review application before the High Court and that that was discontinued after the Inquiry was announced. The Joint Memorandum that was filed in the High Court indicating discontinuance of the proceeding read at paragraph 4, "The parties", the parties being the applicants and the Crown and the Defence Force: "The parties agree that, subject to two qualifications, the Inquiry establish there would be no practical utility in continuing to litigate the substance of the dispute between them". And significantly, the Terms of Reference of the Inquiry were annexed to that Memorandum , so it followed the Terms of

Reference of the Inquiry and it was clear, it is submitted, from the Memorandum that was filed, that there was simply no practical utility in continuing to litigate the substance of the dispute between the parties.

My point here is, firstly, that the Terms of Reference were known at this time. And secondly, that there's never been an acceptance by the Crown that the matters alleged in the Statement of Claim by the applicants were correct or had merit.

So, this Inquiry, in short, is not driven by what's in the Statement of Claim in that proceeding. Its Terms of Reference were appended to that memo and they stand on their own feet. In short, it is submitted that that proceeding doesn't have any bearing at all on the shape of this Inquiry.

One possibility is that the findings of the Inquiry could trigger a criminal, civil or disciplinary investigation but it depends on what you find, and this Inquiry is not in itself an investigation of that kind. The Crown would need to carefully consider its international and domestic law obligations in light of any findings that might emerge from this Inquiry; which brings me really to the second and significant point here, which is that no part of the Terms of Reference suggest that the Inquiry's role or function is to meet the Crown's domestic or international law obligations to investigate suspected breaches of the right to life.

SIR TERENCE: I think it was clause 5, wasn't it, that Ms Manning relied on?

MR MARTIN: The purpose clause is what she took you to, so that's clause 5.

SIR TERENCE: Her argument was that part of the applicable legal framework, including international humanitarian law, brings into play the right to life. What do you say about that?

MR MARTIN: The difficulty with that is, in terms of the

international humanitarian law aspect, you have the ISAF assessment and there hasn't been anything to revisit that from the State's point of view and so, this Inquiry is not a right to life investigation. It is an Inquiry from which grounds might emerge to cause the State to revisit that current understanding.

SIR GEOFFREY: But it is true, is it not, that the investigation will have to traverse whether the law of armed conflict was followed in these circumstances and international humanitarian law which has embedded within it clear principles that you can't go round killing civilians?

MR MARTIN: There's no dispute about that at all. There is complex law that will need to be covered in the course of this Inquiry, absolutely.

The submission is that the Inquiry is not tasked with discharging any obligation on the State to investigate alleged breaches of the right to life under either the New Zealand Bill of Rights Act or the ICCPR. It is submitted, additionally, that even if we were wrong about that, the manner in which the State complies with any obligation is through a combination of investigative measures and the State is entitled to set up a Commission of Inquiry that meets the obligations, provided other steps are taken overall to meet that investigation obligation.

In other words, the Inquiry on its Terms of Reference does not have to be something that satisfies the entire right to life obligation. Potentially, other mechanisms could follow to do so. That is a submission that only follows if you were to find that there was engaged an obligation on the State to investigate in terms of the right to life, which it is submitted is not something which is properly within the mandate of this Inquiry to enter into.

There is quite a body of debatable law that sits in behind

this. I am quite conscious of that, both in terms of IHL and in terms of international human rights jurisprudence. So, what I propose to do -

SIR GEOFFREY: There is also the extraterritorial application of the Bill of Rights Act.

MR MARTIN: Yes, I am scoping some questions which I am not proposing to go into great detail on but I think it might be helpful to scope what they are, so that the Inquiry can follow those to the extent that it wants to.

The submission is that these questions are one that the non-core Crown participants would need to demonstrate, or these propositions the non-core Crown participants would need to demonstrate in order to show an investigative duty arose. As I say, there is a body of law and where I'll come to, if it would assist the Inquiry we could file relatively short, by which I mean a handful of pages, 3-4 pages of submissions that develop this a little bit further, but I am conscious there is a very large body of law that it is submitted is premature for the Inquiry to get into at this juncture.

SIR GEOFFREY: I certainly would like to see that.

MR MARTIN: If I can scope where this might go. In order to make out their case that there is a legal obligation on the Inquiry to investigate breaches to the right to life, the non-Crown participants would need to establish four things.

Firstly, that NZBORA and the ICCPR, and/or those documents, impose a legal duty to investigate breaches of the right to life.

Secondly, if so, the duty to investigate applies extraterritorially.

If so, thirdly, the extraterritorial application extends to impose a duty to investigate deaths of persons

outside New Zealand's effective control.

And if so, fourthly, the duty was triggered in this case.

If we just assume or accept for present purposes, without necessarily conceding the points, that the first and second of those factors are arguably satisfied, it is clear, it is submitted, that the third and fourth are clearly not.

So, I'll take each in turn briefly. The first one that BORA and ICCPR impose a legal duty to investigate right to life. Section 8 of BORA, there's no jurisprudence establishing an investigative obligation akin to that found in article 2 of the European Convention. However, ICCPR, article 6, the right to life incorporates a duty to investigate breaches of right to life.

Move to the second question, this is the proposition that the duty to investigate applies extraterritorially. Under NZ BORA the existing jurisprudence is that that Act does not apply outside of New Zealand. That is the *Queen v Matthews* 1994, 11 CRNZ 564. Academic commentators suggest that development in international jurisprudence may require this decision to be recently considered.

SIR GEOFFREY: There is a recent Court of Appeal decision, and there is dicta on this, involving a case about a Naval person?

MR MARTIN: Yes, you are thinking of Hayley Young?

SIR GEOFFREY: I am.

MR MARTIN: You're right, it's dicta and it didn't go into the issue in detail.

The ICCPR article 2 provides that "Each State party to the present covenant undertakes to respect and ensure that all individuals within its territory and subject to its jurisdiction the rights recognised in the present covenant".

So, it's suggested such duties may extend beyond the State's territory.

Coming to the third proposition, the third and fourth

are the ones that it is submitted are clearly not established here, engaged here. The extraterritorial application, if there is any, applies even in circumstances where New Zealand is not exercising effective control because that is simply not the case on the ground in this situation. Effective control is the test for extraterritorial application of the ECHR and so, where you're looking at military operations in cases such as *Al Skeini* and *Jaloud* in terms of the European Court of Human Rights.

We're getting into that body of case law which has been referenced in terms of the ECHR having been held to apply in areas where the UK has taken on responsibility for authority and control in areas occupied in Iraq. And so, it explains what you see in terms of the application of article 2 there in the Baha Mousa Inquiry and Al-Sweady Inquiry in the UK there is a body of law that sits in that area, in other words.

The ICCPR applies only to individuals within a State's territory and subject to its jurisdiction. That's article 2. So, in certain situations, the ICCPR's obligations may apply in respect of those within the power or effective control of a State's forces that act outside its territory.

In New Zealand though, there's no jurisprudence on the point but no suggestion in any of the academic literature, as far as we're aware, that there's any extraterritorial application that would extend beyond an area where New Zealand had effective control. So, the submission comes down to these operations were not within territory that New Zealand had effective control of. And it is submitted that that seems an inarguable proposition on the facts as understood here.

Operation Burnham took place in an area in which New Zealand had no effective control or authority. So, there's no basis for claiming that the NZBORA or ICCPR applied to circumstances applicable to alleged deaths caused outside

the effective control of New Zealand. That's not to say that international humanitarian law duties did not apply but we're talking about NZBORA and ICCPR and they do not.

It brings me to the fourth of these questions/propositions, and this is that the duty was not triggered in this case. I've touched on the main points here already but the threshold of which the IHL duty to investigate is triggered, is where there are reasonable grounds to suspect all credible allegations that a war crime was committed by the NZDF, so the NZDF Law of Armed Conflict Manual refers to allegations that are well-founded, which is consistent with the Armed Forces Discipline Act.

In this case, a post operation assessment carried out by ISAF and the Afghan Government raised no concerns, as I've mentioned. As a result, the threshold for the duty to investigate under IHL has not been triggered.

It's accepted that Mr Hager and Mr Stephenson have made serious allegations in their book. However, allegations alone are not sufficient to engage a duty to investigate. They must be credible and well-founded allegations and this Inquiry is tasked, in part, with ascertaining whether that is the case.

So, in other words, we're at a point prior, a pre-cursor, to any duty being able to be said to be on the State to undertake the right to life investigation that some of the non-Crown participants contend for.

The reason we're into all of this is because those other participants say it constrains your discretion and what I'm saying is you don't. You go to the Act, you look at the discretions you have and these arguments do not constrain you.

SIR TERENCE: All right. We'll take the break now. How much longer have you got?

