



Defence Force Order 35 New Zealand Defence Force Response to Civilian Harm

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Chief of Defence Force
Headquarters New Zealand Defence Force
WELLINGTON

Authority Order

DFO 35

New Zealand Defence Force Response to Civilian Harm

Issued by the Chief of Defence Force

Authority

1. DFO 35 *New Zealand Defence Force Response to Civilian Harm*, is issued and promulgated by the Chief of Defence Force pursuant to s 27 of the *Defence Act 1990*.

Conflict

2. Nothing in this publication is to be construed as prevailing over any relevant Act of Parliament or regulations made under it.
3. Any conflict between the mandatory requirements stated in this publication and any other policy, order, rule or procedure issued within the New Zealand Defence Force is to be reported to the Custodian without delay.

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Preliminary Provisions

Purpose of DFO 35

1. The purpose of this order is to implement NZDF-wide procedures for responding to reports of civilian harm arising from military activity in situations of armed conflict.
2. *DFO 35 - New Zealand Defence Force Response to Civilian Harm* must be read in conjunction with DM 69 (2 ed) Volume 4 *Manual of Armed Forces Law*.

Application

3. This is a written order to all members of the Armed Forces pursuant to s 27 of the *Defence Act 1990* and instructions to members of the Civil Staff.
4. These orders are to be applied throughout the Defence Force.
5. All members of the Defence Force must comply with the orders stipulated in this publication.
6. The instructions in *DFO 35* apply equally to contractors and consultants and other persons or organisations engaged for Defence Force purposes. It is the responsibility of the member of the Defence Force engaging any contractor, consultant or other person not a member of the Defence Force to make them aware of this requirement and include such requirements in their contracts.
7. Non-compliance with these instructions may result in disciplinary action being taken in accordance with the *Armed Forces Discipline Act 1971* or may result in possible sanctions in accordance with the *NZDF Civil Code of Conduct*.
8. Non-compliance by a contractor, consultant or other person or organisation engaged by the Defence Force could lead to a contract being terminated.

Commencement date

9. The commencement date of *DFO 35* is 20 November 2020.
10. Amendments to this publication are documented in the Record of Change in the End Matter.

Custodian

11. The Custodian for *DFO 35* is the Director of Defence Legal Services.

Meanings of terms

12. Terms used in *DFO 35* and not explained or stated in the authorised references are defined in the annex to these preliminary provisions.

Authoritative version of Defence Force Order 35 New Zealand Defence Force Response to Civilian Harm

13. The online copy of *DFO 35 - New Zealand Defence Force Response to Civilian Harm* promulgated in the defence information environment is the authoritative version. Any printed copy or any other electronic copy is deemed uncontrolled and is to be used for guidance only.

Related publications

[*DM 69 Volume 4 Manual of Armed Forces Law*](#)

Annex A

MEANINGS OF TERMS

1. Words and phrases are to be given their ordinary grammatical or military meaning promulgated in relevant legislation, military glossaries and authorised dictionaries.
2. Meanings of terms used in this publication are—

| Term | Meaning |
|----------------------------|--|
| Amends | Amends refers to the range of options available to armed forces in order to convey condolences for civilian harm. |
| Civilian | Any person who is neither a combatant ¹ nor a non-combatant member of the armed forces. ² |
| Civilian casualty | Civilian casualty, also referred to as CIVCAS, is defined as unintentional or incidental death or injury to persons that would not be lawful military targets in the circumstances ruling at the time. |
| Collateral damage | Unintentional or incidental death or injury to persons, or damage to property, places, objects, infrastructure, or services that would not be lawful military targets in the circumstances ruling at the time. |
| Combatant | <p>Combatant means:³</p> <p>(a) All members of the armed forces of a State that is a party to an international armed conflict except for:</p> <ol style="list-style-type: none"> i. Medical personnel and ii. Religious personnel,⁴ or <p>(b) For the purposes of this order, the term ‘combatant’ also applies to:</p> <ol style="list-style-type: none"> i. A member of the armed forces of a State involved in combat operations as part of a non-international armed conflict (NIAC),⁵ and ii. Any person or class of persons to whom combatant status has been granted by the New Zealand Government, either by agreement or unilaterally. |
| Rules of engagement | Directives issued by the highest level of military command that specify the circumstances and manner under which force will be used in execution of a mission. |

¹ While civilians lose their protection from attack when they directly participate in hostilities, participation does not classify them as combatants. If there is any question as to the civilian status of an individual, they are assumed to be a civilian until evidenced otherwise.

² See DM 69 Vol. 4 Chapter 6, Section 4 at 6.4.1 (and 6.4.2 for definition of Civilian Population).

³ Normally a combatant may be attacked lawfully, however this is not the case if the combatant is *hors de combat*, e.g., they have ceased to take a direct part in hostilities through being wounded, sick, shipwrecked, or deprived of liberty.

⁴ Medical and religious personnel are members of the armed forces however they are afforded special privilege in that they cannot be made the object of an attack.

⁵ While combatant status does not strictly apply in NIACs, members of armed forces deployed by governments to NIACs are generally afforded combatant protections and immunities; see DM 69 Vol. 4 Chapter 6, Section 3 at 6.3.12 and 6.3.13 for further information.

| | |
|----------------------------|---|
| Target | An area, complex, installation, force, equipment, capability, function or behaviour identified for possible action to support the commander's objectives, guidance, and intent. Targets fall into two general categories: planned and immediate. |
| Targeting | Targeting is the process of selecting and prioritising targets and matching the appropriate response to them, taking account of operational requirements and capabilities. |
| Targeting directive | The principal strategic level directive for the conduct of targeting activities in support of operations. It is to be read in parallel with Rules of Engagement, informs all subordinate targeting guidance, and should allow maximum operational flexibility and autonomy consistent with national policy. |

