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# Looking to the future

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# Chapter 12

- [1] During the course of what has turned out to be a long and arduous Inquiry, we have identified deficiencies in the way the New Zealand Defence Force (NZDF) dealt with the allegations of civilian casualties after Operation Burnham, and in the application of New Zealand's detention policy in the context of Operation Yamaha. In this chapter, we outline measures to address some of the key problems that have become apparent to us during the Inquiry. Some issues we address by way of recommendations; in respect of others, we simply make observations that we hope will be taken up by others. One of the recommendations we make will require legislation.
- [2] We have not arrived at our views lightly. Change is necessary. We stress, however, that the problems that emerged in relation to NZDF do not relate to matters of military capability. As far as the conduct of Task Force 81 (TF81) personnel during the various operations discussed in this report is concerned, we make no recommendations for further investigation or other action. Further, we make no recommendations in relation to the New Zealand Special Air Service (NZSAS) and NZDF personnel involved in the events after Operation Burnham. Our focus here is forward-looking—what can be done to prevent or reduce the likelihood of the problems we have seen reoccurring?
- [3] The main recommendations we make relate to:
- (a) Issues of public administration and institutional accountability. The primary problems, although not the only ones, relate to the quality of information provided by NZDF to ministers and, through them, to Parliament, and the mechanisms within NZDF for gathering, recording, preserving and providing information. As the foregoing chapters have shown, the systems in operation in the period covered by this Inquiry were manifestly inadequate.
  - (b) Issues relating to detention arising out of the discussion of Operation Yamaha in chapter 11.

We begin with issues of public administration and institutional accountability.

## What the Constitution requires

- [4] In chapter 2, we highlighted two mutually reinforcing constitutional principles that are fundamental to the proper functioning of New Zealand's Westminster-style democracy. They are:
- (a) civilian control of the military; and
  - (b) ministerial accountability to Parliament.
- [5] The effective operation of these principles depends in the first instance on the provision of accurate information to ministers by NZDF. As demonstrated in earlier chapters, and as was accepted by the four current and former Chiefs of Defence Force from whom we heard evidence, NZDF did not provide accurate information about the Incident Assessment Team's investigation and the possibility of civilian casualties on Operation Burnham to successive ministers. The result was

that, over a number of years, NZDF and ministers (including two Prime Ministers) made public statements that were inaccurate, including in response to parliamentary questions.

- [6] Ministerial accountability is a familiar concept. In a democracy such as New Zealand's, those who govern need to be accountable and responsible to those over whom they govern.<sup>1</sup> Power flows from the voters in elections. A basic duty of Parliament is to hold the Executive Government to account. This accountability requires portfolio ministers actively to supervise and monitor the agencies for which they are responsible, albeit they are likely to focus on policy rather than operational matters. Ministers are answerable to Parliament, and through Parliament to the people, for their stewardship.
- [7] Ministerial accountability takes many forms. Ministers must defend their agencies' policies and activities in parliamentary debates. Ministers must obtain from Parliament the funding needed to ensure their agencies can operate effectively and efficiently. They must appear before parliamentary select committees examining appropriations, as well as appearing in other contexts such as select committee inquiries. Ministers must answer parliamentary questions, and must front to the media and the public, about the policies and activities of their agencies.<sup>2</sup>
- [8] To perform these various functions, ministers need accurate information. When incorrect information is provided by an agency to a minister, or where important information is not brought to a minister's attention, the system breaks down. Incomplete or misleading information fractures the application of ministerial responsibility and renders accountability to Parliament ineffective.
- [9] It also disturbs the operation of the Cabinet and the conventions which surround it. The Cabinet Manual describes the Cabinet as:<sup>3</sup>

... the central decision-making body of executive government. It is a collective forum for Ministers to decide significant government issues and to keep colleagues informed of matters of public interest and controversy.

Obviously, ministers cannot fulfil their obligations to Cabinet if they are not given accurate information by officials. This may jeopardise their relationships with the Prime Minister and other Cabinet colleagues and, if it persists over time, undermine their effectiveness.

- [10] There is the same need for full and accurate advice to ministers to give proper effect to the principle of civilian control of the military, as required by s 7 of the Defence Act 1990.<sup>4</sup> For agencies such as Police, there is a clear distinction between policy issues, which are the concern of the responsible minister, and operational matters, which (by statute) are not.<sup>5</sup> This is not the case in relation to the armed forces. Given the nature of their responsibilities, Ministers of Defence will need to be informed of operational matters, certainly when NZSAS or other NZDF personnel are deployed to areas of armed conflict abroad and perhaps in other contexts as well. As we

<sup>1</sup> AW Bradley, KD Ewing and CJS Knight *Constitutional and Administrative Law* (16th ed, Pearson, London, 2015) at 95.

<sup>2</sup> Cabinet Office *Cabinet Manual* (Wellington, 2017) at 46. On ministerial responsibility see also Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 243–246; Mary Harris and David Wilson (eds) *McGee Parliamentary Practice in New Zealand* (4th ed, Aratia Books, Auckland, 2017) at 124 and 570; Geoffrey Palmer and Matthew Palmer *Bridled Power – New Zealand's Constitution and Government* (4th ed, Oxford University Press, South Melbourne, 2004) at 85–89; and KJ Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962) at 118–131.

<sup>3</sup> Cabinet Office, above n 2, at [5.2].

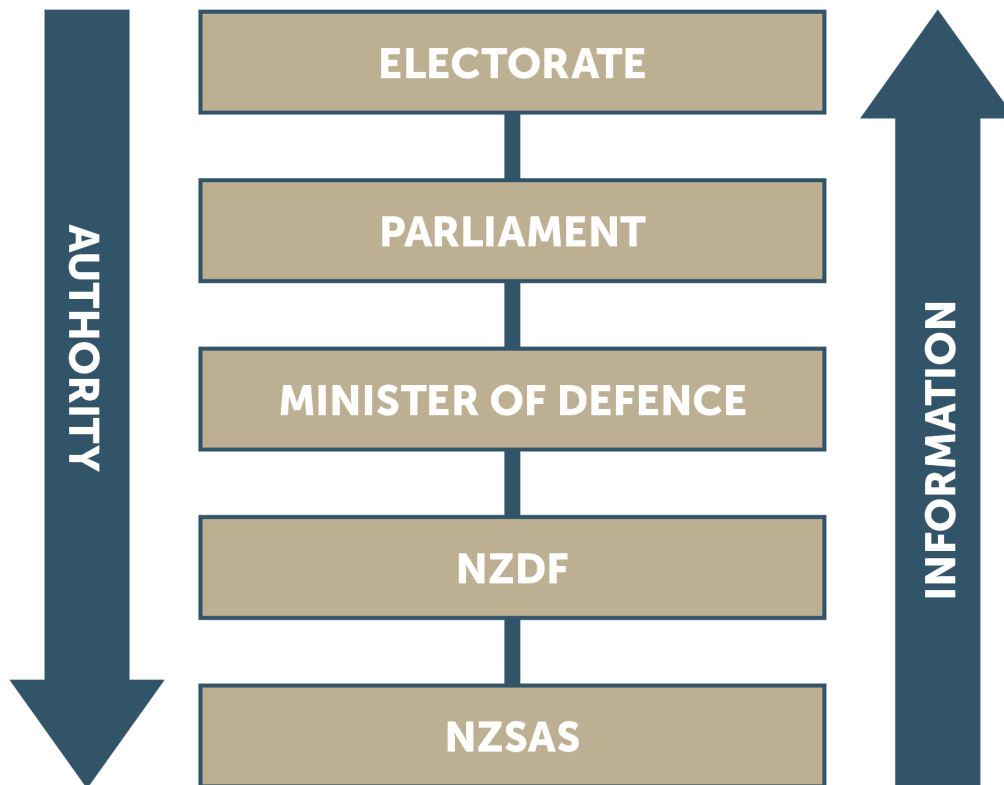
<sup>4</sup> Discussed in chapter 2 at [62] and [81].

<sup>5</sup> Chapter 2 at [72].

explained in chapter 2, operational decisions in the military can have profound reputational, legal and political consequences, both internationally and domestically.<sup>6</sup>

- [11] As will by now be obvious, if the system is to work effectively, the flow of information from NZDF to the Minister must be timely, comprehensive and accurate. Where these features are missing, the quality of government decision-making will be affected and democratic legitimacy and accountability fractured. Hence, the constitutional significance of the problems the Inquiry has seen.

**Figure 7:**  
**Authority and information flows**



### NZDF's engagement with ministers

- [12] Over the period 2010 to 2017 there were four Ministers of Defence. As Hon Dr Mapp noted, the personality and interests of different ministers affect the way they interact with NZDF. A high level of “churn” of ministers is a feature of government in New Zealand, largely because of the short three-year election cycle. This creates obvious risks for effective civilian control of the military, and further emphasises the need for NZDF to provide ministers with full and accurate

<sup>6</sup> Chapter 2 at [78]–[80].

briefings on a regular basis. This need is especially acute where sensitive or complex issues arise. In those instances, lines of communication and accountability assume even greater significance.

