

HON PEENI HENARE, MINISTER OF DEFENCE

Update on Defence Implementation of the Government Inquiry into Operation Burnham and Related Matters Recommendation 3: Civilian Casualties

October 2021

This publication provides documents updating Cabinet on the implementation of Recommendation 3 from the Report of the Government Inquiry into Operation Burnham and related matters, relating to the NZDF's civilian casualty response.

The pack comprises the following documents:

- the Cabinet Business Committee minute of decision: *Update on Defence Implementation of the Government Inquiry into Operation Burnham and Related Matters Recommendation 3: Civilian Casualties* [CBC-21-MIN-0006]
- the Cabinet paper: *Update on Defence Implementation of the Government Inquiry into Operation Burnham and Related Matters Recommendation 3: Civilian Casualties* [CBC-21-SUB-0006].

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



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.

Update on Defence Implementation of the Government Inquiry into Operation Burnham and Related Matters Recommendation 3: Civilian Casualties

Portfolio **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 response to the report of the Government Inquiry into Operation Burnham;
 - 1.2 directed the New Zealand Defence Force (NZDF) and the Ministry of Defence to evaluate Recommendation 3, determine the most appropriate way of meeting its purpose, and put the necessary order/s or policies in place;
 - 1.3 invited the Minister of Defence to report back to ERS by mid-December 2020 on the mechanism put in place for the handling of civilian casualties.

[ERS-20-MIN-0025]
- 2 **noted** that the Chief of Defence Force has promulgated a Defence Force Order, attached as Appendix 1 to the submission under CBC-21-SUB-0006, that sets out a standardised New Zealand Defence Force response process for reports of civilian casualties arising from military activity in situations of armed conflict;
- 3 **agreed** that the Defence Force Order referred to in paragraph 2 above meets the intent of the Inquiry's recommendation to promulgate a Defence Force Order setting out how allegations of civilian casualties should be handled, both in-theatre and at NZDF Headquarters.

Rachel Clarke
Committee Secretary

Present: (see over)

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

Released by the Minister of Defence

UPDATE ON DEFENCE IMPLEMENTATION OF THE GOVERNMENT INQUIRY INTO OPERATION BURNHAM AND RELATED MATTERS RECOMMENDATION 3: CIVILIAN CASUALTIES

Proposal

1. This paper provides an update on the implementation of the Government Inquiry into Operation Burnham and related matters (the Inquiry) Recommendation 3, relating to the New Zealand Defence Force's (NZDF) civilian casualty response.

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. In response to Inquiry Recommendation 3 to promulgate a Defence Force Order (DFO) for dealing with reports of civilian casualties, and Cabinet's subsequent direction to evaluate Inquiry Recommendation 3 and put the necessary order/s or policies in place [ERS-20-MIN-0025 refers], the Chief of Defence Force has promulgated DFO 35: *New Zealand Defence Force Response to Civilian Harm* (Appendix A). This paper seeks Cabinet's agreement that this DFO meets the intent of the Inquiry's recommendation.

Background

5. Recommendation 3 of the Inquiry stated: *We recommend that a DFO be promulgated setting out how allegations of civilian casualties should be dealt with, both in-theatre and at NZDF Headquarters.* Cabinet subsequently directed (1) the NZDF and the Ministry of Defence to evaluate this recommendation, determine the most appropriate way of meeting its purpose, and put the necessary order/s or policies in place; and (2) invited the Minister of Defence to report back to ERS by mid-December 2020 on the mechanism (its nature and content) that has been put in place for the handling of civilian casualties. Following a reprioritisation of Cabinet papers scheduled for December 2020, the report back was deferred until early 2021 to make space for more urgent matters.
6. The NZDF previously lacked a standardised procedure for responding to reports of civilian casualties. Responses have therefore varied in form and function, and there

has been no requirement for further investigation into civilian casualties that occur legally under the Law of Armed Conflict (also referred to as International Humanitarian Law). It is my view, as well as the view of the NZDF and the Ministry of Defence, that the NZDF should respond appropriately and consistently to all reports of civilian casualties. This has informed Defence's response to the Inquiry's recommendation.