Chapter 1 - Introduction

Section One - Background

1.01 Introduction

- a. Consistent with New Zealand's long-standing efforts to strengthen the protection of civilians in armed conflict, and in compliance with International Humanitarian Law/Law of Armed Conflict (IHL/LOAC) – which specifies civilians as a protected class of person, the New Zealand Defence Force (NZDF) strives to avoid civilian harm.
- b. However, the risk of harm to civilians is an unfortunate reality of armed conflict, particularly as armed conflict is increasingly conducted in areas inhabited by civilians. Military operations are now frequently occurring in urban environments or places in which large numbers of civilians, including refugees and displaced persons, may congregate.
- c. IHL/LOAC permits some civilian harm to occur as a result of military attacks, specifically when the military advantage anticipated outweighs the civilian harm estimated. This means civilian harm in itself does not determine whether a military activity is unlawful.⁶
- d. As such, civilian harm can occur despite compliance with IHL/LOAC and even when best practice mitigation processes have been adopted. It is unrealistic to expect that civilian harm can be entirely eliminated in armed conflict. It is therefore important for NZDF to have appropriate and timely response mechanisms in place to respond to reports of civilian harm arising from its military activities in situations of armed conflict.
- e. Civilian harm refers to the range of negative impacts on a civilian population that can arise from military activity. It is a broad term that includes harm to people, property, places, objects, infrastructure, and services. Generally civilian harm occurs for one of two reasons (the latter being harder to identify by the attacking force)—
 - (1) collateral damage; or
 - (2) misidentification of a person or object as a legitimate military target.
- f. Civilian harm can be caused by lawful or unlawful military activity. Response to unlawful activity, such as a violation of IHL/LOAC or a breach of New Zealand criminal law, is handled via the military justice system, within which a robust process for investigation and consequence management exists. This is in contrast to civilian harm caused by lawful military activity upon which IHL/LOAC imposes no legal requirement to investigate or provide amends.

⁶ Further guidance on Proportionality can be found in DM 69 Vol. 4 Chapter 4, Section 4.

- g. Beyond legal considerations, it can be beneficial at a strategic level for NZDF to earn the support of the civilian population local to where NZDF is operating by appropriately responding to all reports of civilian harm. Without this support, civilians may deny assistance to NZDF and may aid the enemy. Civilian harm can be highly damaging to the reputation of a force and to the public support for the cause for which it fights, both at home and abroad.

1.02 Purpose

- a. The purpose of this order is to implement NZDF-wide procedures for responding to reports of civilian harm arising from military activity in situations of armed conflict.

Section Two - Guiding principles

1.03 Principles

- a. Protection of civilians is fundamental to upholding NZDF's military ethos. The following five principles guide NZDF when responding to a report of civilian harm—
 - (1) **Independence** – NZDF will conduct itself without interference from persons or bodies not assigned to the matter, without fear of reprisal, and without expectation of favour for finding any particular outcome;
 - (2) **Impartiality** – there is to be no undeclared conflict of interest or personal or professional bias for any individual assigned to investigate a report of civilian harm, including legal advisors whose advice may have contributed to a particular behaviour or course of action;
 - (3) **Thoroughness** – resources are to be adequate to allow for quality record keeping and to ensure all feasible steps to source, analyse, store, and retrieve relevant information can be met;
 - (4) **Promptness** – NZDF is to act promptly to record, assess, report, and resolve reports of civilian harm (delay can affect the rights of affected persons, implicated NZDF personnel, and witnesses), however, a prompt response should not be prioritised over a thorough approach; and
 - (5) **Transparency** – NZDF's response to reports of civilian harm should offer those involved a high level of assurance in the processes engaged (achieved through regular communication, openness, and accountability).⁷
- b. These principles are underpinned by NZDF's core values of Courage (Tū Kaha), Commitment (Tū Tika), Comradeship (Tū Tira), and Integrity (Tū Maia).
- c. Implementation of this order must be informed by the security context of an operation and not compromise the safety of NZDF personnel.

⁷ While the nature of NZDF's work warrants restrictions on information at times, operational security should be balanced with transparency of the civilian harm response mechanisms employed by NZDF, to the extent possible.

Section Three - Frameworks

1.04 Legal framework

- a. IHL/LOAC is the prevailing legal framework governing military conduct in situations of armed conflict. IHL/LOAC distinguishes between combatants and civilians, permitting lethal use of force against the former as well as civilians taking direct part in hostilities.
- b. IHL/LOAC does not prohibit incidental civilian harm or collateral damage so long as it is not excessive in light of the overall military advantage anticipated from the attack.
- c. Where lawful military activity has resulted in civilian harm, IHL/LOAC imposes no legal obligations requiring investigation or amends, therefore the duty to investigate is limited.
- d. This order intentionally sets a higher bar for responding to reports of civilian harm than what is legally required under IHL/LOAC, as the protection of civilians is a strategic priority for NZDF. However the superior standard to which NZDF seeks to hold itself does not imply any emerging legal norm that obliges NZDF to investigate every instance of civilian harm resulting from its actions.

1.05 Operating frameworks

- a. This order reinforces NZDF's existing operating frameworks including doctrine, orders, guidance, and policy.
- b. This order is to be read in conjunction with Joint Forces New Zealand (JFNZ) Incident Reporting Standard Operating Procedures (IR SOPs).

Chapter 2 - Scope of Application

Section One - Armed conflict

2.01 Scope

- a. This order applies in all environments outside New Zealand where NZDF is operating in a situation of armed conflict⁸ and *ipso facto* operating under IHL/LOAC, including all iterations of international and non-international armed conflict.⁹ This order does not cover NZDF's non-conflict related operations.¹⁰
- b. This order establishes the framework for responding to reports of civilian harm resulting from military activity that NZDF has directly or indirectly participated in. This includes instances where NZDF is operating as part of a multinational force.¹¹

Section Two - Multinational operations

2.02 Respect and ensure respect

- a. As New Zealand is a signatory to the Geneva Conventions and its Additional Protocols, NZDF must not only respect IHL but also ensure respect for IHL.
- b. Civilian protection, including response to reports of civilian harm, must be considered when NZDF is planning to participate in a multinational operation.

2.03 Multinational operations

- a. When considering deployment as part of a multinational force, NZDF is to (in addition to 3.01 c.)—
 - (1) undertake an assessment that examines the capacity and/or approach of the multinational force to respond to reports of civilian harm;¹²
 - (2) encourage the codification of civilian harm response procedures in agreements or arrangements, including clear expectations for information sharing;
 - (3) seek to formalise commitment (where relevant and appropriate) for involvement in joint multinational investigations into reports of civilian harm;

⁸ For further definition of armed conflict see DM 69 Vol. 4 Chapter 5, Section 2.

⁹ For more detail on the material field of application refer to DM 69 Vol. 4 Chapter 5.

¹⁰ All military operations possess the possibility of causing civilian harm, however non-conflict operations require separate examination to establish, among other things, the applicable legal paradigms and any consequential duty to investigate.

¹¹ NZDF are to use civilian harm reporting mechanisms arranged by multinational forces, where applicable. This gives the multinational force the opportunity to investigate for disciplinary action where needed, offer amends if appropriate, and provides NZDF with a level of assurance should a later report claim NZDF activity caused the civilian harm.

¹² Not to prevent partnership but to inform NZDF of how it can best support the partner to protect civilians.

