UNDER **THE INQUIRIES ACT 2013**

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

Submissions by Media Entities in relation to proposed procedure of Inquiry

5 October 2018

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Interested Media Entities

1. This memorandum is filed on behalf of the following six interested media entities, which are collectively referred to in this submission as "the Media Entities":

   (a) NZME Publishing Limited ("NZME"). NZME publishes the *New Zealand Herald*, the *Herald on Sunday*, various regional newspapers, the www.nzherald.co.nz news website, and various radio stations.

   (b) Stuff Limited ("Stuff"). Stuff operates the news website at www.stuff.co.nz, and publishes the Sunday Star-Times, Dominion Post and Press newspapers and various regional newspapers.

   (c) Television New Zealand Limited ("TVNZ"). TVNZ is a state-owned television broadcaster which broadcasts news and current affairs programmes nationally on its TVNZ 1 and TVNZ 2 channels, and operates the website at www.tvnz.co.nz.

   (d) Mediaworks Holdings Limited ("Mediaworks"). Mediaworks owns and operates *Newshub*, which reports on news and current affairs on television, on radio and online.

   (e) Radio New Zealand Limited ("Radio NZ"). Radio NZ is a public service radio broadcaster and Crown entity which broadcasts news and current affairs, and operates the www.radionz.co.nz website.

   (f) Bauer Media Group ("Bauer"). Bauer is an online and print magazine publisher whose publications include items of public interest.

2. Collectively the Media Entities comprise most of the mainstream news media in New Zealand.

Procedural issues relevant to the Media Entities

3. The Media Entities wish to make submissions in respect of the following aspects of the Inquiry's proposed procedure (as set out in Minute No.4 of the Inquiry dated 14 September 2018):

   (a) The proposal to limit the provision of redacted versions of classified material to core participants (paragraph [23] of the Minute).

   (b) The proposal to limit the provision of summaries of classified material to core participants (paragraph [23] of the Minute).

   (c) The consequences of de-classification of classified material (paragraph [27] of the Minute).

   (d) The proposal that all or most of the evidence gathering activities of the Inquiry will occur in private (paragraphs [79], [80] and [85]).

   (e) The proposal that transcripts of evidence will not be publicly available except in the case of evidence given in public session (paragraph [90] of the Minute).

   (f) The proposal that distribution of transcripts of evidence from witnesses who do not seek confidentiality and are not dealing with classified material would be limited to core participants, subject to non-publication orders (paragraph [90] of the Minute).

The Inquiry's power to impose restrictions

4. This Inquiry's power to impose restrictions on access to the Inquiry is set out in s.15 of the Inquiries Act 2013. The Inquiry may forbid publication of (inter alia) any part of the evidence; may restrict public access to any part of the Inquiry; and may hold the Inquiry, or any part of it, in private.

5. But that power is not unfettered. Before making any such order an Inquiry must take into account the criteria set out in s.15(2). The first two mandatory criteria are:

(a) the benefits of observing the principle of open justice; and

(b) the risk of prejudice to public confidence in the proceedings of the inquiry.

6. Parliament has accordingly put the importance of open justice front and centre in this context.

Open justice and the important role of the media

7. By way of introduction to the submissions of the Media Entities it is important to highlight the principle of open justice and the role of the media in giving effect to open justice.

8. The importance of open justice is a *sine qua non* (i.e. an essential and indispensable feature) of our democracy and legal system.

9. The classic statement of the principal in New Zealand is in the judgment of Woodhouse P in *Broadcasting Corporation v Attorney-General* [1992] 1 NZLR 120 at 122 - 123:

> …this case touches a fundamental aspect of the legal system: that in the end justice in a free society depends upon its open administration.
>
> Some of the descriptions applied by the English Court of Appeal and the House of Lords to the concept of open justice are worth recalling. "So precious a characteristic of English law"; "the salt of the Constitution"; "one of the surest guarantees of our liberties"; "our true security for justice under the Constitution": *Scott v Scott* [1912] P 241 at 260 and 287; and [1913] AC 417 at 476 and 482. Those spacious phrases may not precisely capture basic aspects of the New Zealand idiom in 1982 but there is no doubting their message. It is simply that the principle of public access to the Courts is an essential element in our system. Nor are the reasons in the slightest degree difficult to find. The Judges speak and act on behalf of the community. They necessarily exercise great powers in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to facts as they really appear to be. Nor is it simply a matter of providing just answers for individual cases, important though that always will be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process be regarded as fulfilling its purposes.

