# HON PEENI HENARE, MINISTER OF DEFENCE

## Expert Review Group Crown Law Opinion

November 2021

This opinion by the Crown Law Office influenced the thinking of the Expert Review Group. The Expert Review Group was established in response to recommendation one of the Government Inquiry into Operation Burnham and related matters.

The pack comprises the Crown Law opinion *The Role of the Ministry of Defence in advising the Minister and Cabinet on operational deployments* [Crown Law Ref DEF022/71]

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

It has been necessary to withhold certain information in accordance with the following provisions of the Official Information Act 1982. Where information is withheld, the relevant sections of the Act are indicated in the body of the document. Information is withheld in order to protect the privacy of an individual [s9(2)(a)]. It is not considered that the public interest in this information outweighs the need to protect it.

Te Tari Ture o te Karauna
Crown Law

9 February 2021

Carol Douglass
Deputy Secretary, Governance, People and Executive Services
Ministry of Defence
WELLINGTON

By email: s9(2)(a)

Dear Carol

**Role of the Ministry of Defence in advising the Minister and Cabinet on operational deployments**
**Our Ref: DEF022/71**

1. This paper sets out Crown Law's views on the current state of the law for the Defence Expert Review Group (**ERG**) on term of reference [8.1]:

> *The extent to which the Defence Act 1990 does, or should, reflect a role for the Ministry of Defence, working alongside the NZDF, in advising the Minister of Defence and Cabinet on operational deployments.*

This paper does not address the normative aspect ("should"). That aspect will be addressed by policy experts.

2. Crown Law is in the process of seeking a waiver of legal privilege over this opinion, however this does not include waiver over the references cited, some of which contain legally privileged or classified information.

**Summary**

3. The Secretary for Defence (**Secretary**) and Chief of Defence Force (**CDF**) have complementary roles in advising the Minister of Defence (the **Minister**). The Defence Act 1990 sets out a framework for complementary and contestable advice, following consultation.

4. The Minister is generally involved in strategic decisions rather than operational and tactical decisions, but retains democratic oversight of the operation and administration of the New Zealand Defence Force (**NZDF**) and remains responsible to Cabinet and Parliament.

5. CDF has command of the armed forces and operational decisions will generally sit with him, once the strategic mandate is granted by Cabinet.

6. The Secretary's role in advising the Minister is broad. The term "civilian advisor" is not defined, but generally means providing advice from a non-military point of view. The Secretary would not stray into operational advice on military matters — such as capability or how to achieve a military objective — but may advise on other matters



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impacting on the decision, such as the relative importance of the strategic objective and the proportionality of the resources required to achieve it. The division between "military" and "civilian" advice, together with the consultation provisions, is intended to provide the Minister with contestable and balanced advice which reflects a range of points of view.

7. The Minister does retain the power to intervene in operational decisions if these risk straying outside the government's strategic objective (the mandate granted by Cabinet). In that case (and if time permits), the Minister may consider seeking advice from both CDF and the Secretary on their respective spheres.

8. In practical terms, the Minister and the Secretary require regular briefing and information on operational matters to ensure the power of intervention could be exercised where necessary. The Defence Act 1990 provides several mechanisms for this to occur, and there is room for these practices to improve without legislative/structural change.

**Operation Burnham report**

9. Chapter 2 of the Operation Burnham report sets out the constitutional and legal arrangements between Cabinet, the Minister, the Secretary and CDF. On the question of democratic oversight of operations, the report draws the following conclusions:

9.1 The principle of democratic oversight is an essential and permanent component of our defence system, exercised by the Minster, Cabinet and Parliament, *not* by public servants.[1]

9.2 The Secretary and CDF enjoy equal status as servants of the Minister. Their skills are *complementary* and should be fused in a *partnership*.[2]

9.3 While the NZDF is not a government department and the Ministry is,[3] the same *conventions* which apply generally to dealings between Ministers and their senior professional advisors should apply to both CDF and the Secretary.[4]

9.4 Defence Doctrine provides three levels of decision-making:[5]

9.4.1 Strategic (setting the policy and military objective);

9.4.2 Operational (command and planning); and

9.4.3 Tactical (engagements during execution of the campaign).

(TOR 8.1 focuses on the "*operational*" decision-making, rather than strategic or tactical).

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1 Terence Arnold and Geoffrey Palmer *Report of the Government Inquiry into Operation Burnham and related matters* (July 2020) [Op Burnham Inquiry Report], at [66]; quoting and agreeing with D K Hunn *Review of Accountabilities and Structural Arrangements between the Ministry of Defence and the New Zealand Defence Force* (30 September) 2002 at [2.7]–[2.9].

2 Op Burnham Inquiry Report, above n 1, at [66].

3 The Ministry is listed as a "department of the Public Service" in Schedule 1 to the State Sector Act 1988, but the NZDF and New Zealand Police are not.

4 Op Burnham Inquiry Report, above n 1, at [66].

5 Ibid, at [52]; citing chapter 3 of NZDF *Foundations of New Zealand Military Doctrine* (2nd ed, November 2008).

9.5 The Governor-General in Cabinet has the power (at the strategic level) to deploy the NZDF to a theatre/objective.[6] The Rules of Engagement (**RoE**) for the deployment are also approved by the Minister and the Prime Minister, as they reflect New Zealand values.[7] Cabinet may include caveats (as for Operation Burnham), such as a "national veto" for the CDF over particular operations, or limiting the deployment to a particular geographical area.[8]

9.6 *Command* and *control* are different powers and may be exercised by different people. CDF has "command" under s 8(3) of the Defence Act 1990. During Operation Burnham, the CDF delegated command to the Senior National Officer,[9] and delegated control to ISAF.[10]

9.7 While there is no doubt about the power of the Minister to direct a deployment overseas, there is an issue about his power in relation to operational matters. Dr Mapp stated that the Defence Act 1990 is couched in *general terms* to allow a degree of *flexibility* in how different Ministers exercise democratic oversight. Dr Mapp himself received regular briefings and endorsed the RoE for Afghanistan but did not approve or select missions himself. Rather, the NZSAS in Afghanistan was under the control of ISAF and the command of the Senior National Officer.[11]

9.8 The Policing Act 2008 specifically provides for operational independence of the Commissioner of Police from the Minister (s 16(2)). The Defence Act 1990 has no similar separation, probably because of the nature of policing versus defence, and the ongoing relevance of the prerogative to defence activities.[12]

10. Professor Matthew Palmer gave advice in 2002 that the Minister's powers to direct the military were "unclear at the margins and untested in case law". In his view, the Minister is likely to have control over "*general strategic decisions relating to the deployment of troops and politically sensitive decisions relating to foreign policy*." The Minister is unlikely to have control over "*specific operational decisions in a field of conflict which a court is more likely to find to be the preserve of the CDF*".[13]

11. The Operation Burnham report generally agrees with Professor Palmer's advice, but raises the following issues:[14]

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6 Op Burnham Inquiry Report, above n 1, at [63].

