

HEADQUARTERS NEW ZEALAND DEFENCE FORCE
Defence Legal Services
MINUTE

NZDF 1180/DLS/INTOPS/1

29 Mar 17

CDF

NZDF INVESTIGATIONS INTO ALLEGATIONS OF OFFENDING

References:

- A. ATT114/1931 dated 24 Mar 17
- B. DM69 (2nd Ed) Vol 1, Chapter 11

1. Allegations have been publicly made that members of the NZSAS committed offences while participating in a specific operational mission on 22 August 2010 in Afghanistan.

Executive Summary

2. Commanding officers have a mandatory obligation pursuant to s. 102 of the Armed Forces Discipline Act 1971 (AFDA) to investigate matters where there are well-founded allegations of offending by persons under their command. However, these obligations do not arise if the commanding officer does not consider that the allegation is well-founded. The commanding officer can direct a preliminary investigation to assist them in making their decision.

Investigations

External Investigations

3. Reference A is advice provided from the Crown Law Office to the Attorney-General. It set out the spectrum of investigations available, both criminal and non-criminal, should Ministers determine that an investigation should be conducted.

4. This minute focusses on the exercise of jurisdiction and those investigations which NZDF personnel are empowered to conduct. A decision on whether or not an NZDF investigation should be conducted does not preclude another authority exercising their lawful jurisdiction, for instance NZPOL.

NZDF Investigations

5. There are essentially three forms of investigation available to the NZDF in respect of the conduct of its personnel, as set out at Reference B.

6. The internal inquiries that have been conducted in respect of this matter essentially take the form of a command investigation; however, a command investigation is not suitable for formally investigating the allegations, if there were a basis on which to do so.

7. Reference A, paragraphs 25 – 27 set out the basis on which officers, including the Chief of Defence Force, might assemble a Court of Inquiry. The purpose of a Court of Inquiry is to “*provide an expeditious fact finding procedure so that a matter can be promptly investigated and if necessary, prompt, remedial action can be taken*”. A Court of Inquiry is not recommended at this time, given the allegations are essentially of criminal offending, the environment within which the alleged offending occurred, and when the offending is alleged to have occurred.

8. Thus the question really turns, at this time, on whether a commanding officer should direct that a disciplinary investigation be conducted.

Disciplinary Investigation

9. Reference A, paragraphs 10-15 summarises the statutory basis for the conduct of a disciplinary investigation under the AFDA, with specific reference to AFDA s. 102.

10. A fundamental aspect of AFDA s. 102 is that the powers are vested in commanding officers. Thus it is for a commanding officer to direct a preliminary investigation, to determine whether an allegation is well-founded, and to either refer the matter to the civil authorities or to deal with the matter in accordance with the AFDA. Reference A, paragraph 15 sets out these three options available to commanding officers, of which they must take one.

11. Thus, the requirement is for the commanding officer or officers of the personnel involved in the operation to determine which option they will take based on the information available to them at the time they make their decision.

12. The fact that AFDA s. 102 vests decision making authority in the commanding officers does not preclude the Chief of Defence Force from assessing that an investigation may be warranted and issuing appropriate direction. In doing so it is important to be careful not to fetter the discretion of other persons acting with statutory authority.

13. I am informed that at this time, no commanding officer has determined that a preliminary investigation is required or that a matter is well-founded on the information that was presented to them. I am further informed that you do not consider that the information you have in respect of the allegations, including the most recent information released into the public domain by external authors, requires you to direct further action pursuant to AFDA s.102. This is a reasonable decision in light of the information available to you.

14. Where a matter has not been disposed of finally in accordance with the AFDA, further action under the AFDA can still be taken. As such, if further evidence were to come to light the applicable commanding officer or officers should reassess any decision made regarding whether an allegation were well founded pursuant to AFDA s. 102 in light of that further evidence. NZDF has, and should continue to be, explicit in its request that anyone with relevant information should draw that information to the attention of the NZDF so that the matter might be appropriately investigated.

Coalition Forces

15. In this situation, NZDF personnel have no statutory authority to conduct investigations into the conduct of foreign service personnel.

16. Further, NZDF personnel cannot compel foreign service personnel to give evidence in any disciplinary investigation of NZDF service members pursuant to AFDA s. 102, although it could make a request for them to do so.

Disclosure of Information

17. For completeness, I note that requests for access to information relating to the operation have been made both by members of the public and within Government. Requests for information should be managed in accordance with the requirements of the Official Information Act 1982 and the Privacy Act 1993.

