

**REVIEW OF THE PERFORMANCE OF THE DEFENCE FORCE
IN RELATION TO EXPECTED STANDARDS OF BEHAVIOUR,
AND IN PARTICULAR THE LEAKING AND INAPPROPRIATE USE
OF INFORMATION BY DEFENCE FORCE PERSONNEL**

**Report to the State Services Commissioner
by Douglas White QC and Graham Ansell**

20 December 2001

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A. INTRODUCTION

Establishment of review

1. The Minister of Defence and the Chief of Defence Force have each requested, under section 11(4) of the State Sector Act 1988, that the State Services Commissioner “review the performance of the Defence Force in relation to expected standards of behaviour, and in particular the leaking and inappropriate use of information by Defence Force personnel.”
2. To meet that request the State Services Commissioner determined to carry out an inquiry defined in the terms of reference set out in Appendix 1 to this report. The Commissioner appointed us, Douglas White QC and Graham Ansell, under s 25(2) of the State Sector Act 1988, as a Review Team to conduct this inquiry.
3. For the purpose of summoning witnesses and receiving evidence, s 25(1) of the State Sector Act gives the State Services Commissioner the powers of a Commission of Inquiry under the Commissions of Inquiry Act 1908. While those powers attached to our inquiry, we were not a formal Commission of Inquiry as such nor were we expected to hold formal, public hearings with the involvement of parties, and witnesses being cross-examined by opposing counsel.

Context of the review, and relationship to other reviews

4. The Government’s Defence Policy Framework released in June 2000 foreshadowed a “review of accountabilities and structural arrangements between the Ministry of Defence and the New Zealand Defence Force”.
5. On 10 September 2001 the Minister of Defence announced a review of the accountabilities and structural arrangements between the Ministry of Defence, the New Zealand Defence Force, and the three Services. The Minister of Defence expects the reviewer to provide an interim report to him by the end of 2001.
6. In addition to its concerns about accountabilities and structural arrangements the Government has expressed increasing disquiet about the handling of Defence documents and information, including ‘leaks’ to members of the Parliamentary Opposition. The Minister has announced two further reviews as a consequence.

The first is the review that is the subject of this report, about the performance of the Defence Force in relation to expected standards of behaviour, and in particular the leaking and inappropriate use of information by Defence Force personnel. This review was originally required to be completed by the end of November 2001, so that the results would be available to the first (accountabilities and structural arrangements) review as soon as possible, but the reporting time was extended when we were requested to direct our attention to the more urgent matter of the allegations by Mr Ron Mark MP about misuse of his Army files. On completion of our report on that matter on 13 December 2001 we resumed our work on this report.

7. The third review, which is intended to address specific concerns about a letter written by an Army officer in March 1997, and an e-mail circulated by Navy staff in March 2001, is being conducted under the authority of the Judge Advocate General. The Judge Advocate General was originally expected to report by mid-December 2001, but we understand that it is now unlikely that he will do so before the end of January 2002.
8. Our terms of reference note the possibility of overlap between our review and the review being carried out by the Judge Advocate General, and requires appropriate cooperation and consultation between the two.

Nature of Government's concerns

9. Before beginning our inquiry, we were briefed by the Minister of Defence and the Chief of Defence Force on the nature of the concerns which had led to their requesting the State Services Commissioner to initiate the investigation. This was done both orally and by the submission of documents. Their observations covered two broad areas:

9.1 Unauthorised disclosure of official information

The Minister supplied us with a list of 44 occasions on which unauthorised disclosures may have been made. These fell into several different categories, and were of varying degrees of seriousness, though all had caused embarrassment. In some cases, Defence personnel had spoken openly to media representatives or written letters to newspaper editors about policy issues. In other cases, information had been published by the media without

attribution, or at least with no more than a general reference to Service sources. There were a number of instances in which information had apparently been passed, without authority, to Opposition Members of Parliament as background briefing or in the form of copies of official documents. On some occasions, requests for documentation from the media or from Opposition MPs directed under the Official Information Act 1982 or as Parliamentary Questions to the Minister, appeared to have been prompted by sources within the Services. The report from the Chief of Defence Force covered a number of these cases, and some others; and a further list of apparent breaches was later supplied to us by the Chief of the General Staff. Both officers gave us details of investigations already made, where they had been initiated. We received from both copies of instructions they had issued with the aim of discouraging practices which they held to be unacceptable.

9.2 **Standards of Defence Force behaviour**

It was made plain to us that the Government was equally concerned to secure an independent judgement on the standards of behaviour within the Defence Force which had allowed and might have encouraged the spate of unauthorised disclosures. We were asked to endeavour to establish whether within the Force there was a full understanding of the relationship which should properly exist between members of the Force and the Government of the day, and of the need to avoid acting in a way that might suggest disloyalty to Government policies. Reports had reached Ministers and senior officials outside the Defence Force that some members of the Armed Forces believed they had a higher loyalty – to the Queen, through the Governor-General, who is Commander in Chief – which might cause them to work actively against Government policies which seemed to them detrimental to New Zealand defence interests. Essentially, Ministers wished to know whether there had been a breach in the convention of political neutrality within the Defence Force, and if so, what steps the Service Chiefs had taken to remind their subordinates of their obligations and, where necessary, effect a change in attitude.

Our approach and methods

10. At the outset of our review we considered what might be the most appropriate means of making the assessment and answering the questions raised in our terms of reference. We noted that we had not been asked to conduct a formal inquiry into the sources of the unauthorised disclosure of information which had led to our appointment. We were not required to make any findings which might affect the reputation of any identified individual and which might have justified adopting a different approach. We decided that, while under s 25 of the State Sector Act 1988 we had the same powers to summon witnesses and receive evidence as a Commission of Inquiry, the nature of our terms of reference and the need to report expeditiously meant that it would be appropriate and preferable to conduct our review through a series of interviews with persons able to assist us rather than by way of a formal public inquiry. We anticipated that those persons whom we interviewed would be likely to be more forthcoming if we adopted this approach.
11. Statements by the Minister of Defence gave public notice of our review. We believed that anyone who might wish to make a submission to us would have been aware that there was an opportunity to do so. The Minister of Defence also wrote to the members of the Parliamentary Foreign Affairs, Defence and Trade Committee by letter dated 23 October 2001 providing them with a copy of our terms of reference and inviting them to contact us if they wished to contribute to our review. We were not approached by any member of the Committee, although we interviewed Hon. Max Bradford in his capacity as the former Minister of Defence and also Mr Ron Mark MP, the latter primarily in connection with our report on allegations relating to accessing his personal Army files. We received one submission from a member of the public.
12. Having now completed our review, we are satisfied that the process which we adopted was the right one in the circumstances. Since 28 September 2001 we have interviewed a total of 75 people, 5 on more than one occasion. Without exception, everyone interviewed was willing to assist us fully and frankly. Defence personnel had instructions from the Chief of Defence Force to provide us with any information which we sought and they did so. All other persons co-operated fully. A complete list of the persons interviewed appears in Appendix 2 to this report. On several occasions we were welcomed by those interviewed in the Defence Force as

providing an opportunity for them to express views to an independent panel. We record our appreciation of the assistance provided by all those interviewed.

13. In the course of our review we interviewed senior personnel at Defence Headquarters in Wellington and also at the Headquarters of the single Services; Ministry of Defence personnel; heads of other relevant Government departments and persons responsible for security intelligence; staff from the office of the Controller and Auditor-General; as well as a range of others including the former Chief of Defence Force (Lt General Tony Birks), the former Chief of the General Staff (Major General Piers Reid), the former Secretary of Defence (Mr Gerald Hensley) and the former Chair of the Parliamentary Foreign Affairs, Defence and Trade Committee (Hon. Derek Quigley). The questioning of Defence personnel included interviews conducted at Trentham (the Joint Forces Headquarters), Linton Military Camp, Whenuapai Air Force Base and Devonport Naval Base. At each of these places we interviewed commanding officers and groups of mid-ranking officers. We found that these interviews gave us a valuable perspective for our review.
14. In addition to conducting the series of interviews, we sought and obtained a substantial amount of documentary material, some of a background nature and some directly relevant to our terms of reference. An index of the key documentary material which we received is contained in Appendix 3 to this report. The directly relevant documentary material included –
 - 14.1 Lists of information believed to have been disclosed without authority over the past 2 – 3 years provided to us by the current Minister of Defence, the former Minister of Defence, the Chief of Defence Force, and the Chief of the General Staff. A summary list of unauthorised disclosures is contained in Appendix 4 to this report.
 - 14.2 Comments on these lists provided by the Chief of the Defence Force and the Secretary of Defence.
 - 14.3 Defence Force Orders and memoranda issued by the Chief of the Defence Force and instructions to his Ministry by the Secretary of Defence relating to the areas covered by our terms of reference, including classified information,

official information, protected disclosures and the unauthorised disclosure of information.

- 14.4 A Crown Law Office opinion on the constitutional nature of the relationship between the Defence Force and the Government of the day (sought by the State Services Commission and the Defence Force). A copy of the opinion is contained in Appendix 5 to this report.
15. As already noted, our terms of reference required us to co-operate and consult with the other reviewers. To the extent appropriate, we have been in touch with Mr Don Hunn, who is carrying out the accountabilities review, and Mr Colin Carruthers QC, who is carrying out the review for the Judge Advocate General.
16. As anticipated in our terms of reference, we have in the time available obtained the information which we required to carry out our review without needing to exercise any powers under the Commissions of Inquiry Act 1908.

B. BACKGROUND

General

17. As our terms of reference state, the object of our review was to make an assessment of standards and behaviour in the Defence Force in the areas of the handling of official information and relations with Government. To carry out this assessment and to answer the specific questions raised in our terms of reference, it has been necessary for us to enhance our understanding of the current constitutional, legislative, political, economic, military and social environment in which the New Zealand Defence Force and the Ministry of Defence are required to function, by further background reading and the interview process. We make the following brief observations.¹
18. In constitutional terms, protecting the security of a nation is generally recognised as one of the principal functions of a Government. The adequate defence of a nation is a critical part of ensuring its security. For that purpose Parliament has empowered

¹ A more detailed description of some aspects of the background environment may be found in Rolfe, The Armed Forces of New Zealand, 1999, Chapter 3 – “The superstructure: command and control”.

the Governor-General to raise and maintain armed forces for the defence of New Zealand: Defence Act 1990, s 5. The Minister of Defence has general responsibility for the defence of New Zealand and, for that purpose, has power to control the New Zealand Defence Force through the Chief of Defence Force: Defence Act 1990, s 7. It is clear from these provisions and the scheme of the Defence Act that the Government of the day has statutory responsibility for determining defence policy and for directing the implementation of that policy through the Defence Force which it has power to control.² The Government's responsibilities and powers are reinforced in practical terms by the obligation for the Government to obtain Parliamentary appropriations for Defence Force operating and capital expenditure budgets. The Chief of Defence Force also receives detailed terms of reference from the Minister of Defence which stipulate the duties and obligations of the Chief of Defence Force and include a purchase agreement which defines the "outputs" the Government requires from the Defence Force: Defence Act, s 25(2). The role and functions of the Chief of Defence Force and the Chiefs of Staff are plainly subsidiary to the Minister of Defence. In New Zealand there is civilian control of the military.