10. The President was referring there to access to the Courts, rather than

access to an Inquiry, and the other cases cited below are similarly concerned with access to the Courts; but the principle of open justice also applies to an Inquiry, and indeed open justice is a mandatory statutory consideration in respect of any restriction on access to this Inquiry (s.15(2)(a) & (b)). The case law concerning the importance of open justice is accordingly directly relevant to this Inquiry.

11. The President went on to refer (at p.123, line 20) to:

> …the fundamental principle that justice is to be administered openly and publicly; and that any departure from that principle must depend not on judicial discretion but the demands of justice itself.

12. The Supreme Court commented In *Rogers v Television New Zealand Limited* [2007] NZSC 91 (at paragraphs [117] - [120]) on the particular importance of open justice (in the criminal justice process):

> Often freedom of speech and open justice march together as closely related factors in applications of this kind. This case, however, demonstrates that open justice is a distinct consideration. It is primarily concerned with the sound functioning of the judicial process in the public interest whereas freedom of speech is more concerned with the free flow of information.
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> Open justice provides critical safeguards in the operation of the criminal justice process. The ability of the public to attend, and the media to report on, what transpires during a criminal trial provides the transparency in the process that is crucial to fulfilment of the protected right to a "fair and public hearing by an independent and impartial court". But it has also been recognised that the public interest served by openness in the administration of justice goes beyond protecting the fundamental rights of those charged with a criminal offence. Openness also helps meet the need to preserve public confidence in the legal system. As Woodhouse P said in *Broadcasting Corporation of New Zealand v Attorney-General*:
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> > "The Judges speak and act on behalf of the community. They necessarily exercise great powers in order to discharge heavy responsibilities. The fact that they do it under the eyes of their fellow citizens means that they must provide daily and public assurance that so far as they can manage it what they do is done efficiently if possible, with human understanding it may be hoped, but certainly by a fair and balanced application of the law to facts as they really appear to be. Nor is it simply a matter of providing just answers for individual cases, important though that always will be. It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases. To the extent that public confidence is then given in return so may the process be regarded as fulfilling its purposes."
>
> Open justice also provides incentives for self-discipline which foster the sound and principled exercise of judicial power. As well, it makes the judiciary accountable to informed public opinion. These effects lead to

> greater public understanding of the judicial process and, importantly, provide reassurance to both the community, and those close to the accused and victims, that a trial has been conducted fairly and the accused treated justly.

13. The importance of open justice, and the burden on those seeking to displace its application, was recently re-emphasised by the Court of Appeal in *Lyttelton v R* [2016] 2 NZLR 21 at [24] (in the context of an appeal from a High Court take-down order in respect of historical online articles):

> We refer first to the important principle that, with limited exceptions, the work of the courts is to take place in public. Notions of open justice are of great antiquity, as the words of Lord Haldane LC in *Scott v Scott* illustrate. Speaking in the context of a case where the petitioner, in seeking annulment of a marriage, sought to have the case heard in camera, Lord Haldane emphasised the "broad principle" that the courts must "administer justice in public". Any exceptions are the outcome of a yet more fundamental principle, namely, that the "chief object of Courts of justice must be to secure that justice is done". Hence in certain types of case, justice may not be able to be done at all if required to be done in public:
>
> > … As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration.

14. The enactment of the New Zealand Bill of Rights Act ("NZBORA") in 1990 reaffirmed the fundamental importance in a democracy of freedom of expression and open justice. The long title to the NZBORA records that one of its purposes is "*To affirm, protect, and promote human rights and fundamental freedoms in New Zealand*".

