



# A cover-up? An account of what happened

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# Chapter 8

[1] In this and the following chapter we address the allegations made in *Hit & Run* that the New Zealand Defence Force (NZDF) “covered up” what happened on Operation Burnham, particularly in respect of the possibility that there were civilian casualties.<sup>1</sup> These allegations are reflected in the Inquiry’s Terms of Reference. Clause 6 directs the Inquiry to (among other things):

- 6.2. Examine the treatment by NZDF of reports of civilian casualties following Operation Burnham.

Clause 7 requires the Inquiry to inquire into and report on (among other things):

- 7.5. The extent of NZDF’s knowledge of civilian casualties during and after Operation Burnham, and the content of written NZDF briefings to Ministers on this topic.
- 7.6. Public statements prepared and/or made by NZDF in relation to civilian casualties in connection with Operation Burnham.

[2] We will address these issues by first giving an account in this chapter of what happened, by reference to four critical periods:

- (a) The period from immediately after the operation (that is, 23 August 2010) through to the end of December 2010.
- (b) April–December 2011, after a Television New Zealand news story about Operation Burnham.
- (c) June–July 2014, when the Māori Television programme *Native Affairs* ran a report by Mr Jon Stephenson titled *Collateral Damage* which dealt with Operation Burnham.
- (d) The period after the release of *Hit & Run* (21 March 2017) until the establishment of the Inquiry on 12 April 2018.

For ease of reference, there is a timeline at the conclusion of the chapter. In chapter 9, we set out our assessment of what happened.

[3] Before we begin, we note that the International Security Assistance Force (ISAF) had a Standard Operating Procedure (SOP) for handling allegations of civilian casualties. It provided for the setting up of an Incident Assessment Team to conduct a preliminary investigation of such allegations. Following its preliminary investigation, the team would recommend whether or not there should be a further, more formal investigation.<sup>2</sup> As ISAF made clear, its investigative process did not replace national investigations where circumstances warranted them.

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<sup>1</sup> Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017), chapters 7 and 8. Although Mr Hager disputed this, we read the book as alleging a conspiracy by senior NZDF personnel that extended to the upper echelons of government to hide the truth about civilian casualties on Operation Burnham: see *Hit & Run*, for example at 6, 100, 105, 108, 110, 120, and 121.

<sup>2</sup> Evidence of Colonel Rian McKinstry, Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 206–207.

- [4] As will become apparent, an Incident Assessment Team was set up when the allegations of civilian casualties emerged in relation to Operation Burnham. It produced a three-page report, referred to in its title as an “executive summary”.<sup>3</sup> We will generally refer to it as the Incident Assessment Team Executive Summary or the executive summary, although readers should bear in mind that NZDF witnesses and documents refer to it as the “IAT report”.

## Period 1: 23 August – 31 December 2010

- [5] By way of background, the Senior National Officer for Task Force 81 (TF81) when Operation Burnham occurred on 22 August 2010 was Rian McKinstry, then a Lieutenant Colonel (now Colonel McKinstry). His deployment ended at midnight on 6 September 2010, when Chris Parsons, also then a Lieutenant Colonel (now Brigadier Parsons), took over as Senior National Officer. Lt Col Parsons arrived in Afghanistan on 1 September 2010 to begin the hand-over process. For ease of reference, we will refer to these and other NZDF personnel by the ranks they held at the time of the relevant events, except when referring to their evidence in public hearings, when we will refer to them by their current rank or title.
- [6] Colonel McKinstry gave evidence at the Inquiry’s public hearing in September 2019. He said that he was in the Operations Room at TF81’s base camp in Kabul during Operation Burnham and watched a live video feed from a drone stationed above the villages throughout the operation. Colonel McKinstry said that once the TF81 personnel arrived back at their base camp, they separated into their operational groups to conduct a “hotwash” or debriefing. Following that, the commanders of the groups came together for a fuller debrief, in which he participated. He said that civilian casualties were not discussed then as none of the ground forces were aware of the possibility of such casualties.
- [7] This is reflected in the Operation Summary compiled by the Operations Officer in the Operations Room.<sup>4</sup> Relevantly, the Operation Summary contained the following entries:
- (a) Beside the heading “CIVILIANS INVOLVED” is the entry “ALL CIVILIANS WERE PROTECTED THROUGHOUT.”
  - (b) Beside the heading “REMARKS” are the entries “NO CIVCAS” (that is, no civilian casualties) and “ALL WOMEN AND CHILDREN WERE PROTECTED THROUGHOUT”.

This position is also reflected in a media release issued by ISAF following the operation on 23 August 2010.<sup>5</sup> The release stated that 12 insurgents were killed and weapons were seized and concluded by saying that no civilians were injured or killed in the operation. It did not identify the participating forces, presumably for security reasons.

- [8] There were further developments on 22 and 23 August 2010. First, it appears that Lt Col Parsons briefed the Prime Minister on the outcome of the operation, at the request of the Chief of Defence

<sup>3</sup> ISAF *Incident Assessment Team Executive Summary, 26 August 2010: CIVCAS Allegation during TF-81 Level II Deliberate Detention Op in Tigiran Village, Talawe Berfak District, Baghlan Province, RC North* (26 August 2010). This document is classified, apart from one paragraph that we have received permission to quote.

<sup>4</sup> OP-RAHBARI-OBJ-BURNHAM-OPSUM (22 August 2010) (Inquiry doc 02/14) at 2–3.

<sup>5</sup> ISAF “Numerous insurgents killed and weapons recovered” (23 August 2010) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 10.

Force.<sup>6</sup> Lt Col McKinstry subsequently spoke by telephone to the Military Secretary to the Minister of Defence, Group Captain Edward Poot.<sup>7</sup> Lt Col Parsons forwarded a copy of ISAF's draft 23 August media release<sup>8</sup> to Gp Capt Poot.<sup>9</sup>

- [9] Second, Lt Col McKinstry sent an email to the Director of Special Operations, Colonel (later Major General) Peter Kelly, who was based at NZDF Headquarters in Wellington, saying that insurgents had reported that 20 civilians had been killed in the operation and 20 houses had been burnt.<sup>10</sup> The email also noted that intelligence reporting and review of the drone footage would help clarify the position. Lt Col McKinstry attached an update on the operation, which indicated that early intelligence reporting was that a number of insurgents and a small number of civilians (most likely family members) had been killed or injured.<sup>11</sup> The reporting noted that the two objectives (targets) of the operation, Maulawi Neimatullah and Abdullah Kalta, were not accounted for (they were described as "missing").
- [10] Third, *The New York Times* ran a short article about possible civilian casualties on Operation Burnham.<sup>12</sup> It reported allegations of eight civilians killed, 12 injured and nine taken prisoner. The Ministry of Foreign Affairs and Trade sent a copy of the article to Colonel Kelly, who forwarded it to Lt Col McKinstry and Lt Col Parsons (among others).<sup>13</sup> A further article in *The New York Times* on 25 August noted ISAF's Incident Assessment Team's investigation.<sup>14</sup> This article was also circulated to NZDF personnel.<sup>15</sup> It seems that the Minister of Defence, Hon Dr Wayne Mapp, was aware of these articles and concerned about their potential wide distribution.<sup>16</sup>
- [11] On 24 August 2010, Lt Col McKinstry received a second update on the operation.<sup>17</sup> That update recorded the possibility of civilian casualties but noted that the reporting came from uncorroborated human sources. On 25 August Lt Col McKinstry forwarded this update to Colonel Kelly.<sup>18</sup> In his covering email, he referred to the preliminary investigation being carried out by ISAF's Incident Assessment Team, and to the involvement of various TF81 personnel in that process. His email ended as follows:<sup>19</sup>

6 Email from Lt Col Parsons to Gp Capt Poot "Re: Brief to PM" (22 August 2010, 19.18) (Inquiry doc 13/02).

7 Email from Gp Capt Poot to Lt Col Parsons "Brief to PM" (23 August 2010, 07.08) (Inquiry doc 13/02).

8 The draft media release does not include the final sentence that appears in the 23 August 2010 media release, ie "No civilians were injured or killed during the operation".

9 Email from Lt Col Parsons to Gp Capt Poot and Col Kelly "ISAF News Release" (22 August 2010, 20.59) (Inquiry doc 13/03).

10 Email from Lt Col McKinstry to Col Kelly (SWAN – HQNZDF.DSO) "External Release OBJ Burnham Update" (23 August 2010, 10.20pm) (Inquiry doc 08/03).

11 Update Obj Burnham Op 21 Aug 10 (23 August 2010) (Inquiry doc 02/05).

12 "Afghans say NATO troops killed 8 civilians in raid" *The New York Times* (online ed, 23 August 2010) <www.nytimes.com>.

13 Email from [redacted] MFAT to Col Kelly "[No subject]" (24 August 2010, 4.30pm) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 14, 16 and 26.

14 Dexter Filkins "Raid that killed Afghan civilians prompts inquiry" *The New York Times* (New York, 25 August 2010); Dexter Filkins "New Case of Civilian Deaths Investigated in Afghanistan" *The New York Times* (online ed, 25 August 2010) <www.nytimes.com>.

15 Email from [redacted] to [redacted] and others "FW: Baghlan Raid Inquiry" (26 August 2010, 1.18pm) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 58.

16 Email from Col Kelly to Lt Col McKinstry "RE: External Release Update Obj Burnham Op 21 Aug 10 Update 3" (25 August 2010, 9.22pm) (Inquiry doc 02/11).

17 Email from Intelligence Officer to Lt Col McKinstry "Update Obj Burnham Op 21 Aug 10 Update 2" (24 August 2010, 7.17pm) (Inquiry doc 02/09).

18 Email from Lt Col McKinstry to Col Kelly "External Release Update Obj Burnham Op 21 Aug 10 Update 2" (25 August 2010, 5.33am) (Inquiry doc 02/09).

19 At 1–2.

Bottom line at this stage is that there may or may not have been some CIVCAS. This is to be determined by the investigation team in order to inform command action in the matter. The intelligence coming off the OBJ is still very raw and this investigation is welcomed in order to help to clarify ISAF and TF81 actions. I am confident our actions and tactics on the objective were sound and in accordance with ROE, LOAC and the Comd ISAF Tactical Directive. It will be saddening if there has been unnecessary CIVCAS as a result but the reason for looking into this matter is sound.

- [12] On 25 August 2010, the Chief of Defence Force, Lieutenant General (now Sir) Jerry Mateparae, provided a briefing note to the Minister of Defence saying that allegations of civilian casualties had been made following Operation Burnham, and that ISAF Headquarters had initiated an investigation into the operation.<sup>20</sup> The briefing noted that the investigation was being led by a Brigadier, who had interviewed TF81's Senior National Officer (Lt Col McKinstry) and the Ground Force Commander and reviewed video footage from the AH-64 Apaches and AC-130 Spectre gunship. The briefing then set out the other steps that the Brigadier proposed to undertake.<sup>21</sup> The Chief of Defence Force recommended that the Minister discuss the note with the Minister of Foreign Affairs and the Prime Minister.
- [13] On 26 August 2010, Lt Col McKinstry sent Colonel Kelly the next update in relation to the operation.<sup>22</sup> By this stage, the intelligence reporting was beginning to firm up. The assessment conveyed in this third update was that Neimatullah and Kalta were still alive; that only one civilian might have been injured; and that all others killed or injured were insurgents. The update also noted reports that the insurgents were planning retaliatory attacks against the New Zealand Provincial Reconstruction Team (NZPRT) and Afghan police personnel.
- [14] Colonel McKinstry's oral evidence was that he first became aware of the possibility of rounds from a coalition helicopter impacting a building (and so posing a threat to civilians) when he had the opportunity to view video footage from the Apaches and the AC-130 on 26 August 2010.<sup>23</sup> Later that day, he sent an email to Colonel Kelly and Lt Col Parsons to report on what the video revealed.<sup>24</sup> In the email Lt Col McKinstry said:

All in all for TF81 this is good news. It has to date verified that our actions were correct and in accordance with the threat presented. This will likely be looked at by IJC [ISAF Joint Command] from two fronts. Actions by the ground force, (no problems I can see) and actions by the Airborne force, (poss CIVCAS caused in potential accidental impact of rounds onto house identified in slide 1). There is no indication at this stage on the evidence presented to the [Incident Assessment Team] that there was anything other than the correct application of force to a clear and present [insurgent] threat, and that any CIVCAS caused by the [Air Weapons Team] would be collateral and unintended. This point is still to be verified.

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20 Op Watea HQISAF Civilian Casualty Investigation into Operation Burnham (25 August 2010) (Inquiry doc 09/29).

21 According to the briefing note, the Brigadier planned to travel to Baghlan to speak to the German Commander of Regional Command North and the Governor of Baghlan province and, security permitting, he planned to travel to the Tala wa Barfak region to meet with the local Sub Governor of the district.

22 Email from Lt Col McKinstry (WAATEA.SNO) to Col Kelly (HQNZDF.DSO) "External Release Update Obj Burnham Op 21 Aug 10 Update 3" (26 August 2010, 04.42) (Inquiry doc 02/11).

23 Evidence of Colonel McKinstry, above n 2, at 179.

24 Email from Lt Col McKinstry to Col Kelly and Lt Col Parsons "External Release Update Obj Burnham Op 21 Aug 10 Update 4" (26 August 2010, 11.27pm) (Inquiry doc 02/13) at 2.

I have to say that today has felt for the [Officer Commanding] and I like a large weight has been lifted. We have both been personally feeling the weight of potential CIVCAS by TF81 and now having reviewed the tapes, we are both reassured that TF81 actions throughout the operation were of the highest calibre. This is not to say that a CIVCAS has not occurred however if verified it will be as a result of collateral activities from the AH64 weapon problems rather than incorrect application of force. This called for a quiet Whisky and I can tell you it never tasted so good. I will sleep well tonight.

- [15] We pause in the narrative to comment that the evident relief expressed in this email at the conclusion that TF81 personnel were not directly responsible for civilian deaths is reflected in other contemporaneous material available to us (such as personal diaries). We have no doubt that senior New Zealand Special Air Service (NZSAS) officers in Afghanistan were genuinely concerned when the allegations of civilian deaths emerged and were anxious to learn whether TF81 personnel had been directly implicated in them.
- [16] Returning to the narrative, on 27 August 2010 ISAF's Incident Assessment Team provided ISAF with its "Executive Summary" dated 26 August 2010, which set out the results of its investigation into the allegations of civilian casualties on Operation Burnham.<sup>25</sup> As noted, the Incident Assessment Team was headed by a high-ranking United States officer, Brigadier General Zadalis, and comprised ISAF and Afghan personnel. The members viewed the unedited video tapes from the AC-130 and the edited weapons video tapes from the Apaches. They also interviewed several TF81 personnel, engaged with local government officials about the allegations, and followed up a claim that there were two injured women in hospital. The team concluded that the ground forces' actions had not caused any civilian casualties, but that there was a likelihood of civilian casualties from a gunsight malfunction on one of the helicopters. The malfunction caused rounds to impact two buildings (the cache house and the adjoining building). A group of people came out of the adjoining building immediately after the rounds struck. In the executive summary, the Incident Assessment Team did not, however, recommend any further investigation as it did not consider that any further evidence would be found.
- [17] On 29 August 2010, ISAF issued a media release that indicated its Incident Assessment Team had conducted a "full assessment" of Operation Burnham.<sup>26</sup> It said the team had determined that several rounds from coalition helicopters fell short, missing the intended target and striking two buildings, and that this may have resulted in civilian casualties; that insurgents were using one of the buildings as a base of operations but it was not an intended target; and identified the cause of the short rounds as a gunsight malfunction. Brigadier General Zadalis expressed his regret for any possible civilian loss of life or injury.
- [18] Lt Col McKinstry sent an email back to Colonel Kelly on 30 August 2010,<sup>27</sup> to which he attached the post-operation report for Operation Burnham<sup>28</sup> and the latest summary of the intelligence.<sup>29</sup> In the email, he said that he did not think "we will get much more fidelity on the BDA [Battle Damage Assessment]". Lt Col McKinstry said that the Incident Assessment Team had produced

25 As noted earlier, the ISAF Incident Assessment Team Executive Summary is classified although the Inquiry has permission to quote one paragraph from it. The summary that follows refers to publicly available material.