18. While not specifically a legal issue, I note that there are pros and cons to Government officials viewing information that might have evidential status. It is important Government officials understand that viewing information may be construed as having affected their impartiality in the results of any investigation that they might direct, irrespective of their actual impartiality or whether an investigation is actually contemplated.

Conclusion

19. It is primarily for the applicable commanding officer(s) of the service members involved in the operational mission on 22 August 2010 to determine the course of action to be taken pursuant to AFDA s. 102. You can make directions that action be taken pursuant to AFDA s. 102 where you consider it is necessary to do so.

20. Should further information come to light suggesting that an allegation against a person or persons subject to the AFDA may be well-founded, the relevant commanding officers would be obliged to reconsider their decision under AFDA s. 102.

21. Finally, I note that this advice is subject to legal professional privilege and should not be disclosed without discussing the consequences of doing so with the Attorney-General.

PSR(IC)4

LTCOL
DD OPS LAW

Enclosure:

1. Reference A

24 March 2017

Attorney-General

Investigations into NZDF operation in Afghanistan on 22 August 2010, and allegations of mistreatment of Qari Miraj
Our Ref: ATT114/1931

1. This memorandum outlines options for investigations to examine:
 - 1.1 an operation in Afghanistan on 22 August 2010, in which New Zealand Defence Force (NZDF) members participated; and
 - 1.2 allegations of mistreatment of a target of that operation, Qari Miraj, during his subsequent detention by NZDF members.
2. This memorandum is for noting and referral to other Ministers. It has been reviewed by NZDF Legal Services and MFAT Legal Division. Questions may be directed to Deputy Solicitors-General Virginia Hardy (^{PSI}) and Aaron Martin (PSR(IC)4)

Executive summary

3. If Ministers wish to initiate a non-criminal investigation of allegations regarding the operation and the mistreatment, we outline options for doing so. These include:
 - 3.1 a Royal commission, public or government inquiry under the Inquiries Act 2013; or
 - 3.2 a NZDF Court of Inquiry (COI) under the Armed Forces Discipline Act 1971 (AFDA).
4. However it may be prudent to await the decision of NZDF commanding officers as to whether they consider the recent allegations are “not well-founded”. Unless they are so satisfied, the commanding officers are required to refer the allegations into either the military or civilian justice systems.
5. We also outline other criminal investigations which could take place, including by New Zealand Police and the prosecutor of the International Criminal Court (ICC).

Background

6. On 22 August 2010, NZDF Special Air Service (SAS) forces, Afghan National Security Forces, and United States air assets participated in an operation in the Tigiran Valley, Afghanistan. At least nine individuals on the ground were killed.¹ NZDF advises:
 - 6.1 the SAS members were debriefed immediately after the operation (including by a NZDF legal advisor);
 - 6.2 no allegations were made or issues raised in respect of the conduct of any NZDF member.

7. By 26 August 2010, an Incident Action Team (IAT)² led by US Air Force Brigadier-General Timothy Zadalis, and incorporating Afghan Ministry of Defence, Afghan Ministry of Interior and International Security Assistance Force members, investigated allegations that civilians may have been killed in the operation. NZDF advises the IAT:
 - 7.1 concluded that a malfunction with a gun sight on one of the US helicopters caused rounds it fired to fall short of their intended targets, hitting buildings that may have housed civilians, rather than insurgents.³
 - 7.2 concluded that members of ground forces (including NZDF members) appeared to have complied with all applicable Rules of Engagement.⁴
 - 7.3 **PSR(R)1**
 - 7.4 **PSR(R)1**

8. Allegations have recently been made suggesting:⁵
 - 8.1 a larger number of deaths occurred during the operation.
 - 8.2 a number of the deceased were civilians, not insurgents.
 - 8.3 NZDF members departed from applicable Rules of Engagement.
 - 8.4 there are grounds to suspect NZDF members and/or US forces may committed war crimes.
 - 8.5 some months after the operation, one of the operation's intended targets (Qari Miraj) was detained and mistreated by NZDF members.

¹ NZDF "NZDF operations in Bamiyan Province on 22 August 2010" (press release, 20 April 2011).

² Sometimes referred to as an Incident Assessment Team.

³ ISAF Joint Command Afghanistan "Joint assessment team confirms possibility of civilian casualties in Baghlan" (press release, 29 August 2010).

⁴ And consequently the laws of armed conflict and international humanitarian law.

⁵ Including in Nicky Hager & Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the Meaning of Honour* (Potton & Burton, Nelson, 2017).

9. Ministers have sought advice as to the options available, should they consider further investigation of these allegations is warranted.