19. There is a range of legislation which affects the Defence Force and which is relevant to our terms of inquiry. The principal statutes are –

19.1 The Defence Act 1990;

19.2 The Armed Forces Discipline Act 1971;

19.3 The Official Information Act 1982;

19.4 The Protected Disclosures Act 2000.

The effect of this legislation is summarised in the Crown Law Office opinion and we refer to aspects of it in our report. Broadly speaking, all of this legislation applies to Defence Force personnel and affects the way they should behave.

² The limitation on the power of the Courts to intervene in the carrying out of these statutory responsibilities by the Government is illustrated by the recent decision of Heron J in *Curtis v Minister of Defence*, 20 November 2001, which involved an unsuccessful attempt to review the decision to disband the Air Combat Force. It is understood, however, that this decision is under appeal.

20. In political terms the Government of the day is responsible for determining defence policy, which is invariably concerned primarily with an assessment of risks and consequent funding and equipment issues in the context of an ever changing international scene and of New Zealand's international treaty obligations. During our history defence policy has usually been bipartisan (eg during World Wars and the Cold War), but there have also been occasions when it has been intensely political.³ Over the last 10-15 years defence policy has become increasingly political as Governments and Opposition parties have developed distinct policies based on different assessments of New Zealand's defence interests and equipment priorities, with controversial decisions including the establishment of New Zealand as a nuclear free zone by the New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987, the decision to replace the Skyhawks with F-16s, the subsequent reversal of that decision, the decision not to proceed with the Sirius upgrade of the Orions and the priority given to acquisition of new light armoured vehicles for the Army. The advent of MMP with a wider range of views represented in Parliament and the consequential increase in the role of the Parliamentary Foreign Affairs, Defence and Trade Committee have resulted in defence issues receiving a relatively higher public and political profile. The ebb and flow of New Zealand's defence policy over this period is chronicled in the reviews which have been carried out, including the New Zealand Defence Resource Management Review 1988 by Strategos Consulting Ltd; The Defence of New Zealand 1991: A Policy Paper; The Shape of New Zealand's Defence: A White Paper, 1997; the 1999 report of the Foreign Affairs, Defence and Trade Committee, Inquiry into Defence beyond 2000; The Government's Defence Policy Framework – June 2000; and the Government Defence Statement – 8 May 2001.
21. In the context of the Defence Act, the Government of the day, when determining defence policy, is expected to obtain advice from both the Secretary of Defence, who is the principal civilian adviser, and the Chief of Defence Force, who is the principal military adviser: ss 24(2) and 25(1). Furthermore, they are required to consult with each other: s 31(1). Having obtained this advice, the Government of the day has final responsibility for the determination of New Zealand's defence

³ For instance, in the late 1930s four senior colonels in the New Zealand Army, with strong connections to the Opposition, spoke out strongly against the Government's policies: see Barber, "The New Zealand Colonels' 'Revolt', 1938" (1977) NZLJ 496.

policy. Both the Secretary of Defence and the Chief of Defence Force then have significant responsibilities in respect of the implementation of the Government's defence policies. Major policy shifts, coupled with substantial lead-in times for implementation (eg equipment acquisition), together with close scrutiny from Opposition political parties, defence interest groups such as Just Defence and the Centre for Strategic Studies, and the news media have created tensions within the Defence Force and the three separate Services. Political and interest group scrutiny of defence issues has also been reflected in a significant increase in the number of requests for information under the Official Information Act and the number of Parliamentary questions. Whether these tensions have affected the political neutrality of the Defence Force, or any component of it, and the level of trust between the Government and the Defence Force are issues which we address later in this report.

22. The economic environment over the last 10-15 years has not encouraged Governments to spend substantial sums on defence. There have been other priorities. The 1999 Report of the Parliamentary Foreign Affairs, Defence and Trade Committee, Inquiry into Defence beyond 2000, stated at p 12 –

“Faced with a declining defence budget, the result has been a dramatic run-down in capabilities, exacerbated by all the disadvantages inherent in the replacement syndrome as NZDF has struggled to upgrade whatever equipment and facilities it can afford to retain.”

And the Government Defence Statement of 8 May 2001 states at p 4 –

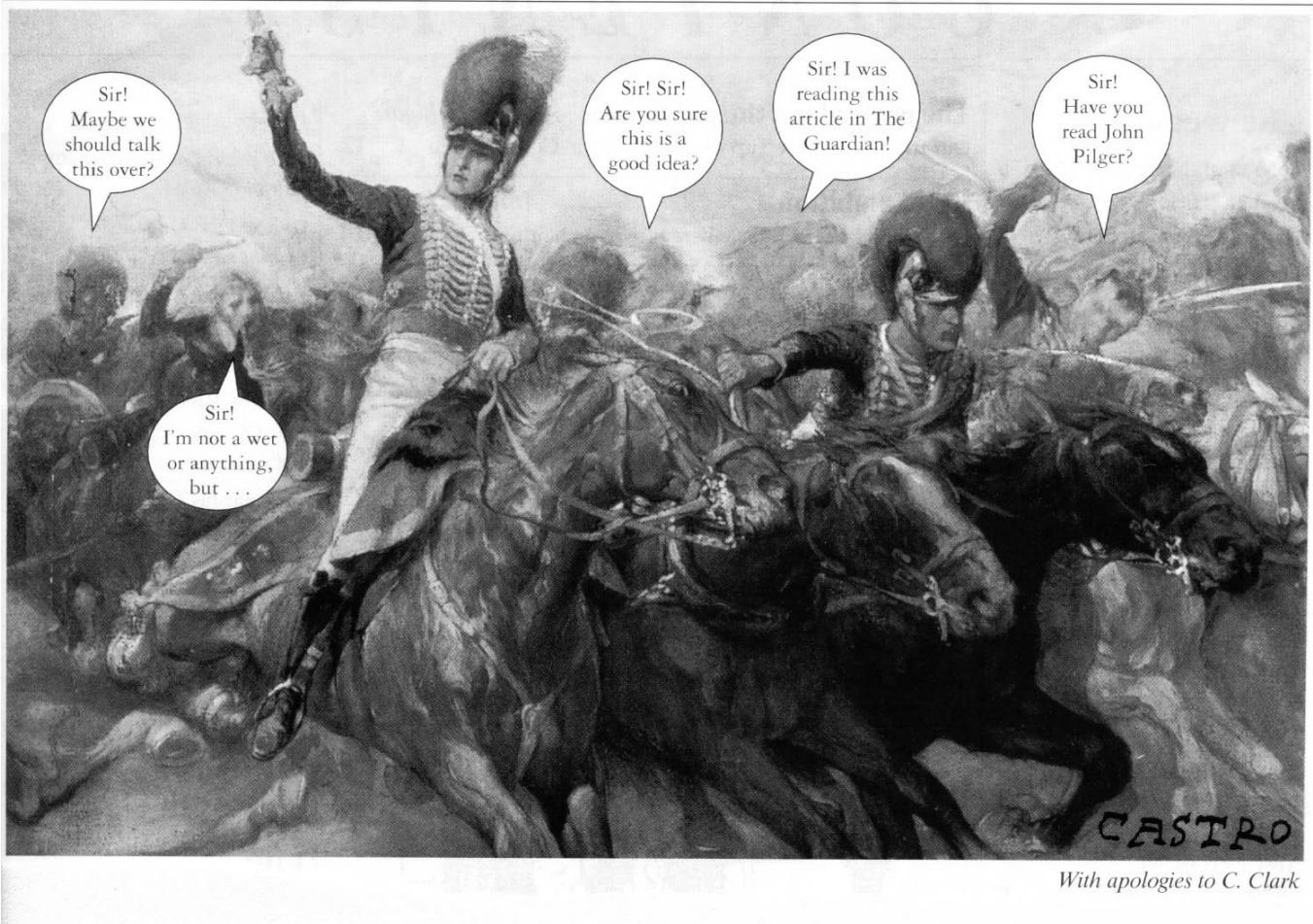
“When the government took office in 1999 it inherited a Defence Force suffering from neglect, underfunding, and confused government decision making. Much of its equipment dated from the Vietnam War era. Operational and personnel spending had been cut by almost eighteen per cent in real terms between 1991 and 1997. The previous government's 1997 Defence White Paper was neither funded nor followed through.”

The overall reduction in defence spending which occurred during the 1990s had a significant impact on the Defence Force. It no doubt contributed to difficulties within the Defence Force and the Ministry of Defence when significant re-equipment decisions were required, and to rivalries between the three Services as they competed, inevitably, for their share of the defence budget. Morale in the Services which believed that their aspirations had not been adequately met was inevitably affected, at least initially.

23. Some of the problems which occurred as a result of these pressures are illustrated by the Report of the Controller and Auditor-General dated 22 August 2001 entitled “Ministry of Defence: Acquisition of Light Armoured Vehicles and Light Operational Vehicles”. The Report described relationships between the Defence Force, the Ministry of Defence and the Army as “dysfunctional”, involving mistrust and confusion: paras 4.18-4.19. The Report recommended that the dysfunctional relationships needed to be corrected – and be underpinned by clear accountabilities, a more trusting environment, and more face-to-face communication.