- [13] We heard evidence from two of the four ministers, Hon Dr Mapp and Hon Dr Coleman. Each approached the role in a different way, reflecting their different backgrounds. Each expected full information from NZDF on relevant matters, but neither always received it, at least in relation to Operation Burnham.
- [14] In the context of civilian control of the military, Dr Coleman considered that there was often a lack of political sophistication in NZDF about what ministers needed to know and what was relevant to the Government's legitimate interests. He emphasised that a failure by NZDF to inform its minister of significant issues created real risks for the minister. If a matter became politically contentious, that might mean, in extreme cases, that the Prime Minister would lose faith in the minister, which could result in his or her dismissal.
- [15] Dr Coleman said:

Yes, in general terms just a closer link between the politicians and the senior military people would be a good idea and ... the military people really understanding that the Minister and the Prime Minister are not just there to rubber stamp what they do and I think it does go back to their training early on, they do not have enough exposure to the political context from an early enough stage.

He said he thought the leadership training in NZDF had to be improved to retain talent and develop a deeper and broader pool of viable candidates for the most senior roles in the NZDF. This would in turn increase the chances of senior NZDF leaders appreciating more fully the principle of civilian control of the military. Dr Coleman suggested that picking candidates to be the Minister's military adviser in his Parliamentary office from the ranks of those who seem to be likely candidates for higher office within NZDF would help with this aim. The Inquiry agrees that those in the upper echelons of NZDF need a better and more sophisticated understanding of ministerial concerns and the political environment, and considers that Dr Coleman's suggestion has value.

- [16] The Inquiry notes that concern about how NZDF deals with ministers is not new. As we outlined in chapter 2, in his 2002 review Mr Don Hunn emphasised the importance of civilian control of the military through the Minister.<sup>7</sup> The failure to engage adequately with ministers was remarked upon in the 2015 *Review of the New Zealand Defence Force* in the following terms:<sup>8</sup>

Improving its rating in terms of engagement with Ministers will require NZDF to do more to ensure that its voice is heard by Ministers and seen to be heard, and respected by its sector partners. The NZDF needs to adapt its modus operandi to be more agile in responding in a timely and user friendly way to its Ministers, recognising the way they like to work. NZDF staff in and engaging with, Ministers' Offices would benefit from opportunities to develop experience of the workings of the Public Service and the interface between agencies, Ministers and Parliament before being put into these roles.

<sup>7</sup> D K Hunn *Review of Accountabilities and Structural Arrangements between the Ministry of Defence and the New Zealand Defence Force* (30 September 2002) at [2.7] and [2.9], quoted in chapter 2 at [66].

<sup>8</sup> State Services Commission, The Treasury and the Department of Prime Minister and Cabinet *Performance Improvement Framework: Review of the New Zealand Defence Force (NZDF)* (September 2015) at 45.

- [17] It is to some extent surprising that these issues persist. One of the features of NZDF Headquarters over the period 2010–2018 that struck us was the fact that a small number of senior personnel circulated among the limited number of available appointments. Where personnel have occupied several positions within the NZDF hierarchy in or around NZDF Headquarters, it might be expected that they would develop a “feel” for the need for appropriate interactions with ministers. Our examination of the interactions between NZDF and ministers on the issue of civilian casualties following Operation Burnham shows that this is not so, and that the issues raised by Mr Hunn in 2002 have not yet been fully and effectively addressed. They need to be.

## Structural issues in relation to special operations

- [18] A structural problem that played some part in the way that the Operation Burnham saga unfolded was the place of the NZSAS within the NZDF organisational setup. The Directorate of Special Operations was located in NZDF Headquarters rather than with the Joint Forces Command at Trentham, and operated to a large extent within a silo. It appears that the Director of Special Operations regularly briefed the Minister of Defence directly (rather than through the Chief of Defence Force) and, as a practical matter, seems to have had direct access to the Prime Minister and other ministers, particularly the Minister of Foreign Affairs, when he thought it necessary.
- [19] The fact that the Director of Special Operations had, effectively, direct access to the Minister was problematic, especially in light of the secrecy that necessarily surrounded some NZSAS activities. Even senior officers in the office of the Chief of Defence Force were not aware of issues relating to the NZSAS. The following exchange between Ms McDonald QC and former Chief of Defence Force Lieutenant General (Retired) Tim Keating at one of the Inquiry’s public hearings is illustrative:<sup>9</sup>

Q. And you were then Chief of Staff to the CDF when the Operation Burnham unfolded, so you knew about the Operation presumably at the time?

A. Not necessarily in my role, Chief of Staff to the CDF was more administrative. So various operations throughout that time were compartmentalised for security reasons and matters, operations of that nature were sometimes need to know and only certain people in the Defence Force were included in the briefings.

Air Marshal Short made a similar point. He said:<sup>10</sup>

... matters involving the NZSAS were held tightly by CDF, the Directorate of Special Operations, and the Commanding Officer of the NZSAS. That closed command structure was well entrenched, having been in place for decades.

- [20] These observations reflect a culture of exclusivity and secrecy associated with the NZSAS as an elite special operations force. This culture resulted in NZDF overly compartmenting information. In chapter 2, we outlined the command and control arrangements the Chief of Defence Force directed for the NZSAS in Afghanistan. Operational command was delegated to the Commander Joint Forces New Zealand. That was a stronger command authority and responsibility than the technical control assigned to the Director of Special Operations. Yet it is apparent that most

<sup>9</sup> Evidence of Lieutenant General (Retired) Tim Keating, Transcript of Proceedings, Public Hearing Module 4 (18 September 2019) at 497.

<sup>10</sup> Evidence of Air Marshal Kevin Short, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 1003.

information about NZSAS operations in Afghanistan went through the Director of Special Operations, and that he had effective decision-making responsibility. This culture of closed command and over-compartmentation appears to have been a contributing factor to the problems we have described in this report.

- [21] The performance of the Directorate of Special Operations was one of the problems highlighted by Dr Coleman in June/July 2014, when the Incident Assessment Team Executive Summary came to light and the Minister expressed his displeasure at NZDF's record-keeping failures.<sup>11</sup> Lt Gen (Ret) Keating said in his evidence that he changed the existing organisational structure in an effort to address the problems that had emerged.<sup>12</sup> In particular, he moved all special forces operations to the control of the Commander Joint Forces, who was located at Trentham rather than at NZDF Headquarters. Lt Gen (Ret) Keating said he considered that running such operations out of NZDF Headquarters was inappropriate as there were not the systems there to handle the wealth of documentation that came in.
- [22] An issue for the current Minister of Defence is whether this organisational change has been effective.

## Information management

- [23] Lt Gen (Ret) Keating acknowledged that operational documentation was not well handled within NZDF Headquarters at the time and that this impacted on briefings. He said he conducted a workshop to examine international best practice to find a better way of handling accusations of civilian casualties.<sup>13</sup> The workshop concluded that NZDF systems were “not fit for purpose for contemporary operations, to give assurances to the public that we’re behaving professionally.”<sup>14</sup> Lt Gen (Ret) Keating said he worked to ensure that better information management systems were put in place. He considered that the various changes he had initiated had improved matters.
- [24] Air Marshal Short told us that considerable work was currently being undertaken to improve NZDF's information management systems, particularly by reducing the number of different electronic systems that NZDF ran (at one point there were 15). He advised us that there had been “a period of intense growth and focus on information management within NZDF”. In particular:
- (a) In 2014, the Knowledge and Information Management Directorate was created, headed by a Chief Data Officer.
  - (b) In 2017, the Commander Joint Forces New Zealand (JFNZ) issued a Directive for Information Management.
  - (c) In 2018, Information Management Instructions were implemented within HQ JFNZ Operation Instructions. The instructions require compulsory repatriation of all physical and electronic records to HQ JFNZ, with specific instructions for managing information while deployed.

<sup>11</sup> See chapter 8 at paragraphs [103]–[105]. In his evidence, Dr Coleman raised other instances where he considered that he had not been properly advised of operational developments that had the capacity to impact on the Government's legitimate interests.

<sup>12</sup> Evidence of Lt Gen (Ret) Keating, Transcript of Proceedings, Public Hearing Module 4 (19 September 2019) at 533–534 and 643–644.

<sup>13</sup> At 644–645.

<sup>14</sup> At 649.



This includes the provision of an Information Management Office for every deployment and deployment-specific sites within the Document Management system.

In addition, a complete technology refresh is under way.

