



# A cover-up? Our assessment

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# Chapter 9

- [1] The account in chapter 8 exposes significant failings on the part of the New Zealand Defence Force (NZDF) in addressing the allegations of civilian casualties after Operation Burnham. These failings would be concerning in any public organisation. They are deeply troubling in an organisation such as NZDF, given the nature of its responsibilities, the importance of the principles of civilian control and ministerial accountability and the image of dedicated and organised professionalism that NZDF seeks to project. The failings are particularly concerning because they are not confined to one or more isolated incidents but are reflected in conduct and events over a number of years. They fall along a spectrum of seriousness.
- [2] We will illustrate and explore NZDF's failings by reference to the way NZDF personnel dealt with the Incident Assessment Team's investigation, as well as by reference to other features that arise from the facts. Before we do so, however, we make two contextual points, which pull in different ways, but should not be forgotten.
- [3] First, Sir Jerry Mateparae, the Chief of Defence Force at the time of Operation Burnham, accepted that any suggestion of civilian casualties arising from an operation in which New Zealand forces were involved would be of concern, not only to NZDF, but also to the Government and the New Zealand public more generally. This reflects the fact that since the end of the Vietnam War, New Zealand's military activities have mainly been of a peace-keeping nature.<sup>1</sup> In terms of NZDF's operational experience, then, such allegations were unusual and, potentially, serious.
- [4] Second, as we explained in chapter 5, it was common for insurgent forces in Afghanistan to conduct operations to influence public opinion ("information operations"), in which the numbers of civilian casualties from coalition activities were exaggerated or even fabricated entirely.<sup>2</sup> Accordingly, some coalition forces tended to treat claims of civilian casualties after operations with a degree of scepticism, understandably perhaps. While both these factors were in play in respect of the claims of civilian casualties after Operation Burnham, we have the sense that, within the New Zealand Special Air Service (NZSAS) leadership at least, the latter predominated over the former.
- [5] Before undertaking our detailed analysis, we mention a persistent error by NZDF that is not, of itself, particularly significant, but which illustrates a bigger problem that will become something of a theme in the discussion that follows. NZDF, seemingly confused by the Incident Assessment Team's report being described as an "executive summary", made repeated requests to the North Atlantic Treaty Organization (NATO) and International Security Assistance Force (ISAF) for a copy of the "full report", despite being advised after the first request that there was no "full report". As far as we can tell (and putting to one side Lieutenant Colonel Chris Parsons' request for the report in early September 2010), NZDF first requested a copy of the "full report" in early July 2014 following the *Collateral Damage* documentary on Māori Television. That was when Commodore Ross Smith, who was tasked to deal with the issues that Hon Dr Jonathan Coleman had raised with Chief of Defence Force, Lieutenant General Tim Keating, asked NZDF staff in

<sup>1</sup> Evidence of Lieutenant General (Retired) Sir Jerry Mateparae, Transcript of Proceedings, Public Hearing Module 4 (16 September 2019) at 26. See also at 38–39.

<sup>2</sup> Chapter 5 at [42].

Afghanistan to obtain a copy. He was advised by email (after apparently thorough enquiries) that there was no “full report”, only the executive summary.<sup>3</sup>

- [6] Despite this advice in 2014, and despite holding the executive summary since 2011, NZDF took further steps to obtain the “full report” in 2017:
- (a) On 23 March 2017 Director of Legal Services Colonel Lisa Ferris asked NZDF’s military representative at NATO to obtain a copy of the “full report” from NATO.<sup>4</sup>
  - (b) On 4 April 2017 Lt Gen Keating wrote to the Chair of the Military Division at NATO requesting a copy of the “full report”.<sup>5</sup>
  - (c) NZDF instructed its defence attaché for the Middle East to conduct a search for a copy of the “full report” and he apparently made various requests of Afghan and United States Government officials for it in April and May 2017.<sup>6</sup>
- [7] This sequence provides a small illustration of a significant defect in the way that NZDF dealt with the civilian casualty issue, namely the lack of corporate memory within NZDF or, more precisely, NZDF’s failure to ensure that corporate memory on this matter was recorded, preserved and accessible. As we described in chapter 8,<sup>7</sup> NZDF did not prepare a written report to Dr Coleman in 2014 on the results of the enquiries that he had asked them to make about how NZDF had obtained the executive summary. Rather, Lieutenant General (Retired) Keating said in evidence that he assumed he would have given the Minister a verbal briefing.<sup>8</sup> But, as is amply demonstrated by the factual account in chapter 8, a corporate record of (among other matters) the outcome of Commodore Smith’s enquiries and the advice given to the Minister would have assisted those NZDF personnel dealing with the allegations of civilian casualties subsequently. This was not simply a matter of preserving an accurate historical record—written records, properly kept by electronic means, should enhance efficiency within NZDF (for example, by avoiding duplication of effort) and facilitate proper accountability in ministerial, parliamentary and other contexts. It should also promote public confidence in NZDF as an organisation, as we discuss further in chapter 12.
- [8] Relying on oral briefings was especially problematic as no one person or office had consistent charge of Operation Burnham-related matters over time. Information was effectively ring-fenced by “need to know” restrictions, reflecting in part the separation of the NZSAS and its operations from mainstream NZDF structures and processes. This was exacerbated by NZDF’s practice of regularly moving people to new roles. All this contributed to a lack of coordination and a loss of visibility of some information, as is most strikingly illustrated by NZDF’s treatment of the executive summary. That document, an overseas partner-sourced document of critical importance, likely came into NZDF’s possession in 2011. It was placed in a safe appropriate to its classification but was then apparently forgotten about, only to be discovered by chance several years later.

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3 See chapter 8 at [108].

4 Email from Col Ferris to Brig Williams “ISAF/NATO Reporting” (23 March 2017, 8.41pm) (Inquiry doc 13/10).

5 Letter from Lt Gen Keating to NATO (4 April 2017) (Inquiry doc 13/15).

6 Email from Col Motley to Brig Boswell and others “HNR DDT Update” (4 May 2017, 10.47) (Inquiry doc 13/12); email from Brig Williams to Capt Arndell “RE: OP BURNHAM DUE DILIGENCE RFIs (1 May 2017, 11.13pm) (Inquiry doc 13/11).

7 See chapter 8 at [109].

8 Evidence of Lieutenant General (Retired) Tim Keating, Transcript of Proceedings, Public Hearing Module 4 (19 September 2019) at 529.

- [9] Against that background, we now undertake our analysis of NZDF’s response to the allegations of civilian casualties on Operation Burnham. For ease of analysis, we will present our assessment under the same headings as we used in chapter 8, before drawing everything together in a conclusion at the end of the chapter.

## Period 1: 23 August – 31 December 2010

- [10] We discuss three points arising from this period:
- (a) Lt Col Parsons’ “misunderstanding” of a paragraph from the Incident Assessment Team Executive Summary (executive summary);
  - (b) NZDF Headquarters’ acceptance of Lt Col Parsons’ description of the executive summary; and
  - (c) the apparent disappearance of a video of a child’s funeral provided to NZDF immediately after the operation but not provided to us until we made specific enquiries.

### Lt Col Parsons’ “misunderstanding” of the Incident Assessment Team Executive Summary

- [11] We begin with Lt Col Parsons’ “misunderstanding” of the paragraph from the executive summary on 7 September 2010, the day he took over from Lieutenant Colonel Rian McKinstry as Senior National Officer for Task Force 81 (TF81).
- [12] Lt Col McKinstry’s reports from Afghanistan to the Director of Special Operations, Colonel Peter Kelly, and to NZDF Headquarters following Operation Burnham set out the position in relation to the possibility of civilian casualties accurately. Those reports reflected Lt Col McKinstry’s viewing of the weapons videos and what ISAF said in its 29 August 2010 media release about the Incident Assessment Team’s findings, namely that there was a possibility of civilian casualties from helicopter weapons fire falling short and striking two buildings.<sup>9</sup> They also reflected the immediate intelligence reporting available to NZDF, which indicated the possibility of civilian casualties.
- [13] Lt Col McKinstry handed over command as Senior National Officer to Lt Col Parsons on 7 September 2010. After his visit to ISAF Joint Command Headquarters later that day, Lt Col Parsons sent an email (the 8 September email) to Colonel Kelly reporting that he had “sighted” the Incident Assessment Team’s “conclusion” and it:<sup>10</sup>

... **categorically clears both [ground] and air [components] of any allegations.** It states that having reviewed the evidence there is no way that civ cas could have occurred.

As we have previously noted, this purported description was wrong because the Incident Assessment Team did not categorically clear the air components. Nor did it say that there was no way that civilian casualties could have occurred; indeed, it said the opposite—that civilian

<sup>9</sup> See chapter 8 at [14] and [18].

<sup>10</sup> Email from Lt Col Parsons (WAATEA.SNO) to Col Kelly (SWAN – HQNZDF.DSO) “RE: [EXTERNAL RELEASE] External Release: Info/Updates” (8 September 2010, 7.12am) (Inquiry doc 09/15). Bold in original. As we noted in chapter 8, this email was sent at 11.42pm on 7 September (Afghanistan time) and received in New Zealand at 07.12am on 8 September (New Zealand time).

casualties were possible. Lt Col Parsons' confidently expressed yet erroneous description was based on what was (as he accepted in cross-examination) a "fleeting glance"<sup>11</sup> at one paragraph of the executive summary.<sup>12</sup>

- [14] Although we quoted the paragraph at issue from the executive summary in chapter 8, we quote it again given its importance to the present analysis:

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 all ROE, the Tactical Directive, and according to the pre-planned CONOP. The AF reported no CIVCAS and the IAT was unable to find any part of their operation where CIVCAS could have occurred.

- [15] Brigadier Parsons said in his evidence that he misinterpreted the paragraph in the executive summary because he misunderstood the abbreviation "AF" in the third sentence. He said he interpreted "AF" to mean "Air Force" whereas in fact, as he now realises, it had been defined earlier in the document to mean "ground assault force".<sup>13</sup> He told us that "AF" was not a NATO acronym for Assault Force, but could have any of four meanings, the most common being Air Force. Nor was it an acronym with a fixed meaning in New Zealand, where it was defined to mean Air Force or Audio Frequency. Being a NATO document, he gave the acronym the most common NATO meaning—Air Force.

- [16] Brigadier Parsons also said that comments made by the (unknown) ISAF officer, probably an American, who showed him the document tended to confirm his understanding of what it said.<sup>14</sup> Brigadier Parsons said under cross-examination that he had told the ISAF officer that he wanted to know whether there were any civilian casualties caused by anybody. He said that he took from the answer he was given that there were none. Brigadier Parsons then said:<sup>15</sup>

A. So I asked him, it was clear to me from his answer that there were no civilian casualties.

I said well I can't very well report that without having seen the report, it would not be the right thing to go back without having verified, at which point he conceded that point, and showed me the paragraph that he was able to show me.

Q. So are you saying that this American, was it American, this person?

A. I think it probably was, yeah.

Q. This person who was probably American lied to you?

A. No I'm not saying that.

Q. Well you are, aren't you, because you're saying he told you there was no civilian casualty?

A. I'm saying that what I understood from what he said was very clearly in my mind that there were no civilian casualties.

<sup>11</sup> Evidence of Brigadier Chris Parsons, Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 295.

<sup>12</sup> Lt Col Parsons' email said that he had "sighted the [Incident Assessment Team's] conclusion" (above n 10). Under cross-examination, he said that he thought he would have clarified to Colonel Kelly in a subsequent telephone call that he had only sighted one paragraph of the report: above n 11, at 295–296. We address this further at paragraphs [40]–[42] below.

<sup>13</sup> Evidence of Brigadier Parsons, above n 11, from 269.

<sup>14</sup> At 283–284.

<sup>15</sup> At 284–285.

Later, Brigadier Parsons accepted that, on his account, the ISAF officer was either mistaken or had misled him,<sup>16</sup> but also emphasised that there may have simply been a misunderstanding between them.<sup>17</sup>

[17] Before we discuss this evidence, we will make three short points of a contextual nature.

### The context

[18] First, Brigadier Parsons has provided us with material showing that he visited ISAF Joint Command on the afternoon of 7 September 2010, the day he took over as Senior National Officer. Although he attended an ISAF Special Operations Forces' meeting, he had time to enquire about the Incident Assessment Team's findings, which we accept he did.

[19] At the time of his visit, Lt Col Parsons knew, as did other NZDF personnel, that ISAF had concluded that it was possible that civilian casualties had been caused when firing from the AH-64 Apache helicopters fell short and hit two buildings. As we have said, this had been stated in ISAF's media release of 29 August 2010 and was supported by video footage that some NZDF personnel had been able to view.<sup>18</sup> Although he had apparently not seen the video footage, Lt Col Parsons had received several of Lt Col McKinstry's post-Operation Burnham updates, which referred to the possibility of civilian casualties, and was also aware of Lt Col McKinstry's email of 6 September 2010 to Colonel Kelly.<sup>19</sup> That email noted that the Commander ISAF Joint Command had been briefed on the findings of the Incident Assessment Team and had accepted that TF81 "had no case to answer". The email went on to say that ISAF would not be taking any further action in the matter, but there might "still be some fallout for the aviation elements". The email attached an ISAF email of 3 September recording this information.<sup>20</sup>

[20] The Incident Assessment Team had, then, drawn a distinction between the ground force and the air assets in terms of allegations of civilian casualties. Lt Col Parsons acknowledged in his evidence that he had received these emails and was aware of their content.<sup>21</sup> Quite apart from all this, it is clear that Lt Col Parsons was fully briefed on the situation by Lt Col McKinstry prior to taking over as Senior National Officer.<sup>22</sup>

[21] Second, Lt Col Parsons was well aware that the Prime Minister and other ministers were interested in knowing what had happened on Operation Burnham.<sup>23</sup> He said in his evidence that he was aware that Colonel Kelly was keen to obtain a copy of the Incident Assessment Team's report so that the

<sup>16</sup> At 285.

<sup>17</sup> At 285, 291 and 303–304.

<sup>18</sup> Lt Col Parsons was a recipient of Lt Col McKinstry's email of 26 August 2010, in which he said that the video footage of the United States air assets indicated that civilian casualties were possible from the accidental impact of rounds on a particular house: see chapter 8 at [14]; 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).

<sup>19</sup> Email Lt Col McKinstry (WAATEA.SNO) to Col Kelly (HQNZDF.DDSO) "External Release Issues External to the Sitrep" (6 September 2010, 01.32) (Inquiry doc 09/13).

<sup>20</sup> Email from ISAF SOF HQ CJ3 DIR IS to ISAF SOF HQ CG COM SOF IS and others "FW CIVCAS INVESTIGATION ON TF81" (3 September 2010, 2.29pm) (Inquiry doc 09/14).

<sup>21</sup> At 264–266.

<sup>22</sup> As was confirmed by both Colonel McKinstry and Lt Col Parsons: see Evidence of Colonel Rian McKinstry, Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 252; Evidence of Brigadier Parsons, above n 11, at 264–266 and 307.

<sup>23</sup> Evidence of Brigadier Parsons, above n 11, at 273–275.

Chief of Defence Force and the Minister of Defence could be briefed.<sup>24</sup> He was also responsible for briefing the Prime Minister about Operation Burnham on at least two occasions.<sup>25</sup> When Operation Burnham got underway, he contacted the Prime Minister to advise him of that.<sup>26</sup> After the operation, he again contacted the Prime Minister, at the request of the Chief of Defence Force, to tell him how it had gone.<sup>27</sup> Brigadier Parsons told us that he did not discuss the issue of civilian casualties with the Prime Minister and we accept that. But Brigadier Parsons acknowledged what is obvious on the evidence, namely that he was aware of the high level of political interest in the operation,<sup>28</sup> as were other NZDF officers—particularly Colonel Kelly.

