

# HON DAVID PARKER, ATTORNEY-GENERAL and HON PEENI HENARE, MINISTER OF DEFENCE

## Establishing an Inspector-General of Defence: Policy Proposals

May 2022

This publication provides information on Cabinet's May 2022 decisions on the proposals to establish the Inspector-General of Defence. It comprises:

- the Cabinet minute of decisions: *Establishing an Inspector-General of Defence: Policy Proposals* [GOV-22-MIN-0009].
- the Cabinet paper: *Establishing an Inspector-General of Defence: Approval to draft a Bill* [GOV-22-SUB-0009].

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

It has been necessary to withhold certain information in accordance with the following provisions of the Official Information Act 1982, in order to:

- maintain the constitutional conventions for the timing being which protect the confidentiality of advice tendered by Ministers of the Crown and officials [section 9(2)(f)(iv)].
- maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any department or organisation in the course of their duty [section 9(2)(g)(i)].

Where information is withheld, the relevant sections of the Act are indicated in the body of the document. No public interest has been identified that would outweigh the reasons for withholding it.



# Cabinet Government Administration and Expenditure Review Committee

## Minute of Decision

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

### Establishing an Inspector-General of Defence: Policy Proposals

**Portfolio** Attorney-General, Defence, Defence

On 5 May 2022, the Cabinet Government Administration and Expenditure Review Committee:

#### Background

- 1 **noted** that on 26 October 2021, the Cabinet External Relations and Security Committee agreed in principle to the key design features of the Inspector-General of Defence (IGD) (i.e. its scope, functions, powers, and form), subject to the outcome of targeted consultation with selected external stakeholders [ERS-21-MIN-0035];
- 2 **noted** that the paragraphs outlined below take into account comments resulting from the targeted consultation, which showed broad overall support for the design features of the IGD;
- 3 **agreed** to establish an independent IGD to provide dedicated independent oversight of the New Zealand Defence Force (NZDF);

#### Purpose

- 4 **agreed** that the IGD's purpose be set out in legislation to show that the IGD is intended to:
  - 4.1 assist the Minister of Defence to facilitate democratic oversight of the NZDF;
  - 4.2 provide the Minister of Defence with an avenue, independent of the Defence agencies, to examine and expose failings and gaps in NZDF systems so that steps may be taken to address and prevent problems, and promote system improvements in the NZDF;
  - 4.3 assist the government in assuring Parliament and the public that the activities of the NZDF are subject to independent scrutiny, including in relation to New Zealand's human rights and international humanitarian law obligations;
- 5 **agreed** that principles be set out in legislation to make it clear that, in undertaking its functions, the IGD should ensure that it:
  - 5.1 acts impartially and in the public interest;

5.2 takes account of the military context in which the NZDF operates;

## Scope

- 6 **agreed** that the IGD could look into any NZDF matter, except the activities of Veterans' Affairs, on the referral of the Minister of Defence, the Secretary of Defence (the Secretary) or the Chief of Defence Force (CDF);
- 7 **agreed** that the IGD should have own motion functions into defined NZDF operational activities that would consist of any domestic or international activity:
- 7.1 in time of war, armed conflict or any other emergency, whether actual or imminent;
  - 7.2 authorised by the New Zealand Government and that involves peace support operations, maintenance or restoration of law and order, or the functioning of government institutions, or where the New Zealand Government agrees to provide assistance or contribution;
  - 7.3 declared by the CDF, by notice in writing;
  - 7.4 including training carried out directly in preparation for any specific activity referred to in paragraphs 7.1 – 7.3 above;
  - 7.5 including intelligence operations carried out directly in preparation for, or in support of, any specific activity referred to in paragraphs 7.1 – 7.3 above;

## Functions

- 8 **agreed** that the IGD have:
- 8.1 an investigation function, to scrutinise and respond to issues that have occurred;
  - 8.2 an assessment function, to minimise or prevent the risk of issues occurring;
  - 8.3 an enquiry function, to support the IGD's effective oversight;
- 9 **noted** that the IGD would not have an advisory function, and would not provide advice to the NZDF before or during an event, to permit operational flexibility and the appropriate, efficient and effective use of expertise by military professionals, including military legal advice;
- 10 **noted** that while the IGD would not have a complaints handling function, any person could bring concerns about potential wrongdoing in, or by, the NZDF to the IGD's attention;

## The IGD's investigation function

- 11 **agreed** that the IGD be required to follow the administrative procedures outlined in Appendix C to the paper under GOV-22-SUB-0009, when commencing own motion investigations;
- 12 **agreed** that the IGD be required to follow the administrative procedures outlined in Appendix C to the paper under GOV-22-SUB-0009 when commencing an investigation on referral;
- 13 **agreed** that when considering whether to initiate an investigation, the IGD have the discretion to:

- 13.1 decline to investigate a matter referred to it by the Minister of Defence, the Secretary or the CDF;
- 13.2 defer an investigation until another body has completed its own investigation;
- 13.3 refer a matter or part of a matter, to a more appropriate body for investigation;
- 14 **agreed** that IGD investigations focus on:
- 14.1 the establishment of facts and the making of findings; and as appropriate
- 14.2 making recommendations:
- 14.2.1 that further steps be taken to determine civil, criminal or disciplinary liability; and/or
- 14.2.2 for the improvement and benefit of the NZDF, relevant to the findings of the investigation;
- 15 **agreed** that the IGD be:
- 15.1 the ‘appropriate authority’ for all protected disclosures from current and former NZDF personnel (except those from Veterans’ Affairs), including those that contain classified information, and that the IGD would be able to investigate any protected disclosure on its own motion, including into matters ordinarily requiring a referral from the Minister of Defence, the Secretary or the CDF;
- 15.2 able to receive disclosures from NZDF personnel about potential wrongdoing, provided they are made in good faith (as determined by the IGD), and that the IGD could investigate disclosures relating to operational activities on its own motion but would need to seek a referral from the Minister of Defence to investigate disclosures on other matters;
- 16 **agreed** that NZDF personnel who make a disclosure to the IGD in good faith be protected from discrimination in relation to their employment or service;
- 17 **agreed** that the IGD could investigate matters that have taken place prior to its establishment;
- 18 **agreed** that the CDF:
- 18.1 could prevent an IGD visit to an operational theatre if it would significantly impede an operation, or risk the safety or security of IGD and/or NZDF personnel;
- 18.2 could incorporate conditions on any access to an operational theatre on the same grounds;
- 18.3 must notify the reasons for such a decision to the IGD and the Minister of Defence, and inform the IGD as soon as practicable of any change in the situation that would enable a visit to take place;
- 19 **agreed** that the IGD not be able to investigate a matter related to an operational activity where a Court of Inquiry has been established until that process has concluded, unless there is an unreasonable delay in undertaking and concluding that process, but that the IGD could investigate any matter subject to a Court of Inquiry that has been referred to it by the Minister of Defence or the CDF;