15. The weighing of competing rights, freedom and interests is governed by sections 5, 6 and 14 of the NZBORA. Section 5 provides that:

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

16. Section 6 provides that:

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

17. Section 14 provides that:

> Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form.

18. Whenever a restriction on the right to freedom of expression or the freedom to seek and impart information is proposed it is necessary to have regard to the requirement of s.5 that such freedoms be subject only to such "reasonable" limits as can be "demonstrably justified" in a free and democratic society.

19. In circumstances where there is conflict or tension between any of the rights and freedoms affirmed in the NZBORA a balancing exercise is required. The competing rights or freedoms must be weighed according to the particular circumstances of the case; should not be interfered with unless there is a demonstrable requirement to do so; and any interference which is required must be as minimal as possible.

20. In *Re Victim X* [2003] 3 NZLR 220 the Court of Appeal explained the inter-relationship between open justice and freedom of expression in the context of suppression of the name of a witness. It expressed the view (at p238, para [36]) that Hammond J's judgment at first instance had provided the correct starting point:

> It is the principle of open justice, especially in criminal proceedings, emphasised at the outset of those reasons. The principle is supported in practice by the right to freedom of expression. This Court has consistently adopted that position both before and after the enactment of the Bill of Rights with its provision for public justice…

21. The Court approached the issue in *Victim X* on the basis that "*compelling reasons*" or "*very special circumstances*" were required before a departure from the open justice principle could be justified (paras [37] and [45]).

22. The inter-relationship between open justice, freedom of expression and the role of the media was again set out by the Court of Appeal recently in *Y v Attorney General* [2016] NZAR 1512 at [25] – [28] (a case involving the suppression of the identities of witnesses):

> The starting point is the principle of open justice and the related freedom of expression guaranteed by s14 of the New Zealand Bill of Rights Act.

…

> Together, these two tenets create a presumption of disclosure of all aspects of civil court proceedings. They are exemplified by the later part of the truism that "justice must not only be done, it must be seen to be done". So the courts administer justice in public, enabling public scrutiny and thus ensuring public confidence in the administration of justice.
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> The fundamental importance of the principle of open justice has been repeatedly emphasised by the superior courts of this country and those of the United Kingdom. For example, in 1982 in *Broadcasting Corporation of New Zealand v Attorney-General*, Woodhouse P in this Court referred to the importance "of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases.
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> In 2014, the Supreme Court of the United Kingdom, in *A v British Broadcasting Corporation*[1] stated:
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> > It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy….society depends on the courts to act as guardians of the rule of law. Sed quis custodiet ipos custodies? Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny.
>
> As the media are the conduit through which most members of the public receive information about court proceedings, the Court considered "it follows that the principle of open justice is inextricably linked to the freedom of the media to report on court proceedings". More recently, the English Court of Appeal in *JXMX v Dartford Gravesham NHS Trust* described the principle of open justice as one of the "utmost importance".[2]

23. As these cases highlight, the media has an important role to play in relation to open justice. It is not possible for all members of the public who are interested in a court proceeding or inquiry to attend the hearings and observe the process in person. The news media acts as a "watchdog" or surrogate for the public in attending and reporting on court proceedings and inquiries. This important role in giving effect to the principle of open justice has been recognised by the Court of Appeal in a number of cases (e.g. *Broadcasting Corporation v Attorney-General* [1982] 1 NZLR 120; *Police v O'Connor* [1992] 1 NZLR 87 at 95; *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, at p. 559 paragraph 45, and p. 561 paragraph 52).

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[1] *A v British Broadcasting Corporation* [2014] UKSC 25, [2015] AC 588 at [23].

[2] *JXMX v Dartford & Gravesham NHS Trust* [2015] EWCA Civ 96, [2015] 1 WLR 3647 at [5].

