MINISTERIAL INQUIRY

Events surrounding the request for waiver of the diplomatic immunity of a Malaysian Defence Attaché

John Whitehead
Ministerial Reviewer
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Foreword

On 11 July 2014, Foreign Minister Hon Murray McCully announced a Ministerial Inquiry would be held into the way the Ministry of Foreign Affairs and Trade handled the case of a Malaysian High Commission official accused of an attack on a Wellington woman.

The Ministry of Foreign Affairs and Trade has a very important role and distinguished record as our official window to the world. Its hard-earned reputation is essential to its effectiveness in fulfilling this role. When something apparently goes amiss, it is critically important that the lessons are learned and acted upon.

This Inquiry focuses on events that had both international and domestic elements. Nowadays, people place a high value on how the Ministry interfaces with New Zealand society domestically as well as on the image and service it provides overseas.

I hope this Inquiry will prove useful both in identifying the lessons from the events under review, and in helping all concerned to move forward.

John Whitehead
Ministerial Reviewer

1 Executive summary

On 11 July 2014 the Minister of Foreign Affairs Hon Murray McCully, announced a Ministerial Inquiry would be held into the way the Ministry of Foreign Affairs and Trade handled the case of a Malaysian High Commission official accused of an attack on a Wellington woman.

The Inquiry was tasked with ascertaining the New Zealand actions that led the Malaysian Government to infer that declining a request for a waiver of immunity was acceptable to the New Zealand Government and:

1. Whether this was an isolated incident or part of a wider pattern;
2. Whether officials met their obligations to inform Ministers;
3. How any shortcomings revealed can be rectified.

The full terms of reference for the Inquiry are set out in the Appendix, Section 6.1.

A consolidated list of recommendations can be found in Section 5.4. I note that while this Inquiry has been underway, the Ministry of Foreign Affairs and Trade has already implemented a number of changes consistent with the direction of these recommendations.

The approach taken to responding to the terms of reference is set out in Section 2.3 of this report which outlines the high-level phases and activities of the Inquiry. The Appendix, Section 6.2 provides more detailed information.

1.1 General procedures and related matters

1.1.1 Vienna Conventions

The Vienna Conventions on Diplomatic and Consular Relations are reflected as part of the law of New Zealand. The Diplomatic Privileges and Immunities Act 1968 gives effect to the Vienna Convention on Diplomatic Relations, and the Consular Privileges and Immunities Act 1971 gives effect to the Vienna Convention on Consular Relations.

On a practical level, failure by New Zealand to fully respect the immunities of foreign diplomatic and consular personnel would severely compromise the conduct of diplomatic relations. It should be emphasised that diplomatic immunity does not exempt diplomatic officers from the duty to respect national and local laws and regulations. There are differing levels of privileges and immunities for different categories of persons as defined by the functions they perform within each diplomatic mission and consular post. These are set out in Sections 3.2.3 and 3.2.4 in some detail.

1.1.2 Waiver of immunity

Privileges and immunities are extended from one country to another, so that only the sending state, and not the individual, can waive them. Host countries have varying processes for when waivers are sought but in general, in serious cases where a request for waiver is refused, the expectation is that the sending state will withdraw its diplomat. If it fails to do so, the host country may declare the diplomat *persona non grata*, leaving that person no choice but to leave the country.

While the basis and parameters of diplomatic immunity are clear from the Vienna Conventions on Diplomatic and Consular Relations the question of when the host country will seek a waiver of that immunity is less clear.

The current practice of the New Zealand Government is referenced in the Protocol Guidelines of the Ministry of Foreign Affairs and Trade and is set out in Section 3.5.1.of this report. Section 3.5.2 also sets out a high-level view of the waiver of immunity process.

1.1.3 Historical data

As part of the Inquiry's work, statistics in relation to incidents involving diplomats and their families were compiled from a search of the Ministry's records over the last 20 years. There were 62 cases examined.

As far as I can determine, there were 13 instances where a waiver of immunity was sought because of the seriousness of the case and seven instances where the waiver was granted. In the 55 cases in which a waiver did not apply, the Police did not proceed to prosecution on 26 occasions; the alleged offender left the country on 16 occasions; immunity was not at issue in another eight cases; the three civil issues were all resolved; and two parking fines remained unpaid.

The analysis also compared the two 10-year periods to see if there were any trends emerging. It is clear from the historical perspective that incidents of a serious criminal nature are relatively rare, and do not appear to be increasing in frequency.

1.1.4 International processes and practices

In Section 3.4 the processes and practices of a number of other countries in relation to the seeking of a waiver of diplomatic immunity are set out and some observations made, which are relevant to some of the final recommendations.

The basic framework in relation to seeking a waiver of immunity is reasonably standard and consistent across the countries surveyed and with New Zealand i.e. the issuance of a Third Person Note to the sending state and, if the waiver is not agreed, to require the withdrawal of the diplomat and, failing that, the expulsion of the diplomat by declaring the individual *persona non grata*.

However, it appears there is a broad range of internal processes which are followed and the circumstances to be considered in seeking a waiver are less standard. This is understandable given that the circumstances for each country will vary widely. There is an opportunity for New Zealand to consider some of these international practices as part of a review of its processes.

See Appendix, Section 6.5 for the Third Person Note requesting the waiver of immunity in the case under review and Section 6.6 for the subsequent decline.

1.1.5 Policy

In a number of respects, New Zealand's policy is consistent with international best practice. However there are a number of ways in which we can still learn from what happens overseas.

I have not been able to discover a statement (such as a Cabinet minute) that formally articulates New Zealand's policy on waiver of immunity. However, the default policy in application has been pretty clear and follows that in the Ministry's Protocol Guidelines, and as referenced in the 1986 Third Person Note issued by the Ministry to the diplomatic corps (as outlined in Section 3.5.1).

I do not detect any significant appetite within New Zealand for softening this approach. The public expectation is that justice should be done, and should be seen to be done, within the provisions of the law.

However, the policy as outlined does raise several questions. First, what should constitute the threshold to consider a crime 'serious' or warranting prosecution? Secondly, does the statement cover all situations? Thirdly, are there ever any grounds for departing from the policy as stated? Fourthly, are there grounds for adopting a wider range of approaches to provide support for the achievement of the objectives of policy? Finally, does it raise any further matters which may need to be considered and possibly incorporated into policy?

The Inquiry examined each of these issues in turn, and raised a set of issues which I suggest the Ministry review in a report to the Minister of Foreign Affairs. Recommendations A and B deal with the policy issues concerning waiver of immunity that are raised in the report.

1.1.6 Roles and responsibilities

It is clear from a consideration of the historical data that serious incidents involving diplomatic immunity in New Zealand are rare and that many managers, other than those in the Ministry's Protocol Division, may not have dealt with one before. This means it is important that the roles and responsibilities of the parties are established clearly and reinforced through good communications, issue resolution and transition arrangements. I am of the view that there is room for improvement here.

The report makes a number of suggestions for reviewing or clarifying roles and responsibilities as they relate to immunity and waivers of immunity. These include: greater clarity around transfer of responsibilities between divisions; clearer expectations on who is responsible for informing whom; and greater clarity on reporting lines especially during the absence of managers from the office. Recommendations C, D and E relate to these matters.

1.1.7 Processes, protocols and systems

While in theory the Ministry currently might have discretion as to whether it will comply with the Police request, I have found, from a review of incidents from the last 20 years, only one instance (in 2002) of the Ministry not proceeding with an (initial) Police request to seek waiver of immunity. Arguably, the outcome was nevertheless in line with the outcome in the unlikely event of the immunity having been waived and the matter proceeding to court.

The report analyses the case for any exceptions to the general policy relating to waiver of immunity and proposes some limited process mapping, as well as some amplification of Ministry guidance on relevant process, protocols and systems. Recommendations F and G deal with these issues.

1.1.8 Communications and awareness building

Section 3.8 looks at the internal and external communications around the Ministry's handling of waiver of immunity issues and identifies scope for possible improvement. While there are some strengths, the report focuses on potential room for improvement on a number of dimensions including: formality of communications, especially in terms of communications that accompany Third Person Notes, and in reporting to the Minister of Foreign Affairs; in keeping the right people informed; in up-to-date record keeping; and in aspects of media management. The report also suggests the Ministry review the pros and cons of greater public transparency around immunity and waiver of immunity issues.

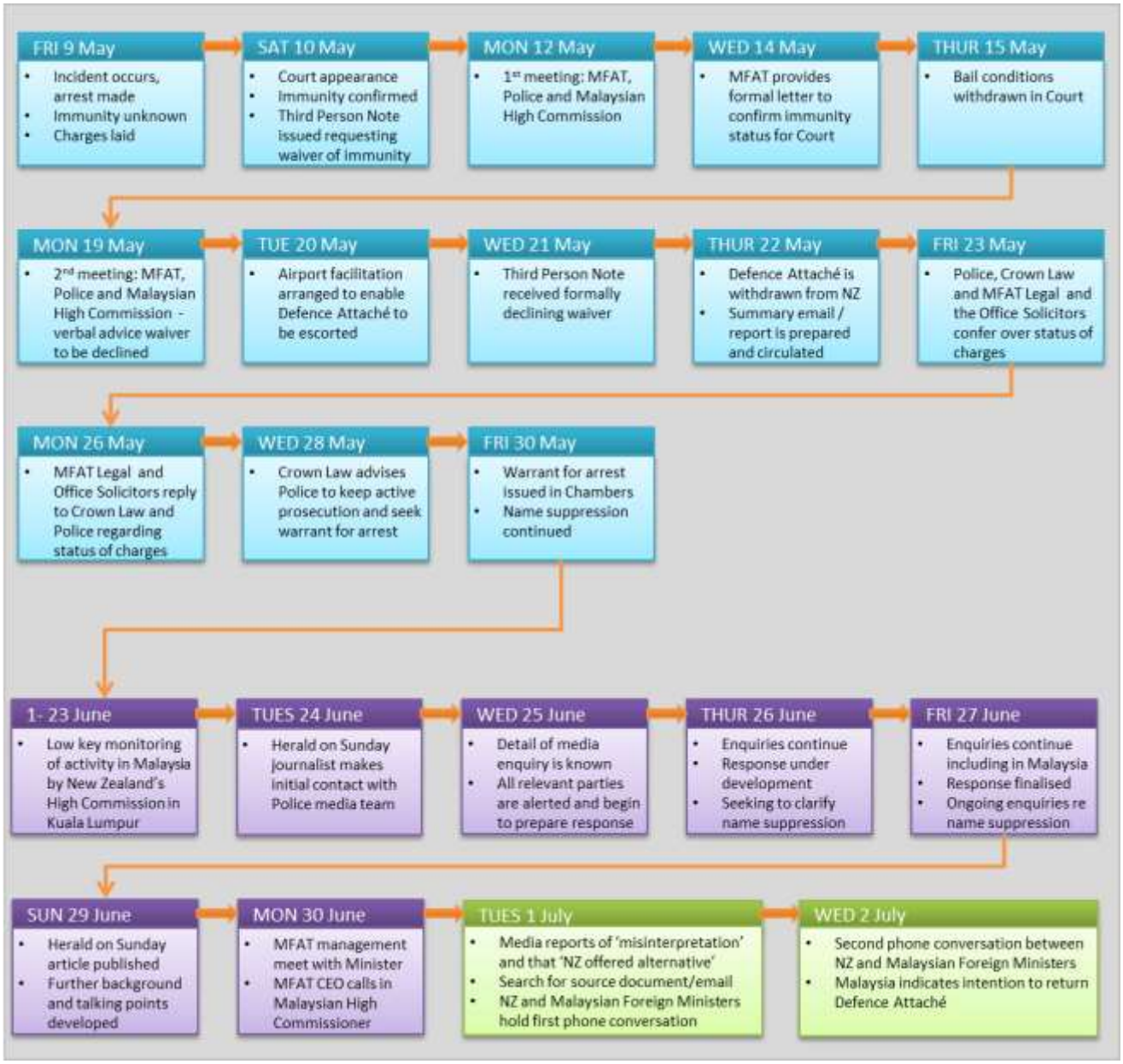
All these issues are dealt with in Recommendation H.

1.2 Ministry's handling of the case concerning the Malaysian Defence Attaché

The events that led to this Inquiry began with a serious alleged incident on the evening of Friday 9th May 2014. In the immediately following sections, I provide a timeline and brief description of the main events as they occurred from the time of the initial incident through to the release of press statements by the Malaysian and New Zealand Foreign Ministers late on Wednesday 2nd July 2014. In subsequent sections I then review these events in more detail, make observations on the actions of key New Zealand participants as they are relevant to the terms of reference of this Inquiry, and draw some conclusions and recommendations from my analysis of the events concerned.

1.2.1 Timeline overview

A high-level timeline is provided below.



For further detail, please see Appendices:
Section 6.3 Timeline – May 2014 and Section 6.4 Timeline – June/July 2014.

1.2.2 Summary of key events

According to information from Police a serious alleged incident involving burglary and assault with intent to rape occurred on the evening of Friday 9th May. Police were called at around 6pm, were quickly on the scene and made an arrest. The alleged assailant made no attempt to claim diplomatic immunity and presented as somewhat confused. Police formed a view that he may have been suffering from some mental health issues.

Police subsequently discovered that he was employed by the Malaysian High Commission and informed the Diplomatic Protection Service who in turn contacted a senior officer in the Protocol Division of the Ministry of Foreign Affairs and Trade. This senior officer then informed the Malaysian High Commissioner who sent an officer to the Police station where they spoke with their employee. A lawyer was also contacted and attended the Police station that evening.

On the basis of an indication from the Malaysian High Commissioner, the senior Protocol officer informed the Police that the person they had detained did not have diplomatic immunity. Accordingly the Police, acting in good faith, then laid charges against the Defence Attaché, and a court appearance followed.

Early the following morning a Ministry Protocol officer was able to confirm to Police that in fact the Defence Attaché did hold diplomatic immunity and therefore should not have been detained and charged. However, a court hearing had been held, bail conditions set and an order for name suppression granted. The Attaché was released from detention.

In the meantime, the Ministry alerted the office of the Minister of Foreign Affairs, which in turn alerted the Minister. By noon, Police had formally requested that the Ministry seek a waiver of diplomatic immunity from the Malaysian Government. The Protocol officer prepared the appropriate documentation, a formal Third Person Note, and emailed a copy of it to a senior officer in the Malaysian High Commission a little over an hour later. The covering email contained language which turned out to be a central issue in this Inquiry; others were afterwards copied into the Third Person Note, but not the covering email. See Appendix, Section 6.5 for the Third Person Note that was sent.

On Monday 12th May, a meeting was held between Police and the Malaysian High Commission, facilitated by the Protocol officer. Unusually for events of this serious nature, there was only one Ministry officer at the meeting. The main outcome of the meeting appears to have been that the Malaysian High Commissioner asked the Police to provide further information about the Friday incident, and another meeting was arranged.

Following the Monday meeting, various steps were still necessary over the days that followed to undo the court requirements in recognition of the diplomatic status of the Defence Attaché.

At the second meeting with the Malaysian High Commissioner on Monday 19th May, the Malaysian High Commissioner verbally confirmed that a decision had been made to decline the request for waiver of immunity, and that the Defence Attaché would be withdrawn on Thursday 22nd May. The High Commissioner raised a question about getting the file on the case sealed.

A formal Third Person Note from Malaysia arrived late on Wednesday 21st May, and the Attaché departed the following day. See Appendix, Section 6.6 for the Third Person Note received. An email reporting on events up to that point (Thursday 22nd May) was prepared and distributed by the Protocol officer just before 4.30pm.

Copies of the email were sent to various staff within the Ministry, and addressed to two staff members of the Minister of Foreign Affairs' office, but in the event not brought to the attention of the Minister.

Between 23 May and 23 June various legal matters were reviewed and put in place in New Zealand, and New Zealand's mission in Kuala Lumpur engaged in low-key monitoring of activity in Malaysia relevant to the case there.

A *Herald on Sunday* journalist made contact in late June and a response was prepared. Media points were also transmitted to the Minister's office along with background to the incident and copies of the Third Person Notes as referenced above. The issue of name suppression came up in the course of development of the media points.

On the afternoon of Thursday 26th June the Protocol officer, who had previously led the day-to-day handling of the issue from the Ministry's perspective, received a phone call from the Malaysian High Commissioner. During the conversation the High Commissioner mentioned that the Malaysian Minister of Foreign Affairs had initially been disposed toward agreeing to a waiver.

There is some difference of recollection about who in the Ministry was informed of this advice from the High Commissioner. The Protocol officer did consider the matter potentially to be significant and believes she raised the issue with the senior officer of the geographic division who, however, has no recollection of such a discussion. It was not included in subsequent briefing notes for the Minister and the Prime Minister.

On the morning of Monday 30th June, advice was sought from Crown Law on the scope of the name suppression order. Advice was received and from that point incorporated into briefing materials.

The issue dominated the Prime Minister's post-Cabinet press conference that afternoon. Following a meeting with the Minister of Foreign Affairs, the Secretary called in the Malaysian High Commissioner to discuss the issues and to reinforce New Zealand's position and the seriousness with which this incident was being regarded. Four matters discussed stand out as having particular significance: the Malaysian view that they had been offered options; discussion of the mental health of the Attaché; the issue of sealing the court file; and the revelation that the Malaysian Foreign Minister had initially been disposed toward agreeing to a waiver of immunity.

On the following day (Tuesday 1st July) Ministry management met with the Minister of Foreign Affairs to discuss the incident and the Secretary's meeting with the Malaysian High Commissioner. The Protocol officer was commissioned to complete three tasks: provide information on how less serious transgressions by diplomats were dealt with; advise on the number of defence attachés in Wellington; and review all documentation relevant to the incident to ensure everything was in order. The first two tasks were completed by mid-morning, and the third was then commenced.

Action had been initiated by the media to lift the court name suppression order and this eventually occurred around 2.30pm that afternoon. By early afternoon the first media reports began to emerge suggesting that New Zealand had 'offered an alternative' option to Malaysia. The search for anything capable of having led to what the media were terming a misinterpretation of the Government's intentions was given urgency and prioritised over other work on Official Information Act requests. This proved to be something of a fraught process, at least in part because there was considerable uncertainty about what the cause of the possible misunderstanding could be.

The Malaysian Foreign Minister held a press conference on the issue around noon Malaysian time (4pm New Zealand time) and referred to a document from New Zealand on which the Malaysian interpretation of New Zealand's wishes concerning the waiver had been based.

Following this, the New Zealand High Commissioner (in Kuala Lumpur) was able to ascertain that the document alluded to was in fact an email, and obtained some detail on its timing. He immediately conveyed this to the senior officer of the geographic division in Wellington who was able to obtain the email from the Protocol officer promptly.

Late in the afternoon, given the apparent confusion between the two governments' public statements, a decision was made in the Minister's office to release the Third Person Notes as provided in the Appendix, Sections 6.5 and 6.6. The discovery of the 10 May email to the Malaysian High Commission was made by the Ministry at almost exactly the same moment as this release was occurring. The email was immediately scanned and sent through to the Minister's office.

A phone call between the two Ministers of Foreign Affairs was finally connected at around 6pm. The New Zealand Foreign Minister was able to explain to his counterpart that the email had just come into his possession and it looked like it was the genesis of the apparent ambiguity in the New Zealand position as conveyed to Malaysia. The Minister subsequently released a press statement on developments. See Appendix, Section 6.7 for the press statement.

The following day (Wednesday 2nd July) the Secretary of Foreign Affairs apologised for the Ministry's handling of the case.

The key event that same day was the second phone call between the New Zealand Minister of Foreign Affairs and the Malaysian Foreign Minister during which the latter indicated Malaysia's intention to waive immunity and return the Defence Attaché to New Zealand. The two Ministers each released press statements that evening (New Zealand time). See Appendix, Sections 6.8 and 6.9 for the press statements.

1.2.3 Analysis and findings

Given that initially neither the Defence Attaché himself nor the staff of the Malaysian High Commission were aware of the Attaché's diplomatic status, in my view the first actions of Ministry officials were entirely proper and prompt. However, as a whole, the actions by the various people involved over the initial days set in train the events which then followed.

In particular, a key factor that has coloured the handling of this incident relates to the expression of personal opinions within internal emails prepared by the Protocol officer that upon subsequent review can create the impression that the Government's position may not have been pursued vigorously and clearly.

The context within various emails sent by the Protocol officer handling the case, to Ministry colleagues, makes it clear that a waiver was being sought and that this would still have been necessary for a judge to have ordered a psychiatric assessment which might then have determined whether or not the accused was in a fit state to stand trial. Specific reference is made to this fact in at least one case. This is consistent with the practice of the Ministry that any decision by Police that a prosecution was warranted, led more or less automatically to a corresponding decision to seek a waiver. This was also the very firm view that the Protocol officer expressed to me. There were two Police officers present at the 12 May meeting with representatives of the Malaysian High Commission. These officers are very clear that the message that the Government was seeking a waiver was delivered unambiguously at that meeting by the Protocol officer.

As it has been the subject of some public speculation, I should also note that there is definite evidence that Ministry staff involved, including the Protocol officer, clearly regarded the incident itself as a very serious matter. The Protocol officer has had a history of zero tolerance for even minor misdemeanours by foreign diplomats, let alone for crimes at the more serious end, and Ministry staff, Police and Diplomatic Protection Service members all confirm this.

