



# Overview of Inquiry and findings

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# Chapter 1

## A Taliban attack in Bamyan

- [1] In 1996, the Taliban took control of the Government of Afghanistan following a four-year civil war. The Taliban Government permitted the terrorist group al-Qaida, under the command of Osama bin Laden, to operate training camps in Afghanistan.<sup>1</sup> On 11 September 2001, al-Qaida operatives led a number of attacks in the United States, most dramatically and devastatingly on the World Trade Center in New York, resulting in the deaths of approximately 3,000 people. This produced an international response, which resulted ultimately in New Zealand deploying defence force personnel to Afghanistan, along with many other nations.<sup>2</sup>
- [2] The Taliban Government fell in late 2001. Following a meeting in Bonn, Germany in December 2001, an interim Afghan Government was set up under the leadership of Hamid Karzai. At the same time, the United Nations Security Council established the International Security Assistance Force (ISAF) to provide military support to the interim Government, initially in Kabul and the surrounding area.<sup>3</sup> ISAF was a North Atlantic Treaty Organization (NATO)-led force. Later, in March 2002, the Security Council established the United Nations Assistance Mission in Afghanistan (UNAMA) to assist the interim Government with its responsibilities in relation to matters such as human rights, national reconciliation and rebuilding and recovery activities.<sup>4</sup>
- [3] New Zealand’s contribution to these efforts was principally two-fold—first, through periodic deployments to Afghanistan of the New Zealand Special Air Service (NZSAS) to provide security, conduct special operations and support the training of Afghan personnel—and second, through its Provincial Reconstruction Team (NZPRT) in Bamyan Province in the central highlands of Afghanistan.<sup>5</sup> The NZPRT was made up mainly of New Zealand Defence Force (NZDF) personnel but, over time, there was increasing civilian participation.
- [4] The military challenges that faced those who operated in Afghanistan were well articulated to the Inquiry by Sir Angus Houston. During his time as the Australian Chief of Air Force and then Chief of the Defence Force, Sir Angus made some 30 separate visits to Afghanistan. In his presentation to the Inquiry he said:<sup>6</sup>

The war in Afghanistan did not involve a fight against a known and formally organised adversary – it was not conducted against formed military units and adversaries wearing uniforms who had set orders of battle of which we already had well documented intelligence.

1 In 1999 the United Nations Security Council passed a resolution designating al-Qaida and the Taliban as terrorist groups: SC Res 1267 (1999).

2 The background is more fully set out in chapter 2.

3 SC Res 1386 (2001).

4 SC Res 1401 (2002).

5 There were other contributions, for example, the deployment of New Zealand Police personnel.

6 Sir Angus Houston “The military context” (Public Hearing Module 1, 4 April 2019) at 13.

Rather there were very few set piece battles. There were no easily demarcated front lines. This was irregular, guerrilla, asymmetric and counter-insurgency warfare. Quite literally a soldier could be standing beside someone in an Afghan village who hours or days later might take up arms against him. Similarly there was a vast civilian population whose tribal and ethnic structure was intricate and complex.

- [5] As we discuss in subsequent chapters, these features of the conflict are important when considering the application of International Humanitarian Law (also referred to as the Law of Armed Conflict) in Afghanistan and, in particular, the use of a list known as the Joint Prioritised Effects List (JPEL) to identify suspected insurgents.
- [6] On 3 August 2010, an NZPRT patrol was returning to base after delivering wire baskets which were to be filled with rocks and used to repair flood-damaged river banks in the northern part of Bamyan province, near the border with Baghlan province. The patrol was ambushed by Taliban insurgents. The commander of the patrol, Lieutenant Tim O'Donnell, was killed and two other soldiers and an Afghan interpreter were wounded.<sup>7</sup> The insurgents escaped, apparently unharmed. This attack triggered a series of events, which led, ultimately, to this Inquiry.
- [7] Following the 3 August attack, the NZSAS were involved in a number of operations directed at those identified as having led the attack. From the viewpoint of the Inquiry and the public, the most significant of these operations is the first, which has become known as Operation Burnham.<sup>8</sup> This was an operation which occurred on 22 August 2010 in two villages in Tiringan Valley in the Tala wa Barfak District of Baghlan province. The operation was aimed at capturing two insurgent leaders thought to have participated in the 3 August attack: Abdullah Kalta and Maulawi Neimatullah. There were as well several other relevant operations, which have attracted less public attention but which fall within the Inquiry's Terms of Reference, as we discuss below.<sup>9</sup>

## Allegations against the New Zealand Defence Force

- [8] In their jointly authored book, *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour*,<sup>10</sup> Mr Nicky Hager and Mr Jon Stephenson dealt with NZDF's response to the 3 August 2010 attack. The authors, both investigative journalists, relied on information from a variety of sources in Afghanistan and in New Zealand. They made a number of allegations about the conduct of members of NZDF during the operations that followed the attack, most particularly in the context of Operation Burnham and an operation that was directed at arresting and detaining Qari Miraj (referred to as Objective Yamaha by NZDF), another insurgent leader suspected of involvement in the 3 August 2010 attack. For convenience, we will refer to this latter operation as Operation Yamaha.

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<sup>7</sup> "Inquiry into death will examine soldier safety" *Otago Daily Times* (Dunedin, 6 August 2010).

<sup>8</sup> The name given to the operation at the time was Operation Rahbari. One of the targets of the operation, an insurgent leader named Abdullah Kalta, was given the name "Objective Burnham". The name "Operation Burnham" has now been widely adopted, so the Inquiry will also use it. It should be borne in mind, however, that the publicly available contemporaneous documentation will refer to "Operation Rahbari" and "Objective Burnham". "Operation Rahbari" was also used at the time to refer to the second operation, which is now commonly called "Operation Nova" (the primary target of that operation being Maulawi Neimatullah, known as "Objective Nova").

<sup>9</sup> See paragraph [12].

<sup>10</sup> Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017).

- [9] In relation to Operation Burnham, the key allegations are:
- (a) The operation was based on faulty intelligence—no insurgents were present in the villages when the operation occurred.
  - (b) Six civilians, including a three year old child, Fatima, were killed and 15 were injured during the operation, mostly as a result of aircraft fire.
  - (c) Villagers' houses were deliberately destroyed or damaged by both the NZSAS and the aircraft involved, in some instances purely for reasons of revenge. In one house, the NZSAS destroyed a room containing religious books.
  - (d) NZDF provided no aid or assistance to the wounded, the relatives of the deceased or those who suffered property damage, either immediately after the operation or at any time subsequently.
  - (e) NZDF did not investigate the allegations of civilian casualties and damage to civilian property, but rather tried to cover up what had happened.
- [10] In relation to Operation Yamaha, the book alleges that, when Qari Miraj was captured, he was beaten by NZSAS personnel, before being transported to an Afghanistan National Directorate of Security (NDS) facility in Kabul where torture was known to occur. Qari Miraj was detained at that facility and was, it is alleged, tortured to extract a confession from him. New Zealand had access to that confession knowing that it had been obtained by torture.
- [11] NZDF's actions in respect of these operations are alleged to have been in breach of its obligations under International Humanitarian Law / the Law of Armed Conflict, the applicable rules of engagement and the law relating to the treatment of detainees.
- [12] The other operations relating to insurgents thought to have been involved in the 3 August 2010 attack which are referred to in *Hit & Run* include operations against:
- (a) Maulawi Neimatullah (Objective Nova). This involved a return operation to the villages where Operation Burnham occurred. *Hit & Run* alleges that the NZSAS personnel on the operation burned down the house of Abdullah Kalta (who was not present) in an act of revenge. We will discuss this operation in conjunction with Operation Burnham.
  - (b) Qari Musa. It is alleged that Qari Musa was killed in a targeted killing carried out on 20 May 2011. The book claims that the NZSAS organised this operation, tracking Qari Musa to a house and then calling in an air strike to kill him.<sup>11</sup> This operation did occur (albeit on 23 May). Qari Musa was initially reported as killed,<sup>12</sup> but reporting shortly afterwards indicated that he had in fact survived.<sup>13</sup> We understand that he is still alive today.<sup>14</sup> More significantly for present purposes, having reviewed the evidence we are satisfied that NZDF personnel were not involved in the planning, preparation or execution of this operation. We will not discuss it further.

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<sup>11</sup> At 91.

<sup>12</sup> CDF Ops Brief Op Watea 31 May 2011 (31 May 2011) (Inquiry doc 11/29).

<sup>13</sup> NZPRT Bamyán Daily Intsum 154-11 (4 June 2011) (Inquiry doc 10/30) at [5].

<sup>14</sup> See, for example, Afghanistan Independent Human Rights Commission "Attacks against Hazaras in Afghanistan" <[www.aihrc.org.af](http://www.aihrc.org.af)>.

- (c) Alawuddin. It is alleged that Alawuddin was killed in a targeted killing on 23 May 2011.<sup>15</sup> It is correct that Alawuddin was killed in an operation (albeit on 20 May), but contrary to the allegations in the book, NZDF personnel were not involved in its planning, preparation, or execution. Again, we are confident of this on the basis of material we have reviewed. We will not discuss this operation further.
- (d) Abdullah Kalta (Objective Burnham). It is alleged that Abdullah Kalta was killed in a targeted air strike, along with five other people, on 21 November 2012.<sup>16</sup> We will address this operation in the context of our discussion of targeted killings in chapter 7.