- [25] NZDF generates and receives a large amount of information, much of it classified. Our experience in this Inquiry was that NZDF was unable readily to retrieve and make available to us all the information we sought. Rather, as it was described to us, NZDF had to devote significant time and resources to finding relevant material, which included locating, reactivating and interrogating old electronic systems. Even then, its searches failed to produce some relevant information. On several occasions the Inquiry had to make specific requests for information it became aware of through other means, but which had not been provided by NZDF as part of the disclosure process. In June 2020, we were still receiving material from NZDF that was plainly relevant and should have been provided much earlier. Yet this was an operation that occurred in August 2010, only a decade ago. The point is that the problems we have described occurred even though the Inquiry was dealing with reasonably recent events.
- [26] This difficulty in identifying and accessing relevant information is not only problematic for subsequent investigations of the type this Inquiry has conducted. It is apparent from the events described in chapter 8 that senior NZDF personnel were themselves unaware of critical information held by NZDF in the period following Operation Burnham. This was a significant factor in the way they responded to the allegations of civilian casualties.
- [27] It cannot be right that obtaining information about an operation that occurred in 2010 should prove so difficult for NZDF. It is self-evident that the wealth of information NZDF holds needs to be managed appropriately, in a way that enables NZDF to access relevant material whenever required, including for the purpose of independent oversight. We are in no position to assess whether the organisational and systems changes made by Lt Gen (Ret) Keating and more recently by Air Marshal Short are sufficient to minimise the possibility of problems of the type described in this report occurring in the future. This is ultimately a matter on which the Minister of Defence will need to be satisfied—as a matter of priority.
- [28] To enable the Minister to make informed decisions about the adequacy of the changes to NZDF’s organisational structure and record-keeping and retrieval systems, and any further changes that ought to be made to them, we recommend that the Minister appoint an expert review group. This group should consist of members from both within and outside NZDF, including some overseas military personnel with relevant expertise. This will help to ensure that the Minister receives robust advice on how NZDF’s organisational structure and systems currently operate, and how they compare to international best practice. While NZDF should, of course, play an active role in the review process, we consider it undesirable that the Minister receive advice on these issues solely from NZDF, particularly given the historic failures to provide full and accurate advice to ministers highlighted in this report. In addition, such a process would assist in the important function of ensuring public confidence in the process and its outcome and, ultimately, in NZDF itself.
- [29] Finally, it is relevant to note that there exists in New Zealand modern and carefully drafted legislation “to enable the Government to be held accountable” by requiring agencies to keep “full and accurate records” of their activities, namely the Public Records Act 2005.<sup>15</sup> That Act aims to provide “for the preservation of, and public access to, records of long term-value” and “to

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15 Public Records Act 2005, s 3.

enhance public confidence in the integrity of public records.”<sup>16</sup> We will not engage in an analysis of the legislation here. We simply note that its purposes were not being met by the record-keeping practices within NZDF to which we were exposed.

#### RECOMMENDATION 1

We recommend that the Minister of Defence take steps to satisfy him or herself that NZDF’s (a) organisational structure and (b) record-keeping and retrieval processes are in accordance with international best practice and are sufficient to remove or reduce the possibility of organisational and administrative failings of the type identified in this report. To enable the Minister to do so, and to ensure public confidence in the outcome, we recommend the appointment of an expert review group comprising people from within and outside NZDF, including overseas military personnel with relevant expertise.

## The need for independent oversight

[30] In chapters 8 and 9 we outlined numerous inadequacies in NZDF’s performance in the aftermath of Operation Burnham. In chapters 10 and 11 we identified a range of issues before, during and after Operation Yamaha. As will be apparent, in relation to Operation Burnham we were deeply concerned by NZDF’s handling of the allegations of civilian casualties. In relation to Operation Yamaha, there were problems with New Zealand’s detention policy in relation to partnered operations and its application in-theatre, as well as a failure to follow up on credible allegations of torture.

[31] In this section, we recommend the establishment of an Independent Inspector-General of Defence to provide a mechanism for independent oversight of NZDF’s activities. We consider this is a necessary step to minimise the possibility of similar failures occurring in the future, and to ensure that, if they do occur, they are investigated and remedied promptly and appropriately. This means addressing any issues identified in a way that:

- (a) is consistent with the underlying constitutional principles of civilian control and ministerial accountability; and
- (b) promotes best practice, as well as public confidence in NZDF.

### Why is independent oversight of NZDF required?

[32] Armed forces occupy a unique position that confers on them both significant powers and significant responsibilities. Their actions can have serious consequences for individuals—including, in some circumstances, death or deprivation of liberty—and for international relations. Accordingly, they are bound to act consistently with the rule of law and the Government’s defence policy objectives, and in a way that facilitates effective civilian control. It is also critical in a democratic society that

<sup>16</sup> Public Records Act 2005, s 3(c) and (d).

they have the confidence and support of the public.

- [33] However, the specialist and often secret nature of their activities can make it difficult for the Government and the public to ensure those responsibilities are being met. As the Geneva Centre for the Democratic Control of the Armed Forces has observed:<sup>17</sup>

There is always a risk, even in more developed countries that, because of their unique qualities and specialisms, the armed forces exercise an influence that is difficult for the non-specialist politician or citizen to question.

It is therefore essential that these forces should be part of a framework which ensures they are subordinate and accountable to democratically elected authorities; implement the political goals set by that leadership, and constitute an integral and respected part of the societies they serve and protect. Mechanisms that facilitate transparency and oversight are essential elements in this democratic framework.

The Centre has also emphasised that independent and impartial oversight bodies are critical to ensuring transparency and accountability in armed forces.<sup>18</sup> This in turn assists in preventing maladministration and human rights abuses.

- [34] The failures within NZDF that we have identified in this report signal to us that the structural and legislative framework currently in place is insufficient for these purposes. Over a number of years, NZDF personnel failed to provide full and accurate information to ministers and the public, and failed to adequately scrutinise or respond to the information available to them. Their actions prevented civilian control and ministerial accountability from operating effectively, and have diminished public confidence in NZDF as an institution. Clearly, some form of increased oversight is needed to ensure this does not happen again.
- [35] As a starting point, we compared NZDF to other organisations that exercise some powers of a similar nature: the New Zealand Police and the intelligence agencies (the Government Communications Security Bureau (GCSB) and New Zealand Security Intelligence Service (NZSIS)). Like police officers, military personnel exercise powers that can impact the life and liberty of individuals. They must comply with laws that protect human rights. In relation to serious complaints against police forces, international best practice indicates that independent, statutorily-based investigative processes are necessary to ensure accountability and to preserve public confidence.<sup>19</sup> Such a mechanism contributes to building public trust and confidence in the Police.
- [36] In New Zealand, this is achieved through the Independent Police Conduct Authority, an independent statutory body that investigates complaints against Police, including complaints of misconduct or neglect of duty; incidents involving death or bodily harm, and wider issues of Police policy, practice or procedure.<sup>20</sup> The Authority's statutory function extends to examining the conduct of specialist Police units that are engaged in dangerous or high-risk situations, such as the Armed Offenders Squad. While defence forces are not in exactly the same position as police forces, there are sufficient similarities to justify applying the same principles to investigations into

<sup>17</sup> Eden Cole, Philipp Fluri and Simon Lunn (eds) *Oversight and Guidance: Parliaments and Security Sector Governance* (Geneva Centre for the Democratic Control of Armed Forces, Geneva, 2015) at 15.

<sup>18</sup> Benjamin S Buckland and William McDermott *Ombuds Institutions for the Armed Forces: A Handbook* (Geneva Centre for the Democratic Control of the Armed Forces, Geneva, 2012) at v.

<sup>19</sup> See, for example, United Nations Office on Drugs and Crime *Handbook on Police Accountability, Oversight and Integrity* Criminal Justice Handbook Series (United Nations, New York, 2011).

<sup>20</sup> Established under the Independent Police Conduct Authority Act 1988.

the more serious instances of alleged NZDF misconduct.

- [37] The secrecy surrounding many of NZDF's activities, particularly those involving special operations, adds a further layer of complexity. The fact that much of the information NZDF holds is classified means that public transparency and accountability are often unable to be achieved through the usual mechanisms, such as Official Information Act requests. In this respect, NZDF is comparable to the intelligence agencies, which operate largely in secret and have intrusive powers that can impact on the rights of individuals. The need for independent external oversight has long been recognised in relation to the intelligence agencies, which have been subject to the jurisdiction of the Inspector-General of Intelligence and Security (IGIS) since 1996.<sup>21</sup>
- [38] The IGIS has wide-ranging investigatory powers aimed at ensuring that the intelligence agencies conduct their activities lawfully and with propriety.<sup>22</sup> As the former IGIS, now Justice Gwyn, explained in her 2018/2019 annual report:<sup>23</sup>

The secrecy under which the intelligence agencies operate constrains the usual constitutional accountability mechanisms, such as access to the courts and access to information under the Official Information Act 1982 or Privacy Act 1993. The Inspector-General is uniquely placed to examine and publicly explain, within appropriate limits, the operational activities of the New Zealand agencies.

We consider there is an equal need for independent scrutiny and reporting on the activities of NZDF.