26 29 August Joint assessment team confirms possibility of civilian casualties in Baghlan (29 August 2010) (Inquiry doc 08/08).

27 Email from Lt Col McKinstry (WAATEA.SNO) to Col Kelly "External Release Issue External to the Sitrep" (30 August 2010, 6.59am) (Inquiry doc 08/07).

28 Summary of Incident (Inquiry doc 02/10).

29 Inquiry doc 02/13, above n 24, from 3.

a report, which found that there was no case for TF81 to answer in relation to civilian casualties and that, if there were any civilian casualties, they were likely the result of a weapon on one of the Apaches not firing true. In addition, he said:<sup>30</sup>

This type of CIVCAS claim is not new and is [an] INS strategy to undermine ISAF operations. RC-N [Regional Command – North] are holding a Shura with District Governor on this tomorrow with IJC [ISAF Joint Command] representation as well to try and get further to the bottom of this.

Lt Col McKinstry also said that he had asked ISAF Joint Command for the completed report and would forward it when it was received.

[19] On 30 August 2010, Brigadier General Zadalis provided ISAF with an addendum<sup>31</sup> to the Incident Assessment Team Executive Summary. Apparently, on further review of the weapons video, another possible occasion was identified where civilian casualties could have occurred. This related to what was described as a “huddled group” with a possible female in it near the engagement area.<sup>32</sup> This group was gathered in close proximity to the wall of a building at a time when the helicopters were firing on a man in the immediate vicinity, who appeared to be moving towards either it or the adjacent building.<sup>33</sup> Brigadier General Zadalis recommended a comprehensive investigation to review the Incident Assessment Team’s findings. The purpose of the investigation was to investigate the facts and circumstances surrounding Operation Burnham in relation to civilian casualties including determining whether the Apache weapons video was intentionally or wrongfully altered or deleted.<sup>34</sup>

[20] Also on 30 August 2010, ISAF issued a further media release.<sup>35</sup> This media release, which was reported in *Pajhwok Afghan News* on 30 August,<sup>36</sup> said that the Commander of ISAF Joint Command had ordered an investigation into the allegations of civilian casualties in Baghlan province during an operation on 22 August. The release said in part:

The investigation was ordered based on information contained in the joint initial assessment team’s report of the operation.

<sup>30</sup> Email from Lt Col McKinstry (WAATEA.SNO) to Col Kelly, Inquiry doc 08/07, above n 27.

<sup>31</sup> The “IAT executive summary addendum memo from [redacted] dated 30 August 2010” is included in the list of exhibits to Headquarters United States Forces—Afghanistan *AR 15-6 Investigation Tigran Village* (30 September 2010) (Inquiry doc: United States Government FOIA release) at 20.

<sup>32</sup> This “huddled group” is referred to in the publicly released AR 15-6 Report Findings and Recommendations and Exhibit 18, Inquiry doc: FOIA release, above n 31, at 6 and 63.

<sup>33</sup> This was part of the same incident described above at paragraph [16].

<sup>34</sup> “Appointment Order” (17 September 2010), in Inquiry doc: FOIA release, above n 31, at 3.

<sup>35</sup> ISAF “Investigation ordered into Baghlan civilian casualty claims” (29 August 2010) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 70. Although this release is dated 29 August, it seems in fact to have been published on 30 August 2010. We will use the latter date to avoid confusion with ISAF’s earlier media release of 29 August. The Inquiry received advice from NATO via the Ministry of Foreign Affairs and Trade on 16 July 2019 that ISAF had no power to order a further investigation, and the investigation which was subsequently carried out was a United States investigation, the findings and conclusions of which were “highly unlikely” to have been brought to the attention of ISAF formally. However, we consider it significant that the media release was issued by ISAF: it stated that the Commander of ISAF Joint Command had ordered a further investigation based on the Incident Assessment Team’s findings; although carried out under United States Army Regulations, the investigator’s report is addressed to the Commander USFOR-A and ISAF (ie, to General Petraeus); and General Petraeus directed that the report’s findings and recommendations be sent to ISAF Joint Command, which was presumably done.

<sup>36</sup> *Pajhwok Afghan News* “ISAF to probe allegations of civilian casualties” (30 August 2010), attached to email from [redacted] DPMC to Defence Intelligence Officer “First take: 1 Sep” (2 September 2010, 8.31am) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 62.



The assessment team determined that several rounds from coalition helicopters fell short, missing the intended target and instead striking two buildings, which may have resulted in civilian casualties. Insurgents were using the building as a base of operations; however, it was not the intended target.

The release concluded by saying that the results of the investigation would be provided on completion.

- [21] It is not clear to the Inquiry exactly when NZDF became aware that ISAF Joint Command had ordered this further investigation in light of the Incident Assessment Team's investigation. NZDF did not provide us a copy of ISAF's 30 August media release. When we asked for a copy, NZDF informed us that it did not hold one.<sup>37</sup> However, NZDF did have a copy of the 30 August media story about the further investigation,<sup>38</sup> and ISAF's two media releases of 29 and 30 August were referred to in an email from Colonel Kelly to Lt Col Parsons dated 24 September 2010.<sup>39</sup>
- [22] On 31 August, Colonel Kelly provided a briefing for the Chief of Defence Force.<sup>40</sup> It recorded that the Incident Assessment Team had produced a report which found that TF81 had no case to answer and if there were any civilian casualties they would have been caused by a misaligned weapon on one of the Apaches.<sup>41</sup> It also noted that the two claimed females in hospital had been found to be fighting age males with probable links to insurgents.<sup>42</sup> The briefing also said that claims of civilian casualties were often made as part of an insurgent strategy to undermine ISAF operations.
- [23] On the same day, after he had seen the ISAF media release of 29 August, Colonel Kelly emailed Lt Col McKinstry noting that the release recorded comments by the leader of the assessment team, Brigadier General Zadalis.<sup>43</sup> Colonel Kelly wrote:

Given that he is speaking publicly, can we now expect a copy of the assessment or at least a copy of the findings so we can report back to the PM, MFA and MINDEF, they are quite [exercised] by this and are very keen to hear the official outcome.

Colonel Kelly followed up by email on 2 September, saying that he was taking a week's leave but if the Incident Assessment Team's report came in, it should be processed and provided to ministers urgently.<sup>44</sup>

<sup>37</sup> NZDF confirmed to the Inquiry in a letter dated 9 July 2019 that it does not appear to hold a copy of ISAF's media release of 30 August 2010, which we find surprising; however, it does hold an email attaching the *Pajhwok Afghan News* article which uses most of the statements in the ISAF release.

<sup>38</sup> "ISAF to probe allegations of civilian casualties", above n 36.

<sup>39</sup> Email from Col Kelly (HQNZDF.DSO) to Lt Col Parsons (WAATEA.SNO) "MINISTERS CONCERN" (24 September 2010, 09.37) (Inquiry doc 13/04). See chapter 9 at footnote 72.

<sup>40</sup> 2010-08-31 CDF Ops Brief (31 August 2010) (Inquiry doc 13/22).

<sup>41</sup> At 8.

<sup>42</sup> Other NZDF briefings state it was the Incident Assessment Team that visited the hospital where the alleged casualties were taken: "Annex A: DOT POINT BRIEF FOR VCDF: TALKING POINTS FOR MEETING WITH PM ON 22 MARCH" (22 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 261; CRU AND NZSAS OPERATIONS IN BAGHLAN PROVINCE AUGUST AND SEPTEMBER 2010 (13 December 2010) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 266.

<sup>43</sup> Email from Col Kelly (HQNZDF.DSO) to Lt Col McKinstry (WAATEA.SNO) and others "CIVCAS REPORTING BY INTERNATIONAL MEDIA" (31 August 2010, 13.05) (Inquiry doc 09/04).

<sup>44</sup> Email from Col Kelly (HQNZDF.DSO) to Lt Col McKinstry (WAATEA.SNO) "RE: External Release: [redacted]" (2 September 2010, 8.17am) (Inquiry doc 09/15).

- [24] The Minister of Defence's office asked NZDF about ISAF's assessment on 31 August 2010.<sup>45</sup> NZDF indicated that the ISAF process was one over which it had little control<sup>46</sup> and said that when it received the official report from theatre, a note for the Minister would be drafted and the Senior National Officer (Lt Col McKinstry) would forward the report to Headquarters NZDF/ Joint Forces New Zealand.<sup>47</sup>
- [25] On 2 September 2010, the Department of the Prime Minister and Cabinet (DPMC) sent a compilation of news reports about casualties in Afghanistan to a Defence Intelligence Officer.<sup>48</sup> That compilation was emailed to Colonel Kelly, who forwarded it to Lt Col McKinstry, Lt Col Parsons and Lieutenant Colonel Karl Cummins (the Deputy Director of Special Operations).<sup>49</sup> The compilation included stories about civilian casualties during the ISAF operation in the Tirgiran Valley. Importantly, the first two stories in the compilation were based on ISAF's media releases of 29 and 30 August 2010 about the operation, the first of these announcing the outcome of the Incident Assessment Team's preliminary investigation (that civilian casualties were possible), and the second announcing that ISAF had ordered a further investigation based on the information obtained by the Incident Assessment Team.
- [26] On 3 September 2010, an internal email was circulated within ISAF Special Forces Operations Headquarters providing "[a]n official update on the CIVCAS allegations against TF81."<sup>50</sup> The update said that the Commander of ISAF Joint Command had been briefed on the findings of the Incident Assessment Team and had confirmed that TF81 had "no case to answer"; however, the air support aspect of the operation was part of an ongoing investigation. The update said that ISAF Special Operations Forces would take no further action. One of the recipients of this email was the TF81 liaison officer attached to ISAF Special Operations Forces Headquarters. The liaison officer forwarded the email to Lt Col McKinstry (among others).<sup>51</sup>
- [27] Lt Col McKinstry then attached the update email to a reporting email of 6 September 2010 to Colonel Kelly.<sup>52</sup> In that email Lt Col McKinstry briefly summarised the update email (TF81 had "no case to answer" but "there may still be some fallout for the aviation elements"), and said that TF81 was looking to get a copy of the Incident Assessment Team's report "when and if it is released". At midnight on 6 September, Lt Col McKinstry handed over command of TF81 to Lt Col Parsons and then left Afghanistan on 7 September 2010.

45 Email from Gp Capt Poot to Col Thompson "Media Article" (31 August 2010, 9.15am) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 72.

46 Email from Col Thompson to Col Hitchings "FW: Media Article" (30 August 2010, 21.19) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 72.

47 Email from Col Kelly to Gp Capt Poot and others "Media Article" (30 August 2010, 21.22) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 77.

48 Email from [redacted] DPMC to Defence Intelligence Officer, above n 36.

49 Email from Defence Intelligence Officer to Col Kelly and [redacted] "FW: First take: 1 Sep" (2 September 2010, 9.20am) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 61; and email from Col Kelly to Lt Col McKinstry and others "FW: First take: 1 Sep" (1 September 2010, 22.14) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 61.

50 Email from ISAF SOF HQ CJ3 DIR IS to ISAF SOF HQ CG COM SOF IS "FW: CIVCAS INVESTIGATION ON TF81" (3 September 2010, 2.29pm) (Inquiry doc 09/14).

51 Email from ISAF SOF HQ CJ3 TF 81 LNO IS to ISAF SOF TF 81 OC IS and Lt Col McKinstry (ISAF SOF TF 81 SNO IS) "FW: CIVCAS INVESTIGATION ON TF81" (3 September 2010, 16.53) (Inquiry doc 09/14).

52 Email from Lt Col McKinstry (WAATEA.SNO) to Col Kelly and others "External Release Issues External to the Sitrep" (6 September 2010, 01.32) (Inquiry doc 09/13).

[28] The Chief of Defence Force and a number of other senior NZDF personnel were briefed on Operation Wātea at NZDF Headquarters in Wellington on 7 September 2010.<sup>53</sup> Operation Burnham was covered during the briefing. The briefing slides record, under the heading “KEY ACTIVITIES/DATES”:

TF81 portion of OP BURNHAM Initial Assessment Team (IAT) report Complete.

Later, the briefing slides said:

- ISAF Initial Assessment Team (IAT) report still in progress.
  - ISAF LEGAD assigned to IAT has advised that COM IJC [ie, Commander ISAF Joint Command] has been briefed by IAT and agrees that TF 81 have ‘no case to answer’.
  - COMISAF [ie, Commander ISAF] has been briefed on progress of report,
  - Investigation into RW CAS [ie, Rotary Wing casualties] is ongoing.

[29] Then, on 8 September 2010, comes a critical development. In an email sent on 7 September at 11.42pm (Afghanistan time) but received on 8 September at 7.12am (New Zealand time), Lt Col Parsons advised Colonel Kelly that he had “sighted the Accident Investigation Team’s (AIT) conclusion into the claims of civ cas in BAGLAN”.<sup>54</sup> On 7 September, he had gone to ISAF Joint Command Headquarters to introduce himself and to seek a copy of the Incident Assessment Team’s report. In his evidence to the Inquiry, Brigadier Parsons said that if someone was with him, it would have been New Zealand’s ISAF Liaison Officer.<sup>55</sup> There was, he said, a lot going on in the ISAF Joint Command operations room.<sup>56</sup> He was introduced to an officer he had not met before and whose name he cannot now remember, although he thought he might have been American<sup>57</sup> and from the ISAF Joint Command legal team.<sup>58</sup>

[30] Lt Col Parsons said that after a brief chat, he asked this officer if he could see the Incident Assessment Team report. The officer said that it had not yet been cleared for release to New Zealand. However, he retrieved a document, pointed to the first paragraph on the final page, and said that it was what Lt Col Parsons wanted to know. Lt Col Parsons read the four-line paragraph over the officer’s shoulder.<sup>59</sup> The paragraph said:<sup>60</sup>

<sup>53</sup> DIRECTORATE SPECIAL OPERATIONS CDF BRIEF OP WATEA (7 September 2010) (Inquiry doc 08/13) at 4 and 7.

