STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kāwanatanga

State Services Commission

Review of agency Health and Safety roles and functions in a military context

10 December 2012

Review of agency health and safety roles and functions in a military context

Background

1 The Iroquois accident on ANZAC Day 2010 revealed the need for clarity as to which government agency is responsible for investigating alleged breaches of the Health and Safety in Employment Act 1992 (HSE Act) in the area of armed forces aviation. The New Zealand Defence Force (NZDF) held a Court of Inquiry into the accident, and disciplinary investigation is continuing. At the time the incident was not investigated under the HSE Act, as both the Civil Aviation Authority (CAA) and the Ministry of Business, Innovation and Employment (MBIE) considered that the responsibility for investigation lay with the other agency. A Crown Law opinion has concluded that CAA is not responsible for investigating military aviation incidents, and hence responsibility for these falls on the Labour group within MBIE as the agency with overall accountability for the HSE Act.

2 The State Services Commissioner initiated a review of roles and function of agencies for health and safety in the military context (in land, sea and air). This review has been undertaken by the State Services Commission (SSC) in close consultation with the Labour group within the MBIE. The review examined issues of jurisdiction and accountability, identified statutory gaps, developed a range of options and ranked them. Criteria used to rank the options were developed through consultation with relevant agencies, analysis of other jurisdictions and consideration of Government priorities.

Scope

3 The review examined the role and functions of agencies in providing HSE assurance for NZDF activities, including designation or warranting under the HSE Act for both monitoring (proactive) and investigative (reactive) activities. The review considered the capability and capacity of agencies to undertake these functions, including the level of technical expertise that is realistically required.

4 The review did not consider incidents arising in a combat situation. The HSE Act does not specifically exclude combat or training situations (in which some level of danger may necessarily be present) from its application, however there may be practical limitations of the HSE Act in these situations. This is explored further in the section 'Limitations of duty of care'. The review considered land, sea and air modes in recognition that many incidents may involve multiple transport modes. This also reflects a joined-up NZDF approach.

5 The review considered the application of the HSE Act within New Zealand and New Zealand's territorial sea (while acknowledging the HSE Act may have limited extra-territorial jurisdiction). The review tested the application of the HSE Act to members of the armed forces and members of the NZDF civilian staff and found that both are covered.

The access of civilian investigators to NZDF premises and to Defence Areas was also considered. The need for inspectors or investigators to have appropriate security clearance was used as a criterion in the analysis of options. Finally the review was tasked with identifying resourcing options for any recommended actions.

Problem definition

6 At the highest level the problem to be addressed is the need for Government to have adequate assurance that the NZDF is complying with its obligations under the HSE Act and that in the event of a serious accident an HSE investigation will be undertaken. At a

more detailed level the issue is identifying a clear line of accountability and ensuring sufficient transparency in the outcome of an investigation.

Context

7 Without a high degree of co-operation between HSE agencies, a series of small oversights may lead to a significant lapse in safety. The Pike River Royal Commission recently criticised the oversight of the regulatory environment for HSE by government agencies. All the Royal Commission's recommendations have now been accepted by Government, except for a recommendation to establish a Health & Safety crown entity. A Task Force on Health and Safety in Employment is due to report to Parliament in April 2013. That report is designed to address the larger systemic and jurisdictional problems which have been highlighted by Pike River.

8 In any incident, civil or military, the concerns of victims or victims' families may include the desire to have someone found accountable. In the case of a fatal accident, there will always exist a tension between the responsibility to undertake a thorough investigation, according to the principles of natural justice, and the provision of a swift decision to assist victims' families to move on with their lives. Responsibility must be seen to be clear, however there may still remain a need for a detailed investigation, which can take time. Often more than one investigation must proceed, to allow different bodies with different powers to fulfil their jurisdiction. A desire to minimise frustration for victims and families must be balanced against the requirement for due process.

Current application of HSE Act

9 Under the HSE Act, employers must take all practicable steps to ensure the safety of employees while at work. MBIE's current enforcement practice embraces a continuum from informal discussions in cases of suspected non-compliance through to prosecution. MBIE's enforcement response is proportional to the potential for harm. This includes severity of an event, for example where there are potential (or actual) fatalities, or where a systemic problem is identified. Where the public has an expectation of accountability due to a death or serious injury, prosecution is highly likely.

Table1: MBIE options for HSE response (scalable according to situation)

Minor non-compliance, no immediate danger	Future compliance agreed with duty-holder
Serious non-compliance	Infringement notice
Likelihood of serious harm	Infringement notice
Actual serious harm, willingness to comply	Negotiate remedial actions
Actual serious harm, recalcitrant	Prosecution
Fatality or previous non-compliance	Prosecution

Source: derived from MBIE *Keeping Work Safe* 2009

10 Under the HSE Act, specific agencies may be designated to administer the HSE Act in specific sectors or industries. In 2003 the Prime Minister designated CAA for Aviation and Maritime New Zealand (MNZ) for the Maritime Sector. NZ Police are warranted to undertake enforcement only, limited to work in commercial vehicles, and do so in both the military and civil sectors. In the case of the aviation sector, the Minister of Transport issued a Gazette notice which subsequently clarified that the designation only applied to civil aviation. By implication this meant the designation did not apply to military aviation and hence coverage of this subsector defaulted back to the Department of Labour (and now MBIE).