Criminal investigations

NZDF preliminary inquiries, investigations and referrals

10. The allegations suggest NZDF members committed offences against the AFDA.⁶ Section 102(1) of the AFDA requires commanding officers to consider action in response to any allegation that an NZDF member has committed an offence against the AFDA. Unless the commanding officer considers the allegation “not well-founded”, they must either:
- 10.1 cause the allegation to be recorded as a charge and investigated under military law; or
 - 10.2 refer the charge to an “appropriate civilian authority”⁷ for investigation
11. An allegation may be considered “not well-founded” for the purposes of a military prosecution if:
- 11.1 the evidence which can be adduced before a military tribunal is sufficient to provide a reasonable prospect of a finding of guilty on a charge; and
 - 11.2 it is in the interests of service discipline that the allegation is recorded in the form of a charge.
12. An allegation may be considered “not well-founded” for the purposes of a civilian investigation if:⁸
- 12.1 there is insufficient evidence which could be adduced before a civilian court to provide a reasonable prospect of conviction; or
 - 12.2 the public interest does not require a prosecution.
13. A commanding officer may initiate a preliminary inquiry to enable them to determine whether an allegation is “not well-founded”. NZDF Orders provide that any NZDF member may conduct a preliminary inquiry, including a member of the Military Police.⁹
14. NZDF advises:
- 14.1 the only inquiries into the conduct of NZDF members during the operation were those carried out:

⁶ Including offences against the general law, which by virtue of s 74(1), are also offences against the AFDA.

⁷ “Appropriate civilian authority” is not defined in the AFDA. We assume for present purposes that New Zealand Police is the civilian authority to which allegations of this kind would most appropriately be referred.

⁸ See the *Solicitor-General's Prosecution Guidelines 2013* at [5.1].

⁹ A preliminary inquiry could also be peer reviewed by a person external to NZDF, eg a lawyer or retired Judge. We are aware the Judge Advocate General maintains a list of security-cleared Queen's Counsel, members of which could be called upon for this purpose. It may also be possible for the relevant NZDF Order to be amended to provide for a substantive preliminary inquiry to be undertaken by a person external to NZDF.

- 14.1.1 in the NZDF debrief immediately following it; and
- 14.1.2 by the IAT in its immediate aftermath, and which reported four days later.
- 14.2 no preliminary inquiry has been undertaken in relation to the allegations of mistreatment of Qari Miraj.
15. In the context of these allegations we consider NZDF commanding officers are required to take one of the following three actions.
- 15.1 Satisfy themselves on the information now available that it cannot be said that the allegations are “not well-founded”. The allegations must thereafter be either:
- 15.1.1 the subject of charges under AFDA, and a military investigation carried out.
- 15.1.2 referred to an appropriate civil authority for investigation.
- 15.2 Satisfy themselves on the information now available (including the IAT report in relation to the operation) that the allegations are “not well-founded”.
- 15.3 Initiate a preliminary inquiry to enable them to determine whether the allegations are “not well-founded”.

Police investigation

16. It remains open for New Zealand Police to (in accordance with their normal procedures) commence an investigation as to whether offences have been committed against the general law (including crimes against humanity and war crimes, in respect of New Zealand civilian courts may exercise jurisdiction, irrespective of where the acts occurred). Such an investigation would not be dependent upon any referral from NZDF.

International Criminal Court

17. The ICC has jurisdiction to prosecute crimes against humanity and war crimes.¹⁰ The ICC prosecutor may commence an investigation at the request of any State Party to the Rome Statute of the ICC, the United Nations Security Council, or on their own initiative.¹¹

¹⁰ Rome Statute of the International Criminal Court, arts 7–8.

¹¹ Articles 13–15. The ICC prosecutor can receive information from any person for this purpose, and will conduct a preliminary analysis of the seriousness of the information received before submitting a request for authorisation of a formal investigation to the ICC Pre-Trial Chamber. Matters considered at this stage include:

- whether the information provides a reasonable basis to believe that a crime within ICC jurisdiction has been committed;
- whether the case is or would be admissible, including by reference to the genuineness of any national-level investigation or prosecution; and
- whether opening an investigation would serve the interests of justice, taking into account the gravity of the alleged crimes and the interests of victims.

18. However the ICC's jurisdiction is complementary to national criminal jurisdictions.¹² A case will be inadmissible before the ICC if it:¹³
- 18.1 is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; or
 - 18.2 has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.
19. New Zealand will be best placed to resist any investigation by the ICC prosecutor if it conducts its own, genuine investigation into the allegations. This is because it may be doubted whether the ICC would consider that:
- 19.1 the IAT investigation was an investigation by New Zealand (it was led by a US official, and it unclear to us at this time whether it had any New Zealand representation); and
 - 19.2 New Zealand has given genuine consideration to prosecuting NZDF members on the basis of the IAT investigation (given its inconclusivity).