What then can have led to the apparent misunderstanding by the Malaysian authorities? While language interpretation and cultural differences may have been a contributing factor, I consider that the most important explanation, and one offered by the Malaysian authorities themselves, relates to a covering email that was sent with the Third Person Note (as provided in the Appendix, Section 6.5) on Saturday 10th May. Normally, such emails would be restricted to words of transmission. In this case, more was said. The relevant paragraph is reproduced in full below, with emphases added:

> "I am attaching a Third Person Note seeking a waiver of Mr Ismail's immunity from your government. Police tell me he is now on bail and is ***due to appear in court on 30 May*** as he did not state that he has full inviolability from detention and arrest and immunity from prosecution. Despite not mentioning his status to police, it is still necessary for us to seek a waiver which must be express. ***If he were to complete his posting prior to 30 May and return to Malaysia with his family, that would be the end of the matter."***

The recipient of the email at the Malaysian High Commission was the only addressee; nobody else from the Ministry or elsewhere was sent a copy. The Protocol officer told me that 'the matter' was intended to refer to the court appearance referred to earlier in the paragraph, and she included the comment because she wanted to ensure the High Commissioner was aware of what would happen to the court fixture if the waiver were refused. On balance, I accept her assurance that she was not intending to suggest that the New Zealand Government was seeking anything other than a waiver of immunity. However, on the basis of a straightforward reading, the email does not clearly explain that 'the matter' relates only to the court fixture and not the incident as a whole, as the Protocol officer stated was her intention. I consider, therefore, that inadvertently the email provided scope for the Malaysian authorities to misunderstand the intent, as subsequently proved to be the case.

There are also a number of learnings from the events of the initial handling which I summarise in recommendations I, J, K and L of this report.

My review of historical cases above, including those related to more recent years, does tend to support the view widely held in the Ministry that these have been professionally managed and well-handled against the yardstick of New Zealand's national interests. Nevertheless, the experience does point to several other lessons.

In the first place, situations possibly involving the exercise of diplomatic immunity are inherently better managed in a team situation in which different angles and perspectives can be brought to bear. Lack of a more collegial approach, consistent with the distributed responsibility management model, meant that opportunities to test and shift direction were lost in the case under review.

Recommendations M and N are made in light of this observation.

There are lessons to be drawn on reporting also. In my view, there is room for both formal and informal reporting on immunity issues, and the need for one does not replace the need for the other.

At key points in the management of serious cases, a formal update via submission is warranted, and I consider this should have been the case with the 22 May report and possibly before then as well. Another reporting issue relates to who is copied into reports or otherwise informed, for example through oral briefings. In terms of the Minister's office some people who should have been copied into the relevant communications were not.

As has been disclosed publicly, the Secretary of Foreign Affairs was not made aware of the case at this time (and indeed only became aware when media interest emerged in late June). While it is impossible to always get the judgement right on such matters, I consider that the Secretary should have been informed earlier than he was. This would also have enabled him personally to fulfil his 'no surprises' obligation with the Minister of Foreign Affairs.

Recommendations G, O, P, Q and R are relevant to this issue.

A view I share with a number of others is that the New Zealand public has high and growing expectations of the Ministry to act to protect New Zealanders' rights to justice. The recent experience emphasises that this expectation applies domestically as well as overseas.

My consultations with Police (including the Diplomatic Protection Service) and Crown Law during the course of this Inquiry suggested to me that relationships with the Ministry's Protocol Division have been strong and effective over a period of several years. At the same time the division of responsibilities between the agencies may not always be immediately clear.

The confusion in the advice provided on the scope of the name suppression underlines the importance of having clear interagency responsibilities on immunity cases and points of law, perhaps by means of an agreed protocol of some sort. While the Ministry's Office Solicitors responded to queries promptly, the limited access to information hampered efforts to achieve clarity more quickly.

In terms of internal Ministry arrangements, it would be useful for Protocol Division to establish clear processes for formally handing over a diplomatic immunity issue when it moves beyond their core area of responsibility. I would suggest that the Ministry also review its approach to following up overseas on situations in which a diplomat accused of committing a serious transgression ends up leaving the country.

With these matters in mind, I make recommendations S, T and U in this report.

The question of the dissemination of the information concerning the Malaysian Foreign Minister's initial disposition to agree to a waiver presents some difficulties, as the facts behind the slow emergence of this information are not entirely clear. What is clear is that the line being taken by Ministers was becoming firmer based on partial information concerning that matter and lack of knowledge of the 10 May email. Earlier knowledge by Ministers raises the possibility that the subsequent course of events could have been different.

The reference in the 30 June 'call-in' meeting to options being provided by the Ministry, to Malaysian officials, was the first identifiable hint that there had been some misunderstanding of New Zealand's communications on the issue. Both Protocol Division and the Police believe that their messaging was clear during the meetings of 12 and 19 May with Malaysian High Commission representatives.

My view is that cultural and language interpretation problems may have confused the difference between 'options' and 'scenarios' in the minds of the Malaysians. Similar factors may have been behind the recurring conversations on the sealing of the court file on the case.

While the events of 1 July are multi-faceted and potentially complex, the issues of direct relevance to this Inquiry are relatively simple to state:

- Why did it take so long to discover what lay behind the Malaysian misunderstanding of New Zealand's intentions on the matter of a waiver?
- Was there a deliberate attempt by anybody to hide, or at least delay release of, the email to the Malaysian High Commission of 10 May?

Organising and reviewing the case documentation initially involved printing out all the Protocol officer's emails on the case, and included a lot of duplicated information as a result of email chains and the interactions of different people at different stages. This was a necessary part of assembling the information required for the Official Information Act requests and other purposes. However, when priority was given to the subsequent task of urgently identifying which document or documents, if any, were involved in the misunderstanding, continuing with this approach did not seem to be the most efficient way of fulfilling the task.

Further, Ministry officials were not entirely clear about what it was they were searching for in the early part of the afternoon. Initially it was not clear that the issue definitely related to a document, New Zealand in origin or otherwise, and only later did it become clear that it was an email. Once the date and timing of the email was clearly identified it was located quickly. Prior to this, nobody in the Ministry had been aware that the particular email existed except, of course, the Protocol officer herself.

I believe the explanation for the apparent delay, therefore, is that initially the Protocol officer was confused about what she was looking for. The stress and pressure of the situation may have also been a factor and interruptions were probably distracting her. Most importantly, though, I believe that she simply did not see, and quite possibly could not see, that the email in question could have been misinterpreted. This is consistent with the view she maintained throughout the Inquiry process.

Nevertheless, it is clear the search for the email took significantly longer than desirable, with an embarrassing outcome for the Government, the Minister and the Ministry.

1.3 Conclusions

My conclusion is that the problems in the Ministry's handling of the case concerning the Malaysian Defence Attaché stemmed from one particular email which, inadvertently, was ambiguous enough to provide scope for the Malaysian authorities to misunderstand the intentions of the New Zealand Government. Because the contents of that email were not more widely known, this gap between the Malaysian interpretation and New Zealand's intentions carried through into the briefing of Ministers and the subsequent handling of the case when it became public.

That outcome has had a number of very serious effects. In the first place, the woman who had suffered traumatically from the alleged incident was left for a considerable period of time with the impression that she would not see justice done in New Zealand. Ministers were seriously embarrassed and had to act very hastily to remedy the situation. Understandably, they were angry at the turn of events. Several staff in the Ministry and in the office of the Minister of Foreign Affairs had their reputations put publicly at risk.

The hard-earned positive reputation of the Ministry itself was damaged. If it had not been for mutual efforts over a number of years to build a strong and positive relationship with Malaysia, that could have been put in jeopardy also. None of this was intended of course, but it followed from the initial misunderstanding of the intent behind the email.

Hopefully, this report will assist in putting the record straight and enable those who were involved in the handling of events in May to July to move on. At the same time, the series of events have highlighted a number of lessons that can be drawn on to strengthen future practice and reduce the risk of a repetition of this kind of situation.

An analysis of the Ministry's records over the past 20 years makes it clear that this case is an isolated one and that there is no pattern of regular departures from the policy of seeking waivers of immunity when police indicate a desire to prosecute a diplomat who has allegedly committed a serious crime. While I have been unable to locate a formal basis for this policy, a statement of it can be found in Ministry's Protocol Guidelines.

Both the historical record and the analysis of international practice in this area suggest that in general these sorts of cases have been well handled. In some, but not in all respects, international best practice is being met. However, there are a number of lessons to be learned in terms of processes, protocols and systems such as the availability of information and the best approach to meeting reporting requirements. Attending to these matters will also help the Ministry provide a reasonable level of assurance that it is meeting its 'no surprises' obligations.

More detailed conclusions, responding specifically to the questions in the Inquiry's terms of reference, can be found in Section 5.3 of this report.

2 Introduction

2.1 Background

On Friday 9th May 2014 a Malaysian Defence Attaché was arrested by the New Zealand Police and charged with serious offences. The Attaché appeared before the Wellington District Court on Saturday 10th May 2014 and was remanded and released on bail pending a future court appearance. As a result of subsequent enquiries the Ministry of Foreign Affairs and Trade clarified that the Attaché had diplomatic immunity from the criminal jurisdiction of the New Zealand courts. The New Zealand Police wished to prosecute the Attaché and requested the Ministry to seek a waiver of the immunity from the Malaysian Government. The Ministry sought that waiver from the Malaysian Government and this was declined. The Attaché was then withdrawn by the Malaysian Government and returned to Malaysia on Thursday 22nd May 2014.

As a result of media interest both in New Zealand and Malaysia, the Malaysian Government stated it considered the withdrawal of the Attaché was signalled by New Zealand to be acceptable as an alternative to waiver of the immunity. Following a search, an email was identified that could have provided a basis for the misunderstanding. The New Zealand Minister of Foreign Affairs accepted that the Malaysian Government had acted entirely in good faith and that New Zealand officials had engaged in informal communications in a manner that would have been ambiguous to the Malaysian Government. The Minister of Foreign Affairs then commissioned a Ministerial Inquiry into the events surrounding the request for a waiver of the diplomatic immunity of the Malaysian Defence Attaché. See Appendix, Section 6.1 for the terms of reference.

2.2 Terms of reference

On 11 July 2014, Foreign Minister Hon Murray McCully, announced a Ministerial Inquiry would be held into the way the Ministry of Foreign Affairs and Trade handled the case of a Malaysian High Commission official accused of an attack on a Wellington woman.

The Inquiry was tasked with ascertaining the New Zealand actions that led the Malaysian Government to infer that declining a request for a waiver of immunity was acceptable to the New Zealand Government.

In particular the Inquiry was to assess:

- the appropriateness and robustness of procedures to deal with circumstances in which a waiver of diplomatic immunity is sought by the New Zealand Government, and;
- the events that took place in the Malaysian diplomat case and the management of the request for a waiver of diplomatic immunity.

See Appendix, Section 6.1 for the full terms of reference for this Inquiry.

My terms of reference relate most closely to the Protocol Division of the Ministry of Foreign Affairs and Trade, and to some extent, those parts of the Ministry and the Minister's office that were involved in the particular matter which is the focus of this Inquiry. Even in recommendations specifically targeted at the Protocol Division it is possible that some recommendations may have broader applicability in the Ministry; if so, that is a matter for the Secretary of Foreign Affairs to determine.

I should also acknowledge that the Ministry has not been idle while I have conducted this Inquiry. Many of their activities are beyond the scope of my review, in particular those associated with the return of the former Defence Attaché to New Zealand. However, the Ministry has also been active in capturing lessons from the period of 9 May - 2 July and has already implemented some interim changes consistent with the direction of the recommendations in this report.

2.3 Inquiry process

The following diagram outlines the high-level phases and activities of this Inquiry.

Preliminary	• Business analysts gathered, analysed and catalogued over 600 emails, developed an initial timeline of the incident and reviewed other background documentation
Foundation	• Reviewer established a foundation for the Inquiry; held initial meetings to clarify the terms of reference; established an approach; reviewed all emails and other background documentation; confirmed technical aspects of immunity • Identified potential people to be interviewed, prepared initial letters and schedule
Interviews – Rounds 1 & 2	• Prepared for and conducted over 40 interviews covering the incident, historical and international practices, with some participants interviewed more than once • Outcomes of all interviews analysed and checked
Historical and international	• Researched, reviewed and analysed information about historical cases and international practices • Conducted several interviews in this regard
Draft and check report	• Consolidated learnings from the interview process and other analysis completed • Drafted the report, checking facts along the way, QA processes completed
Finalise report	• Worked through final stages to see report content finalised and released • Final communications associated with conclusion of Inquiry • Closed down Inquiry

See Appendix, Section 6.2 for more detailed information about the stages of the Inquiry.

2.4 Acknowledgements

During the course of this Inquiry, I interviewed or spoke to a range of people principally from the Ministry of Foreign Affairs and Trade, including the Secretary, but also from:

- New Zealand Police
- Diplomatic Protection Service
- Office of the Minister of Foreign Affairs
- Department of the Prime Minister and Cabinet
- Crown Law
- former officers of the Ministry.

Additionally, both the Prime Minister and the Minister of Foreign Affairs agreed to be interviewed. Information was also obtained from foreign jurisdictions about their practices in immunity cases.

I had also contacted the (now former) Malaysian High Commissioner in the hope of discussing the events. However this unfortunately this did not prove possible before her term was completed and she returned to Malaysia. Accordingly, I have based my findings on the facts relating to the activities which occurred within New Zealand and the public statements of the Malaysian authorities.

I would like to express my appreciation to all those who took part in the Inquiry, and where relevant their legal representatives or support persons. Under the terms of my appointment, I had no powers of compulsion but everyone, currently or previously part of the New Zealand public agencies that I sought to interview, willingly took part, and almost without exception were forthcoming in providing the information sought.

I was particularly struck by the openness of Ministry and Minister's office staff to learn and volunteer lessons from the experience. In some cases, this took the form of taking on a degree of personal responsibility for aspects of the chain of events which it would have taken a considerable stretch to say contributed in a significant way to what happened. I regard this as reflecting the high degree of professionalism and commitment to New Zealand's interests that those concerned exhibit, and which naturally is rarely visible to the general public.

I would also like to express my thanks for the very generous administrative support of Ministry staff and contractors as I undertook this Inquiry. This includes the assistance provided by the:

- Office of the Chief Executive
- Human Resources Group
- Communications Management Division
- Executive Services Division
- Information Management Division
- Audit and Risk Division
- Office Solicitors
- Strategic Policy Division
- Integrated Delivery Division.

To anyone else I may have missed, thank you.

Particular thanks are due to those who assisted me directly in the conduct of the Inquiry, including the business analysts and support staff.

3 Policy and procedures relating to waiver of diplomatic immunity

3.1 Introduction

This section sets out the formal basis for the provision of diplomatic immunity, and the policy and procedures related to seeking a waiver of immunity. New Zealand's current policy and procedures are considered and cases from the last 20 years have been reviewed to determine historical context. International policy and procedures are considered to provide a comparison of New Zealand's practices. Possible improvements to the policy, procedures, protocols, systems and communications are discussed.

3.2 Formal basis for policy

3.2.1 Diplomatic immunity[1]

Diplomatic immunity is a principle of international law by which certain foreign government officials are not subject to the jurisdiction of local courts and other authorities for both their official, and to a large extent, their personal activities. The special privileges and immunities accorded foreign diplomats and consular representatives assigned to New Zealand reflect rules developed among the nations of the world, codified in the Vienna Conventions on Diplomatic and Consular Relations, regarding the manner in which civilised international relations must be conducted.

The underlying concept is that foreign representatives can carry out their duties effectively only if they are accorded a certain degree of insulation from the application of standard law enforcement practices of the host country. New Zealand benefits from the concept as it protects New Zealand diplomats assigned to countries with judicial systems far different from our own. In many situations it would be virtually impossible to carry out diplomatic duties if diplomatic immunity were not available.

Immunity is an automatic right held by the sending state and therefore doesn't need to be claimed or asserted. It can only be waived by the sending state, not by the individual.

There are different levels of immunity that a person (and their family members) can hold depending on the status of the individual. These are discussed in Sections 3.2.3 and 3.2.4.

3.2.2 Vienna Conventions

The Vienna Conventions on Diplomatic and Consular Relations are part of the law of New Zealand. The Diplomatic Privileges and Immunities Act 1968 gives effect to the Vienna Convention on Diplomatic Relations, and the Consular Privileges and Immunities Act 1971 gives effect to the Vienna Convention on Consular Relations.

On a practical level, failure by New Zealand to fully respect the immunities of foreign diplomatic and consular personnel may complicate diplomatic relations between New Zealand and the other country concerned. It may also lead to harsher treatment of New Zealand personnel abroad since the principle of reciprocity has, from ancient times, been integral to diplomatic and consular relations.

[1] Throughout this report the terms 'diplomat' and 'diplomatic immunity' are used for convenience to refer to any representative of a foreign government in the host country and in some cases to their employees and some members of their families who hold some level of privilege and immunity.

It should be emphasised that diplomatic immunity does not exempt diplomatic officers from the duty to respect national and local laws and regulations. Indeed, the Conventions include this duty. Diplomatic immunity is not intended to serve as a licence for persons to flout the law and purposely avoid liability for their actions. The purpose of these privileges and immunities is not to benefit individuals but to ensure the efficient and effective performance of their Government's mission within the host country, and to enable them to attend to official business.

3.2.3 Levels of immunity - members of diplomatic missions

It should also be emphasised that there are different levels of privileges and immunities for different categories of persons defined by the functions they perform within each diplomatic mission.

- **Diplomatic agent** is the term for an Ambassador and other diplomatic officers who generally have the function of dealing directly with host country officials. Family members forming part of the household of diplomatic agents enjoy the same privileges and immunities as the sponsoring diplomatic agent. Diplomatic agents have the highest degree of privileges and immunities. They have complete personal inviolability which means they may not be arrested or detained and neither their property nor residences may be entered or searched. Diplomatic agents have complete immunity from the criminal jurisdiction of the host country's courts and they cannot be prosecuted no matter how serious the offence unless the immunity is waived by the sending state. They also have general immunity from civil proceedings and cannot be compelled to provide evidence as witnesses, whether in criminal or civil matters.
- **Administrative and technical staff** of a diplomatic mission perform tasks critical to the inner workings of the mission. They have privileges and immunities identical to those of diplomatic agents in respect of personal inviolability, immunity from criminal jurisdiction and the obligation to provide evidence as witnesses. Their immunity from civil jurisdiction is only in connection with the performance of their official duties. The family members of the administrative and technical staff have the same privileges and immunities from the host country's criminal jurisdiction as their sponsors. As the family members have no official duties to perform they have no immunity from civil jurisdiction.
- **Service staff** perform less critical support tasks for their missions and have much less in the way of privileges and immunities. They have immunities only in connection with the performance of their official duties. They do not enjoy personal or property inviolability, or immunity from the obligation to provide evidence as witnesses. The family members of service staff enjoy no privileges or immunities.

3.2.4 Levels of immunity - members of consular posts

Consular personnel perform a variety of functions of principal interest to their respective sending states (e.g. issuance of travel documents, attending to the difficulties of their own nationals in the host country and generally promoting the commerce of the sending state). The importance of consular functions has long been recognised however consular personnel do not have the principal role of providing communications between the two countries – that function is performed by diplomatic agents.

The Vienna Convention on Consular Relations grants a very limited level of privileges and immunities to consular personnel. Consular officers are those members of the office who are recognised by both the sending state and host country as being fully authorised to perform the broad array of formal consular functions. They have official acts or functional immunity in respect of both criminal and civil matters, and have limited personal inviolability.

Consular employees have immunity for official acts in respect of both criminal and civil matters but do not have personal inviolability.

Consular service staff do not have any jurisdictional immunity or personal inviolability.

Consular officers, employees and service staff enjoy immunity from the obligation to provide evidence only in respect of official acts.

Family members of consular officers, employees and service staff do not have personal inviolability or jurisdictional immunity of any kind.

3.2.5 Waiver of immunity

Privileges and immunities are extended from one country to another to enable representatives to perform their duties effectively. Therefore, these privileges and immunities belong to the sending state. Individuals enjoying these immunities cannot waive them of their own accord. The decision to waive must be made by the sending state, and sometimes they do waive a person's immunity. The decision of the sending state is not open to debate and a reason for declining a request to waive immunity is not required.

Host countries have varying processes for when waivers are sought but in general, in serious cases where waiver is sought and refused, the expectation is that the sending state will withdraw their diplomat. If they fail to do so, the host country may declare the diplomat *persona non grata* leaving that person no choice but to leave the country.

While the basis and parameters of diplomatic immunity are clear from the Vienna Conventions on Diplomatic and Consular Relations the question of when the host country will seek a waiver of that immunity is less clear. This is understandable given the many factors which need to be considered, and judgements made about the potential consequences for international relations.

3.3 Historical data

This section, derived from a search of Ministry records over the last 20 years (prior to this case), provides statistics of incidents involving diplomats and their families. It looks at the number and nature of these incidents, the number of requests for waiver of diplomatic immunity and the result of these requests.[2]

It should be noted that while a comprehensive search has been conducted and every effort has been made to locate this information within various archives, it is not expected to be 100% accurate. The information presented is also dependent on the completeness and accuracy of the records that were located.

A total of 62 incidents are outlined here and these do not include parking infringements, speeding tickets or similar notices where these have been paid without issue or involvement from the Ministry.

CATEGORIES	NUMBER	COMMENT
Drink driving	11	Alleged offences include refusal to undergo a breath test.
Other traffic	11	Alleged offences include failing to stop at a red light, negligent driving, exceeding speed limits.
Parking fines	2	Only unresolved parking fines are included.
Civil matters	3	Refers to business disputes and bankruptcy.
Serious criminal matters	25	Alleged offences include those of a violent or sexual nature.
Minor criminal matters	10	Alleged offences include shoplifting, disorderly behaviour and other alleged offences which the Police would consider suitable for diversion rather than prosecution regardless of whether it involved a diplomat or New Zealander.
Total	**62**	

As far as I can determine, out of these 62 incidents there were 13 instances where waiver of immunity was sought. In seven of these 13 instances a waiver was granted.