MR MARTIN: Probably not very long, Sir, maybe 10-15 minutes.

SIR TERENCE: Okay. All right, we'll take a 15 minute break.

Hearing adjourned from 10.30 a.m. until 10.48 a.m.

MR MARTIN: Sirs, subject to any questions you may have, I find myself in the happy position, subject to a couple of housekeeping matters, the remaining points have come up and been covered in the course of submissions, so I'm very close to finishing but I obviously do invite any points that I can assist with.

The matters that I was just going to conclude on are, first of all, I was asked about the Ministerial Policy Statement that was referred to in the submissions. It was issued by the Minister under section 206 of the Intelligence and Security Act 2017 and you will see also section 207 mandates the issue of a Ministerial Policy Statement on co-operation with overseas public authorities in that section. So, that's the reference there.

The other point, if it will assist, and I do understand you already have a lot of paper but, if it will assist, the points I took you through, the thumbnail sketch really of those four questions, we can produce in the form of, as I say, about three pages for the Inquiry today, we can have it before you shortly, if that will assist?

SIR TERENCE: Well, we've got the record of it but, yes, you may as well hand it in. It will all be in the transcript, in any event.

MR MARTIN: I am happy to produce it. It's really for completeness but the main submissions, I think, have been now made and will be clear to you.

MS MANNING: Sorry, if I may? It would be very helpful if

that could be provided before the reply submissions are due because we do take issue with one or two points there.

SIR TERENCE: Yes, quite.

MR MARTIN: We will do it today.

SIR TERENCE: It will be done today.

MR MARTIN: Subject to any questions, those are the submissions I propose to make.

SIR TERENCE: I have no questions.

MR MARTIN: Thank you.

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SUBMISSIONS ON BEHALF OF THE NEW ZEALAND DEFENCE FORCE BY MR RADICH QC

MR RADICH: If the Inquiry pleases, the position of the NZDF has in part been covered by the submissions of my learned friend, Mr Martin. The whole purpose of the exercise of having a whole of Crown submission has been so that there weren't disparate parts of the Crown saying different things. There has been significant input from NZDF into those submissions and I am obliged to my learned friend for presenting them in the way that he did.

The purpose for me standing and having filed a further document is just to supplement some points and to raise some points that are unique to NZDF, so I do that. I don't think I'll be too long in going through it.

The first point I make - and there has been a written document made available, a hard copy and electronically now - is that the Inquiries Act does present a very comprehensive package of mechanisms that deal both with open justice and which deal with efficiency and which deal with the various interests that are in play here. It provides mechanisms that are very different from those that are in play in conventional litigation.

On that point, if I might say with respect to my learned friends, that the core participants, all of us, NZDF included, must move away from a litigation-based model, a model where counsel are in different corners, where they are moving the pieces on a chess board, where they're using all their skill and cunning and techniques and where the Judge sits more passively, although intervening for clarity, but where the

Judge sits more passively to absorb the information from these people taking these tactical moves where, through advocacy techniques, parties, through counsel, are trying to "win". I put win in inverted commas because this is not about anyone winning. This is not, as the Act says, an environment where civil or criminal rights are to be determined. It's not an environment where we're looking at investigations and to right of life. It is, as my learned friend, Mr Martin, said, preliminary to that.

My learned friends have, and I respect their intentions in doing so, sought orders. They've said these are the orders that we seek from the Inquiry. And the submission for NZDF is that we're not in an environment where parties are making interlocutory applications to you and asking you for orders. We are in an environment where you, the members of the Inquiry, having given your preliminary thoughts on matters of procedure, have sought input from the parties on that and we are here to provide you with feedback.

The orders sought include terms that are familiar to litigants and to litigation lawyers: discovery, interrogatories have been mentioned, timetabling, hearing schedules. My learned friend used the term "case management". These are all the mechanisms of traditional litigation. They don't, with respect, have a place here. There are aspects of them that can be reflected through the Inquiries Act procedure but in their own rights they don't have a place. The participants play largely a passive role. Everyone contributes appropriately. Everyone contributes to the point that you direct they might contribute but the Inquiry itself moves the pieces on the chess board.

And the NZDF does not for a moment say, and it's been characterised in this way even this morning by submissions from my learned friend, Mr Salmon, with respect, that the NZDF is looking for some sort of closed process. That is not the

case at all. It has never been and it certainly won't be through the course of its involvement.

What the NZDF is saying is that the nuanced approach suggested by the Inquiry in its Minute No.4, which enables rights of participation but makes good provision, for good reason, for sensitive security interests, for confidentiality, for vulnerable people as a system where the rights are catered for appropriately and properly and in accordance with the Act's mechanisms.

The NZDF says, and it will just make a couple of comments along the way, not by way of firm submission or requests for orders but just feeding its thoughts into the process, that the process that has been suggested is sound and the NZDF will gladly work within it.

I set out in these written submissions, first of all, and I won't go through them in much detail in the first two pages, the statutory scheme. My learned friend, Mr Martin, has dealt with that comprehensively but I want to focus on some aspects because it is a very broad scheme, it's bespoke.

Section 14 starts with that very broad discretion. There are the two principles: comply with natural justice and avoid unnecessary delay and cost. And then the section tells us effectively what natural justice is in this context and it's in section 14(3):

"If the Inquiry proposes to make a finding adverse to anyone, then you must, using the process that you determine", even that is broad, "be sure that people are aware of that finding and allow an opportunity for comment". That is the classic statement of what natural justice is and that is the way that it is expressed here but, of course, beyond that, in this provision there is no restriction on your ability to decide whether, for example, to call witnesses, whether to hold a hearing, whether to receive evidence or submission, whether to allow or restrict cross-examination; that is a

broad scheme.

Then you have provisions dealing with production to the Inquiry, disclosure to participants, restrictions and private hearings and immunities. I mention this on page two of this synopsis. Section 20, production of documents and information to the Inquiry. It's important to note that that's where the provisions start in the sequence of things because it's all about the Inquiry having the best information. It comes back to the nature of this not being traditional litigation. So, the Inquiry can compel production, it can examine, it can look at privilege, it can refer to an independent person which is the process contemplated with Mr Keith.

Section 22 then goes on to talk about disclosure to other participants. So, already we're moving away significantly from a Court model where discovery means everyone gets everything at the same time.

Section 22 tells us that an Inquiry may order a person to disclose a document or some information to another person on appropriate terms and conditions. Again, this is expressed broadly, given the fact that this is a statute that covers many different types of issue and different types of Inquiry. And this is where, if I can put it this way, Mr Keith's role and the Inquiry's role beyond it come into play because what is being done there is to consider whether or not there should be disclosure of material the Inquiry already has to other people. And so, one then asks, what are the circumstances, what are the considerations that would inform these words "impose appropriate terms and conditions". In my submission for NZDF, they come from section 15 and on page two it's out of numeric order because I think it comes in in this way. And section 15 tells us that you can forbid publication, you can restrict public access, you can hold the Inquiry or any part of it in private, and I support the points

made by my learned friend, Mr Martin, about the fact that 15(1)(b) and (c) are different. Private can relate to participants. It is different to (b) which relates to public access.

When one looks at section 15 and the criteria, these, together with section 14 in my submission, help to inform the broad discretion you have over section 22 to make documents available to other people on terms and conditions as you see fit.

Section 15(2) speaks about the considerations are 2(a) "the benefits of observing the principles of open justice". There's no doubt that open justice is fundamental to this, it is one of the considerations. The wording is not, and I say this not to detract from those words, the principle of open justice, but the wording is not saying that you must apply the principle. The wording is that you must take into account the benefits of observing it. They are carefully chosen words. You must equally take into account the risk of prejudice, you need to ascertain the facts properly to not prejudice security, economic interests, privacy interests are paramount also or equally applicable, and the administration of justice.

Next on the list, I mention section 27, and the Inquiry is well aware of this, which brings in section 70 of the Evidence Act and that's a provision, as we know, which deals with public interest immunity and that section tells us in turn that the Judge, applied here to the members of the Inquiry, may direct that a communication or information relating to matters of State must not be disclosed. And there's that balancing test there, the public interest and communication being disclosed outweighed by the public interest in withholding it.

I'll come, if I may, in a moment to some points about section 70. Sir Terence, you discussed the point with my

learned friend, Mr Martin, and, if I may, I will just return to that momentarily but I did want to make the point that when we're looking at these particular provisions, when we're looking at section 22 making available to other people, section 15 restricting access to others, section 14 the broad considerations, we're in a very different place than the place where we'd be, for example, when looking at Coroner Inquiries in the UK.