Crown Law opinion

11 A Crown Law opinion of 31 August 2012 advised that CAA is not responsible for investigating military aviation incidents. Responsibility for these falls to MBIE as the

agency with overall accountability for the HSE Act. The relevant legislation is the Civil Aviation Act 1983, the Health and Safety in Employment (HSE) Act 1992 and the Crown Organisations (Criminal Liability) Act 2002. Crown Law considered that in broad terms the Civil Aviation Act does not extend to the NZDF, based mainly on the empowerment of CAA to carry out civil aviation duties. The HSE Act applies to aircraft as a place of work. The HSE Act also can be applied to prosecute a Crown organisation such as the NZDF. Section 28B of the HSE Act authorises the appointment of other agencies, "having regard to the specialist knowledge of relevant agencies"[1]. It is at this point that Crown Law considered the CAA's expertise in civil aviation becomes relevant. On 5 May 2003 the Prime Minister designated CAA for HSE "for the aviation sector"[2] (and MNZ for the maritime sector). This paper did not expressly address whether the designation would apply to military incidents. A notice issued on 11 September 2003 by the Minister of Transport made it explicit that the designation related only to civil aviation. **Appendix One provides** further detail of the history of HSE application in New Zealand. Crown Law noted that the objective of the CAA is to contribute to the aim of achieving an integrated, safe, responsive and sustainable transport system, and that this includes no explicit reference to military aviation.

12 In short, while section 28 B gives statutory authority to designate another agency with relevant technical expertise, it does not change the presumption that MBIE is the primary enforcement agency. Therefore the Crown Law opinion found that responsibility for military aviation remains with MBIE, until such time as MBIE asks the Prime Minister to specifically designate that function to CAA or another body.

Table 2: Current designations to agencies by sector

		Agency currently responsible for HSE Act
Military Aviation	Proactive/ compliance	Recent Crown Law opinion confirms that MBIE has responsibility under HSE Act. (MBIE has an MOU with CAA for HSE and Hazardous Substances coverage in civilian space but this does not specifically extend to military activity).
	Post-incident investigation	Recent Crown Law opinion confirms that MBIE has responsibility under HSE Act. (MBIE has an MOU with CAA for HSE and HSNO coverage in civilian space but this does not specifically extend to military activity).
Military Maritime	Proactive/ compliance	None. HSE only applies to NZ registered ships – NZDF ships are not registered (note: the Act also applies to some foreign ships)
	Post-incident investigation	None. HSE only applies to NZ registered ships – NZDF ships are not registered (note: the Act also applies to some foreign ships)
Military Land Transport	Proactive/ Compliance	MBIE responsibility
	Post-incident investigation	MBIE is responsible but warrants NZ Police (CVIU staff) under the HSE Act to undertake HSE enforcement

Source: MBIE, Crown law opinion 31 August 2012

International approaches

13 Both the UK and Australian regulatory regimes see health and safety in employment legislation applying to the Defence force. While New Zealand and Australia have investigations conducted internally to the Defence force, the UK has established an

[1] HSE Act 1992, section 28B.
[2] Designation of 5 May 2003

independent regulator within the Defence force but outside of the military chain of command. The information provided by the UK and Australia relates directly to aviation incidents, however it can be extrapolated to land, sea and air incidents in the military context. The table below provides a comparison of regimes across these three jurisdictions.

Table 3: Comparison of current approaches to HSE in military aviation across three jurisdictions

	Australia	**UK**	**NZ**
Defence coverage under HSE	HSE legislation applies to Defence. HSE regulator (MBIE equivalent) and the Coroner wait for Defence investigation.	HSE legislation applies to Defence. The HSE regulator (equivalent to MBIE) is responsible for military aviation	HSE legislation applies to Defence
Investigator	Internal: Defence Aviation Safety Management System	Internal: Military Aviation Authority Service Inquiry	Internal: NZDF Court of Inquiry
Reports to	Chief of Defence Force	Minister of Defence	Chief of Defence Force
Approach taken	In line with ICAO aviation safety, focus is on preventing recurrence. Includes identification of systemic problems.	Establish facts, prevent recurrence. Includes considering organisational and system failures.	Court of Inquiry records evidence and comments on the causes of the incident or accident, including system failures. Subsequent disciplinary proceedings (eg Court Martial) may be initiated, but cannot use evidence presented to a COI
Trigger for further investigation and/or prosecution	If a fatality, Commission of Inquiry with civilian president. Subsequently, HSE or the Coroner may investigate and prosecute.	If a Service Inquiry finds an offence may have been committed, must report to the military or civil police. A fatality or identified systemic issue will lead to civil and/or military prosecution or prosecution by HSE	If strong indication of culpability, civil Police investigation and/or HSE prosecution and/or Court Martial (which must obtain own evidence)
Issues identified	Jurisdiction for military aviation accidents lies with Defence, the regulator and the Coroner. The ADF consider the regulator may not have the expertise to conduct military aircraft accident investigations.	UK Military Air Accident Investigation Branch advise greater clarity is needed re the roles of Defence internal regulators, the external regulator, and the Civilian Police.	Lack of clear line of accountability for military HSE.