## The Inquiry is established

- [13] The Inquiry was established by the Attorney-General, Hon David Parker, on 12 April 2018 as a government inquiry under s 6(1)(c) of the Inquiries Act 2013. The purpose section in the Inquiry’s Terms of Reference identifies “the allegations of wrongdoing by NZDF forces in connection with Operation Burnham and related matters” as the matter of public importance that the Inquiry is directed to examine.<sup>17</sup> The purpose section goes on to state that the Inquiry “will” do a number of things, one of which is to “[s]eek to establish the facts in connection with the allegations of wrongdoing on the part of NZDF personnel during the Operations”.<sup>18</sup> Then, under the heading “Scope of the Inquiry”, the Terms of Reference list 10 matters that the Inquiry will inquire into and report on “having regard to its purpose”.<sup>19</sup>
- [14] While the Inquiry has the power to make findings of fault, it has no power “to determine the civil, criminal, or disciplinary liability of any person”.<sup>20</sup> That does not, of course, prevent the Inquiry from expressing a view about New Zealand’s obligations as a State, either under relevant treaties to which it is a signatory or under customary International Humanitarian Law. A further limitation on the Inquiry is that the Terms of Reference state that it “has no jurisdiction to make determinations about the actions of forces or officials other than NZDF forces or New Zealand officials”.<sup>21</sup> This limitation is particularly significant, as we now explain.
- [15] Like many other operations under the umbrella of ISAF at the time, Operation Burnham was a joint operation, involving not only the NZSAS contingent (known for ISAF purposes as Task Force 81 or TF81), but also Afghan ground forces and United States air support (including most relevantly two AH-64 Apache attack helicopters and an AC-130 Spectre gunship).<sup>22</sup> Most of those killed and wounded on Operation Burnham died or suffered injuries as a result of fire from the Apaches and the AC-130. To give a coherent account of Operation Burnham, the Inquiry has had to describe all that happened on the operation, including what the air assets did; but the Inquiry may not (and does not) make any determinations about the actions of the non-New Zealand forces or officials. As set out in chapter 8, an investigation carried out under the United States Army Regulations determined that all engagements by the United States air assets appeared to be consistent with the applicable rules of engagement and the relevant Tactical Directive.<sup>23</sup>

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<sup>15</sup> Hager and Stephenson, above n 10, at 91.

<sup>16</sup> At 92–93.

<sup>17</sup> *Terms of Reference: Government Inquiry into Operation Burnham and related matters* (11 April 2018), cl 5. The full text of the Inquiry’s Terms of Reference is set out in Appendix 1.

<sup>18</sup> Clause 6.1.

<sup>19</sup> Clause 7.

<sup>20</sup> Inquiries Act 2013, s 11; *Terms of Reference*, above n 17, cl 13.

<sup>21</sup> Clause 9.

<sup>22</sup> Other supporting air assets were involved as well. We use the term “air assets” frequently throughout this report. This term reflects military usage and is a comprehensive term for aircraft of all types.

<sup>23</sup> See chapter 8 at [40]–[43].

## The Inquiry's processes

- [16] The Inquiries Act was enacted in 2013 following a Law Commission report entitled *A New Inquiries Act*.<sup>24</sup> The Act was intended to “reform and modernise the law relating to inquiries” by (among other things) “enabling those inquiries to be carried out effectively, efficiently and fairly”.<sup>25</sup> The Law Commission Report, and Parliamentary debates as the Inquiries Bill went through the House, indicated that one of the Act’s purposes was to give inquiries greater flexibility in selecting processes that best fitted their particular circumstances.<sup>26</sup> There was a perception that inquiry processes under the previous legislation had become overly legalistic and adversarial in nature, making them unnecessarily costly and time-consuming.<sup>27</sup>
- [17] An inquiry established under the Inquiries Act has a wide discretion as to what procedures it adopts, as we explained in Minute No 4 and in Ruling No 1. However, in determining its procedure, an inquiry must take into account the principles of natural justice and have regard to the need to avoid unnecessary delay or cost in relation to public funds, witnesses or other persons participating in the inquiry.<sup>28</sup>
- [18] The Inquiries Act provides for the designation of “core participants”.<sup>29</sup> Persons designated as core participants are entitled to give evidence and make submissions to the inquiry “subject to any directions of that inquiry as to the manner in which evidence is to be given and submissions made”.<sup>30</sup> Notably, an inquiry may not order general discovery<sup>31</sup> and a core participant does not have the right to obtain information provided to the inquiry by other core participants (or anyone else); but an inquiry may order such disclosure<sup>32</sup> particularly where it is necessary to meet natural justice obligations.<sup>33</sup> At the outset, the Inquiry designated NZDF, Mr Nicky Hager, Mr Jon Stephenson and three Afghan villagers from Tirgiran Valley as core participants.<sup>34</sup> As we discuss further below, the Afghan villagers withdrew from the Inquiry in June 2019.
- [19] The processes which the Inquiry adopted for handling material and taking evidence were intended to reflect three important considerations in particular:
- (a) most of the potential witnesses had legitimate claims for various reasons to anonymity and confidentiality;
  - (b) much of the documentary material provided to the Inquiry was classified or subject to obligations of confidentiality (for example, to foreign governments or organisations and to sources who assisted Mr Stephenson); and

<sup>24</sup> Law Commission *A New Inquiries Act* (NZLC R102, 2008).

<sup>25</sup> Inquiries Act, s 3.

<sup>26</sup> Law Commission, above n 24, especially at [1.18]–[1.28].

<sup>27</sup> Especially at [1.18]–[1.28].

<sup>28</sup> Inquiries Act, s 14(2); Minute No 4 (14 September 2018) at [46] and [60]–[66]; Ruling No 1 (21 December 2018) at [13].

<sup>29</sup> Section 17.

<sup>30</sup> Section 17(3).

<sup>31</sup> Section 22(1)(b).

<sup>32</sup> Section 22.

<sup>33</sup> Sections 14(2) and (3).

<sup>34</sup> The three Afghan villagers designated as core participants were represented by McLeod & Associates, two of whom were present on the night of Operation Burnham. McLeod & Associates also acted for a further 19 villagers connected to the Operation Burnham events.

- (c) the Inquiry had to be as open as possible given the public interest in its subject matter, albeit against the background of the two constraints mentioned in (a) and (b) above.

In addition, the Inquiry had to be alert to the requirements of natural justice, as required by the Inquiries Act.

- [20] Exercising its judgement as best it could after hearing submissions at a public hearing, the Inquiry determined that:<sup>35</sup>
- (a) it would treat witnesses as witnesses of the Inquiry rather than as witnesses of any particular core participant;
  - (b) most of the oral evidence would have to be given in private and tested by the Inquirers and Counsel Assisting, given the constraints referred to in paragraphs [19](a) and (b); and
  - (c) legal issues could be addressed in public hearings, at which the core participants could make submissions.

In addition, the Inquiry had earlier decided that it would establish an independent review process to examine the classified material provided to it to assist in identifying what could be publicly disclosed.<sup>36</sup>

- [21] The Inquiry went ahead on the basis outlined. It held three public hearings on “modules” which addressed particular legal topics that were relevant to the determinations it had to make.<sup>37</sup> The presentations and submissions at these public hearings were of considerable assistance. They informed our thinking in a variety of ways.
- [22] Most of the evidence heard by the Inquiry was taken in private, including evidence from Mr Hager and Mr Stephenson, and is subject to confidentiality orders. The evidence of NZDF and other government agency personnel, both present and former, was taken in accordance with the Inquiry’s Witness Protocol.<sup>38</sup> This involved Counsel Assisting, Ms Kristy McDonald QC and Mr Andru Isac QC, interviewing the witnesses to prepare “will say” statements, which then formed the basis of witnesses’ evidence to the Inquiry. Witnesses’ oral evidence was recorded and, in most cases, transcribed. The Inquiry did not hear oral evidence from all those interviewed by Counsel Assisting. Those who did not give evidence directly to the Inquiry were deposed by Counsel Assisting under delegation from the Inquiry.<sup>39</sup>
- [23] The evidence-gathering process which we have just outlined met a concern that non-Crown core participants had raised with the Inquiry at an early stage. The concern was that if NZDF was left to brief and lead evidence from its present and former personnel as normally occurs in litigation, there was a risk that the evidence could be “shaded” or “shaped” in the process, whether consciously or unconsciously. From the Inquiry’s perspective, this was not a concern limited to NZDF—it applied more generally. In any event, Counsel Assisting were confident at the end of

<sup>35</sup> Ruling No 1 (21 December 2018) at [79], [82]–[85].

<sup>36</sup> See Minute No 4, above n 28, at [27].

<sup>37</sup> See Minute No 11 (22 March 2019), Minute No 12 (25 March 2019) and Minute No 17 (27 June 2019). The Inquiry held five public hearings in all, totalling 14 days of hearing time. The other two hearings dealt with the procedures the Inquiry would follow and the “cover-up” allegations.

<sup>38</sup> Minute No 4, above n 28, at Appendix 1: Witness Protocol.