7 Ibid, at [69].

8 Ibid, at [48]–[50].

9 Ibid, at [55].

10 Ibid, at [56]. The Op Burnham Inquiry Report states that "control" includes the ability to direct and authorise missions/operations, and also control of the processes and requirements for missions/operations. In Afghanistan, this included issuing directives and standard operating procedures. However, the NZSAS remained bound by the New Zealand ROE. Note this type of military "control" is different from the political "control" exercised by the Minister under s 7.

11 Ibid, at [70]–[71].

12 Ibid, at [72]. We also note that s 16(2) of the Policing Act 2008 reflects the longstanding common law doctrine of constabulary independence.

13 Matthew Palmer, *Legal Analysis of New Zealand's Defence Legislation,* Annex F to the Hunn Report, quoted at [73] of the Op Burnham report, above n 1,.

14 Op Burnham Inquiry Report, above n 1, at [74].

11.1 It may be difficult to specify with precision in a military context what are policy decisions and what are operational decisions.

11.2 NZDF operations generally affect people outside New Zealand whereas policing decisions generally affect New Zealanders.

11.3 There may be circumstances in which the Minister should have the power to intervene and veto a deployment, if the operation is inconsistent with the Government's overall strategic direction.[15] (The Inquiry saw this as part of the democratic oversight of the military, rather than as an application of the "no surprises" policy[16]).

12. In summary, the report states:

> [89] To summarise, the role of ministers involved approving the deployment and the rules of engagement, setting any national caveats and ensuring that appropriate arrangements with ISAF and with the Afghan Government were in place, so as to meet New Zealand's international obligations. *As a general rule, although they should be informed of operational decisions, ministers should not be involved in individually authorising or denying particular military operations and so taking ministerial responsibility for them.* That said, we accept Dr Coleman's point that *there may be occasions where NZDF may need to check that particular operations fit within the Government's strategic objectives for the deployment.* Operation Burnham may have been such an occasion…. [Emphasis added].

13. The report gives as an example, Dr Mapp's role in Operation Burnham itself. Dr Mapp was in Kabul at the time and was given an overview (not full) briefing on Operation Burnham the day before it took place. He considered the operation to be of significance to New Zealand, so he and CDF briefed the Prime Minister in accordance with the "no surprises" policy. He was then given the opportunity to watch the operation via live video feed but declined, believing this was an operational matter for CDF in which he should not be involved.[17] The Inquiry agreed this was an appropriate approach.[18]

14. We agree with these conclusions and adopt them as the starting point for further investigation on TOR [8.1]. The difficulty lies in defining the point where the Minister may (should) intervene in NZDF operations, and whether the Secretary has the power or ability to advise the Minister on this.

**Statutory and prerogative powers**

15. New Zealand military power is derived from a combination of statute and the prerogative power.[19] The governing statutes include the Defence Act 1990, the Armed



15 Ibid, at [74](c) to [78]; quoting former Ministers Dr Mapp and Dr Coleman.

16 The "no surprises policy" is contained in the *Cabinet Manual 2017* at [3.22](a), discussed at paragraph [50] below.

17 Op Burnham Inquiry Report, above n 1, at [84]–[85].

18 Ibid, at [87]–[88].

19 Ibid, at [60].

Forces Discipline Act 1971, the Visiting Forces Act 2004, as well as various other statutes,[20] regulations[21] and Defence Force Orders (**DFOs**).[22]

16. The armed forces are also partly regulated by the prerogative power.[23] The Governor-General and Commander-in-Chief retains the broad defence prerogative powers of the sovereign,[24] for example to declare and conduct war and make peace.[25] The defence prerogative has historically been non-justiciable in court.[26]

17. The relationship between the statutory powers and prerogative powers is complex and subject to disagreement between commentators. The Defence Act 1990 overrides some aspects of the prerogative and saves other aspects. For example:

17.1 A *statutory basis* for the power to raise and maintain armed forces is found in s 5 of the Defence Act 1990.[27] The list of purposes in s 5 for which armed forces may be raised, maintained and deployed appears to cover every contingency, and it is doubtful whether any prerogative power remains to raise or maintain armed forces for any other purpose.[28]

17.2 The prerogative powers of the Governor-General and Commander-in-Chief are *described* (not constituted) in s 6(1): "The Governor-General, by virtue of being Commander-in-Chief of New Zealand, shall have such powers and may exercise and discharge such duties and obligations relating to any armed forces raised and maintained… as pertain to the office of Commander-in-Chief".

17.3 The general prerogative power over the armed forces is also *saved* in s 6(2), which provides "nothing in this section or in section 5 shall affect any power vested in the Governor-General apart from this Act.".[29] However today, the Governor-General's broad defence prerogatives are now exercised by



20 For example, s 7 of the Health and Safety at Work Act 2015 [HSWA] determines when a defence operation is covered by the HSWA and when it is exempted.

21 Regulations such as the Defence Regulations 1990 are promulgated under s 101 of the Defence Act 1990.

22 DFOs are issued by the CDF or delegate under s 27 of the Defence Act 1990. They cover a wide range of governance matters including, for example, conditions of service of military personnel.

23 The royal prerogative is "what remains of [the sovereign's original, absolute power], so far as it has not been superseded by statute, eroded by judicial recession or atrophied by neglect or disuse. The Crown's surviving prerogatives are a bundle of miscellaneous rights and powers of executive government": Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [18.1].

24 Clauses 1 and 2 of the *1983 Letters Patent*. The prerogative power is also described (not constituted) s 6(1) of the Defence Act 1990.

25 Joseph, above n 23, at [17.18.4.3](3); and *Legal Fundamentals of Armed Forces Operations* (legally privileged) at [1.6].

26 *R v Hampden "the Ship Money Case"* 1613, cited in *Legal Fundamentals*, above n 25, at [1.6]; and *Curtis v Minister of Defence* [2002] 2 NZLR 744.

27 The Bill of Rights 1688 forbids the raising and maintenance of an army in time of peace without the consent of Parliament, therefore a statutory power is required); Joseph above n 23 at [17.18.4.3](3); Roger Howard *Laws of New Zealand* Defence: Armed Forces, Part IV(9) at [46]; *Legal Fundamentals*, above n 25, at [1.6], [1.7] and [1.65]; and *Curtis v Minister of Defence* [2002] 2 NZLR 744.

28 Alison Quentin-Baxter and Janet McLean *This Realm of New Zealand: The Sovereign, The Governor-General, The Crown* (AUP, Auckland 2018) at 302; and *Legal Fundamentals*, above n 25, at [1.39–1.40].