24. The principle of open justice and the consequent interest (and duty) of the media to report on the proceedings of courts, tribunals and inquiries gives rise to the standing of the media to be heard in relation to suppression orders, and to apply to set aside or vary orders which prohibit or restrict publication. New Zealand authorities, and authorities also from the United Kingdom and Australia, on the standing of the media in respect of suppression, were collected and applied by Smellie J in *R v L* [1994] 3 NZLR 568. See also the decision of the Full Court of the High Court in *Wilson & Horton Limited v District Court at Otahuhu* (2000) 5 HRNZ 773 at [23] – [28] (Potter & Nicholson JJ) in respect of the standing of the media to seek judicial review of suppression decisions, by reason of the importance of freedom of expression and the role of the media as the watchdog of the public.[3]

25. As the Chair of this Inquiry will recall, the important role of the media was recently re-affirmed by the Supreme Court in *Erceg v Erceg* [2017] 1 NZLR 310 (SC) in which the Court stated (at paragraph [2]) that:

> 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 partiality, 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 by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court. 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.

The Supreme Court went on to note that there are circumstances in which the interests of justice require that the general rule of open justice be departed from; but only to the extent necessary to serve the ends of justice.

[3] The standing of the media to challenge suppression orders was not challenged on appeal, or doubted by the Court of Appeal: *Lewis v Wilson & Horton Limited* [2000] 3 NZLR 546.

The UK inquiry into the 2003 Iraq occupation – a helpful precedent

26. In 2009 an Inquiry (known as the "Iraq Inquiry", or the "Chilcott Inquiry") was established in the UK to inquire into the UK's involvement in the Iraq war. The terms of reference were wide in scope:[4]

> Our terms of reference are very broad, but the essential points, as set out by the Prime Minister and agreed by the House of Commons, are that this is an Inquiry by a committee of Privy Counsellors. It will consider the period from the summer of 2001 to the end of July 2009, embracing the run-up to the conflict in Iraq, including the way decisions were made and actions taken, to establish, as accurately as possible, what happened and to identify the lessons that can be learned. Those lessons will help ensure that, if we face similar situations in future, the government of the day is best equipped to respond to those situations in the most effective manner in the best interests of the country.

27. The UK Prime Minister, Gordon Brown, announced that the Inquiry would be conducted in private.[5] Some of the key drivers for that decision were:

(a) National security concerns.

(b) The view that private hearings "ensure that evidence given by serving and former ministers, military officers and officials is as full and candid as possible."[6]

(c) Resource concerns (as "everybody who comes before one wants to be represented by a lawyer").[7]

(d) The focus on lessons learned, rather than the apportioning of blame or consideration of issues of civil or criminal liability.[8]

28. The Public Administration Select Committee of the House of Commons however urged the Government to change its position on secrecy. The Select Committee considered the issues of national security and drew on the example of the UK inquiry into the death of Dr David Kelly

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[4] The Iraq Inquiry, 'The Inquiry, www.iraqinquiry.org.uk/the-inquiry.

[5] Hansard (15 June 2009) 494 GBPD HC 23.

[6] At 23.

[7] At 29.

[8] At 24.

(known as the Hutton inquiry). That had been a public hearing, and it showed that "*you can publish more than you think you can without bringing down government.*"[9]

29. As regards public versus private hearings the Select Committee considered (emphasis added) that:[10]

> …the fact that the inquiry would need to consider some sensitive evidence *in camera* **does not provide a blanket justification for the inquiry as a whole to operate in private**.

30. As regards the Prime Minister's emphasis on "lessons learned" rather than ascertaining "truth", the Select Committee noted (emphasis added) that:[11]

> "There is, however, another fundamental reason for holding an Iraq inquiry. In the words of one of our seminar participants, an inquiry needs to "get the truth" **and to be seen to be getting at the truth**. This is vital to restoring the loss of public confidence in governing processes and institutions that has resulted from the UK's involvement in Iraq. There is also a justified expectation – demanded in particular by the relatives of British soldiers who have died in Iraq – that the inquiry will enable the executive to be held to account for its decisions and conduct."

31. And also:

> The lack of openness, on the contrary, works against the purposes of having the inquiry, by undermining public trust in it.[12]

32. Ultimately the Iraq Inquiry adopted protocols which ensured that as much as possible of the Inquiry took place in public, as described below.

