



## Office of the Inspector-General of Intelligence and Security

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Report of Inquiry into the role of the GCSB and the NZSIS  
in relation to certain specific events in Afghanistan

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**Public Report**

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## REPORT SUMMARY:

- Intelligence support from the NZSIS and GCSB was essential to protect NZDF personnel in Afghanistan over 2009-2013. A Bureau team in Wellington was focused on supporting NZDF activities in Afghanistan and both agencies at key points deployed personnel to Afghanistan.
- Both intelligence agencies made valuable contributions to the lead-up to Operation Burnham, carried out by NZDF on 21 August 2010. After the Operation they helped gather information relevant to assessing its outcome. In particular they helped identify whether any insurgents had been killed. Through this process both agencies were aware of allegations of civilian casualties.
- The agencies accurately reported to New Zealand partners the intelligence that came to their attention after Operation Burnham. Our inquiry found they could have done more to ensure that the reasonable possibility there had been civilian casualties was considered at an interagency level and reported to Ministers.
- After Operation Burnham both agencies continued to support NZDF efforts to find the insurgents targeted by the Operation, including Qari Miraj. Their work was material to Miraj's capture on 16 January 2011 by NZDF and the Afghan intelligence agency, NDS Department 90, which subsequently incarcerated him.
- By 2010 there was sufficient objective evidence to put the intelligence agencies on notice of a significant risk that NDS 90 might seriously mistreat detainees, primarily to obtain confessions.
- Both agencies received a copy of Miraj's "confession" to NDS and learnt of an allegation that he had been tortured. They shared accounts of these matters with domestic partners but did not consider whether they should analyse the risks to Miraj's human rights or ensure there was wider Government consideration of the possibility he had been tortured. The NZSIS, consistent with the New Zealand Government's position, encouraged NDS to keep Miraj in custody.
- Throughout 2009-2013 the Bureau provided continuous intelligence support to NZDF in Afghanistan. The Service deployed personnel on two separate occasions over the course of NZDF Operations Wātea and the later Awarua. At times the Service directly exchanged information with NDS, while information from the Bureau was capable of making its way indirectly to NDS.
- NDS was involved in arresting or otherwise capturing insurgents. Its detention facilities in Kabul and across Afghanistan were the subject of increasingly credible and authoritative reports of torture of detainees.
- In 2011 a UNAMA report confirmed on-going and widespread serious mistreatment of detainees by NDS. Both intelligence agencies knew of the report. The GCSB responded by putting certain precautions in place. These were positive but needed to go further. The Service made no observable changes to its close relationship with NDS, which it had re-established when it re-deployed personnel in August 2012. Further reports and announcements confirmed the problem with NDS detention facilities. The approaches and safeguards the intelligence agencies put in place, particularly over 2012 and 2013 did not meet best practice.
- Our inquiry finds that the intelligence agencies must take responsibility for identifying and managing risks arising from their participation in the wider New Zealand military enterprise. Those risks are not solely the responsibility of other parts of Government. Our first recommendation addresses this.
- Our second recommendation reflects our view that a precautionary approach should be taken to identification of human rights risks. In particular, it is not enough to have in place a limitation on intelligence sharing that applies only when the particular intelligence shared is likely to "directly" result in a real risk of torture or other serious human rights breaches.



## FOREWORD

1. This public report of our *Afghanistan Inquiry*<sup>1</sup> examines the roles of the Government Communications Security Bureau (GCSB or the Bureau) and the New Zealand Security Intelligence Service (NZSIS or the Service), and the nature and adequacy of their internal processes, in providing support to New Zealand military deployments to Afghanistan from 2009 to 2013. In the five-year period covered by this Inquiry the two intelligence agencies provided the New Zealand Defence Force (NZDF) – both the Provincial Reconstruction Team (NZPRT) and Special Air Service (NZSAS) – with intelligence support.
2. The main prompt for our Inquiry was the 2017 publication of *Hit & Run: the New Zealand SAS in Afghanistan and the meaning of honour*, by Nicky Hager and Jon Stephenson, which includes certain statements about the two intelligence agencies. The then Inspector-General, Cheryl Gwyn, commenced this Inquiry in March 2018 to answer a number of questions.
3. First, we considered it important to form a view on certain suggestions in the book insofar as they related to the intelligence agencies. Second, while we touched on related ground in our 2019 *Senate Report*<sup>2</sup> concerning the agencies' cooperation with the CIA during 2001 to 2009, including in Afghanistan, it is worth understanding how the New Zealand intelligence agencies in the years following and in the different context of supporting NZDF's role in the NATO led coalition, responded both to their operational mission and to human rights issues. Importantly, from 2011 to 2013 there were a number of authoritative public reports and determinations announcing widespread abuse and torture of detainees by Afghan authorities, including by the National Directorate of Security (NDS) with whom the GCSB, by indirect means, and the NZSIS, directly, exchanged information. It is in the public interest for New Zealanders to have a reasonable sense of the nature of the cooperation with NDS, and of our intelligence agencies' response to human rights risks confirmed by official public reports.
4. This *Afghanistan Inquiry* report covers four terms of reference, addressing three broad topics. The first section examines the role of the agencies in supporting NZSAS' Operation Burnham. The separate *Government Inquiry into Operation Burnham*<sup>3</sup> is tasked with making factual findings about what happened in that Operation with particular focus on the role of NZDF. The Inspector-General's jurisdiction by contrast covers the two intelligence agencies, and our Inquiry focusses solely on what the intelligence agencies knew and did – the rest is context. The second section looks at the role of the agencies in respect of the capture and detention of Qari Miraj. Information available to NZSIS and GCSB alleged that he was tortured. (The *Government Inquiry* has subsequently concluded the evidence of this is "strong.") The final section of the report examines the agencies' responses over the five year period of this Inquiry to the human rights risks arising from intelligence exchanges with the NDS. In particular, we were interested in what happened after NDS mistreatment of conflict-related detainees was

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<sup>1</sup> IGIS *Inquiry into the role of the GCSB and the NZSIS in relation to certain specific events in Afghanistan – the Afghanistan Inquiry*.

<sup>2</sup> IGIS *Inquiry into possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme 2001-2009* (31 July 2019) available at [www.igis.govt.nz](http://www.igis.govt.nz). This Inquiry was sparked by the United States Senate Select Committee on Intelligence Report (2014). Given this origin, the short title of our report is the *Senate Report*.

<sup>3</sup> The Report of the *Government Inquiry into Operation Burnham and Related Matters* (July 2020)(*Government Inquiry*).

publicly and comprehensively confirmed. Our assessments and findings reflect, but do not repeat, the analysis of law and “best practice” when engaging with foreign partners contained in the Inspector-General’s 2019 *Senate Report* and its *Supplementary Paper*.<sup>4</sup> Our report concludes with two recommendations concerning the agencies’ support to military operations, followed by some general observations arising from this Inquiry.

### **Our Inquiry process**

5. The evidence for our Inquiry came from interviews on oath with 11 current and former members of agency staff, and from our direct access to agency security records. We reviewed many thousands of documents and emails. I thank all the individuals who spoke to us and all those who provided other assistance, including NZDF. We had regular meetings with the *Government Inquiry* pursuant to a formal Memorandum of Understanding and found these extremely valuable.<sup>5</sup>
6. The Inspector-General left to become Justice Gwyn during the course of this Inquiry. Fortunately, that did not disrupt our process as from an early stage I led on this Inquiry, first as Deputy Inspector-General and, from August 2019 to June 2020, as Acting Inspector-General. I completed the initial drafts of the classified and unclassified reports in that capacity. The new Inspector-General, Brendan Horsley, commenced his role as we were finalising the report. The three investigators who worked with me on the Inquiry and report have paid meticulous attention to detail. Without their expertise in the agencies’ systems and operations and without their persistence many of the documents essential to key findings and issues would not have been located. I thank them for the long hours they put in, and the rigour of the resulting work. It lends confidence, too, that two Inquiries, looking at matters from different perspectives, have independently reached the same position on a number of important issues in common.
7. Our jurisdiction is to ensure the legality and propriety of GCSB and NZSIS activity. It is not our role to assess the agencies’ success in meeting their intelligence objectives and this report does not attempt that. Nonetheless, from our vantage point we are confident the agencies provided valuable assistance to support the New Zealand Government’s role in Afghanistan, including playing a critical role in helping to safeguard New Zealand personnel stationed there. Professional intelligence support of the type provided by NZSIS and GCSB was essential for the NZDF, and the concerns we raise are not with that role itself, but with whether the intelligence agencies were sufficiently alive to, and prepared for, the risks involved. Our objective was to understand the agencies’ responses to the challenging operational context and human rights issues they encountered in Afghanistan, and to make any relevant recommendations for improvement. My two recommendations are directed at matters the intelligence agencies should endeavour to have in place to best fulfil their role in comparable future activities.

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<sup>4</sup> *Senate Report*, above n 2, and accompanying IGIS *Supplementary Paper: Best Practice Approaches to Information Sharing and Cooperation: Ensuring Lawful Action* (2019).

<sup>5</sup> Our Inquiry was signalled and commenced first. Given the parallel subject matter of the *Government Inquiry* and our *Afghanistan Inquiry*, a Memorandum of Understanding was executed between our two Inquiries (available on the IGIS website: [www.igis.govt.nz/publications/currentinquiries](http://www.igis.govt.nz/publications/currentinquiries)).



8. The Inspector-General is required by law to prepare a report on completion of an Inquiry.<sup>6</sup> We prepared a more detailed classified report, and then drafted this public version. It includes as much detail as I sensibly and lawfully can in order to explain the important role played by GCSB and NZSIS in Afghanistan in supporting the lawfully authorised New Zealand military efforts at the time. Information that might prejudice New Zealand's national security or international relations is not disclosed. In satisfying ourselves of that, we have had regard to material already authoritatively in the public domain, to the legal principles that govern the Inspector-General's duty to publish a report,<sup>7</sup> and we have consulted with the agencies.
9. Our office has consistently taken the view that the Inspector-General's duty to report publicly envisages a report that will enhance the accountability of the agencies to the New Zealand public by describing in a concrete way (so far as possible) what they do. Accountability of that type requires provision to the public of factually accurate and sufficiently specific information about agency activities and about their perceptions of their own mandates and responsibilities. Inevitably, we had to leave out many of the operational details that informed our findings. Preparation of this public report has been significantly facilitated by the *Government Inquiry's* work with relevant Government agencies to "declassify" a large volume of historic records. This material has been progressively placed on the Operation Burnham website, and where appropriate we refer in this report to specific documents on that site.<sup>8</sup> The website is in itself a significant step towards increased transparency to the public and therefore increased accountability.

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<sup>6</sup> Intelligence and Security Act 2017 (ISA), s 185.

<sup>7</sup> ISA, s 188(2).

<sup>8</sup> [www.operationburnham.inquiry.govt.nz/](http://www.operationburnham.inquiry.govt.nz/)

**TERM OF REFERENCE A:** What, if anything, was the knowledge, awareness and contribution of the GCSB and the NZSIS to the NZDF operations in Afghanistan in relation to events on 3 August 2010 in Bamyán Province, on 22 August 2010 in Baghlan Province, and in relation to these events over subsequent days?

10. Operation Burnham and its aftermath was a military effort to capture or kill insurgent targets believed to be temporarily located in Tirgiran village. It was supported in various ways by the GCSB and the NZSIS. This first section of our report examines the nature of that support at key points in that specific NZDF operation. In order to understand the nature of the intelligence agencies' contribution, it is necessary to provide some background on the military context and the New Zealand actors most relevant to our Inquiry. Detailed information on the wider Government and international context is in the report of the *Government Inquiry*, as is information about the particular insurgents and NZDF's planning and objectives.
11. By August 2010 there were about 200 NZDF personnel in Afghanistan. Most of these were part of the NZPRT, located at Kiwi Base, in Bamyán Province. On 10 August 2009 Cabinet had approved the additional deployment of a military contingent, consisting mainly of NZSAS members, to be located in Kabul. The NZSAS group was known as Task Force 81 (TF81), and the deployment as Operation Wātea. As well as a handful of New Zealand Police trainers and a resident New Zealand Ambassador stationed in Afghanistan at the time,<sup>9</sup> there were deployed personnel from the GCSB and the NZSIS assisting the military effort in-theatre.<sup>10</sup> In addition, the Bureau provided signals intelligence (SIGINT) support through a dedicated team based in Wellington (GCSB Wellington team).<sup>11</sup>

## RELEVANT NEW ZEALAND ACTORS AS AT AUGUST 2010

### New Zealand Provincial Reconstruction Team

12. The NZPRT operated under the NATO led International Security Assistance Force (ISAF) to assist the Afghan government with capacity building and general reconstruction efforts. The NZPRT had its own intelligence team (PRT-INTEL team), made up of military personnel and housed in its base in Bamyán. The PRT-INTEL team was tasked mostly with contributing to force protection for the NZPRT.

### Task Force 81

13. The NZSAS TF81 deployment lasted 18 months, commencing late September 2009. The deployment was partly at the request of ISAF to replace the departing Norwegian Special

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<sup>9</sup> "Former military chiefs appointed to Afghanistan" *Otago Daily Times*, online ed, Dunedin, (4 May 2010).

<sup>10</sup> Inquiry into Operation Burnham documents 01/01, 01/02, 01/03, 12/09.

<sup>11</sup> NZDF "CDF Operational Directive 21/2009: Commitment of the NZSAS to Afghanistan – Operation Wātea" (July 2009); Inquiry into Operation Burnham document 12/11.

Forces.<sup>12</sup> TF81 was based in Kabul. Both the NZSIS and GCSB provided support for its intelligence aspects.<sup>13</sup>

14. TF81's mandate was to conduct reconnaissance in Kabul and adjacent provinces to identify insurgents and Improvised Explosive Device (IED) networks, to take direct action against insurgent networks when tasked by the Government of the Islamic Republic of Afghanistan (GIROA) or ISAF, to train and support the Afghan Crisis Response Unit (CRU), and to support the NZPRT.<sup>14</sup>

#### **The All-Source Intelligence Cell and intelligence agency deployed support**

15. The TF81 All-Source Intelligence Cell (ASIC) combined human intelligence (HUMINT), SIGINT and other intelligence expertise. Operation Wātea was the first time in New Zealand history that an ASIC had been used in-theatre with this combination of intelligence capabilities.<sup>15</sup> It was housed in TF81's secure Kabul compound, known as Camp Warehouse. Its objective was to have all intelligence streams in the same workspace, cooperating to provide TF81 command with "top secret connectivity in order to facilitate in-theatre intelligence support as well as support located in NZ." The geographical areas of intelligence responsibility for TF81's ASIC were Kabul and surrounding provinces, and also Bamyan province due to the number of NZDF personnel operating there. The primary aims of the "all source intelligence architecture" were provision of "threat warnings", "target packages" and "time sensitive intelligence."
16. For a discrete period during Operation Wātea GCSB personnel deployed to Afghanistan worked closely with the ASIC.<sup>16</sup> The GCSB personnel acted as a conduit between the ASIC and other SIGINT agencies, and provided some systems expertise and oversight.
17. Throughout Operation Wātea deployed NZSIS officers assisted the TF81 mission with HUMINT expertise, including operational liaison with foreign intelligence partners.<sup>17</sup> Intelligence tasks relevant to the work of the NZSAS were within the scope of work for a deployed NZSIS officer. An NZSIS officer was the main liaison on behalf of the New Zealand government with NDS leaders in Kabul and Bamyan.<sup>18</sup>
18. Service employees undertook repeated rotations to cover the duration of the Operation Wātea deployment. The individuals deployed drafted formal intelligence reports known as "ZI" reports.<sup>19</sup> In addition, they sent informative and regular (often daily) reports ("KAB" reports) to Wellington. The record showed that substantive responses to the reports were rare during Operation Wātea. The flow of communications was overwhelmingly Afghanistan

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<sup>12</sup> Minute of Decision CAB Min (09) 28/22. NZDF 03130/DSC (2 July 2009).

<sup>13</sup> Inquiry into Operation Burnham document 12/11.

<sup>14</sup> NZDF 03130/DSC (2 July 2009). Inquiry into Operation Burnham document 12/11.

<sup>15</sup> Information in this section about the ASIC, TF81's "Intelligence Architecture" and NZDF's relationship with international intelligence agencies) can be found in Inquiry into Operation Burnham document 12/11.

<sup>16</sup> Inquiry into Operation Burnham document 12/11 and opening Statement of Director-General of GCSB to intelligence and Security Committee (ISC) (20 February 2019), public hearing) at [www.gcsb.govt.nz/news/opening-statement-to-the-intelligence-and-security-committee](http://www.gcsb.govt.nz/news/opening-statement-to-the-intelligence-and-security-committee)

<sup>17</sup> For example, see NZSIS report KAB0386 (2 September 2010). Inquiry into Operation Burnham documents 11/35 and 12/11.

<sup>18</sup> Inquiry into Operation Burnham document 11/35.

<sup>19</sup> ZI reports were commonly distributed to New Zealand domestic intelligence customers, Five Eyes partners and, where approved, to certain other countries. Inquiry into Operation Burnham document 12/08.

to Wellington, with little comment provided back by NZSIS management. Similarly, when the deployed officers were back in Wellington the record showed limited management focus on their work in Afghanistan.