- [22] Brigadier Parsons suggested to us that ministers were concerned about the possibility that New Zealand forces might have caused civilian casualties and were less concerned with whether the United States air assets might have done so. We understand, however, that civilian casualties occurring on an operation in which New Zealand was involved, however caused, were something that concerned ministers.<sup>29</sup> In any event, Brigadier Parsons did acknowledge in his submissions that the issue of civilian casualties on the operation was a matter of “intense interest”.
- [23] Third, we undertook detailed natural justice processes with Brigadier Parsons given the possibility of adverse findings against him. In fairness to him, we should record the context from his perspective.
- [24] In brief, Brigadier Parsons advised us that his efforts to obtain the Incident Assessment Team’s report and to understand its contents were sandwiched between multiple tasks that resulted in him working for “20 hours straight”. He had broken ribs at the time. By the time he wrote the relevant email to Colonel Kelly shortly before midnight on 7 September (Afghanistan time), he had been “on the job for over 15 hours”. Also, he had not had an opportunity to read ISAF’s Standard Operating Procedure that dealt with the Incident Assessment Team process, so was not aware that a preliminary assessment would be undertaken to see whether a fuller investigation was merited. He said he thought that the paragraph he was shown from the Incident Assessment Team Executive Summary reflected the final result of an on-going investigation and did not realise that a further investigation had been ordered. He had not at that stage seen the video footage showing rounds from an Apache helicopter hitting buildings.
- [25] In reaching the views expressed below, we have taken into account the submissions that both Brigadier Parsons and NZDF made in relation to his position.<sup>30</sup>

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24 At 266.

25 Dr Mapp gave evidence that Lt Col Parsons “talked regularly” with the Prime Minister: Evidence of Hon Dr Wayne Mapp, Transcript of Proceedings, Public Hearing Module 4 (18 October 2019) at 1104–1105. Brigadier Parsons acknowledged this but said his contacts related to his duties and were frequently at the behest of his superiors. He said he tried to keep the NZDF hierarchy informed of his contacts.

26 Evidence of Brigadier Parsons, above n 11, at 275.

27 Email from Lt Col Parsons to Gp Capt Poot “Re: Brief to PM” (22 August 2010, 7.18 pm) (Inquiry doc 13/02); see chapter 8 at [8].

28 Evidence of Brigadier Parsons, above n 11, at 275–276.

29 For example, the then Minister of Defence, Hon Dr Wayne Mapp, gave evidence that the Government took a particular interest in any allegations of civilian casualties arising from operations that New Zealand was involved in, irrespective of whether New Zealand forces were directly responsible: Evidence of Hon Dr Mapp, above n 25, at 1015.

30 We should also note that we have received natural justice submissions from others whose conduct is discussed in this chapter. We have, of course, taken those submissions into account in reaching our final views.



## The meaning of the paragraph

- [26] In his submissions, Brigadier Parsons explained his contemporaneous interpretation of the paragraph from the executive summary quoted at paragraph [14] as follows:

The paragraph commences with a single sentence making the point that two elements need to be considered to make overall conclusions about CIVCAS: element 1 and element 2. The first sentence to then follow deals with the first element. The second sentence to follow then deals with the second element. In short, the paragraph introduces the need to deal with both elements and then appears to provide the findings for both.

- [27] Given the language of the paragraph and what Lt Col Parsons knew when he read it, this was, we consider, an implausible interpretation of the paragraph, as we now explain.

- [28] First, in relation to the meaning of “AF”, we acknowledge that one accepted meaning of the acronym “AF” in NATO and NZDF terminology is “Air Force”. But there is a difference between “the Air Force” as a service and some air assets provided by the United States Army.<sup>31</sup> We note that several NZDF documents concerning Operation Wātea use the term “Assault Force” frequently to refer to the assault force component of the ground force, as one would expect.<sup>32</sup> More significantly, a TF81 document headed “Summary of Incident”, which was completed after Operation Burnham for the Incident Assessment Team, refers to the “Assault Force (AF)”, and then uses the acronym “AF” thereafter on numerous occasions in reference to the ground assault force.<sup>33</sup> It is not clear who within TF81 prepared the document: the Ground Force Commander thought it possible that he had prepared it but has no memory of doing so. But the relevant point is that this is a contemporaneous TF81 document, which Brigadier Parsons acknowledged that he would have seen,<sup>34</sup> that uses the acronym “AF” to refer to the ground assault force, albeit having defined it. While the “AF” at issue appears in a paragraph from an ISAF document, it is not obvious why an NZDF reader would treat the acronym as referring to the air assets on the operation rather than to the ground assault force, especially if there was only a brief opportunity to read the paragraph.

- [29] Second, when he went to ISAF Joint Command Headquarters on 7 September, Lt Col Parsons knew that the Incident Assessment Team had distinguished between the positions of the ground forces and the air assets in terms of possible civilian casualties. The Incident Assessment Team had found no issues with the actions of the ground forces but the actions of the air assets required further investigation because video footage showed that they may have, inadvertently, caused civilian casualties when errant rounds from the Apache helicopters hit two buildings. Lt Col Parsons was aware of this from Lt Col McKinstry’s emails,<sup>35</sup> as he acknowledged in his evidence,<sup>36</sup> and from the media articles about the ISAF media releases that he had been sent.<sup>37</sup>

<sup>31</sup> Brigadier Parsons said he interpreted “AF” to refer back to the “AWT and AC-130” referred to in the first sentence.

<sup>32</sup> See, for example, OP RAHBARI Mission Approval (12 Aug 2010) (Inquiry doc 09/28); OP RAHBARI ORDERS (Inquiry doc 09/39); Accompanies OP RAHBARI ORDERS (Inquiry doc 09/38); OP-RAHBARI-OBJ-BURNHAM-OPSUM (22 August 2010) (Inquiry doc 02/14); OP SUMMARY (Inquiry doc 02/03).

<sup>33</sup> Summary of Incident (Inquiry doc 02/10).

<sup>34</sup> Evidence of Brigadier Parsons, above n 11, at 301.

<sup>35</sup> Inquiry doc 02/13, above n 18; Inquiry doc 09/13, above n 19. Although the email of 6 September 2010 (Inquiry doc 09/13) is not addressed to Lt Col Parsons, he has indicated in evidence (see Evidence of Brigadier Parsons, above n 11, 266) and submissions that he was aware of it at the time.

<sup>36</sup> Evidence of Brigadier Parsons, above n 11.

<sup>37</sup> Email from [Defence Intelligence Officer] to Col Kelly “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.

- [30] On Lt Col Parsons' interpretation of the paragraph, it was fundamentally inconsistent with what he knew to that point. As he interpreted it, the paragraph said that the Incident Assessment Team had been unable to find any part of the air assets' operation where civilian casualties could have occurred. Yet it was clear from the emails he had seen and ISAF's media releases that the Incident Assessment Team had identified a "part of their operation" where the air assets could have caused civilian casualties. Although Lt Col Parsons said he had not seen the video footage of the rounds hitting the houses, Lt Col McKinstry's email of 26 August had described what it showed—errant rounds impacting a house near where a woman and children had been seen earlier. Moreover, Colonel McKinstry said in evidence that when he had watched the weapons video footage, it was obvious to him that there might have been civilian casualties. When Brigadier Parsons was asked whether Lt Col McKinstry had shared that view with him, he said that he was sure they had discussed it.<sup>38</sup> So, the outstanding question in relation to the air assets was not whether there was an occasion on which civilian casualties could have occurred but rather whether civilian casualties had in fact occurred, a question that would have been difficult to resolve quickly, especially given the remote location of the operation.
- [31] Third, if the Incident Assessment Team had intended to say in the paragraph that neither the ground forces nor the air assets had caused any civilian casualties, they would have stated that conclusion in a straightforward way. As written, the paragraph does not plausibly bear that interpretation. What the Incident Assessment Team expressed in the paragraph is, we think, clear:
- (a) In the first sentence of the paragraph, the Incident Assessment Team says that an accurate review of the allegations of civilian casualties requires separating TF81's operations from the air asset engagements.
  - (b) In the second sentence, which refers to the "ground engagement", the Incident Assessment Team does not expressly say TF81 was not responsible for civilian casualties, only that it complied with the rules of engagement, tactical directives and the concept of operations, which, as Lt Col Parsons would have understood, is a different matter. Compliance with those did not preclude the possibility of civilian casualties, as we discussed in chapter 6.
  - (c) In the third sentence, the Incident Assessment Team says that it was unable to find any part of "their operation" where civilian casualties could have occurred. This is the final element of the Incident Assessment Team's findings in relation to TF81—in effect, that it caused no civilian casualties.
- [32] Finally, we should record that, at a very late stage in the Inquiry's processes (on 4 June 2020),<sup>39</sup> Brigadier Parsons advised that he had a notebook that he kept during his period as Senior National Officer for Operation Wātea. Among the entries for 7 September 2010 is the following: "AIT conclusion no case to answer air or gnd". We accept that this entry was made by Lt Col Parsons at the time. It is, of course, consistent with what Lt Col Parsons reported to Colonel Kelly in the 8 September email.
- [33] We will return to the issue of Lt Col Parsons' interpretation of the paragraph in the conclusion and findings section, beginning at paragraph [60].

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<sup>38</sup> Evidence of Brigadier Parsons, above n 11, at 307.

<sup>39</sup> We comment on the late production of relevant material in chapters 1 and 12. We note that Brigadier Parsons was not responsible for the failure to produce the diary earlier.

### Miscommunication between Lt Col Parsons and the ISAF officer

- [34] As noted above, Brigadier Parsons explained in his evidence that his view of what the Incident Assessment Team had concluded was reflected in what was said by the ISAF officer who showed him the paragraph. While he acknowledged the possibility that the ISAF officer may have lied to or misled him, he thought this implausible (as do we), and advanced the explanation that he and the ISAF officer must have been talking at cross-purposes—that there must have been some form of miscommunication between them.<sup>40</sup> He said he asked the ISAF officer whether there were any civilian casualties caused by coalition forces (that is, “by anybody”) on the operation, and he took from the ISAF officer’s answer that the Incident Assessment Team had concluded that there were none at all.<sup>41</sup> It was after that exchange that Brigadier Parsons said he asked to see the report itself, and it was then that he was shown the paragraph.
- [35] Given that Lt Col Parsons was the Senior National Officer and was dealing with an ISAF officer—probably American and presumably also reasonably senior—about a limited and specific subject matter, it would be surprising if a fundamental miscommunication of that nature had occurred. Brigadier Parsons said that the ISAF officer had told him that he was not allowed to see the executive summary. He said the officer “went out on a limb” by pointing him to the paragraph in the executive summary. This indicates that the officer would almost certainly have limited his observations to what he would have regarded as New Zealand’s legitimate area of interest, that is, the actions of New Zealand forces on the operation.
- [36] Furthermore, if the ISAF officer did say anything about the position of the United States air assets, we consider it improbable that his comments would have been inconsistent with ISAF’s public announcements to that point. These were the media releases of 29 and 30 August 2010,<sup>42</sup> which reflected the Incident Assessment Team’s findings. The first has already been mentioned; the second complemented the first by announcing that a further investigation had been ordered based on the information provided by the Incident Assessment Team, and the results would be provided on completion. (As we understand it, that further investigation was the AR 15-6 investigation, which was conducted in the period 17–30 September 2010.)<sup>43</sup>
- [37] The ISAF officer would no doubt have known that a further investigation had been ordered into the position of the air assets and that it had not been completed. We think it implausible that the officer would somehow have managed to communicate to Lt Col Parsons that there were no civilian casualties on any part of the operation when the Incident Assessment Team’s conclusion was the opposite, namely that there was a possibility of civilian casualties from the air asset engagements. It was suggested that the ISAF officer might have said something to the effect that there was no evidence or no proof that there were civilian casualties. But such an observation would not have ruled out the possibility identified by the Incident Assessment Team that civilian casualties had occurred. As we have noted, ruling out that possibility would have been difficult given the location of Operation Burnham.
- [38] Brigadier Parsons accepted that the ISAF officer would not have said anything that was inconsistent with ISAF’s public position and would most likely have restricted his remarks to addressing

40 Evidence of Brigadier Parsons, above n 11, at 284, 291 and 303–304.

41 Evidence of Brigadier Parsons, above n 11, at 283 and following.

42 Discussed in chapter 8 at [17] and [20].

43 As we note in chapter 8, NZDF has advised us that it does not hold a copy of ISAF’s 30 August media release, which may mean that it never received it: see chapter 8 at [21].

New Zealand's position. However, he says that this is not how he understood what the officer said to him at the time.

- [39] As we have already said, everything NZDF had heard to this time about the Incident Assessment Team's conclusion was that it was possible that there had been civilian casualties as a result of errant fire from the Apache helicopters. Lt Col McKinstry's email of 6 September (attaching the ISAF email chain) confirmed this. Given that background, advice on 7 September that the Incident Assessment Team had ruled out the possibility of any civilian casualties at all would have been an unanticipated and dramatic development, as is shown by the way Lt Col Parsons communicated the information (in bold print) in his 8 September email. Despite the pressured environment, any conscientious and reasonable officer in Lt Col Parsons' position would surely have ensured that he understood the position correctly (by, for example, double or even triple checking the information he thought he had been given, or asking what had led to the change of position or if an updated ISAF media release might be expected). Brigadier Parsons said that he did question the ISAF officer, but whatever he did was obviously insufficient to identify his fundamental misunderstanding.

### **Lt Col Parsons' telephone call**

- [40] As we noted in chapter 8, Brigadier Parsons said under cross-examination that he realised that he had sent his email of 8 September 2010 to Colonel Kelly too quickly, and that he thought he would have addressed the matter in one of his regular telephone calls with Colonel Kelly, or perhaps Colonel Kelly's deputy, Lieutenant Colonel Karl Cummins. Brigadier Parsons said in his evidence that he would have "tried to clarify what I saw, what I believed, why I believed that", and "that I only saw that one paragraph".<sup>44</sup> He also advised us that at the time he had been working long hours and was under pressure as TF81 was about to start another significant operation.
- [41] When cross-examined on this, Major General (Retired) Kelly said he was on a skiing holiday at the time, so that his secure communications were patchy and having a secure phone conversation was difficult. He did not recall any discussion with Lt Col Parsons about this, although he accepted it might have happened, perhaps a few days later when he had returned from holiday.<sup>45</sup> He did accept, however, that by 10 December 2010 (the date of the first December briefing note to the Minister), he was aware from conversations with Lt Col Parsons that he had only seen one paragraph of the executive summary.<sup>46</sup> Colonel Cummins was also cross-examined about this and did not recall whether, at the time, he understood Lt Col Parsons to have read the report, or whether he was told that Lt Col Parsons had only taken what has been described as a "fleeting glance" at it.<sup>47</sup>
- [42] On the assumption that Lt Col Parsons did raise the matter with either Colonel Kelly or Lt Col Cummins soon after the email was sent, there are two points to be made. The first is that Lt Col Parsons must have had some misgivings or second thoughts about the emphatic nature of what he had said in his email, given that he had only had a brief look at one paragraph of the executive summary. Brigadier Parsons denied this, saying that he had no doubt as to the accuracy of what

<sup>44</sup> Evidence of Brigadier Parsons, above n 11, at 295–296.

<sup>45</sup> Evidence of Major General (Retired) Peter Kelly, Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 330–332.

<sup>46</sup> At 332–333.

<sup>47</sup> Evidence of Colonel Karl Cummins, Transcript of Proceedings, Public Hearing Module 4 (18 September 2019) at 423.

he reported; the point of his call was simply to correct the impression that he had read the whole report when he had not. However, it is difficult to see why he would have felt a need to do this at the time if it was not material in some way.

- [43] The second is that whatever he told Colonel Kelly (or Lt Col Cummins, as the case may be), it did not prevent NZDF personnel from giving inaccurate accounts of the Incident Assessment Team's conclusions over the following months to the Chief of Defence Force, the Minister of Defence and, ultimately, the Prime Minister and the Minister of Foreign Affairs. So, either whatever he said did not cast doubt on what was said in the email or, if it did, that doubt was subsequently ignored by whoever received the call.
- [44] Another aspect of Lt Col Parsons' interactions with Colonel Kelly is relevant in the present context. As we described in chapter 8, Colonel Kelly emailed Lt Col Parsons on 24 September with an enquiry. Under the subject heading "MINISTERS CONCERN" Colonel Kelly wrote:<sup>48</sup>

The Min has a concern over the 22 Aug job and the media release by ISAF stating they were going to do an investigation (refer ISAF media release on their Website dated 29 Aug) into a civcas allegation stemming from our operation. This was then followed by a subsequent media release on 30 Aug which said that some rounds from the helicopter may have gone astray [and] caused some casualties.