My learned friend, Ms Manning, has done a comprehensive job in explaining some of the principles that arise there but when one looks, for example, at the Coroner's inquests rules in England and Wales, one starts from the proposition in rule 11 that a Coroner must open an inquest in public. The focus in rule 11 is on a public hearing, "There can be a direction that public are excluded". Rule 13 of these UK rules tells us, "Where an interested person asks for disclosure of a document held by the Coroner, the Coroner must provide it or make it available for inspection". There is a provision in rule 15 that enables other interests to be taken into account and the Coroner can mitigate that broad obligation but they're based on statutory prohibitions, copyright, unreasonableness, it relates to criminal proceedings or irrelevancy.

And so, I make the point, not to become technical but just to say again we're dealing with a very different statutory scheme and those cases don't sit comfortably against the Inquiries Act scheme that we are dealing with.

I think if I look at page three of the submissions that I've given you, I won't go through it in detail but the points that are made there with reference to decisions in the UK Courts, the simple point that we have been discussing, that the Courts of law are very different to Inquiries and there's an extract from *Al Rawi* there. *Al Rawi*, the case cited in footnote 4, is put up quite often and extracts have been

referred to you, for the proposition that one cannot compromise on the essential adversarial elements in Court litigation.

But the point there in the quotation I've given in paragraph 7, is the Court saying that's why security issues can't be dealt with in Courts and must be dealt with through Inquiries. That's why Inquiries are needed.

So, we come full circle to the point that we're not in an environment where closed material procedures create an obstacle or a difficulty. We're not saying for a moment that what is being suggested here is a closed material procedure. I think it's significantly nuanced from that and I come back to that in a moment.

It's not for a moment saying that people are excluded altogether from the process. There's the greatest degree of inclusion that is tenable and which the NZDF supports 100%.

I mention an extract from *Kennedy* there in paragraph 8 which makes a similar point.

So, what I say on page 4, I have endeavoured to identify to date in the Inquiries Minute No.4, and I realise this may become subject to change following the hearing, the provision that is being made, the nature of the provision that is being made for full participants, NZDF included, to be involved. The point is that, although there's no right for non-core participants in (a) to receive information produced, the protocol that's being contemplated enables the participants to receive certain information upon completion of the review procedure. That's the information that they should receive and, therefore, will in accordance with the principles of natural justice, everything that, including Mr Keith's process and your involvement in that process, is able to be released fully in a redacted form, a summarised form or a gist form, to use that term that's becoming popular in the UK.

SIR TERENCE: Can I just ask a point of clarification there?

MR RADICH: Yes.

SIR TERENCE: When you say that core participants will be entitled to material that natural justice requires, and it may be provided in a redacted or summary form or it may be the document itself will be disclosed, whatever; you're talking about natural justice in the same sense as Mr Martin?

MR RADICH: Yes.

SIR TERENCE: That is, that it's related to an adverse finding?

MR RADICH: I am, Sir, and the suggestion is for the same reasons my learned friend, Mr Martin, gave, when one looks at costs and efficiencies and when one applies without derogation the notion of natural justice, that is a reasonable starting point, it is a reasonable proposition to say that there's a big funnel that's being used here in a way. NZDF, and I'll come to the NZDF statistics in a moment and what's happening in timing, but the NZDF is looking at a vast tranche of information from multiple sources. It's determining, through a bunch of processes, what is it that should be given to the Inquiry. It's doing that on the basis that it will give everything over that is remotely relevant to the Inquiry.

It's then a question of how the Inquiry manages that because it's important for NZDF to be able to say to you absolutely openly that nothing that has potential relevance is withheld.

And so, Mr Keith then, and I don't want to put too much of a task on Mr Keith's shoulders, very capable though he is, that task then requires further sifting, in the sense that so much of it won't be directly material or have the possibility to give rise to a point that you might rely on in making your finding or that you might rely on in making

an adverse finding.

And so, for Mr Keith to be able to sift to a further degree, to say what are the documents that should be made available in order to satisfy the natural justice obligations, and then let's look at those and then let's look at the statutory tests in relation to them.

And NZDF's position is that each and every document that can be made available, taking into account security interests and the like, should.

I come back to page four and the second point, and this is again to recap the Inquiry's preliminary thoughts on the way in which core participants will be involved. Some of the evidence will be given in a public session, wherever that's possible, bearing in mind the same interests. Although there's no right to cross-examination, that comes under section 22, the Inquiry has indicated that there may be circumstances where you would allow it and where it might be helpful. That is a very good thing that may well be helpful to have people like Mr Salmon with the knowledge and the skills, and Mr Hager and my learned friend, Ms Manning, who have the skills that they possess and the information they possess to become involved but not in cases where it involves information that is giving rise to national security interests and concerns where participants are vulnerable.

This is where the Inquiry, the starting point for the Inquiry is, there needn't be but in cases where it's permissible, having regard to security interests and considerations and vulnerability, where it would be helpful, then it can be considered and brought in. Otherwise, as you have said in Minute No.4, and certainly this would be useful, participants can suggest topics to be pursued, this applies to all of us, NZDF included, and NZDF is not suggesting for a minute that it should be in a room cross-examining vulnerable people, wouldn't dream of it, but it may want to

suggest topics and I think that would be helpful.

In (d), where material, adverse to the interests of a person or of an organisation which emerges, then they will be given a summary, the Minute has said, of relevant information and an opportunity to respond. That, again, is a positive thing and relates directly to this statutory scheme.

You've said also, and I mention this at (e), that where natural justice concerns don't arise specifically, nonetheless you might facilitate participation from giving some transcripts, giving some summaries and holding public hearings.

I just wanted to come to one point, in particular. My learned friends have referred at times to a Crown proposal about lists of documents being provided. To anchor the point from the Crown's perspective and including that of NZDF, it's in the submissions for the Crown, the written submissions at paragraph 69. It's perhaps a little more nuanced than saying that the Crown is going to provide a list of documents.

The way in which it's been expressed is that the Crown is certainly open to the proposal that the Inquiry should maintain a comprehensive document management record in order to keep track of the material that's been provided and reviewed.

The point made in the footnote there, it's footnote 70, is that that's a useful thing and participants would have access to it but that, in terms of document management, the view is that participants seeking to obtain the documents listed in the record, other than through the Inquiry's established process, could cut across the procedure and have us going in different directions. That's the reason that the suggestion is made that it is a document management system, if the Inquiry has the capacity to do this.

SIR TERENCE: Well, we do. We do have litigation management

software.

MR RADICH: Right, right.

I come now to a handful of points that arise for NZDF. The first of them did relate to the section 70 issue. It is a point that I raise for your consideration. I am not expressing a concluded view or say that I'm coming from a corner of any form of ring, but the point is that the provisions in the Act we've been through do provide a statutory scheme under which you are able to determine what it is that you have and what it is out of the information you have that core participants should receive and why, having regard to the statutory considerations there.

As I mention in paragraph 13, it's accepted entirely that the criteria in section 70 have application here as well but the concern, I don't know if concern is the right word but the point that is raised here, is the Inquiry's description in the Minute that it has a power under section 27 of the Act and section 70 of the Evidence Act to assess claims to withhold.

Section 70, of course, is an immunity. It is a different power to the Inquiry's power under section 22 to require disclosure to participants on terms and conditions. The point may be unnecessarily subtle but it is that section 22 is the source of power and it can, in my submission, be informed by sections 14 and 15 and the other relevant provisions because what section 70 does in standard litigation, is it excludes altogether from a Judge and from all the participants a particular document.

The *Al Rawi* case looked at that, of course, and the point that it made, and I won't take the members of the Inquiry to it but it's paragraph 41 and the point made there is that, "If the documents are disclosed as a result of the public interest immunity process, they are available to both parties

and to the Court. If they're not disclosed, they are available to neither the parties nor the Court".

And so, the point being made is that the balancing test there is a relevant balancing test. It's brought into operation equally through the provisions of the Inquiries Act and it may be that the better terminology is to focus on those provisions but draw guidance from section 70, and I just say no more than that.

SIR TERENCE: Just to understand, the power is in the Inquiries Act but the criteria referred to in section 70 would be mandatory, I suppose, considerations?

MR RADICH: Yes, I think that's a fair way of putting it. I think they're brought into purview when that section 22 exercise is being undertaken as well by sections 14 and 15. I think they bring similar considerations into play.

SIR TERENCE: I see, thank you.

MR RADICH: I think we've covered much of what I was wanting to say on page 6. The only other point I wanted to make is towards the bottom of paragraph 19 and over the page to page 7, and that is the jigsaw and mosaic principle. My learned friends have mentioned the principle and have expressed some doubt about its utility.