- (4) make every reasonable effort to ensure that if a multinational force has the facility to establish its own independent investigative body to respond to reports of civilian harm, that NZDF have participation where members of the NZDF were present during or may have been involved in any military activity that the multinational force is investigating. This should include making all reasonable efforts to ensure that NZDF has access to all relevant information, records, reports, and findings impacting on them, with explicit rights to on-share or publish publically¹³ as appropriate;
 - (5) share NZDF guidance for responding to civilian harm; and
 - (6) work with the New Zealand Ministry of Defence (MOD), to ensure that the New Zealand Minister of Defence (here forth Minister of Defence) is advised, as part of the deployment Cabinet paper process, of what is known of the multinational forces' approach to responding to civilian harm reports and any subsequent consequences that this could have for NZDF.
- b. During multinational operations NZDF is to—
- (1) support the prioritisation of civilian protection during the operational planning process, including encouraging early dialogue with humanitarian actors;
 - (2) seek and share best practice for responding to reports of civilian harm;
 - (3) emphasise the importance of addressing reconstruction and stabilisation in exit strategies;¹⁴
 - (4) where practicable, ensure local forces trained by NZDF are competent to respond to reports of civilian harm after the withdrawal of NZDF personnel, including addressing medical needs, management of the dead, missing persons, and clearing explosive remnants of war; and
 - (5) keep the Minister of Defence up to date, via a joint NZDF-MOD Note to Minister (NTM), of any significant change to a multinational forces' approach to reports of civilian harm during a deployment.
- c. Multinational operations present a complex challenge when understanding responsibility for civilian harm, as operations can be the result of intelligence, assets, directives, and use of force from numerous contributing nations. If there is any doubt about legal responsibilities and accountabilities in respect of a report of civilian harm, advice should be sought as soon as practicable from Defence Legal Services. Where it is determined NZDF have a duty to investigate, this is to follow the standard reporting procedure set out in this order. Where it is determined NZDF do not have a duty to investigate, this is to be filed as a report to JFNZ for fullness of record.

¹³ In redacted form if needed.

¹⁴ In conjunction with MOD, any other relevant government departments, and relevant organisations.

Chapter 3 - Responding to Civilian Harm

Section One - Appropriate response to civilian harm

3.01 Preparing for response to civilian harm

- a. Responding to reports of civilian harm is a responsibility of all levels of command. This applies to deployed personnel and those based in New Zealand.
- b. Responding to reports of civilian harm appropriately first requires understanding the risks posed to civilians across the spectrum of military operations.
- c. Steps that can assist in an appropriate response to civilian harm include—
 - (1) pre-deployment training on civilian harm, tailored to the environmental and cultural context of the upcoming deployment;
 - (2) pre-deployment training on cross-cultural engagement relevant to the location of the deployment;
 - (3) pre-deployment training on NZDF (and multinational force, where appropriate) policies and procedures for responding to reports of civilian harm;
 - (4) pre-deployment training on how best to record a scene of civilian harm, including evidence chain of custody and interview techniques for affected persons/witnesses;¹⁵
 - (5) development of Operational Orders, Targeting Directives, Rules of Engagement, and other guidelines that explicitly consider response to reports of civilian harm;
 - (6) a clear and accessible process within every NZDF deployment to facilitate internal reports of civilian harm, with appropriate considerations for ‘whistle-blower’ concerns;
 - (7) a clear and accessible process within every NZDF deployment to facilitate external reports of civilian harm, with appropriate considerations for barriers caused by security, technology, language, and cultural norms;
 - (8) an understanding of the need to develop responses tailored to the demographic make-up of the affected population, e.g., women, children, older persons; and
 - (9) sound data management processes for handling civilian harm reports including documentation, transmission, storage, retrieval, and monitoring for continual learning.

3.02 Categorising reports of civilian harm

- a. Reports of civilian harm may be received internally or externally, and may be considered critical or non-critical in nature. However, civilian harm reports are received, they must be recorded and appropriately reported.
 - (1) **Internal reports**

¹⁵ Further guidance on such topics can be found in manuals such as the Minnesota Protocol.

- (a) Internal reports are those made by a member of NZDF.
 - (b) Internal reports are to be communicated up the chain of command to the relevant Senior National Officer (SNO) or equivalent. Civilian harm reports from subordinates should be viewed as a source of information that supports an SNO to meet their reporting obligations.
 - (c) In cases where an individual is unable or unwilling to report to the relevant SNO or equivalent, they may submit a report directly to JFNZ or an enforcement agency such as the Military Police or New Zealand Police.
- (2) **External reports**
- (a) External reports are those made by a person or body outside NZDF, such as a member of the multinational force in which NZDF is operating, a member of the civilian community affected, the news media or an international organisation/non-governmental organisation (NGO) operating in the area.
 - (b) External reports are valuable sources of information in that they may provide additional information to support an internal report of civilian harm or they may make NZDF aware of civilian harm it did not know about.
 - (c) International organisations and NGOs hold useful information with regard to civilian harm, and particularly with regard to misidentification of targeted subjects. NZDF should actively source and routinely evaluate external reports of civilian harm arising in its area of operation(s) to ensure NZDF is not unknowingly undercounting and failing to respond to reports of civilian harm. Should there be evidence of this occurring, NZDF should urgently seek to improve its accuracy in identifying civilians to prevent unknowingly undercounting reports of civilian harm.
 - (d) External reports may be submitted directly or indirectly, by people immediately affected or those with a broader interest in the matter. The mechanism(s) available for receiving external reports will depend on the nature of each mission. However, regardless of the deployment structure and environment, an accessible and effective process is required to be in place that ensures the safety and privacy of the reporting individual or organisation.
 - (e) Challenges that may prevent an external report from being raised, such as security concerns, telecommunication limitations, language barriers, and cultural norms, should be considered when designing external reporting mechanisms.
 - (f) Sharing of good practices between units, services, and militaries can be valuable in this regard; when NZDF is operating in a multinational environment, the external reporting mechanisms available may involve support from members of the multinational force.

- (g) Information on external reporting mechanisms should be publicly available and outline how to access the mechanism(s), how reports are handled, and by whom. All reports should be promptly acknowledged and the affected person provided an accessible avenue for follow up on the handling of their report.
 - (h) Suggested avenues for facilitating external reports include linking with existing multinational channels, making a contact phone number and email address available, and/or encouraging reports to be made directly to the NZDF through appropriate military channels.
 - (i) Once an external report is received by a member of NZDF, the report is to follow the internal reporting procedure.
- (3) **Critical civilian harm**
- (a) Where determined possibly credible, critical civilian harm must be investigated, regardless of whether it is the result of lawful or unlawful military activity.
 - (b) Critical civilian harm includes—
 - (i) any death or serious physical injury of a person with civilian status;
 - (ii) significant damage to civilian property, including places and objects of cultural significance;
 - (iii) any damage to essential civilian infrastructure or services, or the infrastructure used to access an essential civilian service;
 - (iv) any significant degradation of quality of life imposed on a community, including that caused through residual effects;
 - (v) that where there is a credible allegation of a violation of IHL/LOAC or serious breach of New Zealand criminal law; and
 - (vi) incidents as otherwise determined as critical in nature by the SNO or JFNZ.¹⁶
- (4) **Non-critical civilian harm**
- (a) Where determined possibly credible, and where it is the result of lawful military activity, non-critical civilian harm is all harm being considered minor in nature. For the avoidance of doubt, any harm not meeting the threshold of critical civilian harm is considered non-critical civilian harm.
- b. Proactively establishing channels of communication with other militaries, intergovernmental bodies, international monitors, civil society, and the media is recommended as a method of sourcing and verifying information to assist in the correct categorisation of, and appropriate response to, a civilian harm report.