29 Quentin-Baxter and McLean, above n 28, at 131.

Cabinet.[30] The Governor-General's personal powers relate largely to the complaints process under s 49 and some ceremonial matters.[31]

17.4 The power of *command* is both statutory and prerogative and is discussed in detail at [35]-[40] below.

17.5 The Minster's power to *control* the armed forces under s 7 is different from the power of command, and relates generally to political control. This is discussed in detail at [30]-[34] below.

17.6 The power to deploy the armed forces is found *solely* in the prerogative with no reference in statute.[32] This power is exercised through the Governor General, by ministers in Cabinet.[33] The power is limited by other statutes and international law.

17.7 There is also no longer any prerogative right to deploy the Armed Forces to perform any public service or to provide assistance to the civil power in time of emergency. These powers are codified in s 9 of the Defence Act 1990.

18. A more fulsome legislative history of the Defence Act 1990 is annexed below.[34]

**Democratic oversight of the military**

19. The concept of democratic (or "civilian") oversight[35] of the military is key to safeguarding democratic accountability and ensuring compliance with New Zealand and international law.

20. Democratic oversight of the military includes the usual chain of responsibility through Chief Executive (CDF) to Minister to Parliament (described in more detail below).

21. However, democratic oversight of the military goes further than ordinary ministerial responsibility for government departments, commensurate with national security requirements and the risk that uncontrolled armed forces can present to democracy. The tensions between King Charles I and Parliament during the 17th century (including the raising of an army by the King against Parliament and the later civil wars) illustrated the mischief which democratic oversight is designed to prevent. The subsequent Bill

30 Palmer, above, n 13, at [F.10].

31 Quentin-Baxter and McLean, above n 28; *Legal Fundamentals*, above n 25, at [1.12]-[1.13]; *Bradley v Attorney-General (No 2)* [1988] 2 NZLR 454 per Smellie J at 462. Quentin-Baxter and McLean argue that description of the position "Governor-General and Commander-in-Chief" in s 6(1) is unnecessary and confusing, as there is no separate office entitled "Commander-in-Chief" with separate prerogative powers – all prerogative powers belong to the Governor-General. Above n 28, at 129–131 and 136–137. See in contrast Howard, above n 27, Part IV(9) at [53].

32 The legislative history to the Defence Act 1990 (annexed below) suggests a reason why there is no statutory reference to the power to deploy armed forces. In short, there was such a provision when the Defence Bill 1989 was introduced however Select Committee appears to have agreed with submissions that inserting this a statutory power would be too restrictive, could lead to questions about whether the Government has the authority to deploy armed forces, and the decision to deploy could be challenged in court. See also Howard, above n 27, Part IV(9) at [49].

33 Quentin-Baxter and McLean, above n 28, at p 303; and *Legal Fundamentals* above n 25 at [1.41].

34 For a brief legislative history of military legislation prior to 1990, see Palmer, above n 13.

35 The Geneva Centre for the Democratic Control of Armed Forces recommends that the term "democratic oversight" is preferable because not all "civilian oversight" is democratic; DCAF *Democratic Control of Armed Forces: the national and international parliamentary dimension* (Geneva, October 2002). We adopt this terminology as it better reflects the principles of responsible government which form the basis of New Zealand's system of government. It also enables better differentiation between political oversight (by the Minister and Parliament) from the Secretary's role as "principal civilian advisor". In our view, these are separate concepts.

of Rights 1688 prohibited the King from raising or maintaining a standing army during peacetime, without the consent of Parliament.[36] In New Zealand, Parliamentary consent is given through s 5 of the Defence Act 1990.

22. Another aspect of democratic oversight following the Bill of Rights 1688 is the monopoly of Parliament on imposing taxes and spending public money. This includes separation of "the troops from the gold", achieved through appropriation of defence funds through Parliament. In New Zealand, CDF has a fair degree of control over the NZDF budget, but this is appropriated annually to the Minister by Parliament.[37]

23. The modern approach to democratic oversight assumes that the purpose of the armed forces is to further civilian government policy. While deployment of the armed forces remains a prerogative power (see [17.6] above), in practice this is exercised on the advice of ministers (ie. Cabinet).

24. However, the national security objectives often engaged mean that the ordinary mechanisms for responsible government will not provide a complete check and balance on executive power. Discussion of military operations in Parliament, or even in Cabinet, will often be curtailed by their classified nature. This places greater emphasis on Minister's own responsibility, as well as the Prime Minster.[38]

25. Other democratic oversight mechanisms include the proposed Inspector-General of Defence (similar to the Inspector-General of Intelligence and Security and the Independent Police Conduct Authority) and the UK and Australian Defence Ombudsmen[39] The Courts also play a role in democratic oversight, through judicial review and other litigation, although such cases are rare in New Zealand.

**Ministerial responsibility for operational matters**

26. The Hunn report and the Operation Burnham report both stated that the Minister of Defence remains responsible to Cabinet and Parliament for operations of the Ministry and the NZDF in the usual manner (as noted at [9.3] above). The "power of control" in s 7 (discussed at [30]-[34] below) is given to the Minister for this purpose.

27. Constitutional convention provides that ministers are not generally involved in the day-to-day operations of the department. Nevertheless, they remain individually responsible to Parliament for the conduct of their departments, including acts and omissions of their officials. The *Cabinet Manual 2017* provides:

> 3.7 Ministers decide both the direction of and the priorities for their departments. *They are generally not involved in their departments' day-to-day operations*. In general terms, Ministers are responsible for determining and promoting policy, defending policy decisions, and *answering in the House on both policy and operational matters*.
>
> …3.27 Ministers are accountable to the House for ensuring that departments for which they are responsible carry out their functions properly and efficiently. *On occasion, a Minister may be required to account for the actions of a department when*

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36 This part of the Bill of Rights 1688 forms part of New Zealand law through the Imperial Laws Application Act 1988.

37 *Legal Fundamentals,* above n 25, at [1.6]-[1.8].

38 For example, the Defence Act 1990 provides CDF with access to the Prime Minister in exceptional circumstances (s 25(3)).

39 Such as the Service Complaints Ombudsman for the UK Armed Forces and the Australian Commonwealth Ombudsman.

> *errors are made, even when the Minister had no knowledge of or involvement in, the actions concerned.* The question of subsequent action in relation to individual public servants may be a matter for the State Services Commissioner (in the case of chief executives), or for chief executives in the case of members of their staff. [Emphasis added]

28. Ministerial responsibility to Parliament includes three aspects:[40]

    28.1 "Explanatory" responsibility: explaining all matters about their portfolios to Parliament via Parliamentary questions, debates, etc. This includes a *duty* on Ministers to be kept informed of departments' and officials' actions, and to *actively investigate* any departmental failings which may impact on the public interest.

    28.2 "Amendatory" responsibility: explaining any failings of the department and taking responsibility for correcting the error and minimising the damage.

