

HON PEENI HENARE, MINISTER OF DEFENCE

Report Back on Implementation of the Government Inquiry into Operation Burnham and Related Matters Recommendations

November 2021

This publication provides documents updating Cabinet on the implementation of the Recommendations from the Report of the Government Inquiry into Operation Burnham and related matters.

The pack comprises the following documents:

- the Cabinet minute of decision: *Report Back on Implementation of the Government Inquiry into Operation Burnham and Related Matters Recommendations* [CBC-21-MIN-0007]
- the Cabinet paper: *Report Back on Implementation of the Government Inquiry into Operation Burnham and Related Matters Recommendations* [CBC-21-SUB-0007]

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 where making it available would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand [section 6(a)].

Information is also withheld in order to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials [section 9(2)(f)(iv)].



Cabinet Business Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Report Back on Implementation of the Government Inquiry into Operation Burnham and Related Matters Recommendations

Portfolio Attorney-General / Foreign Affairs / Defence

On 26 January 2021, the Cabinet Business Committee:

- 1 **noted** that in July 2020, the Cabinet External Relations and Security Committee (ERS):
 - 1.1 approved the initial Government response to report of the Government Inquiry into Operation Burnham and related matters, which accepted in principle all four recommendations, and assigned lead agencies;
 - 1.2 requested progress reports on the work streams for each recommendation;

[ERS-20-SUB-0025]

Inquiry recommendation 1: review of NZDF organisational structure and record keeping

- 2 **noted** the progress report from the Ministry of Defence and New Zealand Defence Force on the establishment of the Expert Review Group in the paper attached under CBC-21-SUB-0007;
- 3 **noted** that this work stream is progressing in accordance with agreed timeframes, and a report on Phase 1 of the review will be submitted to ERS by 30 June 2021;

Inquiry recommendation 2: the establishment of the Independent Inspector-General of Defence

- 4 **noted** that the Crown Law Office has progressed this work stream within agreed timeframes;
- 5 **noted** that the companion paper *Progress Update on the Establishment of an Independent Inspector-General of Defence*, attached under CBC-21-SUB-0002, provides advice and seeks decisions on this work stream;

Inquiry recommendation 3: the creation of a civilian casualty policy

- 6 **noted** that the Chief of Defence Force has promulgated a Defence Force Order which establishes the required treatment of civilian casualty reports, both in-theatre and at New Zealand Defence Force Headquarters;

7 **noted** that the companion paper *Update on Defence Implementation of the Government Inquiry into Operation Burnham and Related Matters Recommendation 3: Civilian Casualties*, attached under CBC-21-SUB-0006 provides advice on this work stream;

Inquiry recommendation 4: detention policies and procedures

8 **noted** the progress report, from the Ministry of Foreign Affairs and Trade, on the development of detention policies and procedures in the paper attached under CBC-21-SUB-0007;

9 **noted** that this work stream is progressing within agreed timeframes and officials have commenced work to develop effective detention policies and procedures in the context of offshore military deployments;

10 s9(2)(f)(iv)

11 s9(2)(f)(iv)

12 s9(2)(f)(iv)

Rachel Clarke
Committee Secretary

Present:

Rt Hon Jacinda Ardern
Hon Grant Robertson
Hon Kelvin Davis
Hon Dr Megan Woods
Hon Chris Hipkins
Hon Carmel Sepuloni
Hon Andrew Little
Hon David Parker
Hon Nanaia Mahuta
Hon Poto Williams
Hon Damien O'Connor
Hon Stuart Nash
Hon Kris Faafoi
Hon Peeni Henare
Hon Jan Tinetti

Officials present from:

Office of the Prime Minister
Department of the Prime Minister and Cabinet

Office of the Attorney-General

Office of the Minister of Foreign Affairs

Office of the Minister of Defence

Chair, Cabinet Business Committee

REPORT BACK ON IMPLEMENTATION OF THE GOVERNMENT INQUIRY INTO OPERATION BURNHAM AND RELATED MATTERS RECOMMENDATIONS

Proposal

1. To update on the progress made by lead agencies in implementing the recommendations of the Government Inquiry into Operation Burnham and related matters (“the Inquiry”, “Operation Burnham Report”), as directed by the Cabinet External Relations and Security Committee (ERS) in July 2020.