Source: Australian Defence Force (Director, Defence Aviation Safety) and UK Military Air Accident Investigation Branch

Appendix Two provides further information about international approaches.

Issues

Application to members of the armed forces and members of the NZDF civilian staff

14 The HSE Act applies to NZDF personnel, both civilian and armed forces members. NZDF members are not employed under a contract of service, but rather have agreed under oath to serve the Crown. Crown Law concluded that there were aspects of the HSE Act that were not explicit in their application to RNZAF Aircraft and members of the Armed Forces. In particular the opinion notes that members of the Armed Forces do not fall within the definition of "employee" in the HSE Act as they are not employed under a contract of service [paragraph 45]. Nevertheless, applying a purposive approach to the language of the Act Crown Law concluded "on balance" that members of the Armed Forces are covered by a wide range of provisions of the HSE Act and that "on balance" "aircraft" includes military aircraft. NZDF has subscribed to this position for some time and treats the Act as applicable despite the definitional ambiguity.

15 NZDF have confirmed that a sub-committee responsible for the HSE Act in the Defence arena is developing a 3 to 5 year strategy for a whole-of-Defence approach. An existing Memorandum of understanding (MoU) between the Secretary of Labour and the Chief of Defence Force allows for MBIE inspectors to access NZDF premises (and to enter restricted places with the authorisation of the Officer in Charge)[3]. This is rarely invoked. While the Court of Inquiry report into the Iroquois incident found that there were organisational limitations in the application of HSE principles[4], MBIE are of the view that NZDF is on the whole a responsible employer. Both NZDF and MBIE consider that, even with good intentions, all employers may benefit from independent audit of their procedures.

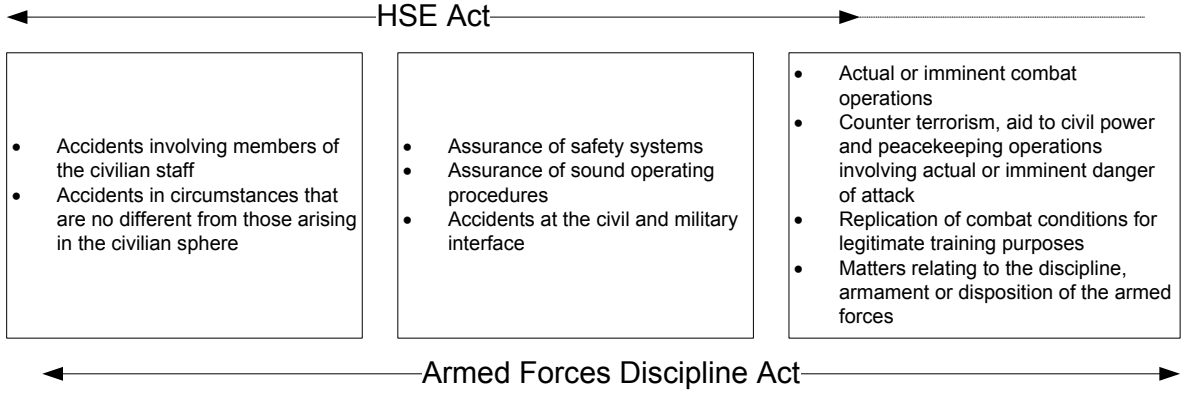
Limitation of duty of care

16 In analysing the appropriate military application of HSE, the review has endeavoured to ensure that the military context is treated the same as every other sector, with the exception of clear training and operational aspects that require an inherent level of danger. However the law does not specifically excise any type of activity from the general investigation powers under the HSE Act. Therefore since the HSE Act applies to NZDF, its application is on a continuum reaching from work situations no different from a civilian context through to active service involving imminent or actual combat operations. The HSE applies the test of “reasonably practicable” to removing the risk of serious harm in the circumstances. It doesn’t provide an exemption from such considerations.

[3] Agreement (1994) between the Secretary of Labour and the Chief of Defence Force, pursuant to Section 31(4) of the HSE Act, Section 8.1

[4] The Court of Inquiry used the James Reason Model of Accident Causation, which analyses the human, environmental and organisational causes of accidents. The Court of Inquiry identified flaws corresponding to all levels of the model that started, sustained or failed to stop the accident sequence. Redacted Report of the Court of Inquiry, p2.

Diagram 1: Overlap of HSE Act and Armed Forces Discipline Act jurisdiction



17 It should be noted that if any accident occurs, even from the first column of the diagram, it is highly likely that NZDF would initiate a court of inquiry and that there would potentially be disciplinary action such as a court-martial. At the far right of the diagram would be off-shore combat or deployment. As noted previously, there may be limited application of the HSE Act outside New Zealand's territories (for example in the maritime sector), however this diagram clarifies that it is the nature of the activity, rather than its location, that would determine whether the HSE Act should apply.

18 The HSE Act has a non derogation clause which states "nothing in this Act, or in any code of practice under this Act, derogates from the effect of any other enactment for the time being in force"[5]. This means the HSE Act cannot take away from the authority of the Defence Act, but may set up a higher standard, through the legal test of "all practicable steps". The HSE Act is free to operate where other statutes are silent on an issue[6].