<sup>54</sup> Email from Lt Col Parsons (WAATEA.SNO) to Lt Col Cummins (SWAN – HQNZDF.DDSO) and Col Kelly (SWAN – HQNZDF.DSO) “RE: External Release: Info/Updates” (8 September 2010, 7.12am) (Inquiry doc 09/15). We will refer to this email as the 8 September email.

<sup>55</sup> Evidence of Brigadier Chris Parsons, Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 281–282. The Inquiry spoke to the New Zealand ISAF Liaison Officer who had no recollection of whether he attended any such meeting.

<sup>56</sup> At 266.

<sup>57</sup> At 284.

<sup>58</sup> At 266–267.

<sup>59</sup> At 267.

<sup>60</sup> *Incident Assessment Team Executive Summary*, above n 3, at 3. NATO granted permission for the Inquiry to quote this paragraph of the Incident Assessment Team Executive Summary but the remainder of the document remains classified.

An accurate CIVCAS review of Op [Burnham] requires separating [TF81] operations from the AWT [Air Weapons Team] and AC-130 engagements. The ground engagement appears to have been conducted IAW [in accordance with] all ROE, the Tactical Directive, and according to the pre-planned CONOP. The AF reported no CIVCAS and the IAT [Incident Assessment Team] was unable to find any part of their operation where CIVCAS could have occurred.

[31] In his email of 8 September 2010 to Colonel Kelly, Lt Col Parsons wrote:<sup>61</sup>

IJC [ISAF Joint Command] wasn't willing to release the report to us, so I can not fwd a copy. However, **it categorically clears both gnd and air c/s of any allegations**. It states that having reviewed the evidence there is no way that civ cas could have occurred. We already knew we were without fault, but the AWT [Air Weapons Team] have now also been cleared which is good news.

[32] In fact, the Incident Assessment Team Executive Summary did not categorically clear the air assets of any allegations; nor did it say that there was no way that civilian casualties could have occurred. To the contrary, as ISAF's media releases stated, it explicitly acknowledged the possibility of civilian casualties from a misaligned weapon on one of the Apache helicopters.

[33] In his evidence to the Inquiry, Brigadier Parsons explained his misunderstanding of what was said in the paragraph from the Incident Assessment Team report by indicating that he understood the acronym "AF" in the third sentence of the paragraph to mean "Air Force", whereas in fact, as he now realises, it meant "ground assault force".<sup>62</sup> He also said (under cross-examination) that he had realised he might have sent his email too quickly, so he believed that he would have mentioned that he had only seen one paragraph of the report to Colonel Kelly (or perhaps to his deputy, Lt Col Cummins) in one of his regular telephone calls to New Zealand.<sup>63</sup> We discuss this in more detail in chapter 9.<sup>64</sup> For the moment, we simply note that the Chief of Defence Force was briefed on the basis of the information in Lt Col Parsons' email, and he in turn briefed Dr Mapp (orally), presumably also on that basis.<sup>65</sup>

[34] On 14 September 2010, the Chief of Defence Force requested a "before and after" assessment of the insurgent network targeted in Operation Burnham.<sup>66</sup> The following day, Colonel Kelly provided a "dot point" briefing for him on the operation, which said that the operation was successful, with a number of insurgents killed or wounded including the two targets (although the latter could not be corroborated).<sup>67</sup> The "before and after" assessment was provided several days later.<sup>68</sup> The assessment consisted of two Link Charts, which indicated that those killed on the operation were believed to be insurgents.<sup>69</sup>

61 Inquiry doc 09/15, above n 54. Bold in original.

62 Evidence of Brigadier Parsons, above n 55, from 269 and at 303.

63 At 295–296.

64 See chapter 9 at [40]–[43].

65 Evidence of Hon Dr Wayne Mapp, Transcript of Proceedings, Public Hearing Module 4 (18 October 2019) at 1019.

66 Email from HQNZDF.AD1DDIS to Lt Col Parsons (WAATEA.SNO) and others "CDF RFI: OP BURNHAM BDA" (14 September 2010, 3.53am) (Inquiry doc 08/09).

67 DOT POINT BRIEF FOR CDF (15 September 2010) (Inquiry doc 08/14) at 2.

68 Email from WAATEA.S2 to Col Kelly (SWAN – HQNZ.DSO) and others "External release RE: CDF RFI: OP BURNHAM BDA" (17 September 2010, 06.41) (Inquiry doc 08/09).

69 Untitled Link Chart (17 September 2010) (Inquiry doc 08/10).

- [35] On 23 September 2010, in an email responding to an inquiry from the Minister's office, Colonel Kelly attached ISAF's 29 August media release and said:<sup>70</sup>

This was the last I saw from ISAF on this. I am not aware of any other releases since.

It does note that the helicopter gun was slightly off, but we now know that no casualties were caused as a result.

I am not sure how ISAF put the record straight further to what they have said here, where they state that casualties may have occurred, we now [know] none did. No nation has been identified and it is a matter for ISAF and their ongoing [Information Operations]/media plan to manage. Not sure what role we have in influencing that.

- [36] As will by now be plain, there are two relevant errors in this email:

- (a) The first is the statement that ISAF considered that there were no civilian casualties. While ISAF had expressed that view in its first media release of 23 August immediately after the operation, it took a different view in its subsequent media releases of 29 and 30 August, and at no point departed from the view expressed in them. This incorrect information appears to be based on Lt Col Parsons' 8 September email.
- (b) The second is that it does not refer to ISAF's media release of 30 August 2010, which announced the further investigation based on the Incident Assessment Team's findings. Although Colonel Kelly said in evidence before us that he was not aware of any media releases from ISAF after the 29 August 2010 media statement,<sup>71</sup> he did refer to both the 29 and 30 August 2010 media releases in an email of 24 September 2010 to Lt Col Parsons.<sup>72</sup> Further, he had been provided with a copy of the news story dated 30 August 2010 about ISAF's announcement in the compilation of media stories provided to NZDF by DPMC, which both Colonel Kelly and Lt Col Parsons received on 2 September 2010.<sup>73</sup>

- [37] As well as referring to both the 29 and 30 August 2010 media releases, Colonel Kelly's email of 24 September 2010 to Lt Col Parsons referred to Lt Col Parsons' advice that the Incident Assessment Team had cleared all coalition forces, both air and ground, and found no evidence of civilian casualties.<sup>74</sup> He advised that the Minister wanted to know how ISAF would "close this loop" in terms of its process and whether the findings would be reported to the media. Colonel Kelly asked for some words to "reassure the Minister" and suggested a signed letter from ISAF Joint Command would be useful.

- [38] In a 29 September 2010 email, Lt Col Parsons informed Colonel Kelly that the Incident Assessment Team's findings had not yet been released to the media, and might not be released.<sup>75</sup> He said New Zealand had not been linked to the incident and the Minister "should be absolutely satisfied that all NZ actions are completely defensible and undertaken with the highest standards

<sup>70</sup> Email from Col Kelly to Gp Capt Poot "Media article" (23 September 2010, 4.09pm) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 117.

<sup>71</sup> Evidence of Major General (Retired) Peter Kelly, Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 322–325.

<sup>72</sup> Inquiry doc 13/04, above n 39. See chapter 9 at footnote 72.

<sup>73</sup> See paragraph [25].

<sup>74</sup> Inquiry doc 13/04, above n 39.

<sup>75</sup> Email from Lt Col Parsons (WAATEA.SNO) to Col Kelly (SWAN – HQNZDF.DSO) and @CO "RE: VISIT TO BAF DETENTION CENTRE" (29 September 2010, 6.50am) (Inquiry doc 13/26).

of discipline” and in accordance with the rules of engagement. He also noted the Governor had not produced any proof in relation to the civilian casualty allegations against the Air Weapons Team, despite being pressed to do so by the Incident Assessment Team.

- [39] We discuss these aspects further in chapter 9.
- [40] We should mention at this point that the further investigation ordered by ISAF on 30 August 2010 appears to be the investigation carried out by a United States officer at ISAF Joint Command in Afghanistan under United States Army Regulation 15-6 (AR 15-6 investigation). This investigation was instituted by letter dated 17 September 2010<sup>76</sup> and reported in writing on 30 September 2010 (AR 15-6 Report). The report was addressed to “Commander, United States Forces-Afghanistan (USFOR-A) and International Security Assistance Force (ISAF)”, namely General Petraeus, who directed that the report’s findings and recommendations be provided to ISAF.<sup>77</sup> A redacted version of the AR 15-6 Report was made publicly available by United States authorities in June 2019.<sup>78</sup>
- [41] The Investigating Officer conducted interviews with the US Airborne Mission Commander, all the air crews and a video editor; the officer also viewed the edited weapons video from the Apaches and the unedited video from the AC-130 (which covered the full length of the operation).
- [42] In relation to civilian casualties, the AR 15-6 Report concluded:<sup>79</sup>

This investigation concurs with the IAT observation that based on [Weapons Systems Video] evidence it is possible that CIVCAS occurred because at the time of the [Air Weapons Team] engagement, women and children appear to have been present ... However, there is no evidence in the video that confirms there were civilian casualties. The only piece of information that can be confirmed is that rounds impacted the roofs of buildings where it is possible that civilians were located. Based on the evidence that I reviewed, I concur with the [Incident Assessment Team] findings that civilian casualties are possible, but cannot be confirmed.

- [43] The AR 15-6 Report also concluded that the United States air crews had acted consistently with their rules of engagement (ROE) and other relevant directives. It said:<sup>80</sup>

The IAT executive summary stated that all engagements appeared to be in accordance with appropriate ROE and the Tactical Directive ... This investigation concurs with the IAT findings. Although there are areas where things could have been done differently or better, the unit effectively used this mission as a way to make improvements in their processes with regard to weapons maintenance, crew training, and overall understanding of the Tactical Directive. It is also important to understand the stresses placed upon the crew at the time of the mission – night, terrain, poor communications, and a high level of threat to friendly forces all played into the situation.

The last sentence of this extract is noteworthy as it emphasises the difficult circumstances in which Operation Burnham was carried out.

76 “Appointment Order” (17 September 2010), in Inquiry doc: FOIA release, above n 31, at 3.

77 “Action Memo” (19 October 2010), in Inquiry doc: FOIA release, above n 31, at 1.

78 Inquiry doc: FOIA release, above n 31.

79 “Findings and Recommendations” at 8, in Inquiry doc: FOIA release, above n 31, at 13.

80 “Findings and Recommendations” at 6, in Inquiry doc: FOIA release, above n 31, at 11.

- [44] Although NZDF personnel were aware that a further investigation had been ordered, we have seen no evidence that NZDF knew that the AR 15-6 investigation was that further investigation or that it was advised of the investigation's outcome at the time. It appears that NZDF first received a redacted version of the AR 15-6 Report on 17 May 2017.<sup>81</sup>
- [45] Several months later, on 10 December 2010, the Chief of Defence Force provided a briefing note to the Minister of Defence about Operation Burnham and the follow-up operation, Operation Nova, with a recommendation that the note be referred to the Prime Minister and the Minister of Foreign Affairs.<sup>82</sup> Colonel Kelly was directly involved in drafting the note<sup>83</sup> and is named in it as the first contact point within NZDF in relation to it.<sup>84</sup>
- [46] As we noted in chapter 4, this briefing note stated that on the basis of intelligence gathered “... the CRU [Afghan Crisis Response Unit], supported by the NZSAS, developed an operation plan targeting the insurgent leadership which was approved by the Afghan Ministry of Interior (MOI) and Commander ISAF to disrupt the insurgent operations centred on Tigiran village”.<sup>85</sup> The paper went on to describe the intent of “the combined CRU/NZSAS” operation and its outcome. The cover sheet, which repeated the recommendations section of the briefing note, contained the following comment in relation to Operation Burnham:

**Note** that the allegations into civilian casualties and destroyed houses were investigated by a joint assessment team and they concluded that the allegations were baseless and cleared the actions of the Response Task Force and coalition air of all allegations.

- [47] The briefing note explained this in more detail, as follows:<sup>86</sup>

Following the operation Afghan citizens from the Talewa Berfak district alleged that up to twenty (20) civilians had been killed by aerial bombardment and twenty (20) houses destroyed by fire. Based on these allegations and reported in the New York Times, a joint assessment team composed of representatives from the Afghan Ministries of Interior and Defence and ISAF officials conducted a full assessment of the operation. The assessment team visited the provincial and district capitals, the hospital where the alleged casualties were receiving treatment, viewed the gun tapes from the coalition air assets and spoke to the NZSAS personnel. As a result of their investigation, the joint assessment team concluded that the allegations were baseless and categorically cleared the actions of the [Response Task Force] and coalition air of all allegations. The assessment concluded that “having reviewed the evidence there is no way that civilian casualties could have occurred”. The joint assessment team's report has not been released beyond Headquarters ISAF and our knowledge of the findings [is] based on the comments provided by the NZSAS Task Force commander, who was permitted to read the report.

<sup>81</sup> NZDF provided the AR 15-6 Report to the Inquiry along with its covering memorandum, which was dated 17 May 2017.

<sup>82</sup> NZSAS (TF81) OPERATIONS IN BAGHLAN PROVINCE AUGUST AND SEPTEMBER 2010 (10 December 2010) (Inquiry doc 09/12).

<sup>83</sup> Evidence of Maj Gen (Ret) Kelly (17 September 2010), above n 71, at 332 and Evidence of Maj Gen (Ret) Kelly, Transcript of Proceedings, Public Hearing Module 4 (18 September 2019) 341–342.

<sup>84</sup> Colonel Mike Thompson is named as the second contact point: see “320-10 NZSAS Operations in Baghlan Province Aug and Sep 2010” (10 December 2010) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 164.

<sup>85</sup> Inquiry doc 09/12, above n 82, at [4]. Also see chapter 4 at [44](a).

<sup>86</sup> Inquiry doc 09/12, above n 82, at [7].

- [48] On 13 December 2010, the Chief of Defence Force provided a publicly releasable version of the briefing note to the Minister of Defence, for discussion with the Prime Minister.<sup>87</sup> Paragraph 4 of that document was substantially the same as paragraph 7 of the 10 December briefing note, except that the last sentence of the paragraph was not included. The attachments to the briefing note included the compilation of media stories referred to earlier,<sup>88</sup> which reported allegations of civilian casualties following Operation Burnham and ISAF media releases, including that ISAF had ordered a further investigation following the receipt of the Incident Assessment Team Executive Summary. There was also a note outlining the risks that NZDF considered were associated with releasing the document publicly.
- [49] In the event, the Prime Minister and Minister of Defence agreed that the briefing note should not be released publicly.
- [50] As was the case with Colonel Kelly's email of 23 September, the briefing material provided to ministers on 10 and 13 December 2010 was not accurate. It did not indicate that ISAF had ordered a further investigation, as announced in ISAF's 30 August 2010 media release. In addition:
- (a) The summary of the Incident Assessment Team's conclusions in paragraph 7 of the 10 December briefing note (and in paragraph 4 of the 13 December note) is incorrect. The Team did not in fact conclude that the allegations of civilian casualties were baseless, nor did they categorically clear both ground and air forces of all allegations.
  - (b) Following from the previous point, the apparent quote from the Incident Assessment Team Executive Summary in the penultimate sentence of paragraph 7 of the 10 December note (and in the final sentence of paragraph 4 of the 13 December note) is not in fact a quote from that document and is, in any event, substantively inaccurate.
  - (c) The person who saw the executive summary, Lt Col Parsons, was permitted to read only one four-line paragraph from it, not the whole document as the final sentence of paragraph 7 of the 10 December note indicates. One of the drafters of the briefing note, Colonel Kelly, was aware of this.<sup>89</sup>
  - (d) The recommendation quoted at paragraph [45] says that the Incident Assessment Team investigated the allegations of "destroyed houses" as well as those of civilian casualties and concluded that they were baseless. This is incorrect—the Incident Assessment Team was established to investigate civilian casualty allegations and did not investigate the property damage allegations. More relevantly, given that NZDF did not have a copy of the executive summary, Lt Col Parsons' description of the Incident Assessment Team's findings in his 8 September 2010 email to Colonel Kelly addressed civilian casualties, not property damage.