Relation to Government priorities

2. This paper concerns the Government’s response to an inquiry stemming from events relating to several military operations occurring in Afghanistan in 2010 and 2011. The response supports the priorities of Aotearoa’s independent foreign policy with a focus on promoting multilateralism, human rights, and the international rule of law.
3. The paper also supports the priorities of delivering a transparent government, valuing who we are as a country, and having an international reputation we can be proud of.

Executive Summary

4. The Inquiry was conducted to establish the facts in connection with allegations of wrongdoing by New Zealand Defence Force (NZDF) personnel during certain operations in Afghanistan; and to examine NZDF’s treatment of reports of civilian casualties, the propriety of the transfer of an insurgent leader to Afghan custody, and the scope of NZDF’s rules of engagement in use during operations in Afghanistan. The Report was submitted to Ministers and publicly released in July 2020.
5. The Inquiry identified areas which would benefit from clarification and improvement, and made four key recommendations. Cabinet accepted these recommendations in principle, and appointed lead agencies to drive and coordinate each work stream, which are summarised below [CAB-20-MIN-0363]:

Ref	Lead	Recommendation
1	Ministry of Defence (MOD), NZDF	To establish an Expert Review Group to satisfy the Minister of Defence that NZDF’s (a) organisational structure and (b) record keeping and retrieval processes are in accordance with international best practice.
2	Crown Law	To, in consultation with other agencies, undertake analysis of the nature, form and functions of the inspector-general role, and establish a senior officials working group to develop a plan for the establishment of an Independent Inspector-General of Defence .
3	MOD, NZDF	To promulgate a Defence Force Order setting out how

		civilian casualties should be dealt with.
4	Ministry of Foreign Affairs (MFAT)	To develop and promulgate detention policies and procedures.

6. These recommendations were designed to support New Zealand’s constitutional principles related to civilian control of the military, and ministerial accountability to Parliament. Additionally, the suite of recommendations, once implemented, will ensure that the way NZDF conducts its business – both at home and abroad - continues to be within the parameters of international law, and in accordance with New Zealand values. The implementation of the recommendations is intended to create mechanisms which strengthen Ministerial and public trust and confidence in the military as an institution, and enhance system-wide transparency.
7. On 28 July 2020, Cabinet External Relations and Security Committee (ERS) invited the Attorney-General and the Ministers of Foreign Affairs and Defence to report back by mid-December on the progress made by lead agencies in implementing the four recommendations (which was later deferred to January 2021)
- 7.1. The Expert Review Group (recommendation 1) and Detention Policy (recommendation 4) updates contained within this paper comprise the full progress reports of those respective work streams.
- 7.2. Separate substantive papers have been submitted for the Inspector-General of Defence work stream (recommendation 2) which seeks consideration of proposed policy outcomes and objectives, and changes to agency and Ministerial responsibility; and the Civilian Casualty work stream (recommendation 3), which provides the Defence Force Order final deliverable for Cabinet consideration as directed by ERS.
8. All four recommendations have been progressed in accordance with the agreed work programmes.

Recommendation 1: organisational structure, record keeping and retrieval processes

9. Cabinet directed “*that the Minister of Defence, in consultation with the Prime Minister, Deputy Prime Minister, Attorney-General and Minister of State Services appoint an expert review group to consider NZDF’s organisational structure, record keeping and retrieval purposes*”.
10. This recommendation results from the Inquiry’s findings related to the quality of information provided by the NZDF to Ministers and, through them, to Parliament. The Inquiry recommended a comprehensive review of the mechanisms within the NZDF for gathering, recording, preserving and providing information to ensure that the flow of material from the NZDF to its Minister is timely, comprehensive and accurate, thereby supporting the constitutional principles of Ministerial accountability and civilian control of the military.