¹⁶ For example, reports that may impact New Zealand's international reputation or be of significance to the New Zealand Government.

Section Two - Procedure for responding to civilian harm

3.03 Outline for civilian harm response

- a. The below framework summarises the procedure for responding to actual or reported occurrences of civilian harm,¹⁷ when implementation of response is not limited by operational and tactical imperatives and does not compromise the safety of NZDF personnel—
 - (1) Incident awareness.
 - (2) Initial Notification Report.
 - (3) Initial Assessment.
 - (4) Incident Report.
 - (5) Investigation.
 - (6) Sharing findings.
 - (7) Amends.
 - (8) Closing Authority.
- b. This order directs systematic response, recording, and reporting of civilian harm reports under a common framework that can and should be tailored to the nature of the civilian harm and the context of the operating environment. A multinational operation will require coordination of procedures. Pre-deployment planning is critical in this regard.
- c. The commander responsible and accountable for the operation¹⁸ will make a judgement as to whether the security situation permits an immediate response as outlined in this section. This *DFO* acknowledges that in sustained combat operations, accuracy and timeliness of an investigation may be challenging due to operational and force protection imperatives.

3.04 Incident awareness

- a. An incident of civilian harm is any event where military activity (that NZDF has directly or indirectly participated in) is reported to have caused civilian harm.
- b. An incident is also considered to be any undesired occurrence from NZDF's operational activity that did not immediately cause a civilian harm incident but that could pose significant risk of one in future.¹⁹
- c. It is a mandatory requirement for all NZDF personnel to report all civilian harm regardless of source, to the relevant SNO or equivalent, as soon as practical.

¹⁷ Appendix 1 provides a high level visual map of this process.

¹⁸ The Commander refers to the person who is best placed to make a judgement on the situation in relation to the operational imperative. In most cases, this will be the person who is directly in command of tactical force elements within the land, sea or air domain.

¹⁹ For example, inadequate Rules of Engagement or weapons malfunction.

- d. It is a mandatory requirement for all SNO to report all civilian harm reports to JFNZ in accordance with this order. Aside from addressing the immediate reported civilian harm, records of reported civilian harm (alongside intelligence reports, situational reports, and post op records) can help establish the credibility of future civilian harm reports, assist with civilian harm mitigation measures, lessons learnt, and development of best practice, as well as assisting with multinational force investigations.
- e. When a member of NZDF is deployed as part of a multinational force, reporting of civilian harm reports may be duplicated to fulfil multinational response mechanism requirements and those of NZDF. For the avoidance of doubt, members of NZDF who report civilian harm (related to NZDF activity) through the reporting mechanism of a multinational force, must also report the harm through the NZDF chain of command.
- f. Where obstacles (such as loss of territorial control) prevent quality or timely reporting, this too should be documented for fullness of record, and reported to JFNZ in accordance with the suspected nature of the possible civilian harm.
- g. Should a report of civilian harm be raised where the NZDF activity in question occurred prior to the promulgation of this order, or after the relevant deployment has ceased, the report of civilian harm is to be referred to CDF.

3.05 Initial Notification Report

- a. Upon learning of a report of civilian harm, an Initial Notification Report (INR) is to be raised by the relevant SNO or equivalent in accordance with JFNZ IR SOPs.
- b. JFNZ is to send an Incident Advisory to inform required personnel of the reported civilian harm, for their notice or action, in accordance with JFNZ IR SOPs.
- c. In response to receiving an Incident Advisory regarding a critical civilian harm report, Commander Joint Forces New Zealand (COMJFNZ) is to provide the Incident Advisory to Headquarters New Zealand Defence Force Strategic Commitments and Engagements Branch (HQNZDF SCE Branch).
- d. Upon receipt of an Incident Advisory regarding a critical civilian harm report, HQNZDF SCE Branch, working with MOD (and any other relevant Government departments), is to produce a joint NZDF-MOD NTM of Defence (with referral to the Prime Minister and Minister of Foreign Affairs), to raise awareness of the critical civilian harm report. This NTM is to be signed out by the Chief of Defence Force (CDF) and the Secretary of Defence.

3.06 Initial Assessment

- a. An Initial Assessment is an informal means to ascertain basic facts that will allow NZDF to triage civilian harm reports and filter out non-credible reports.²⁰ An Initial Assessment may determine a critical harm report as not credible, possibly credible and non-critical in nature, or possibly credible and critical in nature.²¹
- b. The Initial Assessment should contain sufficient information to both demonstrate the rationale for the conclusion of the assessment and capture the fullness of the event for future review.²²
- c. When carrying out an Initial Assessment, the SNO or equivalent should seek engagement with affected persons and witnesses in order to obtain all readily available facts.
- d. Engagement with Defence Legal Services is essential during the Initial Assessment to ensure compliance with this order, legal obligations, and any applicable multinational agreements or arrangements.
- e. The findings of the Initial Assessment forms the basis of the Incident Report.
- f. The SNO or equivalent may obtain the assistance of multinational forces in carrying out an Initial Assessment. They may also request advice from a media advisor, and/or a language and cultural advisor as appropriate and available.
- g. In cases of reported civilian harm where it is not appropriate or possible for an Initial Assessment to be undertaken, this must be immediately reported to JFNZ.²³

3.07 Incident Report

- a. The Incident Report is to be completed in accordance with JFNZ IR SOPs and this order, and include the content of the Initial Assessment.
- b. When an Initial Assessment has determined a civilian harm report to be **not credible**, the following steps are to be followed—
 - (1) The SNO or equivalent is to file the Incident Report, including the content of the Initial Assessment, with JFNZ.
 - (2) JFNZ is to provide the Incident Report to HQNZDF SCE Branch in any instance where despite the report of civilian harm being deemed not credible, COMJFNZ determines the nature of the report to likely be of interest to the Minister of Defence.

