

in the matter of the Government Inquiry into Operation
Burnham and Related Matters

**CLOSING SUBMISSIONS OF COUNSEL FOR JON
STEPHENSON FOLLOWING PUBLIC HEARING 4**

7 November 2019

LeeSalmonLong

Barristers and Solicitors

LEVEL 16 VERO CENTRE 48 SHORTLAND STREET

PO BOX 2026 SHORTLAND STREET AUCKLAND NEW ZEALAND

TELEPHONE 64 9 912 7100 FACSIMILE 64 9 912 7109

EMAIL: tim.mullins@sl.co.nz SOLICITOR ON RECORD: TIM MULLINS

EMAIL: sam.humphrey@sl.co.nz SOLICITOR ACTING: SAM HUMPHREY

CLOSING SUBMISSIONS OF COUNSEL FOR JON STEPHENSON FOLLOWING PUBLIC HEARING 4

MAY IT PLEASE THE INQUIRY

INTRODUCTION

1. After Operation Burnham occurred, materially misleading statements were made by New Zealand Defence Force (**NZDF**) to the Minister of Defence (**Minister**) 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.
2. This synopsis of submissions provides a summary of this evidence as it relates to the main issues covered during Public Hearing 4.
3. The synopsis is not intended to be exhaustive. Mr Stephenson is mindful that the Inquiry has the assistance of Counsel Assisting in assessing the evidence, and will also have access to additional classified material.
4. Not all matters covered in the hearing are addressed in the synopsis. Where a matter is not covered or evidence is not addressed, Mr Stephenson should not be taken as accepting that evidence.
5. The matters covered in this synopsis in chronological order, are:
 - (a) Pre-Operation context.
 - (b) August 2010: CIVCAS allegations and IAT assessment
 - (c) September 2010: Misinterpretation of the IAT report
 - (d) December 2010: The Ministerial briefings
 - (e) April 2011: The One News story
 - (f) May-September 2011: Attempts to obtain the IAT report
 - (g) 1-12 September 2011: Distribution of the IAT report
 - (h) December 2011: Change of minister
 - (i) June-July 2014: *Collateral Damage*
 - (j) March-April 2017: *Hit and Run*

6. A bullet-point summary of the key conclusions in the synopsis is set out in **Annex A**.
7. References to the transcript are recorded in the following format: [Page] [Witness last name] [XIC / XXM / RXM / Inquiry Questions]. References to the bundle are references to either the Inquiry Bundle (**IB**), Inquiry Supplementary Bundle (**ISB**) or Inquiry October Bundle (**IOB**).
8. Witnesses are referred to by “Sir” or “Mr” when they are giving evidence, and their appropriate title and rank at the particular time when referred to as part of the narrative.

PRE-OPERATION CONTEXT

Legal context

9. The allegations of CIVCAS following Operation Burnham engaged obligations on New Zealand and New Zealanders under international and domestic law.
10. In terms of international humanitarian law (IHL), under Additional Protocol II to the Geneva Conventions, all possible measures must be taken to search for and collect the wounded and ensure their adequate care, and search for the dead and decently dispose of them.¹ There is also a duty under customary IHL applicable in non-international armed conflicts on parties to those conflicts to:²

... take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate.

11. In addition, under both international and domestic human rights law, New Zealand had an obligation to conduct an effective investigation into suspected or potentially unlawful deprivations of life in all circumstances wherever article 6 of the International Covenant on Civil and Political Rights and s 8 of the New Zealand Bill of Rights Act 1990 applied.³
12. Finally, commanding officers in the NZDF had an obligation to investigate allegations of offences under s 102 of the Armed Forces Discipline Act 1971 (AFDA) unless the relevant officer determined the allegation was “not well founded”.

NZDF had no order or procedure for investigating CIVCAS-related allegations

13. When Operation Burnham occurred, the NZDF did not have its own internal process for investigating allegations of CIVCAS or breaches of other obligations under international humanitarian law (IHL) or human rights law relating to CIVCAS.
14. In particular, there was no Defence Force Order (DFO) or other policy or rule in place.⁴
15. There appears to have been no real reason for this deficiency. Sir Jerry Mateparae gave evidence that the matter had effectively fallen off NZDF’s radar after a staff member tasked with drafting a DFO left the organisation.⁵

¹ Additional Protocol II, article 8.

² ICRC Study, rule 117.

³ The duty to investigate violations of the right to life has been held by treaty bodies and courts as implicit in the right to life. For interpretation of the right to life under article 6 of the ICCPR, see: *Baboeram v Suriname* (1985) HRC (146/1983 and 148 to 154/1983) at [16]; *Herrera v Colombia* (1987) HRC (161/1983) at [10.3]; and *Arevalo v Colombia* (1989) HRC (181/1984) at [10]. For s 8 of the New Zealand Bill of Rights Act 1990, see *Wallace v Commissioner of Police* [2016] NZHC 1338 (*obiter*).

⁴ 25 Mateparae XIC.

⁵ 75 Mateparae XXM.

16. Sir Jerry Mateparae and Messrs McKinstry, Kelly and Short gave evidence that, in the context of Afghanistan, the NZDF was reliant on the process followed by the International Security Assistance Force (ISAF), at least to gather and conduct a preliminary assessment of relevant evidence, due to lack of capacity.⁶
17. Material relating to this process remains classified. However, in general terms, the ISAF process appeared to follow two steps. First, when an allegation of CIVCAS was made, ISAF would convene an initial assessment team (IAT) comprised of ISAF and Afghan personnel to assess the evidence and prepare a report. Then, if the IAT concluded a coalition force had a “case to answer”, the ISAF Joint Command (IJC) Commander would order the state concerned to conduct its own formal investigation.
18. NZSAS personnel in Afghanistan and New Zealand were aware of this two-step process at the time of Operation Burnham.⁷
19. Based on the information provided about the ISAF process, two aspects are particularly unclear.
20. The first is the scope of an IAT’s jurisdiction. It is unclear what it means for an IAT to conclude a coalition force has “no case to answer”, and whether, in conducting its assessment, an IAT will take into account the range of possible modes of responsibility for legal obligations relating to CIVCAS, for example joint state responsibility and complicity.
21. The second is whether and how the outcomes of the IAT process were communicated to coalition forces. It appears that IAT reports were classified to NATO as originator of the material. After Operation Burnham, it took some time for New Zealand to obtain a copy of the relevant report. In an email sent on 6 September 2010, Lt Col McKinstry reported that NZDF personnel in Afghanistan would attempt to obtain a copy of the report “if and when it [was] released” (emphasis added). This suggests that ISAF did not release IAT reports to coalition forces as a matter of course.
22. It follows that legitimate questions may be asked about the reasonableness of the NZDF having relied on the ISAF process as a proxy for carrying out its own initial assessments of relevant evidence.
23. If IAT assessments were not comprehensive and/or New Zealand did not have ready access to their conclusions, this could have put New Zealand at risk of breaching its obligations to investigate suspected CIVCAS and violations of civilians’ right to life under IHL and human rights law. Deficiencies in the ISAF process could also have meant that the mandatory obligation on commanding officers to investigate suspected offences unless they were “not well founded” under s 102 of the AFDA was not triggered in circumstances where it should have been.

⁶ 43 Mateparae XXM, 74-75 Mateparae XXM, 195 McKinstry XXM, 395 Kelly XXM, 1164 Short XXM.

⁷ IB 61; 206-7 McKinstry XXM (acknowledging an obligation to be familiar with ISAF SOPs, explaining the NZDF had access to them), 215 McKinstry XXM, 349-350 Kelly XXM.

24. Some of these concerns appear to have been shared by various NZDF witnesses. Mr Jones acknowledged:⁸

I agree, as a nation that was leading and participating [in Operation Burnham] we should have had far more access to the information, participation far more in the investigation into that.

25. Both Mr Short and Dr Mapp also accepted that more investigation should have been done by New Zealand.⁹
26. Finally, it may be questioned whether New Zealand really lacked the capacity to carry out initial assessments into credible allegations of CIVCAS itself. Several NZDF witnesses gave evidence that operations involving New Zealand resulting in allegations of CIVCAS were very rare.¹⁰ Sir Jerry Mateparae and Mr McKinstry gave evidence that if an ISAF IAT had determined that the NZSAS had a case to answer, the NZDF would have been required to conduct a full formal investigation itself and would have done so.¹¹

The significance of the Operation

27. Operation Burnham was considered significant even before it commenced. It was personally approved by the Prime Minister on the recommendation of Minister Mapp, who was present in Afghanistan at the time it occurred. Under cross-examination Sir Jerry Mateparae accepted this alone gave it a heightened status.¹² Lt Col. Parsons also notified the Prime Minister once the operation had commenced and kept him briefed in the following days, indicating it was of personal concern to the Prime Minister.¹³
28. In addition to these elements, it was also significant that the Operation was a New Zealand-led operation,¹⁴ involved a large number of NZSAS personnel, and occurred in an area of Afghanistan where the NZDF had not previously operated and did not operate again (other than on Operation Nova).¹⁵
29. The significance attached to the Operation only increased once Ministers became aware of allegations of CIVCAS in the week after it occurred. Mr Blackwell acknowledged that New Zealand had never previously been involved in an operation where an ISAF IAT had been convened.¹⁶
30. It follows that the evidence given by various NZDF witnesses about how many operations the NZSAS conducted in Afghanistan, or how many operations the Office of Chief of Defence Force (**OCDF**) or Office of the Minister of Defence dealt with on a daily or weekly basis can be put to one

⁸ 995 Jones XXM.

⁹ 1163 Short XXM and 1104 Mapp XXM.

¹⁰ 25 Mateparae XXM, 428-429 Cummins XXM, 520 Keating XXM.

¹¹ 75 Mateparae RXM, 195 McKinstry XIC.

¹² 55 Mateparae XXM.

¹³ IB 4 and IB 8.

¹⁴ 53-54 Mateparae XXM.

¹⁵ 746 Blackwell XXM ("It was the only operation we conducted up there. We didn't go back").

¹⁶ 817 Blackwell XXM.

side – not as untrue, but as irrelevant. Operation Burnham clearly stood out.

21-22 AUGUST 2010 – DURING THE OPERATION

31. Sir Jerry Mateparae and Mr McKinstry gave evidence about what they heard and saw as the Operation unfolded. Two aspects of this evidence are significant from the perspective of the allegations of CIVCAS that would ensue.
32. First, Mr McKinstry, who was the Senior National Officer (**SNO**) at the time observing the Operation from Camp Warehouse, said he recognised that a NZSAS sniper had engaged a person. In his evidence in chief he described this person as an “insurgent” but did not elaborate on why he made that assessment.¹⁷ The NZDF have previously acknowledged they cannot conclude that this man was armed.¹⁸ Sir Jerry Mateparae did not comment on this issue.
33. Second, Sir Jerry Mateparae and Mr McKinstry gave evidence about the relationship and communications between the ground and air elements during the Operation.
34. Under re-examination and in response to questioning from the Inquiry, Sir Jerry explained that the air elements were under New Zealand tactical control and acknowledged that New Zealand had a level of responsibility arising out of that.¹⁹
35. Mr McKinstry also said under cross-examination:²⁰
- JTAC was very responsible for ensuring that the aircraft were cleared to engage targets from the perspective of making sure that the threat was real and for ensuring that there were no collateral damage issues before engagement occurs.
36. Under re-examination, Lt Gen Keating added:²¹
- Look, JTAC has some responsibility on the ground for some of the fires and particularly those fires that are closely related to the New Zealand Defence Force ground troops actually in the village itself. The air element still have relative freedom outside those boundaries, but sticking as the report noticed within the tactical directive ...
- Also, the air elements had been confined to meeting the elements of their tactical directive, which was protect the ground forces. They weren't there to kill insurgents; they were there to protect ground forces.
37. Mr McKinstry gave evidence about what he saw and heard of the communications between the NZSAS Joint Tactical Air Commander (**JTAC**) and the US air weapons team (**AWT**) during the Operation. He said:²²

¹⁷ 178 McKinstry XIC.

¹⁸ NZDF memorandum dated 19 July 2019 at [4].

¹⁹ 75-76 Mateparae RXM; 77 Mateparae Inquiry Questions.

²⁰ 249 McKinstry XXM.

²¹ 640-641 Keating XXM.

²² 246 McKinstry XXM.

I spoke extensively with the officer commanding and on occasion with the JTAC, of their actions throughout.

38. Mr McKinstry elaborated that did not know “exactly” what the JTAC was being told by the AWT. He said he “had no reason to ask” about this. However, this does not sit comfortably with his additional comment that he did know:²³

... that the Air Weapons Team subsequently changed from using their cannon to using a hell fire missile, and I make an assessment that that was because of accuracy issues with their cannon.

39. It is possible, based on the fact he had discussions with the JTAC and knew about the change of AWT fires, that Lt Col. McKinstry had some idea that the AH64 had been having targeting issues. He would also have known that the AH64 had been involved in engagements near civilian areas.
40. It follows that even though, as at 22 August 2010, nobody appears to have been aware of the precise fact that rounds from the AH64 helicopter had hit a building, Lt Col McKinstry at least had seen and heard engagements and conversations which should have put him on notice of the possibility of CIVCAS.