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<sup>87</sup> CRU AND NZSAS OPERATIONS IN BAGHLAN PROVINCE AUGUST AND SEPTEMBER 2010 (13 December 2010) (Inquiry doc 09/21). Dr Mapp said in evidence that the publicly releasable version was prepared at the initiative of the Chief of Defence Force because he was keen to be more open about NZDF operations (Evidence of Hon Dr Mapp, above n 65, at 1099–1100). However, a contemporaneous email makes it clear that it was the Prime Minister who asked the Chief of Defence Force to provide an unclassified version of events (email from Col Kelly to R Adm Steer and others "PM RELEASE" (12 December 2010, 23.54) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 71).

<sup>88</sup> See above at [25].

<sup>89</sup> Evidence of Maj Gen (Ret) Kelly (17 September 2010), above n 71, at 332–333.



- (e) Finally, as we explained in chapter 4,<sup>90</sup> the characterisation of Operation Burnham as a CRU-led operation in which the CRU developed the operational plan, supported by the NZSAS, was misleading.

[51] We return to these matters in chapter 9.

## Period 2: April – December 2011

[52] On Wednesday 20 April 2011, *One News* ran a story on Operation Burnham in its 6pm news broadcast.<sup>91</sup> In an exclusive, *One News* reported that it had been confirmed that NZSAS personnel had conducted an operation aimed at the insurgents believed to have been responsible for the death of Lieutenant Tim O'Donnell. As part of the story, *One News* ran excerpts from a *Q+A* interview by Guyon Espiner with the Minister of Defence, Hon Dr Wayne Mapp, which was to be broadcast four days later.<sup>92</sup> That interview dealt principally with issues arising out of the New Zealand deployment in Afghanistan.

[53] During the interview, Mr Espiner asked whether Dr Mapp could confirm that New Zealanders were involved in an operation aimed at the insurgents responsible for Lieutenant O'Donnell's death. The effect of Dr Mapp's response was to confirm that there was such an operation. This exchange followed:<sup>93</sup>

Q. There's an Associated Press report around that time that contains a claim that a number of civilians were killed during that operation.

A. And that's been investigated and proven to be false.

Q. So no civilians were killed in that? You're satisfied about that? You've seen some reports on it?

A. I am satisfied around that.

Q. Only insurgents were killed in that operation?

A. I am satisfied around that.

[54] Before the story ran on *One News*, several NZDF personnel were contacted for comment but no one was able to comment given the shortness of time.<sup>94</sup> Following the news item, there was an exchange of emails about a draft public statement,<sup>95</sup> which was finalised and released later on the evening of 20 April 2011.<sup>96</sup> NZDF's public statement read in part:

<sup>90</sup> Chapter 4 at [45].

<sup>91</sup> *One News* "SAS' deadly Afghan counter attack revealed" (20 April 2011) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 185.

<sup>92</sup> Guyon Espiner "Q+A's Guyon Espiner interviews Dr Wayne Mapp" (24 April 2011) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) from 190.

<sup>93</sup> "Q+A's Guyon Espiner interviews Dr Wayne Mapp", above n 92, at 193–194.

<sup>94</sup> Email from [redacted] to Cdr Bradshaw and others "SAS kill insurgents" (20 April 2011, 17.57) (Inquiry doc 13/06); email from [redacted] to Cdr Bradshaw and others "Re: SAS kills insurgents" (20 April 2011, 17.59) (Inquiry doc 13/06).

<sup>95</sup> Email from Lt Col Cummins to R Adm Steer and others "Draft Release" (20 April 2011, 20.33 2011) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 180; email from R Adm Steer to Lt Col Cummins and others "Re: Draft Release" (20 April 2011, 08.37) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 180.

<sup>96</sup> NZDF "NZDF operations in Bamyán Province on 22 August 2010" (20 April 2011) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 184.

Nine insurgents (not 12 as reported) were killed in the operation which targeted an insurgent group in the area where Bamyán Province borders neighbouring Baghlan province.

Following the operation allegations of civilian casualties were made. These were investigated by a joint Afghan Ministry of Defence, Ministry of Interior and International Security Assistance Force assessment team, in accordance with ISAF procedures.

The investigation concluded that the allegations of civilian casualties were unfounded.

[55] The story was picked up by several media outlets over the next day or so, but it does not seem to have become a major issue. A journalist who had been writing about the NZDF in Afghanistan on *Pundit* made a number of information requests of Dr Mapp under the Official Information Act 1982 on 12 May 2011. Two of those requests are relevant for present purposes. One was for the information “on which you based your recent statement [in a *Q+A* interview] that claims of civilian deaths during a raid in which NZDF personnel participated had ‘been investigated and proven to be false’.” The second was for the “estimated numbers of persons killed, injured, or detained in operations where NZDF personnel have been operating alongside Afghan national security forces”. Dr Mapp did not respond to these requests until 31 October 2011.<sup>97</sup> We will deal with his responses at paragraphs [73]–[75].

[56] The story also generated a question in the House. On 16 May 2011, Dr Mapp replied to the following question for written answer from Keith Locke MP:<sup>98</sup>

What Afghan civilian casualties, if any, have resulted from New Zealand SAS operational activity in Afghanistan since the unit was re-deployed to Afghanistan in 2009 broken down by figures, or estimates, of both the numbers killed and the numbers wounded?

Dr Mapp’s reply was:

Any persons killed in Afghanistan as a result of NZSAS operational activity have been those persons taking direct part in hostilities, and thereby presenting a direct threat to the lives of NZDF personnel, Coalition forces, Afghan security forces, or Afghan or international citizens.

The effect of this answer was to deny that any civilians were killed during Operation Burnham (or any other operation).

[57] Following this, there were two events that require discussion. First, on the morning of 1 September 2011, Nicky Hager’s book *Other People’s Wars* was released.<sup>99</sup> The following day, the Vice Chief of Defence Force, Rear Admiral Jack Steer, sent an email to all NZDF personnel about the book.<sup>100</sup> Relevantly, it contained the following statement:<sup>101</sup>

The book goes on to make claims about an operation in the Baghlan region in August last year. This matter was fully investigated by the NATO-led International Security Assistance Force (ISAF), followed by an investigation by a joint assessment team comprising both Afghani and ISAF officials. After reviewing the evidence the investigation concluded that

<sup>97</sup> Letter from Hon Dr Wayne Mapp to [redacted] re “OIA Request 091-2011” (31 October 2011) NZDF <www.nzdf.mil.nz>.

<sup>98</sup> Question for Written Answer “3678 (2011). Keith Locke to the Minister of Defence” (16 May 2011) <www.parliament.nz>.

<sup>99</sup> Nicky Hager *Other People’s Wars: New Zealand in Afghanistan, Iraq and the war on terror* (Craig Potton Publishing, Nelson, 2011).

<sup>100</sup> Email from Office of Chief of Defence Force to All NZDF “[No subject]” (2 September 2011, 2.39am) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 91.

<sup>101</sup> Email from Office of Chief of Defence Force to All NZDF, above n 100, at 92.

allegations of civilian casualties were unfounded, and the ground force and coalition air were cleared of all allegations.

- [58] There are two significant errors in this passage. First, it refers to an investigation by ISAF and a subsequent investigation by a joint assessment team comprising Afghan and ISAF officials. While it is correct that two investigations were carried out immediately after Operation Burnham, they were not as described in the passage. The first investigation was conducted by the Incident Assessment Team, an ISAF process. That investigation did involve ISAF and Afghan officials. The second was the AR 15-6 investigation, to which we referred earlier.<sup>102</sup> Although that investigation arose out of the Incident Assessment Team's findings and appears to be the investigation referred to in the ISAF media release of 30 August 2010, it seems later to have been treated as an internal United States Forces' investigation. In any event, it seems clear from the passage that NZDF had a mistaken understanding of exactly what investigations had been carried out into Operation Burnham.
- [59] The other error in the passage is the assertion that "the investigation concluded that allegations of civilian casualties were unfounded, and the ground force and coalition air were cleared of all allegations". No investigation had in fact reached that conclusion. As we noted above,<sup>103</sup> the further investigation ordered by ISAF (the AR 15-6 investigation) explicitly endorsed the Incident Assessment Team's conclusion that civilian casualties may have resulted from errant rounds striking buildings (although NZDF first received the AR 15-6 Report in May 2017). We note that this erroneous description of the outcome of the Incident Assessment Team's investigation was repeated in talking points prepared for the Chief of Army (then Major General Tim Keating) on 8 September 2011 by NZDF's communications team.<sup>104</sup>
- [60] The second event requiring discussion is the arrival of the Incident Assessment Team Executive Summary in the Office of the Chief of Defence Force. We heard evidence from Colonel (Retired) Jim Blackwell at the Inquiry's public hearing on the "cover-up" allegations in October 2019. Colonel Blackwell had become Director of Special Operations on 29 March 2011. He said in evidence that when he realised NZDF did not have a copy of the executive summary, he decided that he should try to obtain one.<sup>105</sup> Col (Ret) Blackwell said that he first asked the Senior National Officer in Kabul for the executive summary in April 2011 and was in constant communication with him, and reinforced to him (and to his successor) that NZDF wanted a copy of the executive summary. He went on to say that he did eventually receive a copy of the executive summary from the Senior National Officer (possibly via the Special Operations Liaison Officer within ISAF), who emailed it to him over a secure email system on 1 September 2011.
- [61] Col (Ret) Blackwell said that he read the executive summary and appreciated that its conclusion on the question of civilian casualties was different to NZDF's understanding of the position. He said he would have saved a copy of the executive summary electronically and filed it in the appropriate directory. Col (Ret) Blackwell went on to say that, having realised its significance, he printed a copy of the executive summary and took it to the Office of the Chief of Defence Force, where he gave it to the Deputy Chief of Staff, Colonel Thompson, who was responsible for coordination

<sup>102</sup> See paragraphs [40]–[44].

<sup>103</sup> At paragraph [42].

<sup>104</sup> Email from Christopher Wright to [redacted] "RE: Key Messages" (8 September 2011, 1.47pm) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 93–95.

<sup>105</sup> Evidence of Colonel (Retired) Jim Blackwell, Transcript of Proceedings, Public Hearing Module 4 (15 October 2019) from 659.

between the Office of the Chief of Defence Force and the Minister's office. Col (Ret) Blackwell said that later he briefed the then Chief of Defence Force, Lieutenant General Rhys Jones, and the Minister of Defence, Dr Mapp, on the report. According to the Minister's diary, the only meeting he had with Col (Ret) Blackwell in the relevant timeframe occurred on 12 September 2011.<sup>106</sup> Accordingly, that is the date when any briefing on the executive summary is most likely to have occurred,<sup>107</sup> although the possibility of an unscheduled meeting cannot be ruled out.<sup>108</sup>

- [62] We pause in this account of Col (Ret) Blackwell's evidence to describe what is recorded in the relevant classified document registers. The register for the safe in the Director of Special Operations' office contains no record of the Incident Assessment Team Executive Summary being lodged in it, but that is not surprising given that Col (Ret) Blackwell said he stored it electronically rather than physically. Col (Ret) Blackwell said that he took the document into the Office of the Chief of Defence Force on 1 September 2011. In relation to documents received from Colonel Blackwell on 1 September, the register for the safe in Office of the Chief of Defence Force contains two entries.<sup>109</sup> The first describes the documents in the following way:

BAGHLAN PROVINCE BRIEF  
FOR MINDEF (2 SECRET DOCS)

The description for the second entry simply contains ditto marks under the description from the first entry.

- [63] Although the documents are not identified specifically in the register, one must have been the Operation Burnham storyboard as it has the relevant registration number on its front page. On Col (Ret) Blackwell's account, the second was the executive summary.<sup>110</sup> The register states that the documents comprising the first entry were dispatched to the Minister's office on 1 September 2011, where receipt was acknowledged by Captain Chris Hoey (the Military Secretary for the Minister of Defence). However, Captain Hoey did not record them in the register for his safe until 2 December 2011,<sup>111</sup> as we discuss further below. Capt (Ret) Hoey said in his evidence that he would not have read the documents; rather, he would have "flipped through" them before leaving them with the Minister.<sup>112</sup>
- [64] The register for the safe in Colonel Thompson's office shows that documents described as "Briefing Pack on Civ Casualty – Kabul Aug 2010" with a date of origin of 1 September were

<sup>106</sup> "Extracts from Ministerial Diary of Hon Dr Mapp" (30 August 2010–14 September 2011) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 60a.

<sup>107</sup> On the basis of his diary, Dr Mapp advised he did not attend his ministerial office in the period 1–5 September 2011 (Evidence of Hon Dr Wayne Mapp, above n 65, at 1013).

<sup>108</sup> Dr Mapp said in evidence that any unscheduled meetings he had were likely to have been with the Chief of Defence Force rather than Colonel Blackwell: see Evidence of Hon Dr Mapp, above n 65, at 1080.

<sup>109</sup> "Excerpt from Classified Document Register Office of Chief of Defence Force" (1 September 2011) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 48.

<sup>110</sup> It is relevant to note that Lt Col McKinstry's email of 26 August 2010 to Colonel Kelly (see paragraph [14] above) was printed off as a Microsoft Word document in the Directorate of Special Operations on 1 September 2011. This document may also have been placed into the safe as part of the briefing pack.

<sup>111</sup> "Excerpt from Classified Document Register Office of the Minister of Defence" (2 December 2011) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 50.

<sup>112</sup> Capt (Ret) Hoey said he was "quite certain" he would have given the documents to the Minister straightaway, because of the importance of Afghanistan to the Government (Evidence of Captain (Retired) Chris Hoey, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 840).

received from the Office of the Chief of Defence Force on 7 September.<sup>113</sup> Again, it is clear from a registration number on the Operation Burnham storyboard that it was in this pack of documents.