<u>Witnesses giving evidence to the Iraq Inquiry</u>

33. The protocol for witnesses giving evidence to the Iraq Inquiry set of the procedure for how witnesses come forward and the Inquiry's role of

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[9] Public Administration Select Committee (UK) 'The Iraq Inquiry', Ninth Report, HC 721 2008-9, 18 June 2009 at [10] referencing *Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly CMG,* Session 2003-04, HC 247, 28 January.

[10] At [14].

[11] At [5]

[12] At [14].

assessing who may give evidence and whether anonymity or private hearing was justified for a witness, including:[13]

> 2. 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.
>
> 3. 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 when it is necessary:
>
> a. to protect national security, international relations, or defence or economic interests;
>
> b. to ensure witnesses' welfare, personal security or freedom to speak frankly.

34. Individual witnesses were invited to, if necessary, "give reasons why some or all the witness's evidence should be heard in private" and to "give reasons why the witness's identity should not be revealed in public."[14]

Presumption of public hearings at the Iraq Inquiry & criteria for privacy

35. The Iraq Inquiry's protocol for determining whether a witness may give evidence in part or wholly in private started with the presumption that the Inquiry:[15]

> … will hear all evidence in public unless the Inquiry Committee judges that it should be heard in private. The Committee will make its judgment on a case by case basis.

36. The questions to be asked if a witness is seeking a private hearing to give their evidence:[16]

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[13] The Iraq Inquiry "Protocol: Witnesses Giving Evidence To The Inquiry" <http://webarchive.nationalarchives.gov.uk/20171123123522/http://www.iraqinquiry.org.uk/the-inquiry/protocols/witnesses-giving-evidence/> at 2-3.

[14] At 6.

[15] The Iraq Inquiry "Protocol: Hearing Evidence in Public and Identifying Witnesses" < http://webarchive.nationalarchives.gov.uk/20171123122846/http://www.iraqinquiry.org.uk/the-inquiry/protocols/hearing-evidence-in-public/> at 1.

[16] At 1.

a. would the matters on which the witness will give evidence, if revealed in public, damage national security or other vital national interests? ….

b. What is, or was, the official role of the witness? Ministers, senior military officers, members of the Senior Civil Service and their equivalents, and former holders of those posts, should expect to give evidence in public unless national security requires otherwise….

c. Is there any other genuine reason (such as health or security concerns) why a witness would have difficulty appearing or being frank in public?

37. The Inquiry's protocols made it clear that:[17]

> It cannot be assumed that any witness will be heard wholly in private simply because some of his/her evidence justifies being heard in private.

38. The practical result was that:[18]

> In general a private session will address only the evidence which must be heard in private. The Inquiry will hold a separate public session which will explore all other relevant matters.

Treatment of sensitive information at the Iraq Inquiry

39. The Iraq Inquiry put in place procedures to deal with issues of national security and other sensitive information (being anything the disclosure of which would be likely to harm the public interest), i.e.[19]:

> …Those procedures are intended to avoid the release of anything the disclosure of which would, or would be likely to:
>
> a. cause harm or damage to the public interest, guided by the normal and established principles under which the balance of public interest is determined on grounds of Public Interest Immunity in proceedings in England and Wales, including, but not limited to,
>
> i. national security, defence interests or international relations;
>
> ii. the economic interests of the United Kingdom or of any part of the United Kingdom; …

[17] At 2.

[18] At 2.

[19] The Iraq Inquiry "Protocol: Sensitive Information" http://webarchive.nationalarchives.gov.uk/20171123122708/http://www.iraqinquiry.org.uk/the-inquiry/protocols/sensitive-information/ at (a).

40. Determining the public interest was a balancing exercise based on the test for public immunity interest (i.e. whether the public interest to withhold evidence outweighs the interests of justice to disclose). Included in that assessment was consideration of the extent to which limited disclosure could be ordered.