²⁰ Assessing the credibility of a report takes into account the rights of both the persons affected and the individuals implicated, operational resources, the realities of the battlefield, and the preference for timely resolution where possible.

²¹ Where an Initial Assessment makes a determination that is later brought into question by the emergence of new information, the report of civilian harm will be reassessed.

²² See Appendix 2 for further details on content.

²³ JFNZ is to report this to Defence Legal Services (attention J09) for consideration of any required actions.

- (3) If referred a non-credible civilian harm Incident Report by JFNZ, HQNZDF SCE Branch, working with MOD (and any other relevant government departments), is to produce a joint NZDF-MOD NTM of Defence (with referral to the Prime Minister and Minister of Foreign Affairs) advising of the situation.
 - (4) HQJFNZ is to file the Incident Report (and associated information) for record keeping, reporting, and monitoring purposes.
- c. When an Initial Assessment has determined a civilian harm report to be **possibly credible and non-critical in nature**, the following steps are to be followed—
- (1) The SNO or equivalent is to seek to resolve the situation using amends available in-theatre.
 - (2) The SNO or equivalent is to file the Incident Report, including the content of the Initial Assessment (and amends if relevant), with JFNZ.
 - (3) JFNZ is to provide the Incident Report to HQNZDF SCE Branch in any instance where despite the report of civilian harm being deemed non-critical, COMJFNZ determines the nature of the report to likely be of interest to the Minister of Defence.
 - (4) If referred a non-critical civilian harm Incident Report by JFNZ, HQNZDF SCE Branch, working with MOD (and any other relevant government departments), is to produce a joint NZDF-MOD NTM of Defence (with referral to the Prime Minister and Minister of Foreign Affairs) advising of the situation.
 - (5) HQJFNZ is to file the Incident Report (and associated information) for record keeping, reporting, and monitoring purposes.
- d. When an Initial Assessment has determined a civilian harm report to be **possibly credible and critical in nature**, the following steps are to be followed—
- (1) The SNO or equivalent is to file the Incident Report, including the content of the Initial Assessment, with JFNZ.
 - (2) JFNZ is to provide the Incident Report to HQNZDF SCE Branch, specifically noting the investigative mechanism(s) required.
 - (3) HQNZDF SCE Branch, working with MOD (and any other relevant government departments), is to produce a joint NZDF-MOD NTM of Defence (with referral to the Prime Minister and Minister of Foreign Affairs) advising of the mechanisms required to investigate the critical civilian harm.

3.08 Investigation

- a. An investigation considers the findings of those Initial Assessments which have found a civilian harm report to be possibly credible and critical in nature, as well as concerns of serious systemic issues with potential to cause civilian harm. Investigations provide a source of accountability and allow for a credible response to false accusations. Transparency of the investigative process helps instil trust in the actions of NZDF.

- b. The investigative mechanism for civilian harm caused by lawful military activity or possible systemic issues is a Court of Inquiry (COI)²⁴ (unless directed otherwise).
- c. The COI is to be assembled, pursuant to section 200A of the Armed Forces Discipline Act (AFDA) 1971, at the earliest opportunity to—
 - (1) establish the context and facts of the critical civilian harm report;
 - (2) review NZDF's response and record keeping to date and seek additional information as required;
 - (3) consider the legal and operating frameworks relevant at the time;
 - (4) identify individual or systemic factors that may have contributed to or caused the civilian harm;
 - (5) determine if the report of civilian harm, or potential for civilian harm through a systemic issue, is upheld;
 - (6) determine if any action is required, including any amends or referral to an enforcement agency; and
 - (7) provide any further relevant recommendations and observations.
- d. The COI Terms of Reference are to be drafted in consultation with an NZDF LEGAD.
- e. All appointments to the COI are to be independent from the reported civilian harm under investigation, persons affected, and deployed unit(s) involved.
- f. Requests for support (e.g., legal advice or logistical support) for affected persons/witnesses participating in the COI process should be referred to the COI Office as soon as practicable.
- g. The COI Office is responsible for facilitating liaison with affected parties and external agencies, as well as all requests for information relating to COI.²⁵
- h. At the closing of a COI, the following steps are to be followed—
 - (1) The COI report is filed with JFNZ (and the COI Office).
 - (2) JFNZ is to provide the COI report to HQNZDF SCE Branch.
 - (3) HQNZDF SCE Branch, working with MOD (and any other relevant government departments), is to produce a Cabinet paper for the Minister of Defence. The Cabinet paper is to be signed out by CDF and the Secretary of Defence. The Cabinet paper is to note the outcome of the COI, and seek Cabinet's agreement for any proposed significant amends beyond existing delegated thresholds, and public or international messaging to be made.
 - (4) HQJFNZ is to file the Incident Report (and associated information) for reporting and monitoring purposes. The COI Office is to file the COI Report for record keeping.

²⁴ See AFDA 1971 200-200T for further guidance on COIs.

²⁵CDF Directive 08/2015.

- i. If during a multinational operation, a civilian harm report involving a member of NZDF is to be investigated under the authority of a multinational force commander, the SNO is to notify JFNZ immediately to ensure appropriate involvement from NZDF. Reporting of a joint multinational investigation follows 3.07 d. Regardless of any joint multinational investigation, NZDF may assess the need for its own investigation into the actions of NZDF personnel reported to be involved in an operation causing civilian harm.

3.09 Sharing findings

- a. Prior to finalising the COI, the draft COI report will (where reasonably practicable) be provided to the affected person or their next of kin/representative (redacted as necessary), in an appropriate language and delivered by appropriate means,²⁶ in a timely fashion, for comment.
- b. Prior to finalising the COI, COMJFNZ is to ensure all COI into critical civilian harm are legally reviewed externally.²⁷
- c. CDF is to publish online all civilian harm COI reports (redacted as necessary) following the closing of the COI.
- d. Pending Cabinet direction, CDF is to undertake appropriate internal and external messaging relating to the COI.
- e. CDF is to publish an annual report on all civilian harm reports involving NZDF.

3.10 Amends

- a. Amends offer an opportunity for NZDF to acknowledge harm caused to civilians.
- b. Amends are broadly categorised into three areas—
 - (1) **Restitution** – designed to restore affected persons to their situation prior to harm, including monetary payments, livelihood assistance, contribution to community infrastructure.
 - (2) **Rehabilitation** – including medical, psychological, legal, and social services including resources to search for the missing.
 - (3) **Satisfaction** – including pledges of non-repetition, communicating changes in policy to prevent further civilian harm, official acknowledgement of the facts, public or private apologies, commemorations to victims, and acceptance of responsibility.
- c. Monetary amends are categorised according to recognition of legal liability or fault and can be either—

²⁶ For example, in person, written, or electronic transmission and delivered/signed off by personnel at the appropriate level.