<sup>39</sup> Inquiries Act, s 21.

the process that the NZDF and related witnesses from whom they took “will say” statements gave their unvarnished accounts, uninfluenced by NZDF—a confidence shared by the Inquiry. The Inquiry acknowledges NZDF’s “hands off” approach to this evidence-gathering process.

- [24] An exception to the Inquiry’s approach to taking evidence occurred in relation to evidence from NZDF personnel on the topic of the alleged “cover-up”. This evidence was heard in public session (Public Hearing Module 4) on 16–19 September and 15, 16 and 18 October 2019, for reasons which we explained in Minute No 19.<sup>40</sup> This involved NZDF briefing the relevant witnesses, filing the briefs in advance and leading their evidence at the hearing. Counsel Assisting then examined the witnesses, followed by Mr Davey Salmon, Counsel for one of the non-Crown core participants, on a time-limited basis. Following that, Counsel for NZDF re-examined the witnesses, after which the Inquirers asked any questions they had.
- [25] Finally, in February 2020, the Inquiry undertook a natural justice process with affected persons. This involved identifying potentially adverse provisional findings and making relevant parts of the draft report available to the affected persons so that they were aware of the basis for the potential findings and could comment on them. All but one of the affected parties made submissions.
- [26] At the same time, the Inquiry made its draft report available to the core participants for comment. The Inquiry had intended to give the core participants the opportunity to make oral as well as written submissions on the draft report. Shortly before the hearings were to take place, however, the COVID-19 pandemic lockdown occurred. As a consequence, the proposed hearings were abandoned and the core participants were given the chance to provide further written submissions covering any points that they had intended to cover orally.
- [27] As a consequence of the natural justice process and the submissions from core participants, the Inquiry made changes to the content of the draft report and to some of its provisional findings and recommendations. As should be obvious, it is the Inquiry’s final report that sets out the views the Inquiry ultimately reached.
- [28] Besides analysing the relevant documentation (most of which was classified), conducting interviews and taking oral evidence, the Inquiry undertook extensive research into open source information including, for example, satellite imagery, reports of Afghan government agencies and international organisations, and media reports from inside and outside Afghanistan. The Inquiry had access to specialist expertise and assistance of the highest quality in relation to all facets of its work, for which we express our immeasurable gratitude.
- [29] The Inquiry also acknowledges the assistance it received from the book’s authors, both of whom made helpful submissions on legal and factual matters. We are particularly indebted to Mr Stephenson who, from an early stage, provided valuable assistance in connecting us with some of his important sources and making the results of his extensive researches available to us.

## **The Inquiry’s reporting date extended**

- [30] In its Terms of Reference, the Inquiry was given a year from the date of its establishment to investigate and report (that is, by 12 April 2019). However, it soon became apparent that this timeframe was insufficient to allow the Inquiry to complete its work, for reasons we summarise

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<sup>40</sup> See Minute No 19 (18 July 2019).

below. Accordingly, the Inquiry sought an extension until 31 December 2019 and an increase in its budget, both of which were granted. It then became necessary to obtain further extensions to its reporting date, until, ultimately 17 July 2020, although without any further budget increases.

- [31] A number of factors led to the extension requests. The fact that most of the documentary material relevant to the Inquiry was classified, and that much of it contained information supplied by overseas partners, created real difficulty for the Inquiry, both administratively and substantively. On the administrative side, beyond the usual challenges involved in setting up a new organisation, the Inquirers had to obtain security clearances; the Inquiry had to obtain premises (or access to premises) capable of handling classified material; and most Inquiry staff had to obtain security clearances. This was a time-consuming and demanding exercise. We acknowledge the assistance we received from government agencies with these matters, particularly the Department of Internal Affairs; New Zealand Security Intelligence Service; Government Communications Security Bureau; Ministry of Justice; and Ministry of Business, Innovation and Employment.
- [32] Once the logistical issues were resolved, the Inquiry had to develop, publish and hear submissions on the processes it considered would accommodate the interests identified at paragraph [19], and then make final decisions. Overall, this work took many months. In particular, the Inquiry's determinations in relation to its processes were not finalised until December 2018, after a public hearing held on 21–22 November 2018.<sup>41</sup>
- [33] On the substantive side, the provision of classified documents and information to the Inquiry by government agencies took far too long. We accept that government agencies holding relevant classified material, particularly material provided by overseas partners, had a legitimate interest in being satisfied that the Inquiry's processes for handling classified information were robust and complied with the government's Protective Security Requirements.<sup>42</sup> However, at an early stage, the Inquiry made clear that it would regard itself as bound by those requirements.<sup>43</sup>
- [34] We consider that government agencies did not take adequate steps to facilitate the production of relevant partner and domestic material to the Inquiry as soon as they could have. For instance, they could have started to collate relevant material soon after the Inquiry was established in April 2018, given it was inevitable that the Inquiry would require access to such material. We note that the Inquiry was still receiving relevant material from NZDF and others in June 2020, shortly before the Inquiry was due to report. Some of this material only came to light as a result of the public hearing on the "cover-up" allegations; other previously undisclosed material came to light during the natural justice process. We found this disappointing because specific requests had been made for some of this material much earlier (in particular, a notebook kept by a senior officer in Afghanistan), but it was not provided at the time. The result is that the Inquiry cannot be confident that it has received all relevant material.
- [35] We are not suggesting that NZDF and other government agencies acted in bad faith or were attempting to delay the Inquiry. NZDF advised us that it had to review hundreds of thousands of items to seek out relevant material, which was a time-consuming and resource-intensive process. NZDF also said that it found the iterative nature of the Inquiry's work challenging in

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<sup>41</sup> See Ruling No 1 (21 December 2018).

<sup>42</sup> The Protective Security Requirements (PSR) is a policy framework that outlines the government's expectations for security governance and for managing personnel, physical and information security. Government agencies are expected to adopt the PSR and meet its mandatory requirements. More information can be found at <protectivesecurity.govt.nz>.

<sup>43</sup> See Minute No 4, above n 28, at [5].

this context. But this does illustrate a problem that will be highlighted in subsequent chapters, namely that NZDF had a number of different systems, with the result that it was not able to find relevant material readily—nor could it be sure that the Inquiry had been provided with all relevant information.

- [36] We note that the Inquiry has had access to a range of overseas partner-sourced material, much of it in the possession of New Zealand agencies when the Inquiry was established. New Zealand agencies refused to disclose overseas partner information to us without the consent of the relevant overseas partner, on the basis that it had been provided to New Zealand agencies in the first instance under obligations of confidence. We had some difficulty with the idea that Crown agencies would refuse to provide relevant overseas partner-sourced material in their possession to a government Inquiry without the consent of the relevant overseas partner, particularly as the Inquiry had agreed to meet the Protective Security Requirements.
- [37] Although the Inquiry did eventually obtain access to this material, the process of obtaining overseas partner consent sometimes took what was, from the Inquiry's perspective, an excessively long time—in one instance, a week short of six months. This impacted the Inquiry's ability to make timely progress on some issues. In several instances, material was made available to the Inquiry only in a redacted form. While we are grateful to the overseas partners for granting consent, this raises issues to which we return in chapter 12.
- [38] Finally, we acknowledge the cooperation of the Crown Agencies<sup>44</sup> in the process the Inquiry established for the review of classified material. That review was designed to identify what of the classified material could be disclosed publicly, either in whole or in redacted form. The establishment of the review process reflected two things:
- (a) first, the fact that the need for material to remain classified is not kept under review on any systematic basis, despite such reviews being required by the Protective Security Requirements; and
  - (b) second, the Inquiry's desire to make public as much of the information available to it as it properly could.

The classification review process was led by the Inquiry's independent reviewers, Mr David Johnstone and Mr Ben Keith. As a result of their work, much previously classified material has been disclosed publicly.<sup>45</sup> This was only possible with the considerable cooperation of the agencies, for which we are grateful.

## Particular challenges faced by the Inquiry

- [39] As noted above, the Inquiry faced a number of challenges in preparing its report. These included, among others, challenges resulting from the quantity of classified information and material sourced from overseas partners, the legitimate claims of witnesses to confidentiality and the need to have as much of the Inquiry's work as possible visible to the public, which we address in more detail below.

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<sup>44</sup> As we describe later in the report, the Crown Agencies made submissions to the Inquiry on various topics. They were represented by the Crown Law Office and comprised New Zealand Security Intelligence Service, Government Communications Security Bureau, Ministry of Foreign Affairs and Trade, Department of Prime Minister and Cabinet and Ministry of Defence.

<sup>45</sup> A total of 423 previously classified documents were made publicly available.