Transcripts of evidence at the Iraq Inquiry

41. The Iraq Inquiry's protocols provided that, where the Committee concluded that evidence was to be given in private, careful consideration would be given to how best to explain in public what was covered during the private session. Evidence covered in a private hearing could be disclosed to the public by publishing:[20]

(a) An unclassified summary of the nature of the evidence taken during the private hearing (i.e. where the evidence was so sensitive that it would not be possible to redact the transcript without rendering it unintelligible);

(b) A redacted transcript of the evidence (where sensitive sections of a transcript could be redacted without affecting the overall comprehensibility); or

(c) A full transcript (where, for example, the evidence was given in private for welfare reasons, and the nature of the evidence itself was not sensitive).

42. A transcript of each public hearing was published on the Inquiry's website.[21] Evidence given during a private hearing that did not relate to classified documents, and did not engage any of the categories of "sensitive information", was also capable of being published.[22] Where evidence given in a private hearing was published, it would be redacted

[20] "Protocol: Witnesses Giving Evidence To The Inquiry", at 22.

[21] At 21.

[22] At 25.

as necessary to protect national security, and to meet other relevant concerns.[23]

43. It is submitted that the procedure adopted by the Iraq Inquiry achieved an appropriate balance between the interests of national security and confidentiality/anonymity on the one hand, and the interests of public disclosure and open justice on the other, and is a helpful precedent for the present Inquiry.

The public interest in the Inquiry into Operation Burnham

44. In 2010 members of New Zealand's armed forces took part in a military operation on foreign soil in which local people were killed or injured. It has been publicly asserted that this operation was a revenge mission; that the local people who were killed or injured were members of the civilian population; that misleading or untrue statements were issued to the public about the relevant events and the true facts concealed; and that the incident may have involved breaches of protocols and/or war crimes.

45. Assertions of that nature have been publicly set out in a book (*Hit & Run* by Hager & Stephenson) which contains much detail of what allegedly occurred and commentary on its propriety.

46. The Terms of Reference of this Inquiry record that this has had an impact on the *public* reputation of the New Zealand Defence Force, and that this Inquiry into the matter is in the *public* interest.

The Media Entities' submissions on aspects the proposed procedure in the present case

47. Against that background of the public interest in this Inquiry; the importance of open justice; the role of the media to report matters of public interest; and the procedure adopted in the UK by the Iraq Inquiry, the Media Entities make the following submissions in respect of aspects of the procedure proposed for this Inquiry.

[23] "Protocol: Hearing Evidence in Public and Identifying Witnesses" at 3.

48. The starting point is that there is a significant public interest in the business of this Inquiry; *particularly* in circumstances where there are issues:

(a) whether what the public has been told to date about the relevant events is true or not; and

(b) whether the true nature of events has been "covered up".

It is submitted that in these circumstances the maximum possible degree of public access to the Inquiry is essential to the maintenance of public confidence in the Inquiry.

<u>The role of the media in respect of this Inquiry</u>

49. It is the proper role of the media to keep abreast of the business of this Inquiry; to attend its public hearings; to consider the evidence presented to the Inquiry and other material issued or made available by the Inquiry to the public; and to report on the progress of the Inquiry and its conclusions to the public.

50. The Media Entities wish to be able to report on the proceedings of the Inquiry to the fullest possible extent in order to enable the public of New Zealand to understand the Inquiry and its context; and in particular wish to be able to report properly on matters such as:

(a) how the facts are being investigated;

(b) what evidence is being given and by whom;

(c) to what extent that evidence is contested;

(d) what the evidence shows as to the conduct of New Zealand military personnel, Afghan security forces and coalition forces;

(e) what the evidence shows in terms of the justification and basis for the relevant military operations;

(f) what the evidence shows regarding the accuracy of public statements made in relation to the operation;

(g) what the evidence shows in relation to civilian / ministerial oversight of relevant military operations;

(h) what the evidence shows in relation to the allegations which led to the establishment of the Inquiry;

(i) the nature and robustness of the Inquiry process and in particular the evidence gathering process;

(j) the positions of the core participants;

(k) the submissions of the core participants;

(l) the findings of the Inquiry; and

(m) any other relevant matters of public interest.