You advised that the assessment team has now cleared all coalition forces involved in the operation and found no evidence of any civcas.

The Min wants to know how then does HQ ISAF close this loop formally, in essence what is their process and are the findings released to the media. In his mind he believes the issue is still left hanging with no formal closure.

Can you chat to whoever and give us some words that we can reassure the Minister. A signed letter from IJC [ISAF Joint Command] formally closing this process would be most useful.

See what you can do, don't sweat it but any comment would be useful.

- [45] Lt Col Parsons replied to this enquiry on 29 September, as follows:<sup>49</sup>

As to release ... of the IAT findings to the media – I am informed that this hasn't happened yet and may not. The DCOM ISAF SOF will look into it. Honestly, though – you need to steady our Minister down. There is no link from the media to say that NZ had any involvement and therefore the whole incident has passed NZ by. Furthermore the allegations levelled against the AWT [Air Weapons Team] are just that – to date, the Governor has not produced any proof of any accidental deaths despite the investigation team pressing him to do so. Moreover, our Minister should be absolutely satisfied that all NZ actions are completely defensible and undertaken with the highest standards of discipline and IAW [in accordance with]... the ROE.

Plus, he should not be concerned about any kiwi reaction should it become public knowledge – If Kiwis found out that the blokes who killed Lt O'Donnell had had another crack at Kiwis and came off second best this time – most would be very happy about it.

48 Email from Col Kelly (HQNZDF.DSO) to Lt Col Parsons (WAATEA.SNO) "MINISTERS CONCERN" (24 September 2010, 9.37am) (Inquiry doc 13/04).

49 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).

- [46] What is interesting about this response for present purposes is the way it is expressed. It indicates that the allegations against the air assets remain as potentially viable allegations, subject to the Governor providing proof. This is to be contrasted with Lt Col Parsons' 8 September email, which stated that the Incident Assessment Team had "categorically cleared" the air assets of any allegations and had concluded that there was "no way that civilian casualties could have occurred". On the face of it, these emails are difficult to reconcile.

### **Lt Col Parsons' interactions with a junior officer**

- [47] The Inquiry heard evidence that around the same time that Lt Col Parsons said he saw the paragraph from the executive summary, one of his officers also became aware of the language of the paragraph through an ISAF contact. The officer had fostered relationships with equivalent officers at ISAF and asked a contact about the Incident Assessment Team's findings. The officer initially told us that he received either verbal advice or an email to the effect that the Incident Assessment Team investigation had concluded that there were no civilian deaths as a result of the actions of New Zealand forces. He said he was not given any information about the investigation's conclusion as to whether the actions of the United States air assets had resulted in civilian casualties, but everyone knew that was a possibility. Subsequently, he said he thought he had received an email over the ISAF system—an email containing text that was, as it turns out, from the paragraph in the executive summary that Lt Col Parsons saw. He said he either forwarded the email to Lt Col Parsons, also on the ISAF system, or discussed it with him.<sup>50</sup> In any event, he brought the email to Lt Col Parsons' attention.
- [48] As part of his periodic reporting obligation to Wellington, the officer prepared a situation report ("SITREP") dated 9 September 2010, which included commentary on the Incident Assessment Team's findings. The final version of the SITREP contained the following summary of the outcome of the investigation:
- ... the conclusion of the inquiry was that all TF 81 actions appeared to have been conducted IAW all ROE, the ISAF Tactical Directive, and according to the pre-planned CONOP. The investigation could not find any part of the operation where CIVCAS could potentially have occurred.
- [49] As will be apparent, the first sentence of this extract from the SITREP is essentially the same as the second sentence of the paragraph from the executive summary quoted at paragraph [14] above, except that the word "ISAF" has been added before "Tactical Directive". The second sentence of the extract is a modified version of the third sentence in the paragraph—the opening words ("The AF reported no CIVCAS and") are omitted and the words "their operation" are replaced with the words "the operation". Obviously, these changes make a significant difference to the meaning of the sentence. The question is, how did they occur?
- [50] The officer who drafted the report had a work station immediately beside that of the Senior National Officer—first Lt Col McKinstry, then Lt Col Parsons. He said that, while he wanted to adopt a "whole of operation" perspective,<sup>51</sup> both officers emphasised to him that his concern was only with the actions of NZDF personnel, not with the actions of the United States air assets. He

<sup>50</sup> The officer may not have appreciated at the time that the text came from the executive summary. The Inquiry notes that it has not had access to the ISAF email system; in any event, it may be that emails from it are no longer available.

<sup>51</sup> For example, the officer said he had raised the possibility of NZDF conducting an investigation when the allegations of civilian casualties emerged.

said that when he drafted his 9 September SITREP, he included language about the possibility that the Apaches' firing had resulted in inadvertent civilian casualties. This was consistent with his wish to give the full picture.

- [51] The officer said he removed the language about the United States air assets from the draft at the direction of Lt Col Parsons. The result was that the SITREP stated there were no civilian casualties on the operation and that the Incident Assessment Team investigation had found there were none. The officer said that Lt Col Parsons directed the changes to the sentence in the SITREP taken from the third sentence of the paragraph from the executive summary.<sup>52</sup> While the officer preferred not to change the SITREP to remove reference to the possibility of civilian casualties, he felt able to do so because he considered that those for whom the report was written would understand that it addressed only the New Zealand position. He said that to ensure they did understand, he spoke to a Wellington-based officer by telephone to make that clear.<sup>53</sup>
- [52] The officer noted that he was not privy to his commanders' reporting back to Wellington about civilian casualties on the operation. He said that the first time he realised "something was awry" was when he later saw NZDF's press release of 20 April 2011 saying that the Incident Assessment Team's investigation had concluded that the allegations of civilian casualties were unfounded. He said he became concerned because, to his knowledge, the release was inaccurate. He raised the matter with more senior officers in his team, one of whom acknowledged to us that the discrepancy was indeed brought to his attention at the time by one of his officers (although he could not recall specifically the discussion with the officer in question).
- [53] There is a question as to exactly when any exchange between the officer and Lt Col Parsons would have occurred. Lt Col Parsons visited ISAF Joint Command on the afternoon of 7 September (Afghanistan time) and his email to Colonel Kelly was sent shortly before midnight (arrived at 7.12am on 8 September (New Zealand time)). The officer's SITREP was dated 9 September and, according to the officer, was written that day. It was dispatched by email on 10 September, so the interaction likely occurred on 9 September or possibly on the morning of 10 September.
- [54] What emerges from all this? First, it is clear that the officer who wrote the SITREP did, as he claimed, receive a communication from his ISAF contact which accurately stated part of the Incident Investigation Team's conclusion about TF81's actions on Operation Burnham. That is established first by the fact that the SITREP recorded a meeting with his contact on the issue of civilian casualties and second by the two essentially identical sentences in the executive summary and the SITREP about the ground force's compliance with rules of engagement, the Tactical Directive and the concept of operations. Further, the communication which the officer received from his ISAF contact did not change the officer's existing understanding that civilian casualties were possible as a result of air asset engagements.
- [55] Second, it is equally clear that there are material differences in the language of the third sentence of the paragraph from the executive summary when compared to the equivalent sentence in the SITREP (see paragraph [48] above). The effect of these differences was that the language of the sentence in the SITREP indicated that the Incident Assessment Team had concluded that there was no part of the operation where civilian casualties could have occurred, contrary to what the

52 NZDF has advised the Inquiry that there are no drafts of the SITREP on its systems. The officer said he shared a very small office space with Lt Col Parsons and that he submitted the SITREP to Lt Col Parsons. We understand the changes could have been done directly on screen, so that no draft was saved.

53 The Wellington-based officer has no recollection of the call.

Incident Assessment Team had in fact concluded. Who, then, was responsible for the differences in language?

- [56] As to that, it is implausible that the New Zealand officer's ISAF contact would have sent him the modified wording. First, that wording was inconsistent with, and misrepresented, the Incident Assessment Team's findings. There is no reason why an ISAF officer would have misrepresented the findings to a New Zealand officer in that way. Second, the ISAF contact would have understood that the third sentence in the paragraph from the executive summary was dealing with the TF81 assault force, which was, from ISAF's perspective, the New Zealand officer's legitimate area of interest. The New Zealand officer said his ISAF contact had told him that he would not provide the Incident Assessment Team's findings in relation to the actions of the United States air assets; he would only provide its conclusions in relation to TF81.
- [57] This means that the modifications to the sentence in the SITREP which changed the meaning of the third sentence of the paragraph from the executive summary must have been made by either Lt Col Parsons or the officer. The modified language was, of course, consistent with what Lt Col Parsons advised Colonel Kelly in his email on 8 September, namely that the allegations of civilian casualties on Operation Burnham had no basis in fact. On the other hand, the modified language was inconsistent with the officer's understanding about the possibility of civilian casualties on the part of the air assets—an understanding that was the basis of his approach to his superior officers following NZDF's inaccurate media release of 20 April 2011.<sup>54</sup>
- [58] Brigadier Parsons said that he did not recall directing the officer to make any changes to the draft SITREP, although he acknowledged that, as Senior National Officer, he routinely reviewed and amended outward reports. He said this was, and continues to be, his practice, just as he frequently submits his drafts for review by others. Given their relative positions in the command structure and their close working proximity, it would be surprising if Lt Col Parsons did not review the officer's draft report.
- [59] Ultimately, Brigadier Parsons accepted that he might have told the junior officer to make his report specific to New Zealand. He said that anyone reading the SITREP would have interpreted it as applying only to New Zealand's position.

## Conclusion and findings

- [60] We now attempt to draw all this together.
- [61] First, Brigadier Parsons accepted that what he said in the 8 September email about the Incident Assessment Team's conclusion was inaccurate and acknowledged that he did not take the care that he should have in undertaking what he accepted was an important task. He strongly denied, however, that he had deliberately misrepresented what the paragraph from the executive summary said in his 8 September email. He told the Inquiry that it was simply a genuine and reasonable mistake. He said his inaccurate description of the Incident Assessment Team's conclusion was based on two things: (a) his interpretation of the paragraph from the executive summary; and (b) what the ISAF officer said to him when he was shown the paragraph.

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<sup>54</sup> We acknowledge, however, that even though the officer was uncomfortable with not giving the full picture in the SITREP, he was prepared to adopt the changed wording as he considered that readers of the SITREP would have understood that it applied only to the actions of New Zealand personnel. There were two other statements in the SITREP to the same effect.



- [62] As to (a), we have concluded that Brigadier Parsons' interpretation is not one that the language of the paragraph can reasonably bear in the circumstances as Lt Col Parsons knew them to be. We consider it clear that the paragraph does not have the meaning described (and emphasised) in Lt Col Parsons' 8 September email, for the reasons we have discussed above.
- [63] That said, after much consideration we accept that Lt Col Parsons in fact interpreted the paragraph in the way he said he did. We place some weight on the diary entry in reaching this view. We consider this was a case of confirmation bias: Lt Col Parsons read the paragraph in a way that supported his preconceptions—he saw what he wanted to see and discarded what he otherwise knew. Brigadier Parsons explained that at the time he had broken ribs, was working on multiple tasks and had been working non-stop for many hours. That may be a partial explanation—but it does not excuse what was a serious failure. Lt Col Parsons was the Senior National Officer and was tasked with following up and reporting back to a superior officer on an issue that he knew was of interest to the Chief of Defence Force and to ministers. On any view, the way he both interpreted and reported on the paragraph was unreasonable and unacceptable.
- [64] As to (b), we consider that the “misunderstanding” with the ISAF officer was a further element of Lt Parsons' confirmation bias—he heard what he wanted to hear. The circumstances were such that either the ISAF officer would have talked simply about the New Zealand position (which seems likely given ISAF's reticence about discussing another nation's affairs and the fact that the ISAF officer did not know Lt Col Parsons); or, if he did talk about the position of the United States air assets, he would have done so consistently with ISAF's public announcements (which accurately reflected the findings in the executive summary). Given what Lt Col Parsons knew about the Incident Assessment Team's findings in relation to the United States air assets at the time he went to ISAF Joint Command, his seniority and his position of responsibility, it is difficult to understand how there could have been a “misunderstanding” on his part about what would have been a fundamental—and sudden—change in the Incident Assessment Team's conclusions over the course of a few days. On any view of it, what he says he understood was so at odds with what he knew at the time that he needed to make further enquiries. Brigadier Parsons said that he did question the ISAF officer, but if he did, anything he asked was insufficient to identify the fundamental misunderstanding that he said occurred.
- [65] Second, we accept that Lt Col Parsons did direct the officer to change his SITREP to remove references to the possibility that the air assets had caused civilian casualties. Surprisingly in the circumstances, he did not, either then or later, advise the officer of his understanding of the Incident Assessment Team's conclusion, because the officer continued to think that the air assets may have caused civilian casualties and raised the point with his commanding officer in April 2011. If the draft SITREP contained the final two sentences from the executive summary paragraph essentially word for word, as we believe it did, then those sentences did not change the officer's understanding of the Incident Assessment Team's conclusion (that is, he did not interpret them as Lt Col Parsons had).
- [66] Further, although he seems to have been busy with a variety of matters at the time, Lt Col Parsons would have been able to consider the language more closely than he did at ISAF Joint Command—he would have had the opportunity, in other words, for more than a “fleeting glance”. Finally, we note that Lt Col Parsons accepted that he may have directed the officer to change the wording of the sentence, but said that it would have been to reflect New Zealand's legitimate area of interest (particularly from a legal standpoint), namely, the actions of New Zealand. But the changed sentence is unqualified: “The investigation could not find any part of the operation where CIVCAS could potentially have occurred.” It is also consistent with the tenor of the report

as a whole that there were no civilian casualties on the operation. We do not read the SITREP as confining this conclusion to the actions of TF81: indeed, we think it is clear that it does not.

- [67] Finally, although we accept that Lt Col Parsons genuinely misunderstood the paragraph from the Incident Assessment Team executive summary at the time he read it (albeit that he read it seeing what he wanted to see and ignoring what he otherwise knew), we consider that he had misgivings or second thoughts about the email soon after he sent it. That is why he felt the need to make a telephone call to explain that he had read only one paragraph of the report. There was no need to explain if he was certain as to the accuracy of what he had reported.
- [68] Further, we consider that his exchange with the junior officer who prepared the SITREP must have alerted him to the possibility that he had misunderstood the position. Had he advised that officer of what he thought he had learnt about the Incident Assessment Team's conclusions, his misunderstanding could have been quickly corrected. He did not advise the officer, however. Finally, the content of his email of 29 September to Colonel Kelly is not consistent with the emphatic terms of his 8 September email, as the later email recognises that the allegations that the air assets caused civilian casualties remained extant.
- [69] In short, we consider that soon after he had sent the 8 September email, Lt Col Parsons appreciated that there remained doubts about whether civilian casualties had resulted from the air assets' actions and that he had misstated the position in the 8 September email. Despite this, he took no effective steps to clarify or rectify the situation. Brigadier Parsons denied this, but we do not accept his denial.
- [70] Further, even on his own account, the circumstances which we have discussed above display such a lack of care and rigour by a senior NZSAS officer on a matter of obvious importance, both to his superiors and to the Government of the day, that whether or not he appreciated that he might have misunderstood the paragraph hardly matters. On any view, what happened was inexcusable, especially as it resulted in NZDF giving erroneous information to the Chief of Defence Force, to ministers (and through them, to Parliament) and to the public over the ensuing years.

### **NZDF Headquarters' acceptance of Lt Col Parsons' description of the executive summary**

- [71] We now turn to the reaction of Colonel Kelly and others in NZDF Headquarters to Lt Col Parsons' advice of 8 September 2010. Surprisingly, Colonel Kelly appears to have accepted Lt Col Parsons' report without question and acted on it, despite:
- (a) Lt Col McKinstry's reports to him and ISAF's 29 August 2010 media release, which highlighted the possibility of civilian casualties;<sup>55</sup>
  - (b) ISAF's 30 August 2010 media release and the ISAF email chain attached to Lt Col McKinstry's reporting email of 6 September 2010, which indicated that while TF81 "had no case to answer", there was an ongoing investigation into the air assets;<sup>56</sup>

<sup>55</sup> See chapter 8 at [9], [11], [13], [17], [18] and [27].

