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NEW ZEALAND DEFENCE FORCE
COVER SHEET

To accompany documents to the
Minister of Defence

Subject:	DETAINEE ARRANGEMENTS - AFGHANISTAN		
NZDF File No.	NZDF Tracking # <i>4410</i> <i>(For OCDF Use Only)</i>	Minister's Tracking#: <i>(For Minister's office)</i>	
Priority:	ROUTINE / URGENT	Request Ministerial response by:	
Contacts:	1. Brig PSR(IC)3 2. WgCdr PSR(IC)3	Tel: PSR(IC)3 Tel: PSR(IC)3	A/H: A/H:

Sheet not to exceed one page. Please complete shaded areas.

Purpose:	To advise the Minister of the legal position of New Zealand and NZDF Personnel in Afghanistan with respect to detainees.
Recommendations:	It is recommended that the Minister: a. note this brief.
MOD/NZDF Consultation	Required/ Not required (provide reasons):
Minister's comments:	
Minister's Action:	Signed / Noted / Agreed / Approved / Declined Referred to:
Signature:	Date:


J. MATEPARAE
Lieutenant General
Chief of Defence Force

Date *16 Sep 10*

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NEW ZEALAND DEFENCE FORCE

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NZDF 3304/DLS/INTREL/AFGHAN
NZDF 3304/DLS/INTREL/NATO

16 September 2010

Minister of Defence

DETAINEE ARRANGEMENTS – AFGHANISTAN

Reference:

A. C10004560 – WLN dated 2/9/10

1. As you are aware, there have been suggestions in the media that the support given by the NZSAS to the Afghan Crisis Response Unit (CRU) may render New Zealand and/or members of the NZDF guilty of complicity in torture. This suggestion derived impetus from a UK High Court decision (*Evans*)¹ which concluded that the moratorium imposed by the UK MOD on passing detainees from the UK Forces to the National Directorate of Security (NDS) facility in Kabul should be maintained. The court concluded that there was a real risk that persons handed to the NDS might be tortured and that there were inadequate monitoring measures available to UK Forces to address this risk. A small number of the persons detained by CRU are transferred to the NDS in Kabul.

2. I have received detailed legal advice from the Director General of Defence Legal Services (DGDLS) to the effect that the partnering arrangement between NZSAS and the CRU does not amount to complicity because:

- a. New Zealand does not seek or encourage the torture of any person.
- b. New Zealand advocates against the use of torture, and has recorded its expectation that Afghanistan will comply with international law in the Arrangement with the Government of the Islamic Republic of Afghanistan (GIRoA) for the Transfer of Detainees (ATD).
- c. No New Zealander has any role in the decision to transfer detainees to the NDS.

¹ *R (on application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) (*Evans*).

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- d. NZDF members have not arrested or detained anyone during this operation.
 - e. NZDF currently has no legal obligation, right or physical ability to monitor the well-being of persons detained by the CRU and transferred to the NDS since the ATD does not apply to such people.
 - f. NZDF has no legal capacity to interfere in the arrest or detention of any person or to release the person detained. To assert a right to do so would be an infringement of the sovereignty of Afghanistan.
3. I am naturally pleased to be assured that we are not breaching international law or New Zealand law through this partnering activity and I am in particular pleased to be assured that, contrary to what has been suggested in the media, members of the NZDF do not face the likely prospect of criminal prosecution. I note also that this issue is of wide application to NZDF operations everywhere.
4. Given the importance of the subject matter I have directed that DGDLS's opinion be passed to the Solicitor-General and the Ministry of Foreign Affairs and Trade to seek their concurrence on this issue.
5. The law relating to complicity is, however, only part of this equation and is arguably a rather narrow aspect of the overall picture. An equally important and complex aspect is whether there is a moral imperative for New Zealand to take steps to ascertain that the human rights of persons arrested by the CRU are protected and, if so, how this is to be done. In the light of Ref A I have requested further advice on three potential measures:
- a. Monitoring of the welfare of prisoners arrested by the CRU and transferred to other Afghan authorities.
 - b. Provision of information about prisoners taken by the CRU to the delegates of the International Committee of the Red Cross (ICRC).
 - c. Provision of a legal officer to take up a position within ISAF Headquarters addressing detainee issues.
6. The fourth measure addressed in Ref A, diplomatic engagement with other interested embassies in Kabul, is one which I support and which needs to be advanced through MFAT.