### **GCSB Wellington team**

19. The GCSB provides the New Zealand government with its electronic signals intelligence service, a capability which can protect the NZDF when deployed overseas.<sup>20</sup> With respect to Afghanistan, the Bureau's communications and intelligence support to military operations in-theatre commenced some years prior to Operation Wātea. SIGINT support throughout the period of this Inquiry was provided by a Wellington-based Bureau team described as contributing "dedicated New Zealand based reach-back intelligence support."<sup>21</sup> The Bureau has separately confirmed that "a critical function of its Intelligence Directorate was the provision of SIGINT and GEOINT (geospatial intelligence) reporting in support of New Zealand military deployments overseas. GCSB's reporting in this area continues to be recognised by our New Zealand Defence Force partners as a vital element for force protection."<sup>22</sup>
20. The GCSB Wellington team was tasked with analysing, producing and reporting intelligence about the insurgent network considered to be the primary threat to the NZPRT in Bamyān. There was close communication between it and the PRT-INTEL team. While the NZPRT was the main client, TF81 was also an in-theatre client of the GCSB Wellington team.<sup>23</sup>
21. On the evidence we saw there was minimal engagement between NZSIS and GCSB at the senior management level about their respective activities supporting Operation Wātea, but at the operational level there was a good deal of contact, particularly with respect to target identification and monitoring. Close collaboration also occurred in the sharing of intelligence reports. We found that formal intelligence reports from NZSIS and GCSB were generally distributed to both agencies, their relevant personnel in Afghanistan and New Zealand, and to NZDF intelligence personnel. The Bureau's reports were delivered daily in bulk to NZSIS by electronic means. Overall there was a high degree of integration and shared knowledge between operational personnel in the relevant agencies.

## **ROLE OF THE INTELLIGENCE AGENCIES IN EVENTS CONCERNING OPERATION BURNHAM**

### **Preliminary events and role**

22. Neither the GCSB nor the NZSIS were involved in preparations for the specific NZPRT patrol ambushed by Afghan insurgents on 3 August 2010, killing Lt O'Donnell. After the attack, however, the intelligence agencies became major contributors to an intense NZDF effort to identify and locate those responsible and to obtain a complete picture of the particular insurgent network. This effort led to Abdullah Kalta, Qari Miraj and Maulawi Nematullah being

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<sup>20</sup> Director, GCSB, Speech at the Gallagher Security Conference (March 2013).

<sup>21</sup> Inquiry into Operation Burnham document 12/11, at 17 at [3]. For an account of some of the work of this team in earlier years see the IGIS *Senate Report*, above n 2, at [66] and [67].

<sup>22</sup> GCSB *Annual Report* (2012).

<sup>23</sup> Inquiry into Operation Burnham document 12/11, at 17 at [3].

identified as leaders of the attack on the NZPRT. Operation Burnham, three weeks later, was NZDF's subsequent action, authorised by ISAF, to kill or capture Kalta and Nematullah.

23. A specific issue we examined was whether the intelligence agencies' roles extended to contributing to military targeting decisions relevant to Operation Burnham, or to assessing whether the intelligence case for a particular individual was sufficiently robust to justify nominating that individual as the target for a kill or capture mission pursuant to the ISAF Joint Prioritised Effects List process (the JPEL).<sup>24</sup> A submission to nominate a particular insurgent took the form of a JPEL package. This document summarised the intelligence case against the individual and had to be based on multiple intelligence sources. Once on the JPEL list an individual became a high rated target for a capture or kill operation by coalition forces and their Afghan partners.
24. Kalta, Miraj and Nematullah were each listed on the JPEL in early to mid-August 2010, a pivotal moment in their targeting. Henceforth NZDF efforts shifted from identifying the responsible parties to taking action against the key insurgents.
25. The Inquiry heard that JPEL documents, including the intelligence case, were assembled by the military, independent of the intelligence agencies, although they might substantially draw on their reporting. Once approved by ISAF, JPEL packages were not necessarily circulated to the agencies. We found that while the JPEL approval for the three insurgents named above was informed by SIGINT and HUMINT intelligence reported by the New Zealand agencies, the NZSIS and GCSB had no direct involvement in the decisions that placed the men on the JPEL list, which was an entirely military process.

### **Operation Burnham**

26. Operation Burnham occurred during the night of 21 to 22 August 2010 in Tirgiran, Baghlan province. This was largely Taliban-controlled territory. The NZSAS and its CRU partners targeted Kalta, known as "Objective Burnham." The plan involved assault on three compounds associated with Kalta's insurgent network.<sup>25</sup>
27. We examined the role of the intelligence agencies in support of this operation, and in particular whether they contributed to decisions or assessments that were relevant to the way NZDF conducted itself during the assault. As set out below, we found that the agencies did not influence or contribute to operational decisions during the actual overnight operation. Rather, they assisted with information to support NZDF's planning phase prior to Operation Burnham, and with the Battle Damage Assessment (BDA) phase which followed.

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<sup>24</sup> The formal JPEL process was the system used by ISAF military command to identify the high value military "objectives," including individual insurgents, so that shared efforts and resources could be prioritised. For potential human targets ISAF participating countries submitted the names of individuals to the coalition command, who in turn decided which targets would be placed on the JPEL. The criteria for listing revolved around whether the case had been made that an individual was actively fighting against the GIRoA and ISAF. Operations against JPEL individuals secured priority access to enabling resources of the coalition, such as air support. For more information on JPELs see the "Opinion of Professor Dapo Akande, Legal Opinion for Public Hearing 3 of the Inquiry into Operation Burnham" (July 2019) and "Documents Relating to the Joint Prioritised Effects List"; Available at: [www.operationburnham.inquiry.govt.nz/information/](http://www.operationburnham.inquiry.govt.nz/information/).

<sup>25</sup> NZDF Object Burnham basic overview (29 August 2010).

### **GCSB and NZSIS role leading up to the operation**

28. Both agencies were aware of major developments in the military preparations, including Operation Burnham's timing and objectives. A key finding, based on multiple references in our classified report, is that the agencies' intelligence was vital to TF81 in preparing for the Operation.
29. We concluded that detailed NZSIS reporting in all likelihood determined the timing and location of Operation Burnham. In addition, the NZSIS had a clear understanding of the intended arrangements if the Operation was successful. We learnt from the NZSIS that the plan was for the CRU<sup>26</sup> to undertake the arrest and initial detention of any prisoners and convey them to Camp Warehouse in Kabul. From there they would be transferred to NDS headquarters in Kabul.<sup>27</sup> We were advised that the NDS was to be involved because it was considered reliable and likely to create a robust and professional intelligence case against the insurgents. The choice of partner – NDS or CRU – in the planning for subsequent prosecution and detention has some relevance to matters discussed later in this report.
30. The GCSB Wellington team's contribution was described as instrumental at the time, and that strikes us as accurate. In the lead up to the Tirgiran raid the team had undertaken intelligence analysis that materially contributed to identifying and helping to locate Miraj, Kalta and Nematullah. There had been extensive coordination, approved by Bureau management, between the GCSB Wellington team and the ASIC to determine how to support the operation.
31. Neither intelligence agency participated in or provided support once Operation Burnham commenced. On its conclusion, key personnel in both intelligence agencies assessed the operation to be a success, expressing pride in their respective contributions.

### **GCSB and NZSIS role in ascertaining who was killed**

32. International Humanitarian Law (IHL) provides that civilians are to enjoy protection against the dangers arising from military operations, unless they take a direct part in hostilities.<sup>28</sup> As a result, intelligence on civilian casualties is of distinct relevance to the military for humanitarian reasons, quite apart from the value information about casualties may have for strategic reasons (eg. on-going targeting). IHL undoubtedly creates obligations that apply to the military, but we consider it important that intelligence agencies supporting military endeavours also have an understanding of those obligations just as they have an understanding of the military mission. This will allow them to recognise when humanitarian obligations may be engaged.
33. A BDA is a military task. It is a post-engagement estimate of damage, both to property and humans, resulting from the application of military force. In the case of Operation Burnham the NZSIS and the GCSB became involved at an early stage in analysing intelligence directly

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<sup>26</sup> NZDF's Afghan partner for Operation Burnham.

<sup>27</sup> See also Operation Burnham Inquiry document 12/10.

<sup>28</sup> Common Article 3, Geneva Conventions and Additional Protocols. See further: Yoram Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2008, Cambridge UK) Chapter 5 "Protection of civilians and civilian objects from attack"; UNAMA *Afghanistan: Annual Report on Protection of Civilians in Armed Conflict* (2009, Kabul, Afghanistan) at 35 and 36.

relevant to the BDA because it was strategically critical for NZDF to understand the impact of the raid on the targets and on insurgency leadership. The intelligence agencies obtained intelligence relevant to this issue, compiled reports, and shared them with NZDF and approved New Zealand and foreign partners. From the start, possible civilian casualties emerged as a recurring theme in the intelligence the agencies' encountered, including a number of explicit references to women and children, or to other people who were plainly non-combatants.

34. Although ascertaining with assurance who had been killed and injured was a protracted and difficult exercise, it soon became apparent from intelligence reports that none of the targeted insurgent leaders had been killed in the raid on the village. Intelligence reliably indicated the leaders had indeed been present or proximate, but had escaped the raid and were living nomadically near Tirgiran.
35. There was a significant volume of intelligence, from multiple different sources, about the impact of the assault on the village. It is not for our Inquiry to examine or assess the accuracy of NZDF's ultimate BDA based on this information. It is sufficient for our purposes to note that GCSB, and to a lesser degree NZSIS, were participants in that process. Information available to the intelligence agencies provided greatly varying accounts of the damage incurred, including the effect on civilians. A small number of the accounts were self-evidently implausible. While the bulk were not of that type, they were also not consistent in their specific details of casualty numbers or likely identities.

#### **GCSB and NZSIS response to allegations of civilian casualties**

36. While much of the early reporting on casualties varied as to numbers injured or killed and as to the likely reliability of the sources for that intelligence, it is indisputable on the evidence we saw that the *reasonable possibility* of some civilian casualties was known to the intelligence agencies shortly after Operation Burnham. We found civilian casualties were referenced in a significant volume of intelligence available to them. In addition, the deaths of some likely civilians were mentioned in internal conversations between intelligence agency personnel, and in the Bureau's own formal reporting to interested partners. The focus of these communications was on the BDA or on the implications of likely deaths for on-going targeting of the insurgent network.
37. By 24 August 2010 allegations of civilian casualties were in the public domain. The *New York Times* reported that a team of coalition investigators had been dispatched to the scene to investigate allegations of the deaths of eight civilians and the wounding of 12 in an operation conducted by coalition special forces.<sup>29</sup> The article referred to at least one child being killed. GCSB Wellington team and PRT-INTEL team personnel knew of the article. We saw evidence that at least two Wellington team employees were concerned about the deaths of civilians and raised this with management.
38. Our Inquiry asked what the intelligence agencies did with their knowledge of the allegations of civilian casualties. In particular, did they consider it triggered any responsibilities beyond the

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<sup>29</sup> Dexter Filkins "New Case of Civilian Deaths Investigated in Afghanistan" *New York Times* (24 August 2010).

function of reporting for intelligence purposes? The answer to that question on the evidence we accessed is that the agencies at the time saw their responsibilities as confined to accurately reporting the intelligence they collected. The Bureau has subsequently confirmed to us the propriety of that response. It emphasised in response to a draft of this report that it has no role in assessing the credibility of allegations within particular intelligence reports. Its role instead is to provide intelligence that accurately records matters of fact, such as the fact an allegation has been made. It says other agencies were responsible for assessing the credibility or significance of the allegations.

39. A Bureau officer, shortly after Operation Burnham, sent a formal minute to their manager. It summarised the reports of alleged casualties, noting they ranged from low single digits to an allegation which suggested casualties up to triple figures. It noted some allegations referenced innocent civilians. The minute warned that the early intelligence about casualties should be treated with caution and "its accuracy varies."
40. The Director of the GCSB was advised in an internal email on 23 August 2010 that there was "some chatter" "civilians were killed," but that TF81 was confident it had attacked the right people. Directly below in the same email chain another Bureau manager says the GCSB "had NO effect on this operation." Further, a contemporary written list of "Points" for the Director addresses the Operation but does not mention any alleged civilian casualties, although it is possible that was addressed verbally. Other than these two documents (the email trail, and the "Points"), we saw nothing to suggest the Director was informed of the details of the Bureau's role, or the increasing suggestions of civilian casualties.
41. We cannot agree with the manager's assertion that the Bureau had no effect, given the particular support provided by it in the weeks leading up to the Operation and prior to its commencement. As noted, the Bureau's Wellington team had made a substantial contribution to work to identify and locate Miraj, Kalta and Nematullah. A deployed Bureau officer too had provided some support in preparation for the operation. In Wellington the relevant GCSB senior manager had been briefed on the imminence of the raid and had given approval for specific support activity prior to its commencement.
42. The Bureau also issued a number of formal intelligence reports which went to relevant parties within the New Zealand government, including NZDF and the office of the Minister of Defence. In the body of a couple of these detailed reports there are a number of references to the deaths of individuals who almost certainly would be non-combatants. However, we note that none of the reports are about civilian casualties *per se*. The reports speak of "individuals killed", not civilians, and there is no mention of the word "civilians" in the "Key Point" summaries at the start of each document. Our point is that while these reports are accurate as intelligence reports, they did not communicate the humanitarian concerns in which we are interested.
43. There is force in the Bureau's response that its role is to convey facts accurately, and not to determine the significance of the facts or put a particular narrative on them, especially if they relate primarily to another agency's role (here, NZDF). Nonetheless, we think some formal comment to domestic partner agencies and/or Ministers on the concerning likelihood of civilian casualties would have been proper and easily done. It is the humanitarian significance



of the matter which suggests to us that something more ought to have been done to highlight it – even just a separate briefing, or covering note.

44. In terms of the Bureau's internal communications, after 22 August 2010 we would have expected there to be formal and focussed briefings to its Director. Such briefings ideally would have accurately detailed the nature of the Bureau's support for the NZDF in Operation Burnham, and would have provided clear updates on the unfolding picture of likely or possible civilian casualties. A formal approach of this type within the agency is more appropriate than emails or verbal briefings given the significance of the issue which, for the Government, does go beyond the immediate strategic imperatives of the NZDF. A formal and properly documented approach would allow the highest levels of the organisation to better assess the significance of the issues, including considering whether any steps should be taken, in or outside the agency.
45. It appears that the Service too did not consider civilian casualties might be of any particular significance to any role it had. For instance, on the evidence the possibility of civilian casualties was not notified to senior managers within the NZSIS. As with the Bureau, we saw no discussion within the NZSIS as to whether there should be a multi-agency decision on what New Zealand's obligations might be. A deployed Service officer's weekly KAB report for 23-29 August 2010 does not mention civilian casualties or any intended investigation of that possibility by anyone. A more informal email sent to a fellow employee does record, however, that concerns of significant civilian casualties had led ISAF Commander General Petraeus to call for an investigation to "contain adverse fallout."
46. In addition to the totality of the intelligence clearly indicating a likelihood of some civilian casualties, both agencies knew that an ISAF investigation had been commenced to review the conduct of Operation Burnham. The ISAF investigation resulted in a report by its Incident Assessment Team (the IAT). Importantly, and in summary, the IAT's report concluded that civilian casualties from Operation Burnham were a distinct possibility. We are satisfied that the relevant NZSIS and GCSB personnel had no interaction with that investigation, and agency staff did not see a copy of the IAT report. This question is pertinent to whether the intelligence agencies should have known that NZDF's subsequent public account of the IAT report<sup>30</sup> was incorrect. The Inquiry is satisfied that GCSB and NZSIS staff had no independent contemporaneous knowledge of the content of the IAT report. Any knowledge that can be imputed to them of likely civilian casualties came from their own intelligence holdings, and, as they say, they shared that intelligence within the Government.

#### **ASSESSMENT OF GCSB AND NZSIS RESPONSE TO CIVILIAN CASUALTIES**

47. Agency witnesses consistently represented to the Inquiry that they did not obfuscate or minimise any intelligence collected in relation to the outcome of Operation Burnham, including intelligence that touched on likely civilian casualties, and we accept that. We also

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<sup>30</sup> Based, it appears, on statements made by NZDF reproducing the NZSAS Commander's account that the IAT had concluded allegations of civilian casualties were baseless and had been dismissed: CDF note to the Minister of Defence "TF81 operations in August September 2010" (10 December 2010). For details on this, see the Report of the *Government Inquiry*.

recognise that the supporting role of the intelligence agencies in Operation Wātea did not confer upon them authority to take the lead on any military matter, and they had no legal duty to do so. The finalisation of a BDA, or the assessment of whether any NZSAS operation strayed from the rules of engagement or IHL, and the conduct of corollary investigations into collateral damage and civilian casualties, are all military matters. We acknowledge the fact that in this case NZDF was the lead agency for the Government's military objectives in Afghanistan. Notwithstanding the legal position, in the circumstances we think something more was required from the New Zealand intelligence agencies given their not insignificant role in the collective New Zealand effort and given what they knew from the considerable body of intelligence to which they had access and which they shared.