## An iterative process

- [40] The first challenge was the iterative nature of the investigative process. As we noted in paragraph [13], the Inquiry’s Terms of Reference list 10 specific matters which the Inquiry is to investigate. Those, interpreted in light of the Inquiry’s purpose, provided the framework for the Inquiry’s investigations. As the Inquiry progressed, issues that seemed important initially turned out to be uncontentious. For example, the precise location of Operation Burnham appeared at the outset to be a matter in dispute, but it quickly became obvious that there was no room for dispute. Other contentious issues (such as whether there were insurgents in the villages during Operation Burnham) were readily resolved during the Inquiry for a range of reasons. Some issues, then, fell away, which required some modification to the Inquiry’s work.
- [41] Further, new issues were exposed as the Inquiry progressed. In part, this resulted from the Inquiry obtaining new material from NZDF or other government agencies, in some instances well after the material should have been provided. On occasion, this meant that the Inquiry had to request further material from agencies or obtain further information from witnesses. As noted earlier, one example was the public hearing on the alleged “cover-up”. That threw up a number of new matters from the Inquiry’s perspective and meant that it had to request further documentation and seek further evidence. As we have already mentioned, during the natural justice process we learnt of the existence of information that should have been provided to us much earlier. This led to further information requests and the need to re-write significant parts of the draft report. At times, this became frustrating.
- [42] In summary, while some issues fell away, new ones emerged. The Inquiry had to adjust its work to take account of this. In general though, the issues became more focused as the Inquiry progressed and this allowed us to hone in on what was truly in contention.

## The Afghan villagers

- [43] Second, the Inquiry was conscious that it would face special challenges in taking evidence from the Afghan villagers. Three villagers had issued judicial review proceedings challenging the decision of the previous New Zealand Government not to hold an inquiry.<sup>46</sup> Those proceedings were discontinued when the new Government decided to establish this Inquiry. The Inquiry accorded core participant status to the three villager applicants in the proceedings. As such, they were entitled to give evidence and make submissions to the Inquiry, subject to any directions from the Inquiry about the way this should be done.<sup>47</sup>
- [44] In March 2019, the three villagers with core participant status issued judicial review proceedings challenging the Inquiry’s determination as to process. They applied for interim relief aimed at preventing the Inquiry from holding any further hearings pending determination of their substantive application for review. They also sought permission to administer interrogatories to the Inquiry. The latter application was rejected<sup>48</sup> and, ultimately, the villagers discontinued their proceedings.
- [45] Initially, we assumed that we would need to hear from the three villagers (and other Afghan villagers) directly. We considered how to do this, against the background that they were vulnerable

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<sup>46</sup> *AVI v Attorney-General* Wellington CIV-2017-485-000675.

<sup>47</sup> Inquiries Act, s 17(3).

<sup>48</sup> *K & G v The Government Inquiry into Operation Burnham and Related Matters* [2019] NZHC 854.

witnesses and we needed to accommodate security, cultural, psychological and other issues.<sup>49</sup> We then thought that we might not need to take evidence directly from the villagers but, rather, could rely on the information already available about what the villagers said had occurred, including what they told Mr Stephenson in his interviews with many of them.<sup>50</sup> However, after receiving submissions on that suggestion and considering the matter further, we decided that we did need to hear from the villagers directly. As a result, we indicated that one of us would travel to Kabul to hear the villagers' accounts, with the assistance of a local law firm in Kabul.<sup>51</sup>

- [46] Shortly after (in mid-June 2019), the lawyers for the villagers, McLeod & Associates, advised that their clients were withdrawing from the Inquiry.<sup>52</sup> The reasons given were that the villagers had been sceptical about New Zealand authorities and their legal processes from the start. Their view that the Inquiry's processes had marginalised them had reinforced their scepticism. Counsel advised that their clients had lost confidence in the Inquiry and its processes and were no longer willing to participate in it.
- [47] The Inquiry found this a puzzling and disappointing decision, especially because the villagers had issued judicial review proceedings in 2017 aimed at having an inquiry established and had stated in their supporting affidavits that they wished to speak to the investigators about what had happened to them. Although disappointed by the villagers' decision, we were able to gather accounts from some people who were in the villages during Operation Burnham and who expressed a desire to engage with the Inquiry. This was done through a law firm in Kabul. The firm also made various other enquiries in Afghanistan at the Inquiry's request. Care was taken to ensure that no one was put at risk in this process.

### Maintaining public confidence

- [48] A further major challenge was maintaining public confidence in the outcome of the Inquiry, given that we had decided that much of the evidence from NZDF personnel and related witnesses would have to be taken in private and that much of the classified material could not be disclosed to the public or the non-Crown core participants. Some commentators drew the immediate conclusion that the Inquiry would be a "whitewash".
- [49] Obviously, neither of the Inquirers had any interest in participating in a whitewash, and we did not. We did what we could to promote public understanding of what the Inquiry was doing and the issues it was addressing. This included:
- (a) disclosing much previously classified material on the Inquiry's website;
  - (b) holding public hearings concerning the Inquiry's processes and on significant legal and factual topics, including a public hearing in September/October 2019 on the "cover-up" allegations;
  - (c) publishing submissions received for these hearings, the transcripts of what took place at them, and the associated Minutes and Rulings; and

<sup>49</sup> See Minute No 10 (20 March 2019), Minute No 14 (29 April 2019), Minute No 15 (17 May 2019) and Minute No 16 (4 June 2019).

<sup>50</sup> See Minute No 14, above n 49.

<sup>51</sup> See Minute No 16, above n 49.

<sup>52</sup> RE Harrison QC and DA Manning *Memorandum of Counsel for Former Residents of Khak Khuday Dad and Naik as to Withdrawal from the Inquiry* Submission to Inquiry (18 June 2019).

(d) publishing periodic progress reports on the Inquiry's website.

In the result, we consider that interested members of the media and the public will have been able to follow the Inquiry's work reasonably well.

### A public report?

- [50] The writing of this report was also affected, as we have said, by the constraints resulting from most of the witnesses' evidence being protected by confidentiality orders and much of the material before the Inquiry being classified. We were concerned to produce a report that the Attorney-General could, if he wished, make available to the public. To achieve this, the Inquiry had to be careful to write the report in a way that addressed the issues in sufficient detail to provide a proper explanation to the public but did not compromise legitimate security and confidentiality concerns.
- [51] Given that the matters at issue occurred a decade ago, the Inquiry considered that the security interests were not so much in the information obtained but rather in:
- (a) the particular methods by which information was obtained (that is, the capabilities of NZDF and intelligence agencies);
  - (b) the identity of individuals who provided information (disclosure of which might endanger their safety); and
  - (c) closely protected strategic, tactical and operational information that may have value to opposing forces and others in the future.
- [52] As we have said, the Inquiry had access to relevant material sourced from overseas partners that had originally been provided to New Zealand agencies on a basis of confidence. Whether we have been able to make that material available to non-Crown core participants or the public has, as a practical matter, depended on whether the relevant overseas partner has been prepared to give its consent. While consent was granted in respect of some matters, ultimately we were not able to make available to non-Crown core participants and the public as much overseas partner-sourced material as we would have wished. We comment further on this in chapter 12.
- [53] Accordingly, the report is written in a way that seeks to protect information that is classified or was provided in confidence yet provides a coherent account of relevant factual matters. Where we have relied on material that is unclassified or has been declassified, or on evidence that was given in public session, we have attempted to footnote it. However, we have not referenced classified material (which has been "gisted") or oral evidence provided in confidence. Where we have referred specifically to oral evidence given in confidence, we have obtained the consent of the relevant witness.
- [54] In the result, we believe that we have managed to write a report that is sufficiently detailed and comprehensive to explain the conclusions we have reached yet accommodates legitimate security and confidentiality interests.
- [55] We appreciate that our inability to share classified and confidential material with the public, or even with non-Crown core participants, may be frustrating for those who have taken a close interest in these events over the years. This must be particularly so for the authors of *Hit & Run*, given that the report does not accept allegations they made about the conduct of NZDF forces

during Operations Burnham and Nova, in part on the basis of objective<sup>53</sup> and witness evidence not available to them. Unfortunately, that is part of the reality of an inquiry such as this.

## **Inquiry by the Inspector-General of Intelligence and Security**

- [56] Before this Inquiry was established, the then Inspector-General of Intelligence and Security (IGIS) began an inquiry of her own motion into the roles of the New Zealand Security Intelligence Service and the Government Communications Security Bureau in relation to specific events in Afghanistan from 2009 to 2013, including Operation Burnham. Given that there was a degree of overlap between the two inquiries, we agreed a Memorandum of Understanding with the IGIS as to how we would interact.<sup>54</sup>
- [57] We had regular meetings with the IGIS, which we found helpful. We have attempted to write the Inquiry's report in a way that does not impinge on the work of the IGIS, but refers to her findings where appropriate. We note that the IGIS's public report will be available around the same time as the Inquiry's report.

## **The Inquiry's report**

- [58] This report sets out the Inquiry's views on the matters we were asked to investigate. The structure of the report is as follows:
- (a) Chapter 2 describes the background to the deployment of New Zealand forces to Afghanistan. We deal with the decisions to deploy the NZSAS initially in 2001 (and the NZPRT in 2003), and later the NZSAS in 2009 on Operation Wātea, during which the operations at issue occurred. This chapter also outlines two important features of New Zealand's constitutional arrangements—civilian control of the military and ministerial responsibility to Parliament—and addresses the question of whether there was ministerial authorisation for Operation Burnham.
  - (b) Chapters 3 to 6 relate to Operations Burnham and Nova. Chapter 3 describes the planning and preparation for Operations Burnham and Nova, while chapter 4 outlines what happened on the two operations. Chapter 5 considers whether there were insurgents in the villages at the time of Operation Burnham and addresses the consequences of Operations Burnham and Nova, in particular whether there were civilian casualties and the extent of property damage. Chapter 6 sets out the relevant principles of International Humanitarian Law (or the Law of Armed Conflict) and discusses their application to the facts of Operations Burnham and Nova.
  - (c) Chapter 7 deals with issues relating to targeting killings and the JPEL. It also discusses the air strike that killed Abdullah Kalta in 2012.