24. There are aspects of the military environment which are relevant to our assessment of standards of behaviour in the Armed Forces which may not always be fully appreciated by civilians. Members of the Armed Forces have joined up for the purpose of defending their country and in the knowledge that in doing so they may lose their lives or be seriously injured. They are not public servants or covered by the Employment Relations Act 2000. Their commitment is based on an oath of allegiance to the Sovereign: Defence Act, ss 34 and 35. And the Armed Forces operate through a command structure which requires unquestioning implementation of superior orders which may be conveyed orally or by written or electronic directive. The “command” structure is based on the need in a fighting force for hard decisions in difficult situations and short time frames. As the following cartoon from a recent Spectator issue so graphically illustrates, the command structure does not provide an opportunity, in a battle situation, for debate –

PORTRAIT OF THE WEEK



25. The command structure is derived from the Crown prerogative and is reflected in the Defence Act, ss 8(3) and 28, as well as the Armed Forces Discipline Act 1971, s 38, which makes it an offence to disobey the lawful command of a superior officer. Under the Defence Act the Chief of Defence Force “commands” the three Services and the joint force “through” their respective commanders: s 8(3). And each Service Chief and the commander of the joint force “command” their respective Services and the joint force: s 28. All members of the Armed Forces are inculcated in the command structure which permeates all aspects of the military, operational and managerial. It understandably affects all relationships within the Armed Forces and the manner of communication both within and between the respective Services and Defence Headquarters.
26. The Chief of Defence Force also has power to issue and promulgate Defence Force Orders which bind all Defence personnel: Defence Act, s 27. In addition the Chief of Defence Force has power to authorise other persons to issue Defence Force Orders: s 27(2). We understand that this power has been exercised by the Chief of

Defence Force in favour of the three Service Chiefs. Defence Force Orders are used for many purposes, including the prescribing of conduct in relation to classified and official information. We discuss the effect of this on our terms of reference further in this report. In the meantime we note that failure to comply with a Defence Force Order may be an offence under the Armed Forces Discipline Act 1971: s 39.

27. The traditional military command structure has come under pressure from changes in New Zealand society which are reflected in the Armed Forces. Defence personnel, especially those of officer rank, are generally well educated and articulate. A number of officers view their military service as one step in a career. They are aware of their rights as citizens as well as their obligations as members of the Armed Forces. They have views on the future of their Services and the role of the Defence Force. They would like to be involved in the formulation of policies which affect them. Once policies have been formulated and are being implemented, they would welcome positive recognition and support for their efforts from the Government and the country. They appreciate comments such as those made in the Report of the Parliamentary Foreign Affairs, Defence and Trade Committee Inquiry into Defence beyond 2000 at p 10 –

“Lest it be thought that we are denigrating our armed services personnel, the Foreign Affairs, Defence and Trade Committee of Parliament places on record its high regard for the job they are doing in difficult conditions with limited resources. They deserve the respect of all New Zealanders for the contributions they are making to our foreign policy and security interests and in carrying the New Zealand flag so proudly into international peacekeeping operations, so often far from home.”

28. Overall we were impressed by the calibre, commitment and professional approach of the Defence personnel whom we met in the course of our review. There was general disapproval of the unauthorised disclosure of information which had led to our review and a concern at the impact of the consequent adverse publicity on the Defence Force. But it was also apparent to us from our interviews that the environmental factors which we have identified set the scene for the unauthorised disclosure of information which we were asked to consider in assessing the standards of behaviour in the Defence Force and the Ministry of Defence.

The Defence structure in New Zealand

29. New Zealand’s Defence structure has been designed on the basis of principles widely applied in the State sector reform phase of the 1980s and early 1990s,

including the separation of policy and operational functions,⁴ and provision for contestability in advice to Ministers. The structure is understood to have represented a response to concerns held by the Government of the day about the efficient and effective conduct of some aspects of Defence business, including planning for capability to meet the Government's policy goals, and procurement of major equipment items.

30. Broadly, the structure locates responsibility for performance of the functions and duties of the Armed Forces with the Chief of Defence Force, and responsibility for production of defence assessments, procurement of equipment, and audit of defence functions, with the Secretary of Defence. Section 24 of the Defence Act 1990, which sets out the functions of the Secretary of Defence, requires the Secretary to formulate advice on defence policy in consultation with the Chief of Defence Force. This and other provisions appear to reflect a desire by Parliament for effective communication and cooperation between the two institutions, balanced by an element of constructive tension.
31. The three main institutions are the Minister of Defence, the Defence Force, and the Ministry of Defence.

The Minister of Defence

32. The Minister of Defence has the power of control of the New Zealand Defence Force, exercised through the Chief of Defence Force under s 7 of the Defence Act 1990.

The New Zealand Defence Force

33. The New Zealand Defence Force is constituted under the Defence Act. It comprises the Armed Forces of New Zealand and the Civil Staff of the Defence Force. It is not a department of the Public Service under the State Sector Act 1988.
34. The Chief of Defence Force is appointed from time to time by the Governor-General in Council under s 8 of the Act. The Chief of Defence Force is the principal military adviser to the Minister of Defence and other Ministers, and is

⁴ Ewart and Boston, "The Separation of Policy Advice from Operations: the Case of Defence Restructuring in New Zealand", Australian Journal of Public Administration, Vol. 52, No.2, June 1993, p 223.

responsible to the Minister for carrying out the functions and duties of the Defence Force, its general conduct, and the efficient, effective and economical management of its activities and resources, among other things.

35. The Chief of Defence Force commands the Navy, Army and Air Force through the Chief of Staff of each of those services. The Chiefs of Staff are appointed from time to time not by the Chief of Defence Force but by the Governor-General in Council under s 28 of the Defence Act. The Chief of Defence Force also commands any joint force either directly through a joint force commander or through any of the Chiefs of Staff.

The Ministry of Defence

36. The Ministry of Defence is a department of the Public Service under s 27 of the State Sector Act 1988. The Secretary of Defence is appointed by the State Services Commissioner under s 35 of the State Sector Act. The Secretary is the principal civilian adviser to the Minister of Defence and other Ministers, and is responsible to the Minister of Defence for the carrying out of the functions and duties of the department, the general conduct of the department, and the efficient, effective and economical management of the activities of the department, among other things.

C. STANDARDS

Introduction

37. In this section of our report we consider in general terms the standards of behaviour which the Government requires of the Public Service, including the standards relating to the protection and disclosure of official information. These apply formally to staff of the Ministry of Defence but not to members of the Defence Force, although it is plain to us that Ministers expect from the Force standards of conduct similar to those for public servants. We note that in respect of the Civil Staff employed in the Defence Force the Chief of Defence Force has power to issue a code of conduct covering “the minimum standards of integrity and conduct” applicable to them: Defence Act 1990, s 60. We have examined the Civil Staff Code of Conduct issued under this provision in 1997 and comment on it later.

Standards of general behaviour in the Public Service

38. The standards of behaviour which the Government expects of the Public Service are well established. They are set out in Chapter 2 of the Cabinet Manual and the New Zealand Public Service Code of Conduct published by the State Services Commissioner under s 57 of the State Sector Act. A copy of the relevant parts of the Code is in Appendix 6. As both the Cabinet Manual and the Code of Conduct emphasise, the standards are based on the convention of “political neutrality”. In Palmer and Palmer, Bridled Power New Zealand Government under MMP, 1997, 85, it is stated –

“The key element running through these obligations [in the Code of Conduct] is that the New Zealand public service is politically neutral – loyal to whatever government is in power at any time.”

The purpose of this convention is to ensure that the Public Service gives free and frank advice to the Government of the day while maintaining the ability to give similar advice to future Governments. The Code of Conduct puts it this way –

“Public servants are required to serve the Government of the day. They must act to ensure not only that their department maintains the confidence of its Ministers, but also to ensure that it is able to establish the same professional and impartial relationship with future Ministers. This convention of political neutrality is designed to ensure the Public Service can provide strong support for the good government of New Zealand over the long term.”

39. For present purposes the relevant standards may be summarised as follows –
- 39.1 Public servants are obliged to serve the aims and objectives of the Minister. In this respect they owe a duty of loyalty to their Minister and the Government generally.⁵ They are responsible for providing assistance to their Minister in the development and implementation of policy.
- 39.2 The advice which public servants give must be honest, impartial and comprehensive. Ministers should be in a position to take decisions based on all the facts and an appreciation of all the options. Public servants should fulfil their lawful obligations with professionalism and integrity.
- 39.3 Final decisions on policy are the prerogative of Ministers and not public servants. The latter may not withhold relevant information from Ministers or

⁵ K J Scott, The New Zealand Constitution, 1962, p 140.

seek to obstruct or delay a decision or attempt to undermine or improperly influence Government policy (for example, by the unauthorised release of official information).

39.4 Once policy decisions have been made by the Government public servants are responsible for implementing those policies within the law and to the best of their abilities.

39.5 Public servants who in conscience oppose policies or find themselves unable to implement a policy decision are required to discuss the circumstances with their manager or chief executive. They are not entitled to do anything to circumvent or undermine the Government's policies.

39.6 Public servants should not normally communicate with Opposition Members of Parliament about matters relating to their official duties without prior Ministerial approval. Chapter 2 of the Cabinet Manual makes it clear that consultation and negotiation between the Government and other political parties is the responsibility of Ministers.

39.7 Public servants must take considerable care when communicating with the news media. While they have the same rights of free speech in relation to their private affairs as members of the public, they should not discuss matters relating to their official duties if to do so would –

- reveal advice given to a Minister;
- use or reveal any information gained in the course of official duties where this was not already known by, or readily available to, the general public;
- criticise, or offer alternatives to, a proposed or actual Ministerial policy or departmental programme;
- purport to express or imply a departmental view, rather than clearly expressing a personal view only;
- give openly partisan support to, or criticism of, a political party;

- constitute a personal attack on a Minister, departmental colleague or other public servants; or
- amount to criticism sufficiently strong and/or persistent so as to call into question the public servant's ability to impartially implement, administer, or advise upon a Government policy.

39.8 Only those public servants authorised to do so should make public statements to the media. In respect of public comment, Chapter 2 of the Cabinet Manual states –

“Where press statements or other public comment are concerned, there should be a clear understanding as to which issues are to be handled by the Minister and which by the department. Official comment on behalf of a department should be made only by those employees authorised to do so.”

40. The standards of behaviour of public servants in respect of the handling of official information are affected by the principles and procedures relating to the **authorised** release of information contained in the Official Information Act 1982, other relevant legislation, and specific departmental rules. We refer to the relevant legislation shortly. But at this point we highlight the general obligation on public servants to protect official information from **unauthorised** disclosure. As the Code of Conduct states (p 16) –

“It is unacceptable for public servants to make unauthorised use or disclosure of information to which they have official access. Whatever their motives, such employees betray the trust put in them, and undermine the relationship that should exist between Ministers and the Public Service. Depending on the circumstances of the case, the unauthorised disclosure of information may lead to disciplinary action, including dismissal.”

41. Public servants who are concerned about suspected departmental wrong-doing may report their concerns through their department's normal channels or by following the procedures prescribed by the Protected Disclosures Act 2000 (the “whistle blowing” legislation). The existence of the procedures and protections under this legislation, which provide a legitimate avenue of non-public disclosure when justified by concerns of serious wrong-doing, also serves to reinforce the obligation on public servants to avoid the unauthorised disclosure of official information.