AUGUST 2010: CIVCAS ALLEGATIONS AND IAT ASSESSMENT

Media and intelligence reporting

41. In the days following Operation Burnham, the *New York Times* reported that up to eight civilians had died in the operation. Lt Col McKinstry told the Director of Special Operations (**DSO**) Col Kelly that local Afghans had reported that up to 20 civilians had died and 20 houses had been destroyed. This particular allegation was picked up in the later December 2010 briefings to the Minister. However, there does not appear to be any unclassified record of the source.
42. The documents make clear that the NZDF, as well as MFAT and DPMC, were aware of this media reporting.²⁴ The documents also make clear that the NZDF was receiving intelligence reports suggesting there may have been CIVCAS. Lt Col McKinstry, Col Kelly and Lt Gen Mateparae were all aware of it.²⁵

The IAT investigation

43. Because the IAT report remains classified to NATO, only limited information is known about the process the IAT followed.

²³ 244 McKinstry X XM. It is unclear from the context whether Mr McKinstry was explaining his knowledge at the time, or what he had learned subsequently.

²⁴ IB 11, 14 and 28.

²⁵ 233 McKinstry X XM with reference to the summary of the intelligence position as at 31 August 2010. Regarding C3 intelligence Mr McKinstry said “we give some weight to it” and that “it’s at a level where we’d start to trust it”: 223 McKinstry X XM. See also 44-46 Mateparae X XM.

44. It appears from Mr McKinstry's evidence that the IAT was convened on 23 August 2010 and produced its report on 26 August 2010: a period of just four days.
45. The key aspect of the assessment for present purposes is Lt Col McKinstry's visit to ISAF Joint Command (IJC) on 26 August 2010, where he was permitted to view and obtain a copy of the AWT video footage.
46. Under cross-examination, Mr McKinstry said that on viewing the footage it was "clearly obvious to [him]" that there could have been CIVCAS as a result of rounds hitting a house, purely on the basis that civilians including women and children had been seen in the vicinity.²⁶ Mr McKinstry claimed not to have seen any footage showing women and children huddled near a house.²⁷ However, he acknowledged that, had he been aware of this, this would only have strengthened his conclusions.
47. Mr McKinstry said that while viewing the footage, he was able to hear the contemporaneous communications between the JTAC and the AWT pilots and was reassured by what he heard.²⁸ However, he did not elaborate on why he felt this way, and also acknowledged that he did not hear the remainder of the communications between the JTAC and the AWT.
48. In his evidence, Mr Parsons accepted that Mr McKinstry would have told him what he had seen at IJC.²⁹

NZDF understanding of the IAT conclusions and Ministerial concern

49. On or around 29 August 2010, ISAF put out two public press releases announcing the outcome of the IAT process.
- (a) The first press release stated that the IAT had completed its assessment and produced a report which concluded that "several rounds from coalition helicopters fell short, missing the intended target and instead striking two buildings, which may have resulted in [CIVCAS]" and which caused by "a gun site [sic] malfunction".
- (b) The second press release stated that the IJC Commander had "ordered an investigation into the allegations of [CIVCAS] in Baghlan province during an operation Aug. 22".
50. Under cross-examination, Sir Jerry Mateparae accepted that these press releases would have been rolling in to NZDF at the time, and the NZDF would have understood ISAF's position from 30 August 2010.³⁰
51. On 30 August 2010, Lt Col McKinstry reported back to Col Kelly that the IAT had produced a report which concluded that the NZSAS had no case to answer but blame for CIVCAS could still lie with the air elements as one of the AH64 helicopters had not been firing true.³¹ This was consistent with

²⁶ 251 McKinstry XXM.

²⁷ 249-250 McKinstry XXM.

²⁸ 244-245 McKinstry XXM.

²⁹ 307 Parsons XXM.

³⁰ 39 Mateparae XXM.

³¹ IB 82.

a previous report Lt Col McKinstry had made while the IAT assessment was ongoing.³²

52. On 31 August 2010, Col Kelly told Lt Col McKinstry that the Prime Minister, Minister of Foreign Affairs and Minister of Defence were quite exercised by the issue and “are very keen to hear the official outcome”, adding:³³

Grateful if we could get our hands on the report sooner rather than later please i.e. next 24-48hrs please. I have both Ministers offices on the phone tomorrow chasing it up.

53. There was good reason for the Ministers to want to receive the IAT report, even though they would have known it found the NZSAS had no case to answer. As Sir Jerry Mateparae acknowledged under cross-examination, if IAT had indeed determined that US air elements had a case to answer, that could have had reputational and legal consequences for New Zealand.³⁴ Mr McKinstry also accepted this under cross-examination.³⁵
54. On 3 September 2010, Lt Col McKinstry received an ISAF email chain which confirmed that the IJC Commander had been briefed on the IAT’s findings and agreed that the NZSAS had no case to answer, but that the US air elements were subjected to an ongoing investigation.³⁶
55. In this evidence in chief, Mr McKinstry said that at the time, he interpreted that email chain as saying the IAT process was still underway in relation to the US air elements.
56. This is inconsistent with Mr McKinstry’s own evidence, however, that he understood the ISAF investigation process. It is also inconsistent with Sir Jerry Mateparae’s evidence that the NZDF would have been aware of the relevant ISAF press releases, both of which stated that the IAT process had concluded and one of which specified that an investigation had been ordered.
57. In summary, on the basis of this evidence, the Inquiry may conclude that by 3 September 2010, the NZDF was aware that the IAT process had concluded, the IAT had produced a report, it had been confirmed by the IJC Commander, the report had concluded that CIVCAS may have occurred due to the actions of the air elements, and that the US air elements were subjected to an ongoing national investigation.

³² IB 61-62.

³³ IB 84.

³⁴ 38 Mateparae X XM, 65 Mateparae X XM.

³⁵ 213 McKinstry X XM.

³⁶ IB 92.

SEPTEMBER 2010: MISINTERPRETATION OF THE IAT REPORT

No evidence of requests made for the IAT report

58. Despite Col Kelly's request on behalf of the relevant Ministers, it appears from the evidence of Mr McKinstry and Mr Parsons that neither man made a specific request for the report that week until Lt Col Parsons visited IJC.³⁷
59. Sir Jerry Maraparae also said under cross-examination that he did not personally make a request of ISAF for a copy of the report, although he acknowledged he could have done.³⁸

Lt Col Parsons' visit to IJC

60. Lt Col Parsons visited IJC on 7 September 2010. Mr McKinstry could not recall if he attended with him.³⁹ Mr Parsons did not mention Lt Col McKinstry attending in his evidence but did recall that the New Zealand-ISAF Liaison Officer, Mr Gillies, attended with him.⁴⁰
61. In his evidence in chief Mr Parsons claimed that while at IJC he was shown a few lines of the IAT's report. His evidence about the circumstances in which this occurred was conflicting.
62. In his evidence in chief Mr Parsons claimed that events happened in this order:
- (a) He was introduced to an ISAF officer.
 - (b) They talked for a time.
 - (c) He asked to see the IAT report.
 - (d) He was told he could not see it, but the officer went to retrieve a copy to show him a few lines.
 - (e) He read the lines over the officer's shoulder.
 - (f) He and the officer "had a quick conversation which reinforced the sentiment expressed in the paragraph".
 - (g) He again asked for a copy of the report and this was refused.
63. In his evidence in chief, Mr Parsons did not elaborate on the contents of the conversations he said he had before and after he was shown the few lines of the IAT report.
64. Under cross-examination Mr Parsons changed and embellished this story. He said before the officer went to get the report, he told the officer he was

³⁷ IB 92 "[Redacted – presumably the ISAF Liaison Officer] continues to monitor the status of the IAT report and we are looking to get a copy of the report when and if it is released"; 280 Parsons XXM.

³⁸ 58-59 Mateparae XXM.

³⁹ 237 McKinstry XXM.

⁴⁰ 281 Parsons XXM.

interested in whether there had been CIVCAS caused by *either the NZSAS/CRU or US air elements*⁴¹ and was told there was none at all⁴² or at least that is what Mr Parsons understood him to say.⁴³ Mr Parsons then interrogated him on this.⁴⁴ It was then that the officer went to retrieve the report⁴⁵ and showed Mr Parsons the four lines he showed him, which related to NZSAS/CRU forces only. Mr Parsons also couldn't recall having any subsequent conversation with Mr Gillies.⁴⁶

65. If this version of events were true, the inescapable inference would be that the ISAF officer was deliberately misleading Lt Col Parsons. It is not plausible that Lt Col Parsons could have stated he was concerned to find out there were no CIVCAS, was told there was not, interrogated the position; had that confirmed, and was then shown an excerpt from the IAT report which appeared to say there was no way any CIVCAS had occurred when that was not what the report actually said; for the ISAF officer to have been mistaken or for there to have been a miscommunication.
66. If this account is not accurate, another possibility is that, because of the way in which he interpreted the few lines he was shown, Lt Col Parsons genuinely believed that the report exonerated both ground and air elements, and he simply did not take sufficient steps to verify the position with the ISAF officer. If that were the case, Lt Col Parsons would have been negligent. At the time, Lt Col Parsons had access to a large amount of evidence which was inconsistent with the interpretation of the few lines he preferred, including media and intelligence reporting and, most importantly, ISAF's own press releases about what the IAT had concluded and what the IJC Commander had decided to do about it.
67. Another subtly different possibility is that, on viewing the lines in the report, Lt Col Parsons thought they could technically be interpreted in a way which exonerated both ground and air elements but, given all the information he had available to him, he had a real suspicion this interpretation was wrong. He nonetheless reported it back, being wilfully blind to that possibility because of the documented pressure at that time coming from relevant Ministers.

Lt Col Parsons misreports what he saw

68. When he returned from IJC, at 7.12am on 8 September 2010 New Zealand time, Lt Col Parsons drafted an email to Col Kelly to report back on his visit. The material parts of the email read:⁴⁷

Today I have sighted the Accident Investigation Team's (AIT) conclusion into the claims of civ cas in BAGLAN. IJC wasn't willing to release the report to us, so I cannot fwd a copy. However, **it categorically clears both gnd and air c/s of any allegations**. It states that having that having reviewed the evidence there is no way that civ cas could have occurred. We already knew we were without fault, but the AWT have now also been cleared which is good news.

⁴¹ 283 Parsons XXM.

⁴² 284 Parsons XXM.

⁴³ 285 Parsons XXM.

⁴⁴ 292 Parsons XXM.

⁴⁵ 284 Parsons XXM.

⁴⁶ 287 Parsons XXM.

⁴⁷ IB 104.

(emphasis in original)

69. This email was inaccurate. The IAT had not categorically cleared air assets, or found that there was no way that CIVCAS could have occurred. Lt Col Parsons had also not sighted the conclusion of the IAT's report; he had only seen a few lines.
70. These errors and omissions meant the email was seriously misleading.
71. Mr Parsons accepted that he knew at the time that the way he described what he had seen was misleading. He said:⁴⁸

So, I sent the email probably just a fraction too quickly, would be my recollection, we had a range of other things to go on with. But I remember as I pressed send, I thought oh I could probably say that a little bit more clearly. In hindsight, it might have been nice to have followed up with a second email, I wish I had.

72. In his evidence in chief, Mr Parsons claimed that he had interpreted the IAT report in the way he did at the time, because the lines he saw purported to exonerate the "AF", which he interpreted as "air force".
73. This evidence is not credible. "AF" had been routinely used in the context of planning documents for Operation Burnham to mean "assault force".⁴⁹ The AWT was part of the US Army, not the US Air Force. Under cross-examination, Mr Parsons accepted that he would not have recorded his understanding of "AF" in any contemporaneous documentation,⁵⁰ suggesting this was unlikely to be what he thought at the time. It is possible the "AF" explanation only occurred to Mr Parsons when he was eventually shown the report in preparation for this Inquiry, as a potential explanation for why he reported back in the way he did.
74. The more likely explanation for why Lt Col Parsons acted as he did at the time is the one offered above: that he was either negligent or wilfully blind to the true position and did not take sufficient steps to verify what the IAT report said with the ISAF officer.
75. The significance of Lt Col Parsons' failure to verify what he saw at IJC and communicate it accurately back to the NZDF cannot be overstated. The position, as he erroneously reported it, formed the basis of the CDF's 10 and 13 December 2010 briefings to the Minister on Operation Burnham, which in turn were used as the bases of the NZDF's press statements on 20 April 2011 (in response to the One News story) and 30 June 2014 (in response to *Collateral Damage*). These press statements were then erroneously relied upon as the basis for the NZDF's press statement following the release of *Hit and Run* on 21 March 2017.

The NZDF fail to question the position reported back

76. Mr Parsons could not recall having any discussions with Mr Gillies about what he had seen or talked about at IJC. Mr McKinstry also could not recall

⁴⁸ 296 Parsons XXM.

⁴⁹ Mr Parsons accepted the summary of this evidence put to him by Counsel Assisting at 302 Parsons XXM.

⁵⁰ 310 Parsons XXM.