Retaining the Court of Inquiry

19 The NZDF Court of Inquiry is conducted by members of the military appointed for that specific investigation (a civilian maybe appointed to the Court of inquiry but must be a member of the Civil Staff). The Court of Inquiry approach encourages people to be open about their errors, and as a result is seen to provide the best opportunity for improving safety outcomes. Evidence brought before a Court of Inquiry does not amount to a finding of guilt, but a subsequent Court Martial may be initiated if culpability comes to light. That Court martial must then amass its own evidence.

20 After reviewing the findings of the Court of Inquiry into the Iroquois accident this review considers that the Court of Inquiry process was extremely thorough, and was comparable both with HSE investigations in the civil realm and with international aviation investigations. The Court of Inquiry report demonstrated a determination to bring errors to light despite potential reputational risks to the NZDF. The report found that the organisation rewarded risk-taking behaviour, for example the organisation gave a particular individual a "hero-villain" reputation; "The hero-villain would be lauded for what he/she had achieved, but was known to be pushing the limits of safe operations and therefore in conflict with the safety and rules expectations of the RNZAF" [7]. Consultation with NZDF and with MBIE operational staff supported the view that the Court of Inquiry process served to improve organisational health and safety through honestly identifying and correcting systemic risks.

[5] (s.4 HSE Act)
[6] Matsas, Nicholas, Implementation Issues for Organisations Implementing Policy Initiatives Other than Their *Raison D'etre* Master of Public Policy final paper, Victoria University 2005, page 63.
[7] Court of Inquiry report, paragraph 300

21 This review concluded that a Court of Inquiry process can operate in parallel with an HSE Act investigation. The Court of Inquiry also does not preclude a Court Martial (the equivalent of a civil prosecution). Based on the comprehensive investigation and the technical expertise that can be accessed in a Court of Inquiry, the preservation of the Court of Inquiry process became one of the review's criteria for assessing options.

Necessity of multiple investigations

22 In any serious harm or fatality incident there may be multiple investigations which have a competing purpose. Some investigations, such as the Court of Inquiry, intend that people making genuine lapses and mistakes are not necessarily penalised, depending on the impact of their error and level of culpability. On the other hand where fatalities have occurred, or serious systemic faults are identified and there is a potential for significant harm, there is a strong case to use prosecutions for their deterrent effect. Under the HSE Act there is the expectation that a prosecution may be laid if a person or entity is found to be at fault.

23 There is a potential conflict of interest if a safety authority investigates failures in the system for which it is responsible. There are at least two types of investigation that can occur. The first aims to establish the factors that contributed to the incident. People may be held responsible but no punitive action is taken. This is in line with the current approaches of CAA and TAIC, and with the Court of Inquiry approach in a military context. The second aims to identify whether rules have been complied with and recommend punitive or enforcement action if not. This corresponds with the role currently undertaken by MBIE and NZ Police in enforcing the HSE Act in the civil space, and with the Court Martial process in the military context.

24 There may be a public perception that investigations should be rationalised. However different bodies may have different legislative responsibilities, so concurrent investigations will continue to be required. In practice a criminal investigation takes precedence, but NZ Police can and do allow other investigators access to witness statements or to conduct joint interviews.

25 Bodies that may need to investigate a military incident or accident include:

- The Coroner
- NZ Police
- Military Police
- MBIE (and designated agencies)
- Military Court of Inquiry
- TAIC (if the accident involves both civil and military people or equipment).

26 In terms of sequencing, any criminal investigation by NZ police will have concurrent jurisdiction with NZDF (whether Court of Inquiry or Service Police) for most offences in a Defence Area. If MBIE were to undertake an HSE Act investigation this would have next precedence. The Coroner would retain the right to investigate any death or any accident. NZ Police, MBIE and NZDF have advised that, in practice, joint interviews can be conducted or witness statements may be made available to other investigating bodies as far as practicable, which minimises the impact on survivors having to relive their experience and reduces the risk of evidence being altered in the retelling.

27 This review concurs with the need for HSE investigations to continue to have the option of prosecution if culpability is found. Consequently the ability to undertake an HSE Act prosecution became one of the criteria for assessing options.

Statutory gap: HSE Act currently does not apply to NZDF vessels

28 In the maritime sector, it is arguable whether the HSE Act excludes ships of the NZDF (ref section 3B). Vessels of the NZDF are not and cannot be NZ registered and on that basis the HSE Act would not apply to them. Section 3B (inserted in the 2002 amendment to the HSE Act) may have been intended to ensure that the Act applied to NZ registered ships when outside of New Zealand, in addition to the existing application of the HSE Act. There is no evidence of any policy intent to exclude NZDF ships and the Ministry of Transport (MOT) and NZDF have confirmed in discussions that the legislative amendment which led to the exclusion of Navy vessels from the HSE Act was an oversight. MBIE and MNZ concur that it is desirable to have the HSE Act apply to NZDF ships. Consequently this review recommends that the HSE Act be amended to confirm the application of the HSE Act to NZDF ships.

Statutory gap: Time limit for HSE prosecution

29 NZ Police are currently warranted to undertake HSE enforcement in the military land transport sector, but are not a designated agency (in which case they would have responsibility for the proactive monitoring aspects of the HSE Act). Their enforcement role is funded through the New Zealand Transport Authority, rather than through the HSE Levy which funds designated agencies to administer the HSE Act. The review's engagement with NZ Police confirmed that they issue HSE improvement and infringement notices on a case by case basis. Police also address systemic issues in a sector or region by providing information to employers.