- [65] Returning to Col (Ret) Blackwell's evidence, he said that his requests to the Senior National Officers for the executive summary were conveyed by email. He also stated that the notes he prepared for ministerial briefings were stored electronically. He indicated that he had been told that a search (for the purposes of this Inquiry) of his secure and non-secure emails and documents had been conducted but nothing had been found. The Chief of Defence Force, Air Marshal Kevin Short, was cross-examined on this topic.<sup>114</sup> He advised that, as a result of enquiries he had made, he understood that if a person saved information into folders in what he described as a personal drive (an H drive or an S drive), that information would be deleted when the individual left NZDF. He understood that this may have happened in the case of Col (Ret) Blackwell's material. He said that significant material such as the executive summary should have been placed in a shared drive, where it would be properly archived.
- [66] On learning this, the Inquiry made further enquiries into NZDF's attempts to recover deleted documents and raised the possibility of engaging an independent computer expert to examine NZDF's systems to see whether the relevant material could be retrieved. However, Air Marshal Short responded by letter dated 8 November 2019 indicating that further forensic work carried out by NZDF had resulted in the discovery of some of Colonel Blackwell's emails and other electronically stored material.<sup>115</sup> This material included notes that Colonel Blackwell had prepared for ministerial meetings. The notes he prepared for his meeting with the Minister on 12 September 2011 do not mention the Incident Assessment Team Executive Summary or anything else relevant to the Inquiry.<sup>116</sup> Nor were any other briefing materials found relating to the executive summary.
- [67] Finally, it is important that we note that Col (Ret) Blackwell advised us that he did not save any NZDF documents to a personal drive, and always stored information in a way that would make it available to his successor. By way of example, he said that he insisted that his email address refer to his role rather than his name (ie, DSO@SWAN) so that his successor would have access to his emails. Col (Ret) Blackwell said that he saved a copy of the Incident Assessment Team Executive Summary in "DSO's Briefs, Operation Burnham" in SWAN, to which staff in the Directorate of Special Operations had access.<sup>117</sup>
- [68] NZDF made extensive searches of the relevant Directorate of Special Operations and Senior National Officer electronic systems for relevant emails. In particular, NZDF advised that it had located and searched the Director of Special Operations mailbox, as well as accounts for the Senior National Officer (WAATEA.SNO) and the Commanding Officer of the NZSAS.<sup>118</sup> We understand that NZDF searched some 20,000 items.<sup>119</sup> No emails were found asking the Senior National Officers to obtain the executive summary. No email was found from one of the Senior National Officers to Colonel Blackwell, or from the Special Operations Liaison Officer within

<sup>113</sup> "Excerpt from Classified Document Register Directorate of Coordination, OCDF" (7 September 2011) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 44.

<sup>114</sup> Evidence of Air Marshal Kevin Short, Transcript of Proceedings, Public Hearing Module 4 (18 October 2019) at 1121–1122 and 1166–1167.

<sup>115</sup> Re\_ Recent correspondence about NZDF email and information management systems (8 November 2019) (Inquiry doc 13/01).

<sup>116</sup> "Min Brief Mon 12 Sep" (12 September 2011) (this document remains classified).

<sup>117</sup> Evidence of Colonel (Ret) Blackwell, above n 105, at 711, 810 and 822.

<sup>118</sup> Inquiry doc 13/01, above n 115, at [13], [15] and [19].

<sup>119</sup> At [19].

ISAF to the Senior National Officer or to Colonel Blackwell, attaching the executive summary. No copy of the executive summary was found stored in the electronic system of the Directorate of Special Operations. There is, in short, no electronic footprint of either the emails to which Col (Ret) Blackwell referred in his evidence or to an electronic copy of the executive summary.<sup>120</sup>

[69] In addition, Col (Ret) Blackwell's account of events was explored with Dr Mapp, Lt Gen (Ret) Jones and Col (Ret) Thompson:<sup>121</sup>

- (a) In summary, Col (Ret) Thompson said that he had no recollection of Colonel Blackwell giving him the executive summary and telling him that he needed to bring it to the attention of the Chief of Defence Force. While he did not disagree that it could have happened, he said he thought it was something that would have stuck in his mind if it had happened. He said that if he had understood that he held the executive summary and that it was inconsistent with NZDF's public statements, he would have done something about it. As far as he was concerned, he received some documents, identified them as a briefing pack on civilian casualties in Afghanistan (either by looking briefly at them or because that was what he was told), and registered them in his safe.<sup>122</sup>
- (b) Lt Gen (Ret) Jones had no recollection of receiving a briefing about the executive summary and did not think he was briefed about it. However, he did not feel able to say so definitively, and accepted the possibility that he might be wrong about this. He noted that when, as Chief of Defence Force, he was being briefed on something, the material would be given to members of his staff to analyse so that they could prepare joint advice for him. Nothing of that sort happened in relation to the executive summary.<sup>123</sup> He also agreed that, given the importance of the executive summary, he would have done something about it had he been briefed on it.<sup>124</sup>
- (c) Dr Mapp said that he had a "fragmentary memory" of being told by Colonel Blackwell that there was no evidence of civilian casualties but that it was possible they might have resulted from a misaligned gun on one of the Apaches.<sup>125</sup> Dr Mapp accepted that Colonel Blackwell may have sent the executive summary to his office, but did not accept that he ever read it.<sup>126</sup>

We also note that neither of the Senior National Officers concerned could remember being asked to obtain the executive summary by Colonel Blackwell. Nor did either of them remember sending it to him.

<sup>120</sup> The Inquiry does have one email dated 1 September 2011 to Colonel Blackwell from the Commander of the NZSAS, Lt Col Parsons, that is related to Operation Burnham: see email from Lt Col Parsons (NZSAS.CO) to Colonel Blackwell (HQNZDF.DSO) "FW: External Release Update Obj Burnham Op 21 Aug 10 Update 4" (1 September 2011, 12.33) (Inquiry doc 13/07).

<sup>121</sup> The Minister's diary records Captain Hoey's name alongside Colonel Blackwell's name in the 12 September 2011 entry. That does not necessarily mean that Captain Hoey attended the meeting, although he could have. He would have been the contact person, however. Capt (Ret) Hoey said in his evidence that he did not recall attending a briefing about the Incident Assessment Team's report (Evidence of Capt (Ret) Hoey (16 October 2019), above n 112, at 840).

<sup>122</sup> Evidence of Colonel (Retired) Mike Thompson, Transcript of Proceedings, Public Hearing Module 4 (18 September 2019); Evidence of Col (Ret) Thompson, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019).

<sup>123</sup> Evidence of Lieutenant General (Retired) Rhys Jones, Transcript of Proceedings, Public Hearing Module 4 (18 September); Evidence of Lt Gen (Ret) Jones, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 989–990.

<sup>124</sup> Evidence of Lt Gen (Ret) Jones (16 October 2019), above n 123, at 989 and 991.

<sup>125</sup> Evidence of Hon Dr Mapp, above n 65, at 1012–1013.

<sup>126</sup> At 1028–1029.

- [70] We should make one other relevant point: Col (Ret) Blackwell did not mention in his evidence to us that he visited Afghanistan from 28–31 May 2011.<sup>127</sup> Col (Ret) Blackwell told us he did not mention the visit because he considered it irrelevant. He said his visit involved “an urgent and strategically important task” and he had more pressing concerns than obtaining the executive summary.
- [71] During cross-examination, Lt Gen (Ret) Keating said it was possible the executive summary could have been delivered ‘safe-hand’ by someone not senior in NZDF.<sup>128</sup> This suggestion was put to Col (Ret) Blackwell. He denied that he had received the executive summary unofficially and said that the only person he could have received it from was the Senior National Officer.<sup>129</sup>
- [72] We return to these matters in chapter 9.
- [73] On 7 October 2011, a TV3 News reporter sought information relating to casualties in Afghanistan from NZDF under the Official Information Act 1982.<sup>130</sup> The second of the information requests was for:

The number of civilian deaths, resulting from NZSAS operations in Afghanistan, since their deployment first began.

NZDF consulted with the Minister’s office about proposed responses.<sup>131</sup> An email from the Minister’s Private Secretary (Advisory) to NZDF reads in part:<sup>132</sup>

The Minister was going to call DSO about this but he has changed his mind.

He has some concerns with the response to question 2. The way it is worded, combined with the response to question 3, would suggest that there have been civilian casualties. If there are none, then the response will need to state this.

...

Our suggested response would be along the lines of “*We do not release figures on deaths resulting from NZSAS operations. However, to the best of my knowledge no such casualties have occurred.*”

On 13 December 2011 the Chief of Defence Force responded to this request by saying that NZDF did “not release figures on deaths resulting from NZSAS operations” and declining the request for some or all of security, international relations and operational capability reasons.<sup>133</sup>

<sup>127</sup> The Inquiry first learnt of this visit after the public hearings on the “cover-up” allegations from its analysis of emails provided by NZDF on 15 November 2019. In response to a question from the Inquiry, NZDF confirmed that to the best of its knowledge Colonel Blackwell was in Afghanistan from 28 to 31 May 2011.

<sup>128</sup> Evidence of Lieutenant General (Retired) Tim Keating, Transcript of Proceedings, Public Hearing Module 4 (19 September 2019) at 537.

<sup>129</sup> Evidence of Col (Ret) Blackwell, above n 105, at 715.

<sup>130</sup> Email from [redacted] to [redacted] and others “URGENT: OIA-1586-2011 [redacted] re Afghan Casualties TD 9 Dec 11” (8 December 2011, 3.24pm) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 105.

<sup>131</sup> The draft response from Lt Gen Jones is in *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 104.

<sup>132</sup> Email from Private Secretary (Advisory) to Mike Scrivener “RE: Unclassified: OIA-1586-2011 [redacted] re AFGH casualties.doc” (6 December 2011, 4.51pm) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 101 (italics in original).

<sup>133</sup> Letter from Lt Gen R.R. Jones to [redacted] re “OIA Request 1586-2011” (13 December 2011) NZDF <www.nzdf.mil.nz>.

- [74] This is to be contrasted with the Minister of Defence’s responses to the journalist’s requests for information made on 12 May 2011 (see paragraph [55] above). It will be recalled that the journalist’s first question was for the information “on which you based your recent statement [in a Q+A interview] that claims of civilian deaths during a raid in which NZDF personnel participated had ‘been investigated and proven to be false’”. Dr Mapp responded:<sup>134</sup>

The source of the information on which I based my statement on Q+A on 2 [sic] April was classified operations reporting by the NZDF. *As I stated in the interview, there is no basis in fact that a number of civilians were killed during a raid in which NZDF personnel participated.*

The italicised sentence is important. The draft answers provided by the Directorate of Special Operations did not include it.<sup>135</sup> It must therefore have been added in the Minister’s office. Whereas the journalist’s question refers to information relied on by Dr Mapp when he gave his answer in April 2011, the italicised sentence indicates that the answer he gave on 24 April 2011 continues to state the position.

- [75] The second relevant request was for the “estimated numbers of persons killed, injured, or detained in operations where NZDF personnel have been operating alongside Afghan national security forces”. In relation to that, Dr Mapp gave essentially the same answer as he had given to Mr Locke’s question for written answer in May 2011:<sup>136</sup>

Any persons killed in Afghanistan during NZDF operational activities have been persons taking direct part in hostilities, and presenting a direct threat to the lives of NZDF personnel, Coalition forces, Afghan security forces or Afghan or international citizens.

We return to Dr Mapp’s responses in chapter 9.

- [76] Finally, Capt (Ret) Hoey, who was at the time the Military Secretary to the Minister of Defence, said in his evidence<sup>137</sup> that although he received the executive summary and the other documents in the Minister’s office in September 2011, he did not sign them into the safe for which he was responsible (that is, register them) until three months later, on 2 December 2011.<sup>138</sup> Then, on 5 December 2011, together with the Minister’s Private Secretary, he shredded the documents (along with other documents from the safe).<sup>139</sup> In his evidence, Col (Ret) Blackwell expressed some surprise that the executive summary had been shredded.<sup>140</sup>
- [77] The reason given for the shredding was that Dr Mapp was retiring as Minister of Defence later in December.<sup>141</sup> Capt (Ret) Hoey explained that he thought it likely that he had gone through all the classified material in the safe and destroyed whatever he considered was no longer needed,

<sup>134</sup> OIA Request 091-2011, above n 97 (italics added).

<sup>135</sup> OIA-091-2011 Detainee Policy NZSOF Response Redacted (26 May 2011) (Inquiry doc 13/17) at 1.

<sup>136</sup> OIA Request 091-2011, above n 97.

<sup>137</sup> Evidence of Capt (Ret) Chris Hoey, above n 112, from 838.

<sup>138</sup> Two safes were in the Minister’s suite of offices. One safe was located in the Military Secretary’s office and there was a register for it; the other safe was located in the Minister’s office and there was no register for it.

<sup>139</sup> The Inquiry had access to the register which records “NATO/ISAF (S) OP RAHBARI OBJ BURNHAM” as entered on 2 December 2011 and shredded on 5 December 2011 (“Classified Document Register Office of the Minister of Defence (2 December 2011) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 50).

<sup>140</sup> Evidence of Col (Ret) Blackwell, above n 105, at 744.

<sup>141</sup> Evidence of Capt (Ret) Hoey (16 October 2019), above n 112, at 843.



in preparation for the arrival of the new Minister. He acknowledged that he had not destroyed all material from the safe and that some had been returned to the Chief of Defence Force's office. He said that he destroyed the Incident Assessment Team Executive Summary because he thought another copy would be held in Defence Headquarters.<sup>142</sup>

- [78] Capt (Ret) Hoey said he could not explain the three-month period between the Minister's office receiving the documents and their being entered in his safe's register.<sup>143</sup> He said that the documents may have been placed in the Minister's safe when they first came over from NZDF and only went into the safe in his office shortly before they were destroyed. He acknowledged, however, that the documents might have been placed in his safe when they arrived in the Minister's office and he may have neglected to enter them into the register at the time. The first of these explanations is unlikely given Dr Mapp's evidence that he did not keep any classified material in the safe in his office.<sup>144</sup>

### Period 3: June – July 2014

- [79] On the evening of 30 June 2014, the *Native Affairs* programme on Māori Television ran a report called *Collateral Damage*.<sup>145</sup> In this report Mr Stephenson interviewed several villagers from the Tirgiran area about Operation Burnham. They denied that there were any insurgents in the villages during the operation and alleged that all those killed or injured were civilians. In all, they said, six civilians were killed and 15 were injured. Mr Stephenson explained that no-one accused the ground forces of causing civilian casualties; rather, fire from helicopters was said to be the cause. A doctor, Dr Rahman,<sup>146</sup> who was said to be one of the first to arrive in the area after the operation, said that among the dead was a three year old girl named Fatima.

- [80] In the report, Mr Stephenson pointed to ISAF's media release of 29 August 2010, which had confirmed the possibility of civilian casualties, and said:

But it does call into question Mapp's categorical denial that civilians were killed or injured. It also raises the question of why our defence force said claims of civilian casualties were unfounded [that is, in April 2011] when eight months earlier coalition investigators had said they were credible.

- [81] The programme reported that the then current Minister of Defence, Hon Dr Jonathan Coleman, and the former Minister, Hon Dr Mapp, had declined to appear on the programme. However, Dr Mapp was reported by *Native Affairs* as having said to the programme that it had always been clear to him, based on his briefings from NZDF, that there were no civilian casualties on the operation.