²⁷ An external legal review will consist of a review by one of the external counsel (Queen's Counsel) appointed to the panel established for that purpose by the Office of the Judge Advocate General.

- (1) **ex gratia/solatia** – a symbolic payment, based on local culture and customs, made of good will to convey condolences, but not an admission of legal liability or fault;²⁸ and
 - (2) **claim/compensation** – a payment made in response to legal liability or fault.²⁹
- d. Cultures differ across a variety of dimensions³⁰ and as such, amends must be culturally appropriate to be effective. Amends offered should be informed by the impact of the harm on the specific individual/community, host nation laws, local customs and norms, and should be age-appropriate and gender sensitive.
 - e. Following a COI, it may be considered that significant amends beyond existing delegated thresholds are appropriate. Advice relating to such amends is to be included in the Minister of Defence Cabinet paper when a COI into a critical civilian harm report has been completed. Provision of such amends requires Cabinet’s agreement.
 - f. As the appropriate amount for an ex gratia payment will differ for each event, context, and over time, there are no standard payment amounts directed by this order. However, payment amounts should aim to be fair and consistent, therefore, it is recommended JFNZ be contacted for advice on historical amends given in similar contexts, as well as advice be sought from multinational forces operating in the area who also have civilian harm response policies.
 - g. The appropriate personnel within NZDF to deliver amends will be determined by the nature of the civilian harm and the cultural context, however the SNO or equivalent will usually be the most appropriate person to convey condolence for civilian harm.
 - h. NZDF personnel delivering ex gratia payments are to ensure it is made clear to the recipient(s) that any payment is part of an expression of condolence and not a means of compensation.
 - i. Receiving amends does not preclude affected persons from exercising legal rights with respect to the civilian harm in question.
 - j. Where there are multiple avenues for affected persons to receive amends for an incident of civilian harm³¹ this will not preclude the individual from submitting a report of civilian harm to NZDF, nor from receiving amends from NZDF.

3.11 Closing authority

- a. HQJFNZ is responsible for the appropriate storage and archiving of civilian harm reports (and associated information) where the report has been determined—
 - (1) non-credible, or

²⁸ Ex gratia payment may be made in-theatre or following a COI.

²⁹ Claim/compensation payments sit outside the scope of this order; they are listed for information only.

³⁰ For example, independent vs interdependent living, direct vs indirect communication preferences, hierarchical vs consultative authority, and how the culture defines their worth (face vs dignity vs honour systems). Differing community structures, approaches to resolution, conceptions of forgiveness, religion and rituals, as well as rules for emotional display and language also inform effective amends implementation.

³¹ For example, national compensation schemes or humanitarian assistance from local or international organisations.

- (2) possibly credible and non-critical.
- b. NZDF COI Office is responsible for the appropriate storage and archiving of all possibly credible critical civilian harm COI reports (and associated information).

Section Three - Ex gratia payments

3.12 In-theatre ex gratia payments

- a. In-theatre ex gratia payments can only be made in response to credible and non-critical civilian harm reports caused by NZDF activity. In-theatre ex gratia payments are designed to recognise harm has been caused while minimising the time between the incident occurring and resolution of the issue.
- b. The SNO or equivalent is to determine if an in-theatre ex gratia payment is appropriate response to the harm. When deciding if an in-theatre ex gratia payment is appropriate, the SNO will consider a range of factors such as the findings of the Initial Assessment, the nature of the harm, operational imperatives and security considerations, local economic realities, and cultural norms.
- c. Whereas the SNO determines the appropriateness of an in-theatre ex gratia payment, the paying agent will be determined by the authority provided for in COMJFNZ's Delegated Authority.
- d. If it is not possible to resolve a non-critical civilian harm incident through an ex gratia payment (or other in-theatre amends option available at the time of the event),³² the affected person is to be provided information on how to elevate the matter through NZDF's formal external contact mechanism(s) i.e. email or letter.
- e. Payment must not be made when there is credible reason to believe the ex gratia payment would be used to fund insurgent or terrorist activity harmful to New Zealand or its allies, or breach United Nations Security Council sanctions-related obligations.

3.13 Procedure and reporting requirements

- a. Funding for ex gratia payments is allocated by CDF as part of the annual budget approval process.
- b. Ex gratia payments are specifically limited in financial delegations and are to follow financial delegation limitations, specifically *DFO 77* and COMJFNZ's delegated authority.
- c. If the SNO determines an in-theatre ex gratia payment is an appropriate response to a non-critical civilian harm incident, the payment is to be hand-delivered in local currency cash except where the recipient is not in the same location as the paying agent. In this circumstance, an electronic funds transfer is permitted.³³
- d. The following reporting requirements apply—

³² For example, due to disagreement on a suitable payment amount or operational needs preventing NZDF personnel stopping to resolve the issue.

³³ Support may also be requested from a New Zealand high commission/embassy if necessary.

- (1) Financial reporting: entry of the financial transaction into the cost centre with cost element code 7430.
- (2) Operational reporting: The relevant Situational Report (SITREP) must contain—
 - (a) a copy of the INR and Initial Assessment, and
 - (b) details of the ex gratia payment offered – title of the SNO or equivalent and paying agent involved, the amount approved, to whom the payment relates; if the offer is accepted, by whom the payment was received, when and where, or if the offer is refused, an assessment as to why this occurred.
- (3) Regardless of whether an offer of an ex gratia payment is made or not, or an offer accepted or refused, it must form part of the relevant Incident Report.

Chapter 4 - Roles and Responsibilities

4.01 Office of the Chief of Defence Force

- a. Chief of Defence Force is to—
- (1) issue updates to this order;
 - (2) ensure direction is sent through the NZDF Senior Leadership Team that the protection of civilians and appropriate response to reports of civilian harm is a strategic priority;
 - (3) ensure sufficient resourcing for implementation of this order;
 - (4) initiate action in respect of reports of civilian harm where the NZDF activity in question occurred prior to the promulgation of this order, or after the relevant deployment has ceased;
 - (5) allocate and track funding for civilian harm response and consider requests for additional allocations of funding;
 - (6) sign out joint NZDF-MOD NTM and Cabinet papers in accordance with this order;
 - (7) otherwise keep the Minister of Defence promptly and appropriately informed and updated of all reports of civilian harm involving NZDF that the Minister may find of interest;
 - (8) seek the support of New Zealand Government departments relevant to facilitating Initial Assessments and COI efforts into civilian harm reports;³⁴
 - (9) ensure Cabinet approval for all internal and external messaging relating to COIs;
 - (10) publish all closed civilian harm COI reports online (redacted as necessary); and
 - (11) publish an annual report on all civilian harm reports involving NZDF by 01 October for the period 01 July – 30 June in the period preceding.