30 One issue raised was the current requirement for information regarding an HSE prosecution to be laid within six months of the infringement. Police considered that this timeframe was difficult to meet given their other operational requirements and the need for criminal investigations to have priority. MNZ share the view that the time frame can compromise investigations. Initially the six month limit was introduced to assure employers that prosecutions would be quickly finalised so as not to interfere with business planning. MBIE operational staff consider the tight time frame has worked well for that purpose. However as Police are finding it difficult to meet, MBIE consider on balance that extending the time frame to 12 months would be workable. NZDF have raised no objection to such an amendment. Consequently this review recommends amending the HSE Act to allow a 12 month time frame for laying information for HSE prosecution. This will allow NZ Police to continue to undertake their HSE duties as currently warranted.

Options considered

31 Options for agencies to have jurisdiction in the future for HSE operations in the NZDF fall into three main categories; having responsibility either retained by MBIE, designated to the NZDF to manage itself, or designated to third parties as is currently the case in civil transport operations.

1 – Designation to third parties

32 The review's initial investigations suggested that the most straightforward approach would be to have the military context reflect civil arrangements. This would involve extending the designation of CAA and MNZ to the military environment, to be achieved via a paper to Cabinet and by amending the existing MoUs between MBIE, CAA and Maritime New Zealand (MNZ). This option would include amending the HSE Act to clarify that, for the purposes of this Act, vessels of the NZDF are included in the definition of New Zealand ships. NZ Police would continue to be warranted (rather than designated) for military land transport.

33 In consultation with stakeholders, it became clear that this may not be without its issues. The CAA, while acknowledging that it may be better placed than other entities (with the

exception of NZDF) to administer the HSE Act for military aircraft in operation, noted that it currently had no expertise in the area of military operations Accordingly, sub-options were explored to address these concerns. These included:

- designating CAA for investigations only (not requiring them to undertake proactive monitoring of the HSE Act)
- only designating MNZ (retaining responsibility for military aviation within MBIE).

34 There are two issues with designating to third parties. The first is that capability would need to be lifted to address the technical differences between military and civilian operations. The second is that having multiple agencies responsible introduces unwanted complexity to the accountability arrangements.

2 – NZDF designation

35 This approach would require a legislative amendment to designate NZDF as responsible for its own HSE Act monitoring. This takes account of NZDF's technical expertise and recognises the current robust Court of Inquiry system, but may not provide adequate transparency. Sub-options identified were:

- NZDF having complete designation to undertake the proactive aspects of the legislation as well as conduct its own investigations.
- NZDF operating with oversight by a civilian individual or authority within a constituted board or Court of Inquiry. This would involve amending the Armed Forces Discipline Act to allow an external civilian member (possibly from MBIE) to sit on a Court of Inquiry. This option presents problems for then conducting a prosecution under the HSE Act, as evidence before a Court of Inquiry cannot be used in a prosecution.

3 – MBIE retains responsibility

36 This approach would keep the accountability centralised, with MBIE (or a separately established Occupational Safety and Health body) being the one agency liaising with NZDF. Sub-options within this group were:

- the current model where MBIE generic HSE inspectors would need to deal with technical NZDF matters
- creating a separate OSH body (as currently being investigated in discussions arising from Pike River) which provides clear accountability and transparency but would involve establishment costs. This body could contract in technical experts when necessary, who might be sourced from CAA or MNZ, from the private sector, or from another Defence force
- creating a specialist NZDF capability within MBIE. This could involve recruiting staff with previous military aviation or maritime experience. This team could address technical matters to some extent in the proactive management of HSE, but, as above, could contract in technical experts when necessary.

Criteria for assessing options

37 The criteria were identified through consultation with MBIE, NZDF, the Ministry of Transport, CAA, MNZ (both agencies currently designated to administer the HSE Act), NZ Police (currently warranted to enforce the HSE Act) and the Treasury. The criteria capture potential public and Government concerns as well as administrative practicality. The criteria are:

- Transparency – that the process of compliance investigation is independent and seen to be independent of the agency being investigated

- Investigation is undertaken to the same standard as in the civil jurisdiction, with appropriate technical knowledge
- Allows Court of Inquiry process to continue – as this process was found to be rigorous and to improve safety outcomes
- Clear accountability – it is clear who is responsible for investigating an incident
- Addresses NZDF concerns that operational security is not compromised
- Includes an option to undertake prosecution under the HSE Act
- Minimal legislative change – can be implemented without significant legislative change, noting that any option requires an amendment to the HSE Act to account for NZDF vessels
- Affordable from baselines – allowing for some rebalancing of funding between accountable agencies and taking into account an anticipated surplus in the HSE levy
- Regulatory efficiency/ minimises transactions costs – ensures that actual and imposed costs are minimised.

38 During consultation, a key theme raised by administering agencies was concerns about their capability, capacity and/or resourcing. As a result, two secondary criteria were also taken into account. These were:

- Agency capacity and capability
- Agency acceptability.