    28.3 "Culpability": accepting any political embarrassment of such errors.

29. The Public Service Act 2020 provides that the Chief Executive is responsible to the Minister for the operation of the department and the performance of its functions, duties and powers (including operational matters), but with a duty to act independently on employment matters.[41] These provisions of the Public Service Act 2020 apply explicitly to the Secretary. The Public Service Act 2020 does not apply to CDF,[42] But s 25(1)(b) of the Defence Act 1990 makes CDF responsible to the Minister in the same manner as a departmental chief executive.

**Minister's power of control vs CDF's power of command**

30. The relationship between the Minster and CDF is prescribed in the Defence Act 1990. Specifically, by distinguishing between the Minister's power of *control* and the CDF's power of *command*. In our view, this reinforces the general principle that the minister should not intervene in the NZDF's day to day operations, but does not alter the constitutional principle of ministerial responsibility for the operation of the NZDF.

31. Section 7 confirms the Government of the day (through the Minister) has the *power to control* the Armed Forces, exercised through the CDF:

> **7 Power of Minister of Defence**
>
> *For the purposes of the general responsibility of the Minister* in relation to the defence of New Zealand, the Minister shall have the *power of control* of the New Zealand Defence Force, which shall be *exercised through the Chief of Defence Force.*

32. The power of control is to be exercised "*for the purposes of the general responsibility of the Minister*". This reflects the constitutional principle of democratic oversight and the ordinary principles of responsible government.

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40 Joseph, above n 23,23 at [9.5.1](8).

41 Section 52 and 54. See also ss 32 and 33 of the State Sector Act 1988 (in force at the time of Operation Burnham).

42 The NZDF is not a government department listed in Schedule 2 of the Public Service Act 2020, formerly Schedule 1 to the State Sector Act 1988.

33. The explanatory note to the Defence Bill 1989 states that this provision is new and that it reaffirms the principle that the armed forces are under the control of the government of the day. The then Minister of Defence, Hon Peter Tapsell, described this section as providing for "political control" by the minister.

34. Political control includes setting defence priorities, requesting approval from Parliament for budget appropriation and from Cabinet for deployments, and setting the TOR for the CDF.

35. The prerogative power of *command* was transferred from the sovereign to professional commanders in the 18th century.[43] The power of command now sits with CDF under s 8(3) of the Defence Act 1990, but must be exercised through the service chiefs:

> **8 Chief of Defence Force**
>
> (1) The Governor-General in Council may from time to time appoint an officer of the Armed Forces to be the Chief of Defence Force.
>
> …(3) The Chief of Defence Force shall—
>
> (a) *command the Navy through the Chief of Navy, the Army through the Chief of Army, and the Air Force through the Chief of Air Force*: and
>
> (b) *command any joint force either directly through the joint force commander or through the Chief of any Service*.

36. It is not clear whether s 8 replaces CDF's prerogative power altogether or merely describes it.[44] However, ss 7 and 8 indicate two important constitutional points:

36.1 The Minister has no power of command over the armed forces (or put another way the armed forces can only be commanded by CDF);[45]

36.2 CDF does not have personal command over the NZDF but must exercise command through the service heads – consistent with the constitutional concern that such command should not be concentrated in a single officer.[46]

37. New Zealand Defence Doctrine[47] provides that "command" includes "authority", (the power to give orders and discipline disobedience) "responsibility" and "accountability" (up the chain of command), and "control" (continuing oversight, direction and coordination of forces).[48]

38. The New Zealand "mission command" philosophy is based on delegation of a single "unitary" command to the appropriate level, with each commander having "freedom of action" – the maximum freedom to take initiative and exercise their skills and knowledge of the local situation in the planning and conduct of the operation.[49] Improved technology has led to improved dissemination of information up the chain

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43 *Legal Fundamentals*, above n 25, at [1.10]. Governor Grey purported to exercise the power of command personally at one point in New Zealand's history, however this is generally seen as an aberration: Quentin-Baxter and McLean, above n 28, at 129–130.

44 *Legal Fundamentals,* above n 25, at [1.19].

45 Palmer, above n 13, at F.62.

46 *Legal Fundamentals,* above n 25, at [1.20].

47 New Zealand Defence Doctrine *Command and Control* NZDDP-00.1 (2nd ed) at [1.02]–[1.09].

48 This aspect of "control" is different from the Minister's political "power of control" in s 7, discussed above.

49 NZDDP-00.1, above n 47, at [1.10]–[1.15].

of command, meaning there is a temptation for superiors to make command decisions which have been delegated. Although higher-level involvement may be positive, discipline is required to avoid micro-management.[50]

39. The power to issue DFOs is now a purely statutory power (under s 27).[51] The prerogative power of superior officers to order subordinates remains,[52] and is generally not justiciable.[53] However this power is backed up by the Armed Forces Discipline Act 1971 which creates offences for disobeying a lawful command of a superior officer[54] and failing to comply with a lawful order (including a Defence Force Order).[55]

40. The power to direct or intervene in operational matters is therefore largely circumscribed by the Minister's lack of command power. However, the power of "control" means he retains ordinary ministerial responsibility and the power, along with Cabinet, to make strategic decisions.

**Role of the Secretary**

41. The Hunn report and the Operation Burnham report both stated that democratic oversight is exercised by the Minister, *not* by public servants such as the Secretary (as noted at [9.1]-[9.2] above). But the Minister needs advice on his/her oversight responsibilities. CDF and the Secretary have equal and complementary roles, and should be fused in a partnership providing this advice.

42. The Secretary has no power of command or control over the armed forces and therefore cannot direct or intervene in operational matters.

43. The Defence Act 1990 states that the Secretary is the *principal civilian adviser* to the Minister and other Ministers.[56] However, there is no statutory definition of what a "principal civilian adviser" is or does and, for these purposes, nothing about whether that advice function can or should be exercised in relation to operational deployments or post-deployment matters.

44. The Secretary's other statutory functions are: to formulate advice on defence policy (in consultation with CDF);[57] prepare defence assessments (in consultation with CDF);[58] undertake procurement for things of major significance to military capability;[59] and arrange audit and assessments of NZDF (and some functions of the Ministry of Defence).[60]

45. The principle of *ejusdem generis* would indicate that the meaning of the general term "principal civilian advisor" is informed by the specific functions that follow. However,

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50 NZDDP-00.1, above n 47, at [1.23]–[1.24].

51 *Legal Fundamentals,* above n 25, at [1.24]–[1.25].

52 *R v Froggatt* (1992) 1 NZCMAR 169 at 183; cited by Palmer, above n 13, at [F.54]; *Legal Fundamentals,* above n 25, at [1.24]–[1.25].

53 *Lawrence v Attorney General* (HC Wellington CP191/98, 4 June 1999).

