

HON PEENI HENARE, MINISTER OF DEFENCE

Implementing Recommendation 1 of the Operation Burnham Inquiry Report: Appointment of the Expert Review Group and Terms of Reference

December 2020

This publication provides documents on Cabinet's October 2020 decision to establish an Expert Review Group to consider matters contained in recommendation 1 of the *Report of the Government Inquiry into Operation Burnham and related matters*.

The pack comprises the following documents:

- the Cabinet minute of decision: *Expert Review Group for Recommendation 1 of the Operation Burnham Inquiry Report: Appointments and Terms of Reference* [CAB-20-MIN-0458]
- the Cabinet paper: *Implementing Recommendation 1 of the Operation Burnham Inquiry Report: Appointment of the Expert Review Group and Terms of Reference* [CAB-20-SUB-0458].

This pack has been released on the Ministry of Defence website, available at: www.defence.govt.nz/publications.

It has been necessary to withhold certain information in accordance with the following provisions of the Official Information Act 1982. Where information is withheld, the relevant sections of the Act are indicated in the body of the document. Where information has been withheld in accordance with section 9(2) of the Act, no public interest has been identified that would outweigh the reasons for withholding it.

Information is withheld in order to:

- protect the privacy of natural persons, including that of deceased natural persons [section 9(2)(a)].



Cabinet

Minute of Decision

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Expert Review Group for Recommendation 1 of the Operation Burnham Inquiry Report: Appointments and Terms of Reference

Portfolio Defence

On 5 October 2020, Cabinet:

- 1 **noted** that in July 2020, the Cabinet External Relations and Security Committee (ERS):
 - 1.1 invited the Minister of Defence (the Minister), in consultation with the Prime Minister, Deputy Prime Minister, Attorney-General and Minister of State Services, to appoint an expert review group to consider the New Zealand Defence Force's (NZDF) organisational structure and record-keeping and retrieval processes;
 - 1.2 invited the Minister to report back to ERS by mid-December 2020 with a progress update from the Expert Review Group, with details as to project plans, timelines and monitoring;

[ERS-20-MIN-0025]
- 2 **noted** that the Ministers referred to in paragraph 1.1 above were consulted on the relevant appointments and Terms of Reference for the Expert Review Group;
- 3 **noted** that the Minister intends to **appoint** the following to the Expert Review Group, for one-year terms commencing on the date of appointment:
 - 3.1 Lyn **PROVOST** CNZM as Chair;
 - 3.2 Simon **MURDOCH** CNZM as a member;
 - 3.3 Tony **LYNCH** as a member;
 - 3.4 Richard **FOY** as a member;
 - 3.5 Carol **DOUGLASS** as a member;
 - 3.6 Brigadier Hugh **McASLAN** as a member;

- 4 **noted** that the Minister also intends to **appoint** the following persons to support the Expert Review Group, for one-year terms commencing on the date of appointment:
- 4.1 Air Marshal (retired) Philip **OSBORN** as an international military adviser;
- 4.2 Dennis **RICHARDSON** as an international civilian adviser;
- 5 **approved** the Terms of Reference for the Expert Review Group to consider the NZDF's organisational structure and record-keeping and retrieval processes, attached to the paper under CAB-20-SUB-0458;
- 6 **noted** that the Terms of Reference for the Expert Review Group propose a two-phase approach;
- 7 **noted** that the cost of Phase 1 will be funded from within Ministry of Defence baseline funding from the Audit and Assessment appropriation;
- 8 **noted** that the report of the Expert Review Group for Phase 1 will be presented to the Minister of Defence by June 2021, and that the Minister will consider the report and report back to Cabinet on the findings;
- 9 **noted** that the Terms of Reference and membership of the Expert Review Group will be reviewed after the report on Phase 1 has been presented to the Minister of Defence;
- 10 **noted** that the Minister intends to seek Cabinet agreement for Phase 2, including any revisions to the Terms of Reference and membership of the Expert Review Group.

Michael Webster
Secretary of the Cabinet

Released by the Minister of Defence

Office of the Minister of Defence

Chair, Cabinet

IMPLEMENTING RECOMMENDATION 1 OF THE OPERATION BURNHAM INQUIRY REPORT: APPOINTMENT OF THE EXPERT REVIEW GROUP AND TERMS OF REFERENCE