[2] While examining the behaviour of New Zealand diplomats overseas is outside the terms of reference for this Inquiry, I did consider looking into this to form a reciprocal view of historical incidents. Initial enquiries within the Ministry indicated there have been very few incidents involving New Zealand diplomats over the years and that these would be minor in nature. As this kind of information is not held centrally, and records are not held indefinitely, it was determined that it would be a very resource-intensive exercise to find any information that may exist and it was likely to be of limited value. Therefore, I decided not to pursue this.

In the remaining 55 cases where a waiver did not apply there were the following outcomes:

CATEGORIES	NUMBER	COMMENT
Immunity not at issue	8	Includes situations where the diplomat chose not to disclose their status and where there was no diplomatic immunity.
Alleged offender left country	16	In the majority of these cases the diplomat had left New Zealand before the Police had decided to prosecute.
Civil matters resolved	3	Voluntarily resolved between the parties.
Parking fines not resolved	2	Alleged offenders eventually left New Zealand.
No Police prosecution	26	These are generally matters where Police have chosen not to prosecute for a variety of reasons, exercising discretion as they would in dealing with non-immunity related incidents, or where the probability of a successful prosecution is considered small based on the evidence available.
Total	**55**	

Analysis was also carried out to compare the two 10 year periods to see if there were any trends emerging.

CATEGORIES	1994 – 2004	2005 - 2014
Number of incidents	39	23
Number considered to warrant prosecution	17	8
Waivers sought	7	6
Waivers granted	4	3
Percentage of cases warranting prosecution where waiver sought	41.2%	75%
Percentage of waivers granted to waivers sought	57.1%	50%

Notes:

- Police do not prosecute in every serious case for a variety of reasons, e.g. strength of evidence, alleged offender no longer in New Zealand.
- With one exception (as outlined in 1b within Section 5.3.2) the difference between the number considered to warrant prosecution and the waivers sought is explained by the prior departure of the diplomat concerned from the country.

Over the 20 year period there has been an average of 3.1 incidents per year. If we only consider criminal and serious traffic offences the average reduces to 2.3 incidents per year. It is clear from the historical perspective that incidents of a serious criminal nature are relatively rare.

3.4 International processes and practices

This section considers the processes and practices of a number of other countries and makes some observations from a comparison of these examples.

3.4.1 Country survey

The processes and procedures of the following countries were considered.

United Kingdom

Serious cases are defined in the Foreign and Commonwealth Office (FCO) as an offence that might carry a custodial sentence of over 12 months. If the Police think the case is one that merits seeking a waiver of immunity they submit the full facts to the FCO and the area Chief Crown Prosecutor (CCP). The CCP reviews the case in accordance with the Code for Crown Prosecutors to advise Police and the FCO as to whether the criteria for prosecution are satisfied. If the criteria are satisfied the FCO, after consultation, will decide which of the following courses of action will be pursued:

(a) Bring the offence to the attention of the Head of Mission.

(b) Request the withdrawal of the alleged offender from the country.

(c) Ask that the Head of Mission waive immunity so that a prosecution can proceed.

The FCO will request a waiver of a person's diplomatic immunity in order to arrest, interview under caution and, if appropriate, bring charges. The FCO can (where the circumstances warrant and the mission is in agreement) also seek a partial waiver of immunity in order to question the diplomat or dependent. If a Head of Mission does not agree to a waiver, the FCO will 'make their displeasure known' and ask for the immediate withdrawal of the individual and their family or declare them *personae non gratae*.

United States of America

The stated policy[3] of the US Department of State with respect to alleged criminal violations by persons with immunity from criminal jurisdiction is to encourage law enforcement authorities to pursue investigations vigorously, to prepare cases carefully and completely, and to document properly each incident so that charges may be pursued as far as possible in the US judicial system.

The US Department of State will, in all incidents involving persons with immunity from criminal jurisdiction, request a waiver of that immunity from the sending state if the prosecutor advises that but for that immunity, he or she would prosecute or otherwise pursue the criminal charge.

If the charge is a felony or any crime of violence and immunity is not waived, the US Department of State will require that person to depart the United States and not return unless he or she does so to submit to the jurisdiction of the appropriate court.

[3] As found on the US Department of State's website.

Canada

The Department of Foreign Affairs, Trade and Development (DFATD) of Canada receives reports of incidents involving diplomats via a liaison officer from the Royal Canadian Mounted Police (RCMP) assigned to the Office of Protocol.

All significant incidents involving alleged criminality are reported to the Chief of Protocol, and the Associate Deputy Minister[4] responsible for Protocol, as well as the offices of the Minister and the Deputy Minister. At a minimum, all incidents are also summarised for the Deputy Minister of Foreign Affairs on a quarterly basis.

In cases where charges are not laid, notification may be made to advise the Mission of the report, in accordance with DFATD policy and in consultation with police.

In all cases where criminal charges have been laid, or will be laid, DFATD will consult with the Crown attorney's office and police before seeking a waiver of the relevant immunity. DFATD's preference is to seek waivers of immunity in all cases of alleged violations of the federal laws including the Criminal Code, as well as for violations of provincial statutes that would ordinarily require the affected person or persons to appear before an administrative tribunal.

It is expected that persons with immunity who received infractions for more minor offences will pay the associated fines and not resort to asserting their immunities before the relevant authorities in order to avoid taking responsibility for these infractions.

The Netherlands

In the Netherlands three government agencies (the Police, the Office of the Public Prosecutor [OM] and the Foreign Ministry [Protocol]) are involved in the process of seeking a waiver of immunity in relation to incidents involving diplomats.

The default setting is that in general Protocol executes the decisions of the OM but there is considerable consultation at all stages of the process.

The threshold for seeking a waiver of immunity is for an offence to be grounds for detention on remand. However, the OM does not automatically seek a waiver in all such cases; it is subject to the test of 'opportunity' which in this context refers to prosecution being practical and in the public interest. If the incident does not meet the threshold OM writes to Protocol requesting that the Embassy or international organisation provide an explanation. If it does meet the threshold the next decision relates to whether the immune person involved is a 'suspect' in a formal sense. If so, a request for waiver of immunity would normally follow; if not, there will be a decision to either investigate further or take no action. The desirability of further action is tested by the Foreign Ministry at most stages.

Australia

Australia does not have enunciated policy guidelines on how to handle serious criminal allegations against a member of the diplomatic corps. In practice, the Australian Federal Police (AFP) would investigate to establish whether there was a substantive case to answer. If the AFP decided there was, the Department of Foreign Affairs and Trade (DFAT) would request a waiver of immunity from the relevant sending state. Before DFAT made a request to waive immunity the Foreign Minister would be briefed via a submission and that process automatically copies in the Deputy Secretaries and Secretary of DFAT. The Secretary would be briefed separately only if there was a difference of opinion between the relevant DFAT branches.

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[4] In New Zealand terms this role would fall between the Secretary/Chief Executive and Deputy Secretary level.

In summary

From considering the above and similar information from a number of other countries it is clear that, while the basic processes related to seeking a waiver of diplomatic immunity are reasonably standard and consistent with the New Zealand approach, there is a broad range of internal processes which are followed. This is understandable given that the circumstances for each country will vary widely e.g. the size of the diplomatic community, the different institutional arrangements in each country, their experiences in managing such cases and the volume of offending encountered. However in all instances there is collaboration and consultation between law enforcement, prosecutors and the Foreign Affairs agency.

3.4.2 Transparency

A number of countries publish statistics about the amount of parking fines unpaid by the various foreign missions they host.

The United Kingdom also provides an annual report to Parliament which sets out details of the more serious incidents of alleged diplomatic offending. The report is available to the public via the FCO's website. These details include the alleged offences and the diplomatic missions involved but not the identity of the alleged offenders. This degree of transparency is at one end of the spectrum where the norm is at the other end. In the more general situation, public disclosure of these events through freedom of information requirements is usually in relation to specific incidents, which have come to the notice of the media.

Consideration should be given to the appropriate degree of transparency which must balance the public interest and the interests of New Zealand from an international perspective. This issue is considered further in Section 3.8 below.

3.5 Policy and practice considerations

3.5.1 Overview of current policy and process

The current policy of the New Zealand Government and a high-level view of the applicable process are set out below. The policy is referenced in the Protocol Guidelines of the Ministry of Foreign Affairs and Trade.

Extract from Protocol Guidelines

"Where circumstances arise in which the New Zealand authorities wish to seek a waiver of immunity, to allow legal proceedings against an individual who benefits from immunities under the Vienna Conventions, a request will be made in a formal communication from the Ministry of Foreign Affairs and Trade, Protocol Division, to the relevant Head of Mission or direct to the authorities of the sending state. Depending on the circumstances, a refusal to waive immunity may result in a request by the New Zealand authorities for the person concerned to be withdrawn from New Zealand or, ultimately, that person being declared *persona non grata* in New Zealand.

Only the sending state, or the Head of Mission on behalf of the sending state, may waive the immunity of a staff member to enable legal enforcement proceedings against the staff member. This is a two-step procedure:

- Immunity from legal proceedings is waived;
- Execution of judgement (enforcement is waived).

The staff member concerned may not waive his or her own immunity. Immunity belongs not to the individual, but to the sending state, and must be waived by the sending state. The request to waive immunity should be formally communicated. It is strongly recommended that missions seek instructions from their sending state before the immunity of any member of a mission is waived. A waiver by the Head of Mission or any person for the time being performing this function shall be deemed to be a waiver by that state."

It is clear from the Guidelines that withdrawal of the person concerned is not an alternative to a waiver of immunity but a consequence of the failure to waive immunity.

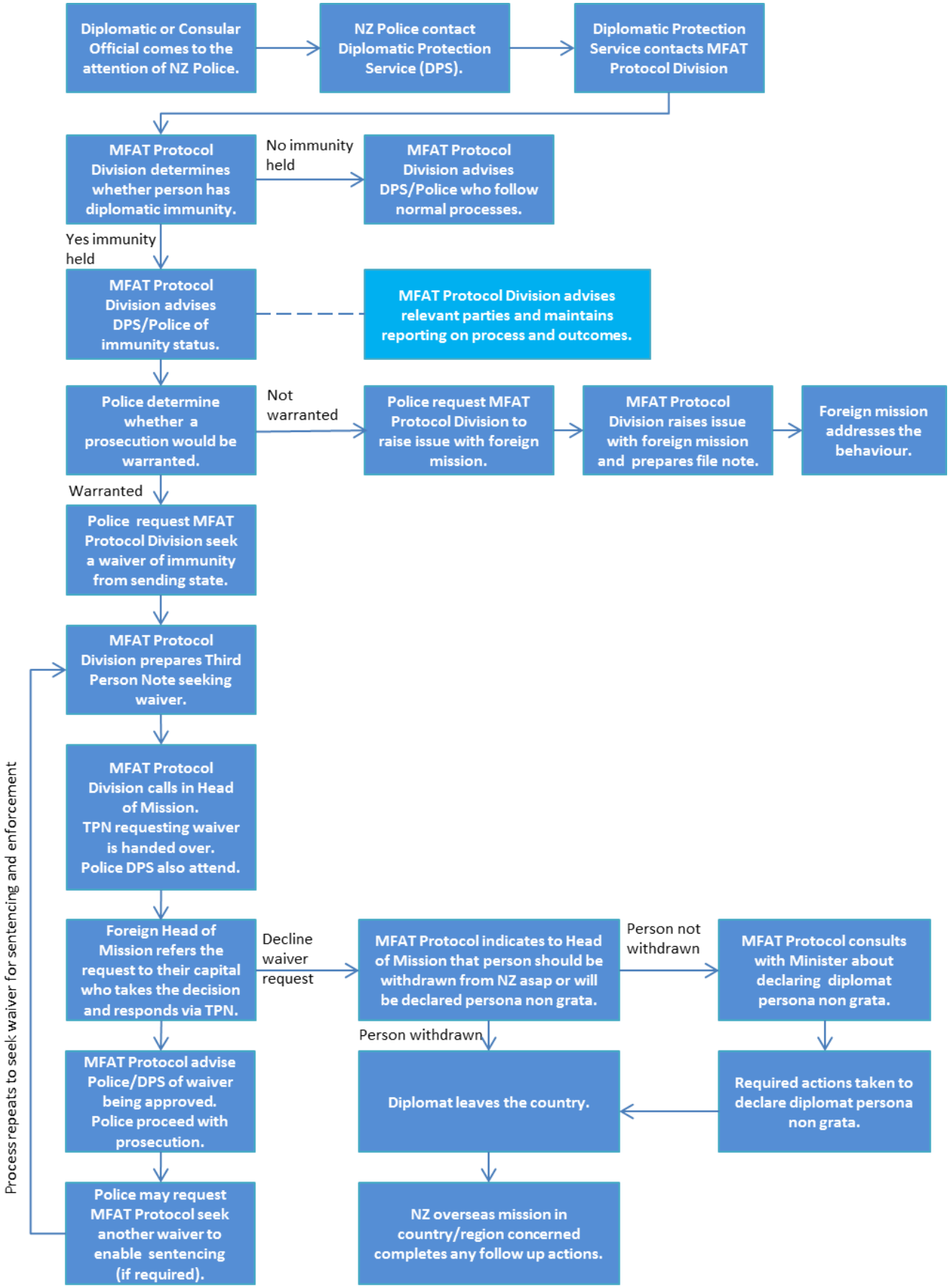
In addition, in 1986 following a very serious traffic incident the Ministry issued a Third Person Note to the diplomatic community setting out guidelines as to their intentions around waivers of immunity. An extract from this Third Person Note is provided below.

Extract from 1986 Third Person Note

"If a major offence has been committed the sending State will be asked to waive immunity so that the matter can be dealt with in court. Should immunity not be waived the withdrawal of the officer concerned will be expected. The Ministry considers the following to be examples of offences which could lead to a request for withdrawal in the absence of a waiver: driving under the influence of alcohol or drugs particularly if aggravated by violence or injury to other persons, dangerous driving or other serious traffic offences which may cause accidents, injuries or death to persons or damage to property, firearms offences, serious cases of assault including sexual offences, possession of drugs, fraud, theft (including large scale shoplifting). In each case the Ministry will, before taking action, give careful consideration to the nature and seriousness of the offence, the circumstances in which the incident occurred and the evidence available."

3.5.2 High-level view of process

The following diagram provides a high-level view of the process around waiver of immunity issues, as I understand it, and has been included to aid general understanding.



3.5.3 General policy considerations

As the survey of international processes and practices suggests, in a number of respects New Zealand's policy is consistent with international best practice. However, there are ways in which we can learn from what happens overseas, and continue to look for further improvements.

I have not been able to discover a statement that formally articulates New Zealand's policy on waiver of immunity. However, the default policy in application has been pretty clear and follows that articulated in Section 3.5.1 above.

I do not detect any significant appetite within New Zealand for softening this approach. The public expectation is that justice should be done, and should be seen to be done, within the provisions of the law. Part of that law in New Zealand, of course, reflects our commitment to the Vienna Conventions, and for reasons outlined above, there are very good reasons for that.

However, the statement of policy as outlined does raise several questions. First, what should constitute the threshold to consider a crime 'serious' or warranting prosecution? Secondly, does the statement cover all situations? Thirdly, are there ever any grounds for departing from the policy as stated? Fourthly, are there grounds for adopting a wider range of approaches to provide support for the achievement of the objectives of policy? Finally, does it raise any further matters which may need to be considered and possibly incorporated into policy?

3.5.4 Threshold issues

Many of the situations foreign diplomats may find themselves in will not be unfamiliar to ordinary citizens. For example, the approach the Ministry of Foreign Affairs and Trade has taken with respect to parking tickets is straightforward: while technically immunity applies, diplomats should pay parking fines like anyone else, as New Zealand diplomats do overseas. This is entirely appropriate in my view. It would be a waste of everybody's time, effort and resources to resort to waiver processes in such situations.

Beyond this, there is a range of activities and situations of gradually increasing seriousness. A number of these, but by no means all, involve traffic-related offences. In the past, the Ministry's Protocol Division has acted in line with a good dose of 'Kiwi pragmatism', by adopting various approaches, including warning letters and discussions with heads of mission. These discussions often result in some internal disciplinary measures for example, voluntary agreement to the surrender of a driver's licence for a period of time; and agreeing on a charitable donation of the same order as that which would be payable if a fine were imposed by a court. Such measures are consistent with the New Zealand expectation, and indeed the requirement under the Vienna Conventions, that those benefiting from immunity are expected to obey the laws of the host country.

However, at some point, alleged offences become serious enough that it is not appropriate to deal with them in this way.

In such serious cases, Police would normally wish to pursue a prosecution and ask for a waiver of immunity to be sought.

Should we attempt to define what constitutes 'serious' in this regard? In my view, there are some reasons for caution about this, despite the fact that some countries do effectively rely on thresholds such as crimes for which a custodial sentence of defined length could be imposed on conviction.

In fact there are differing practices as to what is considered to be a serious offence where a request for waiver will be made, e.g. in the United Kingdom the threshold is where the penalty could be 12 months or more imprisonment; in the Netherlands the threshold is where there are grounds for detention on remand; in other countries there are no specific thresholds; in the United States of America waiver of immunity will be sought in every case where the prosecutor advises that, but for the immunity, charges would be pursued.

Once the threshold is met, different practices apply in different jurisdictions. In the United Kingdom, after the CCP has advised the criteria for prosecution has been satisfied, the FCO will consult and then decide on which of a number of courses of action will be pursued. In the Netherlands the OM does not automatically seek a waiver; it is subject to the test of 'opportunity' – prosecution being practical and in the public interest.

In Canada DFATD makes a determination as to whether to seek a waiver but would always seek waivers for social crimes that are considered to flout Canadian values. In the United States of America and in Australia waivers are sought once the threshold of prosecutors wishing to prosecute is met.

The process, once a decision has been made to seek a waiver of immunity, appears to be standard and consistent with the approach taken by New Zealand i.e. the issuance of a Third Person Note to the sending state and, if the waiver is not agreed, to require the withdrawal of the diplomat and, failing that, the expulsion of the diplomat by declaring the individual *persona non grata*.

There are some reasons to pause before moving toward a rigid specification of the threshold.

First, what constitutes 'serious' might be dependent on the situation. For example, being caught once only for a traffic infringement toward the lesser end of the scale is one thing, but a series of such offences, possibly escalating toward something much more dangerous, might portray a pattern of behaviour with regard to which action should be taken before a serious accident occurs. In short, a series of minor infringements might be seen on a par with a single more serious offence.

Secondly, it may be wise to maintain some degree of flexibility to reflect the fact that social attitudes change. For example, there was a time not really all that long ago in New Zealand (as well as many other Western countries) when to a large extent domestic violence was regarded as a 'family matter', disapproved of perhaps, but by and large regarded as not being something that should be interfered with. Today, we no longer tolerate such behaviour, and expect our enforcement agencies to take appropriate action.

Thirdly, there may be good grounds for leaving the issue of 'seriousness' entirely in the hands of the Police anyway. This preserves clarity in the principle of 'constabulary independence' and allows the Police to exercise the same criteria in considering cases involving diplomats as they apply to non-diplomatic cases. The Ministry of Foreign Affairs and Trade would then simply operate the policy of seeking a waiver.

In conclusion, there may be good grounds for the Ministry of Foreign Affairs and Trade, alongside other agencies such as the Police, Ministry of Justice and Crown Law to review the question of threshold. A possible, perhaps likely, outcome would be to continue to rely on the Police to exercise their judgement on this matter, in a way which protects public safety, serves the interests of justice, and reflects society's standards. This would largely ensure continuation of the situation in which the Ministry of Foreign Affairs and Trade is not obliged to exercise discretion in carrying out the provisions of policy, (subject to any exceptions to policy for extreme situations – a matter which is canvassed later in Section 3.5.6). It also keeps the bilateral relationship somewhat separate from criminal law issues.

3.5.5 Coverage issues

Such an approach might work where criminal matters and therefore the Police are involved, but with the increasing level of diplomatic representation in New Zealand and changing social patterns, what about situations not normally involving the Police, such as disputes over the custody of children?

While such circumstances may occur only rarely, it might be wise for the Ministry, together with Crown Law, and the Ministry of Justice, to consider policy in jurisdictions other than criminal. In particular, who should initiate any request for a waiver of immunity, should such an approach be indicated, given the Police would not be involved?

Another question, which could be considered as part of any review of policy, is whether there might be formal provision for further differentiation in the sorts of waiver of immunity sought.

Already, separate waivers are usually required to take proceedings (prosecution) and for execution of sentence. Some jurisdictions, such as the United Kingdom, have further gradations of waiver, for example, to allow for interview by the Police; for more general investigation procedures including search; or possibly to allow for psychiatric assessment.

3.5.6 Grounds for departure from policy

In determining policy, it is important to consider whether there might need to be provision to allow for departures from it where the situation seems to demand it. Good policy should not require many exceptions, but rigid application in every circumstance might not be in New Zealand's best interests.

I think the grounds for exception to the above statement of policy in relation to serious offences should be extremely rare, but they are not impossible to envisage. The earlier discussion on the approach the Ministry has taken to lesser offences and misdemeanours illustrates there are times when some form of justice was much more likely to have been achieved through the pragmatic approach taken, than if the threshold for waiver had been much lower and the individual concerned ended up leaving the country with no repercussions. Diversion is also an approach used by Police for New Zealand residents in some cases in preference to resorting to prosecution.