The standards governing the handling of official information

42. Our terms of reference require us to assess the standards of behaviour in the Defence Force in relation to the handling of “official information”. The expression “official information” is generally understood to encompass all information, whether in documentary or electronic or other form, held by a Government department or a Minister of the Crown in his or her official capacity. The definition of the expression in the Official Information Act 1982 makes it clear that in this context a Government department is a department as defined in Part I of the First Schedule of the Ombudsman Act 1975 which expressly includes the Ministry of Defence and the New Zealand Defence Force. A similar definition of the expression appears in s 78A(2) of the Crimes Act 1961 and that definition is incorporated in s 25 of the Armed Forces Discipline Act 1971 which proscribes the unauthorised disclosure of official information in certain circumstances. We return to these provisions later in our report as they have a special significance in respect of information held by the Ministry of Defence and the New Zealand Defence Force.
43. The object of the Official Information Act, as its long title states, is –
- “to make official information more freely available, to provide for proper access by each person to official information relating to that person, to protect official information to the extent consistent with the public interest and the preservation of personal privacy, to establish procedures for the achievement of those purposes, and to repeal the Official Secrets Act 1951.”
44. This object is implemented by provisions which make it plain that the principal purposes of the legislation are –
- 44.1 To increase progressively the availability of official information to the people of New Zealand;
- 44.2 To provide for proper access by each person to official information relating to that person;
- 44.3 To protect official information to the extent consistent with the public interest and the preservation of personal privacy (s 4).

45. The purposes are reinforced by the principle of availability in s 5 of the Act which requires all questions of availability to be determined in accordance with these purposes and the principle that –

“the information shall be made available unless there is good reason for withholding it.”

But this approach does not apply where the Act “otherwise expressly requires”. This express exception to the application of the principle of availability is particularly significant in the context of our review which is concerned with all official information held by the Ministry of Defence and the New Zealand Defence Force.

46. The Official Information Act spells out plainly the circumstances in which there will be conclusive reasons for withholding official information. Under s 6 of the Act –

“Good reason for withholding official information exists, for the purpose of section 5 of this Act, if the making available of that information would be likely –

- (a) To prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or
- (b) To prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by –
 - (i) The government of any other country or any agency of such a government; or
 - (ii) Any international organisation; or
- (c) ...
- (d) To endanger the safety of any person ...”

47. The express recognition in s 6(a) and (b) that information should not be made available if it would be likely to prejudice the security or defence of New Zealand or the entrusting of information by a foreign government or an international organisation is consistent with s 25 of the Armed Forces Discipline Act which makes it an offence for any person subject to the Act to disclose such information.⁶

⁶ These provisions also reflect the traditional judicial restraint when dealing with cases involving national security or international relations: see Eagles, Taggart, Liddell, Freedom of Information in New Zealand, 1992, 162 ff.

To similar effect are s 78A of the Crimes Act 1961 and s 20A of the Summary Offences Act 1981. These statutory prohibitions against the unauthorised disclosure of information relating to the security and defence of New Zealand are not surprising. They serve to emphasise for Defence personnel the critical importance of maintaining the highest standards of confidentiality in respect of such information.

48. The Official Information Act contains other provisions relating to the non-disclosure of official information. Under s 9 of the Act there may be good reason for withholding official information where it is necessary to avoid prejudice to the substantial economic interests of New Zealand, or to enable a Minister or department to carry out, without prejudice or disadvantage, commercial activities, or enable a Minister or department to carry on, without prejudice or disadvantage, commercial negotiations. These provisions are likely to be applicable to the Ministry of Defence in respect of the implementation of Government decisions for the re-equipment of the Defence Force.
49. Notwithstanding the principle of availability underlying the Official Information Act, it is clear that there are categories of official information which will be held by Government departments and Ministers which should not be disclosed. Persons holding and having access to such information need to take special care to ensure that such information is not disclosed. The existence of such information also means that a careful approach is required in respect of all official information. This is reinforced by the Cabinet Manual, Chapter 6, which states –

“The government holds a large quantity of information of all kinds. All government information should be treated with care and protected from unauthorised release” and “Where government documents are sensitive, they may be given a security classification. Classified documents must be handled in accordance with their classification, subject to their release under the Official Information Act or under some other proper authority”.

50. The classification of documents for security purposes is carried out as a result of a decision by Cabinet on 18 December 2000.

The security classifications system

51. The security classifications system, which is applicable to official information, has existed for many years. Its classifications and definitions have, in the normal course

of events, been revised from time to time. The system in operation through the late 1990s provided three classifications: *Confidential*, covering information or material the unauthorised disclosure of which would have been likely to damage national interests in a significant manner; *Secret*, relating to information or material the unauthorised disclosure of which would have been likely to damage national interests in a serious manner; and *Top Secret*, covering information or material the unauthorised disclosure of which would have been likely to damage national interests in an exceptionally grave manner.

52. The revised system introduced in December 2000 provided an additional national security classification – *Restricted*, where compromise of information would damage national interests in an adverse manner. Two further classifications were also introduced *for public interest or personal privacy reasons*: *Sensitive*, where compromise of information would be likely to damage the interests of the New Zealand Government or endanger the safety of its citizens; and *In Confidence*, where compromise of information would be likely to prejudice the maintenance of law and order, impede the effective conduct of government in New Zealand or affect adversely the privacy of its citizens.
53. The Director of the Domestic and External Security Secretariat has advised us that the Ministry of Defence has updated its departmental security policy to reflect the new system. The policy is published on the Ministry's intranet and all staff have been trained. New staff are trained as part of the induction process. The NZDF has also updated its departmental security policy. Its intranet includes a self administered training module, completion of which is a prerequisite for authority to use the NZDF email system. Security training is also part of the military training system, with courses for officers and NCOs covering the subject at various levels. At this still early stage the new system appears to be bedding in satisfactorily in terms of comprehensibility, implementation and compliance.
54. Chief executives or other officers responsible for each organisation are entitled to make further more detailed rules to facilitate implementation of the classified information system within their own settings.

D. FINDINGS

55. We now turn to consider how the standards which we have identified in the preceding section of our report have been applied in practice in the Defence Force and the Ministry of Defence. We address our findings under the following headings –

- (a) Standards governing relationships with and obligations to the Government of the day.
- (b) Training in the application of standards governing senior Service personnel relationships with Government.
- (c) The issue of higher loyalty.
- (d) Standards of behaviour in respect of handling official information.
- (e) The scale of the unauthorised release of official information.
- (f) Action taken by CDF to review leaking and adequacy of his action.
- (g) Action taken by Secretary of Defence to review unauthorised disclosures, and adequacy of his action.
- (h) Why did the unauthorised leaks occur?

(a) *Standards governing the relationship of senior Defence personnel with and obligations to the Government of the day*

56. As we have already noted, staff of the Ministry of Defence are bound by the provisions of the Public Service Code of Conduct, which is distributed to all staff on taking up appointment. Standards relating to a number of the matters dealt with in the Public Service Code have been incorporated in various documents issued as Defence Force or Service Orders, especially in relation to the handling of official information. The written guidance or standards governing the relationship of Defence Force personnel with the Government is likewise spread across a number of separate documents. We have noted in particular DFO 34 relating to Defence Force Headquarters Organisation which deals with the powers and functions of the principal offices and institutions of State; but this is more a constitutional statement than a ready guide to the standards which should guide the Defence Force's

relationship with and loyalty to the Government of the day. We formed the view that, in this area, the guidance available to Defence Force personnel was less comprehensive, less explicit and more fragmented than what has been produced for public servants.

57. Programmes and documents have been developed in the individual Services, to underpin the training that all their members receive in core values. These are intended to reinforce such attributes as respect for the traditions of their parent Service, professionalism, loyalty, discipline and teamwork which are of great importance to effective operation of the Defence Force. Indeed these core values constitute the basic foundation for the effective operation of the Force and it is vital that they be universally respected. But they do not set out to cover in any comprehensive way the proper relationship between Service personnel and the Government of the day. There are some short references to these matters, although the precise sense may not always be clear, as for example in the Army's "Ethos and Values" in describing service to the Crown –

"The Armed Forces have a special constitutional position where the members are engaged to serve at the pleasure of the Sovereign. This service is carried out regardless of the political stamp of the Government and is reinforced by the Oath of Allegiance, commissions and warrants."

This may or may not be interpreted as a commitment of loyalty to the Government of the day, although the Chief of General Staff claimed that there is no ambiguity – that personnel are on oath to serve the Government of the day.

58. Similar ambiguity characterises the attempt in the Navy's Command Management and Divisional Manual to describe in flow-chart terms the relationship between Government and Defence Force (see Appendix 7). This diagram might well leave the reader with an exaggerated impression of the role of the Governor-General and a diminished view of the relative importance of Cabinet and the Minister of Defence (leaving aside the curious placement of Parliament). We return later to the matter of the Governor-General's role.
59. It was suggested to us by one officer that his commissioning parchment, which absolutely informed his conduct, contained all that was required in the way of directions on his responsibilities to the Government of the day – but this basic

document is concerned entirely with respect for the orders of his superior officers, and duties towards subordinates.

60. There seems to us to be a need for a single document, unambiguously expressed, incorporating a code of conduct for distribution to all members of the Defence Force. Such areas as the need for loyalty to the Government, and for political neutrality on the part of Force members, could be given appropriate emphasis. The Public Service Code dealing as it does with general behavioural issues as well as with the proper handling of official information provides a commendable model. Officers of the Defence Force are not public servants, and we do not see it as desirable that they should be.⁷ But, like all parts of the Public Service, the Defence Force is responsible to a Minister for giving advice and implementing Government decisions. The Government of the day is entitled to expect the same level of honest, impartial and comprehensive advice from the Defence Force as from the public service. And it is entirely appropriate that the same standards of conduct should apply to the Government's principal civilian and military defence advisers (and their subordinates) particularly when they are required to consult with each other in giving advice on major policy issues. We recognise that the State Services Commissioner's document might well need some adaptation to the special requirements of the Defence Force. We suggest in our Conclusions a method by which this might be done.
61. The Civil Staff Code of Conduct issued by the Chief of Defence Force in 1997 contains a number of cogent requirements of acceptable behaviour, but they are expressed as obligations to the Defence Force rather than to the wider context we are addressing. It does not (nor purports to) deal with the basic issues of political neutrality and loyalty to the Government of the day which are properly highlighted in the Public Service Code. There is therefore a gap to be filled and the suggested new Defence Force Code of Conduct, applied to them, would provide this.

⁷ The Armed Forces "cannot be regarded as a uniformed version of other departments of state" because of the intensity of personal and hierarchical relationships that are developed to ensure success in operations. Consequently "loyalties are much sharper than in an administrative department": Thornton LW, "Comment On Major Looparg's Review of Defence Organisation" in Looparg T. "Defence Reorganisation: A New Approach to Change." Public Sector Research Papers Vol.2, No.1, 1981, p 1.