<sup>56</sup> See chapter 8 at [20] and [25]–[27]. Colonel Kelly prepared a Directorate of Special Operations brief for the Chief of Defence Force dated 31 August 2010, which noted that firing from one of the helicopters had fallen short and appeared to hit the roof of a house where women and children had been seen earlier. The possibility of civilian casualties from this was noted: 2010-08-31 CDF Ops Brief (31 August 2010) (Inquiry doc 13/22) at 8.

- (c) the Apache weapons video footage he had viewed, which he accepted showed the possibility of civilian casualties;<sup>57</sup> and
- (d) the intelligence reporting available to NZDF, which indicated that civilians may have been killed and/or injured.<sup>58</sup>

Lt Col Parsons' email became the basis for an erroneous briefing to the Chief of Defence Force<sup>59</sup> and then for similarly erroneous briefing notes prepared for the Minister (to go as well to the Prime Minister and Minister of Foreign Affairs) on 10 and 13 December.<sup>60</sup> These erroneous briefings later resulted in NZDF making the same erroneous statements to the media and to ministers in 2011, 2014 and 2017, and in ministers making inaccurate statements in the House and to the public.<sup>61</sup>

[72] When cross-examined about this, Maj Gen (Ret) Kelly said he accepted Lt Col Parsons' description of the effect of the executive summary because it was the first time any NZDF officer had seen the document. Previously, NZDF had only had access to second-hand accounts of it. The fact that Lt Col Parsons said he had seen the source document overwhelmed anything else—Parsons' email "superseded all other information and the press releases".<sup>62</sup>

[73] To be fair to Maj Gen (Ret) Kelly, we make two points:

- (a) First, it is obvious from the contemporaneous emails that he thought the Incident Assessment Team would be producing a final report and asked Lt Col McKinstry to obtain a copy as soon as possible, given the ministerial interest in the matter.<sup>63</sup> It may be that he thought Lt Col Parsons had viewed the Incident Assessments Team's final report rather than its preliminary assessment (that is, the executive summary).
- (b) Second, Lt Col Parsons' 8 September 2010 email to Colonel Kelly about the executive summary was highly misleading. Although it did indicate that Lt Col Parsons had been unable to obtain a copy, it described the Incident Assessment Team's findings in categorical terms and did not indicate that it was based on a brief reading of one short paragraph of a three-page report. That said, as we discussed at paragraphs [40]–[42], Maj Gen (Ret) Kelly did accept that Lt Col Parsons made him aware at some point that he had seen only one paragraph from the executive summary. While Maj Gen (Ret) Kelly could not recall when he learnt that, he accepted that he knew it by 10 December when the briefing note he was involved in drafting was sent to the Minister.<sup>64</sup> That briefing note, it will be recalled, said that Lt Col Parsons had been "permitted to read the report".<sup>65</sup>

<sup>57</sup> Evidence of Major General (Retired) Peter Kelly, Transcript of Proceedings, Public Hearing Module 4 (18 September 2019) at 392.

<sup>58</sup> See chapter 8 at [9], [11], [13] and [18].

<sup>59</sup> DOT POINT BRIEF FOR CDF (Inquiry doc 08/14).

<sup>60</sup> NZSAS (TF81) OPERATIONS IN BAGHLAN PROVINCE AUGUST AND SEPTEMBER 2010 (10 December 2010) (Inquiry doc 09/12); CRU AND NZSAS OPERATIONS IN BAGHLAN PROVINCE AUGUST AND SEPTEMBER 2010 (13 December 2010) (Inquiry doc 09/21). The 13 December note was the result of a request from the Prime Minister for something that could be released publicly, although it was not in fact released.

<sup>61</sup> See, for example, chapter 8 at [53], [54], [56], [82], [86], [102] and [116].

<sup>62</sup> Evidence of Maj Gen (Ret) Kelly (17 September 2019), above n 45, at 334. See also Evidence of Maj Gen (Ret) Kelly (18 September 2019), above n 57, at 340–341.

<sup>63</sup> Email from Colonel Kelly (HQNZDF.DSO) to Lt Col Parsons (WAATEA.SNO) and others "RE: External Release Issue External to the Sitrep" (30 August 2010, 6.38am) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 81.

<sup>64</sup> Evidence of Maj Gen (Ret) Kelly, (17 September 2019), above n 45, at 332–333.

<sup>65</sup> See chapter 8 at [47].

- [74] Maj Gen (Ret) Kelly emphasised in his evidence that he did not act alone in accepting Lt Col Parsons' account. He said he co-drafted the ministerial briefing note of 10 December 2010 with Colonel Mike Thompson, who was the Deputy Chief of Staff at NZDF Headquarters.<sup>66</sup> He also said that there was a process within NZDF Headquarters for preparing such notes, which involved a number of inputs and running a draft past NZDF's legal section. Others involved would have been aware of, for example, the intelligence reporting after Operation Burnham.<sup>67</sup> We accept this description of the process that was likely followed. However, it produced a ministerial briefing paper that was inaccurate in fundamental respects. That a consultative process of the type described produced such an outcome is obviously a cause for considerable concern—and, indeed, suspicion.
- [75] We acknowledge that Colonel Kelly did make some effort to understand the apparent discrepancy between what Lt Col Parsons had said about the Incident Assessment Team's findings and what ISAF had itself said. On the afternoon of 23 September 2010, Colonel Kelly sent an email to the Military Secretary in Hon Dr Wayne Mapp's office, Group Captain Edward Poot.<sup>68</sup> The email referred to discussions earlier that day between the Minister and the Vice Chief of Defence Force on "casualty allegations". It reported that after the allegations of civilian casualties emerged, an Incident Assessment Team was established and it found that there were no civilian casualties. As a result of the Incident Assessment Team's investigation, "all forces were cleared of causing civilian casualties, the matter was closed and no formal investigation initiated. The SNO was advised of this and he saw the written report". The email went on to note that "the SNO was adamant that ISAF will not be releasing the report even after he reinforced the national interest angle".
- [76] In his response, Grp Capt Poot said:<sup>69</sup>
- The only critical issue that remains opaque is as follows. NATO put out a press release at the time. Our recollection is that it talks about an investigation. How does NATO close the loop with the wider public in Afghanistan (and troop contributing nations) to advise the outcome of the investigation?
- [77] The text of Colonel Kelly's email of 23 September 2010 in response to Grp Capt Poot's query is set out in chapter 8 at paragraph [35]. This was the email in which Colonel Kelly forwarded a report of the ISAF media release of 29 August (which referred to the possibility of civilian casualties from helicopter rounds landing short and hitting two buildings), describing it as "the last I saw from ISAF on this". He went on to say that he was "not aware of any other releases since".
- [78] However, ISAF had issued a further media release on 30 August 2010, in which it announced that it was recommending a further investigation.<sup>70</sup> Maj Gen (Ret) Kelly said in his evidence that he was not aware of the 30 August media release.<sup>71</sup> However, in the email he sent to Lt Col Parsons

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66 In his evidence, Colonel Thompson said he did not recall being involved in the production or drafting of the 10 or 13 December 2010 briefing notes to the Minister (Evidence of Colonel (Retired) Mike Thompson, Transcript of Proceedings, Public Hearing Module 4 (18 September 2019) at 425).

67 Evidence of Maj Gen (Ret) Kelly (18 September 2019), above n 57, at 341–344.

68 Email from Col Kelly to Gp Capt Poot "VCDF FOR OFFICIAL USE ONLY" (23 September 2010, 3.33pm) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 115.

69 Email from Gp Capt Poot to Col Kelly "Report" (23 September 2010, 03.41) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 115.

70 See chapter 8 at [20].

71 Evidence of Maj Gen (Ret) Kelly (17 September 2019), above n 45 at 322.

on 24 September 2010 (that is, the day after his email to Grp Capt Poot), he referred specifically to ISAF's media release of 30 August as well as to that of 29 August, so he was obviously aware of it then.<sup>72</sup>

- [79] Although this email does show an attempt by Colonel Kelly to obtain more clarity about Lt Col Parsons' description of the Incident Assessment Team's conclusion, it is inconsistent with what is said in the email of the previous day to Grp Capt Poot, to the effect that the ISAF media release of 29 August 2010 was the last Colonel Kelly had seen from ISAF and he was not aware of any subsequent releases. We will return to this in the conclusion section.
- [80] To summarise, as is apparent from his email of 31 August 2010,<sup>73</sup> Colonel Kelly knew that the Prime Minister and ministers were exercised about the possibility of civilian casualties on Operation Burnham and were anxious to learn the "official outcome". Presumably others at NZDF would also have been aware of the ministerial concern. In the face of that, it is obvious that care should have been taken to ascertain the true position before providing advice to the Chief of Defence Force, the Prime Minister and other ministers. As we described in chapter 8,<sup>74</sup> Colonel Kelly and other key officers within both the NZSAS and NZDF more generally were sent copies of media reports (both individual reports and compilations). These referred to claims of civilian casualties and to the two ISAF media releases of 29 and 30 August, so key personnel should have been aware of what was happening in-theatre. They had also received the early September email chain from ISAF, which recorded the outcome of the Incident Assessment Team's investigation.<sup>75</sup> On top of that, intelligence reporting indicated the likelihood (or at least possibility) of civilian casualties.
- [81] Lt Col Parsons' description of the effect of the executive summary was radically different from what was otherwise known, and what ISAF had stated publicly. While the emails discussed above show some awareness of this, nobody within NZDF Headquarters seems to have questioned Lt Col Parsons' description of the executive summary's conclusion. Rather, his description was taken as accurate. Given the obvious and significant discrepancy between the earlier reports and Lt Col Parsons' advice, some scrutiny or questioning might have been expected, yet we have seen no evidence of any. The need for such scrutiny became particularly acute when Colonel Kelly learnt that Lt Col Parsons had seen only one paragraph from the executive summary and in light of Lt Col Parsons' email to him of 29 September, which was inconsistent with what was said in the 8 September email. Overall, there appears to have been a disappointing lack of commitment and rigour to finding out what had happened.

<sup>72</sup> Inquiry doc 13/04, above n 48. The relevant text of the email is set out at paragraph [44] above. It appears from the email that Colonel Kelly has confused the order of ISAF's two media releases. The first in fact refers to the possibility of civilian casualties from helicopter rounds going stray (the 29 August media release); the second refers to the ordering of a further investigation (what this report refers to as the 30 August media release: see chapter 8, footnote 35). As explained in chapter 8, there is some confusion over the respective dates given the varying dates on which the statements were reported in the media. This email shows Colonel Kelly knew about both ISAF releases although he reversed the order in which they were issued and gives the date of 29 August to the release this report refers to as the "30 August media release". 29 August is the date that was indicated on ISAF's website (now archived) In any case, the important point is that he was aware of the content of both media releases.

<sup>73</sup> Email from HQNZDF.DSO to WAATEA.SNO and others "CIVCAS REPORTING BY INTERNATIONAL MEDIA" (31 August 2010, 13.05) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 84.

<sup>74</sup> See chapter 8 at [25].

<sup>75</sup> Email from ISAF SOF HQ CJ3 TF 81 LNO IS to ISAF SOF TF 81 OC IS and ISAF SOF TF 81 SNO IS "FW: CIVCAS INVESTIGATION ON TF81" (3 September 2010, 4.53pm) (Inquiry doc 09/14).

[82] Despite these unsatisfactory features, we do not consider that this was part of a deliberate cover-up within NZDF Headquarters. As Colonel Kelly said in his evidence, Lt Col Parsons was regarded as a “smart lad” and a “very accomplished officer”.<sup>76</sup> He went on to say:

When he looked at that, he knew what he was looking at in terms of the conclusions of the report, and the way he presented that to us, that was our only factual connection to the summary of the report.

Colonel Kelly denied that there was a general interest in denying civilian casualties on an operation associated with the NZSAS.<sup>77</sup>

[83] We return to this in the final section of this chapter.

### Video of a child’s funeral

[84] As we said in chapter 5,<sup>78</sup> shortly after Operation Burnham, NZDF personnel in Bamyán received cell phone video clips which were claimed to show the aftermath of Operation Burnham. Among them were some videos of funerals of people said to have been killed as a result of the operation. We were told that one of these showed a small body wrapped for burial. Other video clips received at the same time showed, for example, damage to Abdullah Kalta’s house. NZDF provided copies of these video clips to us, with the notable exception of the video showing what appeared to be a small, wrapped body. We asked NZDF to conduct further searches for it, resulting in the production of a video that shows an adult male being prepared for burial and, later, a smaller wrapped body. To the naked eye, the size of the body suggests it is a child aged less than 10.

[85] NZDF engaged a well-qualified expert to examine the video forensically in order to estimate the length of the wrapped body. That expert expressed the view that the body was 168 cms long; that is, the size of an average Afghan adult male. By contrast, the imagery expert engaged by the Inquiry put the body’s length at 130 cms, the size of a child approximately 8–10 years old. The difference between them may be explained by a difference of view as to where the body’s feet end in the burial wrapping. Given the range of assumptions that underlie the expert opinions, the difference may ultimately not be capable of resolution.

[86] Based on the evidence we have heard, we are satisfied that:<sup>79</sup>

- (a) a video clip which on the face of it appears to show the body of a child aged up to 10 prepared for burial was provided to NZDF personnel in Bamyán along with the other video clips;
- (b) the video clips were sent electronically to TF81’s base in Kabul;
- (c) some of the video clips are almost certainly authentic, in the sense that they can be identified with some confidence as portraying events related to Operation Burnham;
- (d) others cannot be authenticated with assurance one way or the other; and

<sup>76</sup> Evidence of Maj Gen (Ret) Kelly (18 September 2019), above n 57, at 392.

<sup>77</sup> Evidence of Maj Gen (Ret) Kelly (18 September 2019), above n 57, at 393.

<sup>78</sup> See chapter 5 at [89]–[93].

<sup>79</sup> As we said in chapter 5 at paragraph [93], we cannot be confident that we have received all the video footage that witnesses told us they recalled seeing at the time. From the descriptions they gave, it is possible some witnesses were referring to other video footage not provided to the Inquiry.

(e) all the videos were saved on NZDF's electronic systems and were provided to us, except the one that appears to show a child's funeral, which was only produced after we made specific enquiries.

[87] Obviously, an important question arises as to why the video that appears to show a child's body was not initially produced to the Inquiry. We understand the version now provided was sourced from the New Zealand Provincial Reconstruction Team (NZPRT)'s records in storage,<sup>80</sup> and that the video could not be found in any other location despite evidence indicating that it was provided to TF81 at the time.<sup>81</sup> Given that the videos accompanying it were provided to the Inquiry earlier after NZDF found them in more accessible systems, we can only assume that this video was deleted or misfiled at some stage, most likely in Afghanistan. We return to this in the conclusion section.

## Period 2: April – December 2011

[88] In relation to this time period, we conduct our assessment under two headings:

- (a) How NZDF obtained the Incident Assessment Team Executive Summary; and
- (b) Hon Dr Mapp's understanding of the possibility of civilian casualties.

### How NZDF obtained the Incident Assessment Team Executive Summary

[89] While we accept that NZDF had a copy of the executive summary in 2011, and think it likely that Colonel (Retired) Jim Blackwell obtained it, we do not accept his account of how he obtained it.<sup>82</sup> We note that when first approached by Counsel for NZDF and asked whether he was the person who had obtained the report, Col (Ret) Blackwell said he could not recall whether he had seen it and suggested that counsel should contact his analyst, who was still with NZDF. Counsel contacted the analyst, who was unable to find anything of relevance in NZDF's email or other records (including electronic records).<sup>83</sup>

[90] When, as a result of the Inquirers' questions at the September 2019 public hearing, it became clear that Colonel Blackwell had provided a copy of the executive summary to the Office of the Chief of Defence Force in September 2011, he was contacted again and agreed to give evidence. He explained his failure to recall the executive summary when initially approached by NZDF's counsel by indicating that he was distracted at the time and he had read many such reports over the years.<sup>84</sup> He said that once the media reported that he was the person who had taken the executive summary to the Chief of Defence Force's office, he thought more deeply about the matter and began to recall some of the details, which he was happy to share with the Inquiry.