- [39] We note that NZDF has its own intelligence arm, but it is not subject to the jurisdiction of the IGIS. This can be contrasted with the position in Australia, where the Australian IGIS has jurisdiction over the Defence Intelligence Organisation.<sup>24</sup> Australia has also had an Inspector-General of the Australian Defence Force since 2005.<sup>25</sup> The Inspector-General's office is currently conducting an inquiry into allegations of misconduct by Australian special forces in Afghanistan.
- [40] It is not only domestic considerations that point to a need for independent external oversight. Such oversight has benefits from an international perspective as well. New Zealand is party to a significant number of international treaties or conventions and is in any event bound by customary international law. This means that New Zealand may be called to account for the conduct of its troops before international institutions when it employs lethal force abroad or detains and transfers people who may run the risk of being tortured. The requirements of the international treaties to which New Zealand adheres, including the Convention against Torture and the Rome Statute (which established the International Criminal Court) are onerous. For example, the International Criminal Court can carry out investigations into certain types of conduct if New Zealand fails to do so.<sup>26</sup>

<sup>21</sup> The Inspector-General of Intelligence and Security Act 1996 is now repealed, but the office of the Inspector-General of Intelligence and Security is maintained under the Intelligence and Security Act 2017, pt 6.

<sup>22</sup> Intelligence and Security Act 2017, s 156.

<sup>23</sup> Office of the Inspector-General of Intelligence and Security *Annual Report: For the year 1 July 2018 to 30 June 2019* (5 November 2019) at 4.

<sup>24</sup> Inspector-General of Intelligence and Security Act 1986 (Cth), s 8(3).

<sup>25</sup> Inspector-General of the Australian Defence Force is established under of the Defence Act 1903 (Cth), pt VIIIIB. Although it sits within the Department of Defence, it is independent from the Defence Force chain of command.

<sup>26</sup> We note that the International Criminal Court recently authorised the commencement of an investigation into alleged war crimes committed in connection with the Afghanistan conflict: see *Situation in the Islamic Republic of Afghanistan* ICC Appeals Chamber ICC-02/17 OA4, 5 March 2020.

- [41] New Zealand must also answer for its actions to the Committee against Torture established by the Convention against Torture. The Committee seeks periodic reports from states. It is in New Zealand's interest as a good international citizen to be conscientious, thorough and professional in these matters so it can respond fully to international scrutiny and consider recommendations or suggestions for improvement to laws, policies and practices at a domestic level. Accurate information is critical to meeting these requirements.
- [42] Finally, we note that independent investigations should not be regarded by military personnel in a negative way. External oversight can provide a platform to enhance public understanding of complex legal and operational issues, and to identify good (or bad) practice in a fair, independent and impartial manner. Often, it results in improvements to the way the military operates. This point is well made by the Geneva Academy of International Humanitarian Law and Human Rights in its 2019 publication *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*.<sup>27</sup> The Academy says:
26. The existence of effective domestic procedures and mechanisms for investigations in armed conflict serves to enhance a State's military operational effectiveness. Investigations may be a source of information on the success or failure of military operations and enable appropriate steps to be taken in the latter case. They can likewise assist in the identification of good practice and lessons-learned. Ultimately, investigations are crucial for maintaining discipline in an institution that depends on high levels of command and control.
- [43] Lieutenant General (Retired) Sir Jerry Mateparae told us that had he been advised that civilian casualties might have occurred on a New Zealand-led operation, he would have ordered the New Zealand Senior National Officer in Afghanistan to conduct an investigation and would have sent legal support from New Zealand.<sup>28</sup> We accept that investigations conducted internally within the military will often serve useful purposes and will be sufficient in many situations. But in some instances, internal investigations may not provide an environment that will enable:
- (a) defence force personnel to speak freely, particularly where those in positions of command may bear some responsibility for what has occurred or otherwise be part of the problem; or
  - (b) interested members of the public (and perhaps ministers) to have trust and confidence in the outcome.

In some cases, both internal and external examination will be necessary. In others, the most effective outcomes will be achieved following review or investigation by an independent body.

- [44] As a recent study into the standards and procedures of the United States military for investigations into civilian casualties noted, the fact that military commanders both direct operations and order investigations into harm resulting from those operations "creates an inherent tension and a potential conflict of interest".<sup>29</sup> The report goes on to say that to reduce the risk of bias, commanders should select investigating officers from other units. In a relatively small defence force such as New Zealand's, we consider that the risk of bias or perceived bias is high, which points towards a process independent of NZDF, at least in relation to some matters.

<sup>27</sup> Geneva Academy of International Humanitarian Law and Human Rights *Guidelines on Investigating Violations of International Humanitarian Law: Law Policy and Human Rights* (September 2019).

<sup>28</sup> Evidence of Lieutenant General (Retired) Sir Jerry Mateparae, Transcript of Proceedings, Public Hearing Module 4 (16 September 2019) at 25.

<sup>29</sup> Columbia Law School Human Rights Institute and Center for Civilians in Conflict *In Search of Answers: US Military Investigations and Civilian Harm* (February 2020) at 2.

## An Independent Inspector-General of Defence

- [45] For the reasons canvassed above, we have concluded that an office of Independent Inspector-General of Defence should be established to provide independent and external oversight of NZDF. This would promote civilian control of the military and foster public confidence in the effectiveness of that civilian control—thus supporting the two fundamental constitutional principles identified at paragraph [4]. It would give ministers and the public assurance that significant issues in relation to NZDF are being investigated thoroughly and objectively, and that any problems are being identified and rectified effectively. We see the feature of independence from NZDF as critical to fulfilling these objectives, and consider that independence is best emphasised and maintained where the independent office or entity has a statutory underpinning.
- [46] The Inspector-General would stand outside NZDF<sup>30</sup> and would supplement rather than replace existing investigatory mechanisms such as command investigations or courts of inquiry. An investigation could be triggered by the Inspector-General on his or her own motion, or by the Minister of Defence, the Chief of Defence Force, the Secretary of Defence and, perhaps, Parliament’s Foreign Affairs and Defence Select Committee. The Inspector-General would not be limited to investigating only where internal avenues had been exhausted. This is likely to delay investigations and impede the ability of the Inspector-General to obtain access to the best information. The Inspector-General would operate separately and independently from any internal oversight processes, and should be able to investigate whenever he or she consider it appropriate (although we note that, in making that assessment, the fact of any ongoing or completed internal investigation could be taken into account).
- [47] The Inspector-General need not be a person with a military background, but he or she would need to have access to investigators/advisers with significant military expertise. He or she would also need procedural powers in relation to matters such as gathering evidence, but would probably have to operate under similar constraints to inquiries. This would include having the power to make findings of fact and fault but not to determine liability, and having a power of recommendation (to either the Chief of Defence Force or the Minister, as appropriate). As is the case for other independent oversight bodies, the statutory framework should also clarify how recommendations are received and considered, and what avenues are available if no reasonable or timely action is taken in relation to recommendations.
- [48] The Inspector-General would be able to investigate some “one-off” matters, such as allegations of civilian casualties on a particular operation, issues going to detainee treatment, as well as issues going to the prevailing culture within NZDF (or part of it) or which are, or may be, systemic in nature. Examples of the latter might be allegations of systemic gender discrimination or of systemic failure to respond to sexual abuse allegations appropriately.
- [49] The independent office we recommend would have the capacity to accommodate what is likely to be a feature of many military investigations, namely, the need for confidentiality. Much of the information provided to the Inquiry was classified or otherwise confidential. In relation to military matters today, that will generally be the case. Similarly, much of the oral evidence we heard was given in private, for good reason. Again, that will commonly be the case. The Inspector-General would be able to deal with classified material and preserve confidentiality of witnesses if required;

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30 As noted at footnote 25 above, the Australian Inspector-General sits within the Australian Ministry of Defence but is independent of the Defence Force chain of command. As far as New Zealand is concerned, we consider an Inspector-General should sit completely outside NZDF and have legal, functional and financial independence from it, especially given NZDF’s relatively small size and the need to preserve public confidence in the office.

but the fact that the Inspector-General would be independent of NZDF should give ministers and the public reassurance about the integrity of the investigatory process despite its confidentiality. Furthermore, our experience suggests that, in a military context, a confidential process facilitates getting at the truth.