Lt Col Parsons raising this with him, although he was getting ready to leave Afghanistan at the time.⁵¹

77. Under cross-examination, Mr Parsons said that, soon after he returned from IJC, he telephoned the DSO Col Kelly and explained to him he had only read a few lines of the report.⁵²
78. Mr Kelly changed his brief from the copy he signed on 6 September 2019 to acknowledge it was possible this occurred. Under cross examination Mr Kelly accepted Mr Parsons “could well be right” about this but he could not recollect such a conversation.⁵³ Mr Kelly said this conversation could have occurred after he came back from his week’s leave in Wanaka.⁵⁴
79. Under cross-examination, Mr Kelly also acknowledged that, prior to receiving Lt Col Parsons’ email report, he had expected the IAT to have found there was a possibility of CIVCAS.⁵⁵ He had seen the AWT footage which, when Lt Col McKinstry had seen it, led him to believe it was “clearly obvious to him” CIVCAS may have occurred.⁵⁶
80. Despite Lt Col Parsons placing a caveat on his report through his telephone calls to Col Kelly, and despite the fact Lt Col Parsons’ reports were inconsistent with what Col Kelly expected the IAT report to have said, Col Kelly did not question the position. Under cross-examination he admitted he did not recall checking for any new or updated ISAF press releases.⁵⁷
81. Other high ranking personnel in the NZDF would have had access to the same information that had been available to Lt Col Parsons and Col Kelly. There is no evidence anyone else in the NZDF seriously interrogated the position as reported back by Lt Col Parsons either.
82. When an adviser in Minister Mapp’s office raised the inconsistency between ISAF’s press releases and the position as relayed back by Lt Col Parsons, Col Kelly brushed this aside, telling the adviser he was “not sure how ISAF put the record straight” and saying he was “not sure what role we have in influencing [ISAF’s media plan]”.⁵⁸
83. Under cross-examination, Mr Kelly said the reason he did not take further steps was because he assumed, at the time, that ISAF must have “softened” its press releases.⁵⁹ Even if Col Kelly had held that belief, it would have been an unreasonable one. It is not consistent with ISAF’s second press release, which expressly stated that a formal investigation into the allegations of CIVCAS had been ordered. While under cross examination Mr Kelly denied seeing that press release,⁶⁰ however, his denial that he saw that press release is also implausible. Sir Jerry Mateparae gave evidence that these press releases would have been

⁵¹ 239 McKinstry XXM.

⁵² 295 Parsons XXM.

⁵³ 331 Kelly XXM.

⁵⁴ 332 Kelly XXM.

⁵⁵ 341 Kelly XXM.

⁵⁶ 392 Kelly XXM.

⁵⁷ 361 Kelly XXM.

⁵⁸ IB 117.

⁵⁹ 373 Kelly XXM, 400 Kelly XXM.

⁶⁰ 361 Kelly XXM.

“rolling through” and that by 30 August 2010 the NZDF would have been aware of them.⁶¹ It is likely Col Kelly was aware of it at the time, even if he has forgotten now.

84. The suggestion that ISAF might have intentionally claimed there was a possibility of CIVCAS where it knew no such possibility exists is also counter-intuitive and would have contradicted the “hearts and minds” strategy, not supported it. Mr Keating gave evidence he did not think this was something ISAF would do.⁶²

85. Various witnesses spoke about the great degree of trust they had placed in Lt Col Parsons.⁶³ In this case, those witnesses should have looked past that trust to the evidence that was in front of them.

86. The Inquiry may infer from the evidence – or the lack thereof – of the steps taken to interrogate Lt Col Parsons’ report that the NZDF were wilfully blind toward acknowledging the possibility of CIVCAS arising from Operation Burnham. As Sir Jerry Mateparae said under cross-examination:⁶⁴

Q. ... [L]ooking back now, you can accept, can't you, why people looking back at this might see it as -- on one view of it, NZDF doggedly refusing to accept, even as a possibility, civilian casualties from this operation.

A. Yeah, I can. Yes.

87. Col Cummins said similarly:⁶⁵

Q. And just before we go to lunch, I just want to put to you, you can see why it seems that such a selective seizing on such an unreliable intel source, Brigadier Parsons' email, would look to an outsider, when there was so much other intel available that suggested it was unreliable, as a knee jerk grasping for the not guilty answer, regardless of the facts? Can you see how it looks like that?

A. I can see how that might look, yes.

DECEMBER 2010: THE MINISTERIAL BRIEFINGS

The briefings were in response to an OIA request

88. The next major event after Lt Col Parsons reports back about his observation of the IAT report is the briefings provided to the Minister in December 2010.

89. These briefings were not part of any proactive strategy of informing the Minister of relevant developments about the Operation or providing the public with information. As Sir Jerry Mateparae acknowledged under cross-

⁶¹ 40 Mateparae XXM.

⁶² 528 Keating XXM.

⁶³ 73 Mateparae XXM, 374 Kelly XXM.

⁶⁴ 48 Mateparae XXM.

⁶⁵ 429-430 Cummins XXM.

examination, it was likely they were prepared in the process of responding to an Official Information Act request made by TVNZ.⁶⁶

The December briefings were inaccurate and misleading

90. The 10 December 2010 briefing contained four main inaccurate and misleading aspects, most contained in paragraph 7.
91. First, paragraph 7 advised that the IAT had concluded that allegations of CIVCAS were “baseless” and that it “categorically cleared” both ground and air elements. Again, this was not what the report said.
92. Second, paragraph 7 also stated:

The assessment concluded that “having reviewed the evidence there is no way that civilian casualties could have occurred”.
93. The use of quotation marks in this context suggests that the quote had been taken from the IAT report. In fact, it had been paraphrased from Lt Col Parsons’ email of 8 September 2010.
94. Third, paragraph 7 stated that NZDF’s knowledge about the IAT’s conclusions was based on reports from the Commanding Officer who had been permitted to read the IAT report. In fact, Lt Col Parsons was not permitted to read the report, and only saw a few lines. This was not made clear.
95. Fourth, the 10 December 2010 briefing as a whole omitted to mention there was an ongoing investigation into the air elements ordered by the IJC Commander. Had it done so, the Minister would have been alerted to the fact that there was still a possibility that CIVCAS may have occurred.
96. The 13 December 2010 briefing included the same misleading aspects. However, with regard to the third aspect, the briefing omitted any reference to how the NZDF had knowledge of the conclusions of the IAT report.

The NZDF knew the briefings were misleading and less than transparent when they went to the Minister

97. Mr Kelly accepted that he and Col Thompson had been responsible for drafting the 10 and 13 December 2010 briefings.⁶⁷ Sir Jerry Mateparae gave evidence that he signed off on these briefings and would generally check briefings were correct, but said he relied on his staff to provide him with accurate information.⁶⁸
98. In their evidence, both Mr Kelly and Sir Jerry Mateparae acknowledged that the briefings were inaccurate. However, they claimed that the mistakes were not intentional or knowing. They said the mistakes were due to their reliance on what Lt Col Parsons had reported back about what the IAT had concluded.⁶⁹

⁶⁶ IB 178.

⁶⁷ 342 Kelly XXM.

⁶⁸ 32 Mateparae XXM.

⁶⁹ See eg. 333-334 and 351 Kelly XXM.

99. This evidence cannot be accepted in its entirety, for four reasons.
100. First, when he drafted the December briefings, Col Kelly knew that Lt Col Parsons had only seen a few lines of the IAT report. Lt Col Parsons had told him this. Mr Kelly deliberately changed his brief of evidence from his 6 September 2019 version to acknowledge it was possible Lt Col Parsons told him this.⁷⁰ To write that Lt Col Parsons had been permitted to read the IAT report was therefore knowingly misleading.
101. Second, Col Kelly would have had Lt Col Parsons' 8 September 2010 email available to him at the time. He would have known that it did not say that the allegations of CIVCAS were "baseless", only that the ground and air elements had been "categorically" cleared and that there was "no way civ cas could have occurred". Under cross-examination and in re-examination he maintained he believed this was what Lt Col Parsons had said. Even if that evidence were accepted, at the very least, embellishing the briefings with the word "baseless" was negligent.
102. Third, Col Kelly did not have the IAT report at the time and Lt Col Parsons had not purported to quote from the IAT report in his email of 8 September 2010. In that context, the decision to place quote marks around "having reviewed the evidence there is no way that civilian casualties could have occurred" which indicated the text came from the IAT report must have been a deliberate decision, and was therefore knowingly misleading. Quotation marks are used for a reason. Sir Jerry Mateparae has acknowledged in evidence in chief that he thought the latter quote been taken from the IAT report.⁷¹
103. Fourth, with reference to the 13 December 2010 briefing in particular, under cross-examination, Sir Jerry Mateparae said this briefing reflected "what was considered *useful* for a Minister to disclose" (emphasis added).⁷² Sir Jerry made clear the decision not to mention information about the separate US investigation was a conscious choice. He said:⁷³

Q. You could also have said [in the 13 December 2010 briefing] there's a further investigation ongoing that may reveal damaging material?

A. I could have said that, yes.

Q. But you chose not to?

A. I chose not to.

Receipt of the IAT report at this stage

104. The IAT report was produced in late August 2010. Sir Jerry Mateparae, Mr McKinstry, Mr Kelly, Mr Keating and Mr Thompson all gave evidence that they did not see the report at the time and did not see it until many years later.⁷⁴ Mr Parsons gave equivocal evidence about whether he had the

⁷⁰ 329-330 Kelly XXM.

⁷¹ 23 Mateparae XIC.

⁷² 42 Mateparae XXM.

⁷³ 64 Mateparae XXM.

⁷⁴ 22 Mateparae XIC, 241 McKinstry XXM, 328 Kelly XIC, 381 Keating XIC, 442 Thompson XIC.

report in 2011 before saying he could not recall, but was not asked whether he had received the report in 2010.⁷⁵

105. Mr Blackwell gave evidence that he was the one who received the report in New Zealand, by email from the SNO in theatre.
106. In his evidence in chief, he:
- (a) did not say on which date he received the report;
 - (b) said he “would have read the report”;
 - (c) did not explain what he thought or felt when he read the report;
 - (d) said that he “would have ... saved a copy of it electronically, and then filed the email in the appropriate electronic directory”;
 - (e) said that after reading the IAT report he printed one copy of the report and took it to the OCDF, gave it to Col Thompson and told him it was a document that the CDF and the Minister needed to see;
 - (f) said that he told Col. Thompson to let him know when the CDF was ready to be briefed on the report.
107. Mr Blackwell said he received the report on 1 September 2011. When asked why he recalled that, he said it was because this was the date recorded on the OCDF safe register.⁷⁶
108. Under cross-examination, Mr Blackwell accepted he did not record the IAT report in any classified register within DSO. He said this was because it was received electronically. However, DFO 51 assumes the existence of an Electronic Classified Document Register (**ECDR**).⁷⁷ Mr Blackwell did not give a clear reason why he did not use an ECDR.⁷⁸
109. Mr Blackwell also claimed in his evidence in chief that he printed a copy of the IAT report to take to the OCDF. He accepted he did not record that copy in a DSO register either. He claimed this was because DFO 51 only applies to documents being transferred to third parties. However, the DFO does not expressly state this and arguably the DSO is a separate custodian from the OCDF. Mr Thompson and Mr Hoey gave evidence that they would have thought the IAT report would have been registered within the DSO.⁷⁹
110. Mr Blackwell’s primary reason for recalling receiving the email on 1 September 2011 is not corroborated by the documents. The OCDF safe register entries do not refer to the IAT report or any email.

⁷⁵ 306 Parsons X XM, where Mr Parsons variously said he had “probably” had a copy of the report in 2011, before saying “I don’t think I did”, then “according to my evidence, I don’t believe I’ve seen it until 2018”, then “no”, before later accepting he could not recall.

⁷⁶ 811 Blackwell X XM.

⁷⁷ IOB 17.

⁷⁸ 747 Blackwell X XM.

⁷⁹ 861 Hoey X XM and 948 Thompson X XM.

111. What the OCDF safe register does show is that on 1 September 2011 the “DSO” marched in two sets of documents. One was given the serial number 386/11 and the title “BAGHLAN PROVINCE BRIEF FOR MINDEF (2 SECRET DOCS)” while the other was given the serial number 387/11 and its name denoted with ditto marks.
112. There are no other documentary records which provide any support for Mr Blackwell’s account that he received the IAT report by email from the SNO on 1 September 2011.
113. No clear explanation has been provided for why these records are not available. Mr Radich QC submitted it was possible that email records for the DSO position generally have been lost;⁸⁰ however, records of emails to and from previous and subsequent DSOs have been made available. Mr Short gave evidence that if Col Blackwell had saved relevant emails and documents to his personal drive and not SharePoint they would have been lost when he left the DSO position.⁸¹ However, it is not at all clear from Mr Blackwell’s evidence that this is what he did. Mr Radich QC indicated he would endeavour to obtain an affidavit from the NZDF attesting to the position on this issue but none has been provided (or if it has, it has not been provided to the other core participants).
114. It follows it is possible that Col Blackwell did not receive the IAT report on 1 September 2011 as he said under cross-examination.
115. He may have received it by email earlier than this date. This would be consistent with his evidence in chief.
116. Under cross-examination Mr Keating said it was possible the IAT report could have been delivered safe-hand, potentially to someone who was not very senior in the organisation.⁸² Under cross-examination Mr Blackwell denied this.⁸³ However, since he had no clear recollection of receiving the report by email and based his evidence on reconstruction from register entries which do not mention any email or the IAT report, this must also remain a possibility.