Progress Report by the Expert Review Group (ERG)

11. On 5 October 2020 the previous Minister of Defence, Hon Ron Mark, appointed the members of the ERG and the two international advisors who support the group [CAB-20-MIN-0458 refers]. The ERG is supported by a secretariat from both the Ministry of Defence and the NZDF.

12. The ERG has developed and publicly released the group's Terms of Reference, which outlines the two phases within this work stream:

12.1. **Phase 1:** the ERG 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. The Minister of Defence is expected to report back to Cabinet on the findings of Phase 1 by June 2021.

12.2. **Phase 2:** Once Phase 1 is completed and pending Cabinet approval, the ERG will consider whether the current form, function and structure of the NZDF is fit for purpose within the current and future operational environment.

13. The work of the ERG is proceeding to scope and time. The ERG met for the first time on 23 October and was briefed by the Inquiry authors, Sir Terence Arnold and Sir Geoffrey Palmer. A series of interviews (with individuals who have been identified as having valuable experience or knowledge) are underway, and are expected to be completed by the end of February 2021. s6(a)

Next steps for the Expert Review Group

14. Drafting of the report on Phase 1 will commence in early 2021, and is expected to be consulted with agencies in s9(2)(f)(iv). The Minister of Defence has received a progress report, and will continue to receive regular updates.

Recommendation 2: establishing an Independent Inspector General of Defence (IGD)

15. In July 2020 Cabinet directed *“the Crown Law Office, in consultation with the Department of the Prime Minister and Cabinet (DPMC), the Public Service Commission (PSC), the Ministry of Defence, and the NZDF, to undertake analysis of the nature, form and functions of an inspector-general role, and to establish a senior officials working group to develop a plan for the establishment of an independent IGD”*.

Progress update on the establishment of the Independent Inspector General of Defence

16. A Senior Officials Group (with the addition of the Ministry of Justice) has been convened to develop a plan for the establishment of the IGD. Initial analysis on the nature, scope, functions, powers and form of the IGD has been undertaken. Given the scale and scope of this work stream, the Senior Officials Group has developed a four-phase plan to structure the approach, which spans the entirety of the establishment process from policy development to implementation, including:

16.1. **Phase one:** Policy development on the nature, scope, functions, powers, and form of the IGD and consultation.

16.2. **Phase two:** Drafting legislation to establish the IGD and its powers and responsibilities.

16.3. **Phase three:** Legislative process and budget decisions (if required).

16.4. **Phase four:** Implementation of the legislation and set-up of the IGD.

17. s9(2)(f)(iv)

18. In the Attorney-General's separate paper "*Progress Update on the Establishment of an Independent Inspector-General of Defence*" Cabinet agreement is sought for:

18.1. The proposed policy outcome and objectives to guide the work stream;

18.2. The four-phase plan for establishing the IGD; and

18.3. Ministerial responsibility for the establishment of the IGD being jointly shared between the Attorney-General and the Minister of Defence, and agency responsibility transferring from the Crown Law Office to the Ministry of Defence.

Next steps for the Independent Inspector-General of Defence work stream

19. If Cabinet agrees, the Attorney-General and the Minister of Defence will jointly lead the establishment of the IGD, and will report to Cabinet s9(2)(f)(iv)

Recommendation 3: civilian casualties work stream

20. Cabinet directed the NZDF and Ministry of Defence to evaluate recommendation 3 [*"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"*]; determine the most appropriate way of meeting its purpose, and put the necessary order/s or policies in place.

21. The NZDF and Ministry of Defence have evaluated the recommendation, and the Chief of Defence Force has promulgated Defence Force Order 35: *New Zealand Defence Force Response to Civilian Harm* ("DFO 35"). DFO 35 provides a standardised procedure for responding to reports of civilian casualties relating to NZDF operations in situations of armed conflict overseas,¹ as well as reports of critical or non-critical civilian harm. As soon as any member of the NZDF becomes aware of a report of civilian casualties, DFO 35 outlines the procedures required for assessment, escalation, and reporting within Defence and to Ministers.