54 Armed Forces Discipline Act 1971, s 38.

55 Armed Forces Discipline Act 1971, s 39.

56 Defence Act 1990, s 24(2)(a).

57 Defence Act 1990, s 24(2)(b).

58 Defence Act 1990, s 24(2)(c).

59 Defence Act 1990, s 24(2)(d).

60 Defence Act 1990, s 24(2)(e). We provided advice on the Secretary's audit and assessment function in 2018.

the legislative history (Annex to this letter) indicates that this list of fairly disparate functions reflected a deliberate policy decision on the respective functions of the Secretary and CDF. In particular, the Defence Act 1964, which is the first place the term 'principal civilian advisor appears', indicates that this function was designed to consolidate and unify defence policy advice from several disparate departments.[61]

46. In our view, the term "*principal civilian advisor*" reflects the ordinary dichotomy between "military" and "civilian".[62] In other words, "civilian" means "non-military". The Secretary does not advise on military matters such as capability and military means of achieving an objective. However, the Secretary may give advice from a different point of view, and on other matters impacting on the decision, such as the relative importance of that particular strategic objective and the proportionality of the resources required to achieve it. One example of this is the advice given to Cabinet before authorising a deployment. The Ministry and NZDF prepare the Cabinet paper together, to include both a military and civilian point of view.

47. The Secretary also has the ordinary responsibilities of a Chief Executive of a government department under the Public Service Act (previously the State Sector Act 1988).[63]

**Democratic oversight and the "no surprises" principle**

48. The Operation Burnham report differentiated between democratic ("civilian") oversight (which includes the minister's power to intervene where operations breach their strategic mandate) and the "no surprises" principle.[64]

49. In our view, these principles are related: the power to intervene in operations requires regular advice/briefings from CDF on the progress of such operations. Regular briefing is an aspect of ministerial responsibility (described above), but is reinforced by the "no surprises" principle.

50. The "no surprises" principle relates to reporting and is set out in the *Cabinet Manual 2017*:

> 3.22 The style of the relationship and frequency of contact between Minister and department will develop according to the Minister's personal preference. The following guidance may be helpful.
>
> (a) In their relationship with Ministers, officials should be guided by the "no surprises" principle. As a general rule, they should inform Ministers promptly of *matters of significance within their portfolio responsibilities*, particularly where these matters may be *controversial or may become the subject of public debate*.
>
> (b) A chief executive should *exercise judgement* as to whether, when, and how to inform a Minister of any matter for which the chief executive has statutory responsibility. Generally a briefing of this

61 A brief legislative history of the Defence Act 1964 is included in Annex 1 below.

62 There is no definition of "civilian" in the Defence Act 1990 or the Armed Forces Discipline Act 1971, although both statutes use the term. The Oxford English Dictionary online defines "civilian" as "A person who is not professionally employed in the armed forces; a non-military person."

63 For example, see s 52 of the Public Service Act 2020.

64 Op Burnham Inquiry Report, above n 1, at [78].

> kind is provided for the Minister's information only, although occasionally the Minister's views may be a relevant factor for the chief executive to take into account. In all cases, the chief executive should ensure that the Minister knows why the matter is being raised, and both the Minister and the chief executive should act to maintain the independence of the chief executive's decision-making process. The timing of any briefing may be critical in this regard. As a matter of best practice, briefings should be in writing or at least documented in writing. [Emphasis added].

51. The Solicitor-General has issued guidance on the "no surprises" principle. The key factor is the *significance* of the matter within the minister's portfolio responsibility. Where the function or power is one exercised independently of the Minister, the official should consider the *purpose, timing, manner and scope* of the briefing to ensure that independence is not compromised.[65]

52. The Cabinet Manual and Solicitor-General's guidance clearly leave plenty of flexibility, depending on factors such as the relationship and level of trust between the Minister and CDF and the significance/risk of the particular deployment. However, the timing of briefing need not be left entirely to the CDF's judgment:

    52.1 The CDF's TOR also specifies the regularity of briefing, triggers for "no surprises" briefings on operations.

    52.2 The Cabinet decision mandating the deployment could also provide for briefings to Cabinet or the Minister at regular intervals, or following triggering events.

**Role of the Secretary in operational matters - consultation and contest**

53. The structural separation of the two equal civilian and military advisors indicates Parliament intended the opportunity (where appropriate) for such advice to be contestable. A civilian point of view may be valuable to the Minister when making a decision on a military matter, and vice versa.

54. The value of contest is reinforced by the statutory consultation obligations:

    54.1 The Secretary's must consult CDF when providing advice on defence policy and defence assessment (s 24(1)(b)-(c));

    54.2 The obligation of the Secretary and CDF to consult with each other on any "*major matters of defence policy*" before either of them advises the Minister (s 31(1)); and

    54.3 The Minister's power to *require* consultation between CDF and the Secretary on any advice that is to be, or could be, or could have been given by either of them to the Minister (s 31(2)-(3)).

55. We understand that there are no specific protocols governing consultation and cooperation between the Secretary and CDF, rather the degree of

[65] Crown Law, *Chief Executives and the 'No Surprises' Principle,* 9 September 2016 (updated in September 2020 only to update references to Cabinet Manual 2017 and legislation).

cooperation/consultation depends on the relationship at the time. There is a reasonable level of practical cooperation, for example the CDF and Secretary attend joint weekly briefings with the Minister. However, the Secretary does not attend all the Minister's operational briefings with CDF (which may be daily during an important operation).

56. In our view, an element of the democratic oversight envisaged by the Operation Burnham report (i.e. the Minister's power to intervene where operations breach their strategic mandate) may also require advice from the Secretary, where this is practicable within the time constraints. The Secretary has an important role in advising the Minister and Cabinet when *establishing* the strategic mandate for the deployment. This includes advice on foreign policy, defence policy, and any other "civilian" (non-military) advice required to assist Cabinet in making its decision.

57. The question whether an operation risks breaching or undermining its strategic mandate will often engage the same requirement for policy advice. Therefore, the Secretary will require a level of briefing from the NZDF, to enable the Secretary to properly advise the Minister.

58. There may be occasions (Operation Burnham may be one) where operational imperatives and time constraints do not permit full briefing/consultation with the Secretary. There may also be cases where the issues of defence/foreign policy are obvious or well-known to the Minister, and specialist advice from the Secretary is not required. There may also be questions of privacy or "need to know" in terms of the Protective Security Requirements.[66] In such cases, democratic oversight is preserved through ministerial responsibility. However, these should be the exception, and only where the statutory requirements for consultation are not engaged.

59. Professor Palmer criticised the Defence Act 1990 for containing few powers for the Secretary to obtain information from NZDF to discharge his/her statutory advice function.[67] He considered the incidental powers to do "anything reasonably necessary to enable the performance of functions" were too broad to enable the Secretary to require the specific provision of information by NZDF.[68] As discussed above, he considered the request to the Minister to require consultation is a "blunt and haphazard instrument"[69] and the current relationship is like a "bilateral bargaining game and cannot be expected to work unless both organisations have institutionally equivalent powers and need each other to succeed."