Proposal

- 1 This paper outlines my intention to appoint Lyn Provost as the Chair, and Simon Murdoch, Tony Lynch, Richard Foy, Carol Douglass, and Brigadier Hugh McAslan as members of the Expert Review Group as recommended to be established by the *Report of the Government Inquiry into Operation Burnham and related matters* (the Report). Additionally, I intend to appoint Air Marshal (retired) Philip Osborn and Dennis Richardson as international advisers to support the work of the Expert Review Group. Cabinet approval is sought for Terms of Reference for the Expert Review Group, which are at Annex C of this paper.
- 2 The Expert Review Group will consider the matters contained in recommendation 1 of the Report in Phase 1 of the review. A term of appointment of one year will commence from the date of appointment. Membership will be reviewed, alongside the Terms of Reference, after the report on Phase 1 is presented to the Minister of Defence.
- 3 After Phase 1 is complete, I consider that there is benefit in undertaking a Phase 2, which would look at broader New Zealand Defence Force (NZDF) organisational matters. Cabinet agreement will be sought on Phase 2, including any revisions to the Terms of Reference and membership of the Expert Review Group.
- 4 I will report back to the Cabinet External Relations and Security Committee (ERS) by mid-December 2020 with a progress update from the Expert Review Group, with details as to project plans, timelines and monitoring.

Background

- 5 In April 2018, the Government announced an inquiry into Operation Burnham and related matters. Operation Burnham was an operation undertaken in Afghanistan in 2010, involving the New Zealand Special Air Service (NZSAS) and other nations' forces.
- 6 In the Report released on 31 July 2020, the Inquiry found that the actions of the NZSAS on the ground during Operation Burnham were professional and lawful. However, the Inquiry also found that there were significant shortcomings in the way the NZDF subsequently dealt with allegations of civilian casualties, resulting in a series of incorrect statements in briefings to Ministers and public statements between 2010 and 2017. The Inquiry also

found that New Zealand's detention policy was inappropriate and did not reflect New Zealand's values.

- 7 As a result, the Report made four recommendations (as summarised below):
- 7.1 **Recommendation 1:** The Minister of Defence take steps to satisfy him or herself that the 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 the Report. To enable the Minister to do so, and to ensure public confidence in the outcome, the appointment of an expert review group comprising people from within and outside the NZDF (including overseas military personnel with relevant expertise) is recommended to be established.
 - 7.2 **Recommendation 2:** Establish, by legislation, an office of the Inspector-General of Defence, to be located outside of the NZDF's organisational structure.
 - 7.3 **Recommendation 3:** Promulgate a Defence Force Order setting out how allegations of civilian casualties should be dealt with, both in-theatre and at NZDF Headquarters.
 - 7.4 **Recommendation 4:** Develop and promulgate effective detention policies and procedures.
- 8 On 28 July 2020, ERS considered each recommendation. In respect of recommendation 1, ERS invited the Minister of Defence, in consultation with the Prime Minister, Deputy Prime Minister, Attorney-General and Minister of State Services, to appoint an expert review group to consider the NZDF's organisational structure, record keeping and retrieval processes [ERS-20-MIN-0025 refers].
- 9 In this paper, I address the implementation of recommendation 1 in terms of forming an expert review group, and the scope of work that this group will be expected to carry out.
- 10 I consider that this work is critically important to maintain public and political confidence in the NZDF, and to ensure that lessons are applied and relevant structures and institutions are fit for purpose.
- 11 I agree with the findings of the Report in relation to the failures of senior commanders whose post-operation performance was deficient. These failures undermined two fundamental constitutional principles, 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 the NZDF to ministers.
- 12 In addition to addressing recommendation 1 of the Report, I consider that there would be benefit in exploring the organisational and cultural issues within the NZDF that are outlined in the Report, coupled with strategic

challenges the NZDF is facing and will face in the coming years, to test whether the broader organisational structure of the NZDF is fit for purpose to meet these challenges.

- 13 Strategic challenges include the NZDF's role in the all-of-Government response to COVID-19 and more generally in providing aid to the civil power; increasing national security demands; utilisation of new capabilities; an increasingly complex and dynamic international security environment; economic disruption; and rapid technological change.
- 14 I propose that two separate phases be considered.
- 15 Phase 1 will address recommendation 1 of the Report:
 - 15.1 The Expert Review Group will assess whether the NZDF's organisational structure and record-keeping and retrieval processes are in accordance with international best practice, and whether they are sufficient to remove or reduce the possibility of organisational and administrative failings of the type identified in the Report occurring in the future.
 - 15.2 The report of the Expert Review Group for Phase 1 will be presented to the Minister of Defence by June 2021.
 - 15.3 I will consider the Phase 1 report, and report back to Cabinet on the findings.
- 16 Cabinet agreement will be sought on Phase 2, including any revisions to the Terms of Reference and membership of the Expert Review Group
- 17 Phase 2, if Cabinet was to agree to it, would assess the NZDF's broader organisational structure, including:
 - 17.1 Considering whether the current form, function and structure of the NZDF is fit for purpose for the current and future operational environment.
 - 17.2 Providing input into the Defence White Paper process, should Cabinet decide to commission a White Paper. The Defence Assessment currently underway will provide a comprehensive review of New Zealand's strategic environment and the implications for defence policy settings and NZDF roles and tasks to provide a basis for future analysis and decisions on force structure.
- 18 The Prime Minister, Deputy Prime Minister, Attorney-General, and Minister of State Services were consulted on the relevant appointments, and on the Terms of Reference for the Expert Review Group.