APRIL 2011: THE ONE NEWS STORY

117. On the evening of 20 April 2011, One News led with an item about Operation Burnham.
118. The item included an excerpt of an interview with Minister Mapp which had been conducted for the Q + A programme. In the interview Minister Mapp said:⁸⁴

Guyon [Espiner]: There were also claims that civilians died in the kiwi counter-attack [Operation Burnham].

Defence Minister: That’s been investigated and proven to be false.

⁸⁰ 705 Blackwell XXM.

⁸¹ 1121 Short XXM.

⁸² 536 Keating XXM.

⁸³ 715 Blackwell XXM.

⁸⁴ IB 187.

Guyon [Espiner]: So no civilians were killed in that. You're satisfied about that? You've seen some reports?

Defence Minister: I am satisfied around that.

119. The same evening, the NZDF put out a public statement. The statement was entitled "NZDF Operations in Bamyan Province on 22 August 2010". The statement included the following comment:

Following the operation allegations of [CIVCAS] were made. These were investigated by [the IAT] in accordance with ISAF procedures.

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

120. The Minister's statement that the IAT had investigated the allegations of CIVCAS which were "proven to be false" was wrong. The NZDF's statement that the IAT concluded the allegations of CIVCAS were "unfounded" was also wrong. The IAT had concluded the opposite: that CIVCAS may have occurred.

121. In addition, the NZDF's statement that Operation Burnham had occurred in Bamyan province was also wrong. This was an error of much greater magnitude than the map errors made by the authors of *Hit and Run* in that book, particularly considered the NZDF knew the precise location of the operation and that it took place in Baghlan.

122. There is limited evidence about the briefing process which led to Minister Mapp making these statements. However it may be fairly assumed he relied upon his previous briefings of 10 and 13 December 2010. There is no evidence to suggest the Minister had been made aware of the IAT report at this stage.

123. Mr Cummins and Mr Steer gave evidence about how the NZDF public statement was put together. Mr Blackwell denied having any involvement.⁸⁵

124. Mr Cummins was acting DSO at the time. His evidence on what checks he conducted was inconsistent. In a contemporaneous email he told the VCDF that he had "verified the facts". Mr Cummins then changed his initial brief of evidence to add that he "did not recall" what checks he made but said his "sense" was that he "would have" either spoken to Lt Col Parsons or gone back to relevant emails and/or the 10 and 13 December 2010 briefings (which were inaccurate and misleading).⁸⁶

125. Both Mr Cummins and Mr Steer gave evidence they had no reason to doubt Lt Col Parsons' previous reporting.⁸⁷ In fact, as already submitted, there was every reason to doubt that reporting.

126. Mr Parsons also amended his brief of evidence to add the following:⁸⁸

I recall having a, I think it was a telephone conversation, I don't recall exactly who it was, but it was possible that it was Karl. And we were discussing the press release that was about to go out and my counsel to

⁸⁵ 659 Blackwell XIC.

⁸⁶ 418 Cummins XIC.

⁸⁷ 415 Cummins XIC.

⁸⁸ 273 Parsons XIC.

him was that we should not be definitive over the issue of civilian casualties in that press release. The reasons for that, and I know that might seem at odds with the advice that I -- or the reporting that I gave some seven months earlier, but was that the ISAF had already put out a report, or a press release, and it would be difficult for the public and for the media to understand the difference in our press release without us having to go into details about counter-insurgency strategy and perhaps the reasons why General Petraeus might have taken a softer line on his press release. *Equally, if facts came to the fore in the future, things are always fluid in an operation, that changed our understanding of the time as we knew it, then we didn't want to be in a position where we would have to recant.*

(emphasis added).

127. Assuming this conversation did take place, it is clear that Col Cummins did not take Lt Col Parsons' advice. The NZDF put out a definitive response. What this evidence does show, however, in particular the italicised excerpt, is the NZDF's ongoing refusal to tug at some very obvious threads suggesting that their public position on the CIVCAS issue could potentially be wrong. In April 2011, the very officer who had reported back so conclusively that the IAT had concluded there was "no way" CIVCAS may have occurred, was now counselling caution on the basis that new facts could potentially come forward in the future. Still, it appears the NZDF did little to question the position.
128. If someone within NZDF did have access to the IAT report at this stage, it appears they had not provided it to Col Cummins, or stored it in a place where Col Cummins as acting DSO could readily access it.

APRIL – SEPTEMBER 2011: ATTEMPTS TO OBTAIN THE IAT REPORT

129. In April 2011 Col Blackwell commenced his role as DSO.
130. In his evidence in chief, Mr Blackwell said that "at a later point" (referring back to the One News story) Col Cummins provided a debrief on Operation Burnham and a number of other matters.⁸⁹ He said this was the first time he was made aware of the IAT assessment and the NZDF's understanding of what the IAT report said from Lt Col Parsons. Under cross-examination he said this conversation occurred in April 2011.⁹⁰
131. In his evidence in chief, Mr Blackwell said he then "reinforced" to the SNO in theatre that he wanted him to obtain a copy of the IAT report.⁹¹ Under cross-examination, Mr Blackwell initially agreed that he was "constantly" asking for the report, but when pressed, could not recall even roughly how many times he asked for it and said it would have been one of "several hundred issues" for the SNO in theatre to address.⁹² This suggests it was not a priority for Col Blackwell.
132. No documentary records of any requests Mr Blackwell made of the SNO by email have been made available. This is also consistent with Mr

⁸⁹ 659 Blackwell XIC.

⁹⁰ 697 Blackwell XXM.

⁹¹ 659 Blackwell XXM

⁹² 702-703 Blackwell XXM.

Blackwell having received the IAT report earlier than 1 September 2011 and/or receiving the report, at least initially, by safe-hand.

133. Meanwhile, the documentary evidence makes clear that the issue of allegations of CIVCAS arising out of Operation Burnham remained live during this time. Keith Locke MP asked the Minister Parliamentary questions about it in May.⁹³

1-12 SEPTEMBER 2011: DISTRIBUTION OF AND BRIEFING ON THE IAT REPORT

Distribution to the OCDF

134. Whether or not someone within the NZDF received the IAT report prior to 1 September 2011, it is clear from the OCDF and MilSec safe registers that *some* documents relating to Operation Burnham were marched in to those safes on that date. It is therefore necessary to interrogate which documents and how they came to be stored there.

What documents were marched in

135. Mr Blackwell's evidence in chief was that he printed one copy of the IAT report and took it to the OCDF. He said he did not make any more copies of the report.⁹⁴
136. This claim is implausible. The names given to entries 386/11 and 387/11 in the OCDF safe register ("BAGHLAN PROVINCE BRIEF FOR MINDEF (2 SECRET DOCS)" and ditto marks, respectively) suggest that Mr Blackwell marched in two *sets* of documents containing at least two documents each, not just one copy of the IAT report.
137. In addition, the use of the originator "DSO" suggests that these sets of documents would have been produced and compiled by the DSO (Col Blackwell) and not someone in the OCDF. Put another way, it is unlikely that Col Blackwell gave one copy of the IAT report to someone in the OCDF, who then produced two sets of documents and registered them in the safe under the originator "DSO".
138. In terms of what the documents were, 386/11 has been shredded and no copy remains available.
139. Set 387/11 appears to have been some or all of the bundle of documents uncovered by Capt Hoey from the Deputy Chief of Staff (**DCOS**) / Director of Coordination (**DCOS**) safe on 30 June 2014.⁹⁵ The serial number 387/11 appears on the first page of the first document of the bundle attached to Mr Hoey's affidavit as Exhibit A (the storyboard). That bundle included the Operation Burnham storyboard, drafts of the 25 August 2010, 10 December 2010 and 13 December 2010 briefings to the Minister; an email

⁹³ 1101 Mapp Inquiry Questions.

⁹⁴ 662 Blackwell XXM (on not making a copy). 709-710 Blackwell XXM ("Q. And he's the only person you talked to about it in that office? A. Correct.)

⁹⁵ ISB 55 onward.

from Lt Col McKinstry, and the IAT report. Only the storyboard is labelled with the serial number.

140. It is likely the email from Lt Col McKinstry was included in set 387/11, however, because according to Counsel Assisting, metadata establishes that this document was created on 1 September 2011, and the NZDF have confirmed this document was in a DSO folder on a secure network (it being likely that the DSO put this document set together).
141. It is not clear whether the now-shredded 386/11 was the same as set 387/11. While set 387/11 was named using ditto marks suggesting it was the same as 386/11, this does not necessarily follow. The register form has a column for copies which was not used. Dr Mapp gave clear evidence he did not recall ever reading the IAT report, addressed in more detail below.

What was done with them

142. Mr Blackwell's evidence in chief was that he took the IAT report to Col Thompson and told him it was an important document that the CDF and Minister needed to see.
143. Under cross-examination Mr Blackwell accepted that he could not recall that conversation or what was actually discussed.⁹⁶ Mr Thompson also could not recall the conversation Mr Blackwell said he had with him. He disagreed he had had the conversation Mr Blackwell said he had "on the basis that I don't recall".⁹⁷
144. The register records show that set 387/11 was marched in to the OCDF safe first, before being transferred to Col Thompson's DCOS/DCORD safe by the originator "OCDF" six days later on 7 September 2011.
145. Mr Hoey gave evidence that the OCDF safe would have been operated by the CDF's military assistant. It follows that either Col Blackwell gave documents to the military assistant and not Col Thompson, or he gave them to Col Thompson who then gave them to the military assistant to march in to his safe, before retrieving or receiving them back and marching them into his own safe.
146. It is submitted the former explanation is more plausible. Mr Thompson would be more likely to have remembered receiving the documents if he had effectively received them twice.

Distribution to the Minister

147. The OCDF safe register shows that on 1 September 2011, set 386/11 was referred to "MINDEF". The Minister's Military Secretary safe register shows that the originator "HQNZDF" marched in a document named "NATO//SAF (S) OP RAHBARI OBJ BURNHAM" on "2/12/11" which was given the serial number "504". Going by the date of distribution on the OCDF safe

⁹⁶ 709-710 Blackwell XXM.

⁹⁷ 953 Thompson XXM.

register, the date reference in the MilSec safe register was clearly entered well after the documents were actually received.

148. The name “*NATO/ISAF (S) OP RAHBARI OBJ BURNHAM*” does not refer to the IAT report or an email attaching the IAT report.
149. There is no record of Col Blackwell, the Directorate of Special Operations or the OCDF providing any covering note for set 386/11. Mr Blackwell’s evidence was that he was not responsible for what went over to the Minister’s office and would have expected there to have been a cover sheet.⁹⁸
150. Mr Blackwell’s evidence on this issue does not sit comfortably with his evidence in chief that he made the IAT report available to the Minister. It also sits uncomfortably with the fact that no one from within the OCDF could recall making the IAT report available to the Minister – yet set 386/11 was dispatched on the same day it was marched in to the OCDF safe.
151. It is submitted the most likely explanation is that contrary to his evidence under cross-examination, Col Blackwell must have arranged for the dispatch of set 386/11 to the office of the Minister himself.
152. At the Minister’s end, in his evidence in chief, Mr Hoey gave clear evidence that he could not recall receiving the IAT report at all.⁹⁹
153. Under cross-examination, Mr Hoey gave inconsistent evidence, at times acknowledging he could not recall receiving the IAT report while at other times claiming he was “probably 95%” sure he would have received it and flipped through it.¹⁰⁰
154. Given the significance of the report, it is unlikely Mr Hoey would have received it. Mr Hoey acknowledged that his role as MilSec required him to be broadly familiar with the documents that came across his desk.¹⁰¹ The IAT report is very short. Mr Hoey acknowledged that anything related to Afghanistan was important to the Government.¹⁰² The IAT report was about suspected CIVCAS in an operation involving New Zealand. Dr Mapp gave clear evidence he had never read it. Dr Mapp also said that if he had read it for himself, he would have acted differently and consulted his colleagues.¹⁰³
155. Given that evidence, there are two possibilities. One has been foreshadowed: that the IAT report was never part of set 386/11 / serial 504. Another is that the document was included but Capt Hoey did not realise its significance.
156. The next issue is what Capt Hoey did to bring the document to the Minister’s attention.

⁹⁸ 742 Blackwell XXM, 759 Blackwell XXM (on the expectation there would have been a briefing note).

⁹⁹ 839 Hoey XIC.

¹⁰⁰ 875 Hoey XXM.

¹⁰¹ 850 Hoey XXM (“in a perfect world”).

¹⁰² 851 Hoey XXM.

¹⁰³ 1059 Mapp XXM.

157. Minister Mapp was out of his office from Thursday 1 September to Monday 5 September inclusive.
158. Under cross examination, Mr Hoey speculated that he would have stored the document(s) in his own safe over the weekend before placing them on the Minister's desk in a colour coded folder the following week.¹⁰⁴ There are no records of Capt Hoey storing the documents in his own safe because the date of entry for OCDF document 386/11 in the MilSec safe register is "2 12 2011".
159. Given the speculative nature of Mr Hoey's memory, there is an absence of reliable evidence on this point. This tends to support the proposition that item 386/11 never contained the IAT report.