However, this kind of approach is generally not appropriate for more serious offences. The sort of situation where New Zealand might not want to seek to prosecute a serious offence would have to be very rare. An example might be the sort of event that occurred with the shooting of a policewoman from within the Libyan embassy in London in 1984. In this situation seeking a waiver would have been pointless, and the imperative for public safety was to remove those involved from the country as quickly as possible. This eventually occurred in the London case, and diplomatic relations were severed.

The key point is that the policy is the default option. Any decision to depart from the policy should be rigorously justified, and should possibly involve decision by another authority such as the Solicitor-General. The key criterion should be the national interest, including considerations of justice, and public and individual safety both in New Zealand and overseas.

3.5.7 Supporting the effectiveness of policy

It is clearly in New Zealand's interests for its policy to be as effective as possible. This raises the question of whether there are further instruments available that would increase the probability of our policy succeeding in its objectives.

A careful balance is necessary here. New Zealand is a small country and its international influence is not limitless. Pushing things too far could at times damage New Zealand's wider interests – for example by endangering the safety of diplomats or other New Zealanders overseas. Considerations of reciprocity need to be factored in.

A further cause for restraint is that it will be important not to create situations that might endanger the success of any legal proceedings that might follow the granting of a waiver. For example, suggestions of 'behind the scenes political deals' between governments may be viewed unfavourably by the courts if they were seen as potentially compromising the judicial process in any way.

Nevertheless, there may be ways the Ministry can consider, on a case-by-case basis, different approaches to getting the point across that a waiver is the Government's strong preference. For example, consideration could be given to making a *démarche*[5] in the foreign capital. In the particular case reviewed later in this report, a significant shift in direction occurred following phone conversations between the Foreign Ministers of the two countries concerned. In the case of consular activities (involving the interests of New Zealanders overseas), New Zealand has been prepared to sacrifice some diplomatic 'capital' to achieve its objectives, and similar approaches may be justified where domestic justice is at stake.

3.5.8 Further policy matters

The incident reviewed later in this report is unusual in that it has been followed by a series of events leading to the return of the alleged offender to face the judicial process within New Zealand. It does illustrate that, even when a waiver is declined, while it may be highly unusual, it is not impossible for a diplomat who has since left the country to return to New Zealand. A further example might be where there is a change of government in a foreign country with the new government taking a very different view of a waiver recently declined.

Such matters have been worked through recently, and throw up some very complex legal and related considerations. There may be benefit in taking advantage of that situation to consider whether there are any further policy implications that should be factored in, including reciprocity considerations for New Zealanders serving their country overseas.

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[5] "A démarche has come to refer either to (1) a line of action; move; countermove; maneuver, especially in diplomatic relations or (2) formal diplomatic representation of the official position, views, or wishes on a given subject from one government to another government or intergovernmental organization." *(Wikipedia)*

Recommendation A

The Ministry of Foreign Affairs and Trade, in consultation with other agencies as appropriate, review the existing policy on waiver of immunity and specifically examine issues relating to:

- threshold
- coverage
- grounds and process for departure from the policy
- additional instruments that might be used to support the policy
- other matters that may be relevant to policy.

Recommendation B

Advice arising from this review be provided to the Minister of Foreign Affairs, and other Ministers as appropriate, with a view to making decisions on a formal statement of policy with regard to waiver of immunity.

3.6 Roles and responsibilities

It is clear from a consideration of the historical data that serious incidents involving diplomatic immunity are rare and that many managers, other than those in the Ministry's Protocol Division, may not have dealt with one before. This means it is important that the roles and responsibilities of the parties are established clearly and reinforced through good communications, issue resolution and transition arrangements. There needs to be clarity amongst relevant divisions of the Ministry of Foreign Affairs and Trade and external parties about where decision making sits. Emails and other communications need to be clear about when action is required, and by whom, and when the intention is simply to inform. I am of the view that there is room for improvement here.

Clarification is also needed on who is responsible for informing whom, including the offices of the Secretary and the Minister, and in what circumstances. In recent years, there has been no established principle of keeping the Secretary informed of protocol cases, it being left to the judgement of the Deputy Secretary or less senior officer whether to elevate to that level of not. Such discretion is necessary but clear responsibility is also important.

I also encountered some lack of clarity on where responsibilities lie when a manager is on leave or travelling on Ministry business, and an 'acting' manager has been appointed. This is no doubt exacerbated by the practice of managers closely monitoring emails, texts and phones while out of the office. Where an acting manager is supervising other managers, there needs to be clarity in particular in relation to reporting lines, issue management and escalation.

Recommendation C

Protocol Division work with relevant parties to develop a clear and shared understanding about when responsibility for different tasks will be transferred and to ensure clear communication on such matters.

Recommendation D

Protocol Division work with relevant parties to clarify expectations about who is responsible for informing whom, and in what general circumstances when incidents involving immunity and waivers of immunity are being managed.

Recommendation E

> Clarity on reporting lines, issue management and escalation requirements be established for when managers at different levels are away from the office, and an acting manager is in place.

The major external relationship in the case of incidents is that between the Police and the Protocol Division of the Ministry of Foreign Affairs and Trade.

The role of Police is that of investigating any alleged offence and coming to a conclusion about whether they wish to prosecute an alleged offender. If they do wish to prosecute they will then request that the Ministry seek a waiver of immunity. In coming to that view, Police will exercise its discretion, as it does with all alleged offences, based on a number of factors including: the seriousness of the offence; the full circumstances; public interest and the evidence and strength of the prosecution case if it went to trial. Once Police have requested that the Ministry seek a waiver, the Ministry will process that request and draft a Third Person Note which is the formal communication between the host country and the sending state. The response by the sending state will also be by a Third Person Note.

While in theory the Ministry currently might have discretion as to whether it will comply with the Police request, I have found from a review of incidents from the last 20 years, only one instance (in 2002) of the Ministry not proceeding with a Police request to seek waiver of immunity. That instance involved a series of driving offences (not related to drink driving or involving third parties) and the outcome was that the diplomat involved surrendered his driving licence for six months and made a donation to charity - probably very much in line with the outcome had immunity been waived and the matter proceeded to court.

As outlined in Section 3.5.6 above, it would be worth considering the mechanism for any exception to the general policy for waiver of immunity.

The other major external relationship is with the mission of a sending state and while it is clear that there is a standard process of seeking waivers through Third Person Notes as the formal communication between countries, there needs to be recognition that the context around such Third Person Notes has the potential to weaken or create ambiguity around the formal message. That means that clarity is required around the process in relation to the Third Person Note including when a transmission is not through the formal handover of the Note, e.g. not in person but by email (as it sometimes may be, in the interests of speed). This issue is also covered in relation to the particular incident in Sections 4.3.1 and 4.3.2 below.

3.7 Processes, protocols and systems

Guidelines have been issued to foreign missions present in, or accredited to New Zealand by the Ministry's Protocol Division setting out the policy and processes in relation to a wide range of topics including the seeking of waivers.

While the practice and underlying policy seem to be well understood within the Protocol Division, the rarity of serious incidents means that the other parts of the Ministry are not as well informed.

There may be benefits, therefore, from providing more guidance around the internal management, especially for serious incidents. This may assist staff in both Protocol and other divisions.

Matters that could be dealt with in such guidelines are:

- Identification of levels of seriousness that might involve different processes, protocols and system requirements.
- The need for interagency coordination so that all parties, which includes Police, Crown Law, the Minister's Office, and relevant divisions within the Ministry of Foreign Affairs and Trade, are effectively looped into developments and aware of activities. The lead division must be responsible for coordination and ensuring the sharing of information.
- How issues are to be managed including stakeholder identification and clear roles and responsibilities, including reporting and sign-off.
- Where there are meetings involving external parties the need to have at least two Ministry of Foreign Affairs and Trade staff present, one a designated note taker and the other as facilitator/chair.
- The need to produce a formal file note/record of key meetings in a timely manner and distribute to stakeholders.
- Key processes, including triggers for escalation, management oversight, consultation and reporting requirements.
- Risk identification and management arrangements and responsibilities.
- Structured arrangements governing handover and, where there are follow-up actions, clarity around roles and responsibilities.

In respect of all the above issues there should be a degree of standardised process, however this should not be over-engineered as judgement is still critical on a case-by-case situation.

There would be value in engaging someone who is proficient in leading conversations about end-to-end processes and is able to work effectively with a range of key stakeholders. It is important to achieve the right balance between processes and guidelines and having someone who can be impartial, drive the right conversations and produce clear documentation would help the work to run smoothly, and ensure the right results.

Recommendation F

Consideration be given to a degree of process mapping for management of immunity and waiver issues.

Recommendation G

Additional internal Ministry guidance be developed on processes, protocols and systems. Guidance should include: interagency and internal coordination; stakeholder identification; roles and responsibilities; meeting arrangements; note taking and record keeping; oversight; consultation; reporting and handover arrangements; and other matters as considered appropriate.

3.8 Communications and awareness building

The events under review provide an opportunity to take a look at both the internal and external communications around the Ministry of Foreign Affairs and Trade's handling of waiver of immunity issues, and to identify scope for possible improvement.

Obviously, the comments which arise tend to focus on potential weaknesses, but it should be noted that there are real strengths as well.

For example, the Ministry and specifically the Protocol Division has some good communication processes and practices in place which enable them to respond very quickly when a significant event occurs, and attend to what is required even at unusual hours. I am also aware that Protocol Division has made some significant efforts in recent years to increase understanding among those (inside or outside the Ministry) whose role means they may encounter immunity and waiver of immunity issues at some point.

At the same time I think there is room for considering potential improvement on a number of dimensions:

Formality of communications

- There is room for clear guidance on good practice in terms of any communications that accompany Third Person Notes, including the avoidance of informal messages in transmittal documents. A standardised template for this would be one possible approach.
- The Protocol Division appropriately uses both formal and informal communications. However, the need for one does not replace the need for the other. Identifying clear points in the process when formal communications should occur to the Minister and/or others is necessary.
- When email trails become lengthy, it's easy to get lost in the volume of information especially if you haven't been party to the conversations as they developed. There is a need to stop and summarise the key points when new people are brought into an issue.

Keeping the right people informed

- There is a tendency at times to rely on hierarchy to keep people who should be informed, in the loop. It is more efficient, in my view, to develop a standard list for each immunity issue and copy people in as appropriate.
- Including the Secretary's adviser on the recipient list provides a useful filter mechanism for keeping the Secretary informed if this may be necessary.
- Both internally within the Ministry, and when communicating to the Minister's office, the duties of the officer concerned should guide who is copied into messages and who is not.
- Consideration should be given to the possibility of relaying to their Parliamentary email addresses, any emails sent to the Ministry email addresses of secondees to Parliamentary Services and Department of the Prime Minister and Cabinet.

Record keeping

- Establishing electronic repositories of all events involving immunity and waivers for those occurring in New Zealand, and (separately) for those involving New Zealand diplomats overseas, would greatly improve accessibility and the ability to ensure consistent treatment over time.
- Continuing to maintain an up-to-date list of all potentially critical contact information would be helpful, including email addresses and contact information for High Commission and Embassy staff to enable easier accessibility after hours.

Media issues

- In part in response to the recent incident, the Ministry has already initiated work on its approach to briefing material for Ministers and others responding to media enquiries, and specifically the need to ensure that media briefing and policy development are clearly differentiated. This work is valuable, and also provides an opportunity to clarify sign-off requirements for content.

- Similarly, the media management around waiver issues has highlighted that the work of the media team is often governed by extremely tight deadlines, despite the need to consult with other parts of the Ministry. This creates a tension between the timeliness of material and its potential accuracy. Any further consideration of the media team operation could usefully look at:
  - when it is necessary to adopt measures such as refining very general briefs;
  - providing information that is suitably qualified as to accuracy and confirmation; and
  - occasions when deadlines are so tight there is no option but to renegotiate them.
- Despite the efficiency and generally strong performance of the media team, the roster for weekend management of the ever increasing demands posed by media enquiries and other events puts considerable strain on what is a small group of people. Consideration could be given to drawing on a wider pool of people to fulfil this role.

General transparency

- In Section 3.4, I reviewed international practices and processes and reference was made to the practice of some countries which either report to Parliament or make public a list of significant alleged transgressions by the diplomatic community. The British Foreign and Commonwealth Office currently go the furthest in this regard, linking alleged offences to the diplomatic mission (but not the individual concerned). I understand that at least one other foreign jurisdiction is also considering moving more in the direction of this model. In my view, greater transparency on such events and their aftermath in New Zealand, few as they are, would do much to enhance public confidence in the Ministry's handling of these matters. Accompanying this by greater transparency relating to the Ministry's immunity and waiver of immunity processes would also be helpful.
- At the same time, such transparency arrangements should not be entered into lightly without careful consideration of the potential consequences. These could include implications for New Zealand diplomats overseas and the effective conduct of our international affairs; consequences for our relationships with a minority of countries; and resource and other implications for the Diplomatic Protection Service and the Police. I note that in the British case these factors appear to have been manageable.
- Should changes be contemplated in this area in due course, it will be important to work through them and reset expectations with the diplomatic community in New Zealand which is much smaller than in other countries we compare ourselves to, and where the overall impact could be somewhat greater than in larger diplomatic capitals. While there might be some concern, reinforcing the expectation that New Zealand expects its laws to be respected should have a positive impact overall.

Recommendation H

The Ministry of Foreign Affairs and Trade review its approach to communications when dealing with immunity and waiver of immunity issues, with the review to encompass the appropriate formality of different communications; who needs to be informed in what circumstances; record keeping; media issues; public transparency of process and incidents; and such other matters as are considered relevant.

4 Incident

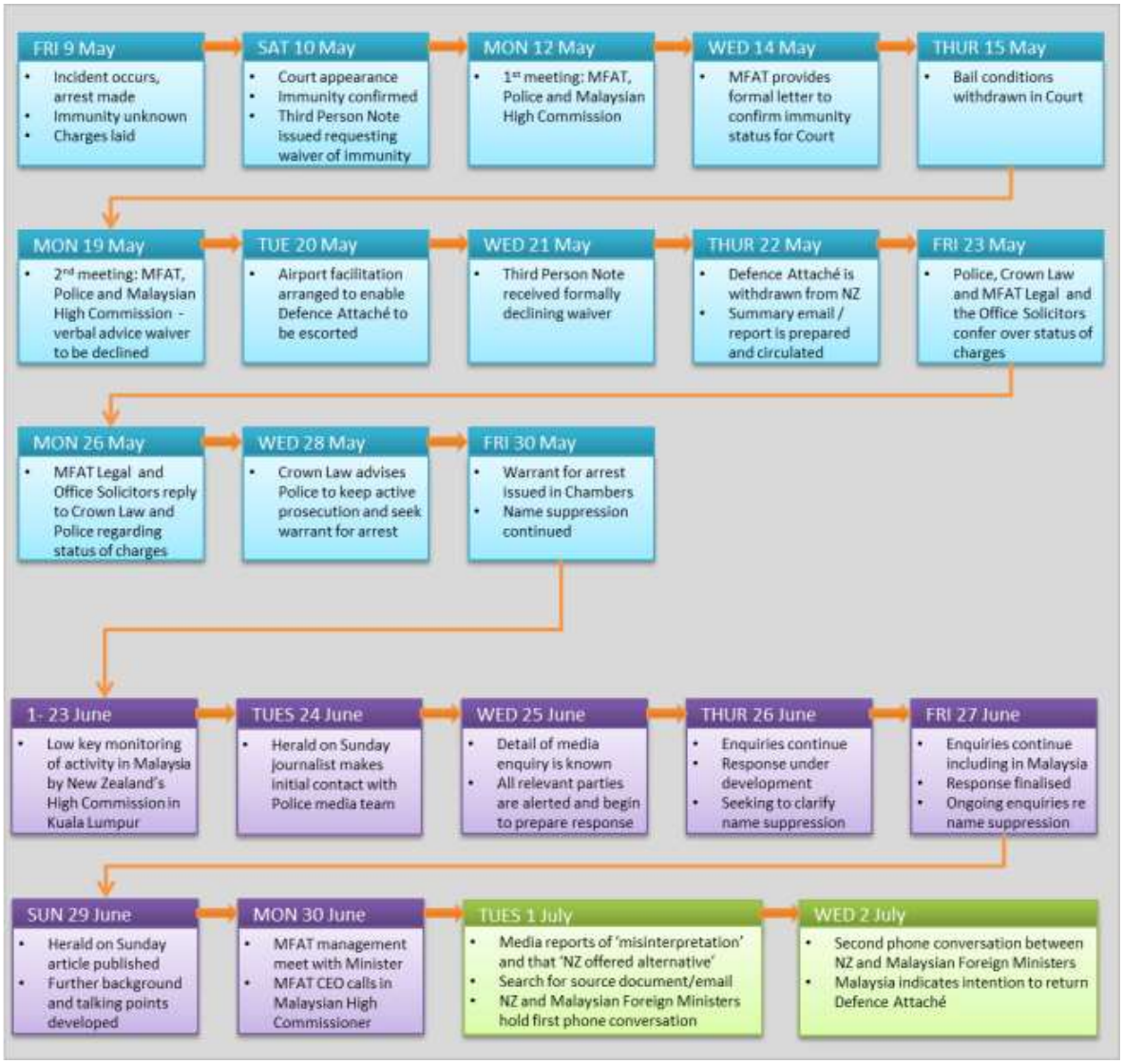
4.1 Introduction

The events that led to this Inquiry began with a serious alleged incident on the evening of Friday 9th May 2014. In the immediately following section, I provide a timeline of the main events as they occurred from the time of the initial incident through to the release of press statements by the Malaysian and New Zealand Foreign Ministers late on Wednesday 2nd July 2014. This marks the point at which the public had been made aware of the main sequence of events, and the Malaysian authorities had agreed to the eventual return of the accused person once necessary arrangements had been negotiated and organised.

In subsequent sections I then review these events in more detail, make observations on the actions of key New Zealand participants as they are relevant to the terms of reference of this Inquiry, and draw some conclusions and recommendations from my analysis of the events concerned.

4.2 Timeline overview

A high-level timeline is provided below.



For further detail, please see Appendices:
Section 6.3 Timeline – May 2014 and Section 6.4 Timeline - June/July 2014.

4.3 Events of 9 - 12 May 2014

This section first reports on the key events of Friday 9th May to Monday 12th May, then provides the detail of my analysis and findings.

4.3.1 Key events

According to information from Police, after purchasing some food a woman was followed to her flat and it is alleged that unauthorised entry occurred during which she was subjected to burglary and assault with intent to rape. The woman was able to fight off her alleged assailant, force him outside, lock the door, and contact Police using the 111 line. The call was logged around 6pm.

Police had a unit nearby and were able to attend the scene within minutes, encountering the alleged assailant partially undressed on the steps of the home. He was arrested and taken to a nearby Police station where he was interviewed. The alleged assailant did not identify himself as a Defence Attaché and made no attempt to claim diplomatic immunity. He presented as somewhat confused and Police formed a view that he may have been suffering from some mental health issues.

In a subsequent search of his belongings, Police discovered evidence that he was employed by the Malaysian High Commission. They immediately informed the Diplomatic Protection Service who in turn contacted a senior officer in the Protocol Division of the Ministry of Foreign Affairs and Trade around 9.20pm. This senior officer then informed the Malaysian High Commissioner who indicated that the person concerned did not have immunity. The senior Protocol officer then contacted the Police again and advised that a representative of the High Commission was being sent to the station, and that the High Commissioner had indicated that the detainee did not have immunity. A lawyer was also contacted and attended the Police station that evening.

Given the ongoing understanding that the Defence Attaché did not have immunity, the Police, acting in good faith, then laid charges against him, and he was held in custody overnight with a court appearance set down for the following day. Given the lateness of the hour and the understanding that immunity did not apply, there was no further role for the Ministry to play that evening.

In the early hours of Saturday 10th May, the Police emailed a report on the events of the previous evening to the Protocol Division of the Ministry of Foreign Affairs and Trade. On reading this around 9am, the senior Protocol officer became concerned as to whether the diplomatic status of the accused person had been properly identified. She contacted her colleague who went into the Ministry to check the relevant records. By 10am, the Protocol officer was able to confirm to Police that in fact the Defence Attaché did hold diplomatic immunity and therefore should not have been detained and charged.

Before anything could be done about this, however, a court hearing had been held, bail conditions set and an order for name suppression granted. The Attaché was released from detention. However, the court provisions meant that, temporarily at least, New Zealand technically continued to be in breach of its responsibilities under the Vienna Convention.

While all this was going on the senior Protocol officer, working in parallel to her colleague, advised senior management and other relevant Ministry officers, and the office of the Minister of Foreign Affairs, which in turn alerted the Minister just after 10am. The senior Protocol officer had also been in touch with staff of the Malaysian High Commission during the day (as well as on the previous evening), but those conversations did not touch on waiver issues.

Both the Police and the Ministry's Protocol staff continued to operate at speed throughout the Saturday. By 12.15pm Police had formally requested that the Ministry seek a waiver of diplomatic immunity from the Malaysian Government. The Protocol officer prepared the appropriate documentation, a formal Third Person Note (as provided in the Appendix, Section 6.5), and emailed a copy of it to a senior officer in the Malaysian High Commission a little over an hour later. The covering email contained language which turned out to be a central issue in this Inquiry, and I will return to this below.