Membership

- 19 I propose that the Expert Review Group comprise:

- 19.1 a Chair, and
- 19.2 five members, including senior public service officials and a senior military officer.
- 20 I further propose that the Expert Review Group be supported by two international advisers: a former senior civilian public official and former senior military officer.
- 21 The Expert Review Group will be able to seek expert advice on any matter within the scope of the Terms of Reference, and may choose to seek input from the academic community to inform its work.
- 22 The Terms of Reference and membership of the Expert Review Group will be reviewed after the Phase 1 report has been presented to the Minister of Defence. Should Cabinet agree to undertake Phase 2, it will be desirable to retain some continuity of membership.
- 23 I intend to appoint Lyn Provost as Chair of the Expert Review Group, for a term of one year from the date of appointment.

23.1

s9(2)(a)

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- 24 I also intend to appoint Simon Murdoch, Tony Lynch, Richard Foy, Carol Douglass, and Brigadier Hugh McAslan as members of the Expert Review Group, for a term of one year from the date of appointment.

24.1

s9(2)(a)

A large grey rectangular redaction box covers the content of paragraph 24.1.

24.2

s9(2)(a)

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s9(2)(a)

24.3

s9(2)(a)

24.4

s9(2)(a)

24.5

s9(2)(a)

- 25 I also intend to appoint Air Marshal (retired) Philip Osborn, of the United Kingdom, and Dennis Richardson, of Australia, as international advisers to support the Expert Review Group, for a term of one year from the date of appointment. I consider that both would offer immense value in being able to provide an independent military or civilian perspective from the New Zealand representatives. Due to travel restrictions as a result of COVID-19, the international advisers will contribute virtually.

25.1

s9(2)(a)

s9(2)(a)

25.2

s9(2)(a)

Meeting frequency and regular reporting

- 26 The Expert Review Group will meet on a regular basis, at a frequency agreed to between the Chair and the Minister of Defence, and sufficient to make timely progress on their work programme.
- 27 The Expert Review Group will report to me by early November 2020 with a progress update on initial planning, and thereafter on a regular basis at a frequency agreed to between the Chair and the Minister of Defence.
- 28 I will report back to ERS by mid-December 2020 with a progress update from the Expert Review Group, with details as to project plans, timelines and monitoring [ERS-20-MIN-0025 refers].
- 29 I may choose to share subsequent updates with ministerial colleagues and/or Cabinet.

Handling of classified information

- 30 The Chair, after receiving advice from the Ministry of Defence and the New Zealand Defence Force, will seek agreement from the Minister of Defence to an appropriate process and settings for the handling of classified information that may be required to be accessed, distributed and discussed by the Group.
- 31 I will include the agreed process and settings for the handling of classified information in the progress update due to be reported to ERS by mid-December 2020.

Representativeness of appointment

- 32 I am satisfied that these appointments provide for a balanced group in terms of gender, age and New Zealand and international representation in view of the high calibre of expertise and knowledge that each candidate is required to have. I consider that there is an appropriate mix of skills and experience that will enable the Expert Review Group to carry out its work.

Remuneration

- 33 The Expert Review Group is classified as a Group 4 Level 1 body under the Cabinet Fees Framework. The fee for the Chair, Lyn Provost, is NZD1,150 per day and the fee for member Simon Murdoch, and international advisers Air Marshal (retired) Philip Osborn and Dennis Richardson is NZD865 per day. These fee rates are consistent with the Fees Framework.
- 34 Tony Lynch, Richard Foy and Carol Douglass, as senior public service officials, and Brigadier Hugh McAslan, as a senior NZDF officer, will not be remunerated for their roles as part of the Expert Review Group.

Appointment process and consultation

- 35 I can confirm that an appropriate process has been followed in selecting the proposed appointees, in terms of the Te Kawa Mataaho Public Service Commission appointment guidelines. In summary, that process comprised consulting officials from the Ministry of Defence, the NZDF, Te Kawa Mataaho, the Department of the Prime Minister and Cabinet, and the Department of Internal Affairs to find suitable candidates for appointment, and to determine the scope of the work that the Expert Review Group will be required to carry out. Discussions were had with each candidate regarding their suitability for appointment.
- 36 This process was appropriate because the Expert Review Group has no legislative basis and is mandated by the 28 July 2020 ERS decision [ERS-20-MIN-0025 refers]. Furthermore, the Expert Review Group needs to be in place as soon as possible to enable the Minister of Defence to report back to ERS by mid-December 2020 as required by the ERS minute cited above.