Registration in the DCOS/DCORD safe

160. The DCOS/DCORD safe register shows that, on 7 September 2011, the originator "OCDF" marched in an item named "*Briefing Pack on Civ Casualty – Kabul Aug 2010*" which was given the serial number "S 116".
161. The name and serial number of this set do not refer back to set 387/11. However, the serial number S116 appears on the first page of the first document of the bundle attached to Mr Hoey's affidavit as Exhibit A (the storyboard), alongside 387/11.
162. This suggests that 387/11 and S116 were the same sets.
163. The bundle of documents retrieve from Capt Hoey's safe on 30 June 2014 contained handwritten markups which suggested that the writer had detected that the (draft) briefings to the Minister of 25 August 2010, 10 December 2010 and 13 December 2010 had been inaccurate and misleading because they had described the conclusions reached in the IAT report inaccurately.
164. Under cross-examination, Mr Blackwell accepted that the combination of the difference in dates between the registration of 387/11 on 1 September 2011 and S116 on 7 September 2011 and the handwritten annotations meant it was likely that the documents had been marked up in the intervening period.¹⁰⁵
165. While Mr Blackwell was unable to identify the handwritten annotations, Mr Blackwell admitted receiving the IAT report. On his own evidence he also appreciated its significance in terms of the NZDF and Minister's previous statements.
166. It is open to the Inquiry to conclude that in the period 1-7 September 2011, if not earlier, Mr Blackwell became aware that the August and December 2010 briefings had been inaccurate and misleading. It is also possible that he made the handwritten annotations to the documents.

¹⁰⁴ 856-857 Hoey X XM.

¹⁰⁵ 740 Blackwell X XM.

The CDF was not briefed

167. In his evidence in chief, Mr Blackwell gave no detail of briefing the CDF. He did not recall Col Thompson actually coming to tell him the CDF was ready to be briefed. All he said was:¹⁰⁶

I cannot recall when exactly I briefed the CDF.

168. Under cross-examination Mr Blackwell was similarly vague. He said he didn't recall briefing the CDF at all. At the same time, he said he "would have been" clearer with the CDF than with the Minister.¹⁰⁷ He also suggested any briefing would have been part of his Command Update brief, which suggests that if the CDF had been briefed, it would not have been a specific briefing. When pressed with the point, Mr Blackwell retreated from speculating about the nature of the brief:¹⁰⁸

Q. So are you suggesting that CDF with full knowledge of the implications and significance of the IAT report made some decision to not do anything about it at that time?

A. No I'm not suggesting that at all.

Q. Well you gave him a recommendation, what was your recommendation?

A. I don't recall

169. There are no documentary records to corroborate Mr Blackwell's evidence that he briefed the CDF. Conversely, there is an email sent from the VCDF Rear Admiral Jack Steer to all NZDF personnel dated 2 September 2011 prompted by the release of *Other People's Wars* by Nicky Hager. The email notes that the book made a claim about Operation Burnham, and states that an IAT had concluded that "allegations of [CIVCAS] were unfounded and the ground force and coalition air were cleared of all allegations".¹⁰⁹ This email suggests that the IAT report had not been brought to the attention of the OCDF on 1 September 2011 as Mr Blackwell claimed.

170. Mr Jones gave clear evidence that he did not recall any briefing from Col. Blackwell about the IAT report. He said he was in China and Afghanistan between 2 and 16 September 2011. He said he had never read the report prior to the Inquiry process. He said if he had received and read the IAT report he would have acted on it. Rear Admiral Steer also gave no evidence to the effect he was briefed on the report.

171. It follows there is no evidence that Col Blackwell briefed the CDF or VCDF on the receipt of the IAT report or in the fullness of time, despite having appreciated that the report was inconsistent with the August and December 2010 briefings to the Minister. That was, at the least, negligent, and at worst, deliberately misleading.

¹⁰⁶ 665 Blackwell XIC.

¹⁰⁷ 767 Blackwell XXM.

¹⁰⁸ 770 Blackwell XXM.

¹⁰⁹ IOB 92.

The Minister was poorly briefed

172. There is more concrete evidence that Col. Blackwell briefed the Minister on something around this time. The Minister's diary recorded a briefing on 12 September 2011 at 3.45pm – 4.15pm.¹¹⁰ Capt. Hoey had also marched in document 386/11 (although he did not record this on the register until December).

173. In his evidence in chief, Mr Blackwell offered little about this briefing, saying "I also cannot recall when exactly I briefed the Minister" before adding:¹¹¹

Although I do not recall the date or the logistics of the briefing, I do recall explaining to the Minister that *the IAT report did not provide evidence that civilians were killed* but that it did conclude that there was a possibility of unintended civilian casualties as a result of a coalition AH64 gun not being slaved correctly to its sight.

(emphasis added)

174. Under cross-examination, Mr Blackwell offered more detail.

175. Mr Blackwell said Minister Mapp had read the IAT report. He was "very familiar" with it¹¹² and asked Col. Blackwell questions about it. Mr Blackwell said he explained to Minister Mapp what the report said fully and candidly. He said the Minister asked for his own opinion about whether there had been CIVCAS, in respect of which Mr Blackwell said:¹¹³

The Minister asked me what my opinion was of whether there were civilian casualties. My answer was very clear. It was, I don't have any evidence to suggest there were, but there may have been, because there were several rounds from the Apache from an incorrect gunsight slaving, but I had no understanding or no evidence to suggest there were, but there could have been.

176. Dr Mapp said repeatedly in evidence in chief and under lengthy cross-examination that he had no memory at all of reading the IAT report, and did not believe he had read it.

177. In his evidence in chief, Dr Mapp said he now had:

... a fragmentary memory of being told by Col. Blackwell that there was no evidence of civilian casualties but that it was possible that civilian casualties may have been caused ... due to a misaligned gun on the United States Apache helicopter.

178. Under cross-examination, however, he acknowledged that he did not recall Col. Blackwell explaining to him the detail of what the IAT had considered. Dr Mapp said he was not told that helicopter rounds had hit residential houses,¹¹⁴ adding "I don't believe I've ever had that sort of detail"¹¹⁵.

179. The extent of Dr Mapp's "fragmentary memory" is accurately captured by the following exchange toward the end of his cross-examination:¹¹⁶

¹¹⁰ IOB 60a.

¹¹¹ 666-667 Blackwell XIC.

¹¹² 748 Blackwell XXM.

¹¹³ 750 Blackwell XXM.

¹¹⁴ 1089 Mapp XXM.

¹¹⁵ 1090 Mapp XXM.

¹¹⁶ 1094 Mapp XXM.

Q. Dr Mapp, if I can just attempt to capture what I take from your answers earlier and then move on. We can take your evidence as being then that in terms of what you understood from your briefing in September 2011, your understanding of the issues around potential civilian casualties was taken entirely from Mr Blackwell's oral briefing to you?

A. Yes.

Q. And the effect of that briefing was that there was no evidence of civilian casualties and thus you did not need to investigate any and that is why you took no steps to investigate and that is why you didn't take any steps to correct prior statements?

A. Correct.

180. It follows that there is a conflict between Mr Blackwell and Dr Mapp's evidence. Mr Blackwell says Minister Mapp had read the IAT report and was fully and candidly briefed on what it contained and what its significance was. Dr Mapp said he had not read the report and that key details about the allegations of CIVCAS and how they occurred were not explained to him.

181. Mr Stephenson submits that Dr Mapp's evidence can be preferred.

182. Mr Blackwell's evidence on several important issues was vague. His evidence in chief did not state when he received the IAT report. His evidence about what he did with the IAT report once he received it is inconsistent with what documentary records are available, and with the evidence of Mr Thompson. His demeanour when giving evidence was antagonistic. Dr Mapp acknowledged that he had previously expressed concerns about Mr Blackwell's reliability privately to Jon Stephenson.¹¹⁷ Dr Mapp's evidence that he did not receive the IAT report is not inconsistent with the evidence of other witnesses such as Mr Hoey (who could not recall receiving the report or giving him the report to read) and the documents (such as the MilSec safe register).

183. Dr Mapp also made clear that if he had read the report he would have at least discussed it with someone, which he did not do. When Dr Mapp was presented with detailed evidence about what had happened on Operation Burnham via *Collateral Damage*, he had an immediate reaction, acknowledging that he might have been wrong when making his 20 April 2011 statements. Dr Coleman made a note in 2014 following discussions with Dr Mapp recording that Dr Mapp had been "poorly briefed".¹¹⁸ All these factors point to Dr Mapp's account being the more credible one.

184. If Dr Mapp's evidence on this issue is accepted, two main consequences follow.

185. First, the NZDF through Col Blackwell misrepresented the conclusions of the IAT report. In his own words, from his evidence in chief and repeated several times in cross-examination, Col Blackwell presented the IAT as really having concluded there was "no evidence" of CIVCAS, despite the formal conclusion that CIVCAS may have occurred. This was false and

¹¹⁷ 1096 Mapp XXM.

¹¹⁸ 1074 Mapp XXM where Dr Mapp acknowledges he must have had a conversation with Minister Coleman around this time.

any reasonable commander in Col Blackwell's position should have known it to have been false.

186. Second, both the NZDF and the Minister would have known at this point that their public statements of April 2011 had been false and misleading. Those statements had said the IAT had concluded the allegations of CIVCAS were "proven to be false" and were "unfounded". Neither did anything to correct this position.
187. Dr Mapp said his understanding at the time was that he would have been told by the Prime Minister's chief of staff that it would not be appropriate for the Government to have put out a press release in those circumstances.¹¹⁹
188. Dr Mapp also said repeatedly he decided not to take any further steps because, as Col Blackwell had told him, there was really "no evidence" that CIVCAS had actually occurred.
189. This view was incorrect. The simple point is this. If there were no evidence of CIVCAS, the IAT would have found that all coalition forces had no case to answer. But it didn't. It concluded that CIVCAS may have occurred, based on the evidence it had reviewed. That included, in particular, the AWT video footage summarised above.

DECEMBER 2011: CHANGE OF MINISTER

Item 386/11 is shredded

190. The register for the safe belonging to the Military Secretary for the Minister shows that on 5 December 2011 item 504 was destroyed by shredding.
191. The content of item 504 has been addressed above. If the item did not contain the IAT report, the shredding of the item becomes less suspect.
192. Mr Hoey's account of the shredding process was just as vague as his account of "receiving" the IAT report.
193. He said the shredding of item 504 would have been done as part of a wider clean-out of the safe due to the change in Minister at that time. He said he did this with Col. Thompson. The fact a "muster" was conducted is corroborated by the fact that the register shows that many other documents were shredded on or around this time.
194. Mr Hoey said he would have seen the IAT report and would have made a deliberate decision to shred it because he would have determined the NZDF retained a copy.¹²⁰ This evidence is too vague and speculative to be credible. It is a reconstruction of what Mr Hoey believes he would have done, and the reasons why he believed he would have done it, not supported by any actual memory or corroborated by documentary record. It can be put to one side.

¹¹⁹ 1066 Mapp XXM.

¹²⁰ 900-902 Hoey XXM.

195. The short point is that if item 504 contained the IAT report and was shredded, this was at the very least, careless. Mr Hoey gave no credible explanation why a document as important as the IAT report would be shredded when other documents such as the original 25 August 2010 note to the Minister were returned to the NZDF. Operation Burnham had, that year, been subject to a number of queries from the media and Members of Parliament which had prompted the NZDF and the Minister to make public statements. There was every possibility the issue would continue to linger, given that ISAF's public messaging remained the same.

Briefing to incoming Minister Coleman

196. Finally, Dr Mapp gave evidence that he had no recollection of providing a briefing for the incoming Minister Coleman on what Col Blackwell had told him about the IAT report – despite the fact that questions had been asked about CIVCAS on Operation Burnham repeatedly in 2011.¹²¹

JUNE-JULY 2014: COLLATERAL DAMAGE

The CDF gives an incomplete briefing to the Minister

197. On Friday 27 June 2014, Jon Stephenson called and then emailed the NZDF to ask a series of questions about allegations of CIVCAS arising out of Operation Burnham.¹²² The purpose was to inform the broadcast of his item *Collateral Damage* on the Maori Television programme *Native Affairs*.
198. On Saturday 28 June 2014, someone informed CDF Chief of Staff (**COS**) Commodore Ross Smith, proposing that the NZDF treat the request as an OIA and respond to it accordingly. Cdre Smith agreed.¹²³
199. Later that day, probably due to the intervention of the Minister's staff, Minister Coleman attended a briefing on the matters raised.
200. In his evidence in chief, Mr Keating said it was possible he conducted this briefing.¹²⁴ This is supported by public comments made by the Prime Minister the following week that the CDF had "come in the previous weekend and conducted a 'thorough review' of the operation".¹²⁵
201. Mr Blackwell denied having any involvement the briefing,¹²⁶ despite the fact the briefing was about a complicated and high-profile NZSAS operation and he was the subject-matter expert. The only reason he gave was that it was the weekend and he assumed he was out of Wellington. However, he independently recalled that "possibly" some information had been provided by his analyst.¹²⁷ The latter point is corroborated by documentary evidence.¹²⁸

¹²¹ 1060 Mapp XXM.