- 20 **agreed** that where the IGD commences an investigation into a matter that is or was subject to a Court of Inquiry, the IGD could follow the administrative procedures set out in Appendix C to the paper under GOV-22-SUB-0009, or determine its own procedures;
- 21 **agreed** that the NZDF be required to:
- 21.1 cooperate and assist the IGD in undertaking its functions;
  - 21.2 through the CDF, notify the IGD of the establishment of a Court of Inquiry, and any reports of civilian harm, including the findings and assessments of NZDF internal processes for responding to civilian harm;
- 22 **agreed** that the IGD produce investigation reports that would be made public to the extent possible while safeguarding national security, New Zealand's international relations, and obligations of confidence;
- 23 **agreed** that finalised investigation reports:
- 23.1 include a summary of facts, the IGD's findings, and any recommendations;
  - 23.2 be sent to the Minister of Defence, the Secretary and the CDF at the same time;
  - 23.3 be shared with the Inspector-General of Intelligence and Security (IGIS) where they include intelligence-related matters;
  - 23.4 have an appropriate security classification determined by the IGD, having taken into account the CDF and Secretary's views (where a report quotes or summarises any classified information, it must not be given a lower classification in the IGD's report);
  - 23.5 subject to paragraph 23.4 above, be published online as soon as reasonably practicable;
- 24 **agreed** that:
- 24.1 published reports should not include information that would be likely to endanger a person's safety, or prejudice:
    - 24.1.1 New Zealand's defence, security or international relations;
    - 24.1.2 New Zealand's ability to receive intelligence from a foreign partner or international organisation; or
    - 24.1.3 a defence agency's ability to continue performing its functions;
  - 24.2 reports should also not include information the IGD is required to protect under the Privacy Act 2020;
  - 24.3 where a report cannot be published, the IGD should consider publishing an unclassified summary;
- 25 **agreed** that prior to publication, investigation reports may be shared with relevant Ministers where they relate to or impact other portfolios, and with the Foreign Affairs, Defence and Trade Committee, subject to paragraphs 23.4 and 24 above, and with permission from the Minister of Defence;

- 26 **agreed** that following an investigation report, the CDF be required to notify the Minister of Defence, the IGD and the Secretary of any action to give effect to, or the reasons to depart from – or not implement – any recommendation;
- 27 **agreed** that the IGD may inform the Minister of Defence about the adequacy of any remedial or preventative measure taken by the NZDF in response to accepted recommendations;

### The IGD's assessment function

- 28 **agreed** that the IGD could undertake assessments into processes, procedures and policies associated with operational activities on its own motion, and into any matter on referral from the Minister of Defence, the Secretary or the CDF;
- 29 **agreed** that the IGD's assessment function not be used to:
- 29.1 assess NZDF Defence Force Orders and processes, procedures and policies for health and safety compliance;
  - 29.2 assess the cost-effectiveness of the NZDF's processes, procedures and policies;
  - 29.3 review the NZDF's performance in undertaking and delivering its functions from an organisational perspective;
  - 29.4 conduct audits that could reasonably be expected to fall within the purview of the Auditor-General; or
  - 29.5 assess whether defence outputs are delivered or that military advice on operational effectiveness and capability development is tested against wider government objectives (e.g. economic, political, foreign affairs);
- 30 **agreed** that when commencing own motion and on referral assessments, the IGD should follow the administrative procedures set out in Appendix C to the paper under GOV-22-SUB-0009;
- 31 **agreed** that the IGD's assessment reports should contain the IGD's findings and any recommendations, and that the requirements set out in paragraphs 23.2 - 23.5 and 24 above would apply to the publication of assessment reports;
- 32 **agreed** that following an assessment report, the CDF be required to notify the Minister of Defence, the IGD and the Secretary of any action to give effect to, or the reasons to depart from – or not implement – any recommendation;
- 33 **agreed** that the IGD may inform the Minister of Defence about the adequacy of any remedial or preventative measure taken by the NZDF in response to accepted recommendations following an assessment report;

### The IGD's enquiry function

- 34 **agreed** that the IGD's enquiry function would enable it to seek information from the NZDF about operational activities outside of an investigation or assessment, and that the IGD would not be required to publish its enquiries;

### Powers and safeguards

- 35 **agreed** that the IGD have the statutory power to:

- 35.1 summon and examine any person on oath and require any person to provide information (including documents or other things in their possession or under their control and information that would not be admissible in a court of law) that the IGD considers to be relevant to an investigation;
- 35.2 enter, at a reasonable time, and with prior written notice, a defence area, or a vehicle, ship or aircraft used by the NZDF, that the IGD considers to be relevant to an investigation (this would be subject to any safety and security conditions imposed under applicable defence regulations);
- 35.3 access NZDF databases and information systems, and records in the NZDF's custody or control, that the IGD considers are relevant for the undertaking of its functions;
- 35.4 require witnesses to disclose information that the IGD considers to be relevant to an investigation, and that would otherwise be under an obligation of secrecy (such as confidentiality requirements) without it constituting a breach of any law that requires that secrecy;
- 36 **agreed** that the power to access NZDF databases and information systems, and records in the NZDF's custody or control, that the IGD considers is required for the undertaking of its functions (paragraph 35.3 above) could also be used to support the IGD's assessment and enquiry functions;
- 37 **agreed** that the IGD's statutory powers contain the corresponding set of protections for both people and information, both during, and after, an investigation, set out in Appendix D to the paper under GOV-22-SUB-0009, and that this include the ability for the IGD to make confidentiality orders to protect witnesses and measures to ensure natural justice;
- 38 **agreed** that the IGD should:
- 38.1 access NZDF databases and information systems, and records in NZDF's custody or control, only when required to perform its functions;
- 38.2 be subject to duties of confidentiality and non-disclosure, with an offence for wilfully failing to comply (as described in paragraph 41.2 below);
- 38.3 share information only with prescribed oversight bodies for the purpose of performing its functions (as described in paragraph 51 below);
- 38.4 be required to consult the CDF prior to sharing certain NZDF information in the performance of its functions (namely, information that would be likely to endanger a person's safety, or to prejudice:
- 38.4.1 New Zealand's defence, security or international relations;
- 38.4.2 New Zealand's ability to receive intelligence from a foreign partner or international organisation; or
- 38.4.3 a defence agency's ability to continue performing its functions);
- 39 **agreed** that the Minister of Defence (in consultation with the CDF and any other relevant party) have the ability to certify that information should not be disclosed, or only disclosed under certain conditions;



## Offences and penalties

- 40 **agreed** that it be an offence, punishable by a maximum fine of \$10,000, for any person that wilfully, without reasonable justification or excuse:
- 40.1 obstructs, hinders, or resists the IGD in the exercise of its powers;
  - 40.2 makes false statements, misleads or attempts to mislead the IGD in the exercise of its powers;
  - 40.3 refuses or fails to comply with any lawful requirement of the IGD;
- 41 **agreed** to the following offences and penalties:
- 41.1 knowingly or recklessly disclosing IGD information in an unauthorised manner:
    - 41.1.1 this offence should be punishable by a maximum fine of \$10,000 for individuals and \$100,000 for body corporates;
    - 41.1.2 leave of the Attorney-General should be obtained before this offence could be prosecuted;
  - 41.2 wilfully failing to comply with a duty of confidentiality or non-disclosure:
    - 41.2.1 this should be applicable to the IGD (including any person in the IGD's office that holds duties of confidentiality and non-disclosure) and punishable by up to two years' imprisonment, or a maximum fine of \$10,000;
    - 41.2.2 leave of the Attorney-General should be obtained before this offence could be prosecuted;
  - 41.3 knowingly failing to comply with a confidentiality order made by the IGD:
    - 41.3.1 this offence should be punishable by a maximum fine of \$10,000 for individuals and \$100,000 for body corporates;