Actions taken to deliver on Inquiry Recommendation 3: civilian casualties

DFO 35 provides an NZDF civilian casualty response procedure

7. On 20 November 2020 the Chief of Defence Force approved DFO 35: *New Zealand Defence Force Response to Civilian Harm* (Appendix A), which was developed to meet the intent of Inquiry Recommendation 3. The DFO has subsequently been promulgated to the NZDF.
8. DFO 35 provides a standardised NZDF procedure for responding to reports of civilian casualties arising from military activity in situations of armed conflict overseas.¹ This procedure also applies to responding to reports of other forms of 'critical civilian harm' (for example significant damage to civilian property, damage to essential civilian infrastructure or services, or significant degradation of quality of life imposed on a community). Additionally, DFO 35 establishes procedures for responding to reports of 'non-critical civilian harm' (being all civilian harm not meeting the threshold of critical civilian harm) as well as reports of civilian harm determined not to be credible. This paper focuses on the specific elements of DFO 35 that relate to the Inquiry's emphasis on introducing procedures for responding to civilian casualties.
9. 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. Further procedural direction, guidance and training for NZDF personnel may be issued as appropriate.
10. As soon as any member of the NZDF becomes aware of a report of civilian casualties arising from military activity in situations of armed conflict, DFO 35 requires that immediate reporting actions be taken to raise awareness within NZDF, the Ministry of Defence and with Ministers. An assessment is to be undertaken by the Senior National Officer or equivalent as soon as possible to ascertain basic facts, and inform whether a more formalised investigation, such as an NZDF Court of Inquiry, is required. Figure 1 provides a visual map for the NZDF civilian casualty response procedure outlined in DFO 35.
11. Implementing the response procedures set out in DFO 35 will have resource implications for the NZDF. It will also affect the Ministry of Defence, in its capacity providing civilian advice on Defence matters to Ministers. Resource implications might include additional personnel required in-theatre and in New Zealand to conduct the civilian casualties response procedure. These implications will be considered in future deployment Cabinet papers.

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. The procedures will be modified as required to reflect this.