39 These criteria are not included in the main table of the options matrix, as they are not a correct test for the appropriate allocation of jurisdiction (in the machinery-of-government context). However they are included as a subsequent table, to inform the analysis and identify potential implementation challenges. The options matrix with scores for each option against these criteria is provided at **Appendix Three.**

Discussion

Preferred option and issues

40 Single point accountability via MBIE achieves the clearest jurisdiction, allows HSE Act prosecution and coverage and supports effective compliance through proactive engagement. Under this approach MBIE would always be the lead agency in an incident involving military personnel and transport systems. MBIE would have resource dedicated to maintaining relationships with NZDF staff, including the existing HSE group within NZDF. MBIE could then call on specialist expertise from CAA, NZ Police or MNZ as required for a specific incident. This model would also leave MBIE with options to seek specialist advice from others, such as private sector aeronautical or maritime experts, or another nation's defence force.

41 MBIE have confirmed that the existing MBIE capability (generic HSE inspectors) does not offer scope to address the technical requirements of the military sector, for either proactive monitoring or post-incident investigation. The option of introducing a standalone workplace health and safety body was raised in response to indications that this is currently being explored through the Independent Task Force on Workplace Health and Safety. If either of these models was used without specifying a clear mandate for the NZDF space, they may not be able to ensure they have staff with appropriate security clearance to access NZDF premises and specialist equipment.

42 The policy rationale for the preferred option is to achieve a consolidated HSE function for NZDF. The model envisages a focused resource of a small number of staff within MBIE (perhaps ex-Defence or with broader military aviation or maritime experience).

These staff would need to have appropriate security clearance to attend Defence premises or equipment, and the relationships and ability to draw on specific external expertise when relevant. This option also provides future-proofing for the military HSE function, since this resource, once allocated, could later be re-aligned into a standalone workplace health and safety body, depending on Government decisions in this area.

Less Preferred Alternative

43 Designating responsibility for HSE in the military context to some combination of CAA, MBIE and MNZ, while bringing greater expertise, would create more concerns about alignment and coordination. Achieving application of specialist expertise, while ensuring coordination and cooperation, would require multiple MOUs and a willingness to share expertise and apply resources – even when a prima facie indication of jurisdiction already exists. There are substantial transactions costs in having multiple agencies engage with NZDF on compliance, especially since the review concluded that NZDF has well-developed systems and procedures already in place.

44 Assigning responsibility for the maritime military sector to MNZ and the balance to MBIE was one option considered. MNZ has indicated that it has substantial expertise in the issues and problems associated with ships as workplaces, and that it sees maritime safety in the civil sector as substantially relevant to the military sector. However this option falls short of allowing an obvious line of accountability and involves a loss of regulatory efficiency. This option would also require more resourcing to MNZ to meet the cost of the additional work.

Discarded Options

45 Designating NZDF to monitor itself, or extending the NZDF Court of Inquiry with a civil representative, compromise the NZDF's own Court of Inquiry process and may preclude a clear course of action for prosecutions under the HSE Act. In addition, neither of these allows sufficient independent oversight to address potential public concerns about transparency of process.

Resourcing

46 In assessing the resourcing implications of applying HSE to the military context, this review has assumed that investigations into military health and safety incidents would be a less than annual event, and that contracting a technical expert could cost in the realm of $250,000 to $400,000 per investigation, based on the high level of technical skill needed and the potential time required. This is a general estimate based on advice from CAA and MNZ about comparable investigations in the civil environment.

47 Health and Safety in Employment is funded through the HSE levy. MBIE have advised that CAA is currently funded from the HSE Levy at $440,000 per annum. MNZ's funding increased to $928,000 for the 2012/13 financial year, following a substantive review of the workload involved in enforcing the HSE Act in the maritime sector. MBIE reviews the HSE levy rate annually and the current rate is five cents for every $100 of payroll (which is paid by NZDF as by other employers). Services are funded through the Budget process and the levy then recovers these costs.

48 MBIE had proposed reallocating a portion of the HSE Levy allocated to CAA and MNZ to MBIE, to assist in resourcing the NZDF health and safety function. This would be a fiscally-neutral adjustment from CAA and MNZ to MBIE, and could be reflected at the next baseline update (with Cabinet approval) but would impact negatively on CAA and MNZ. However since Crown Law found that MBIE has responsibility to administer the HSE Act for Defence, it is difficult to justify reducing MNZ and CAA's funding. The current allocation only covers the cost of existing efforts and any reduction would result in a reduction in effort in the civil environment.

49 A more acceptable option to all agencies is to use the surplus in the HSE levy. At the start of 2011/12 there was $15.7 m surplus in the memorandum account for the HSE levy and this is forecast to still be $2.9 million in surplus at the end of 2015/16[8]. Given that MBIE had received $37 million over four years to strengthen regulatory regimes, a case would need to be made to Cabinet for why funding could not be reprioritised within baselines.

50 The Independent Taskforce on Workplace Health and Safety, which is due to report in April 2013, will consider economic incentives to improve safety outcomes, including the HSE levy and penalty levels[9]. NZDF already contribute to the HSE levy. Consequently any recommended changes arising from the report of the Taskforce could affect the options to resource HSE activity in the NZDF, and MBIE may wish to consider resourcing issues after the Taskforce has reported.

[8] MBIE advise that currently (2011/12) the HSE Levy revenue is $45.597 m. 2011/12 Expenditure on HSE was $41.698m rising to $50.1 m in 2012/13, $52.033 in 2013/14.
[9] MBIE advice on terms of reference for the Independent Taskforce on Health and Safety in Employment

Recommendations

51 Based on the analysis outlined above, this review of agency Health and Safety roles and functions in a military context makes the following recommendations.