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<sup>80</sup> As we said in chapter 5 at paragraph [91], the video was saved in the NZPRT's computer system in early September 2010 and had a file name indicating that it may have been showing casualties of Operation Burnham.

<sup>81</sup> As noted in chapter 5 at [90], we are satisfied, on the basis of the oral evidence we have heard, that this video was among those sent to TF81 at the time.

<sup>82</sup> We put our conclusion to Col (Ret) Blackwell as part of the natural justice process. He maintains the veracity of his account.

<sup>83</sup> Evidence of Lucila van Dam, Transcript of Proceedings, Public Hearing Module 4 (19 September 2019) at 595.

<sup>84</sup> Evidence of Colonel (Retired) Jim Blackwell, Transcript of Proceedings, Public Hearing Module 4 (15 October 2019) at 668.

- [91] Given what we now understand about the ability of NZDF to interrogate its electronic systems, we think it improbable that there would be no relevant electronic record if Col (Ret) Blackwell's account was correct. We think it most unlikely that there would be no electronic footprint of any of the emails dealing with the executive summary that Col (Ret) Blackwell said he sent to Afghanistan and received back, or of the executive summary being sent from Afghanistan, received in Wellington and electronically saved and filed in the Directorate of Special Operations' directory. This is especially so because we have received copies of other emails, briefings and such like generated by Colonel Blackwell in this period.
- [92] We also think it unlikely that the Senior National Officers concerned would not remember Colonel Blackwell asking them to obtain the report given the emphasis Col (Ret) Blackwell told us he placed on it. We also note that in July 2014, while Colonel Blackwell was still the Director of Special Operations, his analyst emailed a copy of the executive summary to him, which he forwarded to Lt Col McKinstry. That copy was a Word document containing a scanned version of the hard copy of the executive summary NZDF had provided to Dr Coleman and showed Dr Coleman's underlining.<sup>85</sup> The significance of this is that when the analyst had been looking for relevant files over the weekend, she did not find the executive summary in the Directorate of Special Operations' electronic files.<sup>86</sup>
- [93] We are also concerned that Col (Ret) Blackwell failed to mention in his evidence that he visited Afghanistan from 28 to 31 May 2011.<sup>87</sup> Col (Ret) Blackwell advised us that he did not mention the visit because he considered it was irrelevant. However, it is clearly relevant, as we now explain.
- [94] Col (Ret) Blackwell said in his evidence that he made vigorous efforts from April 2011 onwards to obtain the executive summary. He accepted that from April on, he would have been "constantly asking" the Senior National Officer for a copy of the report, including by email.<sup>88</sup> At the beginning of May 2011, there was an exchange of emails between Colonel Blackwell and the Senior National Officer which dealt in part with Colonel Blackwell's forthcoming trip to Afghanistan.<sup>89</sup> The email chain comprised three emails dated 2 May, one dated 3 May, two dated 4 May, two dated 5 May and two dated 6 May 2011. Those emails covered a variety of topical matters, including that Colonel Blackwell intended to visit Camp Warehouse on the way back from a conference in Europe and arrangements for the visit. None of these emails mentions obtaining a copy of the executive summary, even though the visit would have been an obvious opportunity to do that.
- [95] Moreover, by email dated 29 May 2011, the Senior National Officer circulated a detailed programme for Colonel Blackwell's visit.<sup>90</sup> It included a meeting with the Commander ISAF Special Operations Forces as well as other introductions to ISAF personnel, which would have provided an opportunity to pursue obtaining a copy of the executive summary.

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85 Email from Col Blackwell (HQNZDF.DSO) to Lt Col McKinstry (@CO) "FW: ISAF Op Assessment Summary" (1 July 2014, 10.15) *Supplementary Bundle for Public Hearing Module 4 – Part 2* (16 September 2019) at 77.

86 This does not necessarily mean there was no copy of the executive summary stored on the Directorate of Special Operation's electronic files as it may have been filed in a way that meant it was not picked up by the search terms used by the analyst.

87 See chapter 8 [70].

88 Evidence of Col (Ret) Blackwell, above n 84, at 702–703.

89 Emails between Col Blackwell (HQNZDF.DSO) and WAATEA.SNO "Matters External to the SITREP" (2–6 May 2011) (Inquiry doc 13/24).

90 Email from WAATEA.SNO to WAATEA.S2 and others "DSO Programme" (29 May 2011, 01.45) (Inquiry doc 13/25); see also emails between WAATEA.SNO and Col Blackwell (HQNZDF.DSO) and others, above n 89.



- [96] As we have said, Col (Ret) Blackwell's explanation for not mentioning his visit was that it was irrelevant for present purposes. He said that during the visit, he was engaged on "an urgent and strategically important task" and had more pressing concerns than obtaining the executive summary. It is, of course, possible that Colonel Blackwell's plans changed after the email exchange with the Senior National Officer at the beginning of May, which contains no indication of "an urgent and strategically important task"—quite the reverse, in fact. But if his plans did change, Colonel Blackwell did not inform the Senior National Officer of that before the latter circulated the 29 May email containing the programme for Colonel Blackwell's visit.<sup>91</sup>
- [97] The relevance of all this is that it goes to Col (Ret) Blackwell's evidence that he was "constantly asking" the Senior National Officer to obtain a copy of the report, including by email. If this was so, it is most surprising that there is no reference to obtaining the executive summary in the email exchange about his proposed visit, given the nature of exchange and what was then contemplated for the visit.
- [98] Further, our understanding (based on evidence from those with experience of ISAF's procedures in-theatre) is that the reports prepared by Incident Assessment Teams were generally made available to those with an obvious interest in seeing them. If Colonel Blackwell did not take the opportunity while in Afghanistan to speak to the Senior National Officer or anyone else about the executive summary, or do anything to obtain a copy, that indicates that he was not as vigorous in his attempts to obtain it as he indicated in his evidence, or that it was obtained by other means.<sup>92</sup>
- [99] Obviously, NZDF did obtain a copy of the executive summary, probably in 2011. However, in light of the matters discussed above, we do not accept Col (Ret) Blackwell's account of how it was obtained.
- [100] In addition, we are satisfied that Colonel Blackwell did not brief either the Chief of Defence Force (Lieutenant General Rhys Jones) or Colonel Thompson about the executive summary in the way he claimed. Neither of them can remember any such briefing—or even of being told that NZDF held the executive summary. We think it improbable in the circumstances that they would have forgotten a briefing on what was undoubtedly an important document. We note that the issue of civilian casualties on Operation Burnham was topical—Dr Mapp had commented on it in an interview in April 2011 and NZDF had issued a media release;<sup>93</sup> Dr Mapp had answered a parliamentary question about it in May;<sup>94</sup> and in early September NZDF had circulated a statement to NZDF personnel which addressed the issue after the publication of *Other People's Wars*.<sup>95</sup> Given that the executive summary was inconsistent with what had been said on these occasions, we consider that both officers would have remembered a briefing of the type Col (Ret) Blackwell said he gave them.
- [101] Further, we accept what Lieutenant General (Retired) Jones told us about the way such a document would have been handled within his office in the normal course.<sup>96</sup> We have seen no indication

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91 Col (Ret) Blackwell told us the task he was referring to was not a matter the Senior National Officer needed to know about.

92 As we noted in chapter 8, Col (Ret) Blackwell denied that he obtained the executive summary unofficially and said that the only person he could have received it from was the Senior National Officer: Evidence of Col (Ret) Blackwell, above n 84, at 715.

93 See chapter 8 at [52]–[54].

94 See chapter 8 at [56].

95 See chapter 8 at [57]–[59].

96 Evidence of Lieutenant General (Retired) Rhys Jones, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 989.

that the executive summary was subject to the type of analysis that would normally have been undertaken. Further, we think it relevant that we have seen no documentary evidence (such as a briefing note) that supports Col (Ret) Blackwell's account, although he said he had prepared a briefing note (which would have been a dot-point executive summary),<sup>97</sup> from which he would have briefed both the Chief of Defence Force and the Minister.<sup>98</sup>

[102] This brings us to the question of Dr Mapp's understanding of the Incident Assessment Team's conclusions.

### **Dr Mapp's understanding of the possibility of civilian casualties**

[103] In relation to Dr Mapp's understanding of the executive summary, the position is unclear. On the evidence available to us, we accept that Dr Mapp's understanding prior to September 2011 was based on the briefings he had received from NZDF, to the effect that the Incident Assessment Team's investigation had concluded that no civilian casualties were caused on the operation by either the ground force or the air assets. This was the position set out in the briefings he received in December 2010 and which he expressed publicly in his interview with Guyon Espiner in April 2011, for example. The question is, what was the position once the executive summary came into NZDF's possession?

[104] Captain (Retired) Chris Hoey, the Minister's Military Secretary, said that when he received the document pack said to contain the executive summary in the Minister's office on 1 September 2011, he "flipped through" (but did not read) the documents before giving them to the Minister. He was certain he would have given them to the Minister in light of the Government's interest in matters relating to Afghanistan.<sup>99</sup> Col (Ret) Blackwell said in his evidence that he had a meeting with Dr Mapp about the executive summary. He said that the Minister had a copy of the executive summary, had read it and was very familiar with its contents and that they had a detailed discussion about it.<sup>100</sup>

[105] By contrast, Dr Mapp said he had a "fragmentary memory" of a meeting with Colonel Blackwell in connection with the executive summary.<sup>101</sup> He said he could remember Colonel Blackwell sitting on the other side of the table, but could not remember the detail of what they discussed or being given a copy of the executive summary. If he had been given the executive summary, he was sure he would have read it. Later in his evidence he stated categorically that he had never read the executive summary and denied that he was familiar with its contents.<sup>102</sup>

[106] On the basis of the Minister's diary, it is likely that the briefing meeting with Colonel Blackwell would have taken place on 12 September 2011. We have Colonel Blackwell's briefing notes for that meeting. They do not mention Operation Burnham, the executive summary or civilian casualties. As to the possibility of an unscheduled meeting, that seems unlikely given first, the

<sup>97</sup> Evidence of Col (Ret) Blackwell, above n 84, at 714.

<sup>98</sup> At 712–713. Also see chapter 8 at [66] regarding notes prepared by Colonel Blackwell for a meeting with the Minister on 12 September 2011.

<sup>99</sup> Evidence of Captain (Retired) Chris Hoey, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 840.

<sup>100</sup> Evidence of Col (Ret) Blackwell, above n 84, at 748.

<sup>101</sup> Evidence of Hon Dr Mapp, above n 25, at 1012.

<sup>102</sup> At 1033. Dr Mapp was not cross-examined about Capt (Ret) Hoey's evidence that he had left the documents with him. He said he had read Capt (Ret) Hoey's brief of evidence and that he did not remember being given the report to read, and that Secret documents were kept in the Military Secretary's safe. He does not believe he had read the Incident Assessment Team report before he met with Colonel Blackwell. See Evidence of Hon Dr Mapp, above n 25, at 1012 and 1036.

lack of a relevant briefing note<sup>103</sup> and second, Dr Mapp's evidence that the unscheduled meetings that occurred were with the Chief of Defence Force, not Colonel Blackwell.<sup>104</sup>

[107] In any event, the absence of any relevant reference in a briefing note to the executive summary or the operation, and the fact that Dr Mapp did not recall any details of what was a matter of significant interest to him, suggest that any briefing Colonel Blackwell gave Dr Mapp was short and cursory rather than detailed, and that it was, in effect, dismissive of the Incident Assessment Team's findings. Ultimately, we think it unnecessary to resolve which of the two accounts is correct. This is because the two witnesses agree in part about what happened, and this is sufficient to enable us to reach conclusions, as we now explain.

[108] Col (Ret) Blackwell said that when the Minister asked him whether there had been any civilian casualties, he described the Incident Assessment Team's report as "a standard NATO response", which was to neither confirm nor deny such casualties. He said he explained to Dr Mapp that he had seen no evidence (including the video footage, storyboard and discussions with his colleagues) that led him to believe there were civilian casualties, although the possibility could not be discounted.<sup>105</sup> Later in his evidence he said: "I had no reason to believe there were civilian casualties, but there may have been."<sup>106</sup> Dr Mapp accepted in cross-examination that Colonel Blackwell had told him that there was no evidence of civilian casualties, but they were possible.<sup>107</sup>

[109] Colonel Blackwell's description of the outcome of the Incident Assessment Team's investigation was, of course, inconsistent with the position that NZDF had expressed in the briefing notes intended for the Prime Minister and ministers in December 2010, as Colonel Blackwell appreciated.<sup>108</sup> For example, the 10 December briefing note said:<sup>109</sup>

... 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.

Nor was it consistent with Dr Mapp's public remarks about Operation Burnham. For example, in his 24 April 2011 interview on *Q+A*, Dr Mapp was asked by Guyon Espiner about the allegations of civilian casualties on Operation Burnham, and Dr Mapp said that the allegations had been investigated and proven to be false. When asked whether he was satisfied that no civilians were killed, Dr Mapp replied that he was "satisfied around that".<sup>110</sup>

[110] Dr Mapp was cross-examined about the apparent contradiction between what he and NZDF had said publicly about the results of the Incident Assessment Team's investigation and what he accepted Colonel Blackwell had told him about it in 2011. Dr Mapp said that he did not think he needed to do anything to correct the public record as, based on what Colonel Blackwell told him,

<sup>103</sup> In his evidence, Col (Ret) Blackwell said he created briefing notes for his own use to support his briefings to the Minister which would be saved electronically: Evidence of Col (Ret) Blackwell, above n 84, at 712 and 753.

<sup>104</sup> Evidence of Hon Dr Mapp, above n 25, at 1080.

<sup>105</sup> Evidence of Col (Ret) Blackwell, above n 84, at 677

<sup>106</sup> At 678.

<sup>107</sup> Evidence of Hon Dr Mapp, above n 25, at 1085.

<sup>108</sup> Col (Ret) Blackwell said that it was this inconsistency that led him to march the executive summary into the Office of the Chief of Defence Force and to brief the Minister about it: Evidence of Col (Ret) Blackwell, above n 84, at 710–711.

<sup>109</sup> Inquiry doc 09/12, above n 60, at [11](d).

<sup>110</sup> "*Q+A's* Guyon Espiner interviews Dr Wayne Mapp"—TVNZ" (24 April 2011) *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 194.

there was no “actual evidence” of civilian casualties. He ultimately accepted, however, that he should have discussed the matter with others and that he may have made the wrong decision.<sup>111</sup>

- [111] Despite Dr Mapp’s persistent refusal to acknowledge it, the inconsistency between the public statements that he and NZDF had made about the outcome of the Incident Assessment Team’s investigation and what he accepted he was told by Colonel Blackwell about its conclusions is both obvious and material. We consider that Dr Mapp should have corrected the public record when he learnt what the Incident Assessment Team had in fact found. Unfortunately, not only did he fail to correct the record, Dr Mapp also furthered the narrative that there was no possibility of civilian casualties on Operation Burnham, as we now explain.
- [112] As noted in chapter 8, in the course of the natural justice process, the Inquiry learnt that a journalist had requested certain information from Dr Mapp under the Official Information Act on 12 May 2011. As soon as we learnt of the journalist’s request, we asked NZDF to provide the relevant documentation, which it did over the period 12–20 March 2020. Although we have described the journalist’s requests and Dr Mapp’s responses in chapter 8, we will set them out again for ease of reference.
- [113] It will be recalled that the journalist’s first request 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>112</sup>

The source of the information on which I based my statement on *Q+A* on 2 [sic] April was classified operations reporting by 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.*

- [114] 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, the Minister gave essentially the same answer as he had given to Mr Locke MP’s question for written answer in May 2011:

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 international citizens.