Non-criminal investigations

20. There are likely to be significant difficulties associated with conducting a non-criminal investigation concurrent with any NZDF disciplinary or civilian investigation or prosecution.¹⁴ This is especially so if the non-criminal investigation's terms of reference would require it to investigate the same subject matter as is the subject of the NZDF disciplinary or civilian investigation or prosecution. For these reasons it may be prudent to await:
- 20.1 the decision of NZDF commanding officers as to whether the allegations are "not well-founded". If that threshold is not satisfied, it may also be prudent for any non-criminal investigation to await the conclusion of any resulting NZDF or civilian investigation or prosecution.
 - 20.2 confirmation from New Zealand Police that either they do not propose to commence any investigation, or that any investigation that has commenced has concluded.
- before any non-criminal investigation is initiated.
21. If Ministers consider further investigation of the allegations is warranted through a non-criminal investigation, a number of options are available.

¹² Preamble, art 1.

¹³ Article 17(1).

¹⁴ These are discussed in more detail at paragraphs 24 and 27 below.

*Viable options**Inquiries Act 2013*

22. The Inquiries Act 2013 regulates three types of investigations into matters of public importance: Royal commissions, public inquiries and government inquiries.¹⁵ Such inquiries have no power to determine the civil, criminal, or disciplinary liability of any person.¹⁶ However they may make findings of fault, and recommend that further steps be taken to determine civil, criminal, or disciplinary liability.¹⁷
23. An Inquiries Act inquiry may summon witnesses and compel the production of documents.¹⁸ It may also:¹⁹
- 23.1 forbid the publication of evidence and submissions, or the identities of persons participating in the commission or inquiry;
 - 23.2 restrict public access to the inquiry; and
 - 23.3 hold any part of the inquiry in private.

In this way, any security concerns regarding the public disclosure of NZDF operational information could be managed.

24. Persons appearing before an Inquiries Act inquiry are entitled to invoke privileges available under the Evidence Act 2006,²⁰ including against self-incrimination for offences against New Zealand or foreign law.²¹ We anticipate that given the serious nature of the allegations, unless there is no realistic prospect of a criminal investigation or prosecution taking place, one or more witnesses could avail themselves of this privilege, thereby impairing the inquiry's effectiveness.

¹⁵ For present purposes the only distinction between a Royal commission and a public inquiry is one of status. The key distinction between a Royal commission/public inquiry, and a government inquiry, is that reports of Royal commissions and public inquiries must be tabled in the House of Representatives, whereas the report of a government inquiry need only be provided to the appointing Minister (although it may thereafter be published, in whole or in part). Recent examples of the different species of inquiries include:

- Royal commissions: Canterbury earthquakes (2011–12) and Pike River (2010–12).
- Government inquiries: Havelock North drinking water (2016–ongoing); foreign trust disclosure rules (2016); management of Tony Douglas Robertson (2015); escape of Phillip John Smith/Traynor (2014–15); allegations regarding Hon Judith Collins and a former Director of the Serious Fraud Office (2014); and Whey Protein Concentrate contamination (2013–14).

There have been no public inquiries since the introduction of the Inquiries Act 2013.

¹⁶ Inquiries Act 2013, s 11(1).

¹⁷ Section 11(2).

¹⁸ Sections 20, 22–23.

¹⁹ Section 15.

²⁰ Section 27(1).

²¹ Evidence Act 2006, ss 60, 61. The privilege against the disclosure of communications with legal advisors (such as the NZDF legal advisor who participated in the debrief immediately following the operation) would theoretically also be available (s 54(1)); however it is arguably the Crown's privilege and could be waived by the Attorney-General.

NZDF Court of Inquiry

25. The Chief of Defence Force²² may assemble a COI “for the purpose of collecting and recording evidence on any matters”, and require the COI to report and comment on those matters.²³ The purpose of a COI is to provide an expeditious fact finding procedure, so that a matter can be promptly investigated and if necessary, prompt, remedial action can be taken. A COI is comprised of NZDF members (including at least one officer), who may be assisted by counsel (who must also be an NZDF officer).²⁴
26. COIs may summon witnesses and compel the production of documents.²⁵ They must sit in private,²⁶ and their record of proceedings may not be disclosed outside NZDF without authority from a superior commander.
27. Persons appearing before COIs are also entitled to invoke the Evidence Act privileges, including that against self-incrimination.²⁷ Again, one or more witnesses could avail themselves of this privilege, thereby impairing the inquiry’s effectiveness. However witnesses may be less likely to invoke the privilege with the confidence that:
- 27.1 sittings of the COI are in private;
 - 27.2 the COI’s record of proceedings is unlikely to be disclosed outside NZDF (or would only be disclosed with significant redactions); and
 - 27.3 the COI’s record of proceedings, and evidence given before it, is ordinarily inadmissible in any other proceedings (military or civilian).²⁸