22. The procedures in DFO 35 are to be followed by all members of the NZDF, including those operationally deployed overseas, and in New Zealand, including at Headquarters NZDF.

Next steps: civilian casualties work stream

23. The Chief of Defence Force has promulgated DFO 35, and this is provided in the standalone substantive paper ("*Update on Defence Implementation of the*

¹ It is likely that the Independent Inspector-General of Defence, once established, will also have a role within the NZDF's civilian casualty response procedures.

Government Inquiry into Operation Burnham and Related Matters Recommendation 3: Civilian Casualties). Cabinet is asked to consider this DFO to ensure that it meets the intent of the Recommendation. Following Cabinet consideration of the DFO, this work stream will be brought to a close and any training on, use of, or updates to the DFO will be incorporated into NZDF's standard routine.

Recommendation 4: detention policy and procedures

24. The Cabinet ERS Committee directed MFAT to lead in the development of effective detention policies and procedures, and work together with NZDF, the Ministry of Defence, Crown Law, and the Department of Prime Minister and Cabinet (DPMC).
25. The Inquiry found that New Zealand's detention policy was flawed, in part, due to the distinction drawn between those international obligations applicable in partnered and non-partnered operations. In relation to the partnered detention operation 'Operation Yamaha', the Inquiry found that:
- 25.1. New Zealand's detention policy was inappropriate and resulted in a detainee being transferred without measures being in place to protect him against the risk of torture or mistreatment in detention.
 - 25.2. Despite strong evidence that the detainee was tortured after he was placed in Afghan custody, senior leaders and Ministers were not briefed, nor were steps taken to investigate, to express New Zealand's position on the use of torture, or review its policy on detention.
26. The Inquiry found that New Zealand had breached its *non-refoulement*², and its obligations under Common Article 1 of the 1949 Geneva Conventions to "ensure respect" for the obligations contained in Common Article 3 concerning the treatment of detainees.
27. The Inquiry recommended that the Government develop and promulgate effective detention policies and procedures (including for reporting to Ministers) in relation to all persons detained by, or with the involvement of, New Zealand forces in operations they conduct overseas, and the treatment of allegations of torture or mistreatment of detainees.

Progress update on the development of detention policy and procedures

28. s9(2)(f)(iv)

29. s9(2)(f)(iv)


² The obligation of non-refoulement requires that a state must not expel, extradite, or return ('refouler') a person to another state if there is a real risk that the person will be subject to torture (or transferred to a third State to be so treated).

s9(2)(f)(iv)

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s9(2)(f)(iv)

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s9(2)(f)(iv)

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s9(2)(f)(iv)

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s9(2)(f)(iv)

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s9(2)(f)(iv)

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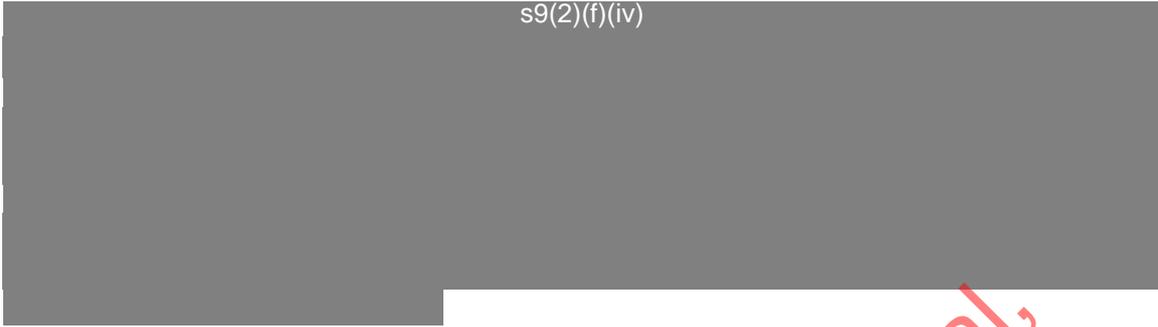
s9(2)(f)(iv)