- [115] It is necessary to understand how these responses were developed. As we noted in chapter 8, after NZDF made its public statement of 20 April 2011 that the Incident Assessment Team’s investigation had concluded that allegations of civilian casualties were “unfounded”, the junior officer whose SITREP was altered at the instigation of Lt Col Parsons pointed out to his commanding officer that NZDF’s statement was incorrect—the investigation had in fact found that civilian casualties were possible.<sup>113</sup> We were told that, shortly after, his commanding officer attended a meeting convened to discuss the journalist’s information requests. That meeting was attended by, among others, either the Director of Special Operations or his Deputy. The commanding officer told us that he raised the need to obtain the Incident Assessment Team’s report at that meeting, on the

111 Evidence of Hon Dr Mapp, above n 25, at 1039–1045.

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

113 See paragraph [52] above.

basis that relying on a second-hand report of it was not good enough. He said that he also had a discussion with Lt Gen Jones around the same time about attempting to obtain a copy of the report.<sup>114</sup>

[116] The outcome of the meeting about the journalist's information requests was that responsibility for preparing answers to them was divided between two units—"NZSOF" (New Zealand Special Operations Forces—effectively, as we understand it, the Directorate of Special Operations) and another unit, with responsibility for answers to the two requests discussed above being assigned to "NZSOF".

[117] The Directorate of Special Operations produced suggested answers for the requests for which it was responsible on 26 May.<sup>115</sup> In relation to the first of the requests above, the suggested answer was:

The source of the information on which I based my statement that claims that a number of civilians were killed during a raid in which NZDF personnel participated had "been investigated and proven to be false" (*Q+A* 24 April 2011) was classified operations reporting provided by the NZDF.

In relation to the second request, the suggested answer was essentially the answer in fact given by the Minister in his 31 October letter. It appears that the reason for the long delay in providing answers to the journalist's requests was that the other unit did not provide its suggested responses to the questions assigned to it until September.

[118] As we noted in chapter 8,<sup>116</sup> the final sentence of Dr Mapp's response to the first information request is important. As can be seen, the draft answer that NZDF provided to the Minister's office did not include it. 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 effect of the final sentence of the answer is that the statement he gave in April 2011 continues to reflect the factual position. The effect of Dr Mapp's responses to both of these information requests, then, is to assert that there were, in fact, no civilian casualties on Operation Burnham.

[119] However, if Dr Mapp's account of what he was told by Colonel Blackwell is correct (that the Incident Assessment Team had concluded that civilian casualties on Operation Burnham were possible), the answers he gave the journalist were misleading and he should have appreciated that. When we asked Dr Mapp about this, he made two points. First, he said that the final sentence of his answer to the first request was intended to refer only to the state of his knowledge as at April 2011. The fact that it expressed a view current at the time he gave the answer to the journalist was an error. Second, he accepted that the answer to the second request was inaccurate, but said he had forgotten about his September briefing from Colonel Blackwell when he finalised the response. Dr Mapp told the Inquiry he felt personal responsibility for the deaths of Corporal Doug Grant and Lance Corporal Leon Smith, which occurred in August and September 2011 respectively. He believes these traumatic events caused him to fail to recall his September briefing with Colonel Blackwell when he responded to the journalist's information requests. Dr Mapp told us that he

<sup>114</sup> In his evidence, Lt Gen (Ret) Jones referred to a discussion around this time with either Col Blackwell or Lt Col Cummins about attempting to obtain the executive summary. He said he was told that it was unlikely that it could be obtained as NZDF had already tried, unsuccessfully: see Evidence of Lt Gen (Ret) Jones, above n 96, at 467–468.

<sup>115</sup> OIA-091-2011 Detainee Policy NZSOF Response Redacted (26 May 2011) (Inquiry doc 13/17).

<sup>116</sup> See chapter 8, paragraph [74].

would not knowingly have given an incorrect answer; but we find it difficult to believe that Dr Mapp would have forgotten about a briefing that he received six weeks earlier on the issue of civilian casualties on an NZDF-led operation, given both his particular interests and the level of interest in the issue that ministers had previously shown.

[120] We return to this in the concluding section.

### Period 3: June – July 2014

[121] Three issues require discussion in this section, although the discussion can be brief as chapter 8 addresses them in some detail. The first concerns NZDF's erroneous advice to Dr Coleman when he requested a briefing about Operation Burnham before the broadcasting of *Collateral Damage* on Māori Television, which led to the discovery of the Incident Assessment Team Executive Summary. The second concerns the fact that NZDF did not issue a media statement correcting the erroneous statement issued on 30 June. The third concerns the enquiries NZDF made at Dr Coleman's request.

[122] NZDF's initial response to learning that a television documentary about Operation Burnham would be shown was to repeat the misinformation it had previously given—the Incident Assessment Team had concluded that there were no civilian casualties. This response was despite the fact that NZDF had received the executive summary some time in 2011, and also had information showing that ISAF had ordered a further investigation based on the Incident Assessment Team's conclusions. Lt Gen Keating briefed the Minister, Dr Coleman, using the same “no civilian casualties” response, on Saturday 28 June 2014, presumably on the basis of material provided to him by his staff. Further, Commodore Smith authorised the release of a public statement to *Native Affairs* on Monday 30 June to the same effect;<sup>117</sup> although by the time he did, the executive summary had been found in an NZDF safe and provided to the Minister's office.

[123] We are satisfied that Lt Gen Keating was not advised that NZDF had the executive summary until the evening of 30 June, when he received a telephone call from Dr Coleman telling him that he had read the executive summary and expressing displeasure that he had been given an erroneous briefing on the Saturday. Given that NZDF had accurate information in its possession, there can be no excuse for providing an inaccurate briefing to the Minister. As we have already said, this incident at least illustrates the inadequacy of NZDF's information storage and retrieval processes and the way information was compartmentalised within NZDF. Whether it involves more than that, we leave to the concluding section.

[124] As we noted in chapter 8, on 30 June 2014 NZDF provided a statement to *Native Affairs* which was screened following *Collateral Damage*, that it stood by its media release of 20 April 2011 and would be making no further comment. The 20 April media release had said that the Incident Assessment Team's investigation had concluded that the allegations of civilian casualties were unfounded. NZDF soon realised that its 30 June statement was incorrect, yet it did not issue a correction. When cross-examined about this, Lt Gen (Ret) Keating said that NZDF did not issue a correction because the Minister had effectively corrected the position on 1 July when he acknowledged publicly that civilian casualties were possible.<sup>118</sup>

<sup>117</sup> Email from [redacted] 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 Module 4, 16 September 2019) at 213.

<sup>118</sup> Evidence of Lt Gen (Ret) Keating, above n 8, at 517.

- [125] We see two problems with this approach. First, NZDF had expressed a public position on a matter of public interest that it realised soon after was inaccurate. As a public organisation, it should have acknowledged its error and corrected the position publicly. In principle, that is what good public administration requires. Second, when the issue arose again in 2017 following the publication of *Hit & Run*, one of the first steps NZDF took was to look at its past media releases, which led it back to the inaccurate 20 April 2011 release. Had a correcting media release been issued in 2014, those who dealt with the initial response to the book in 2017 should not have been misled. In the result, then, in the absence of a specific direction from the Minister not to do so, we consider that NZDF should have issued a correcting media statement.
- [126] Finally, the investigation that Commodore Smith carried out following Dr Coleman's request for answers to various questions appears to have been thorough in some respects and inadequate in others. For example, Commodore Smith did initiate thorough enquires to ascertain whether there was a full Incident Assessment Team report in addition to the executive summary. He also interviewed the Senior National Officer and the Director of Special Operations at the time of Operation Burnham, Colonel McKinstry and Brigadier Kelly respectively, although there appears to be no formal record of what they said.<sup>119</sup>
- [127] However, in relation to the Minister's instruction that enquiries were to be made to find out how NZDF had obtained the executive summary, Commodore Smith did not follow an obvious line of enquiry based on the registers, which would have led to Colonel Blackwell. Col (Ret) Blackwell's evidence as to why he had not advised Commodore Smith that he was the person who had obtained the executive summary, was that he was not asked and so proffered no explanation.<sup>120</sup> The consequence was that Lt Gen Keating advised the Minister that NZDF did not know how it obtained the executive summary. Commodore Smith did not offer a convincing explanation for this obvious investigative failure.
- [128] Further, Commodore Smith did not produce a written report of the results of his work. His evidence was that he did not see himself as conducting a formal inquiry, which would have required greater formality (terms of reference, for example).<sup>121</sup> Given the nature of the Minister's concern, we consider that a written report should have been prepared. Effective civilian control of the military, proper accountability and preservation of corporate memory required as much. If an adequate written report had been prepared and was available to those NZDF personnel responding to issues arising out of Operation Burnham later, it may have prevented errors such as occurred immediately after *Hit & Run* was publicly released in 2017.

## Period 4: March 2017 – April 2018

- [129] The principal aspect for discussion in this section is NZDF's response to *Hit & Run*.
- [130] As we set out in chapter 8, the Chief of Defence Force, Lt Gen Keating, was away in Iraq when the book was publicly released at 5.15pm on 21 March 2017. The Vice Chief of Defence Force, Air Vice Marshal Kevin Short, dealt with the matter in his absence. Mr Jon Stephenson attempted to

<sup>119</sup> Commodore Smith recorded notes from the interviews in his diary ("Diary Notes of Ross Smith Part 1" (June–July 2014) *Supplementary Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 20–21). See also Evidence of Commodore (Retired) Ross Smith, Transcript of Proceedings, Public Hearing Module 4 (16 October 2019) at 982.

<sup>120</sup> Evidence of Col (Ret) Blackwell, above n 84, at 668 and 788–789.

<sup>121</sup> Evidence of Cdre (Ret) Smith, above n 119, at 964.

give NZDF several hours' notice of the release,<sup>122</sup> although that does not seem to have registered at NZDF Headquarters. Pressed by the media for a response, NZDF's first public reaction later that evening was to repeat what NZDF had said previously about Operation Burnham, namely that the Incident Assessment Team had concluded that the allegations of civilian casualties were unfounded. Air Vice Marshal Short said that, with all that was going on, he did not immediately make the connection between the operation that *Hit & Run* addressed and the incident described in the 2014 *Collateral Damage* television programme.<sup>123</sup> However, the connection was soon made, and the briefing material provided to the Prime Minister the following day did accurately reflect the Incident Assessment Team's findings.<sup>124</sup>

- [131] While he was still overseas, Lt Gen Keating had directed his staff to compile relevant material and undertake an analysis of what was claimed in *Hit & Run*. He directed staff to make various enquiries and tasked Colonel Grant Motley with heading a fact-finding team to establish a clearer understanding of the issues raised in *Hit & Run* and information relating to them, including by travelling overseas to make enquiries. In his public statements, Lt Gen Keating invited people with relevant information to come forward and said any allegations of offending by NZDF personnel would be taken seriously.<sup>125</sup> He instructed the Military Police to conduct an investigation into the assault allegations in relation to Qari Miraj.<sup>126</sup> This was to enable him to reach a decision about whether there was a "well founded" case sufficient to lay charges under s 102 of the Armed Forces Discipline Act 1971. Lt Gen Keating also sought permission from NATO and the United States to make available publicly the executive summary and the weapons systems videos. These requests were declined.<sup>127</sup>
- [132] We think it clear that Lt Gen Keating treated the allegations in *Hit & Run* seriously, that he attempted to find out what had happened on Operation Burnham and that he tried to achieve greater transparency for the public about what had happened. This is what one would expect to see in any professional, well-run organisation. In other respects, however, NZDF's response fell below the standard of such an organisation.
- [133] There are two respects in particular in which we consider that NZDF's approach to the book fell below an acceptable standard. First, we consider that Lt Gen Keating erred in giving the prominence he did to the location errors in *Hit & Run* and not acknowledging that the book was accurate in important respects. For example, in a media release of 26 March 2017, Lt Gen Keating said that the central premise of *Hit & Run* was incorrect as NZDF troops never operated in the two villages identified in the book. The media release said:<sup>128</sup>

The villages are named in the book as Naik and Khak Khuday Dad, but the NZDF can confirm that NZDF personnel have never operated in the villages.

<sup>122</sup> See chapter 8 at footnote 185.

<sup>123</sup> Evidence of Air Marshal Kevin Short, Transcript of Proceedings, Public Hearing Module 4 (18 October 2019) at 1144.

<sup>124</sup> "170323 DPB-for-CDF" *Inquiry Bundle for Public Hearing Module 4 – Part 1* (Public Hearing Module 4, 16 September 2019) at 260–281.

<sup>125</sup> "NZDF Statement on Hager/Stephenson book" *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 308.

<sup>126</sup> NZDF MP Incident Report III Treatment of a Detainee (May 2017) (Inquiry doc 11/24).

<sup>127</sup> Office of the Ombudsman "Chief Ombudsman's opinion on OIA requests about Operation Burnham" (9 April 2018) <www.ombudsman.parliament.nz> at [80] and [98]. See also "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 415; and "Transcript: Lieutenant General Tim Keating answers questions at Press Conference" (28 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 343.

<sup>128</sup> "NZDF Statement on Hager/Stephenson book" *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 308.



The authors appear to have confused interviews, stories and anecdotes from locals with an operation conducted more than two kilometres to the south, known as Operation Burnham.

The villages in the Hager and Stephenson book and the settlement which was the site of Operation Burnham, called Tirgiran, are separated by mountainous and difficult terrain.

Similar remarks were made by Lt Gen Keating in the course of a media conference conducted by him and the Director of Defence Legal Services, Colonel Ferris, on 27 March 2017.<sup>129</sup>

[134] The current Chief of Defence Force, Air Marshal Short, explained in his evidence the rationale for NZDF's approach. This was essentially to say "Let's put to one side an operation that did not happen (ie, the operation as described in *Hit & Run*), and NZDF will tell you about the operation that did take place".<sup>130</sup>

[135] However, the effect of NZDF's approach was to indicate that *Hit & Run* was describing a different operation when that was obviously not the case. We make two points:

- (a) The media release of 26 March 2017 (see paragraph [134]) said that NZDF never operated in Naik. While NZDF did generally refer to the area where the operation was carried out as Tirgiran village or Tirgiran Valley, some contemporaneous material also indicates that NZDF understood that there was a village named Naik in that locality. For example, the Joint Prioritised Effects List (JPEL) target pack for Kalta stated that he lived in "Dehane Nayak Village" and gave the grid reference 42SVD 2303691463 which is the exact location of A1.<sup>131</sup> In an update setting out the intelligence gathered by the NZPRT after the 3 August attack, "Dahane Nayak" (also referred to as "Nayak") was identified as a place where Kalta might have a house and again gave a reference that is the same as the reference for A1.<sup>132</sup> In addition, a reference map attached to the intelligence update delineates the intersecting river valleys where the operation took place and identifies the area as "Tirgiran/Dahane Nayak Area".
- (b) *Hit & Run* describes an operation following the 3 August attack on the NZPRT patrol. It names Abdullah Kalta, Qari Miraj and Maulawi Neimatullah as persons identified by NZDF as having been involved in that attack and against whom the NZSAS (allegedly) sought revenge. It uses the term "Operation Burnham" which is close to NZDF's "Objective Burnham". The date given for Operation Burnham is accurate. While many of the photographs in the book are mislabelled or otherwise inaccurate, the photograph of A1 (Kalta's house) and A3 (Neimatullah's house) on page 60 is accurate. Moreover, four of the six names listed on page 126 of the book as having been killed on Operation Burnham are the same as the names that intelligence available to NZDF after the operation indicated had been killed, as we described in chapter 5.<sup>133</sup> Details such as these make it plain that the authors were talking about Operation Burnham even though the satellite imagery in the book showed the wrong location.<sup>134</sup>

<sup>129</sup> "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) at 316.

<sup>130</sup> Evidence of Air Marshal Short, above n 123, at 1142–1143. This is the Inquiry's summation of the effect of Air Marshal Short's evidence.

<sup>131</sup> RTAF 2307 ABDUL KALTA (12 August 2010) (Inquiry doc 07/18) at 4.

<sup>132</sup> KTIC TIC 03 AUG 10 (Inquiry doc 09/01) at 2.

<sup>133</sup> See chapter 5 at [74].

<sup>134</sup> We also note that an email from Mr Stephenson to NZDF prior to the broadcast of *Collateral Damage* in June 2014 confirmed the operation he was referring to in his questions occurred in Tirgiran village in the Tala wa Barfak District of Baghlan province. In the circumstances, this was another piece of information that ought to have indicated to NZDF that the authors were in fact talking about the same operation, in the same location. See chapter 8 at [85].