- [50] Given the need for the office to be independent of, and situated apart from, NZDF, there is a question whether the office should be a stand-alone one or associated with another entity. One possibility is that the office could be located as a separate unit within the Ministry of Defence, with the Ministry providing the necessary support services. Unlike NZDF, the Ministry is part of the mainstream public service. As we described in chapter 2, the Defence Act demonstrates a strong commitment to civilian control. The Secretary of Defence is “the principal civilian adviser to the Minister and other ministers.”<sup>31</sup> The Secretary and the Ministry should be an important source of contestable advice for the Minister. Locating the Inspector-General in the Ministry may strengthen the element of civilian oversight. But whatever decision is made about that, the Inspector-General must, in our view, be located outside NZDF.
- [51] To set up an office of Independent Inspector-General of Defence, it will be necessary to pass a short amending Act. The detailed nature of that legislation cannot be fully analysed in this report. The best existing statutory model is the office of the Inspector-General of Intelligence and Security provided for in pt 6 of the Intelligence and Security Act 2017, although some adjustments would be required. The purpose of the new office would have similarities to the IGIS and it would need similar powers and procedural provisions, including in regard to access to information, handling of classified material and public reporting. We have set out in our recommendation what we consider to be the key areas of focus for the new office.
- [52] We put the idea of establishing an Independent Inspector-General of Defence (in general terms) to several witnesses:
- (a) Lt Gen (Ret) Keating had examined the situation in Australia, where there is an Inspector-General of the Defence Force. He was comfortable with some form of independent scrutiny so long as it had the capacity to understand military operations.<sup>32</sup>
  - (b) Dr Mapp expressed strong support for such an office and considered that if an investigatory process of this type was available, it would assist accountability.<sup>33</sup>
  - (c) Dr Coleman also expressed support for this idea and said he thought the person appointed would need to stay in the role for a reasonable period to be effective, say five to seven years.
- [53] The non-Crown core participants, Mr Hager and Mr Stephenson, supported our recommendation in their comments on our draft report. While accepting the fundamental aim of promoting civilian control of the military and fostering public confidence, NZDF considered that the idea required further consideration and analysis. While we agree that policy work will need to be done to implement this recommendation, there can be no prevarication about the need for the establishment of an independent office of the type we recommend. The need is indisputable.

<sup>31</sup> Defence Act 1990, s 24(2)(a).

<sup>32</sup> Evidence of Lt Gen (Ret) Keating, above n 12, at 650.

<sup>33</sup> Evidence of Hon Dr Wayne Mapp, Transcript of Proceedings, Public Hearing Module 4 (18 October 2019) at 1095–1096 and 1107–1108.

## RECOMMENDATION 2

We recommend the establishment, by legislation, of an office of the Independent Inspector-General of Defence, to be located outside the NZDF organisational structure.

The purpose of the office would be to facilitate independent oversight of NZDF and enhance its democratic accountability.

The functions of the Inspector-General would include:

- (a) investigating, either on his or her own motion or by way of a reference, and reporting on particular operational activities of NZDF to ascertain whether they were conducted lawfully and with propriety;
- (b) investigating and reporting on such other matters requiring independent scrutiny as are referred to it by the Minister of Defence, the Chief of Defence Force, the Secretary of Defence or the Defence and Foreign Affairs Select Committee of Parliament; and
- (c) providing an annual report to the Minister of Defence and to the Defence and Foreign Affairs Select Committee of Parliament.

## A Defence Force Order on allegations of civilian casualties

- [54] Sir Jerry Mateparae noted in his evidence that during his tenure as Chief of Defence Force, work had begun on the preparation of a formal order under s 27 of the Defence Act concerning civilian casualties. He said that the work had not been completed for resource reasons.<sup>34</sup> A further effort was made in 2011/2012 but nothing was promulgated then either. A full draft of the 2012 document was provided to the Inquiry in October 2019. It sets out an elaborate set of procedures for the investigation of unintended casualties if they occur during NZDF operations outside New Zealand. The approach contemplated is thorough, although it may be too elaborate, especially if our recommendation to establish an Inspector-General's office is accepted.
- [55] The Inquiry's preference is for an order that sets out a preliminary process that is intended to determine whether any further, formal investigation is needed—that is, a relatively quick preliminary inquiry carried out in-theatre. A written preliminary assessment would be produced and provided to the Chief of Defence Force so that a decision could be made as to whether a full investigation was required, and if so, what type of investigation that should be. In terms of what approach should be taken to a preliminary investigation, there is useful guidance in the Geneva Academy's *Guidelines on Investigating Violations of International Humanitarian Law*.<sup>35</sup>
- [56] It is a well-known observation that the first information a commander receives after an operation is likely to be wrong. While we acknowledge that, it does not mean that an initial investigation

<sup>34</sup> Evidence of Lt Gen (Ret) Mateparae, above n 28, at 75.

<sup>35</sup> Geneva Academy of International Humanitarian Law and Human Rights, above n 27, at 14–23.



of the type we contemplate should not be carried out. Early investigation generally gives the best opportunity to gather the best evidence. The most obvious example is video footage. Armed conflict in the modern era generates a great deal of objective evidence in the form of video and other imagery. Much of this material is recorded by overseas partners through aerial intelligence, surveillance and reconnaissance platforms (such as drones), and by various forms of attack aircraft (weapons video), although increasingly NZDF will gather its own video footage through helmet cameras and such like. As we understand it, such material is not preserved unless there is some particular reason to preserve it. Obviously, the best opportunity to ensure its preservation is immediately after the particular operation. The investigator(s) could gather such objective evidence,<sup>36</sup> along with any other relevant material, and create a file, which would be available to any subsequent investigation and/or to NZDF personnel who have to address questions about the operation, either at the time or in the future.

- [57] That there should be a process such as this seems self-evident. When it is recalled that Operation Burnham was a rare occasion on which NZDF faced allegations that a New Zealand-led operation had resulted in civilian casualties, it is surprising that NZDF did not undertake something of this sort in any event despite the International Security Assistance Force (ISAF) Incident Assessment Team investigation, which ISAF conducted for its purposes, not New Zealand's.<sup>37</sup>
- [58] In addition to an order on handling allegations of civilian casualties after an operation, the Inquiry considers that greater clarity and direction is required in the directives to NZDF personnel appointed as Senior National Officers and Commanders in operational theatres. The directives we reviewed were what may be described as administrative in nature. They lacked specific guidance, for example, on reporting incidents that may impact New Zealand's national reputation, contravene international or domestic law, or be of significance to the Government. Senior National Officers are delegated national command responsibilities and are appointed to preserve New Zealand's national interests. They should be provided with as much guidance as possible.<sup>38</sup> We understand Australia and other countries conduct specialist briefings for personnel deploying on operations in a specific range of appointments. These briefings are given by the strategic-level headquarters. This training is a formalised package highlighting those matters of national importance with which these appointments must be familiar. NZDF should consider similar briefings.

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<sup>36</sup> We acknowledge that accessing and retaining material created by overseas partners has challenges. It may be that New Zealand should, where it participates in coalitions such as ISAF, make its participation conditional on being able to access objective evidence of the type referred to in the text where there are credible allegations of the type that followed Operation Burnham.

<sup>37</sup> Based on his evidence to us, we think it likely that Sir Jerry Mateparae would have ordered such an investigation following Operation Burnham had he not been erroneously advised on the basis of Lt Col Parsons' misdescription of the Incident Assessment Team's conclusions.

<sup>38</sup> We note in this context that Brigadier Parsons told us he had not had time to read ISAF's standard operating procedures on "inquiries" and was not aware of ISAF's investigation processes before taking up his responsibilities as Senior National Officer in Afghanistan.

### RECOMMENDATION 3

We recommend that a Defence Force Order be promulgated setting out how allegations of civilian casualties should be dealt with, both in-theatre and at New Zealand Defence Force Headquarters.

### SUMMARY OF RECOMMENDATIONS IN RELATION TO NZDF

R1. We recommend that the Minister of Defence take such steps to satisfy him or herself that NZDF's (a) organisational structure and (b) record-keeping and retrieval processes are in accordance with international best practice and are sufficient to remove or reduce the possibility of organisational and administrative failings of the type identified in this report. To enable the Minister to do so, and to ensure public confidence in the outcome, we recommend the appointment of an expert review group comprising people from within and outside NZDF, including overseas military personnel with relevant expertise.

R2. We recommend the establishment, by legislation, of an office of the Independent Inspector-General of Defence to be located outside the NZDF organisational structure.

The purpose of the office would be to facilitate independent oversight of NZDF and enhance its democratic accountability.

The functions of the Inspector-General would include:

- (a) investigating, either on his or her own motion or by way of a reference, and reporting on particular operational activities of NZDF to ascertain whether they were conducted lawfully and with propriety;
- (b) investigating and reporting on such other matters requiring independent scrutiny as are referred to it by the Minister of Defence, the Chief of Defence Force, the Secretary of Defence or the Defence and Foreign Affairs Select Committee of Parliament; and
- (c) providing an annual report to the Minister of Defence and to the Defence and Foreign Affairs Select Committee of Parliament.

R3. We recommend that a Defence Force Order be promulgated setting out how allegations of civilian casualties should be dealt with in-theatre and at New Zealand Defence Force Headquarters.