Responsibility

51.1 Achieve a consolidated HSE function for NZDF by developing a focused resource of staff within MBIE with military aviation or maritime expertise. Responsibilities should include proactive monitoring and liaison with NZDF, undertaking investigations into incidents, contracting in technical expertise as required and maintaining relationships with CAA, MNZ and NZ Police to achieve better coordination of HSE across the civil and military environments.

51.2 MBIE may wish to consider the sequencing of this work in light of the Independent Task Force on Workplace Health and Safety, which is due to report in April 2013.

Legislation

51.3 The HSE Act should be amended to confirm the application of the HSE Act to NZDF vessels, to address the statutory gap identified.

51.4 The HSE Act should be amended to allow a 12 month time frame for laying information for HSE prosecution, which will enable NZ Police to pursue HSE duties as currently warranted and supports more effective investigation among all agencies responsible for enforcing the HSE Act.

Resourcing

51.5 MBIE should investigate using the HSE levy surplus to resource the administration of HSE in the military context. MBIE may wish to defer this until the Independent Taskforce on Health and Safety in Employment has reported (due in April 2013).

Appendix One

History of HSE application in NZ

The Health and Safety in Employment Act 1992 represents enabling rather than prescriptive legislation. It requires employees to be involved in the hazard management process, a concept strengthened in the HSE Amendment Act 2002. The Act also sets up a requirement for notification of serious harm to the regulator. The main legal test for employers and others with duties is "all practicable steps", which allows continuous improvement in safety standards. Because of gaps in legislative coverage of some aircrew, the exemption in the Health and Safety in Employment Act 1992 that applied to aircrew was removed by amending the Act in December 2002. Due to its expert knowledge of the aviation sector, the Civil Aviation Authority, which also administers the Civil Aviation Act 1990, was designated by the Prime Minister to administer the Health and Safety in Employment Act 1992 for aircraft while in operation.

In 2002 Cabinet addressed HSE Act coverage issues for the maritime sector. Part II of the Maritime Transport Act already had occupational health and safety provisions, and the Maritime Safety Authority (Now Maritime New Zealand) wanted to continue in this role. Cabinet agreed to designate the Maritime Safety Authority to administer the HSE Act for the Maritime sector. Also in 2002, Cabinet agreed to a paper from Minister of Labour, proposing that CAA should investigate aviation incidents and that Maritime New Zealand should investigate maritime incidents. In 1994 the Maritime Transport Act had made clear that its application included ships of the New Zealand Defence Force. However, the amendment in 2002 of the HSE Act introduced some confusion as to which ships were covered, since the amended HSE Act applies to New Zealand-registered ships, while ships of the NZDF are not required to be registered. In May 2003 the Prime Minister designation the CAA to be the primary administration and enforcement agency for the HSE Act in the aviation sector. This paper did not expressly address whether the designation would apply to military incidents and a Notice issued in September 2003 by the Minister of Transport made it explicit that the Designation related only to civil aviation.

Two Memoranda of Understanding, between the then Department of Labour (now MBIE) and CAA and MNZ respectively, were renewed in 2011, with related Operational Agreements renewed in 2005. These documents set up a clear understanding on the responsibilities of each agency, the sharing of expertise, managing gaps in coverage, and resolution of any disagreements between the two agencies. The key point made in these operational agreements is that where any doubt exists as to the appropriate jurisdiction, a joint investigation will be carried out, until such time as the appropriate lead agency becomes clear.

Appendix Two

International approaches

In reviewing the options for applying HSE principles to a military context, an environmental scan of the regulatory environment was undertaken, including relevant international jurisdictions. We invited our Australian and UK counterparts to comment on whether Health and Safety in Employment legislation applies to the Military, and if it does, which agency takes responsibility for investigating and enforcing that legislation. We also sought to understand how other jurisdiction approach their responsibilities under relevant Health and safety in Employment requirements, including the processes for proactive compliance systems as well as post-incident investigations.

Australia

The jurisdiction to investigate military aviation accidents in Australia lies with up to 3 different agencies: Defence, Comcare (who is the regulator for the Commonwealth *Work Health and Safety Act 2011*), and the relevant State or Territory Coroner (for deaths).

The Australian Defence Forces (ADF) consider that aircraft accident investigation is a specialist field and must be carried out by appropriately trained and experienced personnel, with access to specialist scientific expertise. Comcare do not have the expertise to conduct aircraft accident investigations. Also, aircraft accident investigation and the Defence Aviation Safety Management System are considerably more advanced than that of Work Health and Safety. This is largely due to the international approach taken to how aircraft accidents are investigated. Therefore, in practice, both Comcare and the Coroner usually wait for Defence to conduct an independent investigation. The Defence investigation outcomes are then used to make an assessment under their legislation.

ADF uses trained aircraft accident investigators from the Directorate of Defence Aviation and Air Force Safety and investigates in line with Annex 13, *Aviation Accident and Incident Investigation*, to the 1944 International Civil Aviation Organisation (ICAO) Chicago Convention on International Civil Aviation, and the Australian Transport Safety Investigation Act (TSI ACT 2003). If there has been a death, then a Commission of Inquiry will be conducted, with the President of the COI a civilian. This provides an added independent oversight of the investigation.