48. It seems that staff in both agencies had doubts about the reliability of various sources of intelligence which mentioned or asserted civilian casualties. These doubts did not result in either agency considering whether it would be appropriate for it, or some other New Zealand partner agency, to attempt to obtain a more certain picture of whether, and how many, civilians may have died. In addition, some of the evidence we saw suggested a sceptical attitude on the part of some individuals in the agencies. It seems likely those factors influenced the approach taken within the organisations. Escalation to Chief Executive level, via a formal and explicit briefing, of the fact that the agencies were indeed recipients of a significant volume of intelligence attesting to civilian casualties, accompanied by some comment on the nature of that reporting, did not happen. Our assessment, at the level of propriety, is that this internal step should have. It might conceivably have led to a different train of inquiry at the highest levels within the two organisations about the appropriate wider Government response.
49. The absence of any such broader analysis and evaluation<sup>31</sup> about what civilian casualties might mean for the New Zealand Government's obligations can probably be attributed to three main factors. One is that agency staff did not contemplate whether there were sufficiently reliable allegations of civilian casualties to trigger demand for any New Zealand response. Second, staff were aware of the ISAF investigation process. They likely considered this sufficient response, and may have come to understand (wrongly) that the IAT report said civilian casualties were unlikely. And third, the clear sense we received from relevant interviews is that any concerns or questions about whether a New Zealand investigation was required into civilian casualties would have been seen at the time as wholly outside the intelligence agencies' bailiwick.
50. We consider there is an alternative perspective, however.<sup>32</sup> Both agencies actively supported preparations for Operation Burnham. Afterwards, there was a consistent theme of civilian

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<sup>31</sup> Elements of the intelligence agencies' functions, as set out in the Government Communications Security Bureau Act 2003, s 8(1)(c) (examine and analyse intelligence) and the New Zealand Security Intelligence Service Act 1996, s 4 (evaluate intelligence).

<sup>32</sup> The Bureau has expressed reservations about the validity of this perspective, and asks that this Report note: "GCSB's role is to provide timely, accurate, and relevant intelligence to inform New Zealand Government decisions. If GCSB holds intelligence about possible civilian casualties as a result of New Zealand military operations, GCSB considers that its role requires it to promptly bring such intelligence to the attention of relevant decision-makers, to enable them to seek further information or take action as they see fit. GCSB is concerned that taking a broader role could inappropriately involve it in operational, policy, or legal issues that are beyond its remit and that other New Zealand Government agencies are better placed to address."

deaths in the totality of the intelligence they held. In all the circumstances, and given the extent and nature of their involvement, the New Zealand intelligence agencies should have taken a broader and more proactive approach to their role at that point. This means more than accurately reporting the intelligence to interested partners by standard methods. In the Inquiry's view the NZSIS and the GCSB were especially well placed to ask the following questions in wider Government circles: did the reasonable possibility that plainly innocent civilians were killed in the NZDF led operation, to which they contributed, require any part of the New Zealand Government (as a matter of law or ethics or State sector propriety) to take any further steps? In particular, should anyone "assess" whether civilians have been injured or killed? Should Ministers receive a focussed briefing on the picture of civilian casualties, and/or should legal advice be obtained?

51. Supporting the NZSAS in Afghanistan was a multi-agency effort. Collective military efforts to which the NZSIS and GCSB contribute should be founded on a collective and articulated multi-agency plan which anticipates likely human rights impacts and addresses the respective intelligence agency obligations if those concerns arise. A recommendation to this effect is included at the end of this report.

**TERM OF REFERENCE B:** If the GCSB and the NZSIS played any role, how did these agencies consider and apply New Zealand's human rights obligations to any information collected and/or received about the capture and detention of any individuals in relation to term of reference A?

52. Term of reference B requires an evaluation of the extent to which New Zealand's human rights obligations were considered relevant to certain operational activities carried out by the GCSB and the NZSIS, over the period September 2010 to April 2011, to support the tracking, capture and detention of Qari Miraj, a member of the Taliban, and some of his Taliban associates. These activities are a particular focus of the Inquiry because the GCSB shared information with New Zealand Government agencies, including the NZSIS, containing an allegation that Miraj's confession was produced as a result of torture.
53. This section explains, to the extent possible, the involvement of the GCSB and NZSIS in:
- activities leading to the capture of Miraj and his associates and the agencies' response to the receipt of Miraj's confession;
  - the detention of Miraj by NDS; and
  - the response of the intelligence agencies once the allegations of torture were known.
54. We also assess the extent to which it is apparent, from our interviews and research, that the intelligence agencies considered and gave effect to relevant human rights obligations during the course of the above activities.

## **AFTER OPERATION BURNHAM: THE CAPTURE OF QARI MIRAJ**

### **Tracking of the insurgent network**

55. A collaborative New Zealand effort was maintained to continue intelligence gathering about the Taliban insurgents identified as having survived the attack on Tirgiran Village and the rest of their insurgent network (the network)<sup>33</sup>. Identification of the network was described as a "hot topic" in GCSB communications. While the network was based in Baghlan Province, and more particularly in the Tala Wa Barfak District, it posed a significant security threat to the NZDF in the neighbouring province of Bamyān. As well as travelling across provinces, network members were known to travel regularly to Peshawar, Pakistan.
56. The activities and whereabouts of members of the network were of sufficient significance to the New Zealand Government that they were the subject of discussion between the NZSIS Director and the Prime Minister in late 2010. We heard from witnesses at interview that there was a general New Zealand concern that the network had been emboldened by the 3 August 2010 attack and was highly likely to attempt to strike again.
57. The GCSB Wellington team worked in close collaboration with the NZDF in Afghanistan and with the deployed NZSIS personnel to identify and monitor specific members of this network as their priority High Value Targets.

<sup>33</sup> These insurgents included Nematullah (JPEL 2306), Qari Miraj (JPEL RTAF 2305), Qari Musa (JPEL RTAF 1861) and Commander Abdullah Kalta (JPEL RTAF 2307). Inquiry into Operation Burnham documents referring to Miraj, Nematullah, Musa and Kalta 08/15; 09/45; 10/04; 10/12; 11/05.

### **Capture of Qari Miraj**

58. In the early hours of 16 January 2011, TF81 conducted an operation in partnership with the NDS which resulted in the capture of five insurgents including Miraj. It was described as a direct detention operation with no fatalities reported.<sup>34</sup> The GCSB and NZSIS support played a significant role in the circumstances leading to the capture of the insurgents.
59. On Saturday 15 January 2011 the GCSB Wellington team provided assistance that helped NZDF to identify and locate Miraj in Kabul. Information was passed to TF81 which, after carrying out a range of checks, mounted a "short notice operation".
60. A deployed NZSIS officer supported the operation by facilitating TF81's partnership with the NDS. The NZSIS officer's perspective on NDS as a partner was that it was a reliable and dependable partner with a professional prosecution system. As explained at interview, the NDS was also already aware of the importance of these insurgents to the NZDF. Elsewhere the officer explained the decision to partner with the NDS as follows:

Stating that we had dialogued with NDS over the August ambush, the Task Force agreed to partner with NDS as opposed to CRU to detain the pair while they overnighted in Kabul. I spoke with [NDS contact at Department 90] who dispatched two NDS investigators. NDS performed very well, but this whole operation required considerable massaging to get it right.<sup>35</sup>

### **Intelligence agencies' involvement in Qari Miraj's detention**

61. The NZDF and the intelligence agencies saw the capture of Miraj as having a potentially significant impact on insurgent capabilities in the Tala Wa Barfak District and along the Baghlan/Bamyan border.<sup>36</sup> Miraj and his four associates were initially detained at the NDS Department 90 detention facility.
62. On 31 January 2011 the NZSIS released a report of a confession made by Miraj (confession report) which had been "officially passed to NZSIS by a senior NDS Officer".<sup>37</sup> The confession described four ambushes Miraj had led over the past three years and identified some individuals who had been under his command. Management within the NZSIS and the GCSB raised no questions about the conditions under which the confession report was obtained.
63. The broader intelligence community was kept briefed about Miraj's detention. For example, on 3 February 2011 relevant Ministers were informed that Miraj and four of his associates had been arrested and that he and one other remained in detention in Kabul. It was unclear what impact the arrest would have on insurgent capability and intent in Tala Wa Barfak and North East Bamyan. An NZSIS officer, as the lead New Zealand contact for NDS, kept NZDF, NZSIS

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<sup>34</sup> TF81: OPSUM/SINCREP 160720 JAN 11: "TYPE OF OPERATION: Deliberate Detention Operation". Inquiry into Operation Burnham documents 11/07; 11/28.

<sup>35</sup> NZSIS deployed officer's report to Wellington (January 2011) in reference to the considerable logistical effort required to plan and mount the operation.

<sup>36</sup> NZSIS deployed officer's report to Wellington (January 2011). Inquiry into Operation Burnham documents disclose a number of similar (KAB) reports: See, for example, documents 11/33; 11/34; 11/35; 11/36; 11/37.

<sup>37</sup> ZI "Afghanistan: Confession statement of Talawe (sic) Barfak District, Baghlan Province insurgent leader Qari Miraj; admits to leading 3 August 2010 ambush against New Zealand Provincial Reconstruction Team convoy (31 January 2011) (confession report). Inquiry into Operation Burnham document 12/08.

Wellington and New Zealand's Ambassador to Afghanistan informed of developments relating to the processing of the detainees of interest. In particular, those agencies and the Ambassador were informed that news of Miraj's detention had spread throughout the Tala Wa Barfak community and that the insurgent network was focussed on obtaining Miraj's early release by any means possible. Insurgent suggestions to achieve this ranged from taking a foreign hostage to accessing the Afghan reconciliation process whereby an insurgent would formally lay down his weapons and agree to submit to the Government of Afghanistan.

64. The Inquiry was advised that New Zealand would not usually get in the way of the Afghan reconciliation process, but that Miraj's case was different. The evidence showed that the NZSIS officer sought and received assurances on a number of occasions from the NDS that Miraj would remain in custody given his confession.
65. We were interested in the NZSIS' mandate for seeking to ensure Miraj's on-going incarceration. The answer turned on the fact that the NZSIS officer had the relationship with the NDS and therefore was probably seen as the person best placed to express New Zealand's view that Miraj should not be released without prosecution. Although there was no formal instruction to pursue this concern, from the officer's perspective it was clear that Wellington (including the NZSIS, the NZDF and MFAT) did not believe it was acceptable for Miraj to be permitted to commit himself to the Afghan reconciliation process given his instrumental role in the 3 August 2010 attack against the NZPRT and the risk he posed to the NZPRT if released.
66. The NZSIS officer's awareness of Wellington's concern was evident, for example, in the following note of his meeting with the New Zealand Ambassador as the officer prepared to leave Afghanistan:

We agreed that due to New Zealand's keen interest in ensuring the ongoing detention of Qari Miraj, he may wish to keep tabs on this case as it develops. I advised that Miraj has recently been transferred from Department 90 to the NDS Prosecutions department.

67. While the NZSIS officer had no express mandate, we saw similar documents that confirmed his efforts in this regard were indeed consistent with the New Zealand Government stance. On 9 March 2011 the NZSIS officer reported that there were "ongoing attempts to free Miraj." Consequently, the officer made contact with Department 90, asking about the current status of Miraj and, it would appear, testing the likelihood that the NDS would "contemplate a reconciliation approach".

#### **ALLEGATION OF TORTURE**

68. In late February 2011 (that is, before the 9 March 2011 notification, above) New Zealand Government officials became aware of information that included an allegation of Miraj's torture while in NDS custody. The suggestion was that the torture had led to Miraj's earlier confession. In our view it is significant that a concern to keep Miraj in custody was maintained even after the intelligence agencies, and others, became aware of the allegation of torture.
69. On 25 February the GCSB recorded this torture allegation in a document which it shared within the New Zealand Government ("the torture allegation"). On the same day the

Headquarters Joint Forces New Zealand also issued a report assessing the torture allegation. It said:<sup>38</sup>

While there is probably an element of truth in the reported use of torture, it is just as likely that this story is deliberately contrived.

70. Our Inquiry having assessed the record of the torture allegation, and having heard evidence about the context in which the allegation arose, is satisfied that on its face there was good reason to assess it may well be true.

### **The intelligence agencies' responses to the allegation of torture**

#### *NZSIS response to allegation of torture*

71. The NZSIS was informed by the GCSB of the torture allegation. After receiving the document, a deployed NZSIS officer expressed the view in a KAB report that it is "highly unlikely that NDS tortured Miraj as instance (sic) of abuse are becoming very rare in NDS detention facilities." The officer asked that the KAB report be brought to the attention of the Deputy Director of Intelligence and a legal adviser. On 9 March 2011, the day the KAB report was received in Wellington, a Service legal adviser responded by asking to be informed about any credible evidence of torture so Wellington could decide whether an investigation needed to be conducted into the claims.
72. While that notation confirms that the NZSIS, as a matter of principle and theory, recognised there may be an obligation on the Government to investigate this allegation of torture, on the evidence the notation was not followed up by anyone in the NZSIS, or reported to senior management.

#### *GCSB response to the allegation of torture*

73. The GCSB's sharing of the allegation of torture was accurate and proper in terms of its function. We heard evidence from some members of the Wellington team that they were shocked by the allegation of torture. The Team Leader took immediate steps, on 25 February 2011, to inform senior managers of the allegation. In response, a senior manager advised that the record of the torture allegation was to be held by the Compliance section of GCSB in case of "a subsequent review by the [Inspector-General]."

#### *GCSB and NZSIS*

74. Both agencies responded to a draft of this report questioning the proposition that there was sufficient information, available at the time Miraj was captured and detained, to put them on notice regarding NDS abuse of detainees at NDS 90. That risk, they say, did not reasonably arise until the publication of the UNAMA report in October 2011. We disagree. Already by 2010 there were objectively credible reports from reputable NGOs, the United Nations, the Afghan Independent Human Rights Commission, and United Kingdom Government agencies to

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<sup>38</sup> J2 OPINTREP 02/11 "TG CRIB: Insurgent Qari Mirajuddin allegedly tortured by NDS" (25 February 2011). Inquiry into Operation Burnham document 12/08.

raise substantial concerns about mistreatment of NDS detainees. Further, the *Evans* case<sup>39</sup> provided salutary warning, in June 2010, of the widespread risk of torture and mistreatment of detainees by Afghan agencies, and in particular the NDS. The Service's own analysis of that case (in 2010) and reports from its deployed staff demonstrate that it was highly conscious of risks associated with NDS detention centres generally. It is significant that the view we express here aligns with that of the *Government Inquiry* who, in response to the same submission made on behalf of Crown Agencies (including the NZSIS and GCSB), observed that "the reality is that New Zealand did not look very hard" for evidence of NDS abuse of detainees in early 2011.<sup>40</sup> The *Government Inquiry* concluded that, in its view, the hand-over of Miraj to NDS 90 was improper and a breach of relevant obligations.<sup>41</sup>

## ASSESSMENT OF RELEVANT HUMAN RIGHTS CONSIDERATIONS

75. Any assessment of the agencies' response to the torture allegation cannot look at the particular event concerning Miraj in isolation but must be set against the context of the respective agencies' activities in the lead up to and aftermath of that particular event. It is clear from the evidence that both agencies were valuable partners in the NZDF operations to track and capture the insurgents assessed as responsible for the 3 August NZPRT attack and who, it was assessed, threatened further attacks. Both agencies received copies of Qari Miraj's confession report and the torture allegation. We note that, in finding *on the facts* Miraj's capture was in substance a New Zealand (rather than an Afghan) detention operation, the role of the initial intelligence was a feature of the *Government Inquiry's* analysis.<sup>42</sup>

### The Bureau

76. For the GCSB Wellington team, the association between its activities and human rights obligations was directly linked to its day to day support of NZDF. Consequently, the GCSB could in large part rely on the established structures and efficacy of the international humanitarian law framework within which NZDF worked. The GCSB team operated at a considerable distance from military decision-making. In these circumstances, and at the particular time, there was a paucity of policies and procedures to identify or give effect to human rights obligations that were of likely practical relevance to its Afghanistan activities.
77. Apart from standard New Zealand Signals Intelligence Directives, there was very little other guidance at this time for the GCSB team regarding predictable human rights issues and the related obligations. The primary policy omission highlighted by the evidence concerning Miraj's arrest and detention was the lack of guidance addressing the precautionary steps required where the Bureau might provide intelligence that would materially contribute to the capture of an individual in the context where there was a real risk the individual might be tortured. Guidance of that nature would also cover rules around the receipt and subsequent sharing of intelligence which might have been obtained through ill treatment of a detainee by

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<sup>39</sup> *R (on the application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin).

<sup>40</sup> See *Government Inquiry*, above n 3, Chapter 11 at [123]. Also Chapter 11 at [125] where the *Government Inquiry* observes "it is clear that, as at January 2011, there were substantial grounds to believe that detainees such as Miraj faced a real risk of torture or mistreatment at NDS 90."

<sup>41</sup> *Government Inquiry*, above n 3, Chapter 11 at [150].