Prisoner monitoring

7. If prisoner monitoring is to be commenced it will need to be thorough, robust, frequent and carried out in accordance with international standards. It will also need to be backed by effective measures to force compliance.
8. At a practical level the first obstacle to be overcome would be simply getting through the door of the various facilities. Since the ATD applies only in respect of detainees we have actually apprehended and transferred ourselves, it may well be necessary to enter into a further arrangement with GIRoA to guarantee a right of

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access by New Zealand personnel to prisoners transferred by the CRU rather than by NZDF. To gain access to NDS facilities this arrangement may need to be concluded at Presidential level, the difficulties of which should not be underestimated.

9. If credible evidence of torture were to be uncovered in such inspections I consider that we would be under a moral and legal duty to act decisively in response. A failure to do so could be interpreted as tacit approval and a much more complete indication of complicity than our current situation. The same is true if access to the facility is refused at any time. Unlike the UK Forces, NZDF does not have the option of handing a person held by Afghan authorities over to another facility or force, nor of simply releasing the person. This may mean that NZDF only has the option of declining to provide further assistance to the CRU for a period or indefinitely. This may have consequences for the viability of the deployment.

Engagement with the ICRC

10. PSR(IC)4, PSR(R)1

a. PSR(IC)4, PSR(R)1

b. PSR(IC)4, PSR(R)1

c. PSR(IC)4, PSR(R)1

d. PSR(IC)4, PSR(R)1

11. The ICRC has a pre-eminent role in the protection of the human rights of persons detained in connection with armed conflict – but it does so on a strictly bilateral basis. It does not make its findings known to anyone other than to the government concerned. We cannot, therefore, shape any response to this issue which has as one of its elements the proposition that the ICRC is responsible for ensuring the welfare of detainees (they are not), or that they will tell NZDF if any person arrested by the CRU is mistreated (they will not). In order to explore further whether it is possible to establish a robust and useful detainee reporting procedure NZDF needs to gain a definitive answer on the information requirements of the ICRC. I have therefore directed DGDLS to seek from the ICRC a simple explanation, in writing, as to their expectations of the NZDF in respect of detainee notifications.

Legal officer support to ISAF

12. Comd ISAF has suggested that a senior NZDF legal officer become involved in assessing detainment arrangements. If this invitation is to be acted upon it will be necessary to clearly define the role of the position so as to avoid compromising the individual and the NZDF. Subject to a suitable role being defined, I see this as a good opportunity for furthering the development of the rule of law in Afghanistan and DGDLS tells me that he can make an officer available.

The situation in Afghanistan now

13. As is recorded in Ref A our recent visit to Afghanistan identified that the structure, policies and procedures regarding the treatment of detainees have undergone rapid overhaul over recent years. The standards of NDS, including those of Department 17, have improved substantially. Furthermore, this improvement is still ongoing, with considerable support from the international community.

14. Clearly this is major risk reduction factor in terms of NZDF operations and provides comfort that if NDS have used torture in the past, we are not forced to the conclusion that they will continue to do so. Indeed if advancements in the rule of law projects being pursued by ISAF continue, the risk identified by the UK High Court may subside to the point that the part of the judgment relating to NDS facility in Kabul becomes moot.

Conclusion

15. As will be apparent the major concern arising from publicity about the *Evans* judgment, namely the possibility of State or individual responsibility for complicity in torture, has receded somewhat. Remaining, however, are complex questions about whether we have a moral duty to do more to protect the human rights of persons detained by the CRU, and if so, how. Attempts to arrange prisoner monitoring will, needless to say, entail significant effort from MFAT and I recommend that you engage with your colleague the Minister of Foreign Affairs to gain his views on this issue. I propose to explore the option of placing a legal officer in ISAF Headquarters and to gain greater clarity about ICRC reporting requirements.

16. In my view the most important element of our response to this matter is in fact the information and assurances provided to you on our recent trip to Afghanistan and which are set out in paragraphs 5–10 of Ref A. These justify a consistent and credible assessment that there are been a substantial improvement in detainee handling procedures in the NDS since the period that forms the factual basis for the *Evans* decision. Furthermore the fact remains that all obligations and powers arise from the act of detaining and transferring an individual and so far members of the NZDF in the current operation have done neither.

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17. Once you have considered this report I propose to provide you with a further oral briefing on the matter.



J. MATEPARAE
Lieutenant General
Chief of Defence Force