## Form

- 42 **agreed** that the IGD be established as an independent statutory officer, associated with a Ministerial portfolio,
- 43 **agreed** that for clarity and accountability, the IGD should:
- 43.1 produce and publish a work programme setting out an unclassified summary of the IGD's strategic priorities and planned activities for the next financial year (i.e. specific investigations, assessments and enquiries it plans to undertake);
  - 43.2 produce and publish an annual report, to include an unclassified summary of:
    - 43.2.1 the number of investigations, assessments and enquiries undertaken by the IGD during the year;
    - 43.2.2 a brief description of the outcome of each of these activities;
    - 43.2.3 information on the IGD's financial performance;



- 43.2.4 any other information the IGD believes necessary;
- 43.3 consult the Minister of Defence on the draft work programme, and take into account the Minister's feedback unless there are clear and compelling reasons not to;
- 43.4 provide the finalised work programme and annual report to the Minister of Defence, who should present each to the House of Representatives;
- 43.5 publish the finalised work programme and annual report online;
- 44 **agreed** that the IGD's initial structure would consist of an IGD and deputy IGD, supported by a team of three FTEs;
- 45 **agreed** that to enhance the perceived independence and standing of the IGD, the IGD and deputy IGD would be statutory officers:
- 45.1 appointed by the Governor-General on the recommendation of the House of Representatives;
- 45.2 able to be removed or suspended from office by the Governor-General on the recommendation of the House of Representatives for incapacity, bankruptcy, neglect of duty, misconduct, or failure to hold the appropriate security clearance, as determined by the Minister of Defence;
- 46 **agreed** that:
- 46.1 the IGD be appointed for a first term of a maximum of five years, with the potential to be reappointed once for a maximum of three years;
- 46.2 the deputy IGD be appointed for terms of no more than three years, with no limit to the number of times they could be reappointed;
- 47 **agreed** that the remuneration for the IGD and deputy IGD be set by the Remuneration Authority;
- 48 **agreed** that the IGD:
- 48.1 be able to appoint employees on a full-time, part-time, temporary (including contractors) or fixed-term basis, provided they are able to obtain and maintain an appropriate security clearance;
- 48.2 be able to remove employees, subject to the conditions of employment;
- 48.3 must determine the terms and conditions, salary and allowances, of its employees, following consultation with the Secretary of its administering agency;
- 48.4 must operate an employment policy that complies with the principles of being a good employer (as set out in section 118 of the Crown Entities Act 2004);
- 49 **agreed** that the IGD be able to:
- 49.1 appoint an advisory panel to provide comprehensive advice that takes account of the wider context over time;
- 49.2 procure 'one-off' specialist advice on a case by case basis to support the delivery of its functions;

- 50 **agreed** that the IGD:
- 50.1 have discretion to determine the panel's terms of reference, remuneration for panel members in line with the Cabinet Fees Framework, and the appropriate number of panel members;
  - 50.2 be required to report publicly on panel appointments, to ensure transparency and avoid perceptions of bias;

### Other matters

- 51 **agreed** that the IGD be able to consult, and share information, with the:
- 51.1 Inspector-General of Intelligence and Security (IGIS);
  - 51.2 Independent Police Conduct Authority (IPCA);
  - 51.3 Privacy Commissioner;
  - 51.4 Auditor-General;
  - 51.5 Human Rights Commissioner;
  - 51.6 Ombudsman;
- 52 **agreed** that, in recognition of the highly sensitive nature of the information the IGD would have access to, the IGD could only share information with the bodies referred to in paragraph 51 above for the purpose of supporting the IGD's functions;
- 53 **noted** that consequential amendments may be required to the establishing legislation of the bodies listed in paragraph 51 above, to enable reciprocal information sharing arrangements with the IGD;
- 54 **agreed** that the IGD be required to have regard to the IGIS' functions, and to consult the IGIS as appropriate to avoid any potential duplication of investigations into similar matters;

### Accountability from other oversight bodies

- 55 **agreed** that the IGD be subject to:
- 55.1 judicial review, Ombudsman oversight, and Privacy Commissioner oversight;
  - 55.2 the Public Records Act 2005 and monitored by Archives New Zealand;
- 56 **agreed** that the IGD:
- 56.1 be subject to the Official Information Act 1982, except where information relates to its investigations, assessments or enquiries (including information it receives in evidence, and correspondence with other oversight bodies, public service agencies and Ministers);
  - 56.2 be obliged to protect personal information under the Privacy Act 2020, but be exempt from Information Privacy Principles 6 and 7 (obligations to provide access to, and correct, personal information) except where the personal information relates to a current or former IGD employee;

- 56.3 not be a ‘public entity’ under the Public Audit Act 2001, exempting the IGD from annual auditing by the Auditor-General;
- 56.4 be exempt from obligations to prepare end-of-year performance information under the Public Finance Act 1989;

57 **agreed** that IGD employees could make protected disclosures about serious wrongdoing in, or by, the IGD to the Minister of Defence;

**Protections for the IGD**

- 58 **agreed** that the IGD, deputy IGD, employees, contractors and advisory panel members:
  - 58.1 be protected from personal liability (civil and criminal) for acts or omissions done in good faith and in performance or intended performance of the IGD’s functions;
  - 58.2 cannot be compelled to give evidence in any court or in proceedings of a judicial nature, in respect of anything that comes to their knowledge when they are performing or exercising their functions and powers;
- 59 **agreed** that the protections set out in paragraph 58 above would not apply in relation to proceedings for an offence:
  - 59.1 relating to a breach of a duty of confidentiality by the IGD, deputy IGD, employees, contractors or advisory panel members;
  - 59.2 against section 78 (*espionage*), 78AA (*wrongful communication, retention, or copying of classified information*), 78A (*wrongful communication, retention, or copying of official information*), 105 (*corruption or bribery of official*), 105A (*corrupt use of official information*), or 105B (*use or disclosure of personal information disclosed in breach of section 105A*) of the Crimes Act 1961;
  - 59.3 of conspiring to commit an offence against any of the above sections of the Crimes Act 1961; or
  - 59.4 of attempting to commit an offence against any of the above sections of the Crimes Act 1961;

**Financial implications**

- 60 **noted** that new funding to establish and operate the IGD is being sought as a tagged contingency in Budget 2022;
- 61 **noted** that the amount of new operating funding being sought in Budget 2022 for the establishment and ongoing operations of the IGD is as follows:

	2021/22	2022/23	2023/24	2024/25	2025/26 & outyears
Operating Expenditure	-	-	1.130	2.254	2.254

62 **noted that** [redacted] s9(2)(f)(iv), s9(2)(g)(i) [redacted]

63 **noted** that the Ministry of Justice will be the administering agency for the IGD;

## Legislative implications

- 64 **noted** that [REDACTED] s9(2)(f)(iv), s9(2)(g)(i)  
[REDACTED]
- 65 **invited** the Attorney-General and Minister of Defence to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs;
- 66 **authorised** the Attorney-General and Minister of Defence to approve matters of detail in relation to the drafting of legislation, which are consistent with the general policy intent of the paper under GOV-22-SUB-0009, without further reference to Cabinet;
- 67 **authorised** the Attorney-General and Minister of Defence to disclose draft legislation giving effect to the above paragraphs to the IGIS, IPCA, Privacy Commissioner, Auditor-General, Human Rights Commissioner and the Ombudsman, in accordance with the Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown annexed to Cabinet Office Circular (19) 2.