¹²² IB 214 and ISB 7-8.

¹²³ ISB 6.

¹²⁴ 480 Keating XIC.

¹²⁵ IB 224.

¹²⁶ 668 Blackwell XIC, 784 Blackwell XXM, 805 Blackwell XXM.

¹²⁷ 799 Blackwell XXM.

¹²⁸ IOB p112o.

202. It is important to determine whether and to what extent Mr Blackwell participated in or contributed documents for the briefing. If he was either involved in the briefing or asked to provide documents for the briefing, it is clear he would have intentionally misled the CDF and the Minister, because he would not have brought the IAT report (which he knew about and had access to, being the DSO) to their attention. Mr Smith gave evidence that when he approved the NZDF statement for *Collateral Damage* he had never seen the IAT report before.¹²⁹
203. There are no documentary records of the briefing. The best evidence is a set of “updated” dot-point briefing notes which the Inquiry may surmise were initially used to brief Minister Coleman in some altered form.¹³⁰

The discovery of the bundle in the safe

204. During the cross-examination of Mr Hoey, Counsel Assisting Mr Isac QC put several questions to Mr Hoey which suggested that the Minister’s Military Secretary Commander Mark Chadwick had given evidence to the Inquiry about what had happened on 29 and 30 June 2014. The following proceeds on the basis of Mr Hoey’s responses to Mr Isac’s questions only and does not assume what Comm. Chadwick may or may not have said to the Inquiry.
205. Mr Hoey could not recall, but had no reason to doubt, the proposition that he received a call from Comm Chadwick on the evening of Sunday 29 June 2014 and that Comm Chadwick came to visit him early the following morning on 30 June 2014.¹³¹
206. Mr Hoey also accepted Comm Chadwick may have uncovered the bundle of documents in Capt. Hoey’s safe, flipped through them and “quite possibly” found the IAT report.¹³²
207. The documents recovered from the safe were the documents attached to Mr Hoey’s affidavit as Exhibit A. The first document, the Operation Burnham storyboard, had the serial numbers 387/11 and S116 printed on it.
208. In his initial affidavit, Mr Hoey said he found the documents stapled together. In his evidence in chief, he said he stapled the documents. Under cross-examination, he said that some of the documents were already stapled, but he would have stapled other documents to form a bundle, namely the draft briefings to the Minister.
209. Mr Hoey said he made a copy of the bundle for Comm. Chadwick. This may explain the duplicate record of S116 in the DCOS/DCORD safe register showing it was marched in on 30 June 2014 and referred to “M Chadwick MilSec” on the same day.

¹²⁹ 88 Smith XIC.

¹³⁰ IB 217.

¹³¹ 906-907 Hoey XXM.

¹³² 908 Hoey XXM.

210. Mr Hoey did not recall whether Cdre Smith then entered the room and the three men discussed what to do about the discovery.¹³³
211. This is a significant point. Cdre Smith approved the NZDF statement to accompany *Collateral Damage* around 12.46pm that morning.¹³⁴ The statement said:
- The NZDF stands by its statement made on 20 April 2011 and will not be making further comment.
212. The statement of 20 April 2011 was that the IAT report had concluded that the allegations of CIVCAS following Operation Burnham had been unfounded.
213. If Cdre Smith had been involved in discussions with Capt Hoey and Comm Chadwick prior to approving the NZDF statement, his decision to approve the statement would have been intentionally misleading. It would also be inconsistent with his evidence in chief that he did not know the NZDF had the IAT report until his conversation with the CDF.
214. Either way, the fact that Capt Hoey and Comm Chadwick discovered the IAT report in the morning of 30 June 2014 and nothing was done to prevent the NZDF making an inaccurate and misleading public statement later that day suggests there was, at the very least, a serious failure of communication across both the NZDF and Ministerial offices.
215. Finally, at around 2pm, Col. Blackwell's analyst in the Directorate of Special Operations provided Lt Col McKinstry with a series of documents relating to Operation Burnham.¹³⁵ This suggests that Col. Blackwell was likely aware that the Operation had become a live issue once again.

Collateral Damage

216. On 30 June 2014 at 8.35pm, *Collateral Damage* aired as a segment of the *Native Affairs* programme. The NZDF statement approved by Cdre Smith was broadcast.
217. Later that evening, Minister Coleman called Lt Gen Keating. Mr Keating said the Minister told him then that the IAT report had been found in Capt. Hoey's safe. The Minister was angry and wanted an explanation.
218. Mr Smith said Mr Keating then called him. He said his "stomach sank" when he learned that the NZDF had had a copy of the IAT report all along, given that its conclusions were inconsistent with the NZDF and the Minister's previous public statements.
219. Again, if Cdre Smith had been involved in the discovery of the IAT report earlier that day, this evidence would have been incorrect. Neither Mr Keating nor Mr Smith gave evidence that they discussed the fact that the IAT report had been found early in the morning that day.

¹³³ 909 Hoey XXM.

¹³⁴ IB 213.

¹³⁵ IOB 112o.

The Prime Minister makes misleading statements and the Minister is briefed

220. At 7.16am the next day, the Prime Minister appeared on the *Newshub Firstline* programme. He was asked whether the Government acknowledged that the allegations of CIVCAS which had been made in the *Collateral Damage* programme were consistent with the NZDF's previously stated position on this issue. The Prime Minister responded:¹³⁶

No it doesn't. ... We were alerted to [*Collateral Damage*] over the weekend and so my understanding is the CDF, Chief of Defence Force came in over the weekend. There was a thorough review of that particular mission that the SAS had gone on and my understanding is that they refute the claims that they say that there were insurgents that were killed and that was it.

221. The Prime Minister was wrong not to have acknowledged the inconsistency. The allegations made in *Collateral Damage* were inconsistent with the NZDF's previously stated position. The Prime Minister was also incorrect to state the NZDF had conducted a "thorough review" of the operation.

222. At 8.30am that morning, then Vice Chief of Defence Force (**VCDF**) Air Vice Marshal (**AVM**) Kevin Short, along with Cdre Smith and the Secretary of Defence, briefed Minister Coleman.

223. It is clear from AVM Short's meeting notes that the Minister:¹³⁷

- (a) felt let down by Lt Gen Keating's briefing on 28 June 2014;
- (b) wanted to know when and how NZDF received the IAT report;
- (c) expressed concern about the lack of accountability for the NZSAS, their credibility eroding over time and the secrecy around their operations having a "shielding effect" (without calling into question their core skills).

224. The Minister requested a report back within two days on an interview with Lt Col McKinstry, how the NZDF received the IAT report and who handled it, a request for the full IAT report, and an assurance on the veracity of briefs "particularly involving SAS".¹³⁸

The Minister does not "set the record straight"

225. Later that day after his briefing, the Minister made public statements. Several NZDF witnesses made comments during Public Hearing 4 to the effect that these statements "set the record straight" and meant that the public was informed about the true position.¹³⁹ This was not the case.

¹³⁶ IB 224.

¹³⁷ ISB 11.

¹³⁸ ISB 11.

¹³⁹ 88 Smith XIC (later conceding there were omissions in the statement – 152 Smith XXM), 512 Keating XXM, 1124 Short XXM.

226. The Minister's position is captured by a report in *Stuff* which quoted him as saying:¹⁴⁰

While you couldn't rule out that civilians didn't die through actions taken by other forces, it's absolutely categorical that New Zealand forces weren't involved in that.

227. While Minister Coleman's statement was an improvement on the NZDF statements of 20 April 2011 and 30 June 2014, it was not open and transparent, and was misleading in an important respect.

228. It was not open and transparent because the Minister did not explain, simply and clearly, that the 20 April 2011 and 30 June 2014 statements had been incorrect *because after investigating the operation, the IAT concluded that CIVCAS may have occurred as a result of the US AH64 rounds hitting a house*. It did not explain that the reason for the abrupt change in position from the previous day was that the NZDF had discovered they had the IAT report, and had had it since 2011.

229. It was also misleading because it stated that it was "absolutely categorical" that New Zealand forces "weren't involved in that". The US AWT were under New Zealand tactical control. Their tactical brief was to protect the ground forces including NZSAS and CRU. The NZSAS JTAC was in constant communication with the AWT. The operation was a joint one.

230. Neither the Minister nor NZDF put out any further statement to clarify the position.

231. Under cross-examination, Mr Keating explained that he decided not to do so out of respect for a "convention" that had been established between the NZDF and Minister Coleman specifically. Under further questioning, however, Lt Gen Keating was unable to articulate what the convention was or why it was an appropriate and necessary one to follow in this instance.¹⁴¹

232. The more likely explanation for why the NZDF did not put out any public statement correcting the position is that it did not consider the public were entitled to any further explanation. Mr Keating said as much in his evidence. He said:¹⁴²

The fact that the documents were found in the safe was not of public interest.

Subsequent "investigation" is inconclusive

233. As mentioned, Minister Coleman asked the NZDF to investigate how the IAT report had come into New Zealand and who had handled it and to report back by 3 July 2014.

234. Lt Gen Keating and Cdre Smith claimed to have carried out the investigation. However, Mr Keating said all he did was to tell Cdre Smith

¹⁴⁰ IB 220.

¹⁴¹ 532-535 Keating XXM.

¹⁴² 527 Keating XXM.

to carry out the investigation and trust him to perform it thoroughly. Mr Keating said he was not sure exactly what Cdre Smith did.¹⁴³

235. Mr Smith's evidence in chief was that he interviewed Lt Col McKinstry and Brigadier Kelly (who had since been promoted) and asked Defence Legal Services to search for the IAT report, all on 2 July 2014. According to Cdre Smith's notes of his interviews, Brig. Kelly had never seen the IAT report and did not know how it arrived, while Lt Col McKinstry had not seen it until the day before when it had been provided to him by the DSO (Col Blackwell) and also did not know how it had arrived.
236. Under cross-examination Mr Smith gave inconsistent evidence about who else he talked to. At one point he expressly said:¹⁴⁴

I conducted a number of interviews and I talked about two of them this morning [McKinstry and Kelly], but, we still did not know how that IAT report got into the safe.

At other points in his evidence he said he only spoke to Brig. Kelly and Lt Col McKinstry.

237. Mr Smith's evidence leaves open the possibility that he spoke to Col Blackwell. While both he and Mr Blackwell denied that Mr Blackwell had any involvement in the investigation,¹⁴⁵ this is implausible. Mr Blackwell was the subject-matter expert and had been the DSO since April 2011.
238. Furthermore, it appears the matter was raised with Col Blackwell indirectly through communications with personnel in theatre. The then-SNO in Afghanistan Lt Col Weston had clearly been asked to try and locate the full IAT report (since at that stage it was assumed the copy that had been found in Capt Hoey's safe was an Executive Summary only) and to determine who had received the summary. On 2 July 2014, Lt Col Weston asked Major Anthony George of Headquarters Joint Forces New Zealand (**HQJFNZ**) whether the DSO had been asked about this. Maj. George responded:¹⁴⁶
- Yes, and most likely source.
239. As Mr Blackwell accepted in cross-examination, this response suggests that he was asked about these matters.¹⁴⁷ The natural inference from the fact that no one appreciated it was him (Col Blackwell) who had received the IAT report is that when asked, he was not forthcoming with this information.
240. If Cdre Smith did not speak to Col Blackwell directly or indirectly, this was careless. If he did, again, the natural inference is that Col Blackwell could not have been forthcoming with relevant information.

¹⁴³ 523 Keating XXM ("I assume my staff, led by Ross Smith, conducted a thorough investigation"; also adding his belief the issue was of "secondary" importance).

¹⁴⁴ 111 Smith XXM.

¹⁴⁵ 154 Smith XXM, 788 Blackwell XXM (didn't recall being asked any questions by Cdre Smith).

¹⁴⁶ IOB 122-123.

¹⁴⁷ 824 Blackwell XXM.

241. Whether or not Cdre Smith spoke to Col Blackwell directly or indirectly, what is clear is that Col Blackwell had some communication with Lt Col McKinstry before he was interviewed by Cdre Smith. As mentioned, Col Blackwell's analyst provided Lt Col McKinstry with the documents which had been used to brief the Minister on 28 June 2014 at 2.04pm on 30 June 2014. Then at 12.34am on 1 July 2014 after *Collateral Damage* had aired, Lt Col McKinstry copied Col Blackwell on an email to Cdre Smith explaining his understanding of why NZDF had taken the position it did in 2011. At 10.12am later that morning, Col Blackwell's analyst provided him (Col Blackwell) with a copy of the IAT report. Finally, Cdre Smith's note of his interview with Lt Col McKinstry says records that Lt Col McKinstry said he had obtained the IAT report from the DSO.
242. Given this evidence, it is unlikely that when providing the IAT report to Lt Col McKinstry, Col Blackwell would not have known that Minister Coleman was concerned to find out who had received the IAT report. It is reasonable to infer that Lt Col McKinstry and Col Blackwell must have had some communication about this. If that were the case, then given Cdre Smith's note of what Lt Col McKinstry told him, Col Blackwell must not have been up front with Lt Col McKinstry.
243. Under cross-examination Cdre Smith also acknowledged he did not undertake any assessment of the documents in the bundle which included the IAT report, for example examining the handwriting on them or investigating the register stamps, to work out who had received and/or handled the IAT report. He gave no satisfactory explanation for why he did not do this. Clearly the problem was not time. NZDF personnel in Afghanistan continued to conduct searches well after the two-day deadline which had been specified by the Minister.
244. In terms of the outcome of this investigation, Mr Keating and Mr Smith said the outcome was "inconclusive".¹⁴⁸ Under cross-examination, Mr Smith said he did not believe that Lt Col Weston ultimately found the full IAT report,¹⁴⁹ but this was not correct. Recently declassified emails show that Lt Col Weston did obtain a copy on 7 July 2014, and that on 11 July 2014 Wing Commander Lorena Thomas reported back to Cdre Smith that:¹⁵⁰
- Sir please see below from LTCOL Weston in Kabul. I have now received the document via HQ JFNZ and can confirm it is the same as the Executive Report held by your staff.
245. This point was not internalised by the NZDF, since after the publication of *Hit and Run*, the NZDF appears to have believed, mistakenly, that the copy of the IAT report available to them at that time was an Executive Summary only and not the full report.
246. Neither Mr Keating nor Mr Smith could recall giving Minister Coleman any briefing on the outcome of the investigation. Mr Keating's lack of memory is especially surprising, given he was the one who had given the 28 June 2014 briefing which had prompted the investigation in the first place. No documentary evidence of any briefing has been provided. As with

¹⁴⁸ 539 Keating XXM.