(b) *Training in the application of standards governing senior Service personnel relationships with Government*

62. Senior officers of the Defence Force have normally been exposed to higher levels of training as they pass through the ranks. Such training includes enhancement of understanding of their proper relationship with the Government of the day. We witnessed a slide lecture presentation by the Defence Force Director of Legal Services, regularly given at the RNZAF Staff College at Whenuapai (but open to the other Services). In this example, it was made clear, eg, that –

“The Defence Force and the disposition of those Forces are at the decision [sic] of Her Majesty’s Ministers for the time being”

And that

“The Minister of Defence shall have control of the NZDF, which shall be exercised through the Chief of Defence Force.”

We were told that these bare statements normally formed the basis for extended discussion.

63. More advanced study of the proper relationship between Government and Armed Forces is included in post-graduate courses undertaken by NZDF officers at staff colleges in a number of overseas countries, as well as New Zealand, and at such institutions as the Massey University Centre for Defence Studies.
64. Since not all officers have access to these levels of training, we see merit in the organisation of special courses of perhaps 1-2 days’ duration aimed at expanding understanding of the standards which should govern civilian/military relationships, and especially the convention of political neutrality which should govern the relationships between the Defence Force and the Government of the day. We believe that such a systematic approach would bring considerable benefit, and alleviate any areas of tension and uncertainty. But, as we observe later, no system of instruction would have prevented the deviant practices which have been the subject of our review: the individuals concerned were generally considered by those who addressed us on the subject to have been fully aware that their activities were in breach of the expected norms of conduct.
65. Our experience in interviewing a number of Army officers in connection with our investigation into Mr Mark’s allegations of misuse of his personal files suggested a

further area in which training might be enhanced. There are times when Service personnel, who may be of relatively senior rank, are posted to sensitive positions in Service or Defence Force Headquarters immediately following long periods of service in overseas or even remote New Zealand locations. Several of these officers, and others whom we questioned on the point, thought that it would be helpful to them, and to their Services, if their Wellington positions were to be preceded by a short “refresher course” bringing them up to date with a range of pertinent issues outside their immediate professional experience, including some political orientation. We think this suggestion merits further consideration.

(c) *The issue of higher loyalty*

66. In our preliminary briefing for the review, and in some of our interviews outside the Defence Force, we were told that it was not uncommon for members of the Force to insist that their loyalty was not necessarily to the Government of the day, but to a higher authority – the Sovereign, to whom all Service personnel swear an oath of allegiance; Her Representative in New Zealand who is, by statute, their Commander in Chief; or simply the Nation. This principle was believed to justify efforts to overturn or frustrate the implementation of Government policies seen as inimical to the country’s security. None of those who passed these reports to us had had such assertions put to them directly by Defence Force officers; but all had received accounts of conversations in which such claims had been made.
67. In most of our interviews with Defence Force personnel, we asked specifically whether the conduct of they themselves, or, to their knowledge, others in the Force was governed or influenced by the “higher loyalty” principle. In all cases, except for one middle-ranking officer, we received firm denials. There was virtual unanimity that, while their oath of **allegiance** was to the Sovereign, their **loyalty** was solely to the Government of the day. Many seemed bemused that the question should even have been asked, over what they regarded as a non-issue.
68. We do not think there is any doubt that members of the Defence Force know that their loyalty is owed to the Government of the day, and that, once decisions have been taken by that Government, they must be faithfully implemented. That does not seem to us incompatible with the sense of duty to the nation that motivates service men and women to place their lives at the ultimate risk in New Zealand’s defence.

69. It was recognised in a number of our conversations that the argument of higher loyalty may well have been deployed as a rationalisation – or, as one interviewee put it, a “refuge” – by some Defence Force officers who embarked on actions they knew to be politically partisan or in defiance of Government policy. But we do not believe that it was a significant element of motivation.
70. Although we do not judge that there is any serious ambiguity in the matter, in our Conclusions we address the statutory role of the Governor-General as Defence Force Commander in Chief. The powers of that office in New Zealand (quite unlike those of, say, the US President as Commander in Chief) are strictly limited in scope. We suggest that clearer statutory definition of the Commander in Chief’s role and powers would remove any grounds for misinterpretations, deliberate or otherwise.

(d) Standards of behaviour in respect of handling official information

71. Our terms of reference require us to address three questions under this heading –
- 71.1 Do senior Defence personnel have clear standards for handling official information?
- 71.2 How do Defence personnel view the leaking of documents and information?
- 71.3 Why would Defence personnel leak documents?

We address our findings in respect of each of these questions in turn.

(i) Defence Force standards for handling official information

72. Both the Defence Force and the Ministry of Defence have adopted comprehensive guidelines for handling official information. The Defence Force has a series of Defence Force Orders promulgated by respective Chiefs of Defence Force under s 27 of the Defence Act relating to the handling of official information. For our purposes the relevant Defence Force Orders currently are –
- 72.1 Defence Force Order 51 relating to Security;
- 72.2 Defence Force Order 70 relating to Official Information;
- 72.3 Defence Force Order 5/1999 relating to NZDF External Relations;

72.4 Defence Force Order 20/2000 relating to the Protected Disclosures Act 2000.

73. We have examined the relevant provisions of Defence Force Order 51 relating to Security. We have also referred them to the Director of the New Zealand Security Intelligence Service for comment. Subject to his confirmation that there is nothing in the Order inconsistent with the Security Manual, we are satisfied that Defence Force Order 51 contains clear standards for the handling of official information relating to the security and defence of New Zealand.
74. We have considered whether senior Defence personnel, who have access to official information relating to the security and defence of New Zealand, appreciate the critical importance of compliance with the standards in Defence Force Order 51. We believe that they do, not least because, significantly, as recorded in paragraph 94, none of the unauthorised disclosures of official information which we have been asked to consider relates to such information. We address this important finding further in our report.
75. We have examined the provisions of Defence Force Order 70 relating to Official Information. We have also referred them to the Ombudsmen for comment. Subject to their confirmation, we are satisfied that Defence Force Order 70 contains clear standards for the handling of official information. The introduction to the Defence Force Order contains a concise and accurate summary of the position –
1. This Manual prescribes the procedures for the handling of official information by all service and civilian personnel within the New Zealand Defence Force. The procedures are designed to provide for the proper implementation of the provisions of the Official Information Act 1982 and to ensure that necessary protection is given to official information.
 2. Where any request for official information is received from any person, it is to be handled in accordance with the provisions of this Manual.
 3. Defence Force Orders for the Navy, Army and Air Force prescribe the procedures to be followed for releasing official information to the news media, publishing books and articles, and delivering public speeches, lectures and radio addresses. Personnel are authorised to release official information to the extent authorised and for the purposes specified in those Orders.
 4. Official reports, correspondence, and documents of whatever description, whether classified or not, are the property of the Crown. The only authorised use which personnel may make of official documents, or information derived from them, is in the performance of their duty.

5. Except as authorised in paragraphs 2 – 4 above no service or civilian employee shall:

- a. publish or disclose in any form whatever outside the New Zealand Defence Force any official information which he or she has acquired or to which he or she has access.
- b. use other than in the course of duty any official documents or their contents or any other official information.

6. All personnel are reminded that there are special provisions in New Zealand law relating to the misuse of information. They are:

Section 25	Armed Forces Discipline Act 1971 - unauthorised disclosure of information.
Section 78	Crimes Act 1961 – espionage.
Section 78A	Crimes Act 1961 – wrongful communication, retention, or copying of official information.
Section 105A	Crimes Act 1961 – corrupt use of official information.
Section 20A	Summary Offences Act 1981 – unauthorised disclosure of certain official information.

7. Defence Force Orders for the Navy, Army and Air Force are to draw the attention of all personnel to the provisions of this Manual.

76. The obligation to protect official information from unauthorised disclosure is mandatory⁸ and is also mentioned in paragraph 1101 of the Order and paragraph 8 of Annex A to Chapter 1 of the Order which is required to be placed in unit or branch orders once every three months as a routine order. The prohibition on unauthorised disclosure is reinforced in respect of communications to the news media by Defence Force Order 5/1999 – “NZDF External Relations” – which we refer to later in our report because it was relied on specifically by the Chief of Defence Force.

77. We have examined the Defence Force Orders for the Navy, Army and Air Force referred to in paragraphs 3 and 7 of this introduction. They are based on Defence Force Order 70.

⁸ cf. Defence Force Order 32/1994 – “The Privacy Act 1993 – New Zealand Defence Force Procedure and Practices” – referred to in our report of 13 December 2001, paras 30-31, 41 and 46.1. To the extent that there was some doubt as to whether paragraph 13(a) in that Order was in the requisite mandatory form we recommended that consideration should be given by CDF to amending it to include a clear prohibition on access to or use of personal information unless required for a lawful purpose.

78. We have considered whether senior Defence personnel appreciate the significance of the obligations imposed on them by Defence Force Order 70 in respect of **all** official information. While we are reasonably satisfied that senior Defence personnel are aware in general terms of the nature of the obligation not to disclose official information unless authorised to do so, it is apparent that –
- 78.1 There has in recent years been a significant increase in the number of unauthorised disclosures of official information relating to the Defence Force;
- 78.2 The steps taken by the Chief of Defence Force to prevent this from occurring have not been successful; and
- 78.3 Some Defence personnel are therefore either unaware of the obligation or, notwithstanding the terms of Defence Force Orders 70 and 5/1999, which are explicit, have deliberately breached the directions and have disclosed official information without authority.
79. We discuss the reaction of the Defence Force to these breaches, the reasons for them and the adequacy of the steps taken by the Chief of Defence Force in respect of them later in this report. As we have already noted, unlike the Public Service which has easy access to its Code of Conduct, the Defence Force has not published a simple, straightforward statement of standards in respect of the protection and disclosure of official information. Instead the relevant instructions are contained in Defence Force Order 70 which is one of some 50 volumes of Defence Force Orders published in book form out of a total of some 128 current Defence Force Orders which relate to a wide variety of different subjects of varying degrees of importance. Furthermore, Defence Force Order 70 is concerned primarily with practices and procedures relating to the disclosure of official information under the Official Information Act 1982. The obligation to protect official information from unauthorised disclosure is mentioned in the Defence Force Order, but it is possible that its significance as a stand-alone obligation may not be fully appreciated by all members of the Defence Force. They may not understand that breach of the obligation may be an offence under s 39 of the Armed Forces Discipline Act 1971. The sanction for failure to comply with this aspect of the Defence Force Order is not mentioned in the Order. Certainly those who have been guilty of the

unauthorised disclosure of official information in the Defence Force were not deterred.