<sup>42</sup> *Government Inquiry*, above n 3, Chapter 11 at [99] and [103].



a partner agency. For staff, such guidance is of fundamental and highly practical importance. Without it, they will be unlikely to identify what circumstances pose human rights risks and how to respond to them, including when, and with what formality, to elevate concerns through management. We consider there are at least two occasions in the events concerning Miraj when the human rights risks were apparent – namely the receipt of Miraj’s confession report and upon becoming aware of the torture allegation and sharing it.

*The Bureau response to the confession report*

78. The Inquiry found no evidence that the GCSB, at a management level, turned its mind to the question of whether there was a possibility that Miraj’s confession statement was obtained as the result of torture or mistreatment. In the context of a generally recognised concern at the time about Afghanistan’s human rights record, and the NDS’ in particular, the entirely inculpatory nature of the information provided by Miraj was an indicator that it might not have been obtained voluntarily.<sup>43</sup>
79. It is reasonable to expect that there would at the time have been processes within the GCSB to identify the inherent risk associated with the confession report, namely that it might not be the product of a voluntary interview. There is no record of any recognition of this fact, or any risk assessment or indeed any organisational response to the confession other than operational consumption of the intelligence it contained.

*The Bureau response to the torture allegation*

80. The GCSB ensured that the record of the torture allegation was shared appropriately with other Government agencies. The Team Leader of the GCSB team additionally took the proper step of drawing the attention of senior management to the report. The evidence suggests that the Wellington Team intended to ensure that the Director of the Bureau was briefed and it sent a short summary of the allegation for inclusion in the Director’s Brief for that week. However, the Bureau could not find a copy of the particular Director’s Brief for the relevant week, and in the circumstances we could make no finding as to whether the Director was in fact briefed. The organisational response was to direct that a copy of the report be filed by the GCSB Compliance section. This was not with a view to following up the allegation or ascertaining its reliability but in case a future Inspector-General of Intelligence and Security might need to see it. The Inquiry considers that, in the circumstances, an informed and

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<sup>43</sup> See IGIS *Supplementary Paper: Best Practice Approaches*, above n 4, at [29] citing the Canadian Information Sharing Evaluation Committee. It is recognised that the risk of involuntary confessions is greater in judicial systems which are highly reliant on confession-based prosecutions for procuring a conviction. For an Afghan example see UNAMA report *Treatment of Conflict-Related Detainees in Afghan Custody* (October 2011, Kabul, Afghanistan) at 45 “Law enforcement and prosecutors rely almost entirely on confessions of guilt from defendants as the basis for prosecution in court. For their part, the courts rarely examine the extent to which confessions have been forced or coerced, even when defendants or defence counsel specifically challenge such evidence at trial.” More generally, in 2016, in recognition of the risks of torture in confession-based criminal justice systems, particularly during the initial stages after arrest, the then UN Special Rapporteur on Torture, Juan Méndez, recommended the development of a universal protocol on non-coercive interviewing methods and procedural safeguards to prevent torture in police custody. (See <https://www.fairtrials.org/news/preventing-torture-moving-away-from-confession-based-criminal-justice>).

documented decision should have been made within the agency about what, if any, the Bureau's responsibilities were, beyond these actions.

81. While it appears no further information was obtained from the interrogation of Miraj, it would have also been prudent for the GCSB to have considered and documented its likely obligations if it were to receive further intelligence (beyond the confession report) from interrogations of Miraj.

## **The Service**

82. The NZSIS, through its deployed officers, provided valuable intelligence to plan the capture of Miraj and his associates, and facilitated the cooperation of the NDS to bring about a successful detention operation. The NZSIS was directly involved in liaising with the NDS and contending for the continued detention of Miraj. Overall the Service personnel faced more immediate challenges than GCSB staff in navigating human rights obligations. They kept their Wellington managers well informed of their activities, reporting regularly and in detail, but they also had to make more complex judgements. In this context it was particularly important for them to have highly engaged supervision and support from Wellington.

### *NZSIS supervision and support from Wellington*

83. The Inquiry concluded that the NZSIS' human rights briefings and policies at the time, and the deployed NZSIS officers' ability to seek specific legal advice, were not sufficient support mechanisms. Given the complexities of working directly with Afghan authorities and other foreign agencies in the context of armed conflict, and which included kill or capture objectives, there needed to be both more responsive and more proactive support from NZSIS Wellington. This support would be expected to engage with the specific contextual issues raised in detail by the NZSIS officers either in the KAB reports or in their formal reporting. The support arrangements should have ensured managerial review of these reports, and, where they raised human rights risks or questions about the proper scope of Service activities in Afghanistan (its "mandate"), they should have been referred for consideration to higher management levels within NZSIS Wellington, and/or for legal advice.
84. By "mandate" here we allude to activities engaged in by the deployed officers, or issues they themselves identified in reports, which raise finely balanced questions of how involved in support to military objectives deployed NZSIS officers could be, given the Service's defined statutory role.
85. The Inquiry (and the Service when requested) located very few examples where feedback of any type was provided from Wellington to the deployed officers. That there was negligible response from NZSIS Wellington to the deployed NZSIS officers during Operation Wātea is corroborated by the deployed officers' own post-operation report:

Despite a high volume of formal notes to headquarters (over 550) we seldom received any messages in return. Requests for action were seldom followed up and generally up to three reminders had to be dispatched to seek action.

86. The Inquiry's concern with possible legal risks in this particular deployment arrangement is not merely theoretical. We saw a number of issues raised in reporting from the NZSIS officers – concerning, for instance, detainees, information sharing and scope of mandate – that should have triggered a response from Wellington, reflecting due internal consideration and clear guidance on the organisational position. The Service, however, did not have a systematic process to ensure the KAB reports were monitored for indicators of legal risk or to provide practical support. There was no instance on record of the NZSIS officers' line manager at the time identifying operational matters that required follow-up for advice or for directions to be provided. The distinct and consistent picture from the documentation, and from witness interviews, was that for most purposes the deployed NZSIS officers were left to make their own judgements.

*NZSIS response to the confession report*

87. The Inquiry found that the NZSIS did not turn its mind to the question whether there was any realistic risk Miraj's confession was obtained as the result of torture or mistreatment, and if so, whether that led to any subsequent responsibilities, legal or ethical, in the particular circumstances.
88. NZSIS receipt of the report from NDS did not trigger any processes within the NZSIS to check whether there was an inherent risk of abuse associated with the confession report. As with the GCSB the organisational response to the confession was the operational consumption of the intelligence it contained.

*NZSIS involvement in ensuring Qari Miraj's continued detention*

89. In addition to the New Zealand intelligence agencies' instrumental role in Miraj's capture, the New Zealand Government, through the actions of the NZSIS, sought here to influence the NDS and its prosecution process to ensure a particular detainee remained in custody. The implications of continuing to advocate for detention, including once the allegation of torture was known, appear not to have been recognised by the NZSIS.<sup>44</sup> (We also saw no records on the agencies' information management systems expressing caution or concern from any other involved government agency. We did not take the point further, as our jurisdiction is limited to the intelligence agencies, and the assessment of the wider Crown's involvement in Miraj's detention is a matter addressed by the *Government Inquiry*.)<sup>45</sup>
90. We consider that the representations of the NZSIS to encourage the on-going detention of Miraj must be treated as made on behalf of the New Zealand Government. The evidence showed they were consistent with its position. We also conclude that, given the effective and close working relationship with the NDS, the NZSIS representations were likely to have had some impact on the NDS' assessment of Miraj's suitability for release at the time.
91. In the Inquiry's view, these facts squarely put a duty on the New Zealand Government, through its relevant officials, to assure itself that there was no real risk that Miraj was being tortured or mistreated. In particular, we are concerned that despite the concerted effort to

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<sup>44</sup> NZSIS deployed officer's report to Wellington (March 2011).

<sup>45</sup> *Government Inquiry*, above n 3, Chapter 11 at [115], [121] to [127], and [132].

keep this particular individual in custody, NZSIS did not, either separately or in conjunction with other New Zealand agencies, identify any responsibility to ensure the New Zealand Government understood the conditions of Miraj's detention and to assess whether they were appropriate in light of New Zealand's legal obligations.

*NZSIS response to the torture allegation*

92. As noted above, the torture allegation was shared by the GCSB with the NZSIS. While the issues raised by the torture allegation were rightly recognised by the NZSIS legal adviser, also as noted above, there is no evidence they were followed up. We found no record that anyone else within the NZSIS considered the torture allegation apart from a mere acknowledgment of receipt from a manager. No other documents or witness evidence advanced this issue.
93. The deployed NZSIS officer's apparent scepticism, mentioned above, about the plausibility of the allegation was not based on a proper evaluation of the information in the circumstances, and his view was not separately assessed or challenged by Wellington managers or personnel in the NZSIS legal team who had responsibility for legal matters and risks associated with the Afghanistan deployment. The organisation's response went no further than asking the deployed NZSIS officer to pass on any NZDF intelligence relating to the allegation. Given that the NZSIS officer had direct contact with the NDS and was advocating for Miraj's continued detention, the officer would have been well positioned to assist with enquiries about Miraj's welfare, but was not instructed to do that.<sup>46</sup>
94. Further, the Service should have specifically considered the effect Miraj's alleged mistreatment had for the Service in continuing to exchange actionable intelligence with NDS. It should have served as a warning that intelligence it shared with the NDS might potentially result in further detention and abuse by NDS of conflict-related detainees.
95. The Inquiry is not critical of the individual NZSIS officer or of their assessment of the allegation. The allegation engaged inherently uncomfortable factual questions for New Zealand officials, and difficult legal ones. We consider that this was a case where objective minds in Wellington, removed from the operational and relationship pressures, had a role to play and should have done more. It is now generally accepted<sup>47</sup> that the response to such situations should be the subject of a settled whole-of-Government approach. Even in the circumstances at the time, however, the issue of mistreatment and possible related responsibilities, especially in light of the NZSIS advocating for Miraj's continued detention, should have been subjected to a rigorous organisational risk-assessment and decision-making process within the NZSIS in Wellington. That may well have led to a wider Government discussion. The Inquiry was unable to interview the relevant manager and the NZSIS no longer has any record of the line manager's emails.<sup>48</sup> As a result, we had no direct management explanation for the lack of guidance or engagement with deployed NZSIS officers' detailed

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<sup>46</sup> Conceivably this would have been considered an undesirable course of action given the deployed NZSIS officer's previous objection to the New Zealand Embassy in Kabul taking steps which might call into question NDS detainee management and treatment. See KAB0386, above n 17, at [3] and [4].

<sup>47</sup> See IGIS *Senate Report*, above n 2, Recommendations A and B accepted by the Bureau and the Service.

<sup>48</sup> The absence of emails in the line manager's email account was a significant gap in the record of the circumstances relevant to this Inquiry.

reports concerning Miraj's detention. From the available documents, we could not discern any articulated management perspective on the Service's obligations.

96. Having searched all likely sources of documents, we did not find evidence of engagement by NZSIS management on the obvious human rights issues raised by Miraj's case. We conclude that NZSIS simply failed to see for itself the significance of the reported allegation of torture.

## **GCSB AND NZSIS – WHAT SHOULD HAVE HAPPENED?**

### **Preparation for supporting NZDF's role in detention**

97. The case of Qari Miraj suggests that both agencies were not adequately prepared for dealing with operational situations that triggered the need to consider the legal and/or ethical response to human rights abuses. The Inquiry acknowledges that the threshold for identifying a human rights risk is sometimes difficult to identify especially in an environment, as in this case, where a certain amount of deference is given to military compliance with IHL. Even so, the intelligence and security agencies should have been alert to occasions where human rights issues related to their intelligence activities intersected with their support to military. In addition to having adequate internal mechanisms to identify risk the intelligence agencies should have ensured there was clarity about respective Government responsibilities as a result of inter-agency planning.
98. Once the torture allegation was to hand senior management in the NZSIS and GCSB should have raised the matter with other government agencies with a view to agreed steps being taken. Reasonable steps might then have involved accessing other information to assess the reliability of the torture allegation. A considered decision on next steps may also have led to New Zealand concern being formally raised with NDS or other Afghan authorities, and consideration being given to whether assurances about Miraj's treatment, if obtained, would be reliable. A cross-agency senior officials meeting might have decided whether it was necessary to request an official welfare check and whether it would be appropriate for relevant Ministers to be informed, especially if New Zealand desired continued detention for the individual.

### **Responsiveness to human rights risks**

99. The responses of the agencies to the confession report and, to a greater extent, the torture allegation did not go far enough. Neither agency acknowledged the seriousness of the issues by recording the allegations in a formal document (eg a briefing paper to their Directors and potentially to the relevant Minister.) The discussions contained in emails and KAB reports provided some (albeit minimal and relatively dismissive) record of the allegations and responses, but were not a sufficient response.
100. A rigorous and objective assessment of the relevant circumstances would have identified the real risk (that is, a factual risk that is more than theoretical) that Miraj had been tortured as claimed. Legal analysis would then have alerted the agencies to ongoing legal risk – from continued detention; from sharing information obtained from torture; from providing intelligence to NDS – and steps required to mitigate these risks.

101. In response to both the confession report and the torture allegation each agency should have followed a recorded process whereby:

- the factual risk of a human rights violation was identified and assessed;
- implications/responsibilities resulting from the risk were identified and evaluated; and
- a decision recorded as to what steps should be taken to mitigate the risks and what internal and external consultation/briefings should be undertaken.

**Specific NZSIS responsibilities**

102. The Service was in a special position with a heightened risk requiring assessment as a result of having expressed views, over a period of time since the capture of Miraj, directly to the NDS about his continuing detention. It did this without having obtained any reliable factual information or assurances about the conditions of his detention. The NZSIS should have recognised that it needed to undertake due diligence with respect to the serious risk of mistreatment to Miraj even if NZDF, MFAT and others failed to do so.

**TERM OF REFERENCE C:** During the period 2009 to 2013, how did the GCSB and the NZSIS consider and apply New Zealand's human rights obligations to relationships, if any, with detaining authorities in Afghanistan?

**TERM OF REFERENCE D:** If the GCSB and the NZSIS played any role, did these agencies take any steps as a result of the report by the United Nations Assistance Mission in Afghanistan (UNAMA) and the UN Office of the High Commissioner of Human Rights in October 2011, on the treatment of conflict-related detainees in custody in Afghanistan (and subsequent UNAMA reports on the same topic)?

103. The preceding accounts of the agencies' roles in Operation Burnham and the capture and detention of Miraj primarily describe facts, although we also discuss the legal and ethical issues they exposed. The two final terms of reference (addressed together) cover the New Zealand agencies' activities concerning Afghanistan over a five year period and are focussed explicitly on the theme of human rights. We have endeavoured to reduce overlap with the first half of the report. The evidence in this section draws mainly from the agencies' documentary record rather than from witnesses. It includes a close examination of their policies and activities. The consideration of ToR C and D is divided into two distinct time periods: the first from January 2009 to August 2011; the second from September 2011 to April 2013:

Time period: Intelligence agency	Explanation
<b>January 2009 to August 2011</b>	
<b>GCSB</b>	
Jan 2009 to Aug 2011	GCSB continues to provide intelligence support to NZDF in Afghanistan, primarily to the NZPRT in Bamyān Province and also to the NZSIS and NZSAS (TF81) when deployed to Afghanistan under Operation Wātea
<b>NZSIS</b>	
Sept 2009 to March 2011	NZSIS deployed to Afghanistan to provide intelligence support to NZSAS under Operation Wātea
<b>September 2011 to April 2013</b>	
<b>GCSB</b>	
Sept 2011 to April 2013	GCSB continues to provide intelligence support to NZDF in Afghanistan and to NZSIS when redeployed under Operation Awarua
<b>NZSIS</b>	
Aug 2012 to April 2013	NZSIS redeployed to Afghanistan to provide intelligence support to NZSAS (TF954) under Operation Awarua

## THE AFGHAN NATIONAL DIRECTORATE OF SECURITY AND NEW ZEALAND INTELLIGENCE AGENCIES

Human rights are a public good, as is security. The balance to be struck by wise government is not between security and rights, as if to argue that by suspending human rights security could be assured. The balance has to be within the framework of rights ... This is a choice that society is able to make when there is a serious terrorist threat ... In those circumstances, checks and balances of good government should come into play to provide confidence that the balance is a genuine one and that red lines are not being crossed. Remaining within the framework of rights is important, however, not least as a constant reminder that there are rights, such as the right not to suffer torture, which cannot be derogated.<sup>49</sup>

104. Terms of reference C and D concern the treatment of conflict-related detainees by authorities in Afghanistan. In particular, the focus is on Afghanistan's primary domestic and foreign intelligence agency, the National Directorate of Security (NDS). It had (and has) broad powers to obtain and exchange intelligence, issue federal warrants and arrest, detain and prosecute people. The NDS headquarters in Kabul includes Department 90 for Counter Terrorism (later renumbered Department 124).<sup>50</sup> The NDS (then and now) operates its own detention facilities, several in Kabul and in numerous provincial locations, for conflict-related detainees and other individuals of concern.
105. Allegations about NDS' mistreatment of detainees were made by a variety of sources from around 2005 onwards.<sup>51</sup> Increasingly over the Inquiry period of 2009 to 2013 there were credible and comprehensive reports of systemic and systematic NDS practices of torturing detainees to obtain confessions.<sup>52</sup> Allegations led to the United Nations Assistance Mission to Afghanistan (UNAMA)<sup>53</sup> commencing its investigation and interviews with detainees in

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<sup>49</sup> Sir David Omand *Securing the State* (Hurst & Co, London, 2010) at 267.