Shortly thereafter, the same Protocol officer sent a copy of the Third Person Note to Ministry management, the Minister's office and New Zealand's mission in Kuala Lumpur. Some commentary accompanied this transmission. Conversations with the Malaysian High Commission continued during the Saturday afternoon and were focused on clarifying for them the diplomatic status of their staff member. Media briefing notes were prepared and provided to the Minister in case the media became aware of the incident.

On Sunday 11th May, the Protocol officer was contacted by the Malaysian High Commission and was asked to set up a meeting with Police for the next day. These arrangements were made.

On Monday 12th May, the media points that had been prepared for the Minister were further refined and included in the Prime Minister's post-Cabinet press conference material in case the matter was raised. Additionally, around 11am that morning the requested meeting was held between Police and the Malaysian High Commission. It was facilitated by the Protocol officer, who was now essentially handling the issue day-to- day from the Ministry's perspective. (The senior Protocol officer who had been involved was preparing to leave the country for two weeks on Ministry business shortly after the meeting was due to end, and so did not attend). Unusually, therefore, there was only one Ministry officer at the meeting. While such events occur infrequently, the usual practice, as might have occurred in other circumstances had the opportunity been taken to formally call in the High Commissioner, was for the senior Protocol officer present to facilitate the meeting and for their colleague to act as note taker.

The Third Person Note was not formally handed over to the Malaysian High Commissioner at the meeting, as would have been the normal practice had the High Commissioner been called in; instead the envelope containing the two formal copies was apparently picked up separately by High Commission staff. The main outcome of the meeting appears to have been that the Malaysian High Commissioner asked the Police to provide further information about the Friday incident, and another meeting was set down for Wednesday 14th May.

4.3.2 Analysis and findings

Given that initially neither the Defence Attaché himself, nor the staff of the Malaysian High Commission were aware of the diplomatic status of the alleged offender, in my view the first actions of Ministry officials (and for the record those of the Police, although these are not the subject of this Inquiry) were entirely proper and prompt on the basis of the information known to them at the time.

In the circumstances, it would be hard to blame anyone in the Ministry (or Police or Courts for that matter), for the initial detention and charging being technically in breach of the provisions of the Vienna Convention given the speed with which events had unfurled and the genuine attempts that were being made to ascertain the facts, and put matters right.

However, as a whole, the actions by the various people involved over these four days set in train the events which then followed. The key factor in understanding these developments is the action of one Ministry officer. To arrive at judgements as to what motivated these particular actions it is necessary to consider not only the actions (including communications) themselves, but also their context, and what the previous practices and likely attitudes of the officer concerned can tell about her intentions.

In an email sent on Saturday 10th May within the Ministry and to the Minister's office (but **not** to the Malaysian authorities), the Protocol officer expressed the view, and I quote, "If this turns out to be a case of mental instability, the best solution will be for the High Commissioner to send the whole family home". In a subsequent email (again internal to the Ministry and Minister's office staff), the same officer stated that "The best outcome (and Police agree) would be for Mr Ismail and his family … to quietly return to Malaysia at the earliest opportunity …" In a third internal email the same day, she expressed the view that a decision to repatriate Mr Ismail and his family "...would bring the matter to a close. I'm hoping that will happen."

Virtually, without exception, those who read those emails at the time interpreted these comments as an expression of personal opinion only and, perhaps after pausing over them briefly, thought no more about them. However there is always a risk that a reader might convert unqualified personal opinions into actions that are contrary to policy, particularly if the reader is not very familiar with what the standard practices for handling such an incident are. In my view, it is wiser in such circumstances to avoid statements that can be viewed as expressing personal opinions, especially in email communications as this increase the risk of confusion.

However, it is important to note that, in themselves, the emails could not have influenced the Malaysian view of what New Zealand was seeking via its formal Third Person Note (as provided in the Appendix, Section 6.5) i.e. a waiver of diplomatic immunity. In the first place, the Malaysian authorities did not see these particular emails. Secondly, and significantly, the context within the emails makes it clear that a waiver was still being sought and that this would still have been necessary for a judge to have ordered a psychiatric assessment which might then have determined whether or not the accused was in a fit state to stand trial. Specific reference is made to this fact in at least one case.

Notwithstanding this, might not these emails betray an attitude, either by the officer concerned or more generally, that the commitment to seeking a waiver was weakened by the speculation concerning possible mental health issues, and that this lack of resolve was conveyed in some way to the Malaysian High Commission? In this regard it is relevant that despite the fact that I have been unable to locate a written version of Government policy on waiver of immunity, every person I spoke to as part of this Inquiry that had any knowledge of protocol issues at all, was crystal clear that any decision by Police that a prosecution was warranted would lead 'virtually automatically' to a corresponding decision to seek a waiver. This was also the very firm view that the Protocol officer (the author of the emails) expressed to me.

Public servants, like anyone else, are entitled to their own opinions. What they are not entitled to do is to allow these opinions to undermine the implementation of Government policy. The key questions, therefore, are whether the Government's intentions were conveyed clearly and unequivocally, and if not, was this done intentionally or inadvertently.

There were two Police officers present at the 12 May meeting with representatives of the Malaysian High Commission. Those officers are very clear that the message that the Government was seeking a waiver was delivered unambiguously at that meeting by the Protocol officer.

While nobody outside of the Ministry's Protocol team was privy to telephone conversations over the weekend involving them and the Malaysian High Commission, these seem to have been focused on clarifying the diplomatic immunity status of the alleged offender, and on making arrangements for the meeting that occurred on the Monday.

The other factor that occupied the mind of the Protocol officer (and Police) related to conversations held with the Malaysians to ensure that sufficient provision was being made around the supervision of the Defence Attaché following his release from custody to ensure the safety of the woman who had experienced the traumatic incident, the Attaché's own family, and the general public. (As it has been the subject of some public speculation, I should also note that there is definite evidence that Ministry staff involved, including the Protocol officer, clearly regarded the incident itself as a very serious matter).

What light can the past practice of the Protocol officer and perceptions of her attitudes cast on her activities during these four days? On this point, and while she was clearly mindful of the speculation that the alleged offender was suffering from mental health issues, feedback was unanimous: she had zero tolerance for even minor misdemeanours by foreign diplomats, let alone for crimes at the more serious end, such as the alleged offence which sparked off the events under Inquiry. Police and Diplomatic Protection Service members, with whom she has worked very closely for a number of years, were particularly strong on this point, indicating that the stance she adopted in conveying what was expected was, if anything, even more firmly stated than the strict approach which they themselves took.

What then can have led to the misunderstanding by the Malaysian authorities? A contributing factor may well have been the fact that their understanding of the New Zealand process in such cases was limited and the New Zealand Protocol officer was placed in a position in which she needed to explain this to them at a time when the Malaysian High Commission's usual expert on such matters was absent. As outlined above, this would have involved the explanation of various scenarios, such as 'what would happen if a waiver were agreed to?' and, 'what would happen if it were not?' It should be borne in mind that for those Malaysian representatives involved, language interpretation may have been an issue; there are cultural differences between the two countries; and the situation involved a degree of stress for the key participants. In these circumstances, the distinction between scenarios on the one hand, and alternatives that could be viewed as equally acceptable on the other, may not have been completely clear.

However, I consider that the most important explanation, and one offered by the Malaysian authorities themselves, relates to a covering email that was sent with the Third Person Note on Saturday 10th May. The intention of this formal diplomatic note was admirably clear (see the Appendix, Section 6.5, for its actual wording). Normally, such emails would be restricted to words of transmission. In this case, more was said. The relevant paragraph is reproduced in full below, with emphases added:

"I am attaching a Third Person Note seeking a waiver of Mr Ismail's immunity from your government. Police tell me he is now on bail and is ***due to appear in court on 30 May*** as he did not state that he has full inviolability from detention and arrest and immunity from prosecution. Despite not mentioning his status to police, it is still necessary for us to seek a waiver which must be express. ***If he were to complete his posting prior to 30 May and return to Malaysia with his family, that would be the end of the matter."***

This email was addressed to a staff member of the Malaysian High Commission, not to the High Commissioner herself, as there had been some problems making contact with her that day. The recipient was the only addressee; nobody else from the Ministry or elsewhere was sent a copy. As far as I have been able to ascertain, no other Ministry officer saw this email prior to the late afternoon of 1 July.

It is certainly possible to read this email as providing an alternative approach to the Malaysian High Commission, but was it intended to encourage this? The Protocol officer told me that 'the matter' was intended to refer to the court appearance referred to earlier in the paragraph, and she included the comment because she wanted to ensure the High Commissioner was aware of what would happen to the court fixture if the waiver were refused. In her (the Protocol officer's) view, there was no room for confusion on the question of whether or not the New Zealand Government wanted the Malaysian Government to waive immunity in this case: the Government's position was that stated in the Third Person Note (as provided in the Appendix, Section 6.5) which was the proper vehicle for government-to-government communication in such situations. However in my view, any additional comment has the potential to influence the reader.

I should also note that the Protocol officer has submitted that the email was not ambiguous. She maintains that if it had been, the High Commissioner would have sought clarification subsequently, which she did not do. However, I do not find this position convincing. It is possible for a message to be ambiguous and for one side to take out of it one meaning only – possibly a meaning very different from the one intended. Furthermore, the Malaysian Government subsequently indicated that they had relied on the email in their interpretation of the New Zealand Government position.

In reaching my view on the questions of clarity and intention, it is necessary for me to consider the total evidence, and not just the expressions of personal opinion in the internal emails.

To summarise the above analysis of the context, the Protocol officer:

- has a record of taking a strong line with diplomats in expecting them to follow the rules, and in conveying the Government's position. This is supported by references in other emails, and the observations and experiences of her colleagues and the Police;
- did not consider that she had the power to influence another Government or that supporting communications would contribute to the official position. She maintains that the Third Person Note alone conveys the Government's official position;
- prepared an email that I believe was worded ambiguously. On the basis of a straightforward reading, it does not clearly explain that 'the matter' relates only to the court fixture and not the incident as a whole, as the Protocol officer stated was her intention;
- expressed personal opinions in internal emails which to others unfamiliar with process and practice potentially detracts from the official position;
- has maintained (strongly) through this Inquiry that she had no intention to mislead.

On balance I accept the Protocol officer's assurance that she was not intending to suggest that the New Zealand Government was seeking anything other than a waiver of immunity. However, I do consider that, inadvertently, the email provided scope for the Malaysian authorities to misunderstand these intentions, as subsequently proved to be the case.

There are also a number of learnings from the events of this initial period which I summarise in the following recommendations:

Recommendation I

When Third Person Notes are being sent in Protocol cases, the phrasing of any covering letter or email should be restricted to the transmission requirements only.

Recommendation J

As a matter of course, all Protocol communications to foreign missions should be copied within the Ministry beyond the author, her or himself.

Recommendation K

It should be standard practice in all Protocol cases of this type for the relevant Head of Mission to be called in, for the formal copies of the Third Person Note to be handed over in person at that meeting and for the Government's intentions, as expressed in the Note, to be carefully explained in the clearest possible terms.

Recommendation L

At such formal meetings, Protocol should ensure a note taker is present in addition to the senior officer presiding over the handover of the Third Person Note. A file note on the meeting should be prepared subsequently.

4.4 Events of 13 - 22 May 2014

This section first reports on the key events of Tuesday 13th May to Thursday 22nd May, then provides the detail of my analysis and findings.

4.4.1 Key events

Following the meeting held on Monday 12th May, various steps were still necessary to undo the court requirements in recognition of the diplomatic status of the Defence Attaché. On Wednesday 14th May, the Ministry provided a formal letter to confirm the Attaché's immunity status for the court. Police formally withdrew the bail conditions in court on Thursday 15th May, following the completion of overnight bail checks, which occurred on the Tuesday and Wednesday evenings. Technically, these checks should not have been completed given the confirmed diplomatic status however it took a while to undo what had been put in place.

At the request of the Police, the Wednesday meeting with the Malaysian High Commission and the Ministry's Protocol officer was postponed until Monday 19th May to give the Police more time to gather information, including a formal interview with the victim which had not yet been completed. At this second meeting, again facilitated by the Protocol officer, Police read out the victim statement, and the seriousness of the charges was acknowledged by those present. The Malaysian High Commissioner verbally confirmed at that meeting that a decision had been made by the Malaysian Government in Kuala Lumpur to decline the request for waiver of immunity, and that the Defence Attaché would be withdrawn from New Zealand on Thursday 22nd May.

In accordance with the provisions of the Vienna Convention, the Protocol officer pointed out that it would be necessary for the Malaysian High Commissioner to advise urgently and formally, via a Third Person Note, that the waiver was to be declined. The High Commissioner also sought an assurance that the file on the case would be sealed, an assurance the police officers at the meeting were not in a position to agree to as access to case files is a court matter. Despite this, the Malaysian High Commissioner apparently expected them to come back to her on the question. The meeting then concluded.

On the following day, Tuesday 20th May, the Malaysian High Commission approached the Ministry's Protocol Division to request airport facilitation arrangements be made to enable the Defence Attaché to be escorted by his manager from Wellington to Auckland, and then through airport security and onto the international flight departing from Auckland. These arrangements, involving some coordination with relevant agencies, were made by a separate member of the Protocol team.

By Wednesday 21st May, the Protocol officer was getting concerned that the Third Person Note formally declining the waiver had still not been received from the Malaysian authorities, and followed up with the High Commission. The Note was eventually received by the Ministry at 8pm that evening and receipt was acknowledged shortly after 9am the following morning. Police were advised and the Attaché's international flight departed at 1.15pm that day (Thursday).

The Ministry and Police continued to correspond throughout the Thursday on border control and re-entry alert provisions. See Appendix, Section 6.6 for the Third Person Note declining the request for a waiver of immunity.

An email reporting on events up to that point (Thursday 22nd May) was prepared and distributed by the Protocol officer just before 4.30pm. Copies of the email were sent to various staff within the Ministry, and addressed to two staff members in the office of the Minister of Foreign Affairs'. The substance of this report was not brought to the attention of the Minister for reasons outlined below.

4.4.2 Analysis and findings

The sense I continually got as I examined the events of this and the preceding period, was of a well-oiled machine that had sprung quickly into action, essentially on a 'standard practice' basis. During interviews I conducted as part of this Inquiry the observation was frequently made to me that the Protocol Division knew what it was doing, had a depth of expertise on immunity and related matters not generally shared more broadly within the Ministry, and had a well-earned reputation for handling this sort of issue very well. Several people also remarked to me that the impression they gained from the Protocol officer's manner was that she tended to prefer working alone and could appear to be resistant to attempts by others to involve themselves in Protocol matters.

My review of historical cases above, including those related to more recent years, does tend to support the view that these have been professionally managed and well-handled against the yardstick of New Zealand's national interests. In particular, there appears to have been very low tolerance indeed for behaviour by diplomats that was in breach of their obligations to observe New Zealand's law (even if such events have been relatively rare). In this regard, the reputation of the Protocol officer seems to me to have been well justified. It is also fair to say in terms of this particular case that she did copy in a moderately broad range of relevant Ministry staff on the summary emails she produced on 10 and 22 May (although, consistent with her usual practice, she did not include the Secretary of Foreign Affairs in the list of addressees).

Nevertheless, the experience does point to several lessons. In the first place, situations possibly involving the exercise of diplomatic immunity are inherently risky to manage and potentially controversial once they reach the public domain. Because of privacy considerations, especially when a victim is involved, there are arguments for not involving too many people in their handling. However, risk is better managed in a team situation in which different angles and perspectives can be brought to bear, even if the team is relatively small. Protocol would provide the lead, but the team could include a representative from the relevant geographic division and, given the focus on risk management, possibly representatives from the Office Solicitors Division and the media team.

Using a team approach also provides the opportunity, from time to time, to put 20 minutes aside to test how the situation is progressing and whether the approach being taken is the best available.

It is also more consistent with the distributed responsibility and collegial approach to management that the Ministry's leadership has been seeking to foster. Collegiality in no way undermines responsibility under a distributed management approach – indeed it reinforces it by allowing the manager to test options and approaches, and ensures a broader range of information can be drawn on by the responsible manager. Lack of a collegial approach meant that opportunities to test and shift direction were lost in the case under review.

There are lessons to be drawn on reporting also. I'm conscious that different ministers prefer different mixes of informal and formal reporting and that these preferences can also shift over time and across issues, even with the same minister. In my view, there is room for both formal and informal reporting on immunity issues, and the need for one does not replace the need for the other. Informal reporting, such as through email, has the advantage of updating recipients promptly when events are moving rapidly.

On the other hand, the current Minister of Foreign Affairs is clear that he always reads all formal submissions and cables. It seems to me that, at key points in the management of serious cases, a formal update via submission is warranted, and I consider this should have been the case with the 22 May report.

Further, the decision not to provide some sort of progress report between the emails around the initial event on the weekend of 10-11 May, and the conclusion of the incident on 22 May seems strange to me. While the outcome of the waiver issue and the departure of the Defence Attaché were accomplished only toward the end of this period, enough was happening around an important situation to warrant keeping the Minister informed. In particular, there was a firm, if informal, indication of intention to decline the waiver on 19 May that in my view should have been reported (with the appropriate qualifications). A report could have alerted the Minister to the direction matters were heading and would have provided an opportunity for him to express his discomfort (or otherwise) if he felt so inclined.

Equally, internal reporting to interested parties over the period after the initial weekend's activities up to the email of 22 May was limited to informal conversations with the exception of one short email to the senior Protocol officer who was travelling overseas. Another reporting issue relates to who is copied into reports or otherwise informed, for example through oral briefings. Again, I consider a collegial need-to-know approach would yield the greatest dividend. In terms of the major internal reporting emails that were sent in this case the following divisions/teams were recipients: geographic division covering Malaysia; the overseas post; two relevant Deputy Secretaries; the media team contact; Office Solicitor and staff in the Minister's office. This is a broad group, although the lack of a team approach meant that the group of recipients was not entirely consistent. Some procedural clarification here would be helpful.

In terms of the Minister's office such clarification would involve giving careful attention to the current responsibilities of office staff rather than always relying on one or two staff members to be the principal conduits to the Minister. In the case under review, some people who should have been copied into the relevant emails were not. Furthermore, the email of 22 May which was sent to one of the Minister's advisers (who is a Ministry secondee) never reached him at the time as his Ministry email account, which he no longer accesses, rather than his Parliamentary email address, was used. I gather this is not an unusual occurrence for seconded staff, despite an automatic out of office message being generated when addresses are inadvertently used as was the case in this situation.

A second Ministerial adviser was also copied into the 22 May email. At the time she was travelling with the Minister and the party had arrived in New York just a few hours earlier from Guyana. The email was despatched at 12.29am New York time, and was just one of the 100 – 200 emails she typically expects to receive each day. Furthermore, because internet reception in Guyana was patchy, she had a considerable backlog of emails to work through. With a busy day ahead on Security Council and other business, she did not get through all the emails in her inbox, and the email remained unopened. Other measures which might have alerted her to the email, such as a text from another member of the office, could not be employed as other staff did not see the email. While the adviser continues to blame herself for not opening the email, I find it hard to see why any significant responsibility should apply in what were difficult circumstances applying at the time.

As has been disclosed publicly, the Secretary of Foreign Affairs was not made aware of the case at this time (and indeed only became aware when media interest emerged in late June). As mentioned above, the senior leadership team has promoted a 'distributed responsibility' ethos within the Ministry, in accord with modern management practice. Under this ethos, individual officers are expected to escalate issues (either for decision or just for information) on the basis of their judgement as to how significant the matter is. 'Significance' is to some extent subjective, but might be expected to be informed by such considerations as the national interest, the rights and interests of members of the New Zealand public, potential political or policy significance, and the probability of the matter becoming the subject of media attention because of its potential interest to the public.

On all the above counts, I consider that the Secretary should have been informed earlier than he was. This would also have enabled him personally to fulfil his 'no surprises' obligations with the Minister of Foreign Affairs. While consistent with her usual practice, the Protocol officer did not copy the Secretary into the reporting, nor was he informed by others up the chain of management who were aware of developments.

What lay behind this lack of escalation to the highest level in the Ministry? The Senior Leadership Team, Divisional Directors and their equivalent third-tier colleagues, and Heads of Mission were all engaged in a major leadership meeting for most of the week commencing 19 May, occupying them from around 8am to 10pm for around four of the five days. There was plenty to keep Ministry officials busy, with the outbreak of fighting in Ukraine, escalation in tensions between China and Vietnam, and the coup in Thailand amongst many other things. However, it cannot be said that these would have dominated entirely the workloads of people involved in the protocol issues, either centrally or otherwise.

Was the distributed responsibility approach at the root of the problem? In my view, it has major advantages to recommend it - not the least because in a significant-sized agency like the Ministry that is constantly busy, operates 24/7 and where events move so much faster and with greater frequency today than even a few years ago, channelling nearly all decisions through a few, key 'wise heads' has become virtually impossible. In particular, it is just not feasible for the Secretary to be informed about everything going on within the Ministry, if indeed it ever has been. However, inevitably judgements about escalation will sometimes be wrong. This was one such occasion.

To insist that officials never make a mistake by neglecting to advise more senior officials (or ministers) about a development of potential interest would be a recipe for seizing up the machinery of government, as the incentive would be created to escalate even relatively trivial issues 'just in case'.

Nevertheless, the failure to inform the Secretary of Foreign Affairs on this occasion is an opportunity to learn more about what needs to be brought to the attention of the most senior officers.

The Ministry has a major international footprint which makes it unique compared to other public sector organisations. It is representing a small country operating in a big, global environment, and is widely recognised as enabling New Zealand to 'punch above our weight class' internationally.