However, the point is that it is a principle that's made quite firmly, features firmly in the decisions of some of the Courts that are referenced there. It's simply that sometimes when one looks at the various snippets of information from a range of sources, one can create a picture that isn't available on the face of an individual document alone. How security is gathered, from what sources, over what period of time, through which pieces of equipment. And it's a request, and it's no more than that, that the process might enable NZDF at the end of the process to look at what is there and to be able to make a comment for consideration by Mr Keith and the

Inquiry about whether there is any application of a mosaic effect here that should take it into account. I just make that point.

The next topic is the protection of the identities of members of the NZSAS. It is a point that's been made in a separate memorandum. My learned friend, Ms McDonald, for the Inquiry has mentioned it as well and I appreciate the way in which that was covered in submissions. The points I make here are known to the Inquiry, I think, but they are emphasising the importance of protecting the interests of members of the SAS and the reasons given here are that this is a highly specialised capability. Its operations, its capabilities, its tactics, its procedures, differ materially from those of conventional forces. They need to operate inconspicuously.

They go through covert and sometimes clandestine operations and advance parties. The importance of anonymity to them underlies the essence of the Service itself. The principles that apply derive from those that derive from the Government's protective security requirements themselves, in terms of what's sensitive and what's secret having regard to the nature of their operations. I mention that in paragraph 28.

SIR TERENCE: How does this fit with, for example, Willy Apiata who won the Victoria Cross? I mean, that was a very public thing.

MR RADICH: Yes.

SIR TERENCE: I think he went back to Afghanistan, didn't he?

MR RADICH: I understand, Sir, and I say this on my own part, I have to say, that his operational capabilities were then adversely affected.

SIR TERENCE: I see.

SIR GEOFFREY: Given the limited number of people who are

in these units, I suppose you're saying the difficulty of redeploying them in the unit would be considerable; is that what you say?

MR RADICH: Yes, Sir Geoffrey, I would. The numbers are small. At any given time there is a small number of people on standby at short notice but it is a small number of people. So, if there is compromise, the ability for New Zealand to respond effectively with this special force is restricted.

The points that are made here, is that as well as that, as well as operational effectiveness considerations, New Zealand has an eye to targets for exploitation, whether these people can become targets if they're known and that's the case. Their personal safety and wellness, the personal safety and wellness of members of their families, for example, when if information is made known, the way in which social media operates can quickly cause significant harm to family members. So, it's for these types of reasons that NZDF is very focused, as are each member of the NZSAS, on ensuring anonymity at all times.

SIR TERENCE: So, in terms of giving evidence, what do you say about the type of mechanisms that Mr Salmon talked about with the screens and so on?

MR RADICH: It's not supported, Sir Terence. An open session with a screen is not, in NZDF's submission, and it doesn't say this with a view of trying to withhold information, it says it purely in terms of operational effectiveness, it is not enough because things that are said can link people to events. It is very difficult to screen. Equally, what ability will those people have to give evidence in this particular case, with these circumstances, without reference to confidential information, sources and footage?

The case that my learned friend, Mr Salmon, referred to

was a little different. It was a case where it was a factual dispute as to whether Mr Stephenson had entered an Afghan CRU, Minister of Interior Crisis Response Unit, based in Kabul and was interviewed by the unit's Commanding Officer. The proceedings weren't concerned with the actions of specific NZDF or NZSAS Military operations, they weren't concerned with classified information relating to those operations. Yes, certainly in the course of discovery NZDF did provide to Mr Stephenson and his counsel classified documents that had been redacted. Some of them, I understand, I haven't seen them, would have had the letters "ISAF" at the top but they were NZDF-generated documents. They didn't, as it's understood, and, as I say, I haven't seen them but what I'm able to tell you is they didn't contain information provided by ISAF or the US. This was not open discovery. It was narrow.

The ability for members of the SAS with the privacy concerns, with the risk of disclosure, even with the use of a screen, and with the confidential nature of the information involved, is such that, in my submission, that evidence is the type of evidence that would need to be given without other counsel and parties being present, so that those people can speak openly to you, so that they can look you in the eye and explain fully and without fear of the environment of a Courtroom what happened on a night or a series of nights. I don't take it beyond that.

Perhaps just while dealing with the Stephenson litigation, I don't want to make this a discussion about that case because of my ultimate submission that I made at the outset and I'll make in conclusion, that this is very different to a piece of litigation. However, just to say that NZDF would not agree to the characterisation my learned friend, Mr Salmon, has given to the disclosure of information and the giving of the evidence. There was, as I understand

and I wasn't involved in that case, a second round of discovery because the search parameters the first time round proved not to be wide enough but I don't take it beyond that.

May I turn, please, to the provision of information to the Inquiry, it's on page 9. May I say at the outset, just to deal with this right upfront, as my learned friend Ms Manning has said, there is much work to be done but NZDF does give the Inquiry an assurance that everything will be finished from its point of view, document-wise, by the end of February, if that's of use. There are a lot of documents there yet to be reviewed and that requires a large team but they will be deployed, to use the language -

SIR GEOFFREY: Is this just NZDF documents or does it include MFAT documents or the agency's documents or DPMC documents?

MR RADICH: Yes, it is just NZDF because I'm not in a position to speak for other agencies, Sir Geoffrey.

SIR TERENCE: So, you say the end of February. Is it intended that they will be made available iteratively, as has been happening to date?

MR RADICH: Yes, Sir. Yes, they very much will. What I wanted to just describe by reference to the next couple of pages is the process that's been used and the figures that were given to you yesterday and how that drop dead date will be achieved. That is not a very appropriate term that I just used actually, I reflect.

If I look at paragraph - let me start, if I may, at paragraph 33. This is an important point and it is fundamental. NZDF is not endeavouring to filter information in any way. Questions have been asked about the fact that NZDF personnel are involved in this task and my learned friends have expressed their own views about the way in which they regard NZDF's approach which simply is not accepted.

The approach is as open and fulsome as it can possibly

be. The process is being monitored and observed and advice is being fed into the process by lawyers with ethical obligations. Dr Sheeran, to my right, is involved. He is contracted into the Special Inquiry Office. His credentials extend into the area fully of IHL. He is involved as a secondee from the Crown Law Office who is involved in the Special Inquiry Office and a significant part of the role is providing this oversight. So, it's as open as it can be.

In the event that it was thought that there might be utility at some stage in Mr Keith, that the process proceeds as the Minute suggests becoming involved to review what is occurring within NZDF, the way in which the process is going through, then that could be something that's considered.

If I can, please, turn to paragraph 34. What's happened is that a framework was developed to try and understand what it is that the task would entail. There was a brief given to research staff as to how they would go about it. As I say at (c), when people started discovering documents manually, looking across the databases and trying to go into the various parts of Defence, they realised that this really was going to take a significant amount of time. And so, they deployed then, I use that term again, information retrieval software. They managed to put that right across all of the databases. One can key in words and clusters of keywords to determine the scope of the exercise. That was done. And what that then showed was that the numbers were significantly higher than the manual estimates that we'd given when we were giving information to the Inquiry previously, were either not correct or that the use of the software was bringing up a lot of information that the search terms grabbed but may not actually have much relevance at all.

That was quickly shown to be the case for many of the documents but, as I mention in (f) and (g), the documents are reviewed for authorship. They are reviewed to determine

whether the interests of international partners or other equities are involved. It is catalogued and indexed and provided to the Inquiry.

The first on page 11 are those that my learned friend, Ms Manning, referred to yesterday and they are these. In the first place, there were around 1,000 paper documents, and then when the electronic retrieval software was used, it threw up 80,000 documents. That could be reduced, as we say in (c), immediately or very shortly after that by 63,000 items because they were regarded as being primarily irrelevant, they were digital map sheets and other GIS documents. That leaves a balance, a big balance still of course, of 17,400. But the documents that you have to date that have been included in those, that have been sifted to date, are, I understand, the most important documents. You have all the relevant Cabinet Papers, the post action reports, the planning documents, the Rules of Engagement.

Before I lose the thought of the term Rules of Engagement, may I mention something about the Rules of Engagement for SAS operations because there have been comments made by Mr Hager, for example, that one can get Rules of Engagement online and yes, one can, some are but the ROEs for an SAS operation are more sensitive, they're highly classified, far more so than for a regular forces operation. That's reflected in this operation. For example, by the fact that the NZSAS didn't carry ROE pocket cards but they were trained and briefed by the deployed New Zealand Defence Force legal adviser on the ROE. What the ROE would reveal to an adversary are the conditions within which the NZSAS use force, have and will use force.

That sort of information doesn't grow old with time. It doesn't grow irrelevant with time. It remains equally applicable; in what circumstances would an SAS officer be authorised to take a life and when would they not? I just

mention that before I lose that thought.