60. However, in our view that is not necessarily a legal problem, and could be addressed through policy or governance decisions:

    60.1 Cabinet's approval of the deployment mandate could include requirements to consult on certain operational decisions or contingencies (such as the "national red card" in Operation Burnham), or to copy reports to the Secretary as well as the Minister;

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66 The structural separation between the Ministry and NZDF mean they would be treated as different agencies under the Privacy Act 2020. This means disclosure of "personal information" from one agency to another would need to be justified under the information privacy principles.

67 Palmer, above n 13, at F.41.

68 Ibid, at F.42.

69 Ibid, at F.42.

60.2 The CDF's TOR could require CDF to consult or to provide the Secretary with copies of briefings on specified matters or following triggering events;

60.3 The parties or Cabinet could promulgate a policy setting out the "major matters of defence policy" on which the Secretary and CDF must consult under s 31(1);

60.4 The Minister could *require* CDF to consult with the Secretary on specified matters under s 31(2). The Scope of s 31(2) is broad and includes both military and civilian advice;[70]

60.5 The Secretary can request the Minister to require consultation under s 31(2);[71]

60.6 The Secretary's audit function could be used to this effect, although in our view it is not designed or fit for that purpose.

**Conclusion**

61. We agree with the Operation Burhman report that the Minister should generally refrain from intervention in operational decisions, which sit within CDF's command responsibility. The Minister's (and Cabinet's) primary role is at the strategic level, approving the deployment of the armed forces, setting any conditions on that deployment and approving the RoE.

62. However, the Minister retains the power to intervene where an operation is in danger of breaching or undermining its strategic mandate. The Minister will require advice from the Secretary for this purpose, in addition to advice from CDF. That may include proactive advice on whether (in the Secretary's opinion), the operation is in danger of breaching its mandate.

63. To facilitate this, the Minister requires regular and fulsome briefings on operations from CDF. The Secretary should also be part of briefings on operational matters where possible, sufficient to enable him/her to provide the proactive advice outlined above.

64. The Defence Act 1990 contains mechanisms to achieve this purpose. These include reporting requirements in Cabinet mandates, specifying reporting requirements in the CDF's TOR, and utilising the statutory consultation requirements in ss 24 and 31.

65. This advice has been peer reviewed by Alison Todd, Crown Counsel.

Yours faithfully
**Crown Law**

Jenny Catran
Crown Counsel

Michael Madden
Crown Counsel

[70] Under s 31(2) of the Defence Act 1990 the Minister can require CDF and the Secretary to consult on "any advice that is to be, or could be, or has been given by the Secretary *or* the [CDF]". The term "or" indicates either civilian advice or military advice. Consultation can be required under s 31(2), even though such advice would normally be outside the remit of the other party.

[71] Section 31(3) of the Defence Act 1990.

## Annex – Legislative history of the Defence Act 1990

### Introduction

1. Prior to 1990, Strategos Consulting Ltd carried out a "major resource management review" of the Ministry of Defence[72] and submitted a report to Government ("**the Strategos Report**").[73] The Strategos Report recommended a new central defence structure, along with the changes to command, management and policy formulation, for the purposes of better resource management and improved accountability.[74] The Government broadly accepted the recommended changes,[75] later referring to the report as the "catalyst" for changes to New Zealand's defence administration. The Defence Bill 1989 was subsequently introduced into Parliament.[76]

2. Following the legislative process (discussed in more detail below), the Defence Act 1990 replaced the Defence Act 1971 for the stated purposes of restructuring Defence administration by abolishing the New Zealand Defence Council,[77] constituting the NZDF as a separate entity, retaining the Ministry of Defence but removing most of its responsibility for military expenditure,[78] and defining the respective roles and responsibilities of the Minister, Secretary and CDF.[79]

3. *Hansard* indicates that another of the purposes of the Defence Act 1990 was to *separate out the formation of defence policy from the delivery of defence outputs*,[80] *and create "contestable" advice for the Minister*. The armed forces component of the Ministry of Defence would be taken out and the new, "much smaller Ministry" would be responsible for providing *independent advice to Government on policy*.[81] The armed forces, together with a civilian staff, would constitute the newly established New Zealand Defence Force and *would be*

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72 One suggestion why the Strategos Report was commissioned is that it was time for the Defence Act 1971 to be reviewed because of changing responsibilities abroad and changes in the Pacific, and to review the military's capabilities to carry out those responsibilities (see *Hansard,* Vol 506, 27 March 1990, page 995, per Hon. Peter Tapsell (Minister of Defence)). Other suggestions are set out in the 2009 Wintringham Report as follows: "The Defence establishment was large and perceived as "ripe" for efficiency extraction in terms of the public management environment touched on above; This was part of the systematic review of all large government departments in terms of the public management paradigm of the 1980s; The measurement of what the Government was getting for its investment in Defence was (and is) difficult. The Government is often purchasing capability rather than an output. Obtaining assurance on the level of capability delivered for the dollars invested required a specialised, external function, rather than reliance on a form of self assessment; Defence policy was perceived as being, if not driven, then at least overly influenced, by professional military preferences for "platforms", rather than vice versa; Furthermore, these preferences were themselves being influenced by an informal understanding between the heads of the three services of "whose turn" it was for capital investment; and The purchasing of large capital items was not done well, in part because the whole of life costs were not being adequately identified and managed by the Ministry. (This was not a Ministry problem alone given the inadequacy of accounting for capital costs which was characteristic of the state sector up to the mid-1980s.)".

73 *Hansard*, Vol 502, 17 October 1989, page 13212, per Rt. Hon. R. J. Tizard (Minister of Defence).

74 Ibid.

75 Although that is not accepted by all. The Deputy Leader of the Opposition at the time said all the proposals were cast aside except for restricting the defence hierarchy into two single departments; see *Hansard*, Vol 502, 17 October 1989, page 13214, per Mr McKinnon.

76 *Hansard*, Vol 502, 17 October 1989, page 13211, per Rt. Hon. R. J. Tizard (Minister of Defence).

77 The New Zealand Defence Council was stated as having the function of commanding the Armed Forces through officers appointed for that purpose, administering the Armed Forces, and assisting the Minister formulate defence policy or recommendations thereon (Defence Act 1971, s 21).

78 Defence Bill 1989 (204-1), Explanatory note.

79 Defence Bill 1989 (204-1), Long title, at (d).

80 *Hansard*, Vol 502, 17 October 1989, page 13211, per Rt. Hon. R. J. Tizard (Minister of Defence).