<sup>53</sup> We use the term "objective evidence" to refer to imagery, video footage, audio tapes and such like.

<sup>54</sup> Sir Terence Arnold and Cheryl Gwyn "Memorandum of Understanding between Inquiry into Operation Burnham (the "Inquiry") and Inspector-General of Intelligence and Security (the "IGIS")" (16 November 2018).

- (d) Chapters 8 and 9 deal with the allegations of a “cover-up” by NZDF. We focus on how NZDF responded to allegations of civilian casualties on Operation Burnham, both initially and in subsequent years. The facts are set out in chapter 8 and our assessment of them in chapter 9.
- (e) Chapters 10 and 11 deal with the capture and detention of Qari Miraj on Operation Yamaha. Chapter 10 explains New Zealand’s policy on detention at the relevant time and the legal context, specifically the law relating to states’ obligations in respect of torture and its prevention. Chapter 11 sets out the facts of Qari Miraj’s capture; addresses allegations that he was assaulted by TF81 personnel and later tortured while in NDS custody; and analyses the circumstances of his capture to determine what obligations New Zealand owed to him at the time.
- (f) Chapter 12 looks to the future and sets out our recommendations and observations.

## Summary of findings and recommendations

[59] The matter of public importance that the Inquiry was directed to examine was “the allegations of wrongdoing by NZDF forces in connection with Operation Burnham and related matters”.<sup>55</sup> Those are the allegations made in *Hit & Run*. Within that context, the Inquiry was directed to:

- 6.1. Seek to establish the facts in connection with the allegations of wrongdoing on the part of NZDF personnel during the Operations;
- 6.2. Examine the treatment by NZDF of reports of civilian casualties following Operation Burnham;
- 6.3. Examine the circumstances of Qari Miraj’s transfer and/or transportation to the Afghanistan National Directorate of Security;
- 6.4. Examine the extent to which NZDF rules of engagement authorised the predetermined and offensive use of force, whether this was apparent to those approving the rules of engagement, and whether NZDF’s application of this aspect of the rules of engagement changed.

The Inquiry was then directed to answer 10 specific questions.

[60] In this section we summarise the Inquiry’s key findings and recommendations, under the following headings:

- (a) Operations Burnham and Nova:
  - (i) Conduct of NZDF personnel on Operations Burnham and Nova
  - (ii) Civilian casualties on Operation Burnham
- (b) Targeted killings and the death of Abdullah Kalta
- (c) The alleged “cover-up”
- (d) Operation Yamaha and the transfer / transportation of Qari Miraj, including New Zealand’s detention policy and its response to the allegation that Miraj was tortured
- (e) Recommendations.

In the course of this summary, we will give a direct response to each of the 10 specific questions we were asked to answer.

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<sup>55</sup> *Terms of Reference*, above n 17, cl 5. See also cl 6.1, which directs the Inquiry to “Seek to establish the facts in connection with the allegations of wrongdoing on the part of NZDF personnel during the Operations”.

## Operations Burnham and Nova

### Conduct of NZDF personnel on Operations Burnham and Nova

- [61] As noted, the origin, planning, conduct and consequences of Operations Burnham and Nova are dealt with in chapters 3–5. The discussion in those chapters shows that while *Hit & Run* is accurate in its account of the operations in some respects, it is inaccurate in other important respects.
- [62] Respects in which the book was accurate in relation to Operation Burnham include the timing of the operation, the identity of the insurgents the operation targeted, their links to the attack that resulted in the death of Lieutenant Tim O’Donnell and the names of the villages in which the operation occurred. As we go on to explain, the book also accurately described some of the consequences of Operation Burnham. It correctly identified some of the people killed and injured, and that there were civilians among them. Further, there was, as the book alleges, some damage to buildings as a result of fires caused by ground troops and rounds from the Apache helicopters. The book is also correct in saying that there was a subsequent operation to the area: Operation Nova.
- [63] However, the principal allegations in *Hit & Run* about the conduct of TF81 personnel on Operations Burnham and Nova are not accurate. First, the operations were not revenge operations; nor were they “ill-conceived”.<sup>56</sup> There were legitimate reasons for them—there was reliable intelligence indicating there were insurgents in the villages who had been conducting attacks in Bamyan province (where the NZPRT was based) and who were planning further attacks on the NZPRT and Afghan security forces. The operations aimed to disrupt the insurgent network and improve security in Bamyan province. They were also planned and approved in accordance with standard national and ISAF processes. Further, there was no “air of rage and lack of control” to the operations.<sup>57</sup> The New Zealand forces involved acted professionally, although several miscalculations or errors may have been made.
- [64] Second, the book describes what happened on Operation Burnham as an “attack on innocent people”,<sup>58</sup> claiming that there were no insurgents in the villages (Khak Khuday Dad and Naik)<sup>59</sup> at the time of the operation. This claim is incorrect. One of the two individuals being sought on Operation Burnham, Maulawi Neimatullah, was in Naik on the night of the operation, as was another insurgent leader, Qari Miraj, who had played a prominent part in the ambush that resulted in Lieutenant Tim O’Donnell’s death. Qari Miraj had two armed bodyguards with him. The other objective (or target) of Operation Burnham, Abdullah Kalta, may also have been present, but we have been unable to confirm that. An ammunition cache and a rocket-propelled grenade launcher were found in Kalta’s house and an AK-47 in Neimatullah’s house.
- [65] In addition, available video footage shows that men with weapons emerged from a house in Khak Khuday Dad and began to climb to high ground as the first CH-47 Chinook transport helicopter arrived at the start of the operation. Some of the weapons were capable of bringing down helicopters (for example, rocket-propelled grenades). The actions of the men were consistent with the pre-operation intelligence, to the effect that the area was under the influence of the Taliban and that there were insurgent leaders and fighters there.

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<sup>56</sup> Hager and Stephenson, above n 10, at 6.

<sup>57</sup> Hager and Stephenson, above n 10, at 41.

<sup>58</sup> At 109.

<sup>59</sup> As we discuss in chapter 3 at [4], the area where Operations Burnham and Nova occurred is referred to by various names, but we will use the names derived from the villagers by the authors—Khak Khuday Dad and Naik—or refer simply to “the villages”. We refer to the area where the villages are located as Tirgiran Valley.

[66] Third, the operations were not conducted in the way alleged in *Hit & Run*. In particular:

- (a) *Hit & Run* alleges that the Apache helicopters started a “ferocious attack”<sup>60</sup> on Khak Khuday Dad almost immediately after they arrived there. In fact, they began firing only after they had seen the men carrying weapons, and after receiving clearance to fire from TF81 personnel. That clearance was granted on the basis that (i) insurgents were positively identified, (ii) there were no “collateral damage” issues, and (iii) friendly forces were not nearby.
- (b) *Hit & Run* alleges that the Apache helicopters “bombarded”<sup>61</sup> and “fiercely attacked”<sup>62</sup> houses, destroying 12 of them.<sup>63</sup> It is clear from the video footage that the helicopters did not attack houses; they were aiming their fire at particular men or groups of men. Some of the firing did land close to or hit the roofs and/or walls of two or possibly three houses in Khak Khuday Dad. However, that was found by a United States Army investigation to be the result of a misaligned weapon on one of the helicopters. Moreover, the rounds that landed near houses were from 30mm caliber cannons, not rockets or missiles as the book alleges.<sup>64</sup> No significant damage appears to have been caused to the houses, although there may well have been injuries to any occupants or others in the vicinity.
- (c) TF81 personnel searched only the three buildings that were targets of the operations (two houses and one agricultural building identified as A1, A3 and A2 respectively), not the upwards of 15 houses alleged in *Hit & Run*.<sup>65</sup> There was some damage to A1 and A3, but we are satisfied it was not caused by improper conduct. Rather, it resulted from: (i) in the case of A1 and A3, the use of a standard military technique to gain entry to houses associated with active insurgents (that is, explosive method of entry); (ii) in the case of A1, the detonation close to the house of the weapons found during the operation; and (iii) in the case of A1 and A3, fires that we consider were started accidentally.
- (d) There was no further significant damage to A1 or A3 on the follow-up operation, Operation Nova, contrary to the allegations in *Hit & Run*.

## Casualties on Operation Burnham

[67] *Hit & Run* alleges that six named civilians were killed on Operation Burnham, including a three year old girl named Fatima, and that 15 named civilians were injured. In relation to the six alleged to have been killed:

- (a) We are satisfied that one of those named, a university student named Islamuddin, son of Abdul Qadir, was not killed in Operation Burnham but died in an incident in late January 2010, seven months earlier.<sup>66</sup> He was the innocent victim of gunfire between an offender and police officers at a bazaar.

<sup>60</sup> At 36.

<sup>61</sup> At 70.

<sup>62</sup> At 53.

<sup>63</sup> At 130.

<sup>64</sup> At 50 and 62.