## Detention

- [59] As described in chapter 11, we consider that New Zealand breached its international obligations in relation to (a) the capture and transfer of Qari Miraj to the NDS and (b) its failure to take appropriate steps after it learnt of the allegations that he had been tortured. The question is, how can the failings we have identified be addressed in a way that minimises the possibility that they may reoccur?
- [60] The answer, in our view, lies in:
- (a) having well-considered detention policies in place in advance of any similar deployment, which reflect New Zealand's values and the letter and spirit of international law on torture prevention; and
  - (b) ensuring that the forces and agencies involved, whether in New Zealand or in-theatre, have a clear understanding of how they should operationalise those policies.<sup>39</sup>
- [61] Future conflicts in which New Zealand forces may become involved are likely to be non-international armed conflicts of the type that occurred in Afghanistan, involving forces from various countries supporting a local government against insurgent forces. Almost inevitably, the fact that there is an insurgency will mean that the local government will not have full control of the country's institutions or agencies. Torture or other mistreatment of detainees in the host country's facilities is likely to be a real risk, at least in some areas, in some facilities, or within some agencies.
- [62] If New Zealand chooses to deploy its forces in a non-international armed conflict, including as part of a coalition, New Zealand needs to determine beforehand what detention policies it will follow and how it will implement them in its arrangements with its coalition partners and the host country. The policies adopted should not be based simply on the letter of the law but should reflect the core values that the law seeks to embody. The approach should not be to limit New Zealand's obligations to a bare legal minimum but rather to act consistently with the fundamental human rights norms to which New Zealand says it adheres—a law and values approach.
- [63] As applied, New Zealand's policy in respect of persons arrested by Afghan personnel on partnered operations meant that New Zealand troops could participate in capturing suspected insurgents without any concern about, or responsibility for, their subsequent mistreatment in detention (assuming no complicity). On the assumption that the Crown Agencies' legal analysis in relation to Operation Yamaha is correct, there must surely be a question as to whether it is consistent with New Zealand's values to allow its forces to be as closely involved in the capture of Miraj as they were without acknowledging any responsibility for the risks he faced in detention. There is an obvious question about a policy which has such an outcome—is that really us?
- [64] In situations of non-international armed conflict, the deployment of forces to assist the local government to deal with the insurgency may well be only one element of a multi-pronged international assistance effort, as was the case in Afghanistan. However, the fact that programmes

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<sup>39</sup> We note this was a significant theme in the 2019 report of the Inspector-General of Intelligence and Security (Inspector-General of Intelligence and Security *Inquiry into possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme 2001–2009* (31 July 2019)), in which significant policy changes were recommended.

or projects are under way with local agencies and personnel to improve understanding of human rights norms, to introduce processes that respect rights, to enhance skills and so on does not relieve an assisting force from addressing the issue of the treatment of those in whose detention it is involved. The way that an assisting force addresses the issue may, of course, assist in the process of promoting and developing an understanding of human rights amongst local officials and agencies.

- [65] Where New Zealand decides to deploy forces to assist in counter-insurgency operations, it should enter into written arrangements with the host country that address how *all* those people New Zealand forces are involved in detaining are to be treated in detention. New Zealand should make it clear that New Zealand forces will not be involved in operations, partnered or otherwise, which result in the detention of suspects who face a real risk of torture without workable and effective arrangements in place to ensure that the risk is not realised.
- [66] We note that in the United Kingdom, the Government issued a policy statement in July 2019 entitled *The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees*.<sup>40</sup> The statement provides useful guidance on a range of matters and includes the following:<sup>41</sup>

When UK Armed Forces or other personnel are operating in a coalition with others and are under time-sensitive operational conditions, they may find themselves engaged in tactical questioning of detainees held by other nations, or in possession of threat to life intelligence, with no opportunity to refer to senior personnel or Ministers. If such a situation arises, all personnel should continue to observe this guidance insofar as is practicable and report all the circumstances to senior personnel at the earliest opportunity. This does not apply when personnel know or believe i) unlawful killing ii) torture or iii) extraordinary rendition will take place, when they will not proceed.

- [67] We consider that a policy statement of this type should be developed and promulgated by the New Zealand Government. Given the importance of torture prevention in international law, the potential impact of a detention policy on the safety of individuals and the need to ensure public confidence in the outcome, the work to finalise the policy would benefit from the input of independent experts. Such experts would have legal or other knowledge and practical experience in preventing torture in a range of settings, including human rights, law enforcement and military settings. New Zealanders are also entitled to know what New Zealand's proposed policy is and to comment on it, a requirement we believe to be imperative.<sup>42</sup>
- [68] Crown Agencies accepted that the allegations that Miraj had been tortured were sufficiently credible to warrant further enquiry. They said that it appeared that the personnel involved in analysing the allegations did not appreciate that New Zealand's obligations to take further steps were triggered even where the allegations had not been established conclusively. The Solicitor-General's advice in his opinion of November 2010 as to what New Zealand needed to do in these circumstances had not been operationalised. In terms of both law and principle, there should be policies and procedures in place to deal with circumstances such as this promptly and effectively. The policies and procedures, as well as the underlying values, principles and rules, should be addressed in training programmes and employee policies in a way that ensures they are followed.

<sup>40</sup> HM Government *The Principles relating to the detention and interviewing of detainees overseas and the passing and receipt of intelligence relating to detainees* (July 2019).

<sup>41</sup> At [17].

<sup>42</sup> We understand that the Ministry of Foreign Affairs and Trade has been working on a policy in relation to complicity.

These should be reviewed regularly to ensure that they remain effective.

## The role of resources

- [69] One of the matters that has arisen during the Inquiry is the question of resources. New Zealand deployed a relatively small number of NZSAS personnel to Afghanistan in 2009 (around 70) and they conducted many operations. As we noted in our brief outline of the development of New Zealand's detention policy in Afghanistan in chapters 10<sup>43</sup> and 11<sup>44</sup>, the issue of resources was raised both before and after the deployment in the context of discussions about detention policy, particularly in relation to those detained on partnered operations. As we discussed in chapter 11, in evidence or submissions, Dr Mapp, NZDF and Crown Agencies raised the issue of lack of resources in this context,<sup>45</sup> and it was also raised in the context of NZDF's ability to conduct investigations into allegations of civilian casualties. The point was that the limited resources available to New Zealand personnel in Afghanistan impacted NZDF's ability to do such things as inspecting detention facilities, monitoring detainees or conducting investigations into allegations of civilian casualties.
- [70] In both contexts, we were disappointed to see the prominence that lack of resources assumed. We accept, of course, that resources are always limited and are an important element of any policy discussion about deployments. We also accept that the commitment of resources may differ where New Zealand is under legal obligations than where the obligations are moral in nature, although in cases of doubt, a precautionary approach should be taken. But, overall, we were left with the strong impression, on the basis of the contemporaneous documentation and the evidence and submissions that we heard, that the issue of resources was a weighty consideration in choices that were made—in our view, too weighty a consideration.
- [71] On future overseas deployments of the type undertaken by the NZSAS in Afghanistan, it will be important to ensure that NZDF has, or has access to, sufficient human and other resources to enable it to meet its responsibilities properly, whether they relate to investigatory obligations or obligations in relation to the treatment in detention of those in whose detention NZDF personnel have been involved. As we described in earlier chapters, New Zealand has a range of obligations under international law and there are significant risks to New Zealand if it fails to meet them, as well as the risk that exists for detainees who are transferred to the jurisdiction of another state. This has resource implications that must be confronted. Lack of resources cannot justify inadequate processes or shortcuts. That devalues the norms at issue. If it is the case that New Zealand does not have the necessary resources and cannot make arrangements to access adequate resources, it should not become involved.
- [72] In our view, it should be possible for NZDF to meet its obligations without the commitment of significant additional resources. We note that Cabinet had imposed a cap on troop numbers in relation to the deployment to Afghanistan, and the number was reduced at the time of the Rugby World Cup in New Zealand in 2011. While the cap was likely imposed as a reasonable government control measure to limit the cost of the deployment, it may also have inadvertently contributed to a less than optimal performance by NZDF in some respects. Obviously, that is something which should be taken into account in relation to future deployments of this type.

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<sup>43</sup> Chapter 10 at [97].

<sup>44</sup> Chapter 11 at [53], [69]–[70] and [70].

<sup>45</sup> Chapter 11 at [77] and footnotes [94]–[96].

## RECOMMENDATION 4

We recommend:

- (a) The Government should develop and promulgate effective detention policies and procedures (including for reporting to ministers) in relation to:
  - (i) persons detained by New Zealand forces in operations they conduct overseas;
  - (ii) persons detained in overseas operations in which New Zealand forces are involved together with the forces of another country; and
  - (iii) the treatment of allegations that detainees in either of the first two categories have been tortured or mistreated in detention (including allegations that New Zealand personnel may have mistreated detainees).
- (b) The draft policies and procedures referred to should be made public, with an opportunity for public comment.
- (c) Training programmes should be developed to ensure that military, intelligence, diplomatic and other personnel understand the policies and the procedures and their responsibilities under them.
- (d) Once finalised, the detention policies and procedures should be reviewed periodically to ensure they remain effective.

## Some observations

[73] In addition to these recommendations, we make four observations.