Rebecca Davies  
Committee Secretary

### Present:

Hon Grant Robertson (Chair)  
Hon Dr Megan Woods  
Hon Chris Hipkins  
Hon David Parker  
Hon Stuart Nash  
Hon Jan Tinetti  
Hon Michael Wood  
Hon Kiri Allan  
Hon Dr David Clark  
Hon Meka Whaitiri

### Officials present from:

Office of the Prime Minister  
Officials Committee for GOV

Office of the Attorney-General

Office of the Minister of Defence

Chair, Cabinet Government Administration and Expenditure Review Committee

## Establishing an Inspector-General of Defence: Approval to draft a Bill

### Proposal

1. This paper seeks Cabinet's agreement to establish an Inspector-General of Defence (IGD) to provide dedicated independent oversight of the New Zealand Defence Force (NZDF). It also seeks approval to draft legislation to give effect to this decision.

### Relation to government and Defence portfolio priorities

2. The establishment of the IGD supports the government priority of *laying the foundations for a better future*. Establishing the IGD will strengthen public confidence and support New Zealand's international reputation by providing assurance that the NZDF's activities, in a rapidly changing global security context, are subject to dedicated independent oversight. It would also support the Defence portfolio's *People* priority. The foundational element of Defence's Angitu (meaning continuously striving for success and security) is the mana afforded to its people. The increased transparency and accountability from the establishment of the IGD would support this mana by ensuring the reputation and credibility of the NZDF's people is supported and maintained.

### Executive Summary

3. The Government agreed in principle to the recommendation of the Inquiry into Operation Burnham and related matters (the Inquiry) to establish an independent IGD to oversee the NZDF in July 2020 [ERS-20-MIN-0025]. The key design features - the scope, functions, powers and form - of the proposed IGD were agreed in principle, subject to targeted consultation in November 2021 [CAB-21-MIN-0439].
4. The Ministry of Defence has now undertaken targeted consultation with key stakeholders on the proposal to establish an IGD. Consultation showed broad overall support for the proposals, including the key design features agreed in principle by Cabinet in 2021. The proposals presented in this paper incorporate the policy changes made resulting from consultation.
5. We now seek agreement to establish an IGD with the below key features, and approval to begin drafting legislation to give effect to this decision.
  - 5.1. **Purpose:** the IGD would be established to support the Minister of Defence in facilitating democratic oversight of the NZDF, and provide an avenue

for the Government to assure Parliament and the public that there is independent scrutiny of the NZDF's activities.

Principles, designed to help the IGD deliver its purpose, would guide the IGD in undertaking its role.

5.2. **Scope:** the IGD's scope would include all NZDF activities (excluding functions undertaken by Veterans' Affairs), with own motion oversight of defined operational activities, and of any matter on referral from the Minister of Defence, the Secretary of Defence (the Secretary) or the Chief of Defence Force (CDF).

5.3. **Functions:** the IGD would have the following functions:

5.3.1. Investigation – to scrutinise and respond to issues that have occurred;

5.3.2. Assessment – to identify gaps to minimise or prevent issues from occurring in future; and

5.3.3. Enquiry – to request information to support its oversight and knowledge of NZDF operational activities.

The IGD could receive allegations of wrongdoing, in or by, the NZDF from anyone. It could investigate protected disclosures (i.e. allegations of serious wrongdoing) made by NZDF personnel, including matters ordinarily requiring referral from the Minister of Defence, Secretary or CDF. It could also investigate disclosures about less serious wrongdoing relating to operational activities on its own motion. NZDF personnel would be protected from discrimination in respect of employment or service, provided disclosures are made in good faith.

5.4. **Powers and safeguards:** the IGD would be supported by statutory powers, offences and penalties, with a range of safeguards to protect people, information, national security and international relationships.

5.5. **Form:** the IGD would be an independent statutory officer associated with a ministerial portfolio, supported by a deputy. Both roles would be appointed by the Governor-General on recommendation of the House of Representatives. The IGD would be able to employ staff, appoint an advisory panel and procure external specialist advice as needed.

5.6. **Oversight and accountability:** the IGD would be subject to a range of oversight mechanisms to ensure it acts lawfully, fairly and responsibly.

6. New funding to establish and operate the IGD was approved as a tagged contingency in Budget 2022. Funding of \$1.130 million to establish and operate the IGD in FY2023/24 and ongoing funding of \$2.254 million per annum from FY2024/25 was approved. Establishing the IGD would support the agreed Defence portfolio *People* priority.

## Background

7. The Inquiry recommended establishing an independent IGD to provide oversight of the NZDF following its examination of allegations of wrongdoing in Afghanistan in 2010 and 2011. Cabinet External Relations and Security Committee, with power to act, accepted this recommendation in principle in July 2020, but determined that the Foreign Affairs, Defence and Trade Committee (FADTC) should not be able to refer specific matters to an IGD for investigation [ERS-20-MIN-0025, refers].
8. In February 2021, Cabinet agreed the Government's intended policy outcome and policy objectives for the IGD's establishment, and invited the Attorney-General and Minister of Defence to report back with detailed policy proposals [CAB-21-MIN-0006, refers]. In November 2021, Cabinet agreed in principle the IGD's key design features (its scope, functions, powers, and form), subject to the outcome of targeted consultation with selected external stakeholders [CAB-21-MIN-0439, refers].
9. Fifteen submissions were received during targeted consultation, showing broad overall support for the establishment of the IGD, with no significant changes proposed to the key design features agreed in principle by Cabinet in November 2021. The feedback received has been carefully considered, and we have made some changes, including in the following areas: the process for investigations into ongoing or in-theatre operations, the IGD's access to confidential or sensitive information held by the NZDF, and the ability for the IGD to receive complaints (including from whistle-blowers).
10. A Summary of Submissions report is attached at **Appendix A** and further information on the targeted consultation process is included at paragraphs 88 and 89 of this paper. The proposals presented below represent the final design of the IGD, including the changes made to the policy as a result of consultation. A summary of the final proposals is also attached at **Appendix B**.

## Design features of the proposed IGD

### **Purpose**

*The IGD should be established with a clear purpose*

11. Providing clarity of the IGD's purpose would situate it clearly within the existing system of NZDF oversight, both domestically and internationally. It would also offer transparency regarding the IGD's intended role. Targeting the IGD's purpose on supporting democratic oversight and providing assurance regarding the NZDF's activities would support the Defence portfolio's *People* priority that the NZDF represents and reflects New Zealand. We recommend the IGD's purpose is set out in legislation to reflect the policy intent that the IGD should:
  - 11.1. assist the Minister of Defence to facilitate democratic oversight of the NZDF;
  - 11.2. provide the Minister of Defence with an avenue, independent of the Defence agencies, to examine and expose failings and gaps in NZDF systems so that steps may be taken to address and prevent problems, and promote system improvements in the NZDF; and



- 11.3. assist the Government in assuring Parliament and the public that the activities of the NZDF are subject to independent scrutiny, including in relation to New Zealand's human rights and international humanitarian law obligations.

*Principles would guide the IGD in undertaking its role and help deliver its purpose*

12. To be effective, the IGD's design must reflect the organisational specificities of the NZDF, including the breadth of activities it undertakes in New Zealand and overseas, and the unique rights, expectations and obligations held by its personnel.<sup>1</sup> To that end, we recommend principles should be set out in the legislation to guide the IGD's oversight and support its decision-making. The principles should give effect to the policy intent that in undertaking its functions, the IGD should:
  - 12.1. act impartially and in the public interest; and
  - 12.2. take account of the military context in which the NZDF operates.