80. Defence Force Order 5/1999 – “NZDF External Relations” – is concerned with unauthorised disclosures of information or news to the media. It does not address the issue of unauthorised disclosure to persons outside the media, such as Opposition members of Parliament. To this extent it might convey the impression that disclosure to such persons is not prohibited.
81. Production of a simple, straightforward statement in booklet form which among other things described clearly the obligation on all Defence personnel to avoid the unauthorised disclosure of official information to anyone, whether or not in the media, would promote understanding of responsibilities. Hence our advocacy of a code on the Public Service model covering both general behavioural issues and the handling of official information.
82. We have examined the provisions of Defence Force Order 20/2000 relating to the Protected Disclosures Act 2000. We are satisfied that it contains appropriate procedures for the implementation of the Act, but we have the following concerns –
 - 82.1 The introduction to the Order does not make it clear that it reinforces the obligation to protect official information from unauthorised disclosure;
 - 82.2 The procedure for making a protected disclosure within the Defence Force may not sit comfortably with the command structure; and Defence personnel may not be aware of its existence and potential significance.

(ii) Ministry of Defence standards for handling official information
83. The Ministry of Defence has issued the following relevant manuals to its staff –
 - 83.1 Security Manual: Policy on Information Security
 - 83.2 Security Manual: Document Security
 - 83.3 Corporate Manual: Ministerial and Information Requests
 - 83.4 Corporate Manual: Official Information Act Procedures

83.5 Legal Compliance Manual: Official Information

83.6 Public Service Code of Conduct

83.7 Human Resources Manual: Code of Conduct

83.8 Corporate Manual: Communication with the news media

83.9 Corporate Manual: Information Technology Management and Security

83.10 Protected Disclosures: Policy and Procedures.

84. We have examined the provisions of these Manuals. We are satisfied that in each case they contain clear standards for the staff of the Ministry. There has been no suggestion that these standards are not understood by Ministry staff.

(e) The scale of the unauthorised release of official information

(i) Analysis of unauthorised disclosures

85. We obtained from the Minister, the former Minister, the Chief of Defence Force and the Chief of the General Staff lists of alleged unauthorised disclosures of information. They covered not only the release of documents or the passing of information in briefing the media but also the provision of hints to members of Parliament as to what documents or information might profitably be sought via Parliamentary questions or Official Information Act requests. We referred the lists to the Chief of Defence Force and the Secretary of Defence for comment. Both of them drew our attention to the fact that inappropriate use of official information covers a broad spectrum of actions –

- *Leaking*, i.e. the deliberate and improper covert release of official information to advance a particular agenda or to embarrass.
- *Unauthorised release*, i.e. an intentional overt release of information outside approved guidelines that, because of its content, should not have been released from that organisation or person.
- *Authorised but unwise release*, i.e. release of information within approved guidelines but with the possibility of causing damage or embarrassment.
- *Accidental release*, i.e. the inadvertent release of information through carelessness.

86. We have analysed the list of possible unauthorised disclosures in the light of this approach. Of the 62 disclosures included on the lists provided by the Minister, Hon. Mark Burton (44), Hon. Max Bradford (4), and Major General Dodson as CGS (14, plus three also in Mr Burton's list), covering a period from April 1998 to October this year, 30 may be classified as 'probable leaks' in the terms above: "*the deliberate and improper covert release of official information to advance a particular agenda or embarrass.*" Of the remainder, 15 may be categorised as 'unauthorised releases' (or unauthorised comments) and four as releases or comments that were 'authorised but unwise'. Most of the remaining 13 cases were either properly authorised releases or comments, or what we have termed 'speculative analysis', that is, journalistic or political comment based on a variety of generally legitimate sources – information obtained under the Official Information Act, and from earlier public comment, for example. In one case, pure mischief seems to have been at work.
87. It is the disclosures in the first category, the 30 'probable leaks', that are of most concern. Four of these 'probable leaks' occurred in Mr Bradford's time, three being to do with major impending procurement decisions (the Air Force's F16s, the Army's light armoured vehicles, and the Navy's third ANZAC frigate). The fourth related to the review of Defence real estate, where Mr Bradford noted a certain inevitability of disclosure given the protracted nature of the exercise and the number of people with interests at stake. In one of these cases the Secretary of Defence of the day initiated a Police inquiry, although this was cut short by Police operational requirements with no conclusions being drawn. Mr Bradford made the point that information in respect of at least six other sensitive Defence issues alive in his term as Minister (matters he may have considered potentially 'leak-worthy') was **not** disclosed.
88. The remaining 26 'probable leaks' have occurred during the term of the present Minister. The first significant case occurred in May 2000 and the most recent in October 2001. The first, relating to Project Sirius, prompted the present Secretary of Defence to initiate a formal inquiry. While this inquiry was appropriately comprehensive it did not identify a source. Only a few others have been followed up by a formal investigation, either by CDF or by the Chief of Staff concerned. Most of the 'probable leaks' since January 2000 have occurred since the middle of

this year (19 of the 26). Almost all of these have been related to the Army, and/or to the CGS personally. Four earlier ‘probable leaks’ also related to the Army and/or the CGS.

89. Of the fifteen disclosures we have categorised as ‘unauthorised releases/comments’, most took place between the middle of last year and the middle of this year. Seven related to the Air Force, focusing mostly on morale and staff retention in the wake of Government decisions about its future role and structure. Some ‘unauthorised releases/comments’ appear to have been misguided contributions to aspects of the fairly lively public debate about defence matters. In the one case of an ‘unauthorised release/comment’ involving the Ministry of Defence the Secretary acted promptly and decisively, reprimanding the person concerned and issuing a general warning to his staff.
90. Our analysis of the items on the lists of possible unauthorised disclosures provided to us is summarised in the chart at Appendix 8. This shows the timing of the various disclosures over the last two years. Bearing in mind the definition of ‘leaks’ we have used (“...*the release of official information to advance a particular agenda or embarrass*”), we have indicated in the chart the institutions or individuals we suspect to have been likely ‘targets’ of the ‘probable leaks’.

(ii) *How Defence personnel view the leaking of documents and information*

91. As we have already noted, the overall impression gained from our interviews was that there was widespread disapproval of the unauthorised disclosure of information which had led to our review. No one sought to argue that any of the leaks were justified. It is appropriate to note here, however, that from a large number of officers we heard the view that the establishment of the Joint Forces Headquarters this year would, by fostering the collaborative working of individuals from all three Services towards a common operational purpose, offer an important new opportunity to widen the understanding of individual officers of the issues facing their counterparts in other Services. If this view is borne out, the effect should be a significant reduction of the “win at all costs” approach to inter Service consideration of major re-equipping requirements, for example, which had sparked much of the aberrant behaviour we have been considering.

(iii) Absence of security leaks

92. Overhanging the emergence of a pattern of unauthorised disclosures plainly intended to advance particular interests within the Defence Forces, or to destabilise or embarrass individuals or embarrass Government itself, is the much more serious issue of national security. At a time when the country is contributing troops to a major international combat operation which involves, among other things, significantly expanded exchanges of highly-sensitive information with partner Governments, it is of even greater importance than usual that the integrity of New Zealand's systems for dealing with such material remains beyond reproach.
93. We sought reassurance from all those we interviewed – as a principal point of concern – that the spate of unauthorised disclosures of recent years had included no information whose release could have prejudiced New Zealand's security or defence interests, or its international relationships, or the Government's capacity to receive information in confidence from other Governments. We paid particular notice to the responses of those who, by virtue of their offices, would have certain knowledge of any such security breaches had they been identified.
94. The unanimous response to our inquiry was that, in these crucial areas, no breach was known to have occurred. We regard this as a most significant finding. The lapses in judgement, discretion and, indeed, loyalty which have been deemed sufficiently serious to justify this review appear to have done no damage to New Zealand's security interests or international relationships.
95. We asked a number of those interviewed if they considered that the evident disregard by some members of the Defence Force of the accepted standards of behaviour, in misusing official information of a domestically sensitive character, might be encouraging a general loosening of discipline in the handling of secure material. Again, the responses were reassuringly negative. It was the general perception that those members of the Defence Force who had been leaking the kind of information which is the cause of this inquiry, and who had done so for a particular purpose in full knowledge that they were acting outside the rules, would nevertheless see it as their duty to continue to treat classified information of a secure character with the respect due to it.

(f) Action taken by CDF to review leaking and adequacy of action

96. We have been asked to describe the action taken by the Chief of Defence Force to review the apparent “leaking” of information by Defence Force personnel and to indicate whether we consider that action was appropriate. In order to carry out this task we referred the lists of information believed to have been disclosed without authority provided to us by the current Minister of Defence, the former Minister and the Chief of the General Staff to the Chief of Defence Force and asked him to comment on the lists and in particular to advise us of the action taken at the time to review the various incidents.
97. In his response to us CDF stated that he did not consider that all of the incidents listed by the Minister constituted unauthorised disclosure of official information by Defence personnel. Many of the incidents involved speculative reporting based on “information” which could have been obtained from a variety of sources. He did not have the resources to investigate every incident of this nature. Nor did he consider that it would be worthwhile doing so. He will direct an investigation when he believes that there is “sufficient circumstantial evidence” to warrant the application of scarce resources and that such an investigation is likely to meet with a degree of success. Lengthy investigations have been conducted in the past three years, but in each case the outcome has been inconclusive. He considered that there was no reason why all investigations must be directed by him. Each single Service Chief of Staff has the authority to conduct his own investigation, where the “disclosed matter” is related to his Service.
98. CDF told us that he has regularly and formally enforced the standards to be applied to the protection of information and the guidelines for those who have authority to make information public via the media. He did this by way of a series of instructions designed to reinforce the restrictions on communications with the news media referred to in Defence Force Order 5/1999 – “NZDF External Relations” – which noted the establishment of a formal NZDF public relations structure and which contained explicit warnings about unauthorised communications with the media. Particular attention was drawn to paragraph 8 of the Order which reads –

“Because of the potential political consequences of remarks made in the absence of complete knowledge on an issue, NZDF personnel, whether uniformed or civilian, are forbidden to publish in any form whatever, or communicate directly or indirectly

to the media or any other external organisation or individual, any Service information, or the individual's views on any Service subject, without specific authority.”