<sup>65</sup> At 40.

<sup>66</sup> He is not the person shown in the photograph at page 57 of the book and identified as Islamuddin. A number of villagers have identified the person in the photograph as someone else.

- (b) In relation to Fatima, we are satisfied that the girl depicted in the photograph at page 52 of *Hit & Run* was not killed on Operation Burnham. However, based on the available evidence we consider it is likely that a female child approximately 8-10 years old (whose identity remains unknown) did die as a result of the operation. Obviously, she was a civilian. Despite this, we have concluded that TF81 personnel had a proper basis for clearing the engagement in which the girl was most likely killed. Based on the information available to them at the time, they would not have known that there were civilians in close proximity to the man who was the target of the firing.
- (c) One of those named is Mohammad Iqbal, the father of the insurgent Maulawi Neimatullah. He was killed while walking along a track below A3 towards the south. He was carrying an AK-47 at the time. We have not reached a firm view on whether he was a civilian, and it is unnecessary for us to do so. The air assets did not seek clearance from TF81 personnel before engaging him. Accordingly, there is no basis on which NZDF could be responsible for his death.
- (d) Another of those named, Abdul Qayoom, son of Sakhi Dad, appears to have been shot and killed by an NZDF marksman as he approached the overwatch position. We have been unable to determine whether he was a civilian or an insurgent. However, based on the information available to the TF81 Ground Force Commander at the time, we conclude that his killing was in accordance with rules of engagement and the principles of International Humanitarian Law applicable to a non-international armed conflict.
- (e) That leaves two men—Abdul Qayoom, son of Mohammad Iqbal and brother of Neimatullah; and Abdul Faqir, son of Abdul Rahman. We are satisfied that both were killed during Operation Burnham. There is some evidence linking both to the insurgent group, but we are unable to express a firm conclusion about whether they were insurgents. It appears likely that Abdul Faqir was part of the group of men who removed weapons from a house in Khak Khuday Dad before moving to high ground. We consider that there was a proper justification for engaging those men. It seems likely that Abdul Qayoom's death resulted from the final engagement, to which we now turn.
- [68] It appears that at least four men were killed in the final engagement of the operation, which occurred over a kilometre south of the main area of operations. All were identified as insurgents in an intelligence report soon after the operation, although they were not named. One may have been Abdul Qayoom, son of Mohammad Iqbal, as noted above. The others, however, do not appear to be any of those named in the book or identified by villagers. This engagement was cleared by the TF81 Ground Force Commander. On the basis of his understanding at the time, as revealed in contemporaneous material, we consider that his clearance of the engagement was consistent with the applicable rules of engagement and International Humanitarian Law / the Law of Armed Conflict.
- [69] As to non-fatal injuries, we agree with the authors to the extent that at least six civilians were injured during Operation Burnham. Based on hospital and health centre records, we are satisfied that at least two women and two girls suffered injuries. We have also established from health centre records and other information that at least two men were injured. Although there is some information suggesting the men may have had links to insurgents, it is insufficient to enable us to determine whether they were insurgents. We therefore assume they were civilians. We accept that others may also have suffered injuries.

## FINDINGS ON THE INQUIRY'S TERMS OF REFERENCE: OPERATIONS BURNHAM AND NOVA

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### Clause 7.1.

*The conduct of NZDF forces in Operation Burnham, including compliance with the applicable rules of engagement and international humanitarian law.*

[7.1.1] The conduct of TF81 personnel throughout Operation Burnham was professional, although there may have been several miscalculations which resulted in damage to property. Contrary to the allegations in *Hit & Run*, TF81 personnel were not motivated by a desire for retaliation or revenge. We have concluded that all actions by TF81 personnel during the operation complied with the applicable rules of engagement and International Humanitarian Law.

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### Clause 7.2.

*The assessment made by NZDF as to whether or not Afghan nationals in the area of Operation Burnham were taking direct part in hostilities or were otherwise legitimate targets.*

[7.2.1] There was a proper basis for TF81's assessment at the beginning of the operation that there were people in the area who were taking direct part in hostilities. Men were observed removing weapons capable of bringing down aircraft from a house in Khak Khuday Dad and moving to high ground. Their actions were consistent with pre-operation intelligence indicating that there were armed insurgents in the villages. The targeting of these men was legitimate, as was the engagement by an NZSAS marksman, which targeted a man who was understood to have come from the same group.

[7.2.2] On the basis of the objective evidence (video footage, audio recordings and location information) there is a serious question as to whether the final engagement, which targeted a group of people who were climbing a hillside over a kilometre south of the main operational area, should have been cleared when it was. However, based on the Ground Force Commander's understanding at the time of what was occurring (as revealed in contemporary documentation), we consider that he gave clearance consistently with the requirements of the applicable rules of engagement and International Humanitarian Law.

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### Clause 7.3.

*The conduct of NZDF forces in the return operation to Tirgiran Valley in October 2010.*

[7.3.1] We have no concerns about the conduct of TF81 personnel during the return operation to the villages: Operation Nova. The evidence does not support the allegations in *Hit & Run* that the return operation was motivated by revenge or that the houses of the targets were destroyed.

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**Clause 7.4.**

*The NZDF's planning and justification/basis for the Operations, including the extent to which they were appropriately authorised through the relevant military chains of command, and whether there was any Ministerial authorisation of the Operations.*

[7.4.1] Operations Burnham and Nova were not revenge raids. There were legitimate military justifications for them—there was reliable intelligence indicating there were insurgents in the villages who had been conducting attacks in Bamyan province where the NZPRT was located and were planning further attacks on the NZPRT and Afghan security forces.

[7.4.2] The operations were planned in accordance with standard operating procedures. Authorisation was obtained from the Chief of Defence Force (which was required because the operations were outside TF81's mandated area of operation) and through the ISAF chain of command (as the Chief of Defence Force had delegated operational control of TF81 to the Commander ISAF).

[7.4.3] The Minister of Defence and Prime Minister were informed of the intention to conduct Operation Burnham and did not object to it. They did not, and were not required to, provide formal authorisation for the operations.

## Targeted killings and the death of Abdullah Kalta

- [70] The Terms of Reference required us to consider whether the rules of engagement authorised the predetermined and offensive use of lethal force against specified individuals (that is, targeted killings). We are satisfied that they did, provided the individual was directly participating in hostilities. This was apparent to both NZDF and responsible ministers, as is evident from briefings provided to the Minister of Defence and public statements made by the Prime Minister.
- [71] In practice, whether an individual was considered to be a legitimate target of lethal force was determined by their inclusion as a "lethal target" on ISAF's JPEL. The JPEL was a mechanism for identifying active insurgents and prioritising the use of ISAF resources to target them (whether through surveillance, capture or killing). These individuals were considered to be directly participating in hostilities by virtue of their ongoing involvement in the insurgency.
- [72] *Hit & Run* alleges that Abdullah Kalta (one of the objectives of Operation Burnham) was killed in a targeted strike by a United States aircraft or drone on an NZSAS operation in November 2012.<sup>67</sup> We agree that Kalta was killed as a result of an air strike in November 2012. NZSAS personnel were involved in gathering intelligence prior to the strike, but it was not an NZSAS operation and we have no concerns about the involvement of NZSAS personnel. After Operation Burnham, Kalta had continued to be a significant security threat and was linked to a number of further attacks. At the time he was killed, he and others were preparing to conduct an ambush on ISAF or Afghan security force personnel. Although Kalta was listed on the JPEL, as events transpired the strike against him was not ultimately authorised on that basis.<sup>68</sup>

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<sup>67</sup> Hager and Stephenson, above n 10, at 92.

<sup>68</sup> See chapter 7 at [51]–[53].

- [73] *Hit & Run* also alleges the NZSAS was involved in two other targeted killings in 2011, but we are satisfied that allegation is incorrect.<sup>69</sup>

#### FINDINGS ON THE INQUIRY'S TERMS OF REFERENCE: TARGETED KILLINGS

##### Clause 7.9.

*Separate from the Operations, whether the rules of engagement, or any version of them, authorised the predetermined and offensive use of lethal force against specified individuals (other than in the course of direct battle), and if so, whether this was or should have been apparent to (a) NZDF who approved the relevant version(s) and (b) responsible Ministers. In particular were there any written briefings to Ministers relevant to the scope of the rules of engagement on this point.*

[7.9.1] The rules of engagement did authorise the predetermined and offensive use of lethal force against individuals on the JPEL. A person identified as a lethal target on the JPEL was treated as directly participating in hostilities for the duration of the listing.

[7.9.2] The fact that such force was permitted by the rules of engagement was apparent to NZDF, the Minister of Defence and the Prime Minister.

##### Clause 7.10.

*Whether, and the extent to which, NZDF's interpretation or application of the rules of engagement, insofar as this involved such killings, changed over the course of the Afghanistan deployment.*

[7.10.1] The rules of engagement were amended in December 2009, which in turn led to a change in the interpretation and application of the rules. Before the amendment, predetermined and offensive use of force would have been permitted only against members of specified insurgent groups. Following the amendment, the rules permitted the use of such force against any person or group who was directly participating in hostilities.