*Other modes of inquiry considered, but not recommended**Inspector-General of Intelligence and Security*

28. NZDF is not currently specified as an “intelligence and security agency” in respect of whom the Inspector-General of Intelligence and Security may inquire.²⁹ However NZDF could be declared an “intelligence and security agency” by Order in Council, thus permitting her to inquire into the allegations.
29. However the Intelligence and Security Bill which recently received its third reading in the House of Representatives provides that only the New Zealand Security Intelligence Service and the Government Communications Security Bureau are intelligence and security agencies in respect of whom the Inspector-General may inquire. That is, the ability to bring other agencies (such as the NZDF) within the Inspector-General’s jurisdiction will soon be removed. For this reason an inquiry by the Inspector-General is not recommended.

²² Or officer in command of any part of the Armed Forces.

²³ AFDA, s 200A(2).

²⁴ Sections 200B(1) and (3)(a).

²⁵ Sections 70(1)(c), 150E(c) and 200I.

²⁶ Section 200F(1).

²⁷ Section 150B(a).

²⁸ Section 200S(1), (3).

²⁹ Inspector-General of Intelligence and Security Act 1996, s 2(1), 11(1).

State Services Commissioner

30. The State Services Commissioner may conduct inquiries, either personally or through a delegate. However the Commissioner's functions relate primarily to the public service departments, which do not include NZDF.³⁰ For this reason an inquiry by the Commissioner is not recommended.

Non-statutory inquiry

31. Ministers or the CDF could commission a non-statutory inquiry.³¹ However the person undertaking the investigation would not have powers to summon witnesses, compel the production of document, and protect classified information. For this reason a non-statutory inquiry is not recommended.

Coronial inquiry

32. A coroner may inquire into a death where the body is not in New Zealand, if the "death occurred on or from" an NZDF aircraft or ship.³² NZDF advises that its aircraft were not involved in the operation. As such this power is unavailable.
33. In theory the Solicitor-General could authorise a coroner to open an inquiry in relation a death that occurred "on or from" another aircraft, ie US helicopters.³³ However such an inquiry seems an unsuitable vehicle for investigating deaths which took place in the context of armed conflict, involving another force's aircraft.
34. For these reasons a coronial inquiry is not recommended. Further a coronial inquiry could not consider allegations of mistreatment of Qari Miraj.

Postscript

35. Your office has today received correspondence from lawyers acting for alleged victims of the 22 August 2010 operation. Their letter does not require an immediate response; the lawyers advise they will write further shortly. We would be pleased to assist your office in the preparation of a response, in due course.

Recommendations

36. We recommend that you:
- | | | |
|------|---|--------|
| 36.1 | note that it may be prudent to await a decision of NZDF commanding officers as to whether the allegations are "not well-founded", before initiating any non-criminal investigation. | Yes/No |
| 36.2 | note options for a non-criminal investigation of the allegations, should Ministers consider this warranted. | Yes/No |

³⁰ State Sector Act 1988, ss 6, 27, Sch 1.

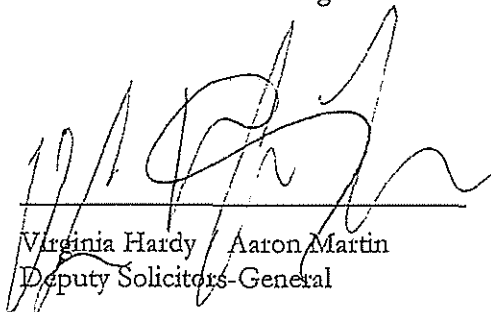
³¹ A recent example is the inquiry initiated by the Director-General of the Ministry of Primary Industries regarding fishing prosecution decisions.

³² Coroners Act 2006, s 59(1)(c)(i)(C)

³³ Section 59(1)(c)(ii).

36.3 provide copies of this memorandum to the Prime Minister, Minister of Defence and Minister of Foreign Affairs.

Yes/No



Virginia Hardy Aaron Martin
Deputy Solicitors-General

Approve/Not approved

Hon Christopher Finlayson QC
Attorney-General
/03/2017