¹⁴⁹ 130-131 Smith XXM.

¹⁵⁰ IOB 121.

correcting the public record, the Inquiry may infer that the NZDF did not regard this matter as a priority at the time. Again, Mr Keating essentially said as much under cross-examination, saying his concern at the time was with looking forward, not backward.¹⁵¹

247. Finally, while he did not mention it at all in his evidence in chief, under cross-examination, Mr Blackwell said that while he was not involved in Lt Gen Keating and Cdre Smith's investigation, he was asked to brief Minister Coleman for four hours on all of the NZSAS's operations. He said he was "staggered" he was asked to give a briefing of that nature, but nonetheless maintained he was not aware that the Minister had wanted to find out who had brought the IAT report into New Zealand.¹⁵²
248. Mr Blackwell's evidence on the latter point is implausible. The briefing he said he gave was highly irregular. It is very unlikely that Minister Coleman and Col Blackwell would have talked for four hours (presumably at one point about Operation Burnham) without Col Blackwell being asked about the receipt of the IAT report.

MARCH-APRIL 2017: *HIT AND RUN*

Human Rights Foundation OIA

249. Just prior to the release of *Hit and Run*, on 15 March 2017, Cdre Smith signed a response by the NZDF to an OIA request from the Chairperson of the Human Rights Foundation. The request had covered civilian casualties caused as a result of New Zealand operations in Afghanistan. On this issue the NZDF response said:

The 2010 raid in Baghlan involved a suspected civilian casualty. There was a formal Coalition CIVCAS investigation team assigned relating to the Baghlan Province Raid incident. The NZDF does not hold a copy of the investigation undertaken by a joint [IAT] into the raid in Baghlan. A copy of this investigation has not been released publicly. The NZDF has no reason to believe that New Zealand personnel conducted themselves other than in accordance with the applicable rules of engagement.

250. The response was clearly incorrect. There was not "a suspected civilian casualty" arising from the operation. The IAT had concluded that civilian casualties (plural) may have occurred.
251. The claim that "the NZDF does not hold a copy of the investigation undertaken by [the IAT]" was also inaccurate. As confirmed by Wing Commander Thomas to Cdre Smith on 11 July 2014, the NZDF had a copy of the IAT report and knew that this was the full IAT report, not just an Executive Summary.
252. Under cross examination Mr Smith denied any intent to mislead by signing out the response. He claimed the omissions were an innocent mistake.
253. Given the extent of Mr Smith's knowledge of the discovery of the IAT report in 2014, the fact he was responsible for identifying how the report came

¹⁵¹ 529 Keating XXM.

¹⁵² 793 Blackwell XXM.

into New Zealand and whether it was the full report, and the fact he had a report back from Wing Commander Thomas confirming the report was indeed the full report, Mr Smith's evidence is implausible. It is open to the Inquiry to conclude that Mr Smith ought to have known, and could possibly have been wilfully blind to, the true position.

The claims made in *Hit and Run*

254. Nicky Hager and Jon Stephenson released *Hit and Run* a few days later, on Tuesday 21 March 2017 at around 5.30pm.

255. The Preface to the book noted that some parts of the book had already come to light in Jon Stephenson's *Collateral Damage* story.¹⁵³

256. In his evidence, Mr Keating claimed he had read *Hit and Run*, and that his understanding at the time the book came out and currently was that the authors had made claims that NZSAS personnel had intentionally targeted and killed people they knew to be civilians or thought could be civilians. Mr Keating was not ambiguous about this. For example, he said:¹⁵⁴

Q. ... I'll just stop there, so it's your -- was it your view that the book alleged deliberately killing civilians?

A. Yes.

257. At times, Mr Keating's descriptions of the claims in the book bordered on the visceral. For example, he also said:¹⁵⁵

Q. So when you're answering my question did you know, and do you know, that they were repeatedly making public statements that you were wrongly inferring, your answer is yep I knew that, but I carried on announcing that's what the book meant?

A. No that's not my answer. My answer is you can't at one end say look we trust the troops and they did well, however, *they disembarked a helicopter and immediately engaged unarmed civilians* --

Q. You need to listen to my questions please.

A. -- *that's a war crime.*

(emphasis added).

258. Under further questioning, Mr Keating retreated from these claims somewhat, suggesting that the book "inferred" that NZSAS personnel targeted civilians and that this was "the strong thesis in the book".¹⁵⁶

259. Mr Keating's beliefs about what the book said or "inferred" are incorrect. There is no reasonable basis for him to hold them now. There was also no reasonable basis for him to have held them after the release of *Hit and Run*. The book does not allege that NZSAS personnel deliberately targeted civilians or people they thought could be civilians. There is no reference to NZSAS personnel disembarking a helicopter and immediately engaging

¹⁵³ *Hit and Run*, p. 7.

¹⁵⁴ 572 Keating XXM.

¹⁵⁵ 602 Keating XXM.

¹⁵⁶ 603 Keating XXM.

unarmed civilians. The Defence Public Affairs summary of the contents of the book which was produced shortly after the release of *Hit and Run* did not state that the book made those claims.¹⁵⁷

260. The fact that Mr Keating maintains this is his current belief about what the book says or implies, suggests he is at best wilfully blind to the true position, and at worst intentionally making comments about what the book says which he knows to be false. Mr Keating volunteered that he has intentionally not followed the public comments made by the authors on this issue.¹⁵⁸

The inaccurate and misleading response to Hit and Run

261. When *Hit and Run* was released, Lt Gen Keating was overseas. The acting CDF was AVM Short. Cdre Smith and Capt Hoey were also still in the same positions. All four officers had been involved in the discovery of the IAT report in Capt Hoey's safe in June-July 2014.

262. In their evidence in chief, Messrs Keating, Short and Smith all claimed that that evening, they did not understand that the main operation described in *Hit and Run* must have been the same operation which had been the subject of the *Collateral Damage* report in June 2014.¹⁵⁹ This was despite the fact the report in the book was by the same journalist, was about an operation in the same area (Baghlan) which the NZSAS had not visited before or since, on the exact same date and also involved allegations of CIVCAS which had been investigated by an ISAF IAT.

263. Under cross-examination, Messrs Short and Smith retreated from their previously categorical positions on this issue. Mr Short said he had an "inkling" on the night that the operation was the same the one addressed in *Collateral Damage* which is why he had the CDF approve the final NZDF statement.¹⁶⁰ The relevant exchange culminated in the following answers:¹⁶¹

Q. So I think that's quite important, I think, Mr Short, so we just need to work our way through this. So you're actually now saying, helpfully I think, that it did dawn on you in fact that this was the Operation that had been the subject of the 2014 debacle hadn't it?

A. It looked very much like that, yes.

Q. Right. And you knew that at the time, didn't you? In 2017?

A. Yes.

264. Mr Smith also said he knew the operation reported in the book would have been Operation Burnham.¹⁶²

¹⁵⁷ IB 283 onward.

¹⁵⁸ 604 Keating XXM.

¹⁵⁹ 483 Keating XIC, 1004 Short XIC, 92 Smith XIC.

¹⁶⁰ 1147 Short XXM.

¹⁶¹ 1147 Short XXM.

¹⁶² 158 Smith XXM.

265. When asked whether he also remembered the discovery of the IAT report in Capt Hoey's safe, Mr Smith took a very long time to answer, before saying:¹⁶³

I'm just trying to -- I didn't -- when we were putting together the immediate press release following the launch of the book, I did not knowingly say that we were going to maintain our position, as in I did not -- I guess there are so many things going on. The -- I was not trying to change the record.

266. Mr Smith also said:¹⁶⁴

I did not refer to that, or look at, or ask for, or read, that ISAF report, the IAT report at the time of the launch of that book.

267. It is open to the Inquiry to reject Mr Smith's evidence on this point. Mr Smith was personally involved in briefing the Minister on 1 July 2014 and, unlike Mr Short, had an ongoing involvement in conducting the investigation into how the IAT report came into New Zealand. It is implausible he would not remember the IAT report and what it had concluded. He and Lt Gen Keating also had a phone call following which Cdre Smith made a note which recorded: "nothing new".¹⁶⁵

268. Even if Mr Smith's evidence were accepted, that evidence leaves open the possibility that Mr Smith was wilfully blind to the true position. His evidence was that he did not read the report or knowingly put out an inaccurate or misleading statement. But he had connected *Hit and Run* to Operation Burnham, as had Mr Short. He must have had an inkling that the claims in the book were broadly consistent with the conclusions of the IAT and that the IAT had not concluded the allegations of CIVCAS relating to Operation Burnham were unfounded. However, he did nothing to verify the position.

269. The choice of response by the NZDF on the evening of 21 March 2017 was informed by the NZDF's (erroneous) understanding of what the book claimed. Mr Keating's evidence on this point has been summarised. Mr Smith made notes of what he believed was a call with Lt Gen Keating that evening. The notes recorded: "the allegations that we are war criminals is unpatriotic".¹⁶⁶ Lt Gen Keating was responsible for approving the final NZDF press release.

270. The choice of response was also informed by political pressure to put out some response. Under cross examination Mr Smith said:¹⁶⁷

You could imagine there was quite a bit of pressure coming on from across in the Beehive.

271. In his evidence in chief Mr Smith said:¹⁶⁸

We thought the most prudent way to proceed, in circumstances where we didn't have all the information in front of us, was to take a position which was consistent with what we had said in the past.

¹⁶³ 160 Smith XXM.

¹⁶⁴ 160 Smith XXM.

¹⁶⁵ 91 Smith XIC.

¹⁶⁶ 91 Smith XIC.

¹⁶⁷ 170 Smith XXM.

¹⁶⁸ 91 Smith XIC.

272. This strategy was irrational and the opposite of a prudent approach. *Hit and Run* was making claims that what the NZDF had said in the past was wrong. A prudent way of proceeding would have been either not to put out a statement at all, or to have put out a statement acknowledging that the book was making claims that the NZDF's previous statements were wrong and that they would therefore be fully and thoroughly investigated. Mr Short responsibly acknowledged under cross examination that he would have preferred to have taken more time to respond, saying:¹⁶⁹

I think that whole particular night we would have done things differently. Because of the speed with which media and the Government wanted us to put out a statement, having just got hold of the book, that there was a series of other – like the Prime Minister and others were going to put out a press release. So under the pressure of time, I wanted to give myself more time and not actually put out anything because I thought it was too soon and we needed time to absorb everything that was stated in that book. There were a number of factors, I think, that really said don't do this in a hurry, take time, this is important, but there was pressure for us to put something out.

273. The eventual NZDF press release was put out that evening. It provided:¹⁷⁰

The [NZDF] stands by the statement it made dated 20 April 2011.

As the 2011 statement says, following the operation, allegations of [CIVCAS] were made. These were investigated by a joint [IAT] in accordance with ISAF procedures.

The investigation concluded that the allegations of [CIVCAS] were unfounded.

274. Despite being titled “NZDF Response to Book”, the only claim in the book that the statement covered was the claim that civilians had been killed.

275. The statement was inaccurate and misleading. The IAT had not concluded the allegations of CIVCAS were unfounded. It had concluded that CIVCAS may have occurred.

The NZDF decide to do nothing to correct the position for four days

276. AVM Short briefed the Prime Minister the next day. It is clear that by this time, the NZDF had appreciated that the IAT had not concluded that the allegations of CIVCAS were unfounded and that therefore the statement issued the previous evening had been wrong.¹⁷¹

277. Despite this realisation, the NZDF did not publish a new statement to correct the position until 26 March 2017.

278. Mr Short said in his evidence in chief this was a deliberate strategy. He euphemistically described it as a “holding position” until the CDF returned to New Zealand.¹⁷²

279. Another way of describing the same strategy is the NZDF knowingly refusing to correct an inaccurate and misleading public statement for as long as possible. Between 21 and 26 March 2017, the time of most intense

¹⁶⁹ 1149 Short XXM.