It is also learning, faster in some parts of the Ministry no doubt than in others, that it also has a very important domestic interface. A view I share with a number of others is that the New Zealand public has high and growing expectations of the Ministry to act to protect New Zealanders' rights to justice, whether the issue arises domestically or overseas. The overseas efforts of the Ministry's Consular Division are highly regarded in this area. The recent experience emphasises that this expectation applies domestically also.

In light of these observations I make the following recommendations:

Recommendation M

The Ministry give consideration to adopting, consistent with the distributed responsibility ethos, a more structured cross-divisional team approach when serious cases involving diplomatic immunity are being handled.

Recommendation N

Risk identification and management techniques be built into the handling of serious cases involving diplomatic immunity considerations.

Recommendation O

In addition to informal updates, practices be established in regard to formal progress reports to the Minister via submission in serious cases involving diplomatic immunity matters.

Recommendation P

Protocol Division pay careful attention to the distribution of responsibilities in the Office of the Minister of Foreign Affairs, and address their communications accordingly.

Recommendation Q

With respect to Ministry secondees to Parliamentary Services and the Department of the Prime Minister and Cabinet, the Information Management Division investigate the possibility of automatically duplicating to their Parliamentary email addresses any emails sent to their Ministry email addresses.

Recommendation R

While avoiding being overly prescriptive, senior managers seek to promote further discussion with staff of the sorts of serious factors which would warrant escalation of issues to more senior levels, including the Secretary as appropriate, such as situations involving the rights of New Zealanders when serious crimes are alleged.

4.5 Events of 23 May to 23 June 2014

This section first reports on the key events of Friday 23rd May to Monday 23rd June, then provides the detail of my analysis and findings.

4.5.1 Key events

Compared to the rapid rate at which events had progressed in the fortnight following the initial incident, the following month was relatively quiet. In the first period, the attention of the Ministry's legal officers and Office Solicitors, together with that of Police and Crown Law, focused on the status of the charges that were still before the court, now that the Defence Attaché had departed from New Zealand. There was also the possibility, considered at that time to be remote, that the Defence Attaché might attempt to return to the country in a private capacity at some point, in which case the legal situation also needed to be clarified. Crown Law advice to Police on Wednesday 28th May was to keep an active prosecution by leaving the charges in place, and to seek a warrant for arrest. Police appeared before a judge in Chambers on Friday 30th May where the warrant was issued. Formal name suppression was continued at this time.

The Protocol officer's summary email of 22 May (addressed to New Zealand's mission in Kuala Lumpur), ends with the sentence: "Post [mission] may want to keep an eye and ear on any further action that might be taken." This was taken by the mission to mean low key monitoring of activity in Malaysia relevant to the case, and some follow-up did occur with a New Zealand Defence Attaché touching base with Malaysian counterparts from time to time over the period which followed.

4.5.2 Analysis and findings

My consultations with Police (including the Diplomatic Protection Service) and Crown Law during the course of this Inquiry suggested to me that relationships with the Ministry's Protocol Division have been strong and effective over a period of several years (although contact with Crown Law is probably less frequent than that between Protocol and Police, especially the Diplomatic Protection Service). A high level of mutual trust seems to apply.

At the same time, given the expansion of diplomatic contacts with foreign countries, issues involving diplomatic immunity, if not day-by-day, might well become more frequent, and the division of responsibilities between the agencies may not always be immediately clear. It was pointed out to me that work was being undertaken by Crown Law, Police, the Ministry of Justice and the Ministry of Foreign Affairs and Trade to establish a set of protocols on responsibilities for (general) extradition cases that also arise from time to time, and that it might be worth considering embarking on a project to establish a parallel set of protocols for diplomatic immunity issues. I note that this might also extend to Family Court cases, such as those involving child custody, in which Police are typically not involved. This idea warrants consideration in my view.

While I do not believe it to be a major contributing issue in the current case, I consider it would be useful for the Ministry's Protocol Division to establish clear processes for formally handing over a diplomatic immunity issue when it moves beyond their core area of responsibility and into that of another division, typically a geographic one which would be responsible for the bilateral relationship and leading any activity in the country concerned. In particular, I think the injunction to the mission in Kuala Lumpur to "keep an eye and an ear on further action" was appropriate given my view that this reflects the expectation of the New Zealand public in such serious cases.

More generally, I would suggest that the Ministry review its approach to following up overseas on situations in which a diplomat accused of committing a serious transgression leaves the country, whether this occurs before or after a foreign state declines to waive diplomatic immunity. New Zealand has an interest in justice not only being done, but being seen to be done, and the Vienna Convention does not exempt a diplomat from prosecution in his or her own country.

Follow-up by a New Zealand mission has to be handled very carefully, of course, to avoid any implication of interfering with the judicial process in the foreign jurisdiction, and diplomats like anyone else should be entitled to a fair trial. The best mode of follow-up is likely to vary from case-to-case and country-to-country, but the interest expressed by New Zealand itself will emphasise that this country regards such matters seriously. Furthermore, in many cases it would be difficult, if not impossible, for the victim of an alleged crime to travel overseas to observe any trial or proceedings which might follow. Reporting by the mission, copied as appropriate to the Police or other relevant authority, would also allow for the victim to be kept informed, at least at a general level.

I therefore make the following recommendations:

Recommendation S

The Ministry, in consultation with Crown Law, Police and Ministry of Justice consider the value of establishing protocols to govern interagency responsibilities relating to the handling of diplomatic immunity and waiver issues.

Recommendation T

Protocol Division establish a formal handover process to make it clear when prime responsibility for an immunity issue passes from Protocol to another division.

Recommendation U

The Ministry review its policies and processes governing follow-up by New Zealand's missions overseas for serious situations in which an offending diplomat leaves New Zealand either before or after a foreign state exercises its right to decline to waive diplomatic immunity.

4.6 Events of 24 - 30 June 2014

This section first reports on the key events of Tuesday 24th June to Monday 30th June, then provides the detail of my analysis and findings.

4.6.1 Key events

Things began to warm up again when a *Herald on Sunday* journalist attempted to contact the Police media team about the issue on Tuesday 24th June. On the following day the journalist succeeded in establishing contact and outlined the nature of the enquiry, and requested an interview. The Police media team advised their senior management and alerted the Ministry's media team, which in turn alerted Ministry senior management, Protocol Division and the relevant geographic division. The senior Protocol officer alerted the Malaysian High Commission in Wellington. The senior officer in the geographic division contacted New Zealand's mission in Kuala Lumpur to alert them to the media interest and tasked them to meet with Malaysian Foreign Ministry officials to advise them of the media interest, and to receive an update on activity since the Attaché had returned. Initial media points were also prepared and transmitted to the Minister's office along with background to the incident and copies of the Third Person Notes as provided in the Appendix, Sections 6.5 and 6.6.

Interaction between the Minister's office and the Ministry concerning the media briefing notes continued on Thursday 26th June, and the *Herald on Sunday* journalist at this stage made a direct approach to the Ministry for information. The issue of name suppression came up in the course of development of the media notes and the Ministry sought clarification from Police as to what details could be released publicly without breaching the name suppression order. New Zealand's mission in Kuala Lumpur reported back on their meeting held with Malaysian authorities the previous day, and enquiries continued in Kuala Lumpur that day and the next in an effort to obtain more information on what had happened with respect to the Defence Attaché since his return.

In the course of the afternoon of Thursday 26th June, the Protocol officer who had previously led the day-to-day management of the issue from the Ministry's perspective received a phone call from the Malaysian High Commissioner (one of several calls to and from Ministry officials over this period of time). The primary purpose of the call was to pursue the point of whether or not the Police had 'sealed' the file on the case. During the conversation the High Commissioner mentioned that, when consideration was being given to the request to waive diplomatic immunity, her Minister of Foreign Affairs had been initially disposed toward favouring a waiver. The decision in the final event had been to decline.

So far as I have been able to ascertain, this was the first time anyone in New Zealand had been made aware that a member of the Malaysian Government had leaned in the direction of approving a waiver. I have been unable to establish with certainty what happened next. What is clear is that the Protocol officer immediately informed her senior Protocol colleague, and she believes there was agreement that she should inform the senior officer of the geographic division. The senior Protocol officer recalls being briefed on the conversation with the High Commissioner. She cannot specifically recall any agreement to brief the senior officer of the geographic division, but accepts that it is the sort of action to which she would have acceded, and is likely to have expected it to occur. The Protocol officer believes she then orally informed the senior officer in the geographic division, but he has no recollection at all of such a conversation. I have not been able to find any evidence which would help determine definitively whether or not this conversation took place.

There was also a phone conversation between the two officials (the Protocol officer and senior officer of the geographic division) on Monday 30th June during which the Protocol officer believes she encouraged him to ensure this difference was highlighted in the media briefing for the Minister and the Prime Minister (although she states that this encouragement could have been during the 26th June interaction instead). Again the senior officer of the geographic division has no recollection that this topic was covered.

Again I have found no contemporaneous evidence to determine this issue definitively one way or the other. There is an email shortly thereafter, dated 2 July and from the Protocol officer which refers to informing the senior officer of the geographic division. However, I am satisfied that this email was not opened by him until months later as part of the Inquiry process. The sheer pressure of the day was probably a factor behind missing it initially, although he may have been informed subsequently that the contents were of a personal nature and therefore left it unopened.

Whatever actually happened in regard to this matter, the result was that the Minister, the Secretary and Deputy Secretaries became aware of the Malaysian Minister's initial disposition somewhat later than might otherwise have been the case (i.e. early the following week). Accordingly, the information did not get included in background briefing notes for the Minister and the Prime Minister.

On Friday 27th June officials were still seeking clarification on the scope of the name suppression order. By mid-afternoon, the information sought by the *Herald on Sunday* had been assembled and was approved for release. The Malaysian High Commissioner sought a meeting with the Secretary of Foreign Affairs, but with only 10 minutes available before he was due to fly to Dunedin to deliver a speech, such a meeting was considered not practicable at the time.

Media briefings for the Minister and the Prime Minister continued to be developed over the weekend. In those briefings, the Ministry passed on (Police) advice that the nationality of the alleged offender could be referred to publicly, but I understand that the Prime Minister was uncomfortable with that advice and decided not to follow it.

Interaction among staff of the Minister's office, the Department of the Prime Minister and Cabinet, and the Ministry continued throughout the day to refine the media points for Ministers and provide more background information. Efforts continued into the night to ensure the governments in both Kuala Lumpur (through our mission) and Wellington could be kept informed of developments.

Activity, public and media interest gathered more momentum on Monday 30th June. First thing that morning advice was sought from Crown Law on the scope of the name suppression order. Advice was received and incorporated into briefing materials by 1pm.

Work continued to ensure coordination in responding to media enquiries and to update, in real time, media briefing points and background for the Minister and the Prime Minister. The issue dominated the Prime Minister's post-Cabinet press conference that afternoon. The first requests under the Official Information Act were received by the Ministry that afternoon.

The Minister of Foreign Affairs met with senior Ministry managers in the mid-afternoon to discuss the ongoing handling of the issue. At that meeting it was decided that the Secretary of Foreign Affairs should call in the Malaysian High Commissioner to discuss the issues and to reinforce New Zealand's position and the seriousness with which this incident was being regarded.

He did so promptly, and the two met later that afternoon, with the senior officer of the geographic division present as note taker. A range of issues were traversed at that meeting, all relevant to the matter of this Inquiry, but four stand out as having particular significance:

1. The Malaysian High Commissioner stated that when she had met with the Protocol officer and New Zealand Police she had been offered three options: send the staff member home; waive immunity so he could face prosecution in New Zealand; or not send him home, in which case he would be 'expelled' (i.e. declared persona non grata). She specifically (but incorrectly) mentioned a reference in the New Zealand Third Person Note to sending the man home before his scheduled court appearance on 30 May. See Appendix, Section 6.5 for the Third Person Note.
2. There was a discussion about the mental health issues of the alleged offender, and New Zealand's hope that this would be explored as part of the Malaysian processes. The High Commissioner indicated that the Malaysian Ministry of Defence had already set up a Board of Inquiry, and that the Defence Attaché was being examined to determine his fitness to stand trial.
3. In response to the question of sealing the court file on the case, the Secretary indicated that the Police wished to retain the right to charge the Defence Attaché should he return to New Zealand, so sealing the file was not a course considered by the Police, and nor could it be influenced by the Ministry. In the meantime, the name suppression order remained in place.
4. The High Commissioner revealed that the Malaysian Foreign Minister had initially been receptive to the Defence Attaché standing trial in New Zealand. (I note that this aspect of the discussion was put in bold type by the note taker to indicate its significance).

4.6.2 Analysis and findings

There are suggestions of a degree of internal Ministry disconnectedness at times during this period. I would not want to overstate this, as it is not unusual in any organisation when an issue which had seemed over and done with, suddenly, and perhaps unexpectedly, re-emerges. It was, no doubt, exacerbated to a degree by the fact that the key Protocol officer had an accident over the weekend and was unable to be in the office on the Monday (although she did maintain phone contact that day). Coincidentally, the senior Protocol officer involved previously was again overseas and heavily involved in pre-planned engagements in Papua New Guinea and not on hand either.

However, I believe it reinforces the potential benefit of a more structured cross-functional team approach in such circumstances: the team could have been reconvened rapidly and the opportunity taken to assign a lead (given Protocol absences) and to share information as it emerged.

A further benefit would have been to tap into the risk management antennae of different parts of the organisation. The relevant geographic division is clearly important in this, but I was also struck by the potential the media team has to offer – and perhaps could have offered in this case as well – as their media background means they have a good sense of when elements of an unfolding story do not have the 'right smell' and are well placed to anticipate angles and implications.

The media team is situated within the Executive Services Division and is located close to the Secretary. It is clear from all the input that I have received that it is a well-managed, hardworking and effectively functioning group that serves the organisation, and the Minister, well. Its location has meant that it has developed a good working relationship with the Office Solicitors, and the team has worked hard to establish and maintain good connections and working relationships with the internal Communications Division and others within the Ministry. However, if the media team were further strengthened by the addition of some senior professional quality assurance with the ability and channels to provide advice to senior management, then its inherent risk sensitivities could perhaps be tapped into more effectively in terms of the early identification and management of risk.

The advice provided on the scope of the name suppression order became a source of some irritation at the political level. In part, this problem may have been exacerbated by the fact that the Ministry rarely has to deal with such matters, and by the absence until late in the piece of a more senior legal adviser who had been on bereavement leave at the time. The Ministry therefore discussed the issue of name suppression with the Police and (subsequently) Crown Law. The Police, for good and well-established legal reasons, did not make their file on the case available to the Ministry. The move eventually to seek a Crown Law opinion was sensible in the circumstances, but underlines the comments made earlier about having clear interagency responsibilities on immunity cases and points of law, perhaps by means of an agreed protocol of some sort.

The question of the dissemination of the information concerning the Malaysian Foreign Minister's initial disposition to favour granting a waiver presents some difficulties, as the facts behind its slow emergence are not entirely clear. On the one hand, the account of the senior officer of the geographic division is supported by his subsequent actions and communications, including the fact that he highlighted the reference to this disclosure by the Malaysian High Commissioner as new and significant information in her 'call-in' meeting with the Secretary of Foreign Affairs on 30 June. On the other hand, the Protocol officer's subsequent actions are also consistent with her version of events, as is reinforced by an email she sent on 2 July (two days after the High Commissioner was called in) but which was not opened by the senior officer of the geographic division to whom it was copied.

There are a number of possibilities around the discrepancy in the versions of events put forward by the two officers. On balance, I do not think either is attempting to mislead deliberately. It is possible that memories of what was a frenetic and stressful time have become vaguer with the passage of time, although both officers have held to their version with some conviction. A possibility is that the Protocol officer did intend to pass the information on, but did not do so with sufficient length or clarity for it to be heard. Another possibility is that the senior officer of the geographic division was distracted by the large number of rapidly moving events he was dealing with at the time.

Overall, I am of the view that whether or not the message was ever transmitted at the time to the senior officer of the geographic division, it was certainly not heard by him. He does seem to have been very clear about its significance when we know he subsequently heard it from the Malaysian High Commissioner's own lips and bolded this point in the original record of the meeting prepared that evening (30 June) as he felt it was so surprising and significant.

Would earlier and wider knowledge of this matter have made a difference? It is hard to be certain – views within the Ministry differ to a degree on this point. However, it is true that the information on which Ministers were basing their public messaging was partial, both in terms of this and another, even more crucial respect. The line being taken by Ministers was becoming firmer based on that partial information, i.e. New Zealand asked for a waiver and it was declined. Our preference would have been for him to face justice in New Zealand.

While the information concerning the Malaysian Minister's initial view had not at this point been confirmed from Kuala Lumpur, the knowledge may have resulted in some softening of the line. More significantly perhaps, it is not inconceivable, likely even, that it might have led to earlier direct contact between the two Foreign Affairs Ministers, which may have led to changes in the subsequent course of events. All of this is inevitably speculative.

In passing, I note that it might also have been of assistance to Ministers in their public presentation if the briefings provided to them had noted that decisions not to waive immunity are relatively common in the international context.

The reference to three options in the meeting held between the Secretary and the Malaysian High Commissioner on 30 June was the first identifiable hint that there had been some misunderstanding of New Zealand's communications on the issue. It was clearly met by considerable puzzlement by the two New Zealand officials present at the meeting.

Both the Protocol officer and the Police believe that their messaging was clear during the meetings of 12 and 19 May with Malaysian High Commission representatives. I accept this. However, my view, as indicated earlier, is that in the context of having to explain in detail the various steps of the waiver process and the consequences of approving or declining the waivers, and given cultural and language interpretation difficulties, the difference between 'options' and 'scenarios' may have been less clear to the Malaysians than we might expect. However, of course neither the Secretary nor the senior officer of the geographic division had been present at those meetings.

Furthermore, the suggestion that the Third Person Note (as provided in the Appendix, Section 6.5) referred to sending the man (the Defence Attaché) home bore no relationship to the wording of the Third Person Note that the New Zealand officials had before them, and was clearly incorrect. (Presumably, this was a reference to the accompanying email of 10 May as yet unseen by Ministry staff at the meeting). Understandably perhaps, in the context of defending their position, the whole series of events, and especially the knowledge that they were increasingly moving into the public domain, would have been stressful to the Malaysian representatives. The New Zealand officials, initially, most likely put the comment down to an element of confusion. Nevertheless, they kept returning to the question in the hours that followed.

While it is perhaps slightly tangential to the main thrust of this Inquiry, I should make a brief reference to the question of the sealing of the court files for the purposes of completeness. Again, the apparent confusion on this issue may reflect cultural and legal differences between the two countries. In New Zealand, court files are essentially permanent, i.e. access can be restricted, but this is a decision only the court can make, usually on application of one of the parties. Therefore, it is not an option for Police simply to 'seal' the files, and of course the Ministry of Foreign Affairs and Trade has absolutely no power or influence in this regard. Nor, of course, would it be within the power of the New Zealand authorities to seek to suppress media investigation or publication of the matter, provided this was being done within the ambit of the law.

4.7 Events of 1 July 2014

This section first reports on the key events of Tuesday 1st July, then provides the detail of my analysis and findings.

4.7.1 Key events

Tuesday 1st July was a day of intense activity – research for this Inquiry identified at least 360 relevant emails on this day, some separated in time only by a matter of seconds. The Protocol officer, who had been away the previous day due to any injury, was phoned early by a Deputy Secretary to ascertain whether she was intending to come into work. During the phone conversation, the Protocol officer mentioned the phone call the previous week in which the High Commissioner had disclosed the Malaysian Foreign Minister's initial disposition to agree to a waiver. However, the Deputy Secretary was already aware of this, having read the notes of the call-in the previous evening.

At 8.30am senior Ministry management met with the Minister of Foreign Affairs to discuss the incident and the Secretary's meeting with the Malaysian High Commissioner held the previous day. The Protocol officer was also present and was given three tasks to complete as a result of the meeting. (1) provide information on how less serious transgressions by diplomats were dealt with; (2) advise on the number of defence attachés in Wellington (relevant to name suppression discussions); and (3) review all documentation relevant to the incident to ensure everything was in order. I understand that the last of these tasks was at the instigation of the Secretary, but confirmed by the Minister.

By 10am the Protocol officer had completed the first two tasks in accordance with the Minister's instructions, and had begun the process of printing out hard copies of the large number of emails she had sent or received that might be relevant to the third task or to the Official Information Act requests that had been flowing in.

Active media monitoring and coordination of enquiries and responses continued and still further requests under the Official Information Act were received during the course of the day. By now, a small group of other Ministry officers were involved and were working to coordinate and provide information to the Minister's office and to the Department of the Prime Minister and Cabinet throughout the day.

As part of this work, some officers were considering the implications of, and providing advice concerning name suppression and the possibilities of courses of action involving extradition.

Further Crown Law advice was provided directly to the Minister that morning confirming that mentioning the nationality of the accused would be inconsistent with the name suppression order as it would be likely to identify the individual concerned. However, action had been initiated by the media to lift the court order and this eventually occurred around 2.30pm that afternoon so it became a moot point.

In the meantime, by early afternoon the first media reports began to emerge suggesting that New Zealand had 'offered an alternative' option to the Malaysian authorities and/or there had been a possible 'misinterpretation' of the messages New Zealand had provided.

A Deputy Secretary approached the Protocol officer, who was printing documentation about the incident for review, and started to skim the headings and the first few sentences of some of the emails that had been printed. Noting the tone of some emails and references to the possible mental health issues of the alleged offender in some of the early internal emails sent by the Protocol officer, the Deputy Secretary had been concerned enough to suggest that the search for anything capable of having led to a misunderstanding of the Government's intentions should be speeded up and given priority over the other work on Official Information Act requests.