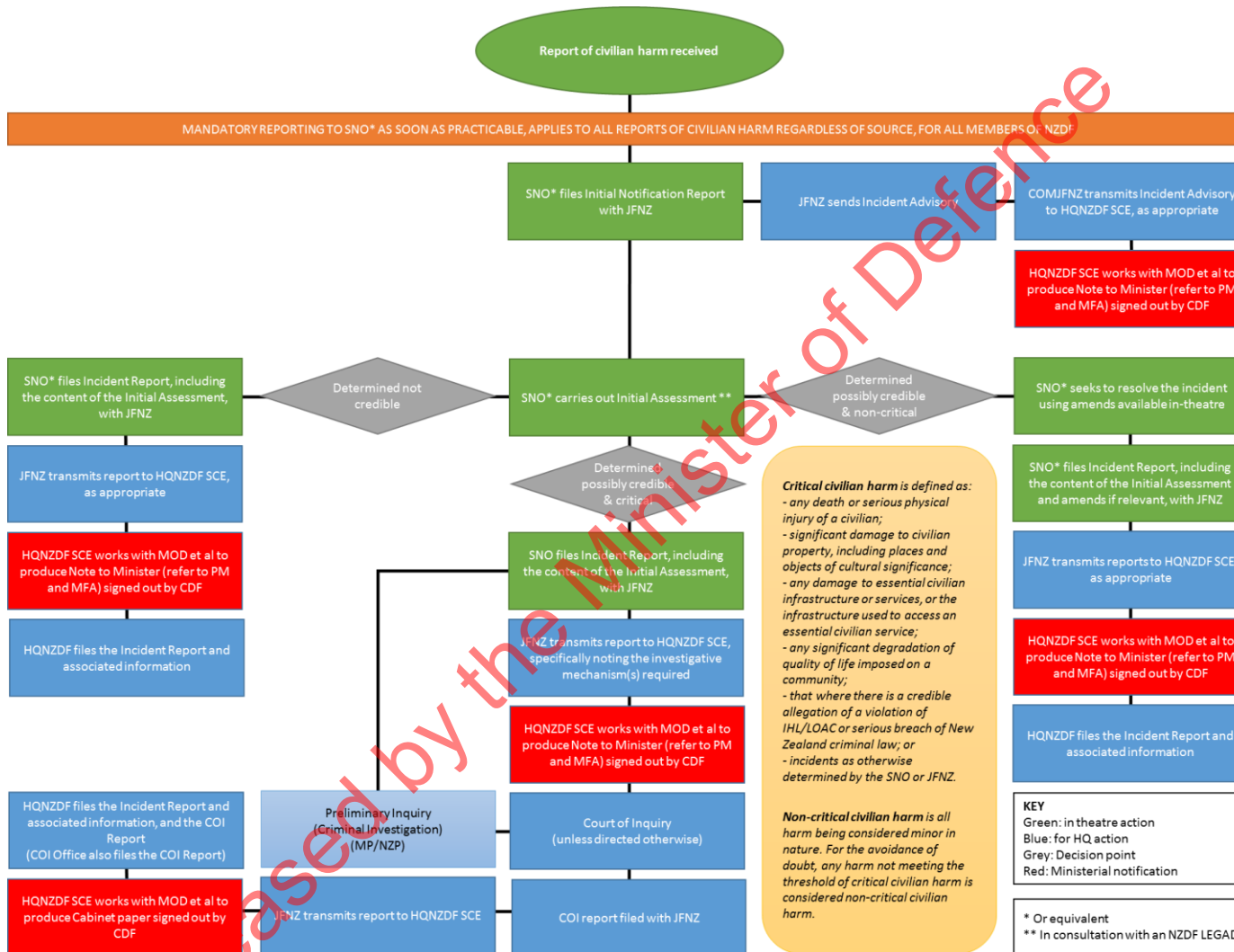


Figure 1 – Visual Map of DFO 35 civilian harm response

Released by the Minister of Defence

Enhancing Ministerial oversight and transparency

12. DFO 35 requires that the NZDF and Ministry of Defence jointly report to Ministers at up to three points during the NZDF civilian casualty response process, as outlined in the table below:

Reporting required by DFO 35	Format
[1] As soon as possible after the report of civilian casualties is received	Note to Minister of Defence, referred to the Prime Minister and Minister of Foreign Affairs
[2] After the initial assessment on the report has been conducted	Note to Minister of Defence, referred to the Prime Minister and Minister of Foreign Affairs
[3] After a Court of Inquiry has been conducted	Minister of Defence Cabinet paper, noting the findings of the NZDF Court of Inquiry, and seeking Cabinet's agreement to any proposed amends, as well as public or international messaging on outcomes

13. As highlighted in the table above, a Note to the Minister of Defence (referred to the Prime Minister and Minister of Foreign Affairs) will advise of any critical civilian harm reports received by NZDF. Further advice will be provided should the initial assessment deem any critical civilian harm report to be possibly credible. Where reports of civilian harm are assessed to be either not credible or non-critical, the Ministers will be advised if Commander Joint Forces New Zealand determines that the nature of the report is likely to be of interest.

14. The following measures outlined in DFO 35 are intended to ensure transparency in the NZDF's civilian casualty response procedure:

- The public release of DFO 35 in full.
- Initial assessments into reports of civilian casualties are to be consulted with NZDF Legal Advisors.
- All Court of Inquiry findings into civilian casualty incidents will be subject to external legal review, prior to their finalisation. Court of Inquiry reports are also intended to be proactively released, redacted as necessary.
- Once established, the Independent Inspector General of Defence will also likely have a role in ensuring the transparency and integrity of NZDF civilian casualty response processes. DFO 35 is expected to be updated as required to reflect any changes to procedures resulting from the establishment of the Independent Inspector General of Defence position.
- The Chief of Defence Force will publish an annual report on all civilian harm reports involving the NZDF.