- [82] NZDF provided the following written statement to *Native Affairs*, which appears on screen at the end of the report:

<sup>142</sup> At 898.

<sup>143</sup> At 843.

<sup>144</sup> Evidence of Hon Dr Mapp, above n 65, at 1012.

<sup>145</sup> "*Native Affairs – Collateral Damage*" (30 June 2014) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 216; "*Native Affairs – Collateral Damage*" (30 June 2014, 8.35pm) *Te Ao Māori News* <[www.teaomaori.news](http://www.teaomaori.news)>.

<sup>146</sup> See chapter 5 at [64].

The NZDF stands by its statement made on 20 April 2011 and will not be making further comment.

(The relevant part of NZDF's 20 April 2011 statement is at paragraph [54] above.)

[83] The background to this is as follows. On Friday 27 June 2014, before the television report, Mr Stephenson contacted NZDF to get its responses to a number of questions, although it does not seem that he advised NZDF of the upcoming report. He telephoned Geoff Davies, who was the Senior Media Advisor at NZDF Headquarters, and outlined the essence of the story he was working on.<sup>147</sup> He followed that call with an email,<sup>148</sup> which attached copies of:

- (a) ISAF's press release of 29 August 2010, in which ISAF announced that the Incident Assessment Team considered that civilian casualties may have been caused when errant rounds from one of the Apaches hit two buildings;
- (b) NZDF's media release of 20 April 2011, where NZDF said that the Incident Assessment Team's investigation concluded that allegations of civilian casualties were unfounded; and
- (c) an extract from an official report which recorded allegations of civilian casualties as a result of Operation Burnham.<sup>149</sup>

[84] Mr Stephenson posed a number of questions in the email, as follows:

Does the defence force stand by its [statement of 20 April 2011]?

Specifically, does it stand by the statement that nine insurgents were killed?

If so, can it confirm that the SAS was responsible for those nine deaths, or can it rule out being involved directly in the nine alleged deaths?

Can the defence force comment on the ISAF media release that refers to the possibility that due to a gun sight malfunction of US helicopters, cannon rounds fell short and hit two houses that were not a target, but where civilians may have been hiding?

Given its involvement in this raid, what steps has the defence force taken to ensure that allegations of civilian casualties have been carefully checked?

Is it correct that Prime Minister John Key personally approved New Zealanders involvement in the raid on Tirgiran.

Although the email did not ask for answers by a particular date, Mr Stephenson apparently indicated in his telephone conversation with Mr Davies that he would like answers on Monday,<sup>150</sup> although this was later revised to Sunday evening.<sup>151</sup>

<sup>147</sup> Email from Geoff Davies to [redacted] "FW:" (27 June 2014, 5.33pm) *Supplementary Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 7.

<sup>148</sup> Email from Jon Stephenson to Geoff Davies "[No subject]" (27 June 2014, 4.35pm) (Inquiry doc 13/08).

<sup>149</sup> United Nations Assistance Mission in Afghanistan (UNAMA) and Afghanistan Independent Human Rights Commission (AIHRC) *Afghanistan: Annual Report 2010: Protection of Civilians in Armed Conflict* (UNAMA and AIHRC, Kabul, March 2011) at [2.2.4].

<sup>150</sup> Email from Jon Stephenson to Geoff Davies in Inquiry doc 13/08, above n 148.

<sup>151</sup> Email from Jon Stephenson to Geoff Davies "Re:" (27 June 2014, 11.33) (Inquiry doc 13/08).

- [85] Mr Stephenson wrote a further email later on the Friday evening in which he said that the operation he was referring to occurred in Tirgiran village in the Tala wa Barfak District of Baghlan province.<sup>152</sup> He indicated he was concerned to rule out the possibility that the NZDF media release of 20 April 2011 might be referring to a different operation and so asked NZDF to confirm that Tirgiran was the village with which the 20 April media release was concerned.
- [86] On Saturday 28 June, there was an email exchange between the Chief of Staff, Commodore Ross Smith, and other NZDF personnel about how to treat Mr Stephenson's questions.<sup>153</sup> The particular issue was whether the request should be treated as having been made under the Official Information Act 1982, with the result that there would be some delay in providing a response, or whether a more immediate response should be given. However, by this stage the Minister's office was involved. Dr Coleman was in Wellington for the National Party Conference. While there, he received a telephone call from Dr Mapp, who expressed concern about a television report that Mr Stephenson had produced about Operation Burnham, which was to be shown on Monday evening. Dr Coleman considered that he needed to be briefed. It was arranged that he would go to Defence House later on Saturday afternoon for the briefing. At around 4pm on the Saturday afternoon, the Chief of Defence Force, Lt Gen Keating, met Dr Coleman to brief him. We do not have a copy of any talking points or other briefing notes. However, in light of what happened later, it is clear that the briefing material was prepared on the basis that the allegations of civilian casualties on Operation Burnham had been investigated by an ISAF Incident Assessment Team and that it had concluded that they were unfounded.
- [87] NZDF personnel attempted over the weekend to gather together relevant material from NZDF's files. On Monday 30 June, an analyst from the Directorate of Special Operations emailed Lt Col McKinstry, then the Commanding Officer of the NZSAS based in Auckland, attaching the material relevant to Operation Burnham gathered from database searches over the weekend.<sup>154</sup> There were over 20 items, but they did not include the Incident Assessment Team Executive Summary. This document came to light in the following way.
- [88] The Minister's Military Secretary said in evidence that on Sunday 29 June 2014 he was contacted by the Minister's political adviser, Josh Cameron, who said that the Minister had received a briefing about an NZSAS operation which was the subject of an upcoming television programme. The Military Secretary was unhappy that he had not been involved in the briefing, or even advised of it, given his role in the Minister's office. He contacted Capt (Ret) Hoey, who was the Director of Coordination for NZDF and responsible for coordinating the flow of information from NZDF to the Minister's office. The Military Secretary told Capt (Ret) Hoey that he would come over to his office at NZDF headquarters at 7am the next day to receive a briefing, so that he could discuss matters with the Minister.
- [89] The Military Secretary said that he went to Capt (Ret) Hoey's office at 7am on Monday morning to be briefed. While he was there, Capt (Ret) Hoey opened his safe and took out some documents. The Military Secretary also looked in the safe, saw what looked like relevant documents, and took them out. Capt (Ret) Hoey referred to a confidential NATO report on the operation which NATO would not release. As he was listening, the Military Secretary flicked through the papers from

<sup>152</sup> Email from Jon Stephenson to Geoff Davies in Inquiry doc 13/08, above n 151.

<sup>153</sup> Email from Cdre Smith to [redacted] "RE: Media question regarding Baghlan Raid in AFGHAN IN 2010" (28 June 2014, 11.33am) *Supplementary Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 6.

<sup>154</sup> Emails from DSO analyst to Lt Col McKinstry (NZSAS.CO) "Docs re Baghlan op" (30 June 2014) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 1120–112y.

the safe and saw that they included the ISAF Incident Assessment Team Executive Summary. The Military Secretary said that Capt (Ret) Hoey was surprised at the discovery.

- [90] According to the Military Secretary, Commodore Smith, who was the Chief of Staff in the Office of the Chief of Defence Force, wandered into the room at this stage and the three men had a brief closed-door discussion. The Military Secretary said that he had read the executive summary and saw that it said that civilian casualties were likely or possible. He said that his interpretation of this was that it was a standard NATO/ISAF “fog of war” response—there may or may not have been civilian casualties.
- [91] The Military Secretary had an 8am meeting in the Minister’s office, so he took the bundle of documents from Capt (Ret) Hoey’s safe and went back to the office. As we understand it, the bundle contained:
- (a) the Operation Burnham storyboard;
  - (b) drafts of the three Ministerial briefing notes of 25 August and 10 and 13 December 2010 (with handwritten annotations);<sup>155</sup>
  - (c) a Microsoft Word version of the text of an email sent from Afghanistan by the Senior National Officer on 26 August 2010 generated in the Directorate of Special Operations on 1 September 2011;<sup>156</sup> and
  - (d) the ISAF Incident Assessment Team Executive Summary.
- [92] Capt (Ret) Hoey gave a rather different account of the discovery of the executive summary.<sup>157</sup> According to his evidence, Dr Coleman asked NZDF to provide him with relevant documents in relation to Operation Burnham. Capt (Ret) Hoey remembered that he had some documents relating to operations in Afghanistan in his safe. He said that he opened his safe to retrieve all the notes to the Minister that were stored there. As he was doing this, he remembered that the safe contained a small bundle of documents relating to Afghanistan and took out the bundle. He said he looked at the bundle quickly and confirmed that it related to an operation in Afghanistan in August 2010. Given this, he provided it to the Military Secretary to provide to the Minister, along with the notes he had found.
- [93] Under cross-examination,<sup>158</sup> Capt (Ret) Hoey accepted that the Military Secretary may have called him on the Sunday evening to arrange to see him the following morning. Capt (Ret) Hoey said he had no reason to doubt that, but said that the meeting the following morning was simply to hand over the material. He did not recall any discussion. When pressed about the details given by the Military Secretary, Capt (Ret) Hoey said he did not recollect the discussion the Military Secretary described but he had no reason to doubt what the Military Secretary said. He accepted it was possible that the Military Secretary had found the Incident Assessment Team Executive Summary in the way he described. He acknowledged that there would have been discussions with Commodore Smith on the Monday or Tuesday but said he could not recall whether the discussion the Military Secretary described had occurred.

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<sup>155</sup> See paragraphs [12] and [45]–[48] above.

<sup>156</sup> See [14] above.

<sup>157</sup> Evidence of Capt (Ret) Hoey, Transcript of Proceedings, Public Hearing Module 4 (16 September 2019) at 460.

<sup>158</sup> Evidence of Capt (Ret) Hoey (16 October 2019), above n 112, from 906.

- [94] For his part, Cdre (Ret) Smith said that he did not recall any discussion with the Military Secretary and Capt (Ret) Hoey on the Monday morning, and said that his diary indicated that he had an Executive Committee meeting from 8.30am onwards that morning.<sup>159</sup> He said that he did not become aware of the discovery of the Incident Assessment Team Executive Summary until the Chief of Defence Force advised him of it on Monday evening<sup>160</sup> (described at paragraph [100]). This is consistent with the fact that he approved the release of a statement to the *Native Affairs* programme on Monday afternoon, to the effect that claims of civilian casualties were unfounded.<sup>161</sup>
- [95] Ultimately, we do not need to come to a definitive conclusion as to which version of events is accurate. The important point is that the Incident Assessment Team Executive Summary was found in Capt (Ret) Hoey's safe on the Monday morning, where, on the evidence we heard, it had been since 7 September 2011. That said, the Military Secretary was quite specific and consistent in outlining what had happened on the Sunday evening and Monday morning, and obviously felt a degree of annoyance at not having been kept informed of NZDF's interactions with the Minister, given the nature of his responsibilities and the Minister's expectations of him. By contrast, both Capt (Ret) Hoey and Cdre (Ret) Smith said they had no recall of matters that they might have been expected to remember. These factors incline us towards the Military Secretary's account. However, there is obviously a question as to whether Commodore Smith would have engaged with the substance of the executive summary at the Monday morning meeting but gone on to approve the inaccurate statement made to Māori Television later on the Monday afternoon (see paragraph [98]). We return to this later.
- [96] After the bundle of documents from Capt (Ret) Hoey's safe had arrived at his office, Dr Coleman read the material, underlining particular passages.<sup>162</sup> Specifically:
- (a) The Minister underlined the passages in the draft ministerial briefing notes of 10 and 13 December 2010 which purported to describe the conclusion of the Incident Assessment Team's investigation. They said the conclusion was that "having reviewed the evidence there is no way that civilian casualties could have occurred". This was presented as a quote from the executive summary.
  - (b) The Minister underlined passages in the 26 August 2010 email and in the executive summary which made it clear that there was a possibility of civilian casualties as a result of errant rounds from a misaligned weapon on one of the Apaches.
- [97] In short, Dr Coleman highlighted the parts of NZDF's briefings to the Prime Minister and Minister of Defence in December 2010 reporting incorrectly on the Incident Assessment Team's conclusions (which reflected what he had been told by NZDF on 28 June 2014), and contrasted that with the true position as reflected in the 26 August 2010 email and in the executive summary itself.

<sup>159</sup> Evidence of Commodore (Retired) Ross Smith, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 978.

<sup>160</sup> Evidence of Cdre (Ret) Smith, Transcript of Proceedings, Public Hearing Module 4 (16 September 2019) at 85 and 108.

<sup>161</sup> Email from [Defence Communications Group] to [Press Secretary] "RE: Media question regarding Baghlan Raid in AFGHAN IN 2010" (30 June 2014, 12.46pm) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 213.

<sup>162</sup> It is not clear to us whether Dr Coleman read the material before or after the usual Monday Cabinet meeting.

- [98] As previously noted, later that day NZDF decided to issue the statement to Māori Television that it stood by its 20 April 2011 media release (that the investigation had concluded that the claims of civilian casualties were unfounded) and would not be commenting further. The draft was approved by Commodore Smith because the Chief of Defence Force was in Australia. Cdre (Ret) Smith said that he approved the release because it was consistent with the Chief of Defence Force's briefing to the Minister of 10 December 2010.<sup>163</sup> The draft answer was also approved by the Minister's press secretary, although it is not clear whether it was discussed with the Minister as he was attending the usual Monday Cabinet meeting at the time.<sup>164</sup>
- [99] The *Native Affairs* programme, *Collateral Damage*, was broadcast that evening. After the broadcast, the Chief of Defence Force received a telephone call in Australia from Dr Coleman. In his evidence, Lt Gen (Ret) Keating described the Minister as "upset"<sup>165</sup> and "very angry".<sup>166</sup> As noted above, Dr Coleman had by this time read the executive summary and had realised that, although it cleared the ground forces, it acknowledged that civilian casualties may have resulted from misfiring from the Apache helicopters. The Minister was concerned that this was inconsistent with NZDF's public position that the Incident Assessment Team's investigation found no civilian casualties and cleared both ground and air forces.
- [100] Lt Gen (Ret) Keating said that he immediately contacted Commodore Smith and advised him of the conversation with the Minister.<sup>167</sup> He asked Commodore Smith about the executive summary and said that he could not believe that NZDF had the document but was apparently unaware it had it. Lt Gen Keating asked Commodore Smith to put together a pack of documents for him, including the executive summary.
- [101] In addition, at 9.35pm, after the programme had finished, the Vice Chief of Defence Force, Air Vice Marshal Kevin Short, received a telephone call from the Minister of Defence's political adviser, Josh Cameron.<sup>168</sup> In that call, Mr Cameron noted the difference between what the Incident Assessment Team said in the executive summary and what NZDF was saying in relation to civilian casualties. Air Vice Marshal Short recorded the following in his diary, in quotation marks: "Primary source document contradicts the brief to [the Minister of Defence]."<sup>169</sup> The diary indicates that Mr Cameron made that comment.
- [102] At 7.16am the following morning (1 July), Prime Minister John Key was interviewed on TV3's *Firstline*.<sup>170</sup> He was asked about the previous evening's *Native Affairs* programme. In particular, the interviewer referred to Dr Mapp's previous statements that only insurgents were killed on the operation and there were no civilian casualties, and asked whether the Government now acknowledged that civilians were killed. The Prime Minister responded that the Government did not acknowledge that. He said his understanding was that there had been a thorough review of the

163 Evidence of Cdre (Ret) Smith, above n 160, at 84.

164 Email from [Press Secretary] to [Defence Communications Group] "RE: Media question regarding Baghlan raid in AFGHAN IN 2010" (30 June 2014, 12.59pm) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 213.