As I say, coming back to the figures at (d) and (e) on page 11, 1,600 or so items have been examined. 1,100 or so have been authored by NZDF. Of those, you have received 324 but it's a diminishing returns proposition effectively, where that which is left do not appear to be anything that's tactical, for example, and I think much of it will be able to be filtered out very quickly. With a good team of people that exercise will be conducted now very properly to conclude it.

Finally on page 12 of the submissions, I make mention of the narrative of events, simply to say that it's been dealt with collaboratively. It is, at this stage of the process, regarded as being that which is appropriate for public disclosure. It is, of course, unclassified but it's based on classified information. It is unprecedented, as we said in the covering memo, in terms of the amount of information that's been given out but it is hoped genuinely that it will assist all of those involved with a better understanding of the process.

Unless I can provide any further information or assistance, Sir Geoffrey and Sir Terence, those are the submissions for the NZDF.

SIR TERENCE: Thank you very much, Mr Radich. Mr Gray?

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SUBMISSIONS ON BEHALF OF HON DR WAYNE MAPP
BY MR GRAY QC

MR GRAY: I will be brief. I don't wish to be repetitive and we are getting to the time of the hearing when it's difficult to avoid but I do want to locate Dr Mapp's position within the range of positions that have been argued before you.

Can I begin by making three core submissions. The first is that Dr Mapp agrees that the work of the Inquiry and the material that you should consider should be public to the greatest extent possible.

Second, Dr Mapp takes this position on grounds that the credibility of the Inquiry will be enhanced by the possibility of public scrutiny.

Third, Dr Mapp knows from his experience as Minister of Defence that there will be some material which will not be public and, therefore, some work by the Inquiry which will be in private, rather than in public.

Dr Mapp doesn't seek to control the environment within which he will come to give evidence to the Inquiry. He will be an environment taker. These submissions are made so that he can understand the position of other participants before the Inquiry and how his dealings with them should be.

I want to make submissions about three topics: open justice, natural justice, and the New Zealand Bill of Rights Act. Those terms have been used widely in the last day and a half and possibly somewhat indiscriminately. Our submission is that they need to be used with some precision in relation to the work of this particular Inquiry.

If I turn to open justice, a concept which is flexible

but whose flexibility arises from and concerns the different underlying interests being served in different hearings. Its genesis in the last century was in cases arising in family law and criminal law where the coercive power of the State was involved to interfere with citizens' rights, including rights to their property. And it was because the power being exercised was community power that it was necessary and appropriate that the community be able to supervise and scrutinise the exercise of that power.

Since its first debate in New Zealand, in *New Zealand Broadcasting Corporation v Attorney-General*, it's been seen that the concept applies to any manner of public hearings with judicial and other appointed officers but also that the interests being served are not identical. And so, it's no longer a one size fits all label. It means different things in different places and its meaning in particular places is dependent on and determined by the interests involved.

And so, when one uses the term "open justice" in relation to this Inquiry, it's using it in relation to an Inquiry and not litigation. The point has been made that the Inquiries Act specifically provides that there are limits on what the powers of an Inquiry can do and so the coercive power of the State to interfere with the liberty and property of citizens is not engaged. We're simply asking two very wise people what they think about something and the rest of us are simply here to help that process by telling the wise people what they know. That is the process that we're involved in.

And so, the concept of open justice in relation to that proceeding is necessarily different from what it would be in a Court proceeding where the liberty or the property of citizens could be interfered with by the coercive power of the community.

If one thinks of the interests being served, it's the New Zealand Defence Force and its reputation and, by

extension, the reputation of New Zealand. It is the villagers. The rest of us are public spirited citizens, authors of books who have already told the world what they think and what they think they know, and people like Dr Mapp who have had some involvement, are public spirited, they will be available, they will be here but they're only here to help you.

And so, what open justice means in relation to each of us, is less important to what it means in relation to you and the public credibility of the work that you do.

And the extent to which the phrase "open justice" means what you do must be in public, is necessarily also affected. When one looks at what the Inquiry Act provides, how it is that our community intends these difficult questions to be addressed by wise people who accept the burden of doing it for the community, one can see the flexibility, the range of powers, the acknowledgment that some of the work will necessarily need to be done in private. That's what Parliament intended when it enacted the Inquiries Act and that full range is available to you to be tailored on a case-by-case basis as the information comes before you.

So, we say it's not for participants to say open justice means I have these rights. Open justice means we all do what we can to help you in your work.

And similarly with natural justice. In the context of litigation, the genesis of rights of natural justice was a lis between the parties. It doesn't exist here. These parties are not combatants with each other. They are not seeking to have you interfere with the personal or property rights of others. Natural justice is particularly provided for in the protections of section 14(3) and I take my position along with the Crown and the New Zealand Defence Force, that the Inquiries Act tells you what natural justice means in the context of this Inquiry.

SIR TERENCE: Just on that, to some extent Inquiries can affect reputational interests?

MR GRAY: Yes, they can.

SIR TERENCE: Is that an interest that would engage, in your submission, a natural justice right?

MR GRAY: Yes, it's the right described in section 14(3). It is the right that was at issue in the *Mahon* proceeding as a result of the Erebus Inquiry. It is a right to be aware of the matters on which your proposed finding is based and having an opportunity to respond to it.

As we know, the product of your Inquiry will simply be your opinion. It will be what you think. The fact that you think it may affect someone's reputation. And so, before forming a view and expressing it, you are obliged to say to someone this is a topic on which I need to hear from you for these reasons because if I were to make this finding, this is what it might mean for you. What do you say about it? That is the natural justice right contemplated by the Act and the one that is appropriate to an Inquiry, as opposed to a piece of litigation.

When it comes to cross-examination, cross-examination is not a natural justice right. The purpose of cross-examination is to help you form your opinion. There's unlikely to be much help for you from argumentative cross-examination about the meaning of things, argumentative cross-examination about what the Rules of Engagement mean, what alternatives are available and whether different alternatives should have been selected, what subjective understandings arising from the Rules of Engagement might have been is unlikely in the end to be helpful to you.

These days, cross-examination still helps where there is conflict of evidence and when your role is to make a determination as to what it is you think occurred when the

evidence given to you about it is conflicting. We can understand that in those circumstances you might feel you will benefit from it but we say the test for you is "will it help us"; not "does somebody else think they need to do it".

And we suspect it will mostly arise in the context of disputed facts about the operations. Otherwise, a process of submission and dialogue in respect of submission, we submit, is likely to be appropriate but that is a decision that will be made by the Inquiry later when it understands what's in its mind and what will be helpful to it.

And then finally and briefly, the New Zealand Bill of Rights Act. The process guarantees in section 27 of the Act are unlikely to require specific reference in this case. The protections of the Inquiries Act are a more detailed expression of them in the context of this particular piece of work. The precise wording, however, of section 14 and freedom of expression is, in the New Zealand context it is the right to receive and impart information and events. And, of course, our formulation is like some but unlike others in its inclusion of the right to receive information, and it has to be accepted that weighs in favour of the maximum degree of openness possible in the way in which you do your work.

But, of course, the New Zealand Bill of Rights Act contains the balancing mechanism that those freedoms and protections can be subject to such reasonable limits as can be demonstrably justified in a free and demographic society. Again, that finds detailed expression in the Inquiries Act and in the mechanisms that there are there.

Like my learned friends for the Crown and the New Zealand Defence Force, I do wonder whether some of the submissions have failed to make the change from adversarial litigation to an Inquiry. I accept that the privileges being identified as a core participant are defined in section 14(3) and I agree with submissions by the Crown that that's really the limit

of them and that being identified as a core participant is not being identified as a party with particular rights attaching to either party. Dr Mapp looks forward to coming and helping when he can. Those are my submissions.

SIR TERENCE: Thank you, Mr Gray.

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SUBMISSIONS ON BEHALF OF THE MEDIA
BY MR RINGWOOD

MR RINGWOOD: The parties that I appear for today, NZME, Stuff, TVNZ, Mediaworks, Radio New Zealand and Bauer Media Group comprise almost all of New Zealand mainstream news media. They are actually all competitors and it's very rare for them to join forces like this and the reason why they have is because there's a matter of principle at stake here for the media and that principle in this case is the extent to which they are going to enjoy access to the process of this Inquiry. And another way of putting that, is the extent to which this Inquiry is going to be conducted in private or in public or somewhere in between what's likely to happen. There is a very great public interest in this Inquiry. I would like to refer to paragraph 3 of the Crown's submissions where they say this Inquiry into Operation Burnham and related matters was established because of the public interest and an independent review of the events that have been subject to serious allegations by Mr Hager and Mr Stephenson and which impact public representation of the NZDF.

That is absolutely right. If I could take you to the Terms of Reference, paragraph 4 of the Terms of Reference reads:

"In light of these allegations, it is in the public interest a Government Inquiry be established into Operation Burnham and related matters".