¹⁷⁰ IB 245.

¹⁷¹ IB 261.

¹⁷² 1006 Short XIC.

media interest in *Hit and Run*, the public was led to believe that the ISAF IAT had investigated the allegations made in the book and concluded they were unfounded. That was a deliberate choice by the NZDF.

The 26 March 2017 press statement

280. When it was published, the 26 March 2017 press statement did not refer to the 21 March 2017 press statement or explain how and why it had been inaccurate.

281. Rather, the statement claimed the central premise of *Hit and Run* was incorrect because the NZDF “had never operated in the two villages identified in the book”. The statement said:

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.

282. The statement did acknowledge in relation to Operation Burnham (which was described as a different operation from that depicted in the book) that an IAT had investigated allegations of CIVCAS and had determined that there had been a gun sight malfunction on a coalition helicopter. However it also stated:

The investigation concluded that this may have resulted in civilian casualties but no evidence of this was established.

283. This statement was inaccurate for two main reasons. First, it stated that the NZDF had never operated in the villages named in the book. At Public Hearing 1, the NZDF acknowledged that the local villagers had referred to their villages as Khak Khuday Dad and Naik. Operation Burnham took place in those villages.

284. Second, the statement claimed the IAT had concluded that “no evidence of [CIVCAS] was established”. That was not what the IAT concluded. The IAT found there may have been CIVCAS based on its review of the evidence it observed, which is why the IJC Commander ordered a formal investigation.

285. The statement was also misleading in that it made no attempt to explain why the NZDF’s previous press statement of 21 March 2017 had been wrong, or reconcile that statement (which related to Operation Burnham) with the claim in the 26 March 2017 press release that *Hit and Run* appeared to be describing a different operation, not Operation Burnham.

286. As the evidence of Mr Short and Mr Smith about their knowledge on the evening of 21 March 2017 makes clear, the NZDF were aware that the main operation described in the *Hit and Run* was in fact Operation Burnham and not a different operation. Under cross-examination Mr Keating attempted to claim that when making the 26 March 2017 press release, the NZDF were not meaning to suggest that the book was describing a different operation in a different place,¹⁷³ but that is exactly what the statement did by saying “the authors appear to have confused” the operation with another operation conducted two kilometres away. Mr

¹⁷³ 578 Keating X XM.

Keating also claimed that by this stage he had put the issues regarding the naming of the villages to one side as “almost inconsequential”¹⁷⁴ – but again, that is not what the statement said. It described the references in the book to the names of the villages and their location as the main inaccuracies in the book.

287. The inaccurate and misleading comments in the 26 March 2017 press release were repeated during the NZDF’s press conference on 27 March 2017.¹⁷⁵ At this press conference Lt Gen Keating appeared to attempt to defend the use of “unfounded” in the 20 April 2011 press release (adopted again on 21 March 2017) as meaning “unfounded, there may have been [CIVCAS]”. Under cross-examination, Mr Keating said what was really in his mind at the time was whether he had evidence that allegations of war crimes made in *Hit and Run* were “well founded” for the purpose of s 102 of the AFDA.¹⁷⁶
288. Whichever was the true explanation, both explanations were wrong. The 20 April 2011 press release was not issued in response to *Hit and Run*. It purported to summarise what the IAT had found. It said the IAT had found the allegations of CIVCAS were “unfounded”. At the time, the NZDF did not think the IAT had concluded there may have been casualties but there was really no evidence to substantiate them; there is no evidence the NZDF or the Minister believed that was the position until September 2011 when Col Blackwell briefed Minister Mapp. At the time, based on Lt Col Parsons’ report and as recorded in the December briefings to the Minister, the NZDF clearly thought “unfounded” meant “no way CIVCAS could have occurred”.
289. If Lt Gen Keating was really thinking in legal terms, he should have explained that the 20 April 2011 press release had been wrong, that the 21 March 2017 press release had also been wrong to adopt it, but that he was now faced with an obligation to decide whether there was sufficient evidence to investigate the allegations made in *Hit and Run* and that he was actively assessing that evidence. That is not what he said.

Lt Gen Keating conducts s 102 assessment

290. On 29 March 2017, Lt Gen Keating decided that the threshold for triggering an investigation under s 102 of the Armed Forces Discipline Act 1971 had not been reached. The briefing note to the Prime Minister stated:

At the time that earlier allegations were made the [CDF] of the day concluded that the allegations were unfounded. Reviewing the totality of this earlier material and the information presented in the book ‘Hit and Run’ I too have concluded that the threshold to trigger an internal Defence Force inquiry into Operation Burnham has not been reached.

291. Mr Keating’s evidence at Public Hearing 4 provides reasonable grounds to conclude this assessment was not conducted in good faith. First, Lt Gen Keating’s evidence under cross-examination shows he did not understand what the allegations in the book actually were. He maintained consistently that the book had alleged that NZSAS personnel deliberately targeted

¹⁷⁴ 577 Keating XXM.

¹⁷⁵ IB 318 and 352.

¹⁷⁶ 580 Keating XXM.

civilians, when the book made no such claims and the Defence Public Advice at the time did not say that the book made these claims.

292. Second, Mr Keating also stated repeatedly under cross-examination that he did not believe the allegations in the book were real evidence. He said:¹⁷⁷


I didn't regard the book as evidence.

293. Despite this decision, Lt Gen Keating nonetheless went on to make a number of inquiries to investigate more about what happened on Operation Burnham. He described it in his evidence in chief in this way:

On the morning of 4 April 2017, I met with VCDF, Kevin Short, the Director of Legal Services, Lisa Ferris, and the Director of Coordination, Chris Hoey. Up until this point, it felt as though we had been operating in a "pressure cooker"; scrambling to make sense of everything. Now, with the pressure relieved to some extent, I wanted to gain some more clarity. The purpose of this meeting was to shift gear from "what we know" to "what more can we know." Even though the Prime Minister had decided not to conduct an inquiry, I still wanted to do further fact finding, to ascertain if there was anything I was missing. I wanted to leave no stone unturned.

294. It may be inferred from this evidence that the NZDF did in fact consider the claims made in the book to have been worthy of further investigation – it just preferred for that investigation to have been conducted without the public scrutiny generated by the release of *Hit and Run*.

Dated 3 December 2019



Davey Salmon / Sam Humphrey
Counsel for Jon Stephenson

¹⁷⁷ 557 Keating XXM.

ANNEX I: SUMMARY OF KEY CONCLUSIONS

- New Zealand had legal obligations to investigate allegations of CIVCAS.
- In Afghanistan, the NZDF relied exclusively on ISAF to conduct initial assessments into allegations, on which it would base its decision whether to conduct a formal investigation or not. It had no process of its own.
- It is unclear whether the ISAF IAT process was comprehensive and whether outputs were made readily available to coalition forces.
- Operation Burnham stood out as a significant operation.
- Operation Burnham was New Zealand-led and the US AWT were under New Zealand tactical control.
- The appropriateness of the actions of the US AWT on Operation Burnham was of legal and political significance to New Zealand.
- During the Operation, Lt Col McKinstry saw that NZSAS personnel had shot a man who could not be shown to have been armed. He also determined that a US AH64 helicopter had changed its fire and assumed this was because of targeting issues. He would have known the helicopter was firing in a residential area.
- In the days following the Operation, the NZDF were aware of media and intelligence reporting which suggested there may have been CIVCAS.
- Lt Col McKinstry saw the US AWT video footage on 26 August 2010 and it then became clearly obvious to him there could have been CIVCAS.
- There was strong political interest from senior Ministers in New Zealand to obtain a copy of the IAT report.
- Despite this, when arriving in Afghanistan Lt Col Parsons did little to agitate for it.
- What likely happened when Lt Col Parsons visited IJC on 7 September 2010 was that he either saw part of the IAT report, thought it could be interpreted to mean no CIVCAS had occurred and was wilfully blind to the true position, or genuinely interpreted the report in the way he claimed but was negligent in failing to clarify the position with the ISAF officer he met.
- Lt Col Parsons' email report back concluding the IAT said there was no way CIVCAS could have occurred was inaccurate and misleading.
- Lt Col Parsons later clarified to Lt Col Kelly he had only seen a few lines of the report.
- These reports from Lt Col Parsons formed the basis of the NZDF's understanding until the IAT report was eventually received. However, the reports were inconsistent with a large amount of information available to NZDF at the time. It is open to the Inquiry to conclude the NZDF were at

least negligent, and possibly wilfully blind to the true position given the extent and cogency of this information.

- The 10 and 13 December 2010 briefings to the Minister were inaccurate and misleading.
- The NZDF knew that certain aspects of these briefings were inaccurate and misleading but provided them anyway.
- While unlikely, it is possible that someone in the NZDF received the IAT report around this time.
- The public statement in 20 April 2011 was inaccurate and misleading. Despite Lt Col Parsons' misgivings, no one interrogated the true position. The NZDF did not agitate to receive a copy of the IAT report.
- Mr Blackwell or others could have received the IAT report by safe hand or email before 1 September 2011.
- Col Blackwell should have registered the IAT report in a hard copy or electronic register within DSO when he received it, but did not do so. This was in breach of DFO 51.
- On 1 September 2011, Col Blackwell assembled bundles 386/11 and 387/11. He would have printed a copy of the IAT report at this stage.
- It is unclear how these bundles came to be placed in the OCDF safe. It is possible Col Blackwell gave them to the CDF's Military Assistant or gave them to Col Thompson to give them to the Assistant.
- It is unclear who got in contact with the Minister's office to advise that a briefing pack was available. No one in the OCDF prepared a cover note for bundle 386/11.
- It is likely that bundle 386/11 did not contain the IAT report. If it did, Capt Hoey did not bring it to the Minister's attention.
- On 1 September 2011 Capt Hoey picked up bundle 386/11.
- Between 1 and 7 September 2011 if not earlier, Col Blackwell came to appreciate that the IAT report had not concluded what the 10 and 13 December 2010 briefings said it concluded and that the briefings had therefore been inaccurate and misleading.
- Col Blackwell did not brief the CDF on this.
- Col Blackwell briefed the Minister on the IAT report on 12 September 2011. He left the Minister with the impression that while the IAT had concluded CIVCAS may have occurred, there was really no evidence to support this conclusion and so in his opinion the Minister did not need to take any action.
- The Minister declined to make any public statement correcting the record because of what Mr Blackwell had explained to him.

- The NZDF and/or the Minister should have made public statements clarifying what the IAT had actually concluded.
- Minister Mapp did not inform Minister Coleman of what Col Blackwell had briefed him about the conclusions of the IAT report.
- On 28 June 2014 the CDF Lt Gen Keating gave an inaccurate and misleading briefing to Minister Coleman about the allegations of CIVCAS following Operation Burnham.
- It is likely that Col Blackwell was asked for his input on this. If he was, his response omitted key relevant information.
- On 30 June 2014 early in the morning, Capt Hoey and Comm Chadwick discovered bundle 387/11 in the DCOS/DCORD safe and realised it contained the IAT report.
- Nobody within the NZDF or Minister's office brought the discovery of the IAT report to the CDF, VCDF, COS or Minister's attention prior to the broadcast of *Collateral Damage*, or if they did, nothing was done and an inaccurate and misleading public statement was put out.
- At a briefing on 1 July 2014, Minister Coleman voiced his suspicions that the NZSAS lacked accountability and the secrecy around operations was having a shielding effect. He asked for a briefing on how the IAT report came into New Zealand.
- The Minister's public statements after the briefing did not set the record straight.
- It is likely that Cdre Smith spoke to Col Blackwell during his investigation either directly or through others, and/or that Col Blackwell discussed the investigation with Lt Col McKinstry because he was interviewed. If this were the case, Col Blackwell must have intentionally withheld relevant information.
- The NZDF knew on 11 July 2014 that the copy of the IAT report they had was the full report.
- Despite this knowledge in March 2017 Cdre Smith signed off on an OIA response which contained inaccurate and misleading information.
- On the evening of 21 March 2017 after *Hit and Run* was released, AVM Short and Cdre Smith realised the main operation described in the book was Operation Burnham.
- It is likely Cdre Smith had some recollection of the IAT report and its conclusions, but was wilfully blind and did not make further inquiries.
- The NZDF public statement released on 21 March 2017 was inaccurate and misleading.

- The NZDF realised it was inaccurate and misleading the next day, but deliberately chose to leave it uncorrected until 26 March 2017.
- The NZDF public statement did not explain why the 21 March 2017 statement had been incorrect or why the NZDF had changed its position. It was misleading because it suggested the NZDF believed the main operation described in *Hit and Run* was a different operation from Operation Burnham, when the NZDF had realised on the night the book was released that it was discussing the same operation.
- Lt Gen Keating's determination that the allegations made in the book were not well founded on 30 March 2017 was based on a misunderstanding of what those claims were, and was not undertaken in good faith.
- The NZDF has never publicly recognised and apologised for the inaccurate and misleading public statements it has made which have been summarised above.
- Whether the above is seen as a symptom of systemic disregard for accuracy and accountability, or instead as a conscious coordinated plan to mislead and obstruct is for the Inquiry. On either view, there was a serious problem within NZDF which raises doubts over the accuracy of public statements and Ministerial briefings then and now.