## The alleged “cover-up”

- [74] *Hit & Run* alleges that, from the outset, NZDF avoided publicity about the role of NZDF personnel in Operation Burnham, beginning with the fact that the ISAF media release immediately after the operation did not refer to their involvement.<sup>70</sup> It also alleges that NZDF was aware that civilians had been killed and injured on the operation as a result of intelligence reporting from shortly after it occurred.<sup>71</sup> The book alleges that an active “cover-up” started with NZDF’s media release of 20 April 2011, when it stated that nine insurgents were killed on the operation<sup>72</sup> and that the ISAF

<sup>69</sup> See paragraph [12] above.

<sup>70</sup> At 8.

<sup>71</sup> At 72.

<sup>72</sup> This was said to be “knowingly false” because NZDF knew that there were no insurgents in the villages at the time of the operation. As we have said, in fact there were.

Incident Assessment Team's investigation had concluded that the allegations of civilian casualties were unfounded.<sup>73</sup> The active "cover-up" allegedly went on from there.

- [75] We are satisfied that NZDF personnel were not aware during the course of Operation Burnham that civilian casualties may have occurred. However, within a few days NZDF knew that civilian casualties were possible, as a result of intelligence reporting, information received by TF81 personnel from the Incident Assessment Team appointed by ISAF to investigate allegations of civilian casualties, and public reports of ISAF media releases circulated within NZDF. The Incident Assessment Team had conducted a preliminary investigation when allegations of civilian casualties emerged immediately after the operation.<sup>74</sup> It effectively "cleared" the ground forces of any allegations of civilian casualties, but concluded that it was possible that civilian casualties had occurred when several buildings were struck by fire from a misaligned weapon on one of the United States Apache helicopters.
- [76] NZDF did not take any effective steps to investigate the allegations of civilian casualties on Operation Burnham. Further, the advice it provided to ministers was inaccurate because it misstated the position in relation to the possibility of civilian casualties. Between 2010 and 2017 NZDF made a series of incorrect statements in both briefings to ministers and public releases, to the effect that the allegations of civilian casualties had been investigated and found to be "baseless" or "unfounded".
- (a) The misinformation stemmed from what was accepted to be a seriously misleading email sent by the Senior National Officer in Afghanistan, Lieutenant Colonel Chris Parsons, to the Director of Special Operations in Wellington, Colonel Peter Kelly, on 8 September 2010 (New Zealand time). Lt Col Parsons said he had "sighted" the Incident Assessment Team's "conclusion". He said that the investigation had "categorically" cleared both the ground forces and air assets of any allegations and found that "there was no way that CIVCAS [civilian casualties] could have occurred". This was based on his reading of one short paragraph in a three-page report (known as the Incident Assessment Team Executive Summary). Lt Col Parsons' description of the Incident Assessment Team's conclusion was inaccurate because the Team had not cleared both ground and air forces but had acknowledged the possibility of civilian casualties from the misaligned weapon. The Inquiry has concluded that soon after he had sent the email, Lt Col Parsons appreciated that he may have misrepresented the Incident Assessment Team's conclusion and failed to take adequate steps to correct the position. This was a serious failure on his part, with significant and long-lasting ramifications.
- (b) Colonel Kelly and other NZDF personnel in New Zealand accepted the advice in Lt Col Parsons' email without question, even though there was substantial evidence contradicting it—including ISAF's own media releases. The email was relied on in preparing erroneous written briefings to ministers in December 2010. The briefings were inaccurate and misleading in describing Operation Burnham as an Afghan Crisis Response Unit (CRU)-led operation when it was not; and in stating that the allegations of civilian casualties had been investigated by a joint assessment team, which found they were baseless and cleared both ground and air forces of all allegations. NZDF issued a media release on 20 April 2011 to that effect and the Minister of Defence, Hon Dr Wayne Mapp, made similar statements to the media in April 2011 and in response to a parliamentary question for written answer in May 2011.

<sup>73</sup> Hager and Stephenson, above n 10, at 100.

<sup>74</sup> The Incident Assessment Team produced a three-page report referred to in its title as an "executive summary". We generally refer to it as the Incident Assessment Team Executive Summary or the executive summary.

- (c) In 2011, NZDF obtained a copy of the Incident Assessment Team Executive Summary, probably through the then Director of Special Operations, Colonel Jim Blackwell. We have concluded that he did not brief the Chief of Defence Force or other senior members of NZDF so as to correct NZDF's inaccurate understanding of the Incident Assessment Team's findings. Nor was a written briefing provided to ministers. Colonel Blackwell did give Dr Mapp an oral briefing, but in a way that minimised the Incident Assessment Team's findings. Nonetheless, Colonel Blackwell's briefing alerted Dr Mapp to the fact that civilian casualties were possible. In light of what Dr Mapp accepted Colonel Blackwell had told him, Dr Mapp (and NZDF) ought to have corrected the public record, but did not. Further, Dr Mapp responded to an Official Information Act request in a way that continued to misrepresent the position. This contributed to subsequent misunderstandings and misstatements.
- (d) In 2014, shortly before a documentary by Mr Stephenson called *Collateral Damage* was to air on Māori Television, the then Minister of Defence, Hon Dr Jonathan Coleman, was orally briefed in line with the inaccurate December 2010 ministerial briefings, to the effect that the Incident Assessment Team had concluded that the allegations of civilian casualties on Operation Burnham were baseless. He discovered the true position only when his Military Secretary found the Incident Assessment Team Executive Summary in a safe at NZDF Headquarters two days later, essentially by chance. Once he was aware of the true position, Dr Coleman's statements to the media accurately stated the Incident Assessment Team's findings.
- (e) Despite the re-discovery of the Incident Assessment Team Executive Summary in 2014, NZDF again made incorrect public statements dismissing allegations of civilian casualties as "unfounded" following the release of *Hit & Run* in March 2017. This appears to have resulted from systemic issues within NZDF, including frequent changes in key staff, failures to keep proper records and provide written briefings, and inadequate information storage and retrieval processes. NZDF did correct the position and acknowledged civilian casualties were possible shortly after.

[77] The Inquiry does not accept that there was an organised institutional strategy within NZDF (or within NZDF Headquarters) to "cover up" NZDF's role in Operation Burnham or the possibility that there were civilian casualties. The Inquiry considers that if there had been clear evidence of civilian casualties on Operation Burnham, NZDF would have faced up to that.

[78] However, the Inquiry agrees with the book's authors that there were serious deficiencies in the way that NZDF dealt with the allegations. The Inquiry has concluded that, at some time soon after he had sent the email, Lt Col Parsons appreciated that he might have misrepresented the Incident Assessment Team's conclusion and did nothing effective to correct the position. The description in his email was too readily accepted by Colonel Kelly and others, despite strong evidence to the contrary. It became the accepted NZDF narrative due to a disappointing lack of commitment and rigour, both individual and collective, on the part of senior NZDF personnel in finding out what had happened. NZDF's failure to obtain accurate information concerning the allegations meant that it advanced a false narrative, which misled ministers and the public and unfairly undermined public confidence in the accuracy of some aspects of the authors' work. NZDF's failures undermined two constitutional principles of fundamental importance, namely civilian control of the military and ministerial accountability to Parliament, both of which depend on the provision of full, timely and accurate information by NZDF to ministers.

- [79] The Inquiry was also concerned that a video claimed to have been taken in the villages shortly after Operation Burnham, which appeared to show the funeral of a child, was not found in TF81's records. In the circumstances, which we explore in more detail in chapter 9, we consider the most likely explanation is that the funeral video was deleted or misfiled, probably in Afghanistan. Whether this was a matter of inadvertence, poor record-keeping or an attempt to hide potentially embarrassing evidence we cannot now determine.

#### FINDINGS ON THE INQUIRY'S TERMS OF REFERENCE: THE ALLEGED "COVER-UP"

##### **Clause 7.5.**

*The extent of NZDF's knowledge of civilian casualties during and after Operation Burnham, and the content of written NZDF briefings to Ministers on this topic.*

[7.5.1] NZDF personnel were not aware during the course of Operation Burnham that civilian casualties may have occurred. However, the possibility of civilian casualties became apparent to NZDF within a few days after the operation.

[7.5.2] NZDF misrepresented the situation to ministers in written briefings in December 2010, by overstating the Afghan Crisis Response Unit's role in Operation Burnham and stating that the allegations of civilian casualties had been investigated and found to be baseless when, in fact, the investigation had concluded that civilian casualties may have occurred.

[7.5.3] The erroneous briefings were based on an email sent by the Senior National Officer in Kabul to the Director of Special Operations, which misrepresented the findings of the ISAF Incident Assessment Team sent to investigate the allegations of civilian casualties. The Senior National Officer who sent the email appreciated soon after he sent it that he may have misrepresented the Incident Assessment Team's conclusion and failed to take adequate steps to correct the position. The advice in the email was accepted without question by the Senior National Officer's superior and others despite being contradicted by other information available to NZDF, including video footage, intelligence reporting and ISAF's own media releases.

[7.5.4] NZDF failed to adequately remedy its incorrect advice. In 2011 the Minister of Defence, Hon Dr Wayne Mapp, was informed orally by the Director of Special Operations that civilian casualties were possible, but in a way that minimised the significance of the Incident Assessment Team's findings. No written briefing was provided. In 2014 the Minister of Defence (then Hon Dr Jonathan Coleman) received an inaccurate oral briefing in line with the December 2010 briefings. He discovered the true position only when his Military Secretary discovered the Incident Assessment Team Executive Summary in a safe at NZDF Headquarters.