That's picked up again in paragraph 5 of the Terms of Reference which begins:

"The matter of public importance which the Inquiry is directed to examine is the allegations of wrongdoing by NZDF etc.".

So, the word "public" keeps cropping up in all of these expressions of the Inquiry's raison d'être. This, in my submission, leads into the role of the news media. The media has long been recognised as a watchdog or surrogate of the public. It is not possible for most members of the public to follow the proceedings of the Courts or an Inquiry in person and so the public relies on the news media to do that for them. The media is the conduit through which the public receives information about these matters of public interest. And this important role of the media, in giving effect to the principle of open justice, has been repeatedly recognised by the Courts, and four Court of Appeal decisions are set out in paragraphs 22-23 of the media's written submissions.

And, most recently, the role that the media plays has been recognised by the Supreme Court in *Erceg v Erceg*. My learned friend, Mr Salmon, resisted quoting from that case to you yesterday but I am unable to resist that. The reason is, not just because it's a decision of the highest authority from the Supreme Court and not just because it's recent, just last year, but because it deals with the principle and because it has an important thing to say about the role of my clients, the news media, and because it also has a very important thing to say about the extent to which the principles should be departed from in circumstances where it's determined that there are reasons why it should be departed from.

So, I'm not sure if you've got my bundle of authorities? I think it reached you eventually.

SIR TERENCE: Yes, I have it. Tab 12?

MR RINGWOOD: Tab 12, yes, Sir. You will be familiar with this paragraph. It begins:

"The principle of open justice is fundamental to

the common law system of civil and criminal justice. It is a principle of constitutional importance, and has been described as an almost priceless inheritance. The principle's underlying rationale is that transparency of Court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partially, on the part of Courts. Open justice imposes a certain self-discipline on all who are engaged in the adjudicatory process, parties, witnesses, counsel, Court Officers and Judges. The principle means not only that judicial proceedings should be held in open Court accessible to the public but also that media representatives should be free to report fair and accurate reports of what occurs in Court". So, that's my client's role. "Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect. The Courts have confirmed these propositions on many occasions, often in stirring language".

I'd like to come on to the next sentence as well because in my submission this is very important too:

"However, it's well established that there are circumstances in which the interests of justice require that the general rule of open justice be departed from." We accept that. Here is the key bit:

"... but only to the extent necessary to serve the ends of justice", "... but only to the extent necessary to serve the ends of justice"

In my submission, that is a very important qualification. In my submission, this is actually a very helpful touchstone for this Inquiry when it's grappling with the practical issues of privacy versus open justice.

It is a healthy touchstone because it's principled, it makes perfect sense, it provides a test against which practical decisions can be made on a day-to-day basis about how far you go in terms of privacy or publicity and you can't really go wrong with it because it has the imprimatur of the Supreme Court.

I think my submission is: if you take anything away from my oral submissions today, it should be the practical importance of this sentence in *Erceg* to the Inquiry.

SIR TERENCE: That was talking about Court proceedings.

MR RINGWOOD: Yes.

SIR TERENCE: How do you make the translation from that context to this?

MR RINGWOOD: My submission is: there's three main reasons why the principle of open justice has important implications for this Inquiry and that transition that you talk about.

The first is, as that decision shows, it is a constitutional principle. It is general application. I take issue with what my learned friend Mr Gray said about the narrow focus of open justice and it being concerned with situations where people's rights or property might be taken away and it's all to do with us being here to help you.

It's actually much more our whole system is grounded in it. It is a constitutional principle of greater importance than that. So, the first point I'd make is that it is of universal application. The second point that is the underlying rationale of the principle has equal application to an Inquiry. In my submission, that rationale involves a quid pro quo. There is a trade-off, if you like, or a pay back, in the sense that if you have open justice, what you get is public confidence in the process in return. That's the quid pro quo. That is what open justice is about. That's the benefit of it; it's public confidence in the process.

So, that applies equally to this Inquiry and, in fact, if we're having an Inquiry into something in respect of which it's said that the public is losing confidence in the Defence Force, perhaps it's affecting their reputation, then it's even more important that there should be public confidence in the Inquiry, and that is what open justice can deliver. So, that's the second reason.

And the third reason, and Sir Geoffrey will enjoy this one, it is in the statute, section 15(2)(a) says that you are to have the guidance and benefit of open justice, so it's imported into this process. That is why I say there is a transition between *Erceg* and this Inquiry.

SIR TERENCE: So, the benefits of the principle of open justice in that list of criteria or considerations, it's one of a number but do you say it's not simply one of a number but it's, if you like, a starting point or the predominant consideration; is that your argument?

MR RINGWOOD: I agree that it's one of a number. I submit that it's significant that it's the first criterion. I submit that it's significant that the second criterion is the obverse or the other side of the coin, which is the importance of maintaining public confidence in the Inquiry. So, those two things are right front and centre at the beginning of section 15(2).

So, I do say it's one of a number of factors and you're right, but I think once you import the concept of open justice as something that you're to have regard to, then I think that it's also open to you to have regard to the general importance of that and also to the circumstances and the case law about the extent to which it should be departed from. I think all of that becomes relevant once you start to consider open justice.

So, in my submission, the media has an important constitutional role to perform here to give effect to that principle. I've actually been through what I was about to say.

In terms of the scheme of the Act, in my submission the Act contemplates that evidence will be given in public unless the Inquiry exercises its powers to order that evidence be given in private. So, there's a starting point, if you like, of openness, unless there's an order to the contrary.

And, in order to make an order to the contrary, the Inquiry must take into account these mandatory matters that we've just discussed: the benefits of observing the principles of natural justice and the risk of prejudice to public confidence in the proceedings of the Inquiry, and they're directly inter-related.

So, while the Inquiry certainly can order that evidence be given in private, this starting point is it should be given in public unless the requirements of section 15 are satisfied and ordered to the contrary.

And this is where Minute No.4 starts to bite for the media and where it has some issues, probably just with the practicalities, where it gets to the practicalities of what's actually going to happen. Because the Minute appears to come the other way round, which is to have an Inquiry process where it's substantially private but there will be some exceptions, perhaps some expert evidence where it ought to be public. Whereas, the scheme of the Act is really the other way round, in my submission, where things should be public unless there's an order made for specific good reasons that they should be private.

Of course, the Inquiry did take open justice into account, it's referred to in the Minute, so you have considered that and you've come to a view. But in the media submissions, the way it's worked out at the moment in the

Minute doesn't give sufficient weight to the principle of open justice because there are things that can be done to make the process more open in some respects which won't lead to any adverse consequences.

So, for example, with 'will say' statements, if there are some 'will say' statements which have been redacted so that they don't include anything that's confidential and they're not sensitive in any way, so they can be provided to other core participants. There's no real reason why that kind of document shouldn't also be made available to the media. It's not going to cause any delay to do that, it won't cause any cost. It's just a way to give extra effect to open justice which has no adverse consequences.

SIR GEOFFREY: What you're really saying is, all the material that the core participants should get, the media should get?

MR RINGWOOD: I think it is possible to make that submission. There may be some -

SIR GEOFFREY: The media should be a core participant?

MR RINGWOOD: I am not suggesting that but whenever you think about what should be provided by way of natural justice, you could also at the same time think and what can be provided by way of open justice because the same consequence might follow. If you're deciding, say, that a document which gives the gist of something without disclosing anything that's secret or confidential should be provided to core participants for natural justice reasons, then you could also think, well, for open justice reasons should that document also be provided to the media so they can better understand what's going on?

My submission is if there's nothing confidential in that document, if it's been properly redacted, if those concerns have been addressed when it's been

provided to the core participants, there's no reason why that document shouldn't also be provided to the media.

So, that applies to 'will say' statements, it will apply to transcripts of evidence which can be redacted as well and there may be other documents that are important which the public might want to know the gist of in order to understand what's happening at the Inquiry, what's being considered.

So, yes, my answer to your question is, should we receive everything? Possibly yes but not that we should receive them in the capacity of a core participant but simply that the principles of open justice mean that similar considerations, in terms of the provision of documents, apply to the media as apply to core participants by reason of considerations of natural justice.

SIR GEOFFREY: I am wondering if really what you're arguing for is the principle of openness? It is not quite the same thing as a principle of open justice because we don't dispense justice, we can't determine rights and obligations here, we have no power to do that.

MR RINGWOOD: I agree with that, you're absolutely right, but the benefit of open justice is public confidence in the Inquiry and that is something that is important to you, Sir, and something to be taken into account under section 15(2) and if that can be improved or facilitated by the provision of material to the media so they can report on what's happening, then I think that's absolutely a proper exercise of power.