51. In terms of their ability to report on such matters the Media Entities recognise that (a) there will be some evidence which for reasons of national security should remain classified; and (b) there may be some vulnerable witnesses who are at risk and who require protection. The Media Entities accept that provision will need to be made to cater for those matters. In general terms however the Media Entities submit that the default position should be that the Inquiry is conducted to the fullest extent possible in public, rather than there being a default presumption or procedure that evidence will be heard in private and then kept private.

52. In this regard the Media Entities are concerned about the following aspects of the Inquiry's proposed procedure.

No provision to Media Entities of redacted classified material

53. It is proposed (paragraph [23] of the Minute) that provision of redacted versions of classified material may be made to core participants. The proposed procedure does not however provide for the provision of redacted versions of classified material to the media.

54. It is understood that the purpose of redactions would be to remove the sensitive content of the material which formed the basis for its classified

status, such that the redacted versions would not need to be treated as classified.

55. If that is correct then it is submitted that there is no compelling reason why the Media Entities should not also be entitled to receive copies of redacted material. The more material the Media Entities have access to, the more fully and accurately they can report matters of public interest to the public.

56. The Media Entities accordingly submit that such redacted material should also be made available to the media.

No provision to Media Entities of summaries of classified material

57. It is proposed (paragraph [23] of the Minute) that summaries of classified material may be provided to core participants. The proposed procedure does not however provide for the provision of such summaries to the media.

58. It is understood that the purpose of the provision of summaries would be to enable core participants to understand the general nature and import of classified material without disclosing to them the sensitive classified content, such that the summaries would not need to be treated as classified.

59. If that is correct then it is submitted that there is no compelling reason why the media should not also be entitled to receive copies of redacted material. Again, the more material the media have access to, the more fully and accurately they can report matters of public interest to the public.

60. The Media Entities accordingly submit that such redacted material should also be made available to the media.

The consequences of de-classification of classified material

61. It is noted (in paragraph [27] of the Minute) that classification claims will be reviewed and that some classified material might thereafter be de-classified or re-classified, which would likely result in wider availability,

certainly in the case of de-classification. The parties to whom such material might be more widely made available are not specified in paragraph [27], but in the context of the proposed treatment of evidence as a whole it appears to be implicit that it is not presently proposed to make such material available to the media.

62. It is submitted that there is no compelling reason why the media should not be entitled to receive copies of de-classified material; and possibly also re-classified material (depending on the re-classification, and the possibility of redaction). Again, the more material the media has access to, the more fully and accurately they can report matters of public interest to the public.

63. The Media Entities accordingly submit that such material should be made available to the media to the fullest extent possible.

The gathering of all or most of the evidence in private

64. It is proposed (in paragraphs [79], [80] and [85] of the Minute) that *all or most* of the evidence be gathered in *private*.

65. This is problematic from the perspective of the Media Entities in terms of their ability to report fully and informatively to the public on the relevant matters of public interest; and is also problematic, it is submitted, in terms of open justice and public confidence in the Inquiry.

66. The Media Entities submit that:

(a) The default position should be that the Inquiry is held in *public*, and that includes the giving of evidence by witnesses to the Inquiry.

(b) The Inquiry has power to order that evidence be given in private (s.15(1)(b) & (c)); however it must take into account certain mandatory criteria before doing so.

(c) Those mandatory criteria include:

(i) The benefits of observing the principle of open justice (s.15(2)(a)).

(ii) The risk of prejudice to public confidence in the proceedings of the Inquiry (s.15(2)(b)).

(iii) Any other countervailing interest (s.15(2)(g)).

(d) Having regard to (a) and (c)(i) & (ii) above, an essentially blanket decision, to have *all or most* evidence given in private, made in advance of witness interviews from which the content of that evidence would be apparent from "will say" statements, is inappropriate, as it:

(i) Gives insufficient weight to the importance of open justice generally.

(ii) Does not have specific regard to the desirability of open justice with respect to the particular circumstances of individual witnesses, and the specific nature and content of particular evidence as apparent from "will say" statements.

(iii) Gives insufficient weight to the importance of maintaining public confidence in the Inquiry.

(e) In order to give due regard to the importance of open justice and the risk of prejudice to public confidence in the proceedings of the Inquiry specific consideration should be given to each witness in terms of whether the hearing of that witness's evidence in private is justified having regard to the mandatory criteria in s.15(2).