### **Scope**

*The IGD's scope should be broad with a targeted focus on operational activities*

13. To provide enduring assurance and flexibility in a rapidly changing defence context, the IGD requires a broad overall scope of oversight. We therefore recommend that the IGD could look into any NZDF matter, except the activities of Veterans' Affairs,<sup>2</sup> on the referral of the Minister of Defence, the Secretary or the CDF.
14. The IGD should also have the ability to look into certain NZDF activities on its own motion. We consider it would be appropriate for the IGD's focus to be targeted towards the NZDF activities that give rise to the most potential to cause harm, undermine public confidence in the NZDF and carry reputational risks to New Zealand. It is these activities in respect of which democratic oversight and ministerial accountability to Parliament are most fundamental. As such, we recommend that the IGD should have own motion functions into defined NZDF operational activities consisting of any domestic or international activity:
  - 14.1. in time of war, armed conflict or any other emergency, whether actual or imminent;
  - 14.2. authorised by the New Zealand Government and that involves peace support operations, maintenance or restoration of law and order or the functioning of government institutions; or where the New Zealand Government agrees to provide assistance or contribution;
  - 14.3. declared by the CDF, by notice in writing;<sup>3</sup>
  - 14.4. including training carried out directly in preparation for any specific activity in paragraph 14.1–14.3; and

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<sup>1</sup> For example, NZDF uniformed personnel can use lethal force, and are subject to the military justice system.

<sup>2</sup> The activities of Veterans' Affairs should be excluded from the IGD's scope as the organisation is a semi-autonomous unit of the NZDF, is accountable to the Minister for Veterans, and operates primarily under the requirements of the Veterans' Support Act 2014.

<sup>3</sup> Note this would be similar to the declarations made by the CDF under the Health and Safety at Work Act 2015, which captures activities such as Explosive Ordnance Disposal.

- 14.5. including intelligence operations carried out directly in preparation for, or in support of, any specific activity in paragraph 14.1–14.3.<sup>4</sup>

## **Functions**

### *The IGD should have both investigation and assurance functions*

15. IGD oversight would add most value by both examining failures that have occurred, and seeking to minimise the possibility of future failures occurring. We therefore recommend the IGD has:
- 15.1. **an investigation function**, to scrutinise and respond to issues that have occurred;
  - 15.2. **an assessment function**, to minimise or prevent the risk of issues occurring; and
  - 15.3. **an enquiry function**, to support the IGD's effective oversight.
16. We do not propose the IGD has an advisory function, as it would risk duplication with the respective roles of the Secretary and the CDF in providing civilian and military advice to the Minister of Defence. While the IGD could provide recommendations to the NZDF as a result of undertaking an investigation or assessment of event(s) that have occurred, it would not have a role in advising the NZDF before or during an event. This would enable the oversight role of the IGD to ensure NZDF compliance and accountability, while permitting operational flexibility and the appropriate, efficient and effective use of expertise by military professionals (including that of military legal advisors).
17. We do not propose the IGD has a function to investigate individual complaints. To do so would duplicate existing mechanisms and detract from the IGD's proposed focus. That said, it is intended that any person would be able to bring concerns about potential wrongdoing in, or by, the NZDF to the IGD's attention. Further detail on disclosures to the IGD is set out in paragraph 22 below.

### **The IGD's investigation function**

#### *The IGD would have broad discretion to initiate own motion investigations*

18. To enshrine its independence and credibility, the IGD should have full discretion to initiate investigations into the NZDF operational activities defined above. To provide clarity relating to the commencement of own motion investigations, we recommend a set of administrative procedures the IGD must follow. These are set out in **Appendix C**.
19. The Minister of Defence, Secretary or CDF may also refer any matter to the IGD for investigation. We recommend the administrative procedures in **Appendix C** apply to on referral investigations.<sup>5</sup> We further recommend, that when

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<sup>4</sup> The IGD would not be concerned with the activities of foreign partners, coalitions or international entities that the NZDF may work with. However, the NZDF's actions as part of, or resulting from, working with such entities would fall within the scope of the IGD.

<sup>5</sup> Note that where a referral relates to an operational activity falling within the IGD's own motion jurisdiction, the administrative procedures relating to the commencement of own motion investigations in **Appendix C** on page 34 would apply.

considering whether to initiate an investigation, the IGD should have the discretion to:

- 19.1. decline to investigate a matter referred to it by the Minister of Defence, Secretary or CDF;
- 19.2. defer an investigation until another body has completed its own investigation; or
- 19.3. refer a matter, or part of a matter, to a more appropriate body for investigation.

*IGD investigations should establish facts and promote system improvement*

20. We recommend that IGD investigations focus on:

20.1. the establishment of facts and making of findings; and as appropriate:

20.2. making recommendations:

20.2.1. that further steps be taken to determine civil, criminal or disciplinary liability; and/or

20.2.2. for the improvement and benefit of the NZDF, relevant to the findings of the investigation.

21. This approach should promote system improvement, and is intended to also allow the IGD to make recommendations that are critical of the NZDF, or that benefit those impacted by the NZDF's actions (e.g. recommending an apology be provided). The approach would not preclude the IGD exploring, as part of an investigation, whether the NZDF's actions were undertaken in accordance with New Zealand law, including New Zealand's human rights and international humanitarian law obligations.

*There should be protections for NZDF personnel who raise concerns with the IGD*

22. While any person would be able to bring concerns about the NZDF's activities to the IGD's attention, NZDF personnel<sup>6</sup> are best placed to identify potential problems within the organisation. We therefore want to ensure there is an avenue for NZDF personnel to raise concerns about potential wrongdoing without fear of reprisal. We recommend the IGD should be:

22.1. the "appropriate authority" for any protected disclosures<sup>7</sup> from current and former NZDF personnel, including those that contain classified information.<sup>8</sup> This would ensure the IGD has oversight of concerns about serious wrongdoing in, or by, the NZDF, including the identification of more widespread or systemic issues;<sup>9</sup> and

22.2. able to receive any disclosures from NZDF personnel about potential wrongdoing. Persons making a disclosure in good faith (as determined by

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<sup>6</sup> Includes members of the services and civil staff (as defined in the Defence Act 1990, ss 2, 11 and 61A), persons seconded to the organisation (from other militaries or other domestic organisations), individuals engaged or contracted for services (contractors), and volunteers.

<sup>7</sup> Protected disclosures related to Veterans' Affairs would continue to be made to the Ombudsman.

<sup>8</sup> The IGIS is the appropriate authority for all protected disclosures that include classified information (information classified as CONFIDENTIAL or above).

<sup>9</sup> The IGD should be able to investigate any protected disclosure from NZDF personnel, including matters that would ordinarily require referral from the Minister of Defence, the Secretary or the CDF.

the IGD) would be protected from discrimination relating to their employment or service. Where a disclosure made in good faith relates to an operational activity, the IGD would have full discretion to investigate it on its own motion. Where a disclosure made in good faith relates to a matter outside of the IGD's own motion scope (and the IGD considers an investigation is warranted), the IGD would need to seek a referral to investigate from the Minister of Defence.