During the morning, information had come to hand that the Malaysian Foreign Minister intended to hold a press conference on the issue around noon Malaysian time (four hours behind New Zealand time). The Malaysian Minister invited New Zealand's High Commissioner in Kuala Lumpur to attend. In the event, a local member of staff attended the conference on his behalf. The High Commissioner did meet with the Malaysian Foreign Minister immediately after the press conference and this provided an opportunity to discuss the case and the Malaysian perspective.

As the afternoon progressed, the urgency of the need to find whatever it was that had led to the misunderstanding with Kuala Lumpur became more and more pressing. Several Ministry officials, including two Deputy Secretaries, the senior officer of the geographic division and an assistant to the Secretary, dropped by on the Protocol officer to ascertain whether they could assist. However, the view was reached that whatever document was involved, if any, was more likely to be found if the Protocol officer was given space to get on with the task essentially alone.

The Minister's office also made a number of calls expressing the Minister's increasing frustration that the information had not yet been made available. Shortly after 3.15pm a message was sent to the Minister's office advising that "a rigorous search of all Protocol Division's emails has failed to bring any such email to light".

Despite the decision to leave the search through what was a very large stack of material (including a level of duplicated information within email chains) in the hands of the Protocol officer alone, some back-up steps were contemplated (e.g. following up with the Malaysian High Commission) or taken (e.g. following up with the Malaysian Foreign Ministry directly) to assist in the discovery process. This finally bore dividends, as New Zealand's High Commissioner in Kuala Lumpur had been able to ascertain from the office of the Malaysian Foreign Minister the fact that the document alluded to was in fact an email. He was then able to discover the date, time of transmission and author of the email concerned.

This information was immediately conveyed to the senior officer of the geographic division in Wellington who was able to obtain the email from the Protocol officer promptly, once he realised an adjustment to the time of transmission was required due to the time difference between New Zealand and Malaysia.

In the meantime, the Minister's office and Ministry's senior management had been attempting to deal with the differences that had emerged in the public statements from the Malaysian and New Zealand sides. This had been the subject of considerable puzzlement in Wellington, as apparently the Malaysian version was at odds with the record available to the New Zealand officials concerned. Late in the afternoon a decision was made in the Minister's office to take the unusual step of releasing the Third Person Notes in an attempt to cast more light on the official exchange. Media contacts began receiving these documents from 5.42pm. See Appendix, Sections 6.5 and 6.6 for the Third Person Notes.

The discovery of the 10 May email to the Malaysian High Commission was made at almost exactly the same moment. The senior officer of the geographic division rushed it up to the Secretary who was on the phone at his desk, surrounded by a number of others who were involved in the handling of the matter. The Secretary immediately terminated his phone call to read the email, and the Minister's office was alerted promptly. The email was immediately scanned and sent through to the Minister's office at 5.45pm, by which time of course the release of the Third Person Notes had already begun.

During the afternoon, there had been discussion about making arrangements for a phone call between the two Ministers of Foreign Affairs, and this call was finally able to be connected at around 6pm. Being now in possession of the email, the New Zealand Foreign Minister was able to explain to his counterpart that this had just come into his possession and it looked like it was the genesis of the apparent ambiguity in the New Zealand position as conveyed to Malaysia.

Later that evening, the New Zealand Foreign Minister released a statement explaining what had been discovered and including background on the phone call between the two Ministers. In this statement, he indicated that New Zealand considered that the Malaysian side had been acting entirely in good faith. The statement is attached in the Appendix, Section 6.7. Finally, updated and corrected talking points were provided to the Minister's office and the Department of the Prime Minister and Cabinet, in readiness for the next day. The Foreign Minister also briefed the Prime Minister that night.

4.7.2 Analysis and findings

While the events of 1 July are multi-faceted and potentially complex, the issues of direct relevance to this Inquiry are relatively simple to state:

- Why did it take so long to discover what lay behind the Malaysian misunderstanding of New Zealand's intentions on the matter of a waiver?
- Was there a deliberate attempt by anybody to hide, or at least delay release of, the email to the Malaysian High Commission of 10 May?

By way of background, I note that the Protocol officer concerned took the step of returning to work on Tuesday 1st July, despite being in considerable pain and discomfort from her injury, and despite concerns of management and colleagues to ensure her well-being. Her day had begun shortly after 7am with a phone call from a senior manager checking to see if she was intending to come into work, and was quickly followed by her joining the meeting with the Minister at 8.30am.

I am satisfied that in following up after the meeting with the Minister and completing the tasks that had been set for her, she prioritised these appropriately in the morning given the requirements at the time. In other words, the order in which she set about the tasks was a sensible one.

Once two of those three tasks had been accomplished by mid-morning she was then free to attend both to the request to compile and review all relevant documentation to ensure it was in order and to begin the process of assembling material to respond to the multiple Official Information Act requests that had been, and were still, flowing in. Bearing in mind that there was some significant overlap between the materials required for the two tasks, she seems to have commenced them both at once by going through her emails one by one and printing out hard copies of each and every email trail which might be required for the Official Information Act process.

However, it should be noted that the Ministry did not initially regard this task as particularly urgent.

The urgency came after the initial media reports of a potential misinterpretation came in and after the Deputy Secretary started to skim the early emails around 1pm. The urgency was also being driven by the Minister's office as the Minister was going into the House at 2pm and was likely to face questions.

Nevertheless, at least another four hours elapsed before the email was discovered. What was behind this apparent delay? It might be conjectured that if a document existed it is reasonable to consider that it would be a communication addressed to the Malaysian High Commission. Since the initial incident occurred only around a dozen emails had gone from the Ministry to the High Commission on this matter of which probably no more than half a dozen could possibly have been relevant. It might be expected that a more directed search could have discovered the offending email somewhat quicker than actually occurred.

However, it needs to be said that Ministry officials were not entirely clear about what it was they were searching for in the early part of the afternoon. The reference to the content of the Third Person Note (as provided in the Appendix, Section 6.5) the previous evening was clearly incorrect. Some of the suggestions coming through related to 'informal communications' which might well have been oral in nature. Initially it was not clear that the issue definitely related to a document or indeed specifically to an email. If it were, then it could also have been a meeting record of some sort that could be considered to be an informal communication. It might even have been an internal message from the Malaysian High Commission to the Malaysian Government that would not have been seen by a New Zealand official.

However, emails clearly had become the focus of the search following media reporting in the early afternoon and in advance of the message to the Minister's office referring to the failure of the 'rigorous' search of Protocol's emails. The phrasing of this message was perhaps a little unfortunate in that it could be taken to imply that the search was over, but I do not believe it was intended to mislead. By then the conclusion was being drawn that the Protocol officer would not find the email being sought, if indeed it existed, and alternative approaches were being pursued. Indeed, the senior officer of the geographic division was the person who both sent the unsuccessful search message to the Minister's office and was instrumental in pursuing the process that eventually led to the finding of the email concerned.

Once the date and timing of the email was clearly identified it was located quickly enough, and to those reading it, no doubt in part with the benefit of hindsight, the potential ambiguity was apparent immediately. For example, the Deputy Secretary who asked to see the email immediately once it was found, was in no doubt as to its potential ambiguity. However, she deliberately reacted in a low key way as she was determined not to rush to judgement on the basis of the evidence provided by a single piece of paper. Prior to this time, because nobody in the Ministry had been copied into it, nobody involved in the search had been aware that the particular email even existed, except of course, the person who composed and sent it: the Protocol officer.

Why then did she not identify this email at an early stage as the clear object of the search? Attempting to look into someone's mind to determine motive is a process fraught with difficulty and uncertainty. There is also, of course, a range of potential explanations, from the possibility that she had entirely forgotten about it to the less pleasant possibility that she knew it was the item being sought, and was deliberately hiding its existence. I do not believe the latter to be the case, given the fact that the email was in the possession of the Malaysian authorities and would become public sooner or later. Instead, I believe the explanation, based on the observations of the people who knew and observed the Protocol officer at work, is somewhat more complex and subtle.

Initially, at least, the Protocol officer seemed to have been in some confusion about what the object of the search was. While I was unable to establish the timing of this uncertainty precisely, in at least one conversation with a Deputy Secretary the Protocol officer seemed to imply that the search was around a Police question of whether a warrant for arrest could be reissued once a person had left the country. While she was managing physically, others observed that she was somewhat flustered and disorganised, not surprisingly perhaps, given the stress and pressure of the situation and the effects of her injury. Further observation implied that she was finding interruption and questioning from multiple people possibly disruptive and frustrating as it interfered with her own activities. In another conversation reported to me, there was a suggestion that she could not remember sending any email that could be relevant.

Based on comments a number of people have made around the Protocol officer's perceived attitudes and practice, I believe that she simply did not see, and quite possibly could not see, that the email in question could have been misinterpreted. This also happens to be consistent with her own comments, maintained throughout the Inquiry process. With the context of the looming 30 May court case in her mind and referenced when she wrote the 10 May email, and given the fact (indeed established diplomatic understanding) that it is the Third Person Note itself that conveys a government's clear position, and not other communications, she has consistently maintained the view that there was no ambiguity.

Despite these considerations, it is clear the search for the email took significantly longer than desirable, with an embarrassing outcome for the Government, the Minister and the Ministry.

4.8 Events of 2 July 2014

This section first reports on the key events of Wednesday 2nd July, then provides the detail of my analysis and findings.

4.8.1 Key events

Wednesday 2nd July was effectively the last day in which events occurred of relevance to the terms of reference of this Inquiry. Again there was a large amount of activity around managing the issue and coordinating the response, but in many respects action now moved into repairing the damage and moving forward.

Active media monitoring, coordination of Official Information Act requests, and responses to media enquiries continued throughout the day, involving the Minister's office, Department of the Prime Minister and Cabinet and the Ministry. Information was also compiled for the Minister to answer oral questions in Parliament.

The Secretary of Foreign Affairs apologised for the Ministry's handling of the case.

However, the key event was the second phone call between the New Zealand Minister of Foreign Affairs and the Malaysian Foreign Minister which occurred around 5.30pm and covered the outcome of the Malaysian Cabinet meeting at which the issue under this Inquiry had been discussed.

During the phone conversation, the Malaysian Minister indicated Malaysia's intention to waive immunity and return the Defence Attaché to New Zealand. This allowed preparations for this to begin almost immediately, including conversations about the likely process and other management and legal considerations.

The two Ministers each released press statements that evening (New Zealand time), between 9 and 10pm. These are attached in the Appendix, Sections 6.8 and 6.9, respectively.

4.8.2 Analysis and findings

This Inquiry is not concerned with the subsequent events, including the matter of the Defence Attaché's return to New Zealand, except that I should observe that the Ministry (along with other relevant agencies) apparently moved quickly to get things underway.

Perhaps the key observation to make is that it is a tribute to the strong relationships between the two countries, and to that of the Ministers concerned, that it has proved possible to address the aftermath of the events described above without ongoing diplomatic damage. However, clearly the events have had an unfortunate effect (hopefully temporary in the main) on the reputations of a number of individuals and the Ministry. Importantly too, if inadvertently, it added further distress to the person who was the subject of the (alleged) traumatic events of 9 May 2014.

5 Conclusions and recommendations

5.1 Introduction

This section sets out my conclusions about the Ministry's handling of the events under Inquiry. I then provide conclusions alongside each item in the terms of reference before presenting a consolidated list of the recommendations made throughout this report.

5.2 Ministry's handling of the events

The events that led to the initial decision by the Malaysian Government to decline a waiver of immunity following the incident of 9 May were unfortunate to say the least. My conclusion is that they stemmed from one particular email, designed to be helpful to the Malaysian understanding of the situation, but which nevertheless was ambiguous enough to provide scope for the Malaysian authorities to misunderstand the intentions of the New Zealand Government. I do not believe this was an intentional act on the part of the officer concerned. Nonetheless, and while the processes and procedures appear to have worked reasonably well in the past, the events of this case do provide an opportunity to learn and to consider system changes that might help prevent similar occurrences in the future.

Like many such circumstances, if any of a number of things had not happened, the sequence of events which inexorably followed might well have been interrupted. If the Malaysian High Commission staff involved had had a clearer understanding of the immunity status of the alleged offender, and if there had been a better understanding of the information available that outlined the process followed in requests for waiver of immunity, the misunderstanding might never have occurred in the first place. If others had been copied into the email of 10 May to the Malaysian High Commission the ambiguity might have been detected earlier. If various Ministry officers in both the Protocol and relevant geographic division had not been travelling at the time in question, the result might have been different. If the Minister had been informed properly and at an early stage of the declining or intended declining of the waiver of immunity, he might have been able to influence the Malaysian decision much earlier than eventually occurred. If a key officer had not had an accident and unavoidably been out of the office on 30 June, the Ministry might have been better prepared for the issues which followed over that and the following two days. However, none of these or other potential events happened, and the outcome inevitably followed.

That outcome had a number of very serious effects. In the first place, the woman who had suffered traumatically from the alleged incident was left for a considerable period of time with the impression that she would not see justice done in New Zealand. Ministers were seriously embarrassed and had to act very hastily to remedy the situation. They were understandably angry with the turn of events. A number of staff in the Ministry and in the office of the Minister of Foreign Affairs were left with their reputations put publicly at risk. The hard-earned positive reputation of the Ministry itself was damaged. If it had not been for mutual efforts over a number of years to build a strong and positive relationship with Malaysia that could have been put in jeopardy also. None of this was intended of course, but it followed from the initial ambiguity and misunderstanding.

5.3 Response to terms of reference

The terms of reference for this Inquiry require me to answer a number of questions. My conclusions follow.

5.3.1 General conclusions

1. Was this an isolated incident or part of a wider pattern?

This was clearly an isolated incident that emerged from the peculiarities of the circumstances and the scope for misunderstanding arising essentially from one particular email.

2. Did officials meet their obligations to inform Ministers?

Officials did not fully meet their obligations to inform Ministers. While the Minister was initially told in fairly general terms that an incident had occurred, and while the Prime Minister was informed via a press briefing in an even more abbreviated form consistent with general practice, follow-up reporting did not occur effectively, nor in my judgement at appropriate intervals in the process. This appears to have arisen from a less than full appreciation of the risks the case presented, and a tendency to treat the case to some extent according to 'standard practice' despite the seriousness of the alleged offence and the unusual initial events around the arrest and court appearance.

3. How can any shortcomings be rectified?

This is covered in my recommendations, a consolidated list of which follows below.

5.3.2 Appropriateness and robustness of procedures

1a. Is there a formal basis for the stated policy of always seeking the waiver of immunity in relation to legal proceedings against diplomats from other countries or is this a policy that has grown from years of practice?

While there are Protocol Guidelines and a Third Person Note issued to the diplomatic community in 1986, I have not been able to discover any formal basis for the policy as stated. However, there is a clear and generally consistent practice that when Police indicate a desire to proceed to prosecution, the Ministry will seek a waiver of immunity from the government of the country concerned (assuming the individual concerned has not already left the country before action could be taken). This practice is referred to in the Ministry Guidelines on Diplomatic and Consular Immunities. See Section 3.5.1 for details.

1b. Was the Malaysian diplomat case unique or have there been other examples in which officials have departed from unambiguously pursuing a waiver of immunity?

There is only one case in the historical record (in the last 20 years) where an expressed desire by the Police to prosecute did not subsequently result in a request for a waiver of immunity. This related to a traffic incident in 2002 (well before the time of the current Protocol team) that was part of a pattern of repeated behaviour, and suggested disregard for New Zealand law. It seems unlikely the case would have been pursued or any penalties imposed by the authorities of the home country. Nevertheless, the Ministry did follow up assiduously and achieved voluntary action on the part of the diplomat consistent in many ways with justice being served.

1c. Is it accepted practice for Ministry officials to entertain departures from the policy of seeking waivers of immunity? If so, at what level of seniority within the Ministry must authority to do so be sought?

It is not accepted practice to entertain departures from the policy, nor (apart from the instance detailed above) is there any pattern of such practice.

1d. What requirements exist for Protocol Division to report decisions to decline requests for waiver of immunity by other Governments and to what level of seniority in the Ministry?

The issue of reporting is a matter which requires regularising. Current expectations and practice in my view are inadequate; in terms both of timing of reporting on key developments, and in ensuring that the right people are identified and copied in. As things stand, requirements are not clear.

1e. Are these arrangements sufficient to enable the Chief Executive to meet his 'No Surprises' briefing obligations to the Minister of Foreign Affairs?

In my view, arrangements are not sufficient at the moment to meet the 'No Surprises' obligations with a reasonable degree of confidence due to the deficiencies with the reporting arrangements. The recommendations on reporting are designed to address this situation.

1f. Are the arrangements that exist in relation to all of the above consistent with international best practice?

In a number but not all respects, Ministry practices are consistent with international best practice. However, there are a number of learnings available from the practice of other countries which could be applied in the New Zealand context, particularly in terms of reporting requirements and public transparency.

1g. What steps are required to rectify any shortcomings of protocols, policies, systems or processes identified in relation to the above?

Please refer to the recommendations below.

5.3.3 Events relating to the specific case

2a. Did Ministry officials engage with the Malaysian Government in a manner that led the Malaysian Government to believe that a decision on their part to decline a waiver of immunity application would be acceptable to the New Zealand Government?

My conclusion is that there was no deliberate attempt to present an alternative approach as being acceptable to the New Zealand Government. However, I do consider that the email of 10 May was ambiguous and provided scope for misunderstanding by the Malaysian authorities.

2b. Were the proposed talking points for the Prime Minister and the Minister of Foreign Affairs outlining New Zealand's policy of seeking waivers of immunity consistent with the actions being taken by officials in the Malaysian case? What explanation is there for any conflicts between the proposed talking points and the actions officials were taking?

There are several distinct aspects to be considered here.

In terms of the seeking of the waiver of immunity itself, the talking points were consistent with the actions taken by officials, or with respect to the email of 10 May, with the intention behind the sending of that email. However, that email did provide scope for the misunderstanding by the Malaysian Government. Officials were initially unaware of this misunderstanding at the time they prepared the talking points in late June.

Those same talking points and background information incorporated technically inaccurate advice about name suppression which was passed on in good faith from information provided by another agency, and subsequently amended.

The talking points and background did not include information around the initial disposition of the Malaysian Minister of Foreign Affairs to favour a waiver of immunity when that first became available to officials. Further, some context would have been useful to Ministers in terms of explaining that, internationally, governments not uncommonly decline requests for waivers of immunity.

2c. Were Protocol Division officials fully involved in the preparation of the talking points?

Protocol Division officials were involved in the preparation of the talking points, although they did not take the lead in this work in late June early July. Further, due to an accident, a key Protocol Division official was not at work on 30 June, although there was some phone contact. The senior Protocol officer who had some knowledge of the events was out of the country for key parts of the relevant period.

2d. What other Ministry Divisions were both sighted on the management by Protocol Division of the Malaysian case and involved in the preparation of talking points?

Apart from Protocol Division, at various points in the process a range of others were involved in the sense of being informed at times of developments or in the preparation of talking points. However, not all were engaged consistently at all points. Those involved included the relevant geographic division, Office Solicitors, Executive Services Division (media unit), two Deputy Secretaries and New Zealand's High Commission in Kuala Lumpur.

2e. What steps were taken by officials or should have been taken by them in order to meet their obligations to the Government in this case?

Apart from the exceptional circumstances noted in this report, officials followed their 'standard' practices in this case. However, these actions were not always adequate, especially considering the serious nature of the underlying incident. The consolidated recommendations are designed to help address the question of what further steps should be considered in future situations of this sort.

2f. What steps are required to address any shortcomings of protocols, policies, systems or processes identified in relation to the above?

Please refer to the consolidated recommendations below.

5.4 Recommendations

This section contains a consolidated list of the recommendations made throughout this report.

Recommendation A *(from Section 3.5)*

The Ministry of Foreign Affairs and Trade, in consultation with other agencies as appropriate, review the existing policy on waiver of immunity and specifically examine issues relating to:
- threshold
- coverage
- grounds and process for departure from the policy
- additional instruments that might be used to support the policy
- other matters that may be relevant to policy.

Recommendation B *(from Section 3.5)*

Advice arising from this review be provided to the Minister of Foreign Affairs and other Ministers as appropriate with a view to making decisions on a formal statement of policy with regard to waiver of immunity.

Recommendation C *(from Section 3.6)*

Protocol Division work with relevant parties to develop a clear and shared understanding about when responsibility for different tasks will be transferred and to ensure clear communication on such matters.

Recommendation D *(from Section 3.6)*

Protocol Division work with relevant parties to clarify expectations about who is responsible for informing whom, and in what general circumstances when incidents involving immunity and waivers of immunity are being managed.

Recommendation E *(from Section 3.6)*

Clarity on reporting lines, issue management and escalation requirements be established for when managers at different levels are away from the office, and an acting manager is in place.

Recommendation F *(from Section 3.7)*

Consideration be given to a degree of process mapping for management of immunity and waiver issues.

Recommendation G *(from Section 3.7)*

Additional internal Ministry guidance be developed on processes, protocols and systems. Guidance should include: interagency and internal coordination; stakeholder identification; roles and responsibilities; meeting arrangements; note taking and record keeping; oversight; consultation; reporting and handover arrangements; and other matters as considered appropriate.

Recommendation H *(from Section 3.8)*

> The Ministry of Foreign Affairs and Trade review its approach to communications when dealing with immunity and waiver of immunity issues, with the review to encompass the appropriate formality of different communications; who needs to be informed in what circumstances; record keeping; media issues; public transparency of process and incidents; and such other matters as are considered relevant.