(f) To do otherwise risks the adoption of a process in which <u>all</u> of the evidence presented to the Inquiry (except, perhaps, certain limited expert evidence) is heard in private, shielded from public view, and unable to be reported by the news media to the public, when it is possible and perhaps likely that some of that evidence, if subject to specific consideration under s.15(2), would not properly satisfy the criteria for such secrecy.

67. The Media Entities accordingly ask that the Inquiry specifically consider in respect of each witness by reference to "will say" statements whether any or all of that witness's evidence should properly be given in private;

and whether any concerns about such evidence being given in public can be accommodated by orders that fall short of a completely private hearing, such as orders that protect the anonymity of witnesses, and/or which only prohibit publication of genuinely sensitive information; and/or which temporarily exclude the media from the hearing for the giving of particular parts of the evidence; in each case where the Inquiry is properly satisfied that this is necessary, having taken into account the statutory criteria in s.15(2).

68. It appears from paragraph [90] that there will be witnesses in respect of whose evidence no confidentiality is sought. Witnesses who wish to give evidence in public should be permitted to do so where there are no security or confidentiality issues with their evidence.

The limited distribution of transcripts of evidence

69. It is proposed (in paragraph [90] of the Minute) that:

(i) Transcripts of evidence will *not* be publicly available except in the case of evidence given in public session.

(ii) Transcripts of evidence from witnesses who do *not* seek confidentiality, and are *not* dealing with classified material, would be distributed to core participants only, and be subject to non-publication orders.

70. The Media Entities submit that:

(a) In both respects this is unduly restrictive and generic.

(b) As regards (ii) above, it is difficult to see how it is justifiable to withhold from the public transcripts of evidence which – by definition – are neither classified nor confidential. Any such transcripts should be made available to the media and the public.

(c) As regards the rest of the transcripts (i.e. (i) above) the default position should be that transcripts are available to the public unless – and to the extent that – the Inquiry makes an order restricting public access to the transcripts after specifically taking

into account the criteria in s.15(2) including the benefits of observing the principle of open justice (s.15(2)(a)) and the risk of prejudice to public confidence in the proceedings of the Inquiry (s.15(2)(b)).

(d) A blanket decision, particularly one taken before the evidence has even been given or "will say" statements prepared, to withhold all transcripts of evidence from the media and the public, is inappropriate, as it:

(i) Gives insufficient weight to the importance of open justice generally.

(ii) Does not have specific regard to the desirability of open justice with respect to the content of particular transcripts of evidence.

(iii) Risks prejudice to public confidence in the proceedings of the Inquiry.

(e) In order to give due regard to the importance of open justice and the risk of prejudice to public confidence in the proceedings of the Inquiry specific consideration should be given to each transcript as to whether restricting public access to that transcript is properly justified having regard to the mandatory criteria in s.15(2).

(f) To do otherwise risks the adoption of a process in which the evidence presented to the Inquiry (except, perhaps, certain limited expert evidence) is shielded from public view, and unable to be reported on by the news media to the public, when it is possible and perhaps likely that some of that evidence, if subject to specific consideration under s.15(2), would not properly satisfy the criteria for such secrecy.

71. The Media Entities accordingly ask that the Inquiry give specific consideration to the extent to which it is necessary for each transcript to be withheld from the public, and to the extent to which any legitimate

concerns about such evidence being available to the public can be accommodated by the redaction of information.

72. The Court of Appeal commented in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at [77] (albeit in the different context of the need to give reasons for the making of suppression orders) on the risks to open justice of a process in which key matters were dealt with in chambers, with the result that the case would have been "*largely unintelligible to anyone present in Court*". The Media Entities wish to avoid a similar issue arising with this Inquiry. It is the role of the media to make this Inquiry intelligible to the public, and in order to do that effectively, and to give effect to the principle of open justice, the media needs to have the fullest possible access to the evidence being presented.

73. The Media Entities thank the Inquiry for this opportunity to make submissions on these aspects of the Inquiry's proposed process.

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