23. This approach would provide comprehensive protections for NZDF personnel and would encourage the reporting of concerns to the IGD, including those that may not, or are perceived not to, meet the threshold of serious wrongdoing of a protected disclosure. The Minister for the Public Service agrees with this approach, noting that the proposal in paragraph 22.1 would require an amendment to the Protected Disclosures (Protection of Whistleblowers) Bill (currently before Parliament awaiting its final reading).

*The IGD should be able to undertake investigations into historic incidents*

24. There may be issues that occur prior to the IGD's establishment, that would be appropriate for the IGD to investigate (rather than establish an inquiry under the Inquiries Act 2013). We therefore recommend that the IGD can investigate matters that have taken place prior to its establishment.
25. Because liability could not be determined as a result of an IGD investigation (only recommendations for further action to determine liability), retrospectivity would not raise concerns in respect of existing rights, duties and situations that address past conduct. The IGD should have the discretion to determine the feasibility or otherwise of an investigation (in terms of accessing the information or evidence required) relating to a historical matter.

*Special process for investigations requiring a visit to an operational theatre*

26. An IGD request to visit an operational theatre<sup>10</sup> as part of an investigation into events where operations are ongoing may give rise to operational, safety or security implications, particularly in situations of armed conflict. As such, we propose a special process to be followed to ensure legitimate operational concerns are taken into account, without preventing an investigation taking place.
27. We recommend that the CDF:
  - 27.1. could prevent an IGD visit to an operational theatre if it would significantly impede an operation, or risk the safety or security of the IGD and/or NZDF personnel;<sup>11</sup>
  - 27.2. could incorporate conditions on any access to an operational theatre on the same grounds;<sup>12</sup> and

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<sup>10</sup> Operational Theatre: A designated geographic area for which an operational-level joint or combined commander is appointed and in which a campaign or a series of major operations is conducted. It encompasses and surrounds the Joint Force Area of Operations in which a joint commander conducts operations, and may include countries that are providing assistance to deployed forces.

<sup>11</sup> Note that visits to an operational theatre may be subject to other approval authorities (beyond CDF's control).

<sup>12</sup> For example, by granting consent to access NZDF areas on a camp or base, but not access to areas where active combat operations may be conducted.

- 27.3. must notify the reasons for such a decision to the IGD and Minister of Defence, and inform the IGD as soon as practicable of any change in the situation that would enable a visit to take place.
28. Where a visit to an operational theatre is not possible, the IGD's powers and the obligation on the NZDF to cooperate with the IGD would enable information to be gathered from the NZDF and other agencies from within New Zealand, imagery and video footage to be obtained and preserved, and reports to be made by officers in theatre to NZDF HQ. The CDF and IGD could also discuss alternative ways for investigations to be supported, for example, the facilitation of interviews via video-link, where it is feasible to undertake them.

*The IGD may investigate matters subject to a Court of Inquiry in limited circumstances*

29. The NZDF sets up Courts of Inquiry to investigate the death or serious injury to a member of the armed forces in peacetime, aircraft accidents, and other matters of sufficient gravity. There is a balance to be struck between the need for the NZDF to continue to be empowered to own, investigate and resolve issues, and the need for transparency and independence where there is a high level of public concern.
30. We recommend that the IGD should not be able to investigate a matter related to an operational activity where a Court of Inquiry has been established until that process has concluded, unless there is an unreasonable delay in undertaking and concluding that process. The IGD would, however, be able to investigate any matter subject to a Court of Inquiry if it has been referred from the Minister of Defence or the CDF.
31. We further recommend that where the IGD commences an investigation in response to the circumstances in paragraph 30 above, the IGD could either follow the administrative procedures set out in **Appendix C**, or determine its own administrative procedures. This would provide the IGD with the flexibility required to adapt its approach (particularly in respect of drafting and agreeing terms of reference) depending on the stage at which an investigation commences.

*There should be obligations on the NZDF to support the IGD's oversight*

32. IGD oversight would be enhanced by the cooperation of the NZDF, and the notification of certain information that may be relevant to the IGD's functions but not in the public domain. We recommend the NZDF should be required to:
- 32.1. cooperate and assist the IGD in undertaking its functions;<sup>13</sup>
  - 32.2. through the CDF, notify the IGD of the establishment of a Court of Inquiry, and any reports of civilian harm, including the findings or assessments of NZDF internal processes for responding to civilian harm.<sup>14</sup>

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<sup>13</sup> Detail on expectations of cooperation and assistance would be determined between the IGD once appointed and the NZDF, for example through a Memorandum of Understanding between the two organisations.

<sup>14</sup> Such as those established by Defence Force Order 35 in response to the Inquiry.



*Investigation reports should be published online to promote transparency*

33. A key Defence portfolio priority is that the reputation and credibility of the NZDF is supported and maintained. To support this, and to deliver public accountability, transparency regarding the outcome of IGD investigations is key. We therefore recommend that the IGD should produce investigation reports that would be made public to the extent possible while safeguarding national security, New Zealand's international relations, and obligations of confidence.
34. We further recommend that finalised investigation reports should:
  - 34.1. include a summary of facts, the IGD's findings, and any recommendations;
  - 34.2. be sent to the Minister of Defence, the Secretary and the CDF at the same time;
  - 34.3. be shared with the IGIS where they include intelligence-related matters;
  - 34.4. have an appropriate security classification determined by the IGD, having taken into account the CDF and Secretary's views. Where a report quotes or summarises any classified information, it must not be given a lower classification in the IGD's report; and
  - 34.5. subject to paragraph 34.4, be published online as soon as reasonably practicable.
35. Published reports should not include information that would be likely to endanger a person's safety, or to prejudice: New Zealand's defence, security or international relations; New Zealand's ability to receive intelligence from a foreign partner or international organisation; or a defence agency's ability to continue performing its functions.<sup>15</sup> Reports should also not include information the IGD is required to protect under the Privacy Act 2020. Where a report cannot be published, the IGD should consider publishing an unclassified summary.
36. Prior to publication, investigation reports may be shared with relevant Ministers where they relate to or impact other portfolios, and with FADTC, subject to paragraphs 34.4 and 35, and with permission from the Minister of Defence.

*The CDF must inform the Minister of its response to IGD recommendations*

37. Following an IGD investigation, we recommend that the CDF be required to notify the Minister of Defence, the IGD and the Secretary of any action to give effect to, or the reasons to depart from – or not implement – any recommendation.
38. We consider there is also value in enabling the IGD to inform the Minister of Defence if it considers the NZDF's response to any accepted recommendation to be inadequate. Both the IGIS and Independent Police Conduct Authority (IPCA) have mechanisms for providing advice (to ministers (IGIS) and the Attorney-General and the House (IPCA)) regarding the receiving body's response to recommendations. We recommend that the IGD has a similar ability to inform the Minister of Defence about the adequacy of any remedial or preventative measure taken by the NZDF in response to accepted recommendations to support accountability.

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<sup>15</sup> Information not to be published is intended to be akin to s 188 of the Intelligence and Security Act 2017.