81 Ibid.

*responsible for operations.*[82] The two organisations were designed to be complementary but distinct.

**Defence Bill 1989 as introduced**

4. When the Defence Bill 1989 was introduced, it sought to follow existing law in most respects however, relevantly for these purposes, the following new provisions were proposed:

   4.1 The express (rather than arguably implicit) power to deploy the Armed Forces for any purpose for which they are raised (as discussed further below, this clause did not survive the legislative process);[83]

   4.2 The 'reaffirmation' of the principle that the Armed Forces are under the control of the Government of the day by making clear that the Defence Force is subject to the control of the Minister of Defence;[84]

   4.3 The Secretary of Defence's role was changed from expressly being the "principal civilian adviser to the Minister" in the Defence Act 1971,[85] to having 'such functions imposed by the Minister to promote efficient and effective Defence policy and activities';[86] and

   4.4 The escalation mechanism by which the Secretary or CDF could ask the Minister to require the other to consult in order to guard against the "temptation to tender advice to the Minister without proper consultation" where their respective "interests do not coincide".[87]

5. The Defence Bill was said to have reflected the Government's broad acceptance of the Strategos Report and, to that end, Parliament expressly set out to change the responsibilities of the Secretary and CDF.[88] The Secretary's responsibilities under the Defence Act 1971 were described as being primarily the financial management of the Ministry (which constituted the armed forces at that point), the role of principal civilian adviser to the Minister and various other matters including preparation of policy, and reviewing policies, plans and programmes.[89] Under the Defence Bill, Parliament said that would change to be *those functions imposed by the Minister to promote the efficient and*

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82 *Hansard*, Vol 502, 17 October 1989, page 13211, per Rt. Hon. R. J. Tizard (Minister of Defence).

83 Defence Bill 1989 (204-1), Explanatory note; "Clause 6 is new. It makes explicit what is (arguably) implicit in the present Act: that the Armed Forces may be deployed for any purpose for which they are raised, and for any other purpose authorised by or under clauses 10 and 11.". Clause 6 provided "6. Deployment of Armed Forces-The Armed Forces may be deployed- (a) For any purpose specified in section 5 (1) of this Act; and (b) For any purpose authorised by or under section 10 or section 11 of this Act." Clause 5 largely mirrors s 5 of the Defence Act 1990 as it currently stands.

84 Defence Bill 1989 (204-1), Explanatory note; clause 8. Although this clause did not exist in the Defence Act 1971, s 17 of that Act placed the Ministry of Defence under the control of the Minister and the Ministry of Defence was comprised of the armed forces. Therefore, arguably, the armed forces was expressly under the control of the Minister under the Defence Act 1971. Further, the Minister was a permanent member of the Defence Council (Defence Act 1971, s 18(a)) and no important decision of the Defence Council could be made unless the Minister was a party to the decision or the Minister assented (Defence Act 1971, s 23).

85 Defence Act 1971, s 25(2)(a)

86 Defence Bill 1989 (204-1), Explanatory Note; Clause 25. As discussed below, this wording did not survive but the reference to the Secretary 'tendering advice' in the consultation clause indicates the Secretary was intended to be a civilian adviser therefore its not clear whether this wording would have been material.

87 Defence Bill 1989 (204-1), Explanatory note; clause 32.

88 *Hansard*, Vol 502, 17 October 1989, page 13212, per Rt. Hon. R. J. Tizard (Minister of Defence).

89 *Ibid.*

*effective formulation and implementation of defence policy and defence activities*.[90] Parliament considered that, in practice, that function would cover *policy advice* to the Minister, *capital expenditure* that entails major changes to capability or equipment, and *audit* of NZDF in delivering defence outputs.[91] Parliament reiterated that those new functions would be "significantly different" from the responsibilities under the Defence Act 1971.[92]

6. *Hansard* emphasises that policy formulation was a principal focus of the Defence Bill.[93] The Secretary will be responsible for policy formation, with military input through formal consultation with CDF. Following "considerable discussion on the actual wording of those provisions" around referring to past advice, it was determined that "[w]hat is in place will not be able to avoid future examination".[94] In other words, the Secretary and CDF could examine past advice for the purposes of performing their respective advice functions (though it is difficult to see the need for that clarification).

7. "Defence policy" was not defined in the Bill (nor is it defined in the Defence Act 1990) but it was explained by Parliament to include "*strategic assessments, defence goals, defence outputs and their costs, funding levels for defence expenditure, and specific expenditure proposals with capability implications*".[95] Major items of repair (e.g. refitting a frigate) are part of capital expenditure and therefore expected to be within the remit of the Secretary's policy function.[96] Parliament likened the relationship between the Minister, Secretary and CDF as a replacement for the Defence Council and expected that frequent advice would be required (e.g. as it was during the purchase of the HMNZS *Te Kaha* and *Te Mana* in 1989).[97]

8. The purpose of the consultative process between the Secretary and CDF was to ensure that independent and balanced advice was provided to the Minister, but that military input was sought and assessed in the policy formation process.[98]

9. Overarching the Bill was the need to maintain the constitutional principle of democratic control of the armed forces, and that the Bill adequately reflected the roles and relationships of the Minister, Secretary and CDF.[99]

10. In terms of operational matters, Parliament was clear that there "was no question" that CDF will have control of the operational activities of the defence forces.[100] One example of the respective roles of Secretary and CDF was that the Secretary advises

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90 *Hansard*, Vol 502, 17 October 1989, page 13212, per Rt. Hon. R. J. Tizard (Minister of Defence).

91 Ibid.

92 Ibid.

93 Ibid.

94 Ibid.

95 Ibid.

96 Ibid.

97 *Hansard*, Vol 502, 17 October 1989, page 13213, per Rt. Hon. R. J. Tizard (Minister of Defence).

98 Ibid.

99 *Hansard*, Vol 502, 17 October 1989, page 13213, per Rt. Hon. R. J. Tizard (Minister of Defence). See also *Hansard*, Vol 502, 17 October 1989, page 13218, per Mr Braybrooke (Napier): "The overall power of the Minister is unchanged".