<sup>50</sup> NDS Kabul also included Department 17 (later renumbered 40) where many detainees were held. There were transfers between Departments 17 and 90.

<sup>51</sup> *R (on the application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin). The Court summarised issues regarding NDS' treatment of detainees over the previous decade and continued the UK's 2008 moratorium on British forces transferring detainees to any NDS facilities in Kabul. The Court found at [287] that: "The picture painted by the independent reports on Afghanistan is one of widespread and serious ill-treatment of detainees, including ill-treatment by the NDS in particular, with continuing grounds for concern despite improvements" and at [291] that "The plausibility of the allegations is enhanced by the importance of confessions as evidence in the criminal legal process and the suggested link between the use of torture and the obtaining of confessions from those under interrogation."; See also, for example, Amnesty International *Afghanistan: Detainees transferred to torture: ISAF complicity?* (November 2007) specifically on reports of torture of detainees by "Afghanistan's intelligence service, the National Directorate of Security"; Repeated by Amnesty International in its 2008 and 2009 reports; Afghanistan Independent Human Rights Commission *Causes of torture in law enforcement institutions* (April 2009); United Kingdom House of Commons Foreign Affairs Committee *Human Rights Annual Report 2008* (Seventh Report of Session 2008-09, HC 557, 9 August 2009); US Department of State *2008 Country reports on Human Rights: Afghanistan* (25 February 2009); Human Rights Watch *World Report 2008: Afghanistan* (2008) and *Letter to President Barack Obama on Afghanistan* (26 March 2009); United Nations *Report of the Independent Expert on Human Rights in Afghanistan* (March 2005) and UN Office of the High Commissioner for Human Rights (OHCHR) *Report of the High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights A/HRC/10/23* (January 2009), A/HRC/7/27 (February 2008) and A/HRC/4/98 (March 2007).

<sup>52</sup> See the *Report of the Government Inquiry into Operation Burnham* (2020), above n 3, Chapter 11 at [122] and [123]

<sup>53</sup> The mandate of the United Nations Assistance Mission to Afghanistan is established through UN Security Council resolutions.



October 2010 and its first report on this topic in October 2011.<sup>54</sup> The report was widely accepted as credible and reliable, including by ISAF and NZDF.<sup>55</sup>

106. Over the relevant five year period the GCSB continued to primarily support the NZPRT in Bamyān, while the NZSIS deployed twice directly in support of NZSAS deployments into Kabul and surrounding provinces. NZSIS' close relationship with NDS, evident from events described in the first part of this report,<sup>56</sup> was re-established and maintained during its second deployment. Significantly, UNAMA reported the abuse of detainees in NDS locations relevant to NZDF operations, with the key location being Department 90/124 in Kabul. UNAMA also identified allegations of NDS torturing detainees in facilities in Bamyān and Baghlan provinces.<sup>57</sup> UNAMA undertook to conduct further investigation into those allegations.
107. This set of events prompted our question: to what extent did the New Zealand intelligence agencies respond to the public highlighting of detainee abuse by NDS?
108. Any operational liaison, cooperation, and intelligence exchanges (whether direct or indirect) with the New Zealand intelligence and security agencies and NDS had a twofold focus:
  - a. to provide and receive intelligence on potential insurgents suspected or known to be a threat to New Zealand Forces and others, for example, a threat to the NZPRT in Bamyān Province;<sup>58</sup> and
  - b. to support the development of the ISAF JPELs,<sup>59</sup> and/or the issue of arrest warrants by Afghan authorities including NDS, for the kill or capture of targeted insurgents.
109. At its most simple, however, the NZSIS and the GCSB were focused on obtaining intelligence about particular insurgents suspected to pose a threat to New Zealand forces, and the above objectives are interconnected. Intelligence provided to an Afghan authority such as the NDS under a. could provide the basis for a warrant under b. Insurgent targets under a. and b. would likely be the subject of an ISAF JPEL and subsequent kill or capture operation. A warrant issued for a target under b. provided domestic Afghan authorisation for the subsequent operation or would add support to a JPEL.
110. Specifically there were risks for the NZSIS and GCSB in the Afghan context, whether working in-theatre or from Wellington, from:
  - Receipt, use and/or dissemination of information that a foreign intelligence agency such as the NDS has or may have obtained by torture (for example, reports from NDS detainee interrogations);

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<sup>54</sup> UNAMA and OHCHR *Treatment of Conflict-Related Detainees in Afghan Custody* (10 October 2011, Kabul, Afghanistan).

<sup>55</sup> Letter to Minister of Defence from CDF, Lt.Gen. R.R. Jones (20 October 2011) at [5]; Publicly released by the Minister of Defence (22 October 2011).

<sup>56</sup> See, for example, KAB0386 above n 17.

<sup>57</sup> Allegations re NDS facilities in Baghlan are in UNAMA's 2011 report, above n 54; those concerning Bamyān NDS facilities are in UNAMA and OHCHR's 2013 report *Treatment of Conflict-Related Detainees in Afghan Custody: One Year On* (January 2013, Kabul, Afghanistan).

<sup>58</sup> NZSIS *Annual Report* (2013) at 6.

<sup>59</sup> See above n 24 for further detail regarding JPEL.

- A failure to assess risks and/or investigate allegations or evidence of torture (for example, a failure to carry out risk assessments prior to engaging with overseas authorities with poor human rights records, as identified in credible United Nations or NGO reports); and
- Continued or insufficiently safeguarded cooperation and intelligence exchanges following suspicion or credible reports of acts of torture by foreign partners. To be specific, legal and moral risks arise when providing intelligence that might or will contribute to a detention operation, where the detainee will be held in a facility in which torture is known or suspected to occur.

111. The last bullet point, above, requires intelligence agencies to engage in a case specific assessment of the role particular intelligence might well play, in particular circumstances. Intelligence agencies commonly use the terms “actionable” and “non-actionable” intelligence to distinguish between types of intelligence which, in specific circumstances, may or may not be shared with foreign partners. While the terminology varies, GCSB at the time had a restriction on sharing “actionable” intelligence where that might engage certain human rights risks. A Bureau policy from October 2011 was applicable to all releases of intelligence in support of authorised detention operations at the time, not just in Afghanistan. It defined “actionable “ intelligence as intelligence which – *without more* – provided a basis on which the receiving party was reasonably likely to be able to take direct adverse action, eg, to capture, detain or kill a target. We consider this a very narrow approach. It creates a threshold of a direct causative link, essentially a “but for” link, before the agency needs to undertake due diligence for risk of human rights breaches to which its actions might contribute. Our interest in the New Zealand agencies’ interactions with NDS is broader. We were concerned about situations where New Zealand intelligence could have been assessed as significantly contributing to an outcome with relevant human rights implications. The appropriate question, in our view, is whether New Zealand intelligence provides one of the prerequisites for action, or significantly contributes to it, and not just situations where it is the definitive piece of a puzzle.
112. In this context the risks for the intelligence and security agencies can be ethical, reputational and/or legal. If not identified and managed they potentially undermine the confidence Ministers and the public should have in the New Zealand intelligence and security agencies. It is appropriate, therefore, to examine the adequacy of the agencies’ policies and operational practices for intelligence contributions and in-theatre activities to see how staff were guided and supported to recognise and give effect to human rights obligations.
113. The question is important because the risks of torture in the Afghan context were not theoretical, as the example of Qari Miraj shows. Moreover, in considering the role of the New Zealand intelligence agencies with NDS the issues should be seen against the backdrop of the New Zealand agencies’ prior engagement with the CIA, a trusted partner agency found to have engaged in brutal interrogation techniques.<sup>60</sup>

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<sup>60</sup> See Report of the majority of the US Senate Committee on Intelligence *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program* (December 2014), p xii. See the IGIS *Senate Report*, above n 2, for the roles and knowledge of the NZSIS and GCSB in this matter, including Appendix B Chronology. There is now a sizeable volume of international caselaw addressing the legal issues arising, including: *Al Nashiri v Poland* [2014] ECHR 875

## AGENCIES' RELATIONSHIP WITH NDS: FIRST TIME PERIOD JANUARY 2009 - AUGUST 2011

### NZSIS first deployment and the NDS

114. As discussed, NZSIS deployed to Kabul under Operation Wātea directly in support of TF81.<sup>61</sup> NZSIS established a declared liaison and intelligence relationship with the NDS, expressed by one deployed officer as the Service managing New Zealand's relationship with the NDS.<sup>62</sup> NZSIS liaison also existed with the Crisis Response Unit (CRU), a Unit of the Afghanistan National Police (ANP) within the Ministry of Interior (MOI). A Service officer opined:<sup>63</sup>

The simple fact is that the NZDF and NZSIS need a constructive relationship with NDS (and MOI) to achieve its mission aims.

115. Determining the extent of liaison with either the ANP/CRU and NDS would not have been a straightforward exercise for NZSIS, as the ANP/CRU and the NDS were both tainted by allegations of torture. From the later part of 2011 onwards, UNAMA's reports on the treatment of conflict-related detainees identify a number of ANP/CRU detention facilities where detainees were abused, in addition to NDS sites. Overall, the evidence we saw indicated limited Service liaison with the CRU, despite TF81 partnering with the CRU for the majority but not all TF81 operations.
116. The Service developed several specific policies prior to the Operation Wātea deployment, as this was the Service's first foreign deployment as support to a military operation. These included guidelines for the exchange of intelligence with foreign liaison and guidelines for interviewing individuals detained overseas. Under the policies, a formal risk assessment was required prior to deployment. Written in 2009, the assessment identified a risk of general human rights violations in Afghanistan. This was to be mitigated by the use of caveats in intelligence shared, and by Service policies. While it is an important feature of NZSIS' preparations for Afghanistan that these policies and guidelines were drafted and in place, the evidence relating to Service engagement with the NDS suggested that several key policy safeguards had not been incorporated into operational practice. We summarise below the more notable points concerning its operational relationship with NDS.

### *Engagement with NDS: intelligence exchanges, detainee issues and NDS detention facilities*

117. The Service's intelligence exchanges, cooperation and meetings with NDS in-theatre were frequent and were extensively reported to NZSIS Wellington. As noted earlier, there were few responses to the officers deployed under Operation Wātea.

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and *Husayn (Abu Zubaydah) v Poland* (Merits and Just Satisfaction) (2014) 876 ECHR; *Al Nashiri v Romania* (Application no 33234/12) ECHR, 31 May 2018; *Abu Zubaydah v Lithuania* (Application no 46454/11) ECHR 31 May 2018; US Court of Appeals for the Ninth Circuit *Zayn Al-Abidin Muhammad Husayn v Mitchell and Jessen* (18 September 2019, 938 F.3d 1123 (9th Cir.2019)).

<sup>61</sup> The arrangement was governed by a Memorandum of Understanding (MOU) between NZSIS and NZDF (August 2009). The Inquiry notes in passing that media accompanying the Prime Minister during a visit to Afghanistan in May 2010 "met with the New Zealand spy based in Kabul. We understood he was from the New Zealand SIS. He ushered the contingent around." Duncan Garner *Newshub* "John Key in secret trip to Afghanistan" (3 May 2010).

<sup>62</sup> KAB0386, above n 17.

<sup>63</sup> KAB0386, above n 17.

118. It was clear from the deployed officers' reporting that the NZSIS relationship with NDS was highly cooperative and that the NDS was active throughout this period as a detaining authority.<sup>64</sup> What we did not see was NZSIS management in Wellington monitoring and assessing the cooperative activities and exchanges against the Service's human rights obligations. This was despite the Service being cognisant of the findings of the United Kingdom's High Court in June 2010 regarding NDS' abuse of detainees.<sup>65</sup>
119. The deployed Service officer's KAB reports contain repeated references to discussing detainee issues with NDS. Unfortunately, however, the specific matters being addressed as detainee issues are not identified in the reports and nor, crucially, are NDS' responses.<sup>66</sup> If any assurances were provided by NDS to the Service concerning the proper treatment of detainees, there is no written record of them.<sup>67</sup>
120. Evidence showed that the Service received second-hand assurances about NDS from other foreign liaison in-theatre. It accorded considerable weight to these undocumented verbal assurances. We note too that a similar reliance on verbal assessments about NDS by a foreign partner some 18 months later, under Operation Awarua, was subsequently shown to be equally unsound.
121. It was of interest to us that a number of documents reference the possibility of the Service inspecting NDS' detention facilities.<sup>68</sup> Ultimately the Inquiry located no record of inspections of NDS detention facilities and witnesses confirmed in evidence that such NDS-related inspections did not take place.
122. In September 2010 New Zealand's newly appointed Ambassador to Afghanistan was tasked with discussing MFAT's concerns about what they described as detainee issues, with the Director-General of NDS. The deployed Service officer offered to facilitate a meeting with NDS<sup>69</sup> and subsequently reported that NDS had agreed to answer any questions that the Ambassador might raise on behalf of MFAT. The record shows, however, that the anticipated engagement did not eventuate. In advance of a further meeting with NDS, the deployed officer asked the Ambassador if there were any questions from MFAT. The Ambassador is recorded as suggesting "that it might be best to let sleeping dogs lie on that issue". As a result

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<sup>64</sup> See for example, Inquiry into Operation Burnham document 12/14, with numerical totals of NDS detentions under Operation Wātea.

<sup>65</sup> *R (on the application of Maya Evans) v Secretary of State for Defence* above n 51; Noted in the Inquiry into Operation Burnham document 11/35. See also further references above n 51.

<sup>66</sup> See for example, NZSIS reports KAB0279 (23 June 2010) Inquiry into Operation Burnham document 11/34; KAB0386 above n 17; KAB0396 and KAB0398 (15 September 2010) Inquiry into Operation Burnham documents 11/36 and 11/37; and KAB0452 (5 November 2010) Inquiry into Operation Burnham document 11/33.

<sup>67</sup> In such circumstances, best practice suggests that verbal assurances received on human rights compliance are confirmed in writing as soon as practicable. See, for example, the discussion on the reliability of assurances in the UK report by David Anderson QC and Professor Clive Walker QC *Deportation with assurances* (2017).

<sup>68</sup> MFAT email chain on NDS detainee mistreatment (3 to 15 September 2010); Inquiry into Operation Burnham document 12/12, records that the deployed Service officer is seeking to visit the one CRU "and the (several?) NDS facilities". KAB0398 (15 September 2010); Inquiry into Operation Burnham document 11/37 notes "New Zealand's concern over detainee issues" raised with NDS Foreign Liaison in Kabul, with NDS agreement to answer any questions New Zealand had on the issue and agreement for the Service officer to inspect the detention centre of one of the NDS departments in Kabul; KAB0452 (5 November 2010); Inquiry into Operation Burnham document 11/33 mentions NDS agreement for NZSIS to inspect that detention centre.

<sup>69</sup> KAB0396 (15 September 2010); Inquiry into Operation Burnham document 11/36.

the NZSIS officer reported to Wellington that “there will be no follow up questions for NDS”.<sup>70</sup> We did not locate any records or receive evidence from witnesses able to shed light on why that approach was taken.

#### **GCSB and the NDS in the first time period**

123. Over this first period, from January 2009 to August 2011, a key priority for the GCSB was “maintaining robust support to military operations capability”.<sup>71</sup> As explained earlier, the Bureau’s Wellington-based team was focused on providing “reach-back” SIGINT support,<sup>72</sup> primarily exchanging intelligence with the NZPRT in Bamyān Province.
124. The evidence showed there were regular intelligence exchanges between the GCSB Wellington team and the NZSIS officers deployed to Afghanistan under Operation Wātea (a feature even more apparent during the subsequent Operation Awarua.)
125. The GCSB Wellington team, unlike the Service, did not cooperate, interact with, or exchange intelligence directly with the NDS. (We also did not find any evidence which suggested that the Bureau’s few in-theatre positions engaged in intelligence exchanges or cooperation with NDS.) The connections between NDS and the Bureau in the flow of intelligence were indirect, in that GCSB worked closely with the Service’s deployed officers who had a direct relationship with NDS.<sup>73</sup> During this period the Bureau did not explicitly approve the sharing of any specific intelligence with NDS. However, from the documentary record, testimony from Bureau witnesses, and the GCSB’s own comments in response to a draft of this report, the Inquiry found that:
- GCSB was aware NZSIS (and NZDF) cooperated with NDS;
  - GCSB provided intelligence to NZSIS (and NZDF); and
  - GCSB understood its intelligence could be relevant to the Service’s (and NZDF’s) interactions with NDS.
126. During this period the GCSB did not have policies specifically directed at human rights in the Afghan context.<sup>74</sup> However, the Bureau was aware of the nature and extent of the concerns around detainee abuse. We saw evidence of GCSB’s contemporary awareness of human rights concerns with NDS practices when it referred us to relevant documents on file, one from 2009 and another from 2010.