165 Evidence of Lt Gen (Ret) Keating, Transcript of Proceedings, Public Hearing Module 4 (18 September 2019) at 481.

166 Evidence of Lt Gen (Ret) Keating (19 September 2019), above n 128, at 511.

167 Evidence of Lt Gen (Ret) Keating (18 September 2019), above n 165, at 481.

168 Evidence of Air Marshal Short, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 1001.

169 "Diary Notes of Air Vice Marshal Kevin Short" (June–July 2014) *Supplementary Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 10.

170 Newshub "Wilson Chats with Prime Minister John Key" (1 July 2014) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 224.

mission over the weekend, and that the NZSAS had refuted the claims of civilian casualties and said all those killed on the operation were insurgents. The Prime Minister concluded this section of the interview by saying:<sup>171</sup>

But my understanding is that after a thorough review by the CDF in the weekend, he is very confident that the New Zealand Defence Force version of events is correct and Mr Stevenson [sic] once again is wrong.

- [103] Soon after this interview, at 8.30am, a meeting was held in the Minister's office attended by Air Vice Marshal Short (filling in for Lt Gen Keating, who was to return from Australia later in the day), Commodore Smith and the Secretary of Defence, Helene Quilter.<sup>172</sup> The Minister said that he felt let down by the briefing he had received on Saturday 28 June. He said that it was too casual and did not provide all the information available—a critical piece was omitted. There was discussion about the accountability of the NZSAS. The Minister observed that the credibility of the NZSAS was eroding over time. While there was no issue about its core skills, there were issues about its political judgement and lack of insight. Ms Quilter agreed with the Minister's observations. She had long-standing concerns about reporting lines and accountability issues in relation to the Director of Special Operations' office.
- [104] The Minister referred to the Prime Minister's (erroneous) remarks to the media earlier that morning and asked NZDF to take a number of steps. In particular, he wanted NZDF to interview the Senior National Officer at the time of Operation Burnham, Colonel McKinstry, to ascertain what he knew and how he interpreted the executive summary. The Minister also wanted to know when and how NZDF had obtained the executive summary and why it was not available to the Chief of Defence Force when NZDF had it. He asked for a report within two days. Reflecting the fact that the Incident Assessment Team's report bears the title "Executive Summary", the Minister asked NZDF to obtain a copy of the "full report". The Minister also said he wanted an assurance on the veracity of briefs, particularly briefs involving the NZSAS.
- [105] Following this meeting, both the Prime Minister and the Minister responded to media questions about the *Native Affairs* programme throughout the day. They acknowledged that the possibility of civilian deaths could not be ruled out, but emphasised that New Zealand forces were not involved in any possible deaths.<sup>173</sup>
- [106] The analyst in the Directorate of Special Operations who had forwarded relevant material to Colonel McKinstry the previous afternoon sent Colonel Blackwell a copy of the executive summary at around 10.15am and he passed it on to Colonel McKinstry.<sup>174</sup> Significantly, the analyst did not obtain a copy of the document from the Director of Special Operations' electronic files, but rather sent a scan of the Minister's copy as a Microsoft Word document, which included the Minister's underlining. The fact that no copy of the document was found in the electronic filing system of the Director of Special Operations is a matter of relevance to which we return in chapter 9.

<sup>171</sup> "Wilson Chats with Prime Minister John Key", above n 170, at 225.

<sup>172</sup> "Diary Notes of Air Vice Marshal Short", above n 169, at 10–11.

<sup>173</sup> For example, *Stuff* "Categorical: 'NZ troops did not kill civilians'" (1 July 2014) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 219; *The New Zealand Herald* "Coleman 'can't rule out' civilian deaths" (1 July 2014) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 222; and *Te Ao Māori News* "Key denies SAS involvement in civilian deaths in Afghanistan" (1 July 2014) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 229.

<sup>174</sup> Email from HQNZDF.DSO-SOANLST to Colonel Blackwell (HQNZDF.DSO) "ISAF Op Assessment Summary" (1 July 2014, 10.12am) *Supplementary Bundle for Public Hearing Module 4 – Part 2* (16 September 2019) at 77.

[107] The Chief of Defence Force, Lt Gen Keating, arrived back from Australia later in the afternoon.<sup>175</sup> He read the briefing pack prepared for him by Commodore Smith. Lt Gen (Ret) Keating told us that this was the first time he had read the Incident Assessment Team Executive Summary. He had a meeting with the Minister and the Secretary of Defence on this issue before the Defence Weekly Meeting, which was scheduled for 4pm that afternoon. Lt Gen (Ret) Keating said that he did not recall the discussion at that meeting, but thought he would have explained that he had not seen the executive summary before and did not know that NZDF had a copy of it. We have brief minutes of the Defence Weekly Meeting that followed this meeting.<sup>176</sup> The only obviously relevant entry is the following:

*Reputational Issues*

Noted at meeting

“Reputational Issues” appears to have been a standing item, but presumably the Minister raised the same concerns about reputational issues as he had raised with NZDF personnel in his meeting with them at 8.30am that morning.

[108] Commodore Smith followed up on the outstanding tasks for the Minister, although he said in his evidence he did not regard himself as conducting a formal inquiry.<sup>177</sup> He interviewed Brigadier Kelly and Colonel McKinstry, the former Director of Special Operations and former TF81 Senior National Officer (respectively) at the time of Operation Burnham.<sup>178</sup> Both said that they had not previously seen the Incident Assessment Team Executive Summary.<sup>179</sup> In terms of finding out how NZDF had obtained a copy of the executive summary and why the Chief of Defence Force did not know about it, Commodore Smith asked NZDF Legal Services whether they had obtained it, but they said they had not.<sup>180</sup> He did not trace through the various classified document registers in an effort to identify the original NZDF recipient of the report.<sup>181</sup> Given the Minister’s question about how and when NZDF had obtained the report, and the information that would have been produced more or less immediately by analysing the registers, this was an obvious step—and a surprising omission. Commodore Smith did ask for a copy of the full Incident Assessment Team report from Afghanistan, but was told that there was no full report—the “Executive Summary” was all there was.<sup>182</sup>

[109] NZDF did not provide the Minister with a written report. Lt Gen (Ret) Keating said he would have given the Minister a verbal briefing on the outcome of Commodore Smith’s enquiries sometime later. In relation to the Incident Assessment Team Executive Summary, it appears that Lt Gen

<sup>175</sup> Evidence of Lt Gen (Ret) Keating (18 September 2019), above n 165, at 481.

<sup>176</sup> Email from Paki Ormsby to Lt Gen Keating and others “RE: Defence Weekly Meeting: Record of discussion & action items 01 July” (2 July 2014, 6.30pm) (Inquiry doc 13/09) at 3.

<sup>177</sup> Evidence of Cdre (Ret) Smith, above n 159, at 964–965.

<sup>178</sup> At 965.

<sup>179</sup> “Diary Notes of Commander Ross Smith” (June–July 2014) *Supplementary Bundle for Public Hearing Module 4 – Part I* (Public Hearing Module 4, 16 September 2019) at 20–21.

<sup>180</sup> Email from [Defence Legal Services] to Cdre Smith “ISAF IAT Report 2010” (2 July 2014, 12.58pm) *Inquiry Bundle for Public Hearing Module 4 Resumed* (Public Hearing Module 4, 15 October 2019) at 119.

<sup>181</sup> Evidence of Cdre (Ret) Smith, above n 159, at 981.

<sup>182</sup> Email from [Deputy Director Strategic Commitments – Global, HQNZDF] to Cdre Smith “FW: SCI BR RFI” (11 July 2014, 10.35am) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 121. The email chain includes an email which states: “Civcas specialists [at ISAF] told me that the report I have sent [ie, the Incident Assessment Team Executive Summary] is very likely to be the final piece of staff work for an incident of this nature” (email from [redacted] to [redacted] “RE: SCI BR RFI” (7 July 2014, 11.52pm) *Inquiry Bundle for Public Hearing Module 4 – Resumed* (Public Hearing Module 4, 15 October 2019) at 121).



Keating advised the Minister that NZDF had not been able to determine how it had arrived at NZDF Headquarters.<sup>183</sup> Moreover, NZDF did not issue a correction to the statement it had given the *Native Affairs* programme, to the effect that it stood by its media release of 20 April 2011. Rather, it relied on the Minister's public statements to correct the position.

[110] Again, this is a matter we return to in chapter 9.

## Period 4: March 2017 – April 2018

[111] In October 2016, an organisation called the Human Rights Foundation of Aotearoa New Zealand requested certain information from NZDF under the Official Information Act 1982. Among the information sought was information in relation to:

... the involvement or participation of New Zealand forces in actions resulting in the deaths or serious injuries of civilians or non-combatants, whether the result of direct actions by New Zealand forces or by the actions of other forces acting alongside, with the cooperation of or under the supervision of New Zealand forces.

The operation in Baghlan province in August 2010 was specifically identified as a relevant operation.

[112] The NZDF response, dated 15 March 2017, was signed by Commodore Smith.<sup>184</sup> It said in part:

The 2010 raid in Baghlan involved a suspected civilian casualty. There was a formal Coalition CIVCAS investigation team assigned relating to the Baghlan Province Raid incident. The NZDF does not hold a copy of the investigation undertaken by a joint Afghan Ministry of Defence, Afghan Ministry of Interior and International Security Assistance Force (ISAF) assessment team into the raid in Baghlan. A copy of this investigation has not been released publicly. The NZDF has no reason to believe that New Zealand personnel conducted themselves other than in accordance with the applicable rules of engagement. Good reason exists for withholding any information the NZDF has relating to this matter pursuant to section 6(a) of the OIA.

[113] It is not clear which document the third sentence of this extract is referring to. If it is the Incident Assessment Team Executive Summary, it is obviously incorrect—NZDF did hold a copy of that and had done so since at least September 2011 (as Commodore Smith was aware). On the other hand, it is clear that some within NZDF Headquarters were misled by the title “Executive Summary” into believing that there was a full report which they did not hold. As we note below, NZDF made efforts to obtain the “full report” soon after this, even though it had been told that there was no full report when it sought a copy in 2014 (see paragraph [128]).

[114] *Hit & Run* was launched publicly at 5.15pm on Tuesday 21 March 2017. NZDF's evidence was that it received no prior notice and that no one tried to obtain NZDF's comment on the book's

<sup>183</sup> Evidence of Lt Gen (Ret) Keating (19 September 2019), above n 128, at 510.

<sup>184</sup> Letter from Commodore Smith to Human Rights Foundation of Aotearoa New Zealand (15 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 231–234.

account (although the Inquiry has confirmed that a short amount of notice was given).<sup>185</sup> At the time, Lt Gen Keating was overseas in Iraq with the then Minister of Defence, Hon Gerry Brownlee. In his absence, the Vice Chief of Defence Force, Air Vice Marshal Short, handled NZDF's initial response, although he did obtain Lt Gen Keating's approval for the media release that NZDF ultimately issued.<sup>186</sup> Soon after the book's launch, the media pressed NZDF to respond.

[115] Air Marshal Short said in evidence that his preference was to take time to read the book carefully to analyse what was being said and then to examine NZDF's internal resources (people and documents), with the objective of giving a measured response.<sup>187</sup> However, given the media pressure to provide an immediate response, the decision was made simply to adopt the same position NZDF had previously adopted in its public statements. A search was made of NZDF's media releases in relation to Operation Burnham and the release made on 20 April 2011 was identified. Air Marshal Short thought it was discovered around 6.20pm that evening as a copy of it was stapled in his diary for that day, with the notation "6.20" on it.<sup>188</sup>

[116] Consequently, the media release that NZDF issued at around 8.25pm that evening contained the same erroneous assertion made in NZDF's 20 April 2011 release, namely that the Incident Assessment Team's investigation had concluded that the allegations of civilian casualties were unfounded.<sup>189</sup> The release went on to say:

The NZDF does not undertake investigations or inquiries into the actions of forces from other nations. That was the role of the joint Afghan-ISAF investigation.

The NZDF is confident that New Zealand personnel conducted themselves in accordance with the applicable rules of engagement.

[117] Air Marshal Short said that with everything going on that evening, he did not appreciate that the allegations in *Hit & Run* related to the same operation as was the subject of the 2014 *Native Affairs* programme.<sup>190</sup> He said that if he had made the connection, he would have reviewed the Incident Assessment Team Executive Summary. As it was, the intention was to "exercise caution and moderation" since NZDF did not have full information. He denied that there was any intention to mislead and said that NZDF had no reason to obfuscate about the conclusions reached by the Incident Assessment Team.

[118] While still overseas, Lt Gen Keating instructed his staff at NZDF Headquarters to gather information concerning post-operation procedures and to do other work in relation to the allegations in

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<sup>185</sup> Cdre (Ret) Smith and Air Marshal Short said in evidence that NZDF was not provided with advance notice of the launch of *Hit & Run* or consulted during the drafting of the book (Evidence of Cdre (Ret) Smith, above n 160, at 88; evidence of Air Marshal Short (16 October 2019), above n 168, at 1003). However, the Inquiry has confirmed that about two hours before the book's public release, Mr Stephenson contacted a staff member in the Office of the Minister of Defence and asked him to advise NZDF of the impending release, and that person did so. During cross-examination, Air Marshal Short confirmed NZDF did have some notice a book was to be released, because someone went to the launch to buy some copies, although he did not know from whom or what information was passed on (Evidence of Air Marshal Short (18 October 2019), above n 114, at 1144–1145).

<sup>186</sup> Evidence of Air Marshal Short (16 October 2019), above n 168, at 1005.

<sup>187</sup> Evidence of Air Marshal Short (16 October 2019), above n 168, at 1004.

<sup>188</sup> Press release with annotations (21 March 2017) (Inquiry doc 13/05).

<sup>189</sup> "NZDF Response to Book" (21 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 245.

<sup>190</sup> Evidence of Air Marshal Short (16 October 2019), above n 168, at 1004–1005.

*Hit & Run*.<sup>191</sup> This included obtaining a classified copy of the video footage from the Apaches and the accompanying audio tape.<sup>192</sup>

[119] On 22 March 2017, there were a number of relevant public statements or comments:

(a) The then Minister of Defence, Hon Gerry Brownlee, commented to the media:<sup>193</sup>

What I've been told is that he [Nicky Hager] is talking about an incident that has been extensively investigated, based on previous accusations of civilian deaths. And those accusations have not been proved at all accurate ... There have been several investigations including by ISAF itself and the allegations that are made simply have not been substantiated in any way whatsoever.