36.

s9(2)(f)(iv)

Released by the Attorney-General,
the Minister of Foreign Affairs and
the Minister of Defence

Next steps for the detention policy work stream

37.  s9(2)(f)(iv)
38.  s9(2)(f)(iv)
39.  s9(2)(f)(iv)

Financial Implications

40. There are no financial implications arising from this paper. In the event that there are financial implications as the work streams progress, these will be covered in subsequent papers.

Legislative Implications

41. There are no legislative impacts arising from this paper.

Regulatory Impact Statement

42. There are no regulatory impacts arising from this paper and a regulatory impact statement is not required.

Human Rights

43. The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.
44. Advice on the rights implications of the final detention policy and procedures will be provided when policy decisions are made (noting that the intention of this work is to strengthen the protection of human rights).

Consultation

45. This paper has been coordinated by the Ministry of Defence, and prepared with contributions from the nominated lead agencies (NZDF, Crown Law, and MFAT).
46. This paper has been consulted with NZDF, MFAT, Crown Law, Te Kawa Mataaho and DPMC (National Security Group and Policy Advisory Group).

Communications

47. It is recommended that the Minister of Defence publicly release a statement which reflects Cabinet's consideration of both the separate IGD and civilian casualty submissions, and references the progress of the detention policy and ERG work streams.

Proactive Release

48. We do not propose to proactively release the paper at this time. We would recommend that a redacted version be released when the final policy decisions of the work streams outlined within this paper are endorsed by Cabinet.

Recommendations

49. The Attorney-General, Minister of Foreign Affairs and Minister of Defence recommend that the Committee:

1. **Note** that in 2020 Cabinet approved the proposed initial response to the Government Inquiry into Operation Burnham and related matters, which accepted in principle the four recommendations, and assigned lead agencies;
2. **Note** that Cabinet requested progress reports on each of the work streams by mid-December 2020, which was later deferred to January 2021;

Inquiry recommendation [1]: review of NZDF organisational structure and record keeping

3. **Note** that the Ministry of Defence and New Zealand Defence Force have provided a progress report on the establishment of the Expert Review Group within this paper;
4. **Note** that this work stream is progressing in accordance with agreed timeframes, and a report on Phase 1 of the review will be delivered to Cabinet by June 2021;

Inquiry recommendation [2]: the establishment of the Independent Inspector-General of Defence

5. **Note** that the Crown Law Office has progressed this work stream within agreed timeframes;
6. **Note** that the accompanying paper *Progress Update on the Establishment of an Independent Inspector-General of Defence* provides advice and seeks decisions on this work stream;

Inquiry recommendation [3] regarding the creation of a civilian casualty policy

7. **Note** that the Chief of Defence Force has promulgated a Defence Force Order which establishes the required treatment of civilian casualty reports, both in-theatre and at New Zealand Defence Force Headquarters;
8. **Note** that this deliverable has been provided separately for Cabinet consideration;

Inquiry recommendation [4] regarding detention policies and procedures

9. **Note** that the Ministry of Foreign Affairs and Trade has provided a progress report on the development of detention policies and procedures within this paper;

10. **Note** that this work stream is progressing in accordance with agreed timeframes and officials have commenced work to develop effective detention policies and procedures in the context of offshore military deployments;

11. [Redacted] s9(2)(f)(iv)

12. [Redacted] s9(2)(f)(iv)

13. [Redacted] s9(2)(f)(iv)

Authorised for lodgement

Hon David Parker
ATTORNEY-GENERAL

Hon Nanaia Mahuta
**MINISTER OF FOREIGN
AFFAIRS**

Hon Peeni Henare
MINISTER OF DEFENCE

Released by the Attorney-General,
the Minister of Foreign Affairs and
the Minister of Defence