99. The steps taken by the Chief of Defence Force to prevent the leaks from occurring and to investigate them subsequently have proved unsuccessful. To that extent they were, by definition, inadequate to ensure either that no breach of the obligation on Defence personnel to protect official information from unauthorised disclosure occurred or that the culprits were identified. But the Chief of Defence Force considers that he took all appropriate steps in the circumstances. And we have a measure of sympathy for his position because at the end of the day if a person is determined deliberately to disclose official information without authority, that person will do so whatever steps are taken.
100. At the same time, however, we consider that the Chief of Defence Force may have been unduly constrained by the command structure and reliance on the existence of Defence Force Orders and instructions, and the authority of the single Service Chiefs to investigate leaks in their own Services. In our view while the command structure is of fundamental importance to the Armed Forces in an operational context it may have its limitations in managerial areas such as enforcement of obligations relating to standards of behaviour or to the investigation of breaches of those obligations. Further steps to reinforce the importance of the obligations appear to be required. Reliance on the existence of Defence Force Orders and instructions – as an element of the command structure – will not suffice. We have already proposed the publication of a simple, straightforward statement along the lines of the New Zealand Public Service Code of Conduct to be made available to all serving personnel as one means of extending the reach of the Orders. But there are other forms of action which might be considered with the aim of enhancing the effectiveness of the command system in non-operational situations.
101. The view of the Chief of Defence Force that it was appropriate to rely on the authority of the single Service Chiefs to investigate leaks in their own Services reflects the constraints which affect the authority of the Chief of Defence Force in respect of the single Service Chiefs. In our preliminary report of 13 December 2001, paras 42 and 43.3, we identified this issue for further consideration. The constraints arise under the Defence Force structure created by the Defence Act 1990 which, in an operational command sense, makes the Chief of Defence Force

paramount, but in a managerial sense makes him only first among equals because all are appointed by the Governor-General and the Chief of Defence Force has no authority to remove or suspend a single Service Chief. The Chief of Defence Force does not have the authority of a chief executive in respect of the single Service Chiefs. They are commanders in their own right in respect of their Service. The review being conducted by Mr Hunn provides a timely opportunity to consider how what seem to us to be structural ambiguities should be resolved.

(g) Action taken by Secretary of Defence to review unauthorised disclosures, and adequacy of his action

102. The Secretary of Defence's response to the list of unauthorised disclosures compiled by the Minister, covering the period March 2000 – October 2001, noted that in only two cases were the examples quoted clearly the responsibility of Ministry staff, or involved misuse by others of material originating in the Ministry. On the first, comments intended to expand a journalist's technical understanding of capability were unauthorised. The staff member concerned was reprimanded for lack of judgement and for acting beyond his authority. All staff were reminded of the Ministry's policy on communication with the news media.
103. The second, more serious case concerned public release of confidential information about an acquisition project, provided to Ministers' offices and several Government departments. The Secretary initiated an inquiry into the matter by writing to the heads of the relevant departments, none of whom admitted responsibility. The Secretary does not believe that the information came from his Ministry, which had held it tight before the wider consultation. He has now made it standard practice for all staff members working on acquisitions projects to sign confidentiality agreements.
104. We are satisfied that the steps taken by Mr Fortune in response to these two incidents were appropriate.

(h) Why did the unauthorised leaks occur?

105. The unauthorised release of information, commonly known as "leaking", provided the most obvious evidence of a pattern of unacceptable behaviour within the Defence Force which was of even greater concern than the leaking itself. While leaking of official information had occurred often enough in preceding years – both

from the Armed Forces and from other Government agencies, and generally to the media – the pattern during the years 1997-2001, on the part of the Defence Force seems to have been more substantial, more complex in character and range than earlier, and to have raised more troubling concerns about the integrity of members of the Force. Why should this be so?

106. In none of the cases drawn to our notice (other than where the release was not deliberate) has the identity of the individuals responsible been firmly established. We were not constituted as a “leak inquiry”, but were charged to examine broad trends in behaviour, as well as the integrity of systems governing the handling of official information within the Defence Force and Ministry of Defence; and we have no independent judgement to offer on the precise origin of the leaks, nor on the motives of those responsible.
107. Moreover, the evidence provided to us during the numerous interviews we conducted was by no means unanimous on either point. Opinions as to the identity and motivations of the miscreants were divided; and conclusions, necessarily speculative but stated by some with assurance, were as confidently contradicted by others spoken to.
108. We must, therefore, acknowledge at the outset that, in the absence of firm evidence of individual culpability, we cannot state with certainty why it was that these breaches of discipline and obligation occurred in such number in the past four years. But although the evidence could not be judged totally conclusive, by the end of our investigation, the weight of opinion appeared to point towards one plausible explanation. The following paragraphs set out our best attempt to chart the course of events and the forces which provoked them. It is to be regarded as an hypothesis rather than a proven diagnosis; but we believe it to lie closely enough to the truth to underpin the conclusions advanced in the final section of our report.
109. The aberrant behaviour manifested in an unacceptable level of unauthorised disclosure of official information during the last four years had its roots in two highly significant trends already touched on in paragraphs 20-22 above. These were the run-down in Defence capabilities stemming from a declining Defence budget, and the emergence of clear divisions between the two major political parties as to

the purpose and structure of the Defence Forces, and the consequential equipment requirements.

110. For a number of reasons, Defence spending has always been a difficult area for New Zealand Governments, not the least the perceived absence of a clear, direct military threat to the country. Another major challenge has been to accommodate within a limited budget periodic expenditure bulges when very large capital assets, especially for the Navy and Air Force, need to be replaced or upgraded. The period 1997 – 2001 with which we have been principally concerned saw these difficulties converge, as major re-equipping decisions covering all three Services could not be further postponed. They were dealt with first in the last years of the National Government, then reconsidered by the incoming Labour Government with different priorities.
111. During the first phase, up to late 2000, there was intense competition between the three Services for their share of the funding likely to be forthcoming. This competition was initially expressed within established consultative procedures aimed at identifying an agreed priority for new capital projects; but as the process advanced and a Ministerial view began to take shape, it became apparent which aspirations were most likely to be fulfilled and which, at least initially, must be deferred or only partially met. In particular, there were apprehensions on the part of many Army officers that their Service's legitimate claims would not be fully met in this round. Such foreboding appears to have actuated the letter sent by Lt Col. Gordon, then on the Defence liaison staff in London, to the Deputy Chief of the General Staff Brigadier Ottaway in March 1997. (Appendix 9). It was written about two weeks after a CGS seminar in which working groups of middle level Army officers had canvassed many of the ideas advanced in the letter.
112. The “Gordon letter” is currently the subject of a separate inquiry under the authority of the Judge Advocate General. We content ourselves with noting that a number of the officers we interviewed, while not necessarily aware of the existence of the letter before it was tabled in Parliament in 2001, believe in hindsight that it constituted a basis from which some of their fellow officers, perhaps with the assistance of certain retired colleagues, did indeed open the “second front” advocated by Col. Gordon. The strategy defined by Gordon was to –

“attain a level of control over NZDF policy making in order to ensure that the capabilities of the NZ Army evolve in such a way as to be able to meet the future challenges likely to be imposed by Government.”

This included ensuring that selected individuals supporting the “two fronts” strategy were selected for promotion to key positions, exploiting “the vulnerability of the air strike capability to the Army’s advantage, and lobbying Maori MPs, select committee members, academic institutions and the general public.”

113. The Judge Advocate General’s inquiry will show how far these ideas were disseminated and acted upon within the Army and disclose the available information concerning the source of the leak of the letter. The important point for us is that a number of Army officers at that time strongly disagreed with an approach which advanced public relations activities into unacceptable territory. It is perfectly appropriate and, indeed, desirable that a Service should maintain a public relations programme designed to disseminate information about its activities as an aid to recruitment, and to wider community understanding of its role. But a fine line demarcates this legitimate activity from the active lobbying of politicians and calculated undermining of the aspiration of other Services. In our view and in those of a number of fellow officers this line was plainly crossed in Col. Gordon’s blueprint. “Working outside the square” as one senior Army officer put it to us. It is significant that at this time the public relations firm Communications Trumps, which had a substantial role in the process, was described by a former director as having been involved in an “Army rebranding” exercise.
114. The split in opinion within the Army was exacerbated by a further divisive internal argument over the appropriate future strategy and consequential equipment requirements of the land force. The debate appears to have continued well beyond the point at which final decisions on the matter were taken by the Government.
115. The current Government’s decision to reverse its predecessor’s decisions in a number of respects, most notably in abandoning the air strike capability and investing more heavily in the Army motorisation project, was clearly disappointing to the Air Force and, to a lesser extent, the Navy. Our inquiries did not, however, produce any evidence or even widespread perception that the rising epidemic of unauthorised disclosures were part of a campaign from within those two Services directed at having the decisions reversed, embarrassing the Government or

destabilising senior individuals within the Defence Force. Comments made to the media about the state of morale in the Air Force, for example, were acknowledged to be due to efforts by the media to secure stories rather than any pro-active campaign. Middle ranking as well as senior officers of these Services assured us that all personnel saw it as their duty now to work zealously to put the new policies into effect.

116. Over the past year the origin and the target of the heightened level of unauthorised disclosures have clearly changed. Without firm evidence it is impossible to identify the sources of this later unauthorised flow of documents, or information about the content or existence of documents to Opposition Members of Parliament and to a smaller extent the information media. We encountered a view, within as well as outside Army, that the prime culprits were Army officers, whether in the Army itself, or on the staff of Defence Force Headquarters, or perhaps retired. Their motives were said to be various: support for what they saw as a more balanced Defence Force structure; opposition to some aspects of Army's current policies; determination to destabilise Army leadership; dissatisfaction with lack of promotion.⁹
117. Initially, this view of Army culpability seemed to us too much of a paradox to be taken seriously. But its repetition and the evidence in some cases that leaked material could only have come from Army sources suggested to us that it might well have greater plausibility than any other likely explanation.
118. It would be wrong to see this inference as indicating widespread disloyalty to the Government. Although the disclosures have plainly caused continuing embarrassment to the Government, they appear to have been aimed primarily at destabilisation of individuals within Army, and at influencing the CDF and CGS appointments. As one senior interviewee put it to us, the aim was to ensure that the "right" people would hold the key positions when the next round of major funding and equipment decisions occurred.

⁹ As Iago put it in *Othello*, Act 1, Scene 1 –
 "... 'Tis the curse of service.
 Preferment goes by letter and affection.
 And not by old gradation, where each second
 Stood heir to th' first."