4.02 Commander Joint Forces New Zealand

- a. COMJFNZ is to—
- (1) ensure due considerations and appropriate actions are taken prior to and during NZDF's participation in a multinational force, in accordance with this order;
 - (2) align, and where practicable apply coalition civilian harm reporting, 'actions on' and amends protocols for a specific theatre of operations;
 - (3) ensure pre-deployment training and operational orders are delivered in accordance with this order;
 - (4) proactively foster regular dialogue with the International Committee of the Red Cross, relevant NGOs, and human rights bodies to better understand the civilian impact of NZDF operations;

³⁴ Support might include high commission/embassy language support, advice on local customs and norms, validating ex gratia payment amounts, facilitating contacts with local leaders/NGOs etc.

- (5) transmit Incident Advisories in accordance with HQJFNZ IR SOPs and this order;
- (6) ensure that HQJFNZ incident reporting mechanisms are in place for receiving reports of civilian harm from NZDF SNOs or equivalent;
- (7) directly receive internal reports of civilian harm where the reporting individual is unable or unwilling to report to the relevant SNO or equivalent;
- (8) keep CDF and HQNZDF SCE Branch promptly and appropriately informed and updated of civilian harm reports involving NZDF as required by this order;
- (9) ensure all COI into critical civilian harm are legally reviewed externally;
- (10) ensure the storage of all civilian harm records in line with NZDF's privacy and data protection policies and the Public Records Act 2005, in a manner that preserves the integrity of the recorded information, in a location that facilitates easy retrieval;
- (11) ensure the monitoring of all civilian harm records for lessons learnt and identifying systemic issues, ensuring wide dissemination into training, doctrine, directives, and planning in a timely manner; and
- (12) submit an annual report to CDF with analysis of all reported civilian harm events involving NZDF by 15 Sep for the period 01 Jul—30 Jun in the period preceding.

4.03 HQNZDF Strategic Commitments and Engagements Branch

- a. HQNZDF SCE Branch is to work with MOD (and any other relevant Government departments) to—
 - (1) ensure that the Minister of Defence is advised of a multinational forces' approach to responding to civilian harm, and any subsequent impact this could have for NZDF, as part of a potential NZDF deployment Cabinet paper; and
 - (2) produce joint NZDF-MOD NTM and Cabinet papers in accordance with this order.

4.04 NZDF Senior National Officers

- a. SNOs or equivalents are to—
 - (1) consider risk factors specific to the civilian groups present in the area of operation as part of the operational planning process;
 - (2) conduct reports and returns, including nil-returns,³⁵ in accordance with relevant Standard Operating Procedures and this order; and
 - (3) support communication and delivery of amends approved following an Initial Assessment or a COI in accordance with financial delegations and this order.

4.05 All members of NZDF

- a. NZDF personnel are to—

³⁵ Nil-returns note that no known civilian harm has occurred. This negative reporting is useful information as it can help assist with any subsequent allegations made against NZDF, particularly in response to false claims used by the enemy in a litigious manner or as information operation propaganda.

- (1) be aware of and respond appropriately to reports of civilian harm – this is a responsibility at all levels of command; and
- (2) communicate all witnessed, suspected, or reported civilian harm reports through the command chain, in accordance with this order.³⁶

³⁶ If for whatever reason a member of the NZDF is unable or unwilling to report through the command chain, a report may be submitted directly to JFNZ or in accordance with NZDF policy on protected disclosures.

Chapter 5 - Monitoring

Section One - Continuous improvement

5.01 Internal monitoring

- a. Accurate standardised tracking of reports of civilian harm is crucial for effective monitoring of NZDF's protection of civilian mitigation and response measures. Monitoring aids in addressing poor practice, improving current practice, and highlighting key messages for NZDF Senior Leadership.
- b. Records of civilian harm should undergo regular, routine standardised reviews to specifically—
 - (1) determine adherence to, and effectiveness of, this order;
 - (2) provide opportunity to identify any administrative or systemic issues for improvement; and
 - (3) establish, communicate, and integrate lessons learnt from the previous period.
- c. Similarly, NZDF should request and review partner civilian harm policies prior to deployment (where possible), and review practice during and after operations, in order to obtain lessons learnt that will further inform NZDF best practice. NZDF should look to proactively share their best practices with partners (and the public, where relevant).
- d. Lessons learnt are to be widely incorporated into training, doctrine, directives, and planning in a timely manner.
- e. Quality response requires sufficient resourcing. Monitoring of personnel, equipment, and time allocation, as well as roles and responsibilities, should also be routinely reviewed to ensure NZDF can meet the requirements of this order and best practice guidance for responding to civilian harm.