During the investigation and the COI, Defence remains in close contact with Comcare (and the Coroner if required), to ensure that the final report addresses the issues of concern to each agency. It remains open for Comcare (and the Coroner) to conduct a separate investigation, however the ADF experience has been that they have rarely, if ever, decided to do so. ADF confirmed that Comcare sits on the ADF health and safety committee, in an ex officio capacity. Comcare's approach is to allow the Court of Inquiry process to run and to follow up with a prosecution where appropriate.

UK

The UK Health and Safety at Work etc Act 1974 (HSW Act) applies to all Defence activities. A principal aim of the UK Defence Plan is to minimise non-combat fatalities and injuries and to achieve zero fatalities from health and safety failures. The HSW Act is administered and enforced by the Health and Safety Executive (HSE) which may have a role in investigating military accidents and incidents. This role is specified in a Memorandum of Understanding[10]. HSE will also consider any part played by, for example, civilian companies operating on Defence premises, who may also have legal duties under the HSW Act. HSE has usually become involved where initial inquiries have identified serious safety management failings, or in support of civilian police investigating a work related fatal accident.

[10] (MOD / HSE General Agreement and HSE Enforcement Policy Statement. (JSP815)

Military aircraft safety is ensured through an autonomous regulator within the defence force, the Military Aviation Authority (MAA). The MAA is independent of the military chain of command and reports directly to the Secretary of State for Defence (The equivalent of our Chief Executive of the Ministry of Defence). Military aircraft accidents are investigated on a 'no blame' basis, with the intent of establishing the facts and preventing recurrence. This may include considering the organisational / underlying failings concerned with such incidents. However, where an investigation concludes that an offence may have been committed, the matter may be reported to military or civil police.

HSE's involvement in military aircraft incidents is on a case by case basis. Where initial inquiries have identified serious safety management failings, or where it is in support of the civilian police investigating a work related fatal accident, HSE has usually become involved. HSE investigations focus on management systems that it would expect to see in place. The focus of a civilian police or HSE criminal investigation is likely to be different from a military police investigation. Under UK Health and Safety at Work legislation one Crown agency cannot prosecute another. However individual Defence employees can be prosecuted.

In the UK, the Civil Aviation Authority (CAA) and HSE jointly regulate health and safety for civilian aircraft according to the CAA HSE Memorandum of Understanding[11].The UK CAA has no responsibility for military aircraft safety.

The UK's Military Air Accident Investigation Branch advise us that investigations of military aircraft incidents since the establishment of the MAA have indicated a need for greater understanding about the respective roles of Defence internal regulators, the HSE as the external regulator, and the Civilian Police. The UK Ministry of Defence aims to establish better liaison and mutual understanding between the entities responsible for administering their HSW Act.

In the UK the CAA does have primary responsibility in the HSE arena for civilian aircraft due to specific regulations. However, the HSE regulator (the equivalent of MBIE) is responsible for military aviation incidents.

[11] www.hse.gov.uk/airtransport/hse-and-caa.htm

Appendix Three:
Options matrix: Responsibility for HSE in the military context, including transport modes, proactive (monitoring) and reactive (investigations) functions

	Options							
	Separate OSH body	MBIE responsibility using generic inspectors	MBIE responsibility with a specialist unit to operate for NZDF	Designation to MNZ, CAA and Police	Designation to MNZ and Police, but to CAA for investigation only	Designation to MNZ and Police, CAA has no military role	Designation to NZDF with civilian oversight to investigation/ Court of Inquiry	Designation to NZDF
Criteria	Possibly a departmental agency	Status quo (in legislation but not in practice)	Unit to utilise ex-Defence staff, maintain MOUs with modal agencies and contract in expertise for investigations	Extending existing civil designations to apply to military sector. MOUs to reflect this	CAA does not undertake proactive, monitoring and inspecting role	CAA have expressed concern about its ability to administer military HSE with its current resource base	Amending Armed Forces Discipline Act to allow a civilian (MBIE) member on Courts of Inquiry. Impact on HSE prosecutions uncertain	NZDF carries total responsibility for HSE
Transparency	2	2	2	2	2	2	0	-2
Investigation equates to civil standard	1	0	1	1	1	1	1	0
Allows Court of Inquiry to continue	1	1	1	1	1	1	-1	1
Clear line of accountability	1	1	1	0	-1	0	1	1
Security concerns addressed	0	0	1	0	0	0	1	1
Option for HSE prosecution	1	1	1	1	1	1	0	0
Minimal legislative change (apart from NZ ships definition)	1	1	1	1	-1	1	-1	1
Affordable from within baselines	0	0	0	1	1	1	1	1
Regulatory efficiency/ transaction costs	0	1	1	0	0	-1	1	1
Score	7	7	9	7	4	6	3	4

Secondary criteria

Agency capability/ capacity	0	-1	1	0	0	0	1	1
Agency acceptability	0	-1	1	-1	0	1	-1	1
Total score	7	5	11	6	4	7	3	6

Key: Yes = 1 point, Maybe = 0 points, No = -1 point
Transparency is given a double weighting, so a Yes =2 points and No = -2 points.