100 *Hansard*, Vol 502, 17 October 1989, page 13230, per Rt. Hon. R. J. Tizard (Minister of Defence). Later, at second reading, Parliament repeated the position that CDF "will have the responsibility for all of the operational activities of the Defence Force" (see *Hansard*, Vol 506, 29 March 1990, page 1120, per Rt. Hon. R. J. Tizard).

on "what one might like to do with the equipment" and CDF advises on "what one can do with the equipment and training one has".[101]

**Report back from Select Committee**

11. Contrary to modern practice,[102] the Defence Bill 1989 appears to have been reported back from the Foreign Affairs and Defence Select Committee without an explanatory note or commentary setting out the reasons for the proposed changes. The relevant changes included:

    11.1 The express power to deploy the Armed Forces was removed;[103]

    11.2 The Secretary's role and functions were replaced with the five largely prescriptive functions that exist in the current s24 of the Defence Act 1990 (i.e. principal civilian adviser to the Minister, formulate defence policy in consultation with CDF, prepare defence assessments, procurement, and assessment and audit);[104] and

    11.3 Adding an express requirement on the Secretary and CDF to consult with each other on any advice on major matters of defence policy that is to be given by either of them to the Minister or other Ministers.[105]

12. As indicated above, there is little commentary on why these changes were recommended by Select Committee.[106] The Secretary and CDF's staff provided a joint report to the Select Committee noting some issues, which may have led to the changes.[107] For example that joint report notes advice from the Law Commission and Legislation Advisory Committee's that:

    12.1 The express statutory power to deploy the armed forces should be removed because it is too restrictive and could lead to questions about whether Government has the authority to deploy armed forces, and a decision to deploy could be challenged in court;[108]

    12.2 The relationship between and powers of the Secretary and CDF were not clear enough.[109] In particular, the absence of specificity in the role of the Secretary could provide "scope for dispute" and conflicting advice on the breadth of the Secretary's powers, such as the Secretary's power to acquire

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101 *Hansard,* Vol 506, 29 March 1990, page 1120, per Rt. Hon. R. J. Tizard.

102 For example, the Foreign Affairs, Defence and Trade Committee's report on the Defence Amendment Bill 2011 includes commentary on why numerous changes were recommended.

103 Defence Bill 1989 (204-2), clause 6.

104 Defence Bill 1989 (204-2), clause 25.

105 Defence Bill 1989 (204-2), clause 32. This requirement is duplicative of the Secretary's duty to consult with CDF on matters of defence policy (cl 25(2)(b)) therefore the only substantive effect of this clause is to require CDF to consult with the Secretary when exercising the principal military adviser function on matters of defence policy (cl 26(a)). As a matter of contemporary drafting, it may have been thought necessary to restate the Secretary's consultation duty in the consultation provision (i.e. cl 32) for the avoidance of doubt.

106 See *Hansard,* Vol 506, 27 March 1990, pages 990-996 for Parliament's discussion following the report back from the Select Committee but prior to second reading.

107 Report of the Secretary of Defence and the Chief of Defence Staff to Foreign Affairs and Defence Committee on the Defence Bill (February 1990).

108 Ibid, at para 2.3.

109 Ibid, at para 2.6.

information from the NZDF in order to formulate policy and effectively review;[110] and

12.3 The requirement on the Secretary and CDF to consult was "unnecessarily formal and negatively bureaucratic".[111] An amendment to the consultation clause was jointly proposed by the Secretary and CDF and later adopted.[112]

13. There is suggestion in the House that the duty to consult was inserted because the military should have the right, and be seen to have the right, to put forward its viewpoint early rather than at the last stage "after the civilian element had formulated its policy".[113]

**Establishment of the Secretary**

14. Going back in time a little further, the Secretary is said to have been originally established by Cabinet direction in 1962, following a recommendation by the Royal Commission of Inquiry into the State Services.[114] In particular, the Royal Commission recommended that a Department of Defence be established under a Secretary of Defence for the purpose of advising the Minister on defence commitments, expenditure and allocation of funds, and to give advice on matters of joint-Service[115] activities, integration and conditions of service in the Armed Forces.[116] The reasons for this recommendation included the fact that Government was having to "hammer out a unified defence policy based on advice from at least give different departments".[117] For example, Treasury and the External Affairs Department had defence branches for the purposes of giving diplomatic and financial advice when the Budget was being prepared.[118]

15. Instead of the functions recommended by the Royal Commission, Mr Hunn (the person who carried out the 2002 Hunn Review) was appointed Secretary of Defence on June 1963 specifically for the purpose of preparing a report on the practicability and feasibility of a single Ministry of Defence.[119] Following Mr Hunn's recommendations, the Government established the Defence Office, which was later changed to the Ministry of Defence when the Defence Act 1964 was drafted.[120] There is said to have been "much debate and argument" about the role of the Secretary of Defence and that it was eventually decided that the role would be described as

110 Ibid, at para 2.8.

111 Ibid, at para 2.12.

112 Ibid, at para 3.5.

113 *Hansard,* Vol 506, 29 March 1990, page 1120, per Rt. Hon. R. J. Tizard.

114 Ministry of Defence, *Manual of Armed Forces Law*, Vol 1, Ch 2, pg 2-8.

115 At that time, the Armed Forces was constituted as three separate services (Army, Navy and Air) and the Minister of Defence was described as being, in reality, the Minister for Army, Minister for Navy and Minister for Airforce – see Report of the Royal Commission of Inquiry, *The State Services in New Zealand*, June 1962, at 123.

116 Report of the Royal Commission of Inquiry, *The State Services in New Zealand*, June 1962, at 128.

117 Ibid, at 123.

118 Report of the Royal Commission of Inquiry, *The State Services in New Zealand*, June 1962, at 123. Treasury was responsible for advising on financial implications of defence expenditure, and pay and conditions of service for the Armed Forces. The External Affairs Department was concerned with the international aspects of defence, including treaty obligations and coordination of defence with overseas affairs.

119 Ministry of Defence, *Manual of Armed Forces Law*, Vol 1, Ch 2, pg 2-8

120 Ibid, at pg 2-9.

'principal civilian adviser'.[121] There was also dispute about whether the three separate services would be part of the new Ministry but Cabinet determined that the services would retain their identity and the Secretary would have ordinary powers of a department head but not the power of command nor the responsibility for efficient and economic administration of the Armed Forces.[122]

16. The explanatory note for the Defence Bill 1964 states its purpose was to establish the Ministry of Defence and provide for a unified defence policy for the better defence of New Zealand.[123] Neither the Defence Act 1964, Defence Bill nor explanatory note defines 'civilian advice'[124] but it was made clear that the Secretary:[125]

16.1 is not responsible for the command and economic administration of the Services;

16.2 may carry out inspections and report to the Minister; and

16.3 is responsible for coordinating long-term financial planning within the Ministry and for control of the defence programme expenditure.



121 Ministry of Defence, *Manual of Armed Forces Law*, Vol 1, Ch 2, pg 2-9.

122 Ibid.

123 Defence Bil 1964 (67-1), Explanatory Note.

124 The furthest Parliament went was saying that the intention is that the Secretary and Chief of Defence Staff (as it was called) should provide a continuing source of informed yet independent advice on defence matters – see *Hansard,* Vol 340, 30 September 1964, , page 2373, per Hon. D. J. Eyre (Minister of Defence).

125 Defence Bil 1964 (67-1), Explanatory Note, cl 7. See also *Hansard*, Vol 339, 28 August 1964, page 1685, per Hon. D. J. Eyre (Minister of Defence).