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**Clause 7.6.**

*Public statements prepared and/or made by NZDF in relation to civilian casualties in connection with Operation Burnham.*

[7.6.1] NZDF made a series of erroneous and misleading public statements about the possibility of civilian casualties on Operation Burnham from 2011 to 2017. On 20 April 2011 it issued an inaccurate media release, which said the Incident Assessment Team had concluded that the allegations of civilian casualties were “unfounded”. This position was repeated in subsequent public statements by NZDF and ministers in 2014, although the Prime Minister and the Minister acknowledged publicly that civilian casualties were possible after NZDF found the Incident Assessment Team’s report in a secure safe, essentially by chance. NZDF did not itself issue a public correction, however. Despite these events, NZDF’s initial public response when *Hit & Run* was launched in March 2017 was to repeat the false narrative and advise ministers accordingly—although it stated the correct position within a day or two.

[7.6.2] NZDF’s continued repetition of incorrect statements, both publicly and to ministers, resulted from the combined impact of frequent changes in key staff, failures to keep proper records and provide written briefings, and inadequate information storage and retrieval processes. These were not simply failures of organisational structure or systems; they were also failures of culture, particularly in relation to NZDF’s obligations to ministers.

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**Clause 7.7.**

*Steps taken by NZDF after Operation Burnham to review the conduct of the operation.*

[7.7.1] NZDF failed to take appropriate steps after the operation to determine what happened. It did not conduct any effective investigation into the allegations of civilian casualties; nor did it appear to give any serious consideration to whether such an investigation was appropriate, despite clear ministerial concern about the allegations. NZDF relied on the Incident Assessment Team’s investigation, although it was aware this was only a preliminary assessment and not intended to replace a national investigation if appropriate. NZDF also had information that ISAF had ordered a further investigation following the Incident Assessment Team’s preliminary investigation, but did nothing effective to follow up on that.

## Operation Yamaha and the transfer / transportation of Qari Miraj

- [80] *Hit & Run* alleges that when Qari Miraj was captured in January 2011, he was assaulted and injured by NZSAS personnel in retaliation for his involvement in the raid that resulted in Lieutenant O'Donnell's death.<sup>75</sup> He was then handed over to the NDS, where he was tortured and made a confession. The book says that New Zealand authorities received Miraj's confession and were advised of his torture, but did nothing about it.<sup>76</sup>
- [81] Despite a vehement denial by the person said to have been responsible, we consider that Qari Miraj was assaulted as he was being placed into a vehicle for transport to an NDS facility in Kabul. Miraj was punched once or possibly several times around the ribs or stomach. While there is some difference between the assault described to us and that described in *Hit & Run*, any unjustified striking of a detainee is wrong, and it should not have happened. Given the persistent rumours about it at the time, the matter should have been looked into more closely then.
- [82] In addition, there is strong evidence that Miraj was tortured by NDS personnel soon after he was delivered to an NDS detention facility by NZDF personnel, and made a confession. New Zealand authorities learnt of the allegations that he had been tortured soon afterwards, but did not conduct further enquiries or bring it to the attention of relevant ministers. In the result, New Zealand did nothing in response to the allegations. We consider that action should have been taken.
- [83] Because Qari Miraj was captured on an Afghan-partnered operation (that is, an operation conducted by NZSAS troops in conjunction with an Afghan partner force), New Zealand considered it did not owe the same obligations in respect of protecting him from torture and mistreatment in detention that it would have owed if NZDF personnel had detained him in a non-partnered operation.
- [84] When Cabinet approved the deployment of the NZSAS to Afghanistan on Operation Wātea in 2009, it directed a two-pronged approach to detention:
- (a) Cabinet accepted that where New Zealand forces detained people directly, either when acting alone or during a New Zealand-led operation involving another ISAF partner, the detainees could not legally be transferred to people or places where there were substantial grounds to believe that they faced a real risk of torture. Accordingly, in respect of such detainees, New Zealand entered into arrangements with the Government of the Islamic Republic of Afghanistan which were intended to ensure that New Zealand could meet its international obligations in relation to the transfer and subsequent treatment of detainees.
  - (b) By contrast, in respect of those arrested during partnered operations by an Afghan official under an Afghan arrest warrant, New Zealand considered that its obligations in relation to transfers did not arise. In such operations, New Zealand took the view that it had no jurisdiction to interfere with the operation of Afghan criminal justice processes following arrest, and so accepted no responsibility to prevent or act on any subsequent torture.

During Operation Wātea, only one or two people were detained by NZDF personnel directly in terms of (a) above; almost 200 were detained in Afghan-partnered operations under (b) above.

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<sup>75</sup> At 84–85.

<sup>76</sup> At 88–89.

- [85] As a blanket policy, we consider that the approach to Afghan-partnered operations was inappropriate. As we see it, the facts of particular operations matter—the key issue is the substance of an operation, not the form. On some Afghan-partnered operations, NZDF personnel could properly be seen as mentors simply observing and, where necessary, overseeing Afghan authorities in carrying out their law enforcement functions, but not being actively involved in the operation. In such circumstances, New Zealand might not owe those detained by Afghan forces legal obligations going to their conditions of detention.
- [86] However, on other operations (Operation Yamaha in particular), the comprehensive nature of NZDF’s involvement, both in the operation itself and in the way the person captured was processed and handled, the position may be different. In such operations, New Zealand may properly be seen as a detaining authority. As such, New Zealand owed certain obligations to the detainee, including a duty not to transfer them in circumstances where they faced a real risk of torture (a duty of *non-refoulement*). As a consequence, New Zealand could not transfer such detainees to Afghan custody where there were substantial grounds to believe that they faced a real risk of torture, without having appropriate arrangements in place. In our view, as it was articulated and applied, New Zealand’s policy in relation to detention on Afghan-partnered operations did not recognise the critical importance of the particular factual context or the fundamental nature of the relevant obligations.

## FINDINGS ON THE INQUIRY’S TERMS OF REFERENCE: OPERATION YAMAHA

### Clause 7.8.

*Whether NZDF’s transfer and/or transportation of suspected insurgent Qari Miraj to the Afghanistan National Directorate of Security in Kabul in January 2011 was proper, given (amongst other matters) the June 2010 decision in R (oao Maya Evans) v Secretary of State for Defence [2010] EWHC 1445.*

[7.8.1] The transfer and transportation of Qari Miraj to the NDS in Kabul was improper in three respects.

[7.8.2] First, as Miraj was being placed in a vehicle for transportation, he was punched around the rib or stomach area by a member of TF81. Although rumours of the assault circulated within TF81 at the time, insufficient steps were taken to address the matter.

[7.8.3] Second, there were insufficient measures in place to protect Miraj against the risk of torture or mistreatment in detention. TF81 developed and led the operation to detain Miraj, had effective control over him for an hour or more and delivered him to the NDS. Accordingly, if there were substantial grounds to believe that he faced a real risk of torture, New Zealand had an obligation to ensure that he was not transferred into Afghan custody without sufficient protective arrangements being in place. Despite this, New Zealand’s policy on detention meant he, like others detained on Afghan partnered operations, was treated as an Afghan detainee and did not benefit from the arrangements in place to protect New Zealand detainees (such as notification and monitoring obligations). We consider New Zealand breached its duty of *non-refoulement* and related obligations to prevent torture in relation to Miraj.

[7.8.4] Third, there was strong evidence that Miraj was tortured soon after he was placed into NDS custody, which New Zealand authorities became aware of a short while later. Despite this, senior leaders and ministers were not briefed; nor were any further steps taken to investigate, to express New Zealand's position on the use of torture, or to review its policy on detention.

## The Inquiry's recommendations

[87] In chapter 12 we make four recommendations to address some of the problems identified by the Inquiry. They are set out below:

### RECOMMENDATION 1

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

### RECOMMENDATION 2

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

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

The functions of the Inspector-General would include:

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

### RECOMMENDATION 3

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

### RECOMMENDATION 4

We recommend:

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

[88] We see recommendations 1, 2 and 4 as necessary to enable full effect to be given to two important constitutional principles—civilian control of the military and ministerial responsibility to Parliament.

[89] We make no recommendations arising out of the various operations discussed or in relation to any failures within other government agencies. Rather, we leave it to those responsible to assess whether any further action is required in light of the discussion in this report.

# Inquiry by the numbers

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159

Individuals who  
gave evidence  
to the Inquiry

423

Documents publicly  
available as a result of  
the Inquiry's process  
for reviewing classified  
information

119

Submissions  
and memoranda  
published on the  
Inquiry's website

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29

People the Inquiry  
heard evidence  
from in public

5

Public hearings  
held over 14 days

1,756

Pages of public hearing  
transcripts published on  
the Inquiry's website

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4,431

Documents  
disclosed to  
the Inquiry

3,237

Documents  
disclosed  
by NZDF

1,194

Documents from other  
agencies and core  
participants, including  
the *Hit & Run* authors,  
MFAT, DPMC, NZSIS,  
GCSB, and MOD

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