I would like to actually, as a result of that, I'd like to make it clear what the media is not seeking, just so there's no confusion. The media is not arguing the whole Inquiry should be conducted in public. It is not arguing that classified material should be publically disclosed. It is not arguing that witnesses who fear for their safety should

be identified. The media accepts there will be classified documents that they shouldn't see. There will be some evidence that concerns matters of national security which should be heard in private and there may be certain witnesses who, for their own safety or because of the nature of their evidence, should give evidence in-camera. All of that is accepted.

But the media's position is that doesn't justify a document default private process for the Inquiry generally where everything is private unless ordered otherwise and it doesn't justify keeping things private that don't need to be private. The UK's Iraq Inquiry got this right, in our submission. I am not suggesting that that Inquiry got everything right but I think they got this right.

If I could refer you in my bundle to paragraph 16, I will quickly take you to the principles that they adopted for that Inquiry in relation to this. This is at tab 16 of my bundle. Halfway down the page is a section headed "Principles":

"The Iraq Inquiry is committed to ensuring that its proceedings are as open as possible. It recognises this is one of the ways in which the public can have confidence in the integrity and independence of the Inquiry process. As much as possible of the Inquiry's hearings will therefore 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 private. That will be appropriate, for example, where it is necessary (a) to protect national security, international relations, or defence or economic interests; and (b) to ensure witnesses' welfare, personal security or freedom to speak frankly".

That covers all of the things that we have been hearing about in this hearing. This is how that Inquiry dealt with that. In my submission, they got that exactly right.

In my submission, that is the right balance that should be struck between open justice and concerns about national security and witness safety. These two short paragraphs here, in my submission, are an embodiment of the correct balance and the media urges the Inquiry to adopt the same approach as this.

I would also say this is completely consistent with what the Supreme Court says in *Erceg*.

SIR TERENCE: I suppose, one of the issues that arises is, as the story unfolds, if some elements are made public but some cannot be made public, there will be a distorted view of the way it is unfolding. In other words, the way it unfolds to us and the way it unfolds to the public through the media and what is publically available will be two or may be, depending on how many vulnerable witnesses there are and how much classified information there is, there might be a very different picture that we're seeing than what the public is seeing. Does that help public understanding or does that create a problem?

MR RINGWOOD: If you're putting that as a concern about open justice, then that would be true of any report, of any proceeding really. Not to disparage my clients but -

SIR TERENCE: They are looking at you very carefully.

SIR GEOFFREY: Are you suggesting they are not always accurate reports?

MR RINGWOOD: I am suggesting it might not always report events that you would think were most important and that's not necessarily -

SIR GEOFFREY: They didn't even report, they said this was part of the District Court when in fact it's part of the High Court.

MR RINGWOOD: I apologise for that. I think it would be rare that there's a view so distorted that it's problematic.

I think it would be more likely it would be an incomplete view perhaps in some respects but I would submit that an incomplete view is better than no view at all. And in terms of the benefit that open justice delivers, the public will be seeing something of what's happening at the Inquiry and it will help to give them confidence. If that's based on an incomplete view, it's nevertheless delivering the benefit. So, I think that it would be wrong to be too concerned about that aspect, in my submission.

SIR TERENCE: Thank you.

MR RINGWOOD: I think that, I would just like to say something briefly about costs here as well because I've already submitted it won't actually cost anything more to also give material to the media if it's already being given to core participants. But I'd also like to note that while you do have to have regard to costs, it is a mandatory consideration for you under section 14, that section talks about you being careful to avoid unnecessary costs. I think the word "unnecessary" there is really important because if you are a fan of open justice like I am, if there's some additional cost in delivering open justice, that is not an unnecessary cost. That is a worthwhile cost. Especially when you're mandated by a statute to have regard to open justice, the cost of that is worthwhile and arguably necessary and in my view certainly not unnecessary.

I think that the parties may not in fact now be all that far apart on the particular things that I'm concerned about. The Crown's submissions contain some very helpful concessions and if I could take you to their submissions. Paragraph 87, the Crown says:

"That said, the Crown accepts that a case-by-case evaluation of the requirements of each witness may be

appropriate. The Crown does not understand the Inquiry to have ruled out public evidence taking sessions. There may be circumstances in which public evidence sessions are appropriate (for instance where a witness wishes to give evidence publically)".

So, I would agree with that. That's very helpful.

And then if you could turn to paragraph 99, the Crown says:

"The Crown does not oppose the proposal for transcripts of evidence to be shared more generally. Where evidence is provided in a closed hearing, the interests of open justice may be served by the production of a redacted transcript or summary".

So, that's very helpful as well, provided that that means produced to the media as well as to participants. In my submission, there's no reason why that couldn't happen.

And then if I could take you to paragraph 100:

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

Again, if you could highlight that, Sir. That essentially is making my point.

I don't think we are too far apart on the fact that it should be possible without compromising the process for the media to have greater access to material than was proposed in Minute No.4.

Maybeif I could end with this: This particular Inquiry arises in part from allegations that the public has not been

told the truth about what happened during Operation Burnham and that the true nature of events have been covered up. In my submission, a mainly private Inquiry into an alleged cover up may not be apt to inspire public confidence. There is a continuum with a private process at one end and a public process at the other end and this Inquiry will be somewhere in-between. At some points it will be down one end near private and at other points it can be right up the other end, public as it is today. So, it's a question of being flexible and working out what the best thing to do is in respect of each aspect of the Inquiry. And, in my submission, flexibility in that respect is helpful and a touchstone for deciding whereabouts on the continuum a particular matter should fall. The touchstone for that is that sentence that I've pointed to in *Erceg*.

I think my job is to try to cajole or persuade you to lean more towards the public end but another way and perhaps a better way of putting that, based on *Erceg*, is that to the extent that you head down towards the private end of the continuum, you should only do that where that's necessary in the interests of justice and only to the extent that it's necessary to do that.

SIR GEOFFREY: I wonder if you would agree with the following sentence from Sir Richard Scott in a Law Quarterly Review article in 1995 in which he concludes with a very thoughtful analysis of how Inquiries should be conducted. I quote:

"The golden rule, in my opinion, is that there should be procedural flexibility with procedures to achieve fairness tailored to suit the circumstances of each Inquiry.".

MR RINGWOOD: I would agree with that, Sir.

Those are my oral submissions, unless you have any questions, and there's more detail in the written

submissions.

SIR TERENCE: Thank you, Mr Ringwood.

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SUBMISSIONS FROM HAZEL ARMSTRONG LAW
BY MRS ARMSTRONG

MRS ARMSTRONG: Thank you very much for giving a public spirited citizen the opportunity to speak to you on procedure. Using the words of my friend there, that's the basis upon which I'm here. I am not a core participant and I don't have a particular interest, other than as a public spirited citizen. I am also not a human rights lawyer with years of experience like some of my friends here. In fact, a lawyer that represents people around their rights in Health and Safety at Work or Accident Compensation or employment, so I'm a rights-based lawyer.

So, I come to this kind of as a public spirited citizen and I look back in 2010 when this incident occurred. You will know that three months after Operation Burnham the Pike River explosion occurred in November 2010, so that three months was a very rough time for New Zealanders.

And why I mention Pike River, which I'm going to speak a bit more about, is because it's interesting that it's taken us all of this time, to 2018, and I can't think why it's taken so long, Sir Geoffrey, for us to actually have an Inquiry established into those events in 2010, August 2010. And why also we're witnessing the reopening of the Pike River mine. So, they're two examples of how sometimes you have to have a change in political climate before these issues are open to public scrutiny.

What I believe has happened, is that you've got the right people with keen minds and a concern about rights and the interests of the public who have made decisions to open these

matters up again for public scrutiny.

So, to me, these events that took place in 2010 raise issues for all New Zealanders and, as a person who is a rights based lawyer, I have always felt that New Zealand has never really understood the concepts of rights and that your Bill of Rights is still something that needs to be examined further.

What I'm hoping that will come out of this Inquiry is the application of the New Zealand Bill of rights when our people are overseas. I do not believe that is fully understood and I do not accept the Crown's submission or other submissions that it's outside of the purview of this Inquiry. I think it will be very helpful for New Zealanders to know whether or not the New Zealand Bill of Rights applies to us wherever we are and wherever we deploy our troops, and I would hope that those able people will make submissions on that so that you can actually give us some jurisprudence on the application of the New Zealand Bill of Rights. And I hope that someone like myself will be able to give some submissions on that matter.

But today Minute No.4 asks us to think about procedure. Well, as we know, the allegations made in Nicky Hager's book *Hit & Run* and Jon Stephenson's book raises serious allegations of breaches, in my opinion, of fundamental human rights against civilians by the New Zealand Defence Force. How this public spirited citizen sees it is that the New Zealand Defence Force didn't respond openly and we know that the SAS suffered casualty, we know their ground forces were at risk and we also can foresee that New Zealand soldiers returning to New Zealand, and my friend there made this point, that some of them will be suffering physical and mental health problems which will, in fact, impact on their families and their communities within New Zealand.