### Culture and transparency

[74] When NZDF personnel commit to their oath or affirmation on enlistment, they enter into a unique arrangement involving what has been termed “unlimited liability.”<sup>46</sup> They can use lethal force in service but run the risk of surrendering their own lives. Each person undertakes in the final analysis to kill or be killed for a purpose in which they may have no direct personal interest. It is this feature that gives the military its distinct culture and sets it apart from nearly all other agencies of the State.

[75] During our examination of the operations at issue, we have seen evidence of what we regard as failings of culture at the upper echelons of NZDF—confirmation bias, lack of objectivity and rigour in scrutinising “facts”, unnecessary defensiveness coupled with an unwillingness to acknowledge error, failure to follow up inconvenient information, and non-compliance with the disciplines and obligations inherent in the principles of ministerial control of the military and

<sup>46</sup> John Hackett *The Profession of Arms* (The Times Publishing Co, London, 1962) at 63.

ministerial responsibility to Parliament. While our perspective is a relatively narrow one, so that we cannot say with confidence that these failings are characteristic, we suspect that they go beyond what we have seen.

- [76] We note that in 2010, the Controller and Auditor-General conducted an inquiry into NZDF payments to officers seconded to the United Nations. In her report, the Auditor-General identified three features of NZDF's organisational structure:<sup>47</sup>
- (a) a "silo" mentality, where people saw strong boundaries between organisational units and did not see any need to draw attention to mistakes being made by others;
  - (b) military hierarchy and the operation of command lines within the organisation, which meant that some people saw themselves as unable to raise concerns about decisions made by more senior officers; and
  - (c) inadequate recognition of when an issue may touch on fundamental public sector values of integrity and the rule of law.
- [77] We saw similar shortcomings. It may be that NZDF has taken steps which go some way to rectifying them, but we are unable to assess that. However, given what we have seen, we are not confident that any steps that have been taken will be sufficient. While organisational and other changes may help, what is required is a fundamental change in culture. Our recommendation for an Independent Inspector-General of Defence may assist in that regard.
- [78] We also consider that NZDF's culture would benefit if NZDF embraced greater openness and transparency as an operating principle, thereby building greater public trust and confidence. The 2002 Hunn Review noted that NZDF needed to move from an information-denial culture to an information-sharing culture.<sup>48</sup> Internally, this would require rebalancing towards security rather than secrecy. Security is a positive attribute and entails classifying and protecting information while ensuring appropriate distribution and awareness. Secrecy, on the other hand, has a more negative connotation of denial of information, including to NZDF's own people, some of whom may need the information.
- [79] Based on our admittedly constrained look into NZDF's performance, we query whether NZDF has been prepared to share sufficient information with the public in a timely way. Dr Mapp told the Inquiry that he favoured a move to greater openness.<sup>49</sup> The argument that secrecy is required to preserve security, both operational and national, is sound in many circumstances. But it must be balanced against the values of transparency in a democratic country and what is a "reasonable" approach to the public's right to know in the military sphere. A closed approach can be taken too far, as the Inquiry suspects has been the case with the activities of the NZSAS.
- [80] On occasion, the NZSAS are called upon to carry out dangerous operations in hostile conflict areas. Being too open about their activities may place them in danger. Much of what they do depends on the element of surprise, and the conditions in which they operate are challenging, with the constant prospect of casualties.

<sup>47</sup> Auditor-General *Inquiry into New Zealand Defence Force payments to officers seconded to the United Nations* (July 2010) at [8.48]–[8.49].

<sup>48</sup> Hunn, above n 9, at 33.

<sup>49</sup> Evidence of Hon Dr Wayne Mapp, above n 33, at 1108–1109.

- [81] Despite the need for some security constraints, however, it seems possible that a policy of greater openness with regard to information about NZDF's activities could be adopted, including as to the activities of the NZSAS.<sup>50</sup> The special tactics, techniques and procedures that provide the NZSAS with an operational edge must be protected. Yet when they are deployed in New Zealand's name because of policy choices made by the Government, there must be some transparency concerning their actions. The NZSAS are the forces of New Zealand. What they do engages New Zealand's cultural, legal and reputational interests and will be relevant to all New Zealanders. The tasks they perform must accord with New Zealand public opinion as to what is appropriate for our forces operating abroad. It is relevant in this context to note that both intelligence agencies, the GCSB and the NZSIS, have engaged publicly to a greater extent than previously.
- [82] We encountered an instructive example of the value of openness in an event into which we enquired, namely the death of Abdullah Kalta discussed in chapter 7. It was an event that attracted some media attention. The Chief of Defence Force, Lieutenant General Rhys Jones, was interviewed on *Morning Report* on *Radio New Zealand* on 27 November 2012.<sup>51</sup> He was asked some detailed questions on the nature of the operation, including the nature of the intelligence that led to it and other details. He was able to answer the questions without compromising national security. As far as we can see, the appearance satisfied the public interest in that operation at the time.

## The Protective Security Requirements

- [83] As we said in chapter 1, the work of the Inquiry was complicated by the fact that most of the documentary and other material provided to us has been classified. While we have been able to release a reasonable amount of classified material to the public through the review process we established, most of the material we have seen remains classified.
- [84] Each of us has, in our past professional lives, been involved in the public sector, including in relation to classified material. Indeed, one of us has held the positions of Prime Minister, Deputy Prime Minister, Minister of Justice and Attorney-General. Each of us has been astonished at how the classification system has grown since the time of our work in the public sector. One measure of this is the proliferation of facilities to handle classified material.
- [85] Extensive classification of information in the public sector is costly in financial terms, given its surrounding apparatus of facilities, clearance processes and the like. More importantly though, it has the potential to cut across—and significantly undermine—the freedom of information regime that New Zealand adopted in 1982 in the Official Information Act. When the Inspector-General of Intelligence and Security reviewed the New Zealand Security Classification System in 2018,<sup>52</sup> she made the point that classification systems have an “inherent bias towards over-classification”, noting that “security bureaucracies give officials powerful reasons to over-classify and little or no reason to avoid or challenge over-classification.” She described several harmful effects of this, notably that “[p]ublic access to official information, including the historical record, is excessively restricted.”<sup>53</sup> Our experience on this Inquiry is consistent with the Inspector-General's views.

50 We should make it clear that we are referring to genuine transparency, not a series of public relations exercises.

51 Morning Report “Defence Force speaks out about Abdullah Kalta death” *Radio New Zealand* (27 November 2012) <[www.rnz.co.nz](http://www.rnz.co.nz)>.

52 Inspector-General of Intelligence and Security *A review of the New Zealand Security Classification System* (August 2018).

53 At [106]–[107].



- [86] When the Protective Security Requirements were introduced in 2001, it was emphasised that there had to be a proper basis for classification and that classifications should, in general, be time-limited, in the sense that the need for material to remain classified should be kept under review.<sup>54</sup> That approach continues to apply. The updated Protective Security Requirements require that, when first applying a protective marking to information (that is, classifying it), agencies should limit the duration of the protective marking and set up review procedures in order to keep the volume of protectively marked information to minimum.<sup>55</sup> The Protective Security Requirements also note that archiving protectively-marked information can create high administrative and financial costs.
- [87] In her review, the Inspector-General of Intelligence and Security said that the systematic declassification programmes of agencies were “modest, meagre or non-existent”<sup>56</sup> and recommended a new topic-based approach supervised by a multi-agency group of officials.<sup>57</sup> For our part, we have seen no evidence of systematic classification review programmes within NZDF.
- [88] Another feature of the Protective Security Requirements that we noted in chapter 1 relates to information sourced from overseas partners. As we said, government agencies refused to provide information of that type which they held to the Inquiry without the consent of the relevant overseas partner. We think that approach is wrong in principle. The information was provided to the New Zealand government for its use. We are a government inquiry with power to make recommendations to our appointing minister. We accepted at an early stage that we would handle classified information (including confidential information sourced from overseas partners) in accordance with the Protective Security Requirements. To that extent, the Inquiry was in no different a position than a government agency.
- [89] The Inquiry does, of course, have the same powers as a court under s 70 of the Evidence Act 2006 to order disclosure of classified information, including overseas partner-sourced material.<sup>58</sup> The tests are the same as those applied under the Official Information Act 1982. Overseas partner information is at no greater risk of being made public when held by an inquiry than it is when a government agency holds the information, given the Official Information Act and to the courts’ power to order disclosure should the information be relevant to some issue in legal proceedings. Such information is, after all, held subject to New Zealand law. Obviously, such information would not be disclosed publicly without first having a hearing so that the relevant issues can be thoroughly examined.
- [90] The consequence of the Crown’s approach was that, in some instances, we waited almost six months before the relevant overseas partner granted its consent. From the Inquiry’s perspective, this time lag was excessive and caused significant difficulties. It cannot be right that a New Zealand inquiry process should be held up by delays of this sort. If an overseas partner were to refuse to grant consent, the position would be even worse: a government agency would hold relevant information which it would presumably refuse to disclose to the Inquiry. This could result in a contested s 70 hearing, with all the difficulties that entails. If New Zealand intends to maintain its current approach to information sourced from overseas partners, that should be taken into account before New Zealand agrees to participate in international coalitions such as that in Afghanistan.