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<sup>70</sup> KAB0452 (5 November 2010) at [3]; Inquiry into Operation Burnham document 11/33.

<sup>71</sup> GCSB *Annual Report* (2011). The Inquiry sought to confirm the role of GCSB by reviewing any MOU that covered the agency’s support to NZDF for 2009 to 2013. While an MOU from 2007 had some relevance, there was no authoritative document reflecting the authorised extent of GCSB’s intelligence support to NZDF in Afghanistan over this period.

<sup>72</sup> NZDF “CDF Operational Directive 21/2009: Commitment of NZSAS to Afghanistan – Operation Wātea” (July 2009); Inquiry into Operation Burnham document 12/11.

<sup>73</sup> The record is clear that NZSIS did not maintain a relationship with NDS when the Service was not deployed in-theatre.

<sup>74</sup> We were referred to the Bureau’s operational position from 2011 concerning intelligence exchanges with a foreign agency, suspended due to human rights breaches. Those documents (eg, an Executive Briefing Note) were specific to the country at issue but did acknowledge and address the potential for an intelligence released to lead to extra-judicial killings or torture of detainees. The Inquiry was also referred to SIGINT policies at that time which, in our view, on their face related more to protecting equities than to Afghanistan and/or human rights.

## AGENCIES' RELATIONSHIPS WITH NDS: SECOND TIME PERIOD – SEPTEMBER 2011 - APRIL 2013

127. The second time period in this part of the Inquiry is based on five key “developments” in Afghanistan. These developments took the form of reliable public reporting about abuse of detainees and ISAF orders in response. The five developments we describe were well exposed in the public domain over this period and were all highly relevant to the leadership and operational practices of the NDS, and to intelligence sharing (both direct and indirect) between NDS and the New Zealand intelligence and security agencies. The developments were:

- the UNAMA report on the treatment of conflict-related detainees, October 2011
- the first ISAF FRAGO<sup>75</sup> in response, October 2011
- the Afghanistan Independent Human Rights Commission (AIHRC) and Open Society Foundations report on the torture and transfer of detainees, March 2012
- the second ISAF FRAGO in response, October 2012
- the UNAMA report on the treatment of conflict-related detainees, January 2013.

128. The New Zealand intelligence agencies' operational and policy responses to these human rights warnings are the focus of our interest, but we summarise below the detail and impact of the five developments as that detail illustrates the enormous complexity faced by foreign liaison engaging and operating in Afghanistan. The developments highlight the constantly challenging and fragmented nature of the human rights situation in Afghanistan at the time. This in turn shows up the need for highly alert, nuanced and agile responses from foreign partners, including intelligence agencies.

### The 2011 UNAMA Report and the first ISAF FRAGO in response

129. The UNAMA Report on *The Treatment of Conflict-Related Detainees in Afghan Custody* was published on 10 October 2011. Extensive interviews over a 10 month period<sup>76</sup> with 379 detainees at 47 facilities in 22 provinces identified interrogation techniques that constitute torture under international law as well as other forms of mistreatment. While detainee abuse was not a sanctioned Afghan Government activity or policy, it was systemic across a number of facilities. Almost half (46%) of the interviewed detainees held by NDS were found to have experienced torture, and 35% of interviewed detainees held by ANP.

130. The report identified 16 facilities where torture was occurring, including NDS Department 124 in Kabul. NDS officials did not allow UNAMA access to the Department 124 facility to interview detainees, so UNAMA “gathered substantial information” by interviewing detainees at various other facilities who had previously been held at Department 124.<sup>77</sup> UNAMA found “compelling evidence” that officials at Department 124 systematically tortured detainees for the purposes

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<sup>75</sup> A FRAGO is a Fragmented Order which can vary an aspect of an existing order, in a timely manner and without the need to restate the full operational order. In this instance, the FRAGO relates to an order of ISAF Command and applies to all military operating in Afghanistan under ISAF Command, eg, from NATO member states and others including New Zealand. (Some US forces were not operating under ISAF). See, for example, reference to ISAF FRAGO in NZDF “CDF Ops Brief” (24 May 2011); Inquiry into Operation Burnham document 11/12.

<sup>76</sup> Carried out by UNAMA October 2010 through to August 2011.

<sup>77</sup> UNAMA *Treatment of Conflict-Related Detainees* (2011), above n 54, at 18.

of obtaining information and confessions.<sup>78</sup> It also identified allegations, which UNAMA signaled would be investigated further, of abuse at the NDS regional detention facility at Baghlan, where an estimated 25% of the conflict-related detainees made claims of torture.

131. In response ISAF issued a FRAGO suspending the certification of and the transfer of detainees to the 16 NDS and ANP detention facilities identified in the UNAMA report.<sup>79</sup> Then, from September 2011, ISAF put in place a 'Six Phase Remediation Plan' for the 16 implicated detention facilities, involving a programme of: *inspection* of the detention facilities; *remediation* through training of Afghan authorities; *certification* of facilities; *accountability* for standards; ongoing *monitoring*; and *communications*.<sup>80</sup>
132. From November 2011 to March 2012 ISAF re-certified<sup>81</sup> 14 of the facilities for the transfer of detainees from international military forces. Five were re-certified on a conditional basis, subject to improvements in their treatment of detainees. One of those five was NDS Department 124 in Kabul.

### AIHRC Report 2012

133. In March 2012 AIHRC published *Torture, Transfers, and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan*. The report was based on interviews with detainees in 12 NDS and 10 MOI detention facilities between February 2011 and January 2012. AIHRC was denied access to the "high-value" terror suspects and other detainees in NDS 124. Through interviews with detainees previously held in Department 124, AIHRC identified torture there as "a particularly serious problem".<sup>82</sup>
134. The report noted intelligence sharing as a concern, with a "significant risk" that intelligence provided by Afghan authorities was "gathered through torture".<sup>83</sup> No ISAF nation had implemented measures to ensure that intelligence gathered by Afghan authorities, and then shared and utilised by their forces, was not obtained through the use of torture.<sup>84</sup> This was of greater relevance to the GCSB than to the NZSIS, given the former's continued involvement

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<sup>78</sup> UNAMA *Treatment of Conflict-Related Detainees* (2011), above n 54, at 18.

<sup>79</sup> UNAMA *Treatment of Conflict-Related Detainees* (2011), above n 54, at 5 and 40. The 16 locations where UNAMA found compelling evidence of torture and ill-treatment of detainees by NDS and ANP officials were: NDS Department 90/124 in Kabul; NDS provincial facilities in Herat, Kandahar, Kapisa, Khost, Laghman and Takhar; Kandahar District 2 NDS office; ANP district facilities in Kandahar including Daman, Arghandab, District 9 and Zhari; ANP headquarters in Khost, Kunduz and Uruzgan; and the ANP district facility in Dasht-e-Archi, Kunduz.

<sup>80</sup> UNAMA *Treatment of Conflict-Related Detainees in Afghan Custody: One year On* (2013), above n 57, at 76 to 80.

<sup>81</sup> UNAMA noted that re-certification of a facility was not an ISAF endorsement that the facility was torture-free, rather it was a recognition that the facility had been through the first three stages of the ISAF remediation plan and ISAF was not aware of any further torture or ill-treatment. UNAMA *Treatment of Conflict-Related Detainees in Afghan Custody: One year On* (2013) above n 57, at 7 and 8.

<sup>82</sup> AIHRC and Open Society Foundations *Torture, Transfers, and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan* (17 March 2012, 27 Hoot 1390) at 19.

<sup>83</sup> AIHRC *Torture, Transfers* (2012) above n 82, at 41.

<sup>84</sup> AIHRC *Torture, Transfers* (2012) above n 82, at 41. The AIHRC's assessment was formed after "interviews with various foreign government officials." The AIHRC report (at 41 and 42) commented on the ongoing relationship between non-ISAF special operations forces, the CIA, and NDS 124, stating: "although US officials themselves have not been directly implicated in torture, close cooperation between US and Afghan intelligence officials, particularly at NDS Department 90/124, would raise serious concerns that US officials could be complicit in torture and ill-treatment perpetrated by Afghan intelligence officials."

with Afghanistan as at March 2012. The Inquiry located no records indicating an awareness of this AIHRC report by the Service or Bureau.<sup>85</sup>

### The second ISAF FRAGO 2012

135. ISAF Command issued a second FRAGO in October 2012.<sup>86</sup> Following ISAF's receipt of credible information concerning systemic torture and abuse – amounting to gross violation of human rights – ISAF suspended detainee transfers to, and revoked the conditional re-certification of, seven NDS and ANP detention facilities. This included NDS 124.
136. Views from foreign liaison in-theatre suggested this FRAGO would be lifted by early 2013, but New Zealand agency reporting identified that it was still in effect in early March 2013. Further developments with regard to the second FRAGO were not reported by the New Zealand agencies. It appears from the public record and UNAMA reports that NDS 124 was re-certified on 6 March 2013; subsequently had the certification revoked; was further re-certified on 5 May 2013; followed by a reversal of certification on 22 May 2013 with all transfers to NDS 124 detention facility suspended.<sup>87</sup>

### The 2013 UNAMA Report

137. The UNAMA January 2013 report "*One Year On*" again identified systematic torture of conflict-related detainees in NDS facilities, including NDS 124 and provincial offices. Fourteen of the sixteen facilities certified by ISAF had "cases of concern". An increase in the number of detainees held in ANP facilities and interrogated there by NDS raised serious questions for UNAMA about NDS attempting to reduce the level of scrutiny it received.<sup>88</sup>

Over the one-year period, UNAMA observed early improvement in some NDS facilities with a decrease in allegations of torture. This reduction corresponded with a decrease in transfers by international military forces and increased monitoring by ISAF. However, after ISAF resumed transfers to these facilities and reduced its monitoring, UNAMA observed an increase and resumption in incidents of torture.

138. Across 16 regional NDS detention facilities, including those in Bamyan and Baghlan, 19% of the conflict related detainees interviewed alleged ill-treatment or torture. UNAMA was to further investigate those allegations.<sup>89</sup>
139. Two reports were located from foreign liaison received by the NZSIS and GCSB in November 2012 and January 2013 which solely addressed the imminent updated report from UNAMA, set out details of the further abuse and UNAMA's conclusions as a result of its detainee interviews (completed in October 2012). In particular, the two reports outlined UNAMA's conclusion that, despite efforts made, torture and ill-treatment of conflict-related detainees had persisted throughout numerous Afghan detention facilities including NDS facilities. The

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<sup>85</sup> The Inquiry did locate a 2012 NZDF report in the Service's document system, which included a reference to the March 2012 AIHRC Report.

<sup>86</sup> UNAMA *Treatment of Conflict-Related Detainees in Afghan Custody: One year On* (2013) above n 57, at 79.

<sup>87</sup> UNAMA and OHCHR *Update on the Treatment of Conflict-Related Detainees in Afghan Custody: Accountability and Implementation of Presidential Decree 129* (February 2015, Kabul, Afghanistan). The Orders of ISAF Command beyond the time period of this Inquiry were not consulted.

<sup>88</sup> UNAMA *Treatment of Conflict-Related Detainees: One year on* (2013) above n 57, at 5 and 30.

<sup>89</sup> UNAMA *Treatment of Conflict-Related Detainees: One year on* (2013) above n 57, at 30.



documentary record, confirmed by the evidence of witnesses to the Inquiry, was that the GCSB and the NZSIS were not aware of the 2013 UNAMA report. The Inquiry located no records of this report being discussed or circulated within the intelligence agencies.

#### **THE INTELLIGENCE AGENCIES' ACTIONS: RESPONSES TO THE KEY DEVELOPMENTS**

140. The 2011 UNAMA report was rightly recognised by key New Zealand government agencies as relevant and concerning. On 20 October that year the Chief of the New Zealand Defence Force advised the Minister of Defence that “the UNAMA Report is well-researched and is accepted as credible by ISAF” and that its “findings are of considerable concern”.<sup>90</sup>
141. In our view the UNAMA report had acute significance for the NZSIS given that after the report was released the NZSIS re-deployed to Afghanistan, from August 2012 to April 2013. This deployment was in support of the NZSAS’ own August 2012 re-deployment, “Operation Awarua”. The nature of the Service’s cooperative relationship with NDS meant that legal or best practice issues concerning detainees were inextricably enmeshed in that relationship. The Bureau’s response to the UNAMA report can be dealt with briefly. We then discuss the more complex position of the Service in greater detail.

#### **The Bureau and the 2011 UNAMA report**

142. Throughout this second period of our Inquiry the GCSB continued to provide critical support to the NZDF personnel deployed overseas, including the provision of intelligence information to support NZDF’s operations in Afghanistan.<sup>91</sup> As in the preceding years, the Bureau’s intelligence went primarily to the NZDF but there were also frequent intelligence exchanges with the NZSIS officers deployed under Operation Awarua. The Bureau also received, via the Service, intelligence reports from the Afghan authorities, including on occasion information sourced from detainee interviews.
143. GCSB engaged directly and promptly with the 2011 report.<sup>92</sup> Three new Bureau policies were approved shortly afterwards by the Director, focused on Afghanistan operations. These included a high-level framework regarding intelligence sharing in situations where it might provide *the* basis for detention (followed by acts of torture or other abuse). Another policy established clear internal reporting lines for concerns or allegations about such mistreatment. We found no further records relating to the latter policy requirement and so we were not able to identify what effect, if any, it had at the operational level. The Bureau suggested to our Inquiry that the absence of records may indicate that there were no such concerns. With respect, given the evidence reviewed, and the environment identified in the 2011 UNAMA report, we consider this to have been unlikely.

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<sup>90</sup> Letter to Minister of Defence from CDF, Lt.Gen. R.R. Jones (20 October 2011) at [5]; Publicly released by the Minister of Defence (22 October 2011).

<sup>91</sup> GCSB *Annual Report* (2013) and (2014).

<sup>92</sup> The Service was not deployed in Afghanistan in October 2011. Nevertheless the Inquiry located relevant internal Service updates around that time, one noting the UNAMA report and the other the ISAF FRAGO in response.

## **The Service and the 2011 UNAMA report**

144. The Service's re-deployment to Kabul and Bamyan Province as part of Operation Awarua came in the wake of several NZDF casualties from insurgent activities. The NZSAS, now named TF954, had been re-deployed to reduce risk to the NZPRT and NZDF made a direct request to NZSIS for deployed intelligence support, to assist with that objective.<sup>93</sup> Service support "focused on continued liaison with the Afghan National Directorate of Security, the Afghan National Security Forces as well as other partners".<sup>94</sup>
145. An initial scoping exercise in Afghanistan undertaken by the Service had determined that a substantive deployment would be of substantial value.<sup>95</sup> Coincidentally, at the time of this scoping mission the Afghan President had just dismissed the head of NDS. The newly appointed NDS Director-General Khalid was the subject of numerous reports in the public domain citing his involvement in the torture of detainees.<sup>96</sup> The Bureau and Service were therefore on notice as to those specific concerns. In contrast to the earlier Operation Wātea, the Service did not carry out a formal pre-deployment risk assessment under Operation Awarua, despite its explicit intention to re-establish close liaison with NDS. The NZSIS relied instead this time on assurances made by Afghan authorities to a particular trusted foreign liaison partner. NDS' assurances had subsequently been shared, second-hand, with NZSIS.
146. The previous Service policies relating to Afghanistan were again considered relevant and in force, although one manager's evidence was that not all aspects of these policies were operationally applicable for this re-deployment. Some further key observations about the Service's activities and approach at this period of time follow.

### *Sharing intelligence with NDS*

147. The Service, which had ceased all contact with NDS at the conclusion of Operation Wātea, resumed intelligence exchanges with the NDS as soon as it re-deployed in August 2012. It is the assessment of the Inquiry that some of the intelligence conveyed to NDS contributed significantly to subsequent kill or capture missions.<sup>97</sup>
148. The record also indicates that this was a period of heightened intelligence sharing and cooperation between the Service and Bureau with regard to Afghanistan and insurgent targets of interest to New Zealand. On occasion, specifically at the request of a deployed Service officer, GCSB approved NZSIS to provide intelligence to NDS.

### *NZSIS understanding of detainee issues*

149. In contrast to reports from the Service's first deployment under Operation Wātea, the Inquiry did not locate any records in the context of Operation Awarua to indicate that deployed officers raised detainee issues in meetings with NDS 124.

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<sup>93</sup> NZSIS *Annual Report* (2013).

<sup>94</sup> NZSIS *Annual Report* (2013).

<sup>95</sup> NZSIS *Annual Report* (2013).

<sup>96</sup> See, for example, articles by Amnesty International (2012), Human Rights Watch (2012) and Canada's Military Police Complaints Commission (2009), alleging Khaled's involvement in the torture of detainees.

<sup>97</sup> Multiple examples are described in the classified report of the Afghanistan Inquiry.