Recommendation I *(from Section 4.3)*

> When Third Person Notes are being sent in Protocol cases, the phrasing of any covering letter or email should be restricted to the transmission requirements only.

Recommendation J *(from Section 4.3)*

> As a matter of course, all Protocol communications to foreign missions should be copied within the Ministry beyond the author, her or himself.

Recommendation K *(from Section 4.3)*

> It should be standard practice in all Protocol cases of this type for the relevant Head of Mission to be called in, for the formal copies of the Third Person Note to be handed over in person at that meeting and for the Government's intentions, as expressed in the Note, to be carefully explained in the clearest possible terms.

Recommendation L *(from Section 4.3)*

> At such formal meetings, Protocol should ensure a note taker is present in addition to the senior officer presiding over the handover of the Third Person Note. A file note on the meeting should be prepared subsequently.

Recommendation M *(from Section 4.4)*

> The Ministry give consideration to adopting, consistent with the distributed responsibility ethos, a more structured cross-divisional team approach when serious cases involving diplomatic immunity are being handled.

Recommendation N *(from Section 4.4)*

> Risk identification and management techniques be built into the handling of serious cases involving diplomatic immunity considerations.

Recommendation O *(from Section 4.4)*

> In addition to informal updates, practices be established in regard to formal progress reports to the Minister via submission in serious cases involving diplomatic immunity matters.

Recommendation P *(from Section 4.4)*

Protocol Division pay careful attention to the distribution of responsibilities in the office of the Minister of Foreign Affairs, and address their communications accordingly.

Recommendation Q *(from Section 4.4)*

That with respect to Ministry secondees to Parliamentary Services and the Department of the Prime Minister and Cabinet, the Information Management Division investigate the possibility of relaying to their Parliamentary email addresses any emails sent to their Ministry email addresses.

Recommendation R *(from Section 4.4)*

While avoiding being overly prescriptive, senior managers seek to promote further discussion with staff of the sorts of serious factors which would warrant escalation of issues to more senior levels, including the Secretary as appropriate, such as situations involving the rights of New Zealanders when serious crimes are alleged.

Recommendation S *(from Section 4.5)*

The Ministry, in consultation with Crown Law, Police and Ministry of Justice consider the value of establishing protocols to govern interagency responsibilities relating to the handling of diplomatic immunity and waiver issues.

Recommendation T *(from Section 4.5)*

Protocol Division establish a formal handover process to make it clear when prime responsibility for an immunity issue passes from Protocol to another division.

Recommendation U *(from Section 4.5)*

The Ministry review its policies and processes governing follow up by New Zealand's Posts overseas for serious situations in which an offending diplomat leaves New Zealand either before or after a foreign state exercises its right to decline to waive diplomatic immunity.

6 Appendices

6.1 Terms of reference

Ministerial inquiry into the events surrounding the request for a waiver of the diplomatic immunity of a Malaysian diplomat

Terms of Reference

Events surrounding the decision of the Malaysian Government to decline a request from the New Zealand Government for a waiver of immunity in relation to a Malaysian diplomat have undermined public confidence in the performance of the Ministry of Foreign Affairs and Trade.

This Inquiry is tasked with ascertaining the New Zealand actions that led the Malaysian Government to infer that declining a request for a waiver of immunity was acceptable to the New Zealand Government and:

1. whether this was an isolated incident or part of a wider pattern;
2. whether officials met their obligations to inform Ministers; and
3. how any shortcomings revealed can be rectified.

1. The Inquiry will assess the appropriateness and robustness of procedures to deal with circumstances in which a waiver of diplomatic immunity is sought by the New Zealand Government including the following questions:

a) Is there a formal basis for the stated policy of always seeking the waiver of immunity in relation to legal proceedings against diplomats from other countries or is this a policy that has grown from years of practice?
b) Was the Malaysian diplomat case unique or have there been other examples in which officials have departed from unambiguously pursuing a waiver of immunity?
c) Is it accepted practice for Ministry officials to entertain departures from the policy of seeking waivers of immunity? If so, at what level of seniority within the Ministry must authority to do so be sought?
d) What requirements exist for the Protocol Division to report decisions to decline requests for waiver of immunity by other Governments and to what level of seniority in the Ministry?
e) Are those arrangements sufficient to enable the Chief Executive to meet his "No Surprises" briefing obligations to the Minister of Foreign Affairs?
f) Are the arrangements that exist in relation to all of the above consistent with international best practice?
g) What steps are required to rectify any shortcomings of protocols, policies, systems, or processes identified in relation to the above?

2. The Inquiry will specifically evaluate the events that took place in the Malaysian diplomat case, including both the management of the request for a waiver of diplomatic immunity and the preparation of talking points on the subject, including the following questions:

a) Did Ministry officials engage with the Malaysian Government in a manner that led the Malaysian Government to believe that a decision on their part to decline a waiver of immunity application would be acceptable to the New Zealand Government?
b) Were the proposed talking points for the Prime Minister and Minister of Foreign Affairs outlining New Zealand's policy of seeking waivers of immunity consistent with the actions being taken by officials in the Malaysian case? What explanation is there for any conflicts between the proposed talking points and the actions officials were taking?
c) Were Protocol Division officials fully involved in the preparation of the talking points?
d) What other Ministry Divisions were both sighted on the management by Protocol Division of the Malaysian case and involved in the preparation of the talking points?
e) What steps were taken by officials or should have been taken by them in order to meet their obligations to the Government in this case?
f) What steps are required to address any shortcomings of protocols, policies, systems, or processes identified in relation to the above?

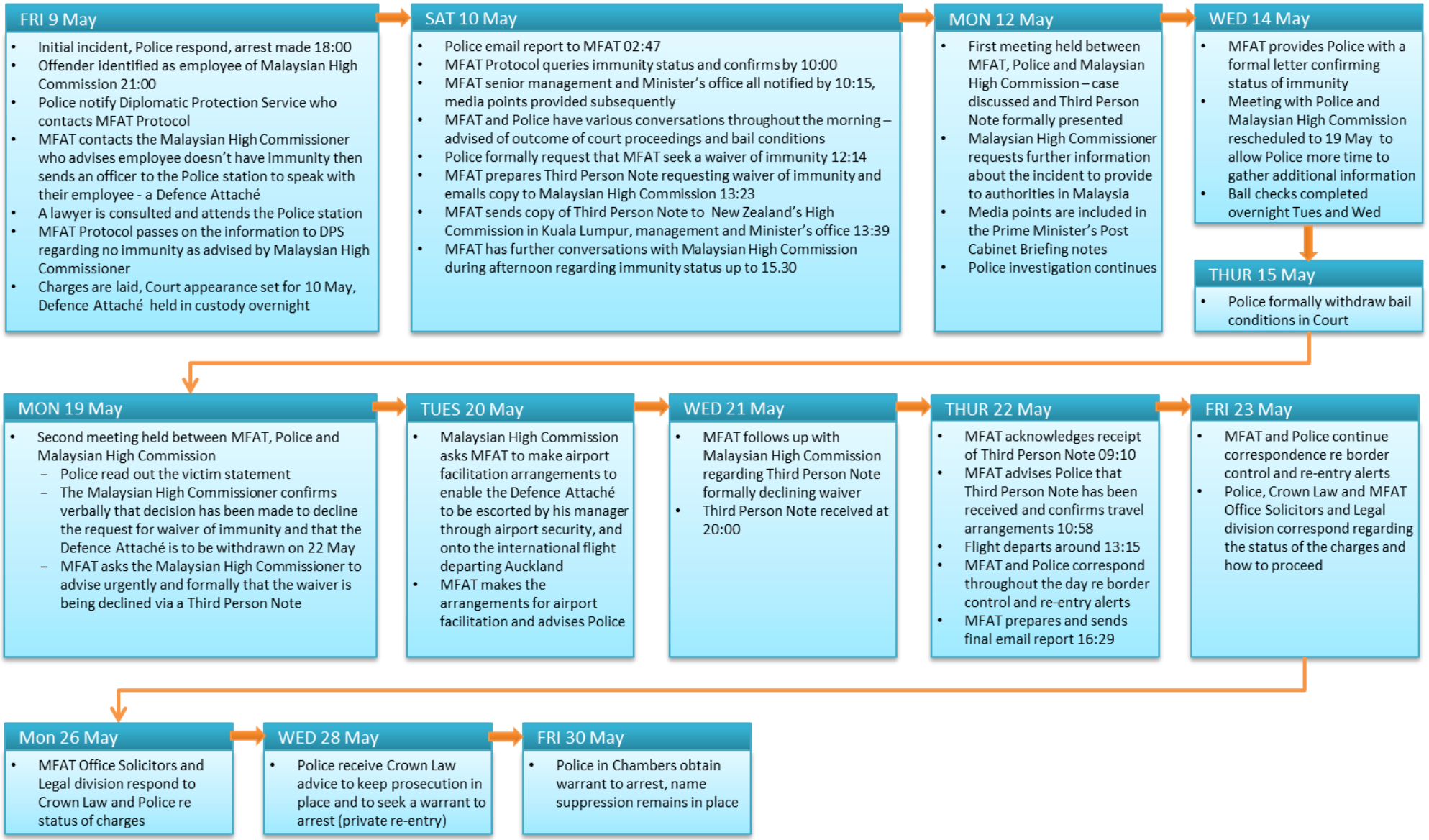
The Inquiry will report in a timely fashion and may, if it sees fit, report findings at any interval in the process.

6.2 Inquiry process

The following diagram provides further commentary about the high-level phases and activities of this Inquiry.

Preliminary	• Terms of reference for Inquiry released 11 July 2014 • Business analysts gathered and organised emails, and reviewed background documentation • Analysed approximately 600+ emails and built initial timeline of incident • Catalogued emails, identified key parties, recorded initial questions for clarification
Foundation	• Reviewer appointed, initial meetings with Minister, CEO, HR, Communications division • Reviewer read all emails and background documentation, familiarised with timeline • Technical briefings on the Vienna Convention, relevant processes and points of law • Analysed and catalogued additional 300+ emails as received, updated timeline • Identified potential people to be interviewed, prepared initial letters and schedule • Identified key communication requirements
Interviews – Rounds 1 & 2	• Research and preparation conducted for each person to be interviewed • Analysed and catalogued additional 200+ emails as received, updated timeline • Held first round of interviews, approximately 35 people interviewed covering incident, historical and international practices • Held second round of interviews, several people interviewed plus other clarifications sought generally via email • Outcomes of all interviews analysed and checked in parallel to other activities
Historical cases and international practices	• Reviewed the detailed files on some historical cases from the last 5 years • Reviewed summary of incidents that have occurred over the last 20-30 years, exceptional cases reviewed in more detail • Sought information from some other countries about their practices • Conducted research of international practices based on information in public domain • Conducted interviews about historical cases and international practices • Analysed processes and practices
Draft report	• Prepared an initial outline for the report • Consolidated learnings from the interview process and other analysis completed • Drafted the report, checking facts as required along the way • Quality assurance and natural justice checks completed
Finalise report	• Worked through final stages to see report content finalised • Determined steps to see report released • Final communications associated with conclusion of Inquiry • Determined approach to provide any subsequent clarification • Closed down Inquiry

6.3 Timeline – May 2014



6.4 Timeline – June/July 2014

6.5 Third Person Note requesting waiver of immunity

NOTE No: 2014/125

The Ministry of Foreign Affairs and Trade presents its compliments to the Malaysian High Commission in Wellington and has the honour to refer to a Police matter concerning Mr MUHAMMAD RIZALMAN BIN ISMAIL, a member of the administrative and technical staff at the High Commission.

The Ministry wishes to advise that the New Zealand Police has informed the Ministry of alleged offences committed by Mr ISMAIL including Burglary and Assault with Intent to Commit Rape. Both charges are punishable by a period of ten (10) years imprisonment under the Crimes Act 1961.

The New Zealand Police believes that it is in the public interest to prosecute these offences due to the serious nature of the offending by Muhammad Rizalman bin ISMAIL and has accordingly requested the Ministry to pursue appropriate avenues to enable a prosecution against Mr ISMAIL to proceed.

In order for the New Zealand Police to proceed with the prosecution of Mr ISMAIL, the Ministry therefore wishes to seek from the Malaysian authorities a waiver of the personal immunity granted to Mr ISMAIL under Article 31 of the Vienna Convention on Diplomatic Relations and of the personal inviolability granted under Article 29.

Should the waiver be granted by the Malaysian authorities, the Ministry will facilitate cooperation between the Malaysian High Commission and the New Zealand Police. The Ministry stands ready to provide advice to the High Commission in dealing with this matter.

The Ministry reminds the Malaysian High Commission that under Article 41 of the Vienna Convention on Diplomatic Relations, it is the duty of all persons enjoying privileges, inviolability and immunities to respect the laws and regulations of the receiving State. It is on this basis and on the advice of Police that the Ministry seeks a waiver of immunity to allow a prosecution to proceed.

The Ministry of Foreign Affairs and Trade takes this opportunity to renew to the Malaysian High Commission the assurances of its highest consideration.

Ministry of Foreign Affairs and Trade
Wellington
10 May 2014

6.6 Third Person Note declining request for waiver

The High Commission of Malaysia presents its compliments to the Ministry of Foreign Affairs and Trade of New Zealand and has the honour to refer to the latter's Note No 2014/125 concerning a police matter involving a member of the administrative and technical staff at the Malaysian High Commission.

The High Commission of Malaysia has the honour to inform that the Government of Malaysia will not waive the personal immunity granted to Mr Muhammad Rizalman Bin Ismail and has decided that he should be repatriated to Malaysia as soon as possible. Should the Ministry of Foreign Affairs and Trade of New Zealand accept this arrangement, the High Commission proposes to send him and his family back home on Thursday, 22nd May 2014 at 1.15 pm by MH 130.

The High Commission of Malaysia would like to also seek the cooperation of the Ministry of Foreign Affairs and Trade of New Zealand and the New Zealand Police to kindly consider sealing all documentations pertaining to the above mentioned matter and withdrawing all charges against Mr Muhammad Rizalman Bin Ismail.

In choosing this course of action, the High Commission of Malaysia would like to assure the Ministry of Foreign Affairs and Trade of New Zealand that the Government of Malaysia will ensure that Mr Muhammad Rizalman Bin Ismail does not return to New Zealand in the future.

The High Commission of Malaysia avails itself of this opportunity to renew to the Ministry of Foreign Affairs and Trade of New Zealand the assurance of its highest consideration.

High Commission of Malaysia
Wellington

21st May 2014

6.7 New Zealand Minister of Foreign Affairs' statement: 1 July 2014

Murray McCully

1 July, 2014

McCully receives Malaysian assurances

Foreign Affairs Minister Murray McCully has tonight spoken to Malaysian Foreign Minister Anifah to clarify any misunderstanding relating to the diplomat who was accused of an attack on a woman and the circumstance involving his return home.

"The Malaysian Foreign Minister is absolutely committed to the alleged offender facing a proper judicial process," Mr McCully says.

"The individual concerned is a military person and the Malaysian Chief of Defence Force has established a Board of Inquiry process. Minister Anifah assured me that any material provided by New Zealand Police will be placed before the Board of Inquiry.

"The Minister made it clear that he would not allow the actions of one individual to tarnish the reputations of all Malaysian diplomats.

"It is clear to me from my conversation with Minister Anifah that his Government's decision to decline New Zealand's request for immunity to be lifted was driven by his Chief of Defence's desire to put in place a robust judicial process to deal with this matter and his officials' belief that this would be an outcome acceptable to New Zealand.

"The Ministry of Foreign Affairs and Trade has this evening provided me with the correspondence between New Zealand and Malaysian officials on this matter. While the formal request is absolutely unambiguous in seeking the lifting of immunity, it is now clear to me that officials engaged in informal communications over what is a complex case, in a manner that would have been ambiguous to the Malaysian Government.

"Due to the nature of the proceedings that lie ahead, I am unable to be more forthcoming on the matter at this stage. However, I can say that the Malaysian side have acted entirely in good faith.

"I have emphasised to my Malaysian counterpart the New Zealand Government's commitment to justice for the victim in this case, and my colleague assures me that the Malaysian Government shares this view," Mr McCully says.

Murray McCully Foreign Affairs

6.8 New Zealand Minister of Foreign Affairs' statement: 2 July 2014

Murray McCully

2 July, 2014

Malaysia will return accused to New Zealand

Foreign Affairs Minister Murray McCully has welcomed the announcement from Malaysian Foreign Minister Anifah that the official accused of an attack on a young woman in Wellington will be returned to New Zealand.

"Earlier this evening I spoke with Minister Anifah and he advised me that the Malaysian authorities will be returning the official in question to New Zealand to assist with our investigation," Mr McCully says.

"I want to convey my thanks to the Malaysian Government for this very welcome development which underlines the good faith and integrity with which they have approached this issue.

"There was never any intention by either Government to let this matter rest, and regardless of whether the process took place in Malaysia or New Zealand there was a strong commitment to seeing justice done. The Malaysian authorities have offered their assistance with the on-going investigation and I welcome their continued involvement.

"It must be noted that the accused has the right to be presumed innocent until proven guilty and deserves the right to a fair trial.

"The young woman involved has been through a great deal and the way this matter has been handled has only added to her suffering. I hope she, and her family, will welcome news that the accused will return to New Zealand so the matter can be fully investigated as was always the Government's intention.

"This is now a matter for the Police and the Courts and I will not be commenting further," Mr McCully says.

Murray McCully Foreign Affairs

6.9 Malaysia Minister of Foreign Affairs' statement: 2 July 2014

Former Malaysian Defence Staff Assistant to be sent back to New Zealand to assist investigation

The Government of Malaysia has decided to send back to New Zealand, Second Warrant Officer Muhammad Rizalman Ismail, former Defence Staff Assistant at the High Commission of Malaysia in Wellington, to assist in the investigation for the charges of burglary and assault with intent to commit rape. Mr. Muhammad Rizalman will be accompanied by a Senior Military Officer from the Ministry of Defence.

This decision was conveyed by YB Dato' Sri Anifah Aman, Minister of Foreign Affairs to his counterpart, the Hon. Murray McCully, Minister for Foreign Affairs of New Zealand this afternoon.

The Malaysian Government is of the view that this decision will provide an opportunity for Mr. Muhammad Rizalman to cooperate fully and assist the New Zealand authorities in the on-going investigations on the allegations made against him. In this regard, the legal principle that one is considered innocent until proven guilty should apply to Mr. Muhammad Rizalman. The Government of Malaysia will provide legal assistance to Mr. Muhammad Rizalman if necessary.

Malaysia has complete faith in the New Zealand legal system and has full confidence that Mr. Muhammad Rizalman will be given fair treatment with dignity as provided under the law.

The Government of Malaysia's decision is a clear testament of the excellent bilateral relations between Malaysia and New Zealand.

PUTRAJAYA
2 July 2014

6.10 Technical Addendum

This is a technical addendum to the Whitehead Report of the inquiry into the way the Ministry of Foreign Affairs and Trade handled the case of a Malaysian High Commission official accused of an attack on a Wellington woman.

This addendum contains technical updates to the statements relating to the policies and practices of the United Kingdom and the Netherlands contained in Section 3.4 of the Whitehead Report entitled International processes and practices.

United Kingdom

Serious cases are defined in the Foreign and Commonwealth Office (FCO) as an offence that could, upon conviction, carry a custodial sentence of 12 months or more. Drink driving and driving without motor insurance are also considered serious offences. If the police consider that a case is one that merits seeking a waiver of immunity they submit the facts to the FCO. The FCO will request a waiver, or partial waiver, of a person's diplomatic immunity to enable the police to arrest, interview under caution and, if appropriate, bring charges. If a waiver of immunity is granted, the alleged crime is investigated by the police or other law enforcement agencies. Thereafter the area Chief Crown Prosecutor (CCP) reviews the case in accordance with the Code for Crown Prosecutors to advise police as to whether the criteria for prosecution are satisfied. If a waiver of immunity is not forthcoming for a serious alleged offence the FCO will seek the withdrawal of the individual and their family, or declare them personae non gratae if necessary. A Written Ministerial Statement of serious offences allegedly committed by those entitled to diplomatic immunity in the UK is published annually (see here).

Less serious cases are considered on a case-by-case basis. The gravity of the alleged offence, the strength of the available evidence, whether the diplomat has allegedly committed any other offences in the UK, and any aggravating or mitigating factors, will all be taken into account when an appropriate response to the offence is considered.

The Netherlands

In the Netherlands, two government agencies (the Office of the Public Prosecutor [OM] and the Foreign Ministry [Protocol]) are involved in the process of seeking a waiver of immunity in relation to serious (criminal law) incidents involving diplomats.

The default setting is that in general Protocol acts on the basis of an official request by the OM. Even so there is considerable consultation between the parties at all stages of the process.

The threshold for seeking a waiver of immunity is in principle for suspicion of an offence serious enough for the law to provide for the possibility of detention on remand. However, the OM does not automatically seek a waiver in all such cases, but only if it believes prosecution would pass the test of 'opportunity' to which all criminal prosecutions are subject. The principle of 'opportunity' in this context refers to prosecution being practical and in the public interest. If the incident does not meet the threshold, either the OM or the police writes to Protocol, providing a description of the incident, with a request to take appropriate steps.

If it does meet the threshold the next decision relates to whether the immune person involved is a 'suspect' in a formal sense. If so, a request for waiver of immunity would normally follow; if not, there will be a decision to either investigate further or take no action. The desirability of further action is evaluated by the Foreign Ministry at all stages.