54 Department of the Prime Minister and Cabinet “Security in the Government Sector” (2002).

55 “Guidelines for protective markings” (5 August 2019) Protective Security Requirements <[www.protectivesecurity.govt.nz](http://www.protectivesecurity.govt.nz)>.

56 Inspector-General of Intelligence and Security *A review of the New Zealand Security Classification System*, above n 52, at [252]

57 At [249].

58 Inquiries Act 2013, ss 15 and 22.

This is because the approach inhibits New Zealand's ability to examine matters in which its own personnel have been closely involved and in respect of which it may incur international obligations.

- [91] In summary, the Protective Security Requirements have greatly complicated our work and mean that the Inquiry has taken longer and been more expensive than it needed to be. We are concerned that a public Inquiry looking into the conduct of New Zealand forces operating within a coalition overseas should face the constraints that we have faced in first, obtaining and second, being able to use information because it remains classified, in circumstances where the particular information does not appear to require protection because it reveals nothing other than what happened a decade ago.
- [92] As we acknowledged in Minute No 4 and Ruling No 1, we accept that there are legitimate security interests to be protected in an inquiry such as this, including information about sources and methods of gathering information, operational methods and tactics, and other matters of that sort. But factual information about what happened on an operation that occurred in 2010 as part of a coalition that no longer exists seems to us to be, in general, of a different order.

## **The role of military lawyers**

- [93] The Inquiry heard many submissions and much evidence from military lawyers in the course of the Inquiry, both in the public hearings and in private. Access to timely and accurate legal advice that takes account of the facts on the ground is essential for those conducting military operations abroad, given the demanding requirements of International Humanitarian Law / the Law of Armed Conflict. The Chief of Defence Force recognised this in 2009 when he accepted that an NZDF lawyer should be deployed with the NZSAS to Afghanistan.
- [94] The legal issues arising from International Humanitarian Law / the Law of Armed Conflict, as well as International Human Rights Law which continues to operate in these settings, can be complex. Soldiers must understand the law sufficiently to be able to act in accordance with it, often in circumstances of confusion and uncertainty. NZDF's manual on the Law of Armed Conflict is an impressive document. We were struck by how thoughtful and careful NZDF's lawyers were in the advice and training they provide to soldiers, both as part of their training and in theatre.
- [95] We had the impression, however, that legal advisers in-theatre are not always kept fully in the information loop by commanders. Military command structures seem to work on a "need to know" basis. The consequence is that legal staff may not be told of information that would be important from a legal perspective. This in turn affects the ability of legal advisers to brief their senior officers in New Zealand, who will be responsible for briefing ministers on complex and sensitive legal matters. We saw examples of this in relation to the aftermath of Operation Burnham and in relation to detention and the aftermath of Operation Yamaha.
- [96] We acknowledge the steps that NZDF has taken for some years now to, for example, enhance its legal capacity, develop and publish legal manuals and training materials, conduct training modules for troops on the Law of Armed Conflict, and include lawyers on deployments. They are commendable. However, where legal officers are taken on deployments (which is, we think, of great value), care must be taken to keep them fully engaged by sharing all information that might be relevant to potential legal issues. The approach should be to err on the side of caution by giving more information, not less. There is little point in having competent legal advice available in-theatre if it is not fully or properly used, especially as part of the lawyer's role is to ensure New Zealand forces comply fully with their international legal obligations.

## The role of the Vice Chief of Defence Force

- [97] In 2014 and 2017, when issues arose in relation to allegations of civilian casualties on Operation Burnham, the Chief of Defence Force was overseas and the Vice Chief of Defence Force was performing his duties. On each occasion NZDF adopted a “holding position” until the return of the Chief of Defence Force, by (in effect) simply reiterating the last public statement issued by NZDF on the topic. On each occasion, the public statement relied on was NZDF’s erroneous public statement of 20 April 2011 that allegations of civilian casualties on Operation Burnham were “unfounded”.
- [98] NZDF advised that on both occasions, the Chief of Defence Force, Lt Gen Keating, provided letters to Vice Chief of Defence Force, Air Vice Marshal Short, temporarily delegating authority to him. These letters set out the dates when authority was delegated, and what tasks Vice Chief of Defence Force, as acting Chief of Defence Force, was authorised to undertake. However, it is unclear to us to what extent the delegation of authority involved a hand over of awareness and knowledge of particular events and ongoing issues. In a governance and accountability sense, it is important that the person to whom the delegation is made is in a position to assume control of any matters that may arise. The Chief of Defence Force is the principal military adviser to the Government and, in the event of a domestic security incident requiring NZDF’s involvement, would be pivotal. In the absence of the Chief of Defence Force, this and other key decisions fall to the Vice Chief of Defence Force, an appointment not referenced in the Defence Act. By definition a “Vice” should be prepared to assume the duties of the “Chief” at any time. To do so, the Vice Chief of Defence Force must be as informed on NZDF issues as the principal. Oral evidence presented to the Inquiry suggests this may not have been the case during key events in 2010–2017 relating to Operation Burnham.

## A concluding perspective

- [99] *Hit & Run* is a collaboration between two investigative journalists, of whom one, Mr Jon Stephenson, provided most of the sources and the other, Mr Nicky Hager, did most of the writing. The authors relied on a variety of sources from both New Zealand and Afghanistan. Although the authors succeeded in uncovering a considerable amount of factual material, they inevitably fell into error, especially in relation to the operation at the heart of the book: Operation Burnham. This is not surprising as the authors had to place heavy reliance on leaks and did not have access to the extensive intelligence, planning and operational material relating to the operation.
- [100] The book does not attempt to present a dispassionate account of what happened on Operation Burnham or the other operations it discusses. It makes serious allegations about the conduct of NZSAS personnel, claiming that they were out to seek revenge on the operations and deliberately and without justification destroyed houses in the villages of Khak Khuday Dad and Naik. In this way, the book impugns the integrity and professionalism of the NZSAS personnel involved. The book also impugns their capability and skills, alleging that the intelligence on which NZSAS personnel relied was wrong and there were no insurgents in the villages at the time of Operation Burnham. It claims that those killed or injured were innocent civilians.
- [101] The book is as much polemic as investigative account and contains many errors besides the obvious ones relating to location. Some of these could have been avoided if common research techniques had been followed, for example, taking metadata from photographs.

- [102] Despite this, in important respects the book was right. We think it likely that a child was killed on Operation Burnham; some civilians did suffer injuries; an NZSAS trooper did punch Qari Miraj; the evidence indicates that Miraj was tortured while in NDS detention; New Zealand did, in our view, breach its *non-refoulement* and related preventative obligations to him; New Zealand agencies were advised that Miraj had been tortured by the NDS when detained but did not advise ministers or take any other action; NZDF did give erroneous information to ministers and the public about the allegations of civilian casualties on Operation Burnham over a number of years.
- [103] Given this, and given that we have made recommendations that, if adopted, should assist in preventing or minimising failures of this type in the future, we think it right to acknowledge that the book has performed a valuable public service. We think Mr Stephenson made an important point when he submitted:

A healthy democracy and free society depend on more than Parliament and the judiciary. The authors of *Hit and Run* and their sources, as well as the Inquiry, have played a vital role in holding the defence force to account regarding Operation Burnham. Our job, like yours, is to monitor power. The Fourth Estate, like Parliament and the judiciary, is an integral part of democracy, serving society by holding powerful people and organisations accountable. The point I would like to make here is this: the conduct of the defence force relating to Operation Burnham has not only undermined Parliament, it has undermined the Fourth Estate.

- [104] We said when we began this Inquiry that we were determined to get at the truth. In some respects, we are confident that we have been able to do so; in other respects, we are not so confident that we have the full picture. We are, however, confident that the report has taken matters as far as they could be taken given the available evidence. Most importantly, we are confident that the recommendations we have made will, if implemented properly, assist in preventing or reducing failures of the type we have seen.
- [105] Ultimately, how useful the report is will be for others to judge. For our part, if our recommendations are accepted and implemented without undue delay, we will feel it has all been worth it.
- [106] To conclude, the evidence given by NZDF to the Inquiry shows that it is not necessarily an incident in conflict that defines the character of an organisation. Rather, it is how that organisation characterises and manages the incident subsequently that reveals its character and will either instil or undermine public trust in the organisation. The friction, uncertainty and complexity of armed conflict mean that some contentious incidents will inevitably occur—the “fog of war” results in mistakes. It is how our military personnel choose to respond to situations where it is alleged that things have gone wrong that is defining. In relation to Operation Burnham, it is indisputable that NZDF’s response was woeful. In Operation Yamaha, a person was transferred to NDS custody despite a real risk of torture, and NZDF and other New Zealand agencies did not respond as they should have when they learnt of the possibility that he had been tortured. How NZDF addresses its failings and goes forward will reveal its true character and the strength of its purpose.