- [136] The notion that the villagers who spoke to the authors could have been describing another operation is implausible. This was not an area where there had been a visible coalition presence before Operation Burnham, as NZDF personnel knew. It would have been possible to check whether there were any subsequent operations in the area that might have confused the locals. There was Operation Nova but that could not have been mistaken for Operation Burnham and was, in any event, another New Zealand-led ISAF operation.
- [137] Consequently, we consider that Lt Gen Keating made too much of the location errors and ignored, unfairly, what was accurate in the book. We can appreciate the frustration—and anger—that he and other members of NZDF must have felt, given that *Hit & Run* made a number of serious allegations against NZDF personnel that were inaccurate and unjustified. As Lt Gen Keating noted, the allegations struck at the heart of the professionalism and integrity expected of a trained and disciplined force.<sup>135</sup> NZDF was, of course, entitled to respond—and to respond forcefully—but it should have focused on the issues of substance rather than on points that were of little real significance. In addition, NZDF should have been prepared to acknowledge that the book was accurate in important respects.
- [138] Similarly, we consider that NZDF’s attempts to explain its use of the word “unfounded” in its public statements<sup>136</sup> were misguided. It will be recalled that a number of media statements issued by NZDF said that allegations of civilian casualties on Operation Burnham were “unfounded”. For example, NZDF’s media release of 20 April 2011 said:

Following [Operation Burnham] allegations of civilian casualties were made. These were investigated by a joint Afghan Ministry of Defence, Ministry of Interior and International Security Force Assessment team, in accordance with ISAF procedures.

The investigation concluded that allegations of civilian casualties were unfounded.

This reflected the advice for ministers in NZDF’s 10 December 2010 briefing note, as follows:<sup>137</sup>

... 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.

- [139] Those statements were based on Lt Col Parsons’ erroneous advice that the Incident Assessment Team had found there were no civilian casualties on the operation. We think it obvious that the “unfounded” statement was intended to mean that the possibility of any civilian casualties had been positively ruled out, and that was how the media generally interpreted it.<sup>138</sup>
- [140] When asked about this at a media conference shortly after the publication of *Hit & Run*, Lt Gen Keating said “unfounded” meant the same as “there may have been”. His point was that although the Incident Assessment Team had concluded that civilian casualties were possible, there was no

135 “NTM 098-2017 Defence Force Inquiries into Allegations of Offending” at [11] (30 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 364.

136 “Transcript: Lieutenant General Tim Keating answers questions at Press Conference”, above n 127, at 348; “NZDF release: Op Burnham information pack” *Inquiry Bundle for Public Hearing Module 4 – Part 3* (Public Hearing Module 4, 16 September 2019) at 568; “Second release of information” (9 April 2018) *Inquiry Bundle for Public Hearing Module 4 – Part 3* (Public Hearing Module 4, 16 September 2019) at 584.

137 Inquiry doc 09/12, above n 60, at [11](d).

138 See, for example, David Fisher “*Hit & Run*: Why doesn’t NZDF start by answering this question?” *Pundit* (online ed, 6 April 2017).

corroboration of any civilian casualties; that is, no certainty.<sup>139</sup> Later, NZDF said that “unfounded” only related to NZDF personnel, whose conduct had been cleared by the Incident Assessment Team—it did not refer to the conduct of the operation as a whole.<sup>140</sup> NZDF explained:

The NZDF is conscious of its responsibilities regarding allegations of use of force against civilians not participating in hostilities by its personnel. Under the Armed Forces Discipline Act (AFDA), allegations of this nature (against NZDF personnel) must be investigated where they are “well founded”. As there was no evidence produced at the time of any specific civilian casualties, and those that may have occurred were not as a result of any actions undertaken by NZDF, any such allegations were not “well founded” in terms of the AFDA. This is the reason the term “unfounded” was the particular term used in NZDF’s press releases.

When the Prime Minister, Rt Hon Bill English, was asked about this, he commented that he understood “unfounded” was a legal term.<sup>141</sup>

- [141] While we note that NZDF appeared to acknowledge that its use of the term “unfounded” caused confusion, we think its attempt to defend the term’s use was unfortunate. The term was used because it reflected NZDF’s belief at the time that the Incident Assessment Team had ruled out the possibility of any civilian casualties on Operation Burnham. That belief was erroneous. We consider that NZDF should have simply acknowledged its mistake, rather than attempting to explain its use of the term in the way it did. We note that NZDF now acknowledges that its description of the allegations of civilian casualties on Operation Burnham as “unfounded” was incorrect.<sup>142</sup>
- [142] Finally, we mention NZDF’s stance on whether there should be an inquiry to investigate the claims made in *Hit & Run*. NZDF took the position that no inquiry was required. It explained its position in a briefing note to the Minister of Defence dated 30 March 2017.<sup>143</sup> In that briefing, Lt Gen Keating set out what he saw as the options available to him. These were a command investigation, a court of inquiry and a disciplinary investigation. Lt Gen Keating said that the internal enquiries that NZDF had carried out to that point were essentially command investigations, but that this process was not suitable for formally investigating allegations of unlawful conduct. He also rejected the possibility of a court of inquiry, saying such a process was inappropriate given the unsubstantiated allegations of unlawful conduct. Lastly, he rejected the option of a disciplinary investigation under s 102 of the Armed Forces Discipline Act 1971, on the basis that there was insufficient credible evidence to justify such an investigation.
- [143] As we have said, we accept that NZDF took a number of steps following the publication of *Hit & Run* to make further enquiries and endeavoured to have relevant material made publicly available. We have said that this was what would be expected of a well-run public organisation. However, we also consider that NZDF was too defensive, in the sense that it was unwilling to concede what was obvious; namely that, despite the location errors, *Hit & Run* was in fact referring to Operation Burnham, and that some of the important detail in the book was accurate.

<sup>139</sup> “Transcript: Lieutenant General Tim Keating answers questions at Press Conference”, above n 127, at 348.

<sup>140</sup> NZDF “Second release of information after Ombudsman direction” (November 2017) NZDF <[www.nzdf.mil.nz](http://www.nzdf.mil.nz)>.

<sup>141</sup> Nicholas Jones “PM: No Inquiry into SAS allegations in Afghanistan” *The New Zealand Herald* (online ed, 3 April 2017) <[www.nzherald.co.nz](http://www.nzherald.co.nz)>.

<sup>142</sup> Paul Radich QC *Closing submissions for NZDF following September and October hearings* Submission to Inquiry (1 November 2019) at [1].

<sup>143</sup> “NTM 098-2017 Defence Force Inquiries into Allegations of Offending”, above n 135, at [14].

[144] Moreover, NZDF was unwilling to admit error on its part. As an organisation, it had at the outset misled the Prime Minister, ministers, members of Parliament and the public about the possibility of civilian casualties on Operation Burnham, describing the allegations as “unfounded”.<sup>144</sup> NZDF did acknowledge in public comments in 2017 that civilian casualties were possible,<sup>145</sup> and Lt Gen Keating accepted that NZDF had missed opportunities to clarify the position, which, he said, happened for a variety of reasons over a lengthy period, including before he became Chief of Defence Force. A partial explanation for NZDF’s overly defensive approach may be that the two authors have been persistent critics of NZDF over a number of years. Yet criticism, even if it is sometimes unwarranted, is part and parcel of the culture of a liberal democracy such as New Zealand’s; organisations such as NZDF have to accept that and be prepared to address criticism constructively, with an open mind. As Mr Stephenson reminded us, the Fourth Estate plays a vital role in a free and democratic society, and public institutions need to recognise this.<sup>146</sup>

## Drawing it all together

[145] Taken as a whole, the factual account set out in chapter 8 and the analysis in this chapter do not reflect well on NZDF as an organisation. NZDF acknowledged in its submissions following the hearing on the “cover-up” allegations that it made a number of missteps in relation to its public statements on Operation Burnham, but denied any intention to mislead or conceal information from the public.<sup>147</sup>

[146] It is worth re-stating the constitutional framework relevant to the discussion which follows. As we explained in chapter 2, two fundamental constitutional principles are at issue—civilian control of the military and ministerial accountability to Parliament and through that, to New Zealanders. The successful operation of those two principles is critically dependent on NZDF providing ministers with accurate, comprehensive and timely information. Where NZDF provides ministers with inaccurate or incomplete information, the two principles cannot operate effectively.

[147] Both Mr Nicky Hager and Mr Jon Stephenson, through their respective counsel, contested NZDF’s denial of any intention to mislead or conceal information in their submissions following the public hearing into the “cover-up” allegations. Mr Hager submitted that some senior members of NZDF deliberately misrepresented what they knew about the likelihood of civilian casualties to their colleagues, to the Government and to the public so as to avoid greater scrutiny of their actions and the associated repercussions.<sup>148</sup> This was part of a culture that was hostile to criticism and involved “multiple acts of active dishonesty”.

<sup>144</sup> NZDF continued to attempt to justify its use of “unfounded” in the material it published on its website in March and April 2018 following Ombudsman direction: see chapter 8 at [125].

<sup>145</sup> “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 308–309; “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) at 316–322; “PowerPoint presentation for Press Conference” (27 March 2017) *Inquiry Bundle for Public Hearing Module 4 – Part 2* (Public Hearing Module 4, 16 September 2019) at 323–339.

<sup>146</sup> One senior officer acknowledged in evidence to us that when the book was released he saw it as an attack on the credibility of NZDF and his initial response may not have been as balanced as it should have been. He considered that NZDF as an organisation reacted defensively, and should have been more willing to step back and take a broader view of what the authors were trying to say. He emphasised, however, that there was also an obligation on those making allegations to do so in a balanced way.

<sup>147</sup> *Closing submissions for NZDF following September and October hearings*, above n 142, at [6].

<sup>148</sup> Counsel for Mr Nicky Hager *Submission on behalf of Nicky Hager in relation to Public Hearing 4* Submission to Inquiry (1 November 2019) at [2.1]–[2.2].

[148] Mr Stephenson’s argument, supported by a careful analysis of the evidence, is encapsulated in the opening paragraph of his submissions:<sup>149</sup>

After Operation Burnham occurred, materially misleading statements were made by New Zealand Defence Force to the Minister of Defence ... and to the public on whether civilian casualties (CIVCAS) had occurred and how allegations of CIVCAS had been investigated: a matter of immense public interest. There is considerable evidence to suggest that this conduct was not only sustained but deliberate. This conduct seems symptomatic of a culture in which accuracy and accountability were not valued. It may have included a coordinated agreement to cover up mistakes that were made. Based on the evidence presented at Public Hearing 4, it is open to the Inquiry to conclude that the NZDF’s culture and systems leave it vulnerable to repeating this behaviour.

[149] One striking feature of the aftermath of Operation Burnham was that NZDF did no internal investigation into the allegations of civilian casualties. Nor does NZDF appear to have given serious thought to doing so,<sup>150</sup> even though intelligence suggested that civilians had been killed during the operation and it received a video that appeared to show the funeral of a child. As Counsel for Mr Stephenson emphasised, at the time of Operation Burnham NZDF did not have its own internal process for investigating allegations of civilian casualties. When Sir Jerry Mateparae was Chief of Defence Force, work was underway to prepare a Defence Force Order about how to address allegations of civilian casualties, but for one reason or another that work was never completed.<sup>151</sup> The result was that NZDF relied on the Incident Assessment Team’s investigation. But that investigation was a preliminary assessment, designed to ascertain whether a fuller investigation should be ordered, as it ultimately was. NZDF knew that ISAF Incident Assessment Team investigations were not intended to replace national investigations, if warranted.<sup>152</sup> Given that Operation Burnham was a New Zealand-led operation, albeit carried out under the authority of ISAF, and that NZDF knew that the Prime Minister and ministers were exercised by the issue of civilian casualties, there was an obvious case for some form of investigation, even if informal; yet none was conducted.<sup>153</sup> Meanwhile, TF81 moved on to other operations almost immediately.

[150] NZDF’s approach is to be contrasted with that of the Australian Defence Force, at least when Sir Angus Houston was its Chief of Defence Force. He described his approach as follows:<sup>154</sup>

In Australia, while I was CDF, we conducted an Inquiry or investigation whenever there were confirmed or alleged civilian casualties. This was important from a transparency and accountability aspect. This was in addition to any other investigation by other bodies or agencies including ISAF, the United Nations, and the International Committee of the Red Cross.

<sup>149</sup> Counsel for Mr Jon Stephenson *Closing submissions of counsel for Jon Stephenson following Public Hearing 4* Submission to Inquiry (4 November 2019) at [1].

<sup>150</sup> Given the allegations of civilian casualties, an NZDF officer in Camp Warehouse raised the possibility of NZDF undertaking an investigation with the Senior National Officer. He was told that ISAF had investigated: the actions of New Zealand forces were lawful and New Zealand had no ability to address the actions of United States forces.

<sup>151</sup> Evidence of Lt Gen (Ret) Sir Jerry Mateparae, above n 1, at 75.

<sup>152</sup> See, for example, Evidence of Colonel Rian McKinstry, Transcript of Proceedings, Public Hearing Module 4 (17 September 2019) at 210; Evidence of Maj Gen (Ret) Kelly (18 September 2019), above n 57, at 350.

<sup>153</sup> NZDF submitted that the enquiries made by Lt Col McKinstry and Lt Col Parsons about obtaining a copy of the executive summary amounted to an “informal investigation” in the nature of a command investigation. Those efforts fall significantly short of what we regard as an “investigation”, even an informal one.

<sup>154</sup> Sir Angus Houston, former Chief of the Defence Force of Australia “The military context” (Public Hearing Module 1, 4 April 2019) at 14.

- [151] Although NZDF did not have a specifically developed mechanism for investigating allegations of civilian casualties, we consider that an investigation in the nature of a commander's inquiry could have been conducted, at least in the first instance. The Armed Forces Discipline Act 1971 provides for the establishment of courts of inquiry and one was established after the death of Lieutenant Tim O'Donnell to establish the circumstances of his death. However, a court of inquiry would not necessarily be the best means of conducting an investigation of the type required in this instance. Besides the absence of a specifically adapted mechanism, it seems clear there was concern about the resource implications of NZDF conducting investigations itself,<sup>155</sup> although, as we have said, it did devote resources to investigating the circumstances of Lieutenant O'Donnell's death. Senior officers in Afghanistan were also influenced by the fact that NZDF had no jurisdiction in relation to the actions of the United States air assets.<sup>156</sup> Despite this, we consider that there is much to be said for the approach outlined by Sir Angus Houston, particularly where the operation at issue is New Zealand-led—as we will discuss further in chapter 12.
- [152] In making our assessment of what occurred, we have been conscious of the fact that we have subjected the events at issue to close scrutiny, whereas for those involved they were part of a wide range of daily activities and concerns. Despite this, we consider that there is ample justification for the views we have reached, as set out below. We begin with some specific findings and end with an overall conclusion.
- [153] First, we consider that Lt Col Parsons' misinterpretation of the paragraph from the executive summary resulted from confirmation bias—he saw what he wanted to see. In that sense Lt Col Parsons made a genuine mistake when he misinterpreted the paragraph. However, in all the circumstances, his mistake was not, as he claimed, a reasonable one. He was a senior officer and was charged with fulfilling a task on an issue that he knew was important to the Chief of Defence Force and to ministers. Given what he knew about developments in relation to the possibility of civilian casualties from the emails and ISAF's media releases, we consider it inexcusable that he failed to provide his superior officers with a correct statement of the Incident Assessment Team's conclusions, especially if—as he claimed—he thought that they had completed their investigation. We do not regard a heavy workload or insufficient time to familiarise himself with ISAF procedures as a sufficient explanation—much less an excuse—for his errors. We see his misunderstanding of what the ISAF officer told him in the same way.
- [154] In addition, we consider that Lt Col Parsons realised soon after he sent his email that he may have misdescribed the Incident Assessment Team's conclusions; yet he failed to take any effective steps to correct the position or to find the true position. We consider that his interactions with the officer about the wording of the SITREP should have caused him to reassess matters. In any event, his email of 29 September to Colonel Kelly shows that by that time he must have appreciated that the possibility of civilian casualties from errant Apache helicopter rounds striking buildings had not been ruled out.
- [155] In summary, Lt Col Parsons failed to ensure that he obtained and relayed accurate information about the Incident Assessment Team's findings and failed to take adequate steps to rectify the position once he appreciated that he may have misinterpreted the paragraph.