119. Moreover, the group of officers orchestrating the disclosures is considered to be small, and the overwhelming majority of Army officers do deplore the tactics employed. Some informants expressed the hope that this group would be identified and dealt with summarily.
120. Our inquiries have then not established any grounds to conclude that there has been a systemic failure in the behavioural standards of the Defence Force. We were impressed by the integrity and commitment of the serving officers we met and their obvious distaste for the aberrant conduct of a few. Loyalty to the Government, for most, is not at issue. It is in everyone's interest that a stronger attempt should now be made by the new leadership to identify those few who have overstepped the mark and neutralise their ability to do further damage. There are also a number of areas in which we believe improvements in the framework governing standards of behaviour and the handling of official information would help to clarify and reinforce the Government's expectations; and these are addressed in the conclusion section which follows.

E. CONCLUSIONS

121. In this section of our report we set out the various conclusions which we have reached in the course of making an assessment of standards and behaviour in the Defence Force in the areas of the handling of official information and relations with the Government. As we have discussed with you in the course of our inquiry, our conclusions respond to the specific questions raised in our terms of reference as well as other more general matters which have arisen in the context of making the requisite assessment.
122. On the basis of the more than 70 interviews which we have conducted (see Appendix 2), we are satisfied that in the Defence Force overall standards of integrity, commitment and professionalism are high and that there is general disapproval of the unauthorised disclosure of official information: see paragraphs 28 and 91 above.
123. While we were frequently assured that within the Defence Force there are clear and appropriate standards governing the relationship between the Defence Force and the

Government of the day, we believe that the form and content of these standards is by no means as clear, comprehensive or accessible as the situation requires. It should be an early priority to fill this gap: see paragraphs 56-61 above. On the other hand, we found no reason to doubt that officers were generally well aware of their responsibilities and we certainly found no evidence of widespread disloyalty: see paragraphs 67-69 above.

124. At the same time, however, there have been a substantial number of incidents involving the unauthorised disclosure of official information relating to the Defence Force and these incidents constituted breaches of the obligation on Defence personnel not to release such information. We were not asked to identify the individuals responsible for these deliberate “leaks” and, as we have made it plain, there is no clear evidence of culpability. We were guided in most cases by the weight of opinion in the responses to our inquiry. Nevertheless it became apparent to us that they probably came largely from factions in the Army: see paragraphs 111-117 above. As far as we could tell, there were few, if any, deliberate “leaks” of information from persons in the Navy, the Air Force, the Joint Force or the Ministry of Defence: see paragraphs 102-103 and 115 above.
125. As we have emphasised in our report, none of the “leaks” referred to us involved classified information or information which related to the security or defence of New Zealand: see paragraphs 92-95 above. This conclusion was confirmed by all of those responsible for the protection in New Zealand of such classified information: see paragraphs 93-94 above.
126. It is difficult to escape the conclusion that the “leaks” which occurred were originally designed to advance the interests of the Army, primarily against the interests of the other Services. Subsequently the “leaks” were designed to counter the influence of a faction in the Army by causing personal embarrassment to the CGS. These various leaks also had the consequential result of causing political embarrassment to the Government and the Minister: see paragraph 118 above.
127. In essence, with the qualifications already referred to, it seemed to us that the “leaks” occurred because –

- 127.1 There was widespread concern in the Defence Force, and in the Army in particular, as a result of the run-down in Defence capabilities stemming from a declining Defence budget, and the emergence of clear divisions between the two major political parties as to the purpose and structure of the Defence Force, and the consequential equipment requirements: see paragraphs 109-110 above.
- 127.2 There was intense competition between the three Services for their share of the funding likely to be forthcoming: see paragraph 111 above.
- 127.3 A group of officers in the Army decided to pursue an active “campaign” designed to ensure that the Army obtained its share of resources. One aspect of this “campaign” involved undermining the claims by the Navy and Air Force for their share of resources. This included the judicious, but deliberate “leaking” of official information to the news media: see paragraphs 112-113 above.
- 127.4 As a result of the perceived success of the Army “campaign” and those involved with it, another faction in the Army, for a variety of motives, reacted by deliberately “leaking” information to Opposition members of Parliament which led among other things to well directed requests for official information under the Official Information Act and Parliamentary questions which caused considerable personal embarrassment to CGS and consequential political embarrassment to the Government: see paragraph 118 above.
128. These two phases of deliberate “leaking” of official information involving different factions in the Army are not indicative of any widespread malaise either in the Defence Force or indeed in the Army: see paragraph 120 above. They have involved a relatively small number of individuals who misguidedly believed that their breaches were somehow justified: see paragraph 119 above. Some of them may now appreciate that their actions were unwise and not in the best interests of the Army. We found no evidence of any systemic problem underlying the disclosure of official information in the Defence Force.

129. We have set out in our report the steps taken by the Secretary of Defence to investigate the unauthorised disclosure of official information: see paragraphs 102-103 above. We are satisfied that these steps were adequate and appropriate in the circumstances: see paragraph 104 above.
130. We have also set out the steps taken by the Chief of Defence Force to investigate the unauthorised disclosure of official information: see paragraphs 96-98 above. Although the steps taken by the Chief of Defence Force in relation to a much greater number of alleged breaches proved unsuccessful, they appeared adequate and appropriate in the circumstances: see paragraphs 99-101 above.
131. We consider that the Chief of Defence Force was inhibited in successfully investigating the “leaks” by the following factors –
- 131.1 Reliance on the command structure and on the force of orders in a managerial context. Some individual Army officers were prepared to disregard the orders in a way which would have been unthinkable to them in an operational context: see paragraph 100 above.
- 131.2 The decision not to investigate “leaks” apparently from the Army on the grounds that the investigation of those “leaks” was the responsibility of the CGS: see paragraph 101 above.
132. Our terms of reference do not require us to make any recommendations. We understand that this is because it is intended to refer our report to Mr Don Hunn to assist him in his major review of the accountabilities and structural arrangements between the Ministry of Defence and the New Zealand Defence Force. Both you and Mr Hunn have suggested, however, that it would be helpful if we were to identify in our conclusions any matters arising from our inquiry which might be taken into account in Mr Hunn’s review. This we now do.
133. It seems to us that in the context of the subject matter of our review there is a need for clear and decisive leadership at the top of the Defence Force and the Army to identify and remove or neutralise those individuals responsible for the breach of Defence Force standards and the unauthorised disclosure of official information. The recent appointments to those two positions have provided the Government with

an ideal opportunity to ensure that the new leaders are not only of high professional competence but will also deal promptly and effectively with the culprits.

134. The terms of reference to be given by the Minister to the CDF when that officer takes up his appointment should state clearly and prominently that one of his principal responsibilities will be to take decisive steps to end this sorry saga. They must include a vigorous attempt to identify and remove or neutralise that small minority of officers who have participated in it; the expeditious reiteration to all personnel of their responsibilities in this area, and all practical means that can be taken to enhance and preserve respect for the accepted standards of behaviour. It should be made plain to the new CDF that the degree of his success in meeting this explicit requirement will be a major element in judging his performance.
135. In paragraph 101 above we referred to the existence of constraints on the powers of the Chief of Defence Force to carry out his responsibilities in relation to management as distinct from operational functions. In these management areas he has similar accountabilities to the Government as does any Chief Executive in the Public Service. He can, however, only perform this role through the Service Chiefs; yet since he does not appoint those Chiefs he has very limited disciplinary power over them and therefore less authority to ensure that his wishes are carried out. While this may not be a significant problem at times when all the senior officers concerned are working in harmony history has shown that this will not always be the case. It seems to us that this area – of heightening the effectiveness of accountability procedures within the Defence Force – needs to be considered further in the context of Mr Hunn’s review.
136. One possible approach might be a change in the way Service Chiefs are appointed. In the latest round of appointments of CDF and Service Chiefs, the State Services Commissioner, with the assistance of an advisory panel, advised the Government of the candidates whom he believed were best qualified for the respective positions. The appointments were then approved by the Governor-General in Council. This procedure, for the first time followed the State Services model, except that whereas the State Services Commissioner formally appoints Departmental Chief Executives, who are then bound in a contractual relationship with him, the appointment of the Service Chiefs has been effected, as required by the Defence Act, through the issue of Warrants by the Governor-General. Consideration might now be given to

aligning the two appointment processes a stage further – that, while the Governor-General in Council continues to approve the appointment of Single Service Chiefs, the Defence Act could be changed to provide for the appointment to be formally made by the CDF, bringing the Service Chiefs into the same kind of contractual relationship with CDF as the State Sector Chief Executives have now with the State Services Commissioner.

137. We anticipate that Mr Hunn will consider the need for structural changes at New Zealand Defence Force Headquarters and consequential legislative amendments to the Defence Act 1990. In the course of our inquiry we formed the view that the experience of the last decade indicates that consideration could usefully be given to other amendments of the Act including -

137.1 The nature and extent of the powers of the Chief of Defence Force to command all aspects of the Defence Force. (Current ambiguities should be removed).

137.2 The role and functions of the three Service Chiefs now that the Joint Forces Headquarters has been established.

137.3 The effectiveness of the command structure outside operational and related areas.

137.4 A requirement that by the end of a transitional period all appointments to senior positions should have Joint Forces experience.

138. If it is decided to make amendments to the Defence Act 1990, there are a number of further specific points which might be considered –

138.1 Clarification of the role of the Governor-General as Commander in Chief: see paragraph 70 above.

138.2 Inclusion of a specific provision requiring political neutrality of the Defence Force and briefing of the Leader of the Opposition to encourage a bipartisan approach to defence issues. There is a precedent for such a provision in the New Zealand Security Intelligence Service Act 1969: see s 4AA.

139. The Defence Force should consider producing a simple, straightforward statement in booklet form describing clearly the obligations of all Defence personnel to observe political neutrality and to avoid the unauthorised disclosure of official information to anyone, whether or not in the media: see paragraphs 60 and 81 above. The Public Service Code of Conduct could be used as a model, but adapted to reflect the unique features of the Defence Force and to include the points made in the introduction to DFO 70. The contents of the booklet might usefully be prepared after consultation with members of the Defence Force using a “bottom up” approach.
140. The Defence Force should consider extending the education and training of its officer corps in all Services to include an appropriate course covering the essential features of the constitutional relationship between civilians and the military: see paragraph 64 above. The course already developed by the Director of Legal Services would be a valuable starting point. All appointees to New Zealand Defence Force Headquarters should have the benefit of such a course where the nature of their prior experience justified this.
141. The changing principles of Defence Force personnel – better educated, more questioning than their predecessors – suggest to us that there may be a need for some forms of safety valve. At the higher level, these might include a vehicle on the lines of the now discontinued Defence Quarterly which enabled them to advance views publicly in their personal capacity. For lower ranks as well as higher, there would be value in providing full opportunity to advance views on major impending policy issues, and to receive the feedback from their Service which would give those who took advantage of the process a feeling of ownership in the results.

Douglas White QC

Graham Ansell

20 December 2001