### **The IGD's assessment function**

*Assessments would provide a preventative approach, promoting system improvement*

39. Enabling the IGD to assess the NZDF's processes, procedures and policies against relevant best practice would highlight problems early and prevent escalation into issues requiring future investigation. Assessments could also be used to provide an independent view on the overall health of parts of the system (for example the military justice system). We recommend that the IGD could undertake assessments into processes, procedures and policies associated with NZDF operational activities on its own motion; and into any matter on referral from the Minister of Defence, the Secretary or the CDF.
40. In recognition of the existing oversight of the NZDF's activities by other bodies, we recommend that the IGD's assessment function would not be used to:
  - 40.1. assess NZDF Defence Force Orders, and processes, procedures and policies for health and safety compliance;
  - 40.2. assess the cost-effectiveness of the NZDF's processes, procedures and policies;
  - 40.3. review the NZDF's performance in undertaking and delivering its functions from an organisational perspective;
  - 40.4. conduct audits that could reasonably be expected to fall within the purview of the Auditor-General; or
  - 40.5. assess whether defence outputs are delivered or that military advice on operational effectiveness and capability development is tested against wider government objectives (e.g. economic, political, foreign affairs).
41. To provide clarity relating to the commencement of own motion and on referral assessments, we recommend a set of administrative procedures the IGD must follow. These are set out in **Appendix C**.
42. As is the case with investigation reports, the IGD should publish its assessment reports online to promote transparency. We recommend that the IGD's assessment reports contain the IGD's findings and any recommendations, and that the requirements for investigation reports set out in paragraphs 34.2 – 34.5, and 35 would apply to the publication of assessment reports.
43. We recommend that following an assessment report, the CDF should be required to notify the Minister of Defence, the IGD and the Secretary of any action to give effect to, or the reasons to depart from – or not implement – any recommendation. We further recommend that the IGD may inform the Minister of Defence about the adequacy of any remedial or preventative measure taken by the NZDF in response to accepted recommendations following an assessment report.



## **The IGD's enquiry function**

*Enquiries would ensure the IGD's understanding of NZDF activities remains current*

44. The proposed enquiry function would enable the IGD to gather information outside of an investigation or assessment to better understand the NZDF's operational activities, thereby improving and enhancing the IGD's oversight. Enquiries would be an essential resource, ensuring the IGD maintains a sound understanding of the NZDF's tools and techniques as they evolve in a landscape of technological advancements in defence and security. As enquiries would not involve the IGD undertaking any evaluation, or making findings or recommendations, we recommend that the IGD could make enquiries into operational activities on its own motion, but not be required to publish them.

## **Powers and safeguards**

*The IGD should have appropriate powers to support its proposed functions*

45. Cabinet previously agreed in principle that the IGD's functions would be supported by statutory powers. Such an approach is consistent with other oversight bodies and public inquiries. For the IGD's investigation function, we recommend the IGD should have the statutory power to:

45.1. summon and examine any person on oath, and require any person to provide information (including documents or other things in their possession or under their control, and information that would not be admissible in a court of law), the IGD considers to be relevant to an investigation;<sup>16</sup>

45.2. enter, at a reasonable time, and with prior written notification, a defence area, or a vehicle, ship or aircraft used by the NZDF that the IGD considers to be relevant to an investigation. This would be subject to any safety and security conditions imposed under applicable defence regulations;

45.3. access NZDF databases and information systems, and all records in the NZDF's custody or control, that the IGD considers are relevant to the undertaking of its functions; and

45.4. require witnesses to disclose information that the IGD considers to be relevant to an investigation, and that would otherwise be under an obligation of secrecy (such as confidentiality requirements) without it constituting a breach of any law that requires that secrecy.

46. We recommend that the power to access NZDF databases, and information systems, and records in the NZDF's custody or control, as relevant for the undertaking of its functions (paragraph 45.3) should also be used to support the IGD's assessment and enquiry functions.

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<sup>16</sup> Note that on rare occasions there may be practical difficulties in enforcing the IGD's powers, for example on participants who are unwilling or unable to participate (e.g. former NZDF armed forces staff outside of New Zealand, or members of partner militaries). There may also be challenges in respect of veterans who are too vulnerable or unwell to participate. In such cases, the IGD would use its discretion to make decisions on how to proceed.

47. We recommend that the statutory powers proposed for IGD investigations contain a corresponding set of protections for both people and information during, and after, an investigation. Safeguards would provide incentives for honest and open participation, supporting the IGD in getting to the truth. They would include the ability for the IGD to make confidentiality orders to protect witnesses and other participants, and measures to ensure natural justice (such as provisions relating to self-incrimination). They would also provide assurances that information provided to, or accessed by, the IGD is subject to appropriate protections. Further detail about the safeguards recommended is set out in **Appendix D**.

*Safeguards to limit the IGD's use, storage and sharing of NZDF information*

48. Through its ability to access NZDF databases and information systems, and records in the NZDF's custody or control, the IGD would have sight of a wide range of information, including information sourced from other government agencies or foreign partners and information under confidentiality or 'need to know' requirements. Ensuring that information remains subject to the strongest protections is fundamental for both national security, and the integrity of the IGD.
49. We therefore recommend that the IGD should:
- 49.1. access NZDF databases and information systems, and records in the NZDF's custody or control, only when required to perform its functions;
  - 49.2. be subject to duties of confidentiality and non-disclosure with an offence for wilfully failing to comply (see paragraph 54.2 below);<sup>17</sup>
  - 49.3. share information only with prescribed oversight bodies for the purpose of performing its functions (see paragraph 64 below);
  - 49.4. be required to consult the CDF prior to sharing certain NZDF information<sup>18</sup> in the performance of its functions.
50. In addition to the above, we recommend that the Minister of Defence (in consultation with the CDF and any other relevant party) should have the ability to certify that information should not be disclosed, or only disclosed under certain conditions. This would permit the NZDF (or another government agency if they have provided the IGD with the information in question) to escalate concerns about how the IGD proposes to share or publish information, where they have been unable to resolve them with the IGD.
51. We recommend imposing these safeguards, rather than limiting the IGD's access to exclude information provided to the NZDF by foreign partners or protected sources and information that is under confidentiality or 'need to know'

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<sup>17</sup> In line with the IGIS and its office (see Intelligence and Security Act 2017, s 219), the IGD, deputy IGD and IGD employees, contractors and members of the IGD's advisory panel (in addition to holding TSS level security clearance) should have a duty to keep confidential all information that comes to their knowledge. They should not be able to make a record of, use, or disclose to any other person, NZDF records or information relating to NZDF activities that they receive or access, other than in the performance of their functions.

<sup>18</sup> This would include information that would be likely to endanger a person's safety, information subject to an obligation of secrecy or non-disclosure, or information likely to prejudice New Zealand's defence, security or international relations; New Zealand's ability to receive intelligence from a foreign partner or international organisation; or a Defence agency's ability to continue performing its functions.

requirements. This would avoid delays to IGD investigations. It also aligns with the feedback of the Inquirers, Sir Terence Arnold and Sir Geoffrey Palmer, detailed in **Appendix E**.