Section Two - Annual reporting

5.02 Annual reporting

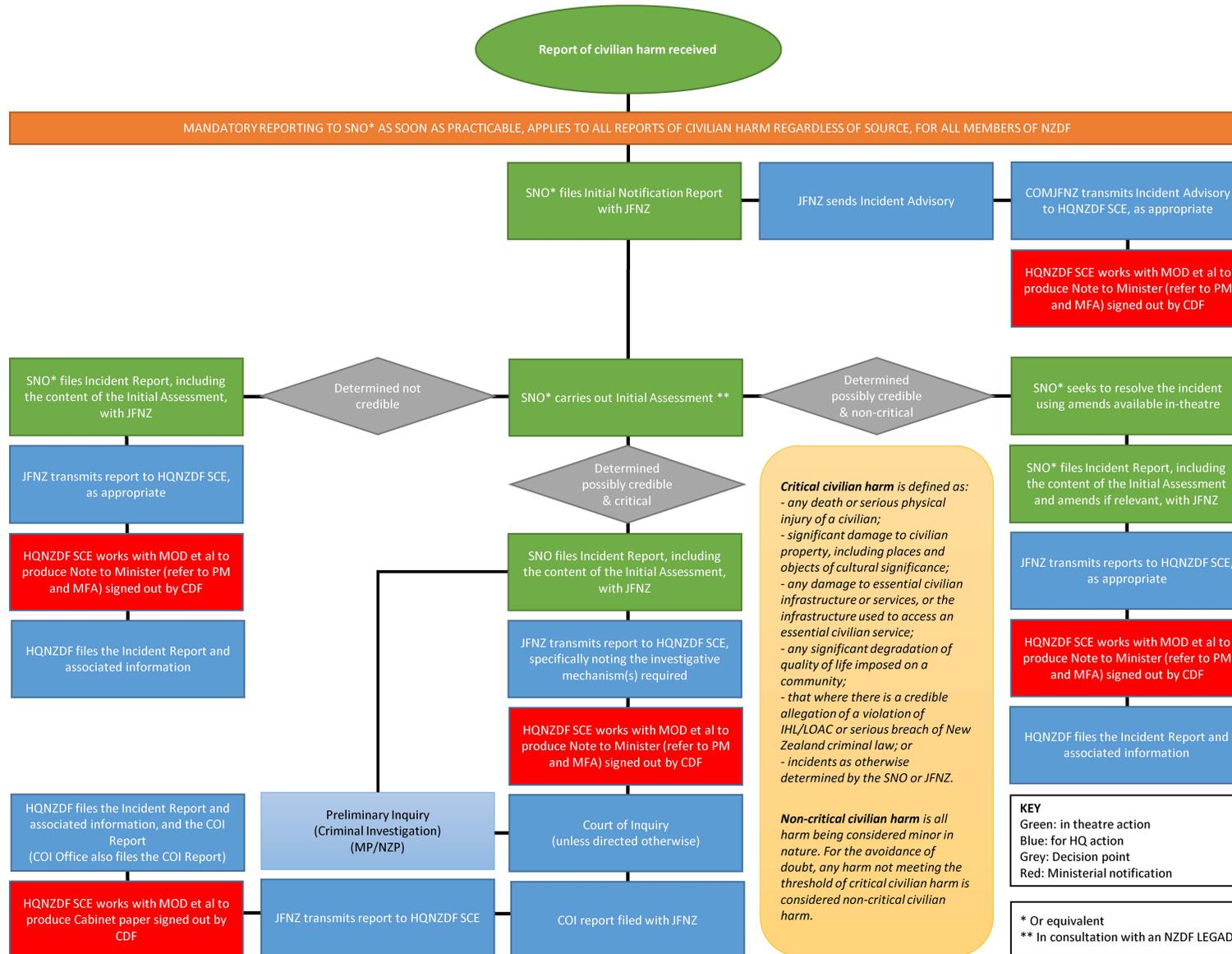
- a. On 01 Oct each year CDF is to make public a report for the preceding period 01 Jul—30 Jun, summarising—
 - (1) civilian harm reports involving NZDF that were determined not to be credible;
 - (2) non-critical civilian harm reports involving NZDF, including number determined credible, type of harm, and amends provided (where relevant);
 - (3) critical civilian harm reports, including number determined credible, number under current investigation, type of harm, and amends provided (where relevant);
 - (4) value of ex gratia payments paid in the period and the source of the funds, as well as any other forms of amends offered in the period;
 - (5) methods and uptake of external reporting mechanisms; and

- (6) information from monitoring bodies in relevant areas of operation, with explanation for any discrepancies in civilian harm reports.

Appendices

1. Visual Map of Civilian Harm Response
2. Initial Assessment

VISUAL MAP OF CIVILIAN HARM RESPONSE



Appendix 2

INITIAL ASSESSMENT

As applicable/available, when undertaking an Initial Assessment the SNO or equivalent is to:

- a. Record the mission specific information – type, time and duration of operation, weather conditions, facts and circumstances that led to the engagement/reported civilian harm, targeting information, Battle Damage Assessment and Weapons Surveillance Video, as well as NZDF, multinational, and enemy forces operating in the area at the time of the reported civilian harm.
- b. Record the civilian harm specific information – time, date, location, names/age/gender of those affected, names and contact details of witnesses, and statements from relevant NZDF and/or partner personnel, affected persons, and witnesses including NGOs and media in the area, with adequate interpretation and security made available.
- c. Record the immediate response information – medical care provided, key leader engagement, information operation efforts.
- d. Ensure preservation of all relevant information reasonably available, preferably by a member of the NZDF not directly involved in the reported civilian harm. Details can be captured in writing, drawing, photographs, audio description, video recording, or other available means with preference for electronic means for ease of subsequent transmission.
- e. Undertake an assessment of the situation to ascertain—
 - (1) the credibility of the report;³⁷
 - (2) the nature of the harm reported, i.e., critical or non-critical;
 - (3) the apparent cause of the civilian harm;
 - (4) whether there are any credible reasons to believe there has been a violation of IHL/LOAC that require further investigation by an appropriate enforcement agency;
 - (5) whether there are any allegations against a person subject to the AFDA 1971 that require further investigation by NZDF Military Police or other law enforcement agency;
 - (6) whether there are further matters, e.g., systemic failures, which may warrant the assembly of a COI;
 - (7) the rationale for proposing amends or not; and
 - (8) if amends are proposed, the type and value of the proposed amends.
- f. Confirm with the NZDF LEGAD any obligations under—
 - (1) this order and other applicable NZDF orders and directives;

³⁷ Including sourcing reports from affected persons, NZDF and community witnesses, NGOs operating in the area, international organisations, and media where appropriate and feasible.

- (2) any multinational agreement or arrangement (where applicable), specifically obligations for civilian harm response and information sharing protocols;
 - (3) international law (specifically IHL/LOAC and IHRL) as well as requirements under any other relevant treaty;
 - (4) domestic (New Zealand and host nation) law as applicable; and
 - (5) the AFDA 1971.
- g. Record the findings of the Initial Assessment and the proposed consequence management including—
- (1) name of the relevant member of the NZDF that carried out the Initial Assessment and name of NZDF LEGAD supporting;
 - (2) categorisation of the reported civilian harm, including whether incident awareness was made through an internal or external report, and if the incident is critical or non-critical in nature; and
 - (3) where the reported civilian harm has been deemed credible and non-critical, the details of amends (where offered), including value of any monetary or in-kind assistance offered, the basis for the amount, if the offer is accepted, by whom the amends were received, when and where, or
 - (4) where the reported civilian harm has been deemed credible and critical, which kind of investigation(s) is recommended.
- h. Contact community leaders and relevant organisations to exchange information and coordinate next steps, if appropriate.

End Matter

Record of Change

| Amendment Number | Commencement Date | Reference | Details of Change | Approving Authority |
|------------------|-------------------|-----------|------------------------------------|---------------------|
| V1.00 | 20 Nov 20 | 70121217 | Initial Issue | CDF |
| V1.01 | 21 Jan 21 | 70122001 | Amendment to Appendix 1 Visual Map | VCDF |
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Note: Record of Change terminology—

- On Issue** Initial issue or subsequent reissue of the publication.
- Withdrawn** A complete publication is withdrawn for use by the NZDF.
- Repealed** A complete part of a Defence Force Order or Defence Force instruction is repealed/cancelled.
- Replaced** Complete parts, chapters or sections may be replaced with new parts, chapters or sections.
- Inserted** New text may be inserted within parts, chapters or sections.
- Substitute** Published text is substituted with new text or words.