155 See, for example, Evidence of Maj Gen (Ret) Kelly (18 September 2019), above n 57, at 395; Evidence of Air Marshal Short, above n 123, at 1163.

156 Evidence of Lt Gen (Ret) Keating, above n 8, at 625–626.

[156] Second, we consider that Colonel Kelly and other senior officers within NZDF Headquarters were too willing to accept uncritically Lt Col Parsons' account, given that it was inconsistent with the significant amount of other credible information they held about the operation, which came from a variety of sources, including ISAF and the weapons video footage. While they may well have had many other pressing issues to address, the outcome of Operation Burnham was something that ministers were not only interested in but, as Colonel Kelly put it in a contemporaneous email, were "exercised" about. Ministers were entitled to accurate and complete reporting from NZDF. They did not receive it. As we have said, without the provision of full and accurate information, the principles of civilian control of the military and ministerial responsibility to Parliament cannot operate effectively. They did not operate effectively in this instance. Some NZDF personnel responsible for dealing with this matter showed a lamentable lack of a collective commitment to finding out what the true position was and an equally lamentable failure to take individual responsibility to ensure that this was done properly.

[157] Third, it is disturbing that the 10 December 2010 briefing note for the Minister of Defence<sup>157</sup> not only reported the inaccurate advice in Lt Col Parsons' 8 September email, but also added to the inaccuracies:

- (a) First, the briefing note stated that Lt Col Parsons had been "permitted to read the report", when one of its authors, Colonel Kelly, knew that Lt Col Parsons had been permitted to read only one paragraph of the report.
- (b) Second, the briefing note quoted language from Lt Col Parsons' email in such a way that it appeared to be a quote from the Incident Assessment Team itself.
- (c) Third, the briefing note stated that the Incident Assessment Team had concluded that "the allegations of civilian casualties *and destroyed houses*" were baseless.<sup>158</sup> However, Lt Col Parsons' 8 September email was concerned with civilian casualties and said nothing about the allegations that had been made and reported in the media about the destruction of houses.<sup>159</sup>

When cross-examined about the first inaccuracy, Maj Gen (Ret) Kelly said simply that the drafting was "sloppy".<sup>160</sup> When cross-examined about the second inaccuracy, he said this was "another error".<sup>161</sup>

[158] Moreover, the briefing note characterised Operation Burnham in a way that was misleading and likely to result in misunderstandings on the part of ministers. This was because it stated that "the CRU, supported by the NZSAS, developed an operation plan targeting the insurgent leadership". We explained in chapter 4 why that characterisation is inaccurate.<sup>162</sup> It simply does not accord with the reality of what occurred. The Afghan Crisis Response Unit (CRU) had little to no involvement in planning the operation.<sup>163</sup>

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<sup>157</sup> Inquiry doc 09/12, above n 60. Also see chapter 8 at paragraphs [45]–[50].

<sup>158</sup> Emphasis added.

<sup>159</sup> Nor, for that matter, did the paragraph of the executive summary that Lt Col Parsons read.

<sup>160</sup> Evidence of Maj Gen (Ret) Kelly (17 September 2019), above n 45, at 333.

<sup>161</sup> Evidence of Maj Gen (Ret) Kelly (18 September 2019), above n 57, at 352. There was no cross-examination on the third point.

<sup>162</sup> See chapter 4 at [44]–[46].

<sup>163</sup> Maj Gen (Ret) Kelly suggested that there were diplomatic sensitivities at play here. We do not see how they could possibly justify an inaccurate description in a briefing to a New Zealand minister.

- [159] This document was a briefing note to the Minister. It was intended to be provided as well to the Prime Minister and the Minister of Foreign Affairs. The briefing note was fundamentally inaccurate both in the way it characterised the operation and in its presentation of the Incident Assessment Team’s conclusions:
- (a) The characterisation of the operation as CRU-led cannot be the result of sloppiness or inadvertent error. Apart from anything else, the fact that planning an operation of the complexity of Operation Burnham was beyond the capacity of the CRU must have been well understood by Colonel Kelly and others involved in the drafting of the note. We consider that the misleading characterisation of the operation in the note was an attempt to further the partnering narrative, which had been an important part of the Government’s decision to authorise Operation Wātea in 2009. Moreover, it is difficult to see how a quotation taken from Lt Col Parsons’ email could inadvertently have been presented in the briefing note as a quotation from the Incident Assessment Team’s conclusion.
  - (b) Greater care should have been taken to provide accurate information about the Incident Assessment Team’s investigation—“sloppiness” and “errors” in reporting by senior NZDF officers to ministers on matters of such moment are unacceptable.
- [160] These matters go to the core of New Zealand’s constitutional arrangements in relation to the military. The provision of inaccurate information to ministers about Operation Burnham undermined the efficacy of civilian control of the military; it also undermined the principle of ministerial accountability to Parliament. This is unacceptable. In this particular context, Colonel Kelly failed to meet the standards required of him. It goes beyond failing to exercise the standard of care and diligent oversight that ministers and the public were entitled to expect from a senior officer in his position; regrettably, it also involves the presentation of a narrative about the respective roles of the CRU and the NZSAS on Operation Burnham that Colonel Kelly must have appreciated was not in accordance with the facts.
- [161] Fourth, there is a question as to exactly what happened after the officer whose report was altered at the direction of Lt Col Parsons pointed out to his commanding officer that NZDF’s media statement of 20 April 2011 was incorrect. As we noted in chapter 8, we were told that, shortly after, the commanding officer attended a meeting at which the journalist’s Official Information Act request of 12 May 2011 was discussed and queried why NZDF did not have a copy of the Incident Assessment Team’s report. However, any misgivings about the accuracy of NZDF’s understanding of the Incident Assessment Team’s conclusion, as expressed in the 20 April 2011 media statement, were not reflected in the answers ultimately given by Dr Mapp to the journalist on 31 October 2011. In the circumstances, it is difficult to see how this could have been an inadvertent error, particularly if, as we discuss below, Dr Mapp was, like Colonel Blackwell, aware of the true position concerning the Incident Assessment Team’s investigation from mid-September 2011.
- [162] Fifth, we accept that NZDF obtained a copy of the executive summary sometime in 2011 and that Colonel Blackwell likely obtained it. However, we do not accept his account of how he received it; nor do we accept that he gave full explanations of what it said to any of Lt Gen Jones, Colonel Thompson or Dr Mapp. Despite this, what Dr Mapp accepted Colonel Blackwell did tell him about the executive summary was sufficient to alert Dr Mapp to the fact that the advice provided to him by NZDF about civilian casualties in the December 2010 briefing papers was wrong; that the public statement made by NZDF in April 2011 was wrong; that what he said in his interview with Guyon Espiner on 24 April 2011 was wrong; and that his written answer



to Mr Locke's parliamentary question in May 2011 was wrong. Furthermore, in light of what Dr Mapp accepted Colonel Blackwell told him in mid-September 2011, he ought to have been aware that the two answers he gave to the journalist's Official Information Act requests on 31 October 2011 were inaccurate.<sup>164</sup> In addition, the *Native Affairs* programme on 30 June 2014 reported that Dr Mapp had told the programme that it had always been clear to him, based on his briefings from NZDF, that there were no civilian casualties on Operation Burnham. Again, this was not an accurate statement in light of what he accepted he had been told by Colonel Blackwell.

[163] Accordingly, Dr Mapp did not simply fail to correct the public record—he continued the false narrative that the Incident Assessment Team had found there were no civilian casualties on the operation even though he knew the true position about its conclusion, which was that civilian casualties were possible. Obviously, this was a significant departure from the standards expected of ministers and contributed to the persistence of NZDF's false narrative in subsequent years.<sup>165</sup>

[164] Sixth, during its various submissions and evidence, NZDF asked rhetorically why it would “cover up” the findings of the Incident Assessment Team given its conclusion that TF81 had “no case to answer”.<sup>166</sup> However, as we have said, it is apparent from the documentary record that the Prime Minister and ministers in 2010 were concerned at the possibility of civilian casualties, no matter who caused them. As Sir Jerry Mateparae accepted, *any* civilian casualties on an operation in which TF81 was involved would have caused concern.<sup>167</sup> Had evidence of civilian casualties been clear and incontrovertible, we believe NZDF would have faced up to that. But as there was no such evidence, NZDF was content to rest on the Incident Assessment Team's findings that TF81 had “no case to answer” and was unwilling to look more broadly. NZDF did not make any significant effort at the time to investigate the possibility of civilian casualties on the operation. In our view, it should have, as we discuss further in chapter 12.

[165] Seventh, we believe the events in late June and July 2014 showed a surprising level of ineptitude and disorganisation within NZDF Headquarters. The Chief of Defence Force, Lt Gen Keating, briefed the Minister on 28 June on the basis of the material provided to him by his staff. That material did not include the executive summary, even though it was in a safe in NZDF Headquarters. Accordingly, the briefing repeated the erroneous position taken in the December 2010 ministerial briefing notes and NZDF's April 2011 public statement, to the effect that the Incident Assessment Team had concluded that there were no civilian casualties on Operation Burnham. On learning later that NZDF had the executive summary, Lt Gen Keating asked how it could be that he was not advised of it. The evidence shows that the executive summary was found essentially by chance. The enquiry which Lt Gen Keating ordered into how NZDF acquired it was ineffectual and failed to pursue obvious lines of investigation. It appears that Colonel Blackwell was not spoken to and did not volunteer any information. No written report was prepared for the Minister on the outcome. None of this inspires confidence in NZDF's processes at the time, and it does much to undermine the principle of civilian control of the military.

<sup>164</sup> See chapter 8 at paragraphs [74]–[75].

<sup>165</sup> Dr Mapp accepted in cross-examination that he should have spoken to someone about what Colonel Blackwell had told him: Evidence of Hon Dr Mapp, above n 25, at 1044 and 1063–1064.

<sup>166</sup> See, for example, Paul Radich QC *Opening Submissions for NZDF at September Hearing* Submission to Inquiry (16 September 2019) at [20].

<sup>167</sup> Evidence of Lt Gen (Ret) Sir Jerry Mateparae, above n 1, at 26.

- [166] Eighth, we accept that Lt Gen Keating took a range of steps following the publication of *Hit & Run* to find more information about Operation Burnham and its aftermath and to get that information into the public arena. As far as they went, these steps were commendable. However, we consider that the location mistakes made in the book were given more emphasis than they deserved. To some extent, this is understandable, given that the book made a range of serious allegations about the conduct of TF81 troops and the air assets that were unjustified. Despite this, it is important that an organisation such as NZDF approaches such matters dispassionately, based on the facts. On such an approach, it would have been obvious that the operation on which the book focused was Operation Burnham. It would also have been obvious that even though the book contained significant inaccuracies, there was much in it that was accurate, and NZDF should have acknowledged this. In addition, instead of attempting to explain away NZDF's earlier use of the term "unfounded" in the way it did, NZDF should have candidly acknowledged that it was wrong when it said the Incident Assessment Team had concluded that allegations of civilian casualties were unfounded.
- [167] Finally, there is the video showing what appears to be a wrapped body (we will refer to it as the funeral video). As we have said, NZDF recently provided an expert opinion which states that the wrapped body in the funeral video is of a length (168 cms) that indicates it is an adult. The Inquiry's expert reached a different view and considers that the length of the body is consistent with that of a child (130 cms). We make two points about this.
- (a) First, the Inquiry has seen no evidence that NZDF undertook this type of expert forensic analysis of the funeral video when it was received immediately after Operation Burnham, despite the fact that, to the naked eye, the wrapped corpse appears to be that of a child.
  - (b) Second, ultimately it does not matter for present purposes whether or not the funeral video does depict a dead child. What is important is that the Inquiry was informed by a number of witnesses that shortly after Operation Burnham, the NZPRT obtained various videos said to be related to the operation. Some obviously are related to it. The funeral video was provided at the same time and given a file name to the effect that it showed possible victims of Operation Burnham. It has been confirmed to us that the funeral video was, along with the other videos, passed on to TF81 personnel at TF81's base in Kabul, where it was viewed to determine its authenticity. Witnesses believed that NZDF had not been able to determine whether the video related to Operation Burnham and gave no indication that any specialist analysis had been undertaken to determine what was depicted or its size. All witnesses who recalled the video continued to believe that it showed the funeral of a child. We think it surprising that NZDF did not undertake some form of investigation itself, given the funeral video and the post-operation intelligence reports indicating the possibility of civilian casualties.
- [168] Although NZDF was able to provide us with the other videos sent to TF81, it did not provide a copy of the funeral video until, after specific questions from the Inquiry, NZDF found a copy of it in the NZPRT's files in storage. This raises an obvious question: why was NZDF unable to produce the funeral video from its systems when it had been able to produce the other videos provided to TF81 at the same time? In the circumstances, we consider the most likely explanation is that the funeral video was deleted or misfiled, most likely in Afghanistan. Whether this was a matter of inadvertence, poor record keeping or an attempt to hide potentially embarrassing evidence we cannot now determine.

- [169] To conclude, the issue which we have been addressing in chapters 8 and 9 is whether NZDF engaged in a “cover-up” in relation to the possibility of civilian casualties on Operation Burnham. A “cover-up” is an attempt to hide the truth about something that may be seen as blameworthy. Standing back and considering the events we have examined overall, we do not believe that there was a widespread conspiracy within the top echelons of NZDF to “cover up” the possibility of civilian casualties Operation Burnham, either in 2010 or subsequently. We consider it implausible that there was a coherent strategy of that type extending over a number of years within NZDF. We also consider that, had there been clear evidence of civilian casualties on Operation Burnham at the time, NZDF would have faced up to the consequences of that.
- [170] That said however, the evidence is clear that in the months immediately following the operation, the actions of some senior NZSAS personnel resulted in NZDF advancing what was a false narrative, namely that the Incident Assessment Team had concluded that there were no civilian casualties on Operation Burnham. This false narrative was advanced to the Chief of Defence Force, to the Prime Minister, to relevant ministers and eventually to the public. It was advanced even though some within NZDF either knew or suspected, or had strong reason to suspect, that the narrative was false. There was no proper scrutiny of it by senior NZSAS officers at the outset—contrary evidence was unjustifiably ignored or minimised. Even if there was not a deliberate attempt among a group of senior officers to suppress the truth, the cumulative effect of what they did (or failed to do) was precisely that—to suppress the truth.
- [171] In addition, having obtained the executive summary in 2011, those NZDF personnel who were aware of its contents, together with the then Minister, Dr Mapp, effectively ignored what it said. The executive summary was placed in a safe and forgotten about. No attempt was made to correct the public record at the time, either by the relevant NZDF personnel or the Minister. NZDF’s systems were such that when the issue of civilian casualties on Operation Burnham arose again in June 2014, the executive summary was at first overlooked and was then discovered only by chance, although that did not prevent the repetition of the false narrative, initially at least.
- [172] We accept that more was done in 2017, after the publication of *Hit & Run*. Even so, NZDF’s response was disappointing. NZDF was too defensive; it was too quick to seize upon errors in the book; it was unwilling to acknowledge the respects in which the book was accurate; and it was unwilling to acknowledge the full extent of its own errors over the years. Regrettably, NZDF’s response appears to have been affected by a degree of personal animosity towards the authors.
- [173] The failures which we have described in this chapter are not simply failures on the part of individuals; nor are they simply failures of organisational structure or systems. They are also failures of culture. NZDF is subject to the control of the minister, who in turn is accountable to Parliament. NZDF is also subject to the Official Information Act, with its emphasis on transparency within state organisations to the extent possible. On the basis of what we have seen in this Inquiry, it appears that the culture within NZDF was not fully accepting of the constraints and disciplines inherent in those fundamental principles. If it was, it is difficult to see how events such as we have described could have occurred.

[174] Obviously, what we have described above is unacceptable in a system in which the military is under civilian control and where ministers are answerable to Parliament. There is an issue as to whether NZDF's culture, organisational structure and systems leave it vulnerable to repeating unsatisfactory behaviour of the type described. That depends substantially upon whether the steps taken by Lt Gen Keating and his successor, Air Marshal Short, to remedy matters are proving adequate and, importantly, whether ministers and the public can have confidence that they are proving adequate. We return to this in chapter 12, where we set out a range of recommendations designed to address some of the issues which arise from our analysis.