So, it's absolutely fundamental to us to know what the

issues are behind this because it will have an ongoing impact on us.

The Terms of Reference at 5 state that:

"The matter of public importance to which the Inquiry is directed is to examine the allegation of wrongdoing".

It also takes place within a non-international armed conflict situation and it makes you think about or all of us think about the applicable legal framework that you will be considering.

That brings me yet back to the application of the New Zealand Bill of rights. One thing I do hope that comes out of this Inquiry is that you will give us guidance and give the New Zealand Defence Force guidance on the weight to be given when they deploy overseas on the right to be deprived of life and the role of families in a situation where life has been deprived. So, I'm saying that the New Zealand Bill of Rights is at the core, well is one of the core issues for you to discuss.

I am not an expert in all the case law and I really appreciated, Sir Geoffrey, you telling us to read the Inquiries Act. I felt that was very helpful because it is a well written clear Act but I notice that my friend there referenced the case of *Jordan* but I won't say that I know it backwards and forwards, I just accepted that it had a sort of quite nice summary in that case about the degree of public scrutiny that's required will vary from case to case.

And in this case it is a very serious allegation and, therefore, the amount of public scrutiny will be greater. Someone used this kind of idea of a scale and I think that's true but the more serious the allegations and if there are allegations of a cover up, the more public scrutiny there has to be, uncomfortable though that might be with people that you are scrutinising.

So, we're saying to you, or I'm saying to you as a public

spirited citizen, that the more transparency and openness that you can give us, the more public confidence we will have. And I was so appreciative to open my Stuff Dom Post this morning as I had my cup of tea to see a full page on this Inquiry because, in my view, there is nothing more important than what you are doing in New Zealand currently. It is critically important to our democracy and the rule of law and our rights what you come up with through this process. And we want to, as a member of the public, go on that journey with you and I think it would be a mistake if too much was held in private and that we couldn't follow the journey either on the web or through the media.

I just again want to draw you back to what happened with the Pike River mine tragedy. So, a Royal commission, as you know, was established under the - it wasn't established under the Inquiries Act because that hadn't come into effect by then but it was an Inquiry of great -

SIR GEOFFREY: I think it had. It's just the Government didn't want to use it.

MRS ARMSTRONG: Oh, well, I realised it wasn't under the Inquiries Act.

SIR GEOFFREY: It was under the 1908 Act.

MRS ARMSTRONG: Yes, maybe it should have been under the Inquiries Act, Sir, it might have benefitted from being under the Inquiries Act because one of the problems with the Pike River Royal Commission, and I just want to give you an example, I mean I followed it of course because it resulted in 29 workers dying. The lawyer representing the Pike River families at the Royal Commission stated that he had not been shown video footage of the mine. And then Sonya Rockhouse, who everyone will have seen on the media, stated that the families had not seen the footage. This led to concern amongst family members of other material which they

believed had not been shown. And so, what Sonya Rockhouse said at the Royal Commission was, "Who knows what difference it might have made? I'm not sure. Right from the beginning they were telling us there was a raging inferno, everything would be dust and there would be the structural damage and when you see that in the drift it's just about the complete opposite".

Now, why I draw this analogy in that eight years on the families of those killed at Pike River are still campaigning for justice. You will be aware of the Supreme Court decision, an excellent decision, I must say, ruled that the actions of the State agents were illegal and the Government has had to spend a further $36 million on re-entering the mine with a possibility of yet a further public Inquiry.

Now, the point I'm making is: had that Royal Commission done their job differently, perhaps then we wouldn't still have years later people camped out in front of the mine and another $36 million to be spent with another further Inquiry to come.

So, what I'm saying is if the people most affected aren't able to satisfy their hunger for information, it will just keep on going and that's what we've seen with Pike River and, actually, that's what we're seeing here, that's why we're here, there's a hunger for information.

So, in terms of why I'm standing up here as a public spirited citizen, what information do I want? Well, I actually agree to some extent with counsel for the media's submission that, you know, he will say we need summaries, redactions of declassified information and that we wouldn't have disclosure of sensitive information, yes, and we get texts of interviews and transcripts of evidence, I hope I'm summarising you correctly, or appropriate summaries when witnesses don't seek confidentiality. His argument was, and

I agree with that, that where you can give us openness, give us the information so that we don't have to sit here in person, that he can get the information through the media.

What I was also attracted to was the argument run by counsel for the families that I think there's quite a high level of trust by members of the public. I know that not everyone would think this but the core participants, we would trust if you gave access to the witness to counsel for the core participants, to counsel for the villagers or Nicky Hager and Jon Stephenson, their counsel, to cross-examine witnesses in-camera. We wouldn't need, as members of the public, to hear everything but we would have confidence if we knew that they were cross-examining and then you got the benefit of their rigorous cross-examination.

I am not sure if I'm making my point clear but I'm trying to say that to assist you I think you would benefit from them being able to cross-examine witnesses and that as a member of the public I wouldn't need to know everything that is said but at least I'd know that you knew everything. Does that kind of make sense?

SIR TERENCE: Yes, we understand.

SIR GEOFFREY: We understand it.

MRS ARMSTRONG: That's good, excellent. I also want to give a lovely quote, I'm just closing up now because I am aware that I only have 15 minutes. There's a lovely quote from Court of Appeal decision *Fay Richwhite & Co v Davidson*:

"Public confidence in the Commission and the very purpose of constituting the Commission could be substantially impaired or thwarted if all the truly important evidence and all the truly important submissions were heard in private".

Well, I'm saying that I was attracted to the argument which I hadn't heard before that private

doesn't necessarily mean only the Defence Force and the witness. That private could mean exclusion of the media and the public but inclusion of the counsel for the core participants. I found that an attractive argument which I hadn't heard before which is kind of a different definition.

SIR TERENCE: I should say that private would, as I interpret it, exclude also counsel for the witness. In other words, that you might not - that's poorly expressed. If it was a Defence witness and the evidence was heard in private, the lawyers for the Defence Force would not have a right to be present. So, private means simply that it is the Inquiry, Counsel Assisting and the witness. No lawyers from any core participant. I just wanted to correct that.

MRS ARMSTRONG: I am not so attracted to that idea. I am more attracted to the definition that I hadn't considered before, that you could look at private, a bit like we have in some proceedings, as those interested parties and you wouldn't have to because I do think you will benefit from cross-examination. Counsel have all got responsibilities to you, so you would be able to trust their confidentiality.

I think it would be a more robust process that would give public confidence.

SIR TERENCE: Yes, we understand that submission. I was just a little concerned that your definition of private is not the definition that we're talking about, that's all. Anyway, you finish off.

MRS ARMSTRONG: Yes. Actually, I think I'm finished and thank you so much for the opportunity, I am very pleased that you have given me the opportunity.

SIR TERENCE: Thank you, Mrs Armstrong. Well, that brings us to an end, subject to the Crown getting that four

pages available to everyone and, as we said, if there are any submissions in reply, three pages by 5.00 p.m. next Friday.

MR SALMON: There's just one very brief point that might be better to clarify now while counsel is here, rather than in reply. I intend to talk to my learned friend Mr Radich about it. I think there is a slight clarification needed about one submission he made based on discussions with Dr Sheeran.

With regard to the extent lawyers have been involved in screening material to be provided to the Inquiry from NZDF, as I understand the correct position, it is correct that Dr Sheeran has reviewed - I will make sure he can hear in case he's concerned - I think the correct position, I will try and put this accurately but if I'm wrong I will be corrected, the correct position is everything is being screened by non-legal NZDF personnel, four of them in particular doing the main work. Dr Sheeran is screening everything that is proposed to be provided to the Inquiry but not anything that has been screened and excluded by those NZDF personnel.

I raise that now because there is a slight wrinkle in what's happening and if that's right, it can be clarified without interfering with a reply and a reply to a reply. Have I got that right?

MR RADICH: Yes, the only thing I would add is that Dr Sheeran, as I understand it, is involved also in providing general guidance and looking at particular information. If issues are arising, he is consulted and gives advice, just as a senior member of a law firm might.

SIR GEOFFREY: Thank you.

SIR TERENCE: Thank you, counsel, for all your submissions,

they have been very helpful, the whole process has been very interesting. Obviously, we will now go off and think about it and talk about it and we will make a ruling on these issues. We'd like to do it before Christmas but there's quite a lot of ground to cover, so we may not be able to achieve that but we certainly want to get it done promptly.

Thank you all.

Hearing concluded at 12.35 p.m.