Deployments with international partners

15. In the event of a report of civilian casualties relating to an NZDF operational activity involving foreign partner nations, the NZDF's civilian casualty response procedure would apply to the actions of involved NZDF personnel. New Zealand would generally be required to rely on the consensual participation of partner nations in any New Zealand investigation.
16. At the same time, large multinational missions (such as the US-led Operation Inherent Resolve in the Middle East region) more frequently contain civilian casualty tracking and reporting cells, and investigative procedures. DFO 35 directs the NZDF to engage proactively to seek sufficient information sharing and involvement of the NZDF in any such civilian casualty response mechanisms, prior to NZDF deployments to situations of armed conflict.
17. Advice on partner approaches to responding to civilian casualty reports will be included in all future relevant deployment Cabinet papers. This is to ensure that Cabinet understands potential impacts for the NZDF's conduct of its civilian casualty response procedure, if civilian casualties do occur.

Further developments to NZDF civilian casualty response procedures

18. DFO 35 is intended to be a living document, and will continue to be updated by the NZDF as required so that it remains as relevant and effective as possible. The NZDF intends to review the DFO once it has been in force for 12 months. This first review would enable the role of the Independent Inspector General of Defence (which by this stage should be more clearly defined) to be incorporated into the civilian casualty response procedure outlined in DFO 35. It would also enable any issues identified with the implementation of the DFO to be resolved.

Legal considerations

19. Civilian harm is not necessarily unlawful under the Law of Armed Conflict/International Humanitarian Law. For example, during armed conflicts, lethal force against civilians directly participating in hostilities is permitted. Further, unintentional or incidental civilian harm is not unlawful if it is not excessive in light of the overall military advantage anticipated from an attack. As such there is no legal duty to investigate every incident of civilian harm.
20. Nevertheless, the protection of civilians is a strategic priority for NZDF. DFO 35 intentionally sets a higher bar for responding to reports of civilian harm than what is legally required under the Law of Armed Conflict/International Humanitarian Law. However, this superior standard to which NZDF seeks to hold itself does not imply any emerging legal norm to investigate every instance of civilian harm resulting from military activity.

Financial Implications

21. While funding for the work on DFO 35 has been sourced from existing baselines, implementing DFO 35 may impact budgets in the future. Cabinet agreement will be sought if the result of an investigation into a report of civilian harm is that significant amends beyond existing financial delegation thresholds are proposed.

Human Rights

22. The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990.

Consultation

Jointly prepared by	New Zealand Defence Force; Ministry of Defence.
Consulted	Ministry of Foreign Affairs and Trade; Department of the Prime Minister and Cabinet (NSG); Crown Law Office.
Informed	Department of Prime Minister and Cabinet (PAG).

23. While not consulted on the specific text of DFO 35, representatives from the Red Cross Movement, UNICEF, the Council for International Development and New Zealand academic institutions were consulted by officials to inform the production of DFO 35.

Communications

24. Should Cabinet agree with this paper, it is recommended that I publicly announce Defence's response to Inquiry Recommendation 3.

Proactive Release

25. DFO 35 is intended for public release in full. A redacted version of this Cabinet paper will be proactively released following consideration by Ministers.

Recommendations

26. The Minister of Defence recommends that the Committee:

1. **Note** that the Chief of Defence Force has promulgated a Defence Force Order that sets out a standardised NZDF response process for reports of civilian casualties arising from military activity in situations of armed conflict.
2. **Agree** that this Defence Force Order meets the intent of the Inquiry's recommendation to promulgate a Defence Force Order setting out how allegations of civilian casualties should be handled, both in-theatre and at NZDF Headquarters.

Authorised for lodgement

Hon Peeni Henare
MINISTER OF DEFENCE