150. From our interviews and NZSIS records from 2012, it appears the Service saw its obligations, with regard to NDS abuse of detainees, as limited to not sharing information that NDS may use to detain and mistreat an individual. In keeping with this view, the Service relied heavily on NDS' (unrecorded) assurances; on reports from deployed Service officers containing no suggestion that detainees in respect of which the Service had provided intelligence would be mistreated; and that responsibility for monitoring treatment of detainees post-arrest resided elsewhere. The Service also considered that NDS observed due process, because of the effort it took to have NDS accept and use NZSIS' intelligence cases as a basis for arrest warrants. It was not apparent that the Service's approach recognised that due process in one area or facility is not a reliable indicator of due process in another – a point clearly and credibly made in the UNAMA report one year earlier.
151. Our ability to obtain a complete picture of the Service's understanding of detainee issues at this time was also hampered by gaps in the record. We saw references to certain emails sent from in-theatre to which the Service in Wellington responded, for example, relating to the Service's obligations, but the substantive emails themselves could not be located. As noted above, references to assurances provided by NDS did not identify the nature or content of the assurances, nor were those assurances recorded elsewhere in writing.
152. The 2011 UNAMA report showed it was not safe to assume detainees would be protected in provincial NDS facilities, as opposed to only being at risk if held by the NDS in Kabul. Close organisational links between provincial NDS and NDS departments in Kabul made distinctions between engaging with NDS 124, and engaging with provincial NDS, questionable.
153. In 2012 the Service inquired with provincial NDS about the detention process. The Inquiry located no analysis of whether the Service found the process, as described to it, met New Zealand's expectations of due process. In our view, several aspects did not. As with the Service's deployment under Operation Wātea, a visit to a provincial NDS facility<sup>98</sup> was mentioned under Operation Awarua, but no visit eventuated.
154. The (then) Inspector-General of Intelligence and Security was briefed by NZSIS in late 2012 about the Service's role in Operation Awarua. The Hon Paul Neazor was assured in writing that the deployed Service officers were tasked to view, where possible, detention facilities. The briefing did not mention, however, the anticipated difficulties in doing so and the fact that no visits to NDS facilities had occurred.

#### **New Zealand intelligence agencies' responses to the second ISAF FRAGO**

155. The evidence we heard was that the second ISAF FRAGO on 24 October 2012, responding to further reports of detainee torture by Afghan authorities, had not been expected by the Service. Nevertheless the record shows that the Service acted immediately. Its response mirrored to a large extent the ISAF response and, importantly, it ceased all Service engagement with NDS 124 in Kabul. Intelligence exchanges with provincial NDS were to

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<sup>98</sup> As distinct from meeting with the detainees in an NDS facility.

continue. Allegations of the torture in regional facilities were seemingly overlooked, or at least, we saw no evidence they were engaged with.<sup>99</sup>

156. While the Service enunciated to the GCSB its approach under the FRAGO, the Inquiry did not find any record of the Service communicating its cessation of engagement with NDS 124 to that Department. We question the propriety and utility of not informing NDS 124 of the human rights concerns giving rise to the halted intelligence exchanges and liaison.<sup>100</sup>
157. There were limits on the functions of provincial NDS that frustrated the New Zealand intelligence agencies and the Service in particular. Provincial arrest warrants for insurgents had effect only in that province, whereas insurgents travelled widely. NDS in Kabul had the advantage of being able to issue warrants of federal scope and application. An attempt to work around the FRAGO to achieve a level of engagement with NDS 124 was proposed by the Service, but a witness testified that it did not proceed.
158. Even after ISAF issued this second FRAGO, a level of intelligence sharing continued, between the Bureau and the Service and between the Service and provincial NDS. The Inquiry compiled an illustrative case study from NZSIS and GCSB records from late 2012 and early 2013 concerning a specific insurgent of interest to New Zealand. Considerable detail is provided in our classified report. Suffice to note here that the NZSIS and GCSB were involved and materially interested at key points in the events that transpired, before and after the individual was transferred into NDS detention. We concluded that a real risk of torture to the captured insurgent was clearly in the frame in at least two ways, but that risk was not adequately recognised and engaged with by either of the New Zealand agencies.
159. In late 2012 the Service directed that a specific caveat be added to all information it passed to NDS for intelligence cases. The substance of the caveat acknowledged the sovereign right of the Afghan Government to take reasonable measures to ensure public safety, but where action against an individual was warranted, NZSIS expected the individual to be treated in accordance with “accepted human rights norms” and “due process of law”. Given Afghanistan’s law already prohibited torture, and the well-known unreliability of GIROA assurances that such practices were discontinued, it seems doubtful that the added caveats would, without more, have had practical impact in-theatre. In particular, there was no policy or framework pursuant to which the Service intended to monitor and assess adherence to its caveats.
160. Specifically with respect to the Bureau, the Inquiry noted that during the post-FRAGO period a high-level decision was made within the agency to change handling requirements for any intelligence approved for sharing (eg, via the NZSIS) with Afghan authorities, including NDS. The record indicates the Service was supportive of the Bureau making this change. We

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<sup>99</sup> See UNAMA reports of October 2011 and January 2013 above n 54 and n 57.

<sup>100</sup> It has been suggested that a lack of notice such as this can, in some circumstances, be an indicator of whether one state’s intelligence agency may be crossing a line into complicity with human rights abuses by a foreign intelligence agency. We do not suggest complicity in torture here, but find the Service’s unwillingness under Operation Awarua to explicitly raise these concerns disappointing.

considered the nature of these changes, and in particular their timing which almost directly coincided with the second FRAGO, to be counter-intuitive and risky in the circumstances.

**Re-engagement with NDS Department 124: A red line**

161. As at February 2013 the second ISAF FRAGO was still in place. The Service's inability to contribute intelligence to NDS 124 in Kabul, to facilitate NDS issue of federal arrest warrants, was viewed as an inhibitor for NZSAS operations against suspected or known insurgent threats.
162. Consequently the Service, in a decision taken by the Director on 18 February 2013, re-engaged with NDS 124 for the purpose of general liaison. The Director specifically required that all of liaison activity should be documented. He also directed that there was a 'red line', not to be crossed, namely the passing of intelligence to NDS 124 that could lead directly to a detention operation. The 'red line' was to remain in place until the FRAGO was lifted.
163. The record shows the import and applicability of the 'red line' being tested via a number of operational requests. For instance, a direct request from the deployed Service officer regarding asking NDS for information obtained from a detainee was identified by Wellington as crossing the line. The request was declined for potentially exposing the Service to risk.
164. By contrast, there were records indicating that the Service provided intelligence to the NDS during this period. Service reports to Wellington referred, for example, obliquely to "a course of action" for acquiring authorisations or to "a concern" shared in meetings with NDS 124. We found no evidence that the Wellington manager asked for clarification of these references. Informal communications and later reports made it clearer that the Service passed intelligence to NDS 124, albeit on occasion through foreign partners, to obtain warrants. The Inquiry identified several instances where the Service passed intelligence to the NDS which could have led to a detention operation and a crossing of the red line. Despite this risk, there were no records indicating that senior management in Wellington actively monitored the provision of intelligence to NDS to ensure compliance with the explicit 'red line' directive.
165. From the records reviewed we formed the view that across this period the reinstated relationship between the Service and NDS 124 could properly be described as professional but also both personal and close.
166. In terms of the GCSB, we saw several instances in the first months of 2013 when it rightly expressed caution over intelligence exchanges. One instance in particular saw the GCSB decline cooperation with another agency given the risk it posed of an individual being tortured by NDS for information. The Bureau manager considered that if that eventuated, the risk could be directly attributable to New Zealand actions.
167. NZSIS and GCSB both ceased their Afghanistan activities in April 2013, on the departure of New Zealand Forces from theatre.

## OUR ASSESSMENT: 2009 TO 2013

### Assessment of agencies' relationships with NDS in the first time period: January 2009 to August 2011

168. Intelligence engagement in Afghanistan – from New Zealand and especially from in-theatre – presented considerable dangers and risks for those involved. At the outset in 2009 both intelligence agencies were broadly aware that Afghanistan had a poor human rights record. There was available a consistent body of allegations regarding the severe mistreatment of detainees by Afghan authorities including NDS. Over this first time period, the public reporting of NDS abuse of detainees became increasingly reputable, reliable and comprehensive. The agencies were familiar too, from June 2010, with the extensive UK High Court decision in *Evans*<sup>101</sup> concerning NDS abuse.
169. For this first period under ToR C and D, the GCSB conducted intelligence activities in support of the NZDF, with no direct liaison with NDS and no policies specifically directed at Afghan activities and human rights. There was no GCSB risk assessment carried out for operations with regard to Afghanistan prior to or after 2009. Perhaps due to an absence of direct engagement with the NDS, we located no records where the GCSB considered the issue of the mistreatment of detainees by NDS (or ANP).
170. When the Service was in-theatre, the Bureau exchanged intelligence with the Service officers. The GCSB was aware of the Service's close relationship with NDS and understood its intelligence could be relevant to the Service's interactions with NDS, eg, to obtain warrants for insurgents of interest to New Zealand. No intelligence was explicitly approved by the GCSB for release to NDS during this period, although nor can we rule out that some GCSB intelligence may have reached that agency. We note the GCSB itself has previously acknowledged that some Afghan individuals may have been detained as a result of intelligence provided by the Bureau. The Bureau also received reports and data from detainee interrogations from intelligence sources – including NZSIS reports of NDS detainee "debriefs", during the first period.
171. For the Service, the first deployment in-theatre was accompanied by policies, a documented risk assessment concerning human rights, and an MOU with the NZDF/NZSAS. The weakness was that those policies were not adequately embedded and operationalised. For example, the Inquiry found no evidence that deployed officers operationalised several key policy requirements, and nor was there follow-up on those matters from Wellington.<sup>102</sup>
172. It is clear that the deployed officers established strong relationships with NDS Department 90 in Kabul and, importantly, did raise detainee issues at meetings with NDS. However, there is no record of what those issues comprised; what the specific NDS responses were, if any; and what effect this had operationally. The Inquiry was told that NDS assurances were verbal, unrecorded and, at this distance in time, unable to be recalled by witnesses. Reliance was

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<sup>101</sup> *R (on the application of Maya Evans) v Secretary of State for Defence* above n 51.

<sup>102</sup> For example, considerations when receiving intelligence reports from foreign partners with poor human rights records.

placed on information from foreign liaison in-theatre as to NDS practices with detainees – taken, it appears, as sufficient assurance.

173. We have commented earlier on the absence of active management supervision during Operation Wātea, and we do not repeat that here, but it had the effect that some obvious risks were not identified. The response from Wellington management to the deployed officers' reporting was seriously wanting.
174. In the balance struck between effective intelligence engagement with the NDS on the one hand, and the human rights of individuals detained by NDS as a result of that intelligence on the other, the record available to the Inquiry suggests the latter was of less concern.

**Assessment of agencies' relationships with NDS in the second time period: September 2011 to April 2013**

175. In October 2011 UNAMA credibly reported systematic NDS practices of torturing detainees, primarily to obtain confessions. This key public development was one of five in this period, including further comprehensive reports and ISAF Command responses. The 2011 UNAMA report provided a stark signal and an evidential basis for the New Zealand security and intelligence agencies to:
- re-evaluate the adequacy of their operational activities in Afghanistan to ensure intelligence objectives were achieved in compliance with human rights
  - re-assess risk, along with how to best mitigate those risks, for example, through limiting exchanges of intelligence with specific NDS locations; and
  - reconsider the reliability, retention and use of any intelligence reports received from NDS.
176. The five key developments during this period presented considerable problems for the New Zealand agencies in contributing to intelligence exchanges with the NDS. Given the critical role of NDS in issuing federal arrest warrants this cooperation was seen as vital for the NZDF to achieve its mission aims. However the Service, and, to a lesser degree the Bureau via the Service, in continuing intelligence exchanges with NDS in reliance only on the particular policies they had in place at the time risked being identified as agencies who turned a blind eye to breaches by foreign intelligence agencies of both international and New Zealand domestic law.

*The Service*

177. The Inquiry acknowledges that the Service's engagement under Operation Awarua and the scoping exercise was arranged in some haste, and it is important to recall that there was a body of relevant policies already in place. We also observe that there was a distinct improvement from the previous deployment over this period, namely the level of day to day engagement by the NZSIS line manager with the deployed Service officers. But, in terms of giving effect to human rights obligations, the Service on redeployment into the Afghan theatre:

- did not carry out a risk assessment prior to redeployment (two years after the previous one)
- did not review applicable policies in place since 2009 (and informed the Inquiry that a key part of those policies did not apply in 2012)
- relied on assurances of NDS compliance with human rights, predominantly as repeated to them by foreign liaison in-theatre, notwithstanding the clear public evidence of ongoing risk
- did not – according to the record – raise issues of NDS mistreatment of detainees and human rights requirements in meetings the Service held with NDS 124, bearing in mind that NDS at the time had been identified as responsible for serious and ongoing abuse of conflict-related detainees; and
- put in place caveats on intelligence passed to NDS, but without any plan or ability to monitor whether the caveats were observed by NDS in practice.

178. The Service, in its comments on the draft of this report, did not respond to any of the criticisms made with regard to its actions or omissions during this second time period.

179. Moving into 2013, the Service Director's 'red line' approach showed a clarity of intent that was appropriate. However, the Service did not seem to have processes for actively monitoring NZSIS adherence to the 'line,' to ensure that specific intelligence which could lead to detention would not be shared.

180. In May 2013 the Service carried out a strategic assessment on the effect of NZSIS' deployment under Operation Awarua. The Service considered it had materially reduced the threat to the NZPRT operating in Bamyān.<sup>103</sup> Its conclusions were reflected in a briefing to the Minister responsible for the intelligence and security agencies, who at the time was the Prime Minister, and to several other Ministers and CEOs, including the GCSB Director. Given the alignment between the NZSIS and the GCSB at this time, aspects of this Service assessment regarding intelligence exchanges also addressed the GCSB.

181. The Service assessed it had made a significant impact to the overall New Zealand contribution to Afghanistan, with the greatest impact in areas including operational delivery and relationship and capacity building with the ANSF (which includes the NDS). Our own role is not to assess the intelligence agencies' effectiveness in achieving their intelligence objectives, but it seems to us that – as far as it goes – the Service's assessment is a fair one.

182. On the issues that are most relevant to the office of the Inspector-General, as the oversight body, the evidence we reviewed and heard shows:

- a close and functional intelligence relationship existed between the NZSIS and the GCSB
- the NZSIS' key operational relationship and intelligence sharing was with NDS Department 124 in Kabul, largely concerning known or suspected insurgents of specific interest to New Zealand

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<sup>103</sup> NZSIS *Annual Report* (2013).



- the NZSIS and the GCSB were fully aware of the breaches of human rights carried out by NDS through torture of significant percentages of conflict-related detainees<sup>104</sup>
- these agencies were fully aware that New Zealand intelligence had at times allowed the NDS to take action
- some of the insurgents captured as a result of this intelligence were detained in or transferred to NDS facilities and to NDS 124 in particular
- the New Zealand agencies received reports with intelligence from detainee interviews by NDS, often with confessions, with some of these reports received via foreign liaison; and
- one detainee held by NDS was interviewed by a deployed Service officer.

183. The Service's briefing to the Prime Minister and others identified certain intelligence successes. It did not say that the close relationship and intelligence exchanges between New Zealand intelligence agencies' (the Service in particular) and the NDS incorporated a distinct level of risk that NDS may abuse people detained on the basis of intelligence to which New Zealand significantly contributed. Nor did it explain how the New Zealand agencies handled reports they received of NDS interrogations where the intelligence or confession was potentially obtained through the torture of an individual. In the Inquiry's view, these risks and their relevant mitigations (where engaged) are also an important part of the picture for the responsible Minister. They bear on how well equipped the New Zealand agencies are to operate with propriety in such challenging circumstances.

184. Overall for the Service, the Inquiry considers there is a disconnect between the evidence we saw of the Service's actions on human rights and its own self-assessment (especially during Operation Awarua) that, at the time, it was acutely aware of the potential human rights risks associated with interactions with agencies in Afghanistan.

#### *The Bureau*

185. Overall for the Bureau, the connection with NDS was not as proximate. There was no evidence of direct GCSB to NDS exchanges of intelligence. Nevertheless the Bureau knew that certain information it shared with the NZSIS could be passed to NDS, and this was particularly the case during the Service's re-deployment under Operation Awarua. During this second time period, GCSB introduced specific handling requirements for any intelligence approved to be shared (eg, via the NZSIS) with Afghan authorities including NDS. We also note there were several prudent enquiries made later in the Inquiry period by specific individuals in GCSB management when human rights breaches were potentially in play.

186. The Bureau reacted positively to the first key development, the 2011 UNAMA report, moving swiftly to develop policy, applicable to the situation in Afghanistan. A high-level framework barred the sharing of intelligence where there were reasonable grounds for concern that – *without more* - it would be used as a basis for detention and torture. As noted above, we consider that causal-link requirement set the threshold too high. Further, the effective operationalisation of that policy was difficult to observe in the records available to this

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<sup>104</sup> Although the NZSIS in its comments on a draft of this report considered it to be just "alleged" torture by NDS.

Inquiry. As our classified case study<sup>105</sup> identified, the real risk of torture of a detainee captured due to New Zealand intelligence and actions went unremarked (by both agencies). Nor did we find records that indicated the Bureau considered the reliability or appropriateness of reports from detainee interrogations it received, indirectly, from NDS.