(b) The Prime Minister, Rt Hon Bill English, responded to an oral question in the House as follows:<sup>194</sup>

The New Zealand Defence Force stands by the release that it put out last night – that is, that on the basis of independent investigation by the Afghan Government and the coalition forces back in 2011, they believe that New Zealand Defence Force personnel conducted themselves according to the rules of engagement and that civilian casualties have not been substantiated.

This answer appears to be based on talking points prepared for Air Marshal Short for a meeting with the Prime Minister at 12.30pm on 22 March 2017. Those talking points indicated that the Incident Assessment Team had concluded that “it was possible that civilian casualties occurred because two buildings were used by insurgents as cover and that women and children were in those buildings”.<sup>195</sup>

(c) In a widely reported interview, Dr Mapp said that he accepted that there had been civilian casualties in Operation Burnham,<sup>196</sup> although he also made it clear that he rejected any suggestion that New Zealand forces were guilty of war crimes.<sup>197</sup>

<sup>191</sup> See, for example, email from Col Ferris to Brig Williams “[redacted]” (22 March 2017, 08.41) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 249; “Diary notes of Ross Smith Part 2” (23 March 2017) *Supplementary Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 26.

<sup>192</sup> Evidence of Lt Gen (Ret) Keating (18 September 2019), above n 165, at 484.

<sup>193</sup> Isaac Davidson “Defence Chief: Hager’s ‘revenge raid’ book could harm New Zealand’s reputation” (22 March 2017) *Supplementary Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 34.

<sup>194</sup> (22 March 2017) 721 NZPD 16889.

<sup>195</sup> “Annex A: DOT POINT BRIEF FOR VCDF: TALKING POINTS FOR MEETING WITH PM ON 22 MARCH, above n 42.

<sup>196</sup> For example, *The New Zealand Herald* “Former Defence Minister concedes civilian casualty in 2010 SAS raid in Afghanistan” (22 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 250; *Newshub* “Wayne Mapp does not deny ‘Hit and Run’ Afghan raid claims” (22 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 253; *Radio New Zealand* “Afghan raid: Ex-minister accepts reports of civilian deaths” (22 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 255; and *Stuff* “Former Defence Minister Wayne Mapp says civilian deaths in Afghanistan were ‘an accident’” (22 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 257.

<sup>197</sup> For example, *The New Zealand Herald* “Former Defence Minister concedes civilian casualty in 2010 SAS raid in Afghanistan”, above n 196; *Stuff* “Former Defence Minister Wayne Mapp says civilian deaths in Afghanistan were ‘an accident’”, above n 196.

- (d) Lt Gen (Ret) Jones, the recently retired Chief of Defence Force, said that he was “pretty confident” that there were no civilian casualties on the operation. He said.<sup>198</sup>

As far as I’m aware, the official report is accurate, I’ve no reason to believe that there was any cover-up of information from that report.

- [120] Lt Gen Keating returned from Iraq on Saturday 25 March 2017.<sup>199</sup> The following morning he read a package of relevant documents prepared for him, including the Incident Assessment Team Executive Summary. A number of NZDF personnel briefed him before he met with first, the Minister of Defence and later, the Prime Minister. He was assisted in briefing the Prime Minister by NZDF’s Senior Legal Adviser, Colonel (now Brigadier) Lisa Ferris. In the course of briefing the Prime Minister, Lt Gen Keating referred to the Incident Assessment Team’s investigation. His briefing notes for the meeting say:<sup>200</sup>

That report made recommendations as to any further action to be taken by ISAF and/or the troop contributing nations. The investigation team concluded that **civilian casualties may have been possible** due to the malfunction of an air weapon system, as was made public by ISAF on 29 August 2010.

The investigation concluded that no further action be taken. The NZDF was provided with a summary of that report and its conclusions, which Prime Minister you may review.

- [121] While this summary of the Incident Assessment Team Executive Summary accurately records the position in relation to the possibility of civilian casualties, it is inaccurate in stating that the investigation concluded that no further action should be taken. As noted above, the true position is that the Incident Assessment Team issued an addendum and ISAF ordered a further investigation, which ISAF publicly announced on 30 August 2010.<sup>201</sup> As noted previously, this announcement was picked up by overseas media and is reflected in the media compilations available to NZDF personnel at the time.

- [122] On 26 March 2017, NZDF issued what was described as a “Statement on Hager/Stephenson book”.<sup>202</sup> The statement has three significant features:

- (a) First, it said that the central premise of *Hit & Run* was incorrect. Specifically, NZDF troops never operated in the two villages identified in the book, namely Khak Khuday Dad and Naik, which, the statement said, are separated from the site of Operation Burnham by mountainous and difficult terrain.
- (b) Second, the statement said that an ISAF investigation “determined that a gun sight malfunction on a coalition helicopter resulted in several rounds falling short, missing the intended target and instead striking two buildings”, which “may have resulted in civilian casualties but no evidence of this was established”.

<sup>198</sup> *Radio New Zealand* “Checkpoint with John Campbell: ‘It’s possible’ civilians were killed – former Chief of Army” (22 March 2017) *Supplementary Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 37.

<sup>199</sup> Evidence of Lt Gen (Ret) Keating (18 September 2019), above n 165, at 484.

<sup>200</sup> “Brief notes for Prime Minister on Operation Burnham” *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 411 (bold in original).

<sup>201</sup> See above at paragraphs [19]–[20].

<sup>202</sup> NZDF “NZDF Statement on Hager/Stephenson book” (26 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 308.

- (c) Third, it concluded by saying that anyone with relevant information should come forward and should be assured that “any allegations of offending by NZDF personnel would be taken seriously and investigated in accordance with our domestic and international legal obligations”.

[123] The following day, Lt Gen Keating held a media conference.<sup>203</sup> At the conference, he reiterated the point that the villages at which *Hit & Run* said the operation occurred were not villages in which NZDF personnel had operated. Rather, they had operated two kilometres away, in another village, Tirgiran. Lt Gen Keating then explained what had happened on Operation Burnham by reference to maps. When he turned to the ISAF investigation, he asked Colonel Lisa Ferris, Director of Defence Legal Services, to take over. In the course of her remarks Colonel Ferris said:<sup>204</sup>

Subsequent information, received after Operation Burnham indicated that civilian casualties may have been possible ... ISAF stood up an investigation team headed by an ISAF Brigadier General and supported by a team including an ISAF Legal Officer as well as Government of the Islamic Republic of Afghanistan representatives from the Ministry of Interior and Ministry of Defence. That report made recommendations as to any further action to be taken by ISAF and/or the troop contributing nations. The investigation team concluded that civilian casualties may have been possible due to the malfunction of a weapon system, as was made public by ISAF on 29 August 2010. The investigation team also concluded that members of the NZSAS appear to have complied with the ISAF commander’s tactical directive, the rules of engagement, and accordingly the law of armed conflict. The investigation concluded no further action be taken. The NZDF was provided with a summary of that report and its conclusions.

[124] At the question and answer session after the NZDF presentations,<sup>205</sup> questions were asked about NZDF’s earlier statements that allegations of civilian deaths were “unfounded”. The point was that those earlier statements seemed inconsistent with the possibility that there were civilian casualties, as the Incident Assessment Team had concluded. Lt Gen Keating answered the question by suggesting that “unfounded” meant the same as “there may have been”.<sup>206</sup> The Prime Minister gave a similar response a few days later. On 3 April 2017 at a post-Cabinet press conference, the Prime Minister was asked whether it was misleading for NZDF to have used the word “unfounded” in relation to civilian casualties. He responded:<sup>207</sup>

... as I understand it, it’s a legal term. What has been clear from 7 years ago is that there was a possibility of civilian casualties, but what’s also become clear is that there hasn’t been evidence that there were casualties—which is not to say it certainly didn’t happen. It’s simply to say that there hasn’t been evidence that there were casualties.

203 “Speech notes for Press Conference on Operation Burnham” (27 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) from 316; “PowerPoint presentation from Press Conference” (27 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 323–339.

204 “Speech notes for Press Conference on Operation Burnham”, above n 203, at 321.

205 “Transcript: Lieutenant General Tim Keating Answers Questions on Operation Burnham as part of the press conference” (28 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 3* (Public Hearing Module 4, 16 September 2019) at 340–352.

206 “Lieutenant General Tim Keating Answers Questions on Operation Burnham as part of the press conference”, above n 205, at 348.

207 “Post-Cabinet Press Conference: Monday, 3 April 2017” (3 April 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 385.

- [125] The point seems to be that by describing the allegations of civilian casualties as “unfounded”, NZDF intended to convey that civilian casualties had not been substantiated but were possible. A rather different answer was given the following year. In response to concerns from the Ombudsman, NZDF agreed to release a “question and answer” style document on its website in March 2018.<sup>208</sup> One of the matters covered was the use of the term “unfounded”:

If ISAF had said civilian casualties may have occurred, why did the NZDF maintain that reports of civilian casualties were “unfounded”?

There has been some confusion regarding statements made in the ISAF press release of 29 August 2010 and subsequent NZDF press releases stating that allegations of civilian casualties were unfounded.

The term “unfounded” was intended to address the suggestion that the NZDF was responsible for civilian casualties.

In so far as there may have been civilian casualties caused by a malfunction on a coalition helicopter in the same operation, the NZDF acknowledges that use of the term “unfounded” may have suggested that the NZDF does not accept this possibility.

This is not the case.

NZDF provided a longer explanation in a later document published on its website in April 2018, referring to the use of the phrase “well founded” in s 102 of the Armed Forces Discipline Act 1971 in its explanation.<sup>209</sup>

- [126] We return to this issue in chapter 9.

- [127] Finally, on 29 and 30 March 2017 NZDF provided briefing notes to the Prime Minister and Minister of Defence saying that the threshold for establishing an internal inquiry had not been met on the basis of the information available.<sup>210</sup> In the 29 March briefing note, Lt Gen Keating said:<sup>211</sup>

I would welcome and consider any new evidence presented by any individual. If any such evidence does reach the necessary threshold, causing me to consider the allegations to be well-founded, then I would be obliged under s102 of the Armed Forces Discipline Act to initiate the appropriate Defence Force inquiry, for which I have the statutory duty and authority to do.

- [128] NZDF took various steps to obtain more information about what had occurred on Operation Burnham. In particular:

On 23 March 2017, Colonel Ferris emailed NZDF’s Military Representative at NATO to ask him to obtain the Incident Assessment Team’s “full report” as NZDF had only the

<sup>208</sup> NZDF “Operation Burnham Information Pack” (March 2018) <www.nzdf.mil.nz> at 18.

<sup>209</sup> NZDF “Second release of information after Ombudsman direction: Parts B + C – Advice to Government” (April 2018) <www.nzdf.mil.nz>.

<sup>210</sup> “Legal Threshold for Defence Force Inquiry into Operation Burnham” (29 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 354; “Defence Force Inquiries into Allegations of Offending” (30 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 364.

<sup>211</sup> “Legal Threshold for Defence Force Inquiry into Operation Burnham”, above n 210.

executive summary.<sup>212</sup> The Military Representative did attempt to source such a document from NATO, but ultimately asked them to discontinue its search.<sup>213</sup> Even so, NATO did provide an electronic copy of the executive summary around this time.<sup>214</sup> As we indicated earlier, there was an executive summary but no “full report”.

- (a) NZDF’s Defence Attaché for the Middle East also conducted a search for the “full report”. He seems to have found out about the United States AR 15-6 report during that search and understood that it was being considered for release.<sup>215</sup>
- (b) Lt Gen Keating directed Colonel Grant Motley to head a Fact Finding Team to visit various countries to conduct an Operation Burnham Due Diligence Task over May to June 2017. The purpose of this work was “to establish a clearer understanding of the information that exists relating to the allegations made against the NZDF”.<sup>216</sup> As we understand it, there was a briefing note to the Minister on 5 July 2017, but no written report of the results of this assignment.<sup>217</sup>
- (c) Lt Gen Keating wrote to the Chairman of NATO’s Military Committee on 4 April 2017 asking for a copy of the “full” Incident Assessment Team’s report.<sup>218</sup>

[129] Ultimately, the Prime Minister announced that the Government had decided that it would not hold an inquiry into Operation Burnham.<sup>219</sup>

[130] Following the change of Government in 2017, the question of an inquiry was again raised. Various options were considered, including an inquiry by a Parliamentary Select Committee. Ultimately, the decision taken was to establish the present Inquiry.

[131] In a briefing note from Lt Gen Keating to the Minister of Defence on 4 April 2018, NZDF took the view that any form of inquiry was unnecessary in the circumstances.<sup>220</sup> It highlighted what were considered to be errors in *Hit & Run*, making extensive reference to the video footage from the Apache weapons systems and the drone in the process. NZDF also drew attention to its efforts to have the Incident Assessment Team Executive Summary and the drone footage cleared for public release. NZDF offered the Attorney-General the opportunity to view the video footage and, as is apparent from his public remarks, the Attorney took up that opportunity.<sup>221</sup>

[132] Finally, we note that once the decision was made to conduct an inquiry, Lt Gen Keating committed NZDF to cooperating fully with it.<sup>222</sup>

<sup>212</sup> Email from Col Ferris to Brig Williams “ISAF/NATO Reporting” (23 Mar 2017, 20.41) (Inquiry doc 13/10).

<sup>213</sup> Email from Col Motley to Lt Gen Keating “HNR DDT SITREP: Week Ending 5 May 17” (5 May 2017, 2.46am) at [8] *Inquiry Bundle for Public Hearing Module 4 – Part 3* (Public Hearing Module 4, 16 September 2019) at 446.

<sup>214</sup> NZDF informed the Inquiry that email chains of April 2017 confirm its understanding that NZDF received the Incident Assessment Team report directly from NATO in electronic form in or around March 2017.

<sup>215</sup> Email from Brig Hayward to Brig Williams “RE: HNR DDT Update” (4 May 2017, 12.14) (Inquiry doc 13/12); email from Brig Hayward to Capt Arndell “RE: OP BURNHAM DUE DILIGENCE RFIs” (2 May 2017, 07.13) (Inquiry doc 13/11).

<sup>216</sup> Email from [redacted] to Brig Hayward and others “OP Burnham Due Diligence Task” (3 May 2017, 5.50pm) (Inquiry doc 13/16).

<sup>217</sup> “New Zealand Defence Force Update: ‘Hit and Run’ Allegations” (5 July 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 3* (Public Hearing Module 4, 16 September 2019) at 479–481.

<sup>218</sup> Letter from Lt Gen Keating to NATO (4 April 2017) (Inquiry doc 13/15).

<sup>219</sup> “Post-Cabinet Press Conference: Monday, 3 April 2017”, above n 207.

<sup>220</sup> “Operation Burnham – Update on a number of issues including further analysis of the book *Hit and Run*” (4 April 2018) *Inquiry Bundle for Public Hearing Module 4 – Part 3* (Public Hearing Module 4, 16 September 2019) at 527.

<sup>221</sup> Hon David Parker “Approval for inquiry into Operation Burnham” (11 April 2018) <www.beehive.govt.nz>.

<sup>222</sup> NZDF “NZDF Special Inquiry Office Established” (15 May 2018) <www.nzdf.mil.nz>.





## Timeline of key events relating to the “cover-up” allegations