Conflicts of interest

- 37 I can confirm that appropriate enquiries concerning conflicts of interest have been carried out, in accordance with Te Kawa Mataaho appointment guidelines, to identify any conflict of interest that could reasonably be identified, and no conflicts of interest have been identified.

Timing and Publicity

- 38 I will release a press statement, which will include the Terms of Reference, once the appointments to the Expert Review Group have been approved and the Chair, each member and both international advisers have been notified.

Consultation

- 39 The Prime Minister, Deputy Prime Minister, Attorney-General, and Minister of State Services were consulted on the relevant appointments, and on the Terms of Reference for the Expert Review Group.
- 40 The Treasury, Te Kawa Mataaho, Department of the Prime Minister and Cabinet, Department of Internal Affairs and Crown Law were consulted.

Financial implications

- 41 The operating expenditure for Phase 1 is estimated to be up to NZD700,000. This expenditure is forecasted out 12 months to cover the Expert Review Group's fees in line with the Cabinet Fees Framework, costings for the Ministry of Defence to employ staff to support the functioning and work of the Expert Review Group, domestic travel, commissioning expert advice and any workshop or stakeholder engagement events. Due to travel restrictions as a result of COVID-19, the international advisers will contribute virtually.
- 42 Phase 1 operating costs will be funded from within Ministry of Defence baseline funding from the Audit and Assessment appropriation. As a result, the Ministry's Audit and Assessment work programme for financial year 2021 will entirely comprise the work of the Expert Review Group. The purpose of this appropriation is for the Secretary of Defence to arrange for the assessment and audit of any function, duty or project of the NZDF, as and when required by the Minister of Defence. The Terms of Reference for the Expert Review Group clearly fall within scope.
- 43 Existing staff from the NZDF and the Ministry of Defence will need to support elements of the work of the Expert Review Group. Due to the technical nature of parts of the scope of the Terms of Reference, particularly in relation to record-keeping and retrieval processes, the NZDF will need to resource technical specialists to support the work of the Expert Review Group. These technical specialists will be primarily sourced from the Communication and Information Systems Branch and the Knowledge and Information Management Directorate. It may also be necessary to draw upon expertise from outside of the Defence agencies for this work.
- 44 Phase 2 will need to be costed prior to Cabinet agreement being sought.

Recommendations

- 45 It is recommended that Cabinet:
1. **note** that on 28 July 2020, ERS invited the Minister of Defence, in consultation with the Prime Minister, Deputy Prime Minister, Attorney-General and Minister of State Services, to appoint an expert review group to consider the NZDF's organisational structure and record-keeping and retrieval processes [ERS-20-MIN-0025 refers];
 2. **note** that the Prime Minister, Deputy Prime Minister, Attorney-General and Minister of State Services were consulted on the relevant appointments and Terms of Reference for the Expert Review Group;
 3. **note** my intention to appoint the following persons to form the Expert Review Group, for a term of one year commencing from the date of appointment:
 - a. Lyn Provost as the Chair;
 - b. Simon Murdoch as a member;

- c. Tony Lynch as a member;
 - d. Richard Foy as a member;
 - e. Carol Douglass as a member;
 - f. Brigadier Hugh McAslan as a member;
4. **note** my intention to appoint the following persons to support the Expert Review Group, for a term of one year commencing from the date of appointment:
 - a. Air Marshal (retired) Philip Osborn as an international military adviser;
 - b. Dennis Richardson as an international civilian adviser;
 5. **approve** the Terms of Reference for the Expert Review Group to consider the NZDF's organisational structure and record-keeping and retrieval processes;
 6. **note** that on 28 July 2020 ERS invited the Minister of Defence to report back to ERS by mid-December 2020 with a progress update from the Expert Review Group, with details as to project plans, timelines and monitoring;
 7. **note** that the cost of Phase 1 will be funded from within Ministry of Defence baseline funding from the Audit and Assessment appropriation;
 8. **note** that the report of the Expert Review Group for Phase 1 will be presented to the Minister of Defence by June 2021;
 9. **note** that the Minister of Defence will consider the Phase 1 report, and report back to Cabinet on the findings;
 10. **note** that the Terms of Reference and membership of the Expert Review Group will be reviewed after the report on Phase 1 has been presented to the Minister of Defence;
 11. **note** that Cabinet agreement will be sought on Phase 2, including any revisions to the Terms of Reference and membership of the Expert Review Group.

Hon Ron Mark
Minister of Defence

Annexes:

- A. Organisation Form
- B. Candidate CV Forms

C. Terms of Reference for the Expert Review Group

Released by the Minister of Defence