187. The Bureau's responses to the other four key developments were not evident. Notably, a change in its handling requirements for any information approved for sharing with Afghan authorities coincided with the second ISAF FRAGO. The documents for the Bureau's decision-makers concerning this change made no reference to the human rights risks attached to intelligence exchanges with NDS. The change was strongly supported by the Service. As noted above, the Inquiry considers the shift in approach as at October 2012 was counter-intuitive. It suggested to us that the focus was squarely on passing intelligence about suspected insurgents which might protect New Zealand personnel in-theatre. We do not disagree with the importance of that goal; but the protection from torture of Afghan individuals, detained partly in consequence of the intelligence shared, was not similarly considered and addressed.

## Conclusion

188. At the systemic level a precautionary approach should be adopted, which affords genuine protection to the human rights of individuals.<sup>106</sup> As part of that system, intelligence agencies do not operate in a legal or moral vacuum. "Their acts are attributed to the state as a matter of international law and can result in determining that the state violated its legal obligations."<sup>107</sup> There are specific factors relevant to intelligence sharing that regulate the cooperation between agencies and which need to be taken into account in any analysis of legality and propriety, but no matter the benefits from effective intelligence relationships they:

...cannot serve as an excuse to discard the existing human rights obligations of the state. The real – or foreseeable or probable – wrongful conduct by another state can be decisive in assessing whether the first state has breached its own international obligations.<sup>108</sup>

189. Operational activities of the Service and Bureau, in high risk environments, engaging with foreign authorities with known practices which breach customary international and domestic law, require of New Zealand intelligence agencies:

- a heightened monitoring and awareness
- ongoing documented risk assessments and legal analysis
- a willingness and ability to have the difficult discussions with foreign partners and to cease cooperation and exchanges in the face of ongoing partner breaches of human rights; and

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<sup>105</sup> Appendix A in the classified report of the Afghanistan Inquiry.

<sup>106</sup> See IGIS *Senate Report* above n 2, at [190] and Appendix D at [72] to [74]; Report of the *Government Inquiry* above n 3, Chapter 11 at [75], [76], [98] and [115].

<sup>107</sup> Martin Scheinin and Mathias Vermeulen "International Law: human rights law and state responsibility" in Hans Born, Ian Leigh and Aidan Wills (eds) *International Intelligence Cooperation and Accountability* (Routledge, Oxford, 2011) at 269.

<sup>108</sup> Scheinin and Vermeulen "International Law: human rights law and state responsibility" above n 107 at 269.

- protection through the adoption of best practice approaches<sup>109</sup> to intelligence activities and exchanges (for example, with regard to the actual use to be made of caveats and assurances and comprehensively operationalised policies).

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<sup>109</sup> See IGIS *Supplementary Paper: Best Practice Approaches to Information Sharing and Cooperation: Ensuring Lawful Action* above n 4.

## **OBSERVATIONS**

190. This section makes some general observations about process matters which impacted the Inquiry and which may have on-going relevance to oversight, or particular issues that stood out.

### **Quality of engagement of senior management**

191. We consider that, during the period covered by this Inquiry, the senior levels of management in both agencies should have been more aware of the operational and legal developments arising both from their staff's deployed work and from their Wellington support to military operations activities. This would have required the Directors and senior managers to be more regularly and formally briefed by staff on a range of developing issues.
192. Regular briefings at Senior Leadership Team level would have ensured risks were identified and discussed at the right level in the organisation. This would help overcome the fractionalisation of information within the agencies which we saw, where important knowledge was often held by individual operational staff rather than being attributable to a more senior or strategic part of the corporate body. Part of the answer also lies in ensuring that formal briefing notes and memoranda are used for important communications to the Directors-General and senior management. We saw a tendency for staff to rely on verbal briefings, emails, and emails embedded within email chains, for important communications.

### **HUMINT deployments**

193. The classified report presents this observation in slightly different terms, but the general point is that particular challenges apply to overseas HUMINT deployments, especially in a theatre of war, like Afghanistan. We have concerns about the wisdom of deploying individuals without close support and supervision. Particularly with the first NZSIS deployment in-theatre under Operation Wātea, there was a lack of direct management response and guidance to the deployed NZSIS officers. The responsiveness of management was much improved under Operation Awarua. Notwithstanding this criticism, an inescapable feature of the evidence is how industrious and effective the deployed NZSIS officers were as intelligence officers operating in an enormously hostile foreign environment. In a short period of time they built productive intelligence relationships, and collected and shared valuable intelligence. They reported regularly and in detail back to their managers in Wellington. Any suggestion in this report that they should have done anything differently reflects on the decision-making processes and support from within the main agency, and is not a criticism of the individuals.

### **Public sector records**

194. There is a general obligation on all public sector agencies to keep "full and accurate" records in order to ensure accountability.<sup>110</sup> The GCSB and the NZSIS now also have a specific duty to undertake their activities in a way that "facilitates" effective democratic oversight.<sup>111</sup> The main

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<sup>110</sup> Public Records Act 2005 (PRA) s 17(1).

<sup>111</sup> ISA s 3(c)(iii) and s 17(d).

thing our office needs, as the primary accountability body for the agencies, is timely access to records.

195. In this Inquiry we found the agencies have a considerable distance to go before they can satisfy the PRA standard or the facilitation obligation under the ISA. There were deficiencies in their management of important business records. The events about which we sought information were up to ten years prior, but that is not an unusual or long time in the context of corporate record maintenance. Some examples illustrate where the agencies' information management process are inadequate or hindered rather than facilitated our Inquiry:

- Email storage processes were materially deficient:
  - The NZSIS could not retrieve any emails from the account of a particular senior manager. It is likely all were deleted when he left employment in the Service but the Service could not confirm what had happened.<sup>112</sup>
  - Technological challenges caused delays of many months. We sought access to email accounts of specific agency staff in August 2018. No NZSIS accounts were made available until mid December 2018. The Bureau took even longer. Access to GCSB accounts was provided incrementally from late December through to May 2019.
- The agencies' inability to locate the final, or signed, or latest version of key documents. Not only did such issues cause delay and wasted efforts while we and agency staff searched, they also created doubt as whether particular documents ever existed, or which documents were in fact in place at the relevant time.

196. The technological difficulties for the agencies in providing us with access to information understandably put pressure on them. We had the clear impression, conveyed often during the Inquiry, that the obligation to retrieve large volumes of records or organise our access to their systems was considered a significant burden, and an interruption to their operational work. The Inspector-General has often had to emphasise that resourcing the needs of oversight must also be seen as a core operational activity. We appreciate the agencies were under multiple pressures over the last 18 months, including from two major external Inquiries<sup>113</sup> (which, we understand, imposed far tighter deadlines and more onerous information demands than our Inquiry did). Ultimately, significant efforts were made by the agencies to retrieve the records necessary for this Inquiry. However, from the perspective of public sector accountability and the duty to facilitate a timely and thorough Inquiry by the agencies' primary oversight body, they should do better.

### **Storage and use of emails**

197. Access to the emails of staff in both agencies was a critical source of evidence for this Inquiry. It provided the basis for many key factual findings in respect of both agencies. We observe, for instance, that most of what we learnt about the details of GCSB's Wellington team's support for Operation Burnham came from contemporary emails of team members, rather than from

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<sup>112</sup> The NZSIS has assured us that a technological solution was put in place in 2014 to ensure email accounts cannot be deleted.

<sup>113</sup> *Government Inquiry into Operation Burnham and Royal Commission of Inquiry into the Attack on Christchurch Mosques.*

witness interviews or other documents. The way in which staff used agency email accounts gives rise to two observations.

198. First, where email is an appropriate form of record and communication for operational matters there must be a requirement and processes in the agencies to ensure all relevant email records created by staff are filed and stored in a logical and retrievable way. It needs to be clear that personal privacy interests do not attach to such business records. They should not be stored in the email accounts of the individual staff, past or current, along with all other emails; nor should they be archived according to how particular teams or individuals choose to do it. All business records, including emails, need to be in a properly organised central records system.
199. Second, we saw a confined body of emails generated by some staff in the GCSB Wellington team that were distasteful and unprofessional. This was not the general tenor of that team's internal communications, and we also saw some emails that showed an appropriate management response. In response to the same material the Director-General for the Bureau has been publicly clear there is no place in the public sector culture for such communications.<sup>114</sup> We add that if staff knew all operations related emails must be filed and would be available for colleagues, managers and oversight to access, that would impose an effective discipline on how work email accounts are used.

#### **Duty to facilitate oversight**

200. Over the course of our Inquiry the agencies' processes and responsiveness to our information requests improved considerably. It was a slow first half, however. Emails are again the catalyst for two observations concerning the Inspector-General's powers, and the correlative duty on the agencies to facilitate oversight.
201. The Inspector-General must be given access to all "security records."<sup>115</sup> This undoubtedly includes business emails in staff email accounts. The IGIS' power to directly access these was expressly challenged by the Directors-General in writing.<sup>116</sup> The reasoning in support of this was not comprehensive or compelling, and was ultimately not pursued. The particular objection, however, took a number of weeks to resolve before the agencies even turned their attention to the significant technological difficulties they faced in facilitating our access to the emails. A challenge to a fundamental element of effective oversight<sup>117</sup> should not be made without significantly more detailed analysis. It would also be wise for it to be reviewed by Crown Law first. The objection of the Directors-General was not made to prevent our access to the unprofessional emails described above, I have no doubt of that. Rather, it was fuelled by a belief that the personal content of staff email accounts should outweigh the Inspector-General's right to directly access these work records and to determine for herself what

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<sup>114</sup> GCSB Director-General Media statement (16 December 2019).

<sup>115</sup> ISA s 217(1), and the definition of "security records" in s 4.

<sup>116</sup> Letter from NZSIS and GCSB Directors-General to IGIS (15 November 2018) at [20] to [28].

<sup>117</sup> Direct access to systems is both necessary and was intended: see *Intelligence and Security in a Free Society* (Cullen and Reddy), at [4.68] and [4.69]; and *Departmental Report on the New Zealand Intelligence and Security Bill* (December 2016), at [978] and [1129].

material is relevant to her Inquiry. If the agencies have no process for separating personal and work-related emails, oversight may require access to the entire account.

202. The Inspector-General also had occasion during this Inquiry to remind senior management in the GCSB of our power to issue a summons if staff are not available to us on a more informal basis. In the end we had a voluntary meeting with relevant personnel (about technical issues concerning email accounts) which was thoroughly reassuring and helpful. Our observation is that unnecessary delays add up, and are not consistent with the duty to facilitate oversight.

### **Transparency: classification and international relations**

203. In respect of the NZSIS and GCSB I share the reservations voiced by the *Government Inquiry*, in the Observations section of its report, about over-classification of information, and the problems inherent with the concept of “foreign partner control” of historic factual information concerning New Zealand government agencies. We routinely see a tendency to over-classification by the intelligence agencies, where the likelihood of prejudice from disclosure has not been or cannot reasonably be made out. There is also the related problem of near-permanent classification due to the lack of systematic classification review processes within the New Zealand government. Progress has been slow in response to the Inspector-General’s 2018 review of the classification system and recommendations.<sup>118</sup> I endorse the proposition of the *Government Inquiry* that factual information about the basic activities of New Zealand government agencies, including the two intelligence agencies, 8-10 years ago in Afghanistan, which does not disclose (directly or indirectly) sensitive information about sources of intelligence, capabilities, or identifying information, will be unlikely to give rise to any legitimate security interests.

### **Threshold in the agencies for identifying risks to human rights from information sharing**

204. The evidence of the agencies’ influential role in the detention of Qari Miraj, in the classified “case study”, and in the Service’s fulsome engagement with NDS 124 from 2012, reinforces the key message from our *Senate Report*<sup>119</sup> that the agencies must ensure they have a more effective and embedded system for human rights risk identification, analysis, and mitigation. In this regard a lot of sound work has been done by the agencies, particularly since the enactment of the ISA in 2017. We described in detail and made recommendations on the agencies’ current policy framework in our *Senate Report*.
205. A specific point stood out in this Inquiry, and has led to my second Recommendation. Both agencies articulate and apply a test of “clear causative link” in assessing whether their assistance gives rise to a real risk of mistreatment or torture. That is the threshold in their current guiding Joint Policy Statement (JPS) on Human Rights Risk Management. At present, a number of times every month if not every week, the agencies use that threshold to decide whether they can safely share intelligence with foreign partners.

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<sup>118</sup> IGIS *Review of the New Zealand Security Classification System* (September 2018) available at: <http://www.igis.govt.nz/publications/investigation-reports/>.

<sup>119</sup> IGIS *Senate Report*, above n 2.

206. The JPS is to be reviewed, as recommended in our *Senate Report*. We expressed the view there that the “clear causative link” threshold is too high. The evidence we saw in this Inquiry confirms that. The *Government Inquiry*, like us, has articulated a more risk-averse threshold, based on concepts of a precautionary approach and rigorous risk analysis where New Zealand information or activities might reasonably “contribute” to human rights breaches.
207. Review of the JPS is part of a suite of work the agencies have commenced concerning human rights risks engaged by international cooperation and sharing. An initial component of that work involves review, led by the Department of Prime Minister and Cabinet, of the *Ministerial Policy Statement on Foreign Cooperation*. We think the threshold for intelligence sharing in the agencies’ own JPS can nonetheless be amended urgently and in advance of any other work. If the intelligence agencies do not do that, we suggest caution in the meantime when applying the current JPS threshold, and particularly close attention should be paid to best practice approaches to intelligence sharing and risk mitigation. We have described such approaches in detail in the Supplementary Paper to the *Senate report*.<sup>120</sup>

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<sup>120</sup> IGIS Supplementary Paper Best Practice Approaches to Information Sharing and Cooperation: Ensuring Lawful Action above n 4.



## RECOMMENDATIONS

208. I have made two recommendations, based on the significant themes from our assessments across the four terms of reference. There is a risk that in the context of interagency cooperation, such as the events and activities described in this report, accountability for identifying, addressing and reporting on human rights risks and concerns can fall through the gaps between agencies. The purpose of Recommendation 1 is to ensure there is a clear inter-agency framework for cooperative military endeavors, which puts appropriate focus on identifying and managing human rights risk, including, if necessary, reporting these to relevant Ministers. At a practical level a memorandum of understanding might be desirable between the Directors-General of GCSB, NZSIS, the Chief of the Defence Force, and possibly also MFAT, addressing:

- the areas of operation where New Zealand's human rights and international humanitarian law obligations might be engaged
- the obligation on each party to the memorandum, regardless of which agency is the "lead" agency, to notify the others of any specific matter where there is a reasonable possibility of human rights breaches which concern or might implicate the New Zealand government
- guidance to ensure that staff are aware of when and to whom they should report any concerns they have about compliance with human rights obligations
- a process, suitable for the context and nature of the particular exercise, that sets out the roles and responsibilities of the parties if any real risk to human rights is identified; and
- where documentation related to this process should be kept.

### **Recommendation 1:**

**I recommend that in situations where the NZSIS and the GCSB are to provide support to military operations the intelligence agencies work to ensure there is inter-agency planning, in advance of that activity, which anticipates human rights risks, including how they will be identified and approached in the context of the collective inter-agency effort and the overarching government responsibilities.**

### **Recommendation 2:**

**I recommend the agencies' review of the Joint Policy Statement on Human Rights Risk Management is expedited and pays specific attention to best practice, involving:**

**(i) the threshold applied by the agencies to make decisions on sharing intelligence where there is a risk of human rights abuse, and**

**(ii) the factors relevant to mitigation, especially the reliance that can safely be placed on factors such as assurances and caveats in inherently risky circumstances.**

## COMMON ACRONYMS

AIHRC	Afghanistan Independent Human Rights Commission
ANA	Afghan National Army
ANP	Afghan National Police (part of MOI)
ANSF	Afghan National Security Forces (including NDS)
ASIC	All Source Intelligence Cell
BDA	Battle Damage Assessment
CRU	Crisis Response Unit (Afghan counterterrorism service part of ANP/MOI)
FRAGO	Fragmented Order – issued by ISAF Command in Afghanistan
GIRoA	Government of the Islamic Republic of Afghanistan
HUMINT	Human-sourced intelligence
IED	Improvised Explosive Device
IHL	International Humanitarian Law
INS	Insurgents
INT	Intelligence
ISAF	International Security Assistance Force
KAB Reports	Regular activity reports prepared by the NZSIS officers in Kabul
MOI	Ministry of the Interior, Afghanistan
MTA	Military Technical Agreement
NATO	North Atlantic Treaty Organisation
NDS	National Directorate of Security, Afghanistan
NZDF	New Zealand Defence Force
NZPRT	New Zealand Provincial Reconstruction Team, NZDF, in Bamyán Province
NZSAS	New Zealand Special Air Service, NZDF
OHCHR	UN Office of the High Commissioner for Human Rights
SIGINT	Signals intelligence
SMO	Support to military operations (NZSIS)
SNO	Senior National Officer, NZSAS
TB	Taliban
TF	Task Force
TWB	Tala Wa Barfak region
UNAMA	United Nations Assistance Mission to Afghanistan
UNSC	United Nations Security Council
ZI Reports	NZSIS intelligence reports