### **Offences and penalties**

*Offences and penalties would underpin the effectiveness of the IGD's powers*

52. An offence and penalty regime would be essential in ensuring the effectiveness of the IGD's powers. The below offences and penalties are intended to supplement existing offences in the Crimes Act 1961.<sup>19</sup>
53. We recommend an offence, punishable by a maximum fine of \$10,000, for any person that wilfully, without reasonable justification or excuse:
- 53.1. obstructs, hinders, or resists the IGD in the exercise of its powers;
  - 53.2. makes false statements, misleads or attempts to mislead the IGD in the exercise of its powers; and
  - 53.3. refuses or fails to comply with any lawful requirement of the IGD.<sup>20</sup>
54. To underline the importance of confidentiality, we recommend the following offences:
- 54.1. **Knowingly or recklessly disclosing IGD information in an unauthorised manner.** This would apply to anyone involved in an investigation or an assessment, or that has had information disclosed to them – and has subsequently released it – in an unauthorised manner.<sup>21</sup> The offence would be punishable by a maximum fine of \$10,000 for individuals and \$100,000 for body corporates. Leave of the Attorney-General should be obtained before this offence could be prosecuted;<sup>22</sup>
  - 54.2. **Wilfully failing to comply with a duty of confidentiality or non-disclosure.**<sup>23</sup> This would be applicable to the IGD<sup>24</sup> and punishable by up to 2 years' imprisonment, or a maximum fine of \$10,000. Leave of the Attorney-General should be obtained before this offence could be prosecuted; and

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<sup>19</sup> For example, knowing or reckless unauthorised disclosure of classified or official information (see ss 78A, 78AA and s 105A). Witnesses examined by the IGD on oath could also be liable for perjury if they knowingly make a false statement to the IGD with the intention of misleading them (see s 108).

<sup>20</sup> The proposed offence is consistent with similar offences available to other oversight bodies, including the IGIS, the Ombudsman, and the IPCA.

<sup>21</sup> The proposed offence is similar to s 191 of the Intelligence and Security Act 2017 relating to the unauthorised disclosure of IGIS information.

<sup>22</sup> This offence would not restrict the communication or reporting of proceedings in Parliament.

<sup>23</sup> This would cover any sharing of information by the IGD (including staff and appointees) to anyone, except where it is expressly permitted (e.g. sharing information with a prescribed body for the purpose of supporting the exercise of the IGD's functions). Accidental disclosure would not be covered.

<sup>24</sup> Including any person in the IGD's office that holds duties of confidentiality and non-disclosure. The proposed offence is consistent with s 219 of the Intelligence and Security Act 2017.

- 54.3. **Knowingly failing to comply with a confidentiality order made by the IGD.** The offence would be punishable by a maximum fine of \$10,000 for individuals and \$100,000 for body corporates.

### **Form**

*The IGD's form and governance arrangements would underpin its independence*

55. We recommend that the IGD be established as an independent statutory officer, associated with a ministerial portfolio. This is a bespoke organisational form that provides flexibility to tailor the structural, appointment and reporting arrangements for the IGD. It is proportionate to the IGD's proposed scope, size and functions and powers, offering the lowest cost while providing the required independence. The independence delivered through this proposed form would help to achieve the Defence portfolio *People* priority as it would support the reputation and credibility of both the IGD and the NZDF.
56. For clarity and accountability, we recommend that the IGD should:
- 56.1. produce and publish a work programme setting out an unclassified summary of the IGD's strategic priorities and planned activities for the next financial year (specific investigations, assessments and enquiries it plans to undertake); and an annual report, to include an unclassified summary of: the number of investigations, assessments and enquiries undertaken by the IGD during the year; a brief description of the outcome of each of these activities; information on the IGD's financial performance; and any other information the IGD believes necessary;
  - 56.2. consult the Minister of Defence on the draft work programme and take into account the Minister's feedback unless there are clear and compelling reasons not to;
  - 56.3. provide the finalised work programme and annual report to the Minister of Defence, who should present each to the House of Representatives; and
  - 56.4. publish the finalised work programme and annual report online.

*The office would start small, with the ability to scale if necessary*

57. We recommend that the IGD's initial structure would consist of an IGD and deputy IGD, supported by a team of three FTEs. The proposed starting size would provide proportionate and cost-effective oversight, and there is opportunity for the office to scale up and seek any additional resources as needed.
58. The IGD would have a fused governance and executive role. They would be accountable for the delivery of investigation and assurance functions, and responsible for building and managing relationships with the Minister of Defence, the Secretary and the CDF. Appointing a deputy IGD would ensure the office could continue to operate in the event of recusal, absence or vacancy of the IGD. It would also enable a greater skills-mix between the two senior roles in the office allowing for greater functional flexibility.

59. To enhance the perceived independence and standing of the IGD, we recommend that the IGD and deputy IGD would be statutory officers:
- 59.1. appointed by the Governor-General on the recommendation of the House of Representatives;<sup>25</sup> and
  - 59.2. able to be removed or suspended from office by the Governor-General on the recommendation of the House of Representatives for incapacity, bankruptcy, neglect of duty, misconduct, or failure to hold the appropriate security clearance, as determined by the Minister of Defence.
60. We recommend the IGD be appointed for a first term of a maximum of five years, with the potential to be reappointed once for a maximum of three years, and that the deputy IGD be appointed for terms of no more than three years, with no limit to the number of times they could be reappointed. The IGD and deputy IGD should have their remuneration set by the Remuneration Authority.<sup>26</sup>

*The IGD should be able to employ staff and appoint an advisory panel*

61. We recommend that the IGD:
- 61.1. should be able to appoint employees on a full-time, part-time, temporary (including contractors) or fixed-term basis, provided they are able to obtain and maintain an appropriate security clearance;
  - 61.2. should be able to remove employees, subject to the conditions of employment;
  - 61.3. must determine the terms and conditions, salary, and allowances of its employees, following consultation with the Secretary of the administering agency; and
  - 61.4. must operate an employment policy that complies with the principles of being a good employer (as set out in section 118 of the Crown Entities Act 2004).
62. The IGD would need to have recourse to specific technical or other specialist advice where it is not available within its skillset or that of its staff. As such, we recommend the IGD be able to:
- 62.1. appoint an advisory panel to provide comprehensive advice that takes account of the wider context over time; and
  - 62.2. procure “one-off” specialist advice on a case by case basis to support the delivery of its functions.

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<sup>25</sup> Both the IGD and deputy IGD should be required to obtain and maintain an appropriate level of security clearance as a condition of appointment. They should also be required to declare all interests that they acquire that could conflict with the proper performance of their functions or duties.

<sup>26</sup> In line with Cabinet Office circular CO (11) 7 which states that the Authority is “*responsible for determining the remuneration of specified officers, whose roles require them to perform quasi-judicial roles, or to exercise, and be seen to exercise, a high degree of independence*”. This position is also consistent with the arrangements for statutory appointees to the IGIS and to independent Crown entities (including the IPCA). The approach would not preclude the IGD and its office being able to receive actual and reasonable costs – from the funds of the IGD’s office – for travelling and other expenses related to the performance of their functions and duties.



63. In appointing an advisory panel, we recommend the IGD would have discretion to determine the panel's terms of reference, remuneration for panel members in line with the Cabinet Fees Framework, and the appropriate number of panel members.<sup>27</sup> The IGD would be required to report publicly on panel appointments, to ensure transparency and avoid perceptions of bias.

### **Other Matters**

#### *The IGD's functions should complement, rather than duplicate, existing oversight*

64. It is important that the IGD and other oversight bodies are able to interact appropriately as part of the wider ecosystem of oversight – particularly with a view to minimising duplication. We therefore recommend that the IGD be able to consult and share information with a small number of bodies who have existing oversight of the NZDF's activities that may overlap with the IGD, or that have oversight of agencies that work closely with the NZDF on operational activities. Those bodies are:
- 64.1. The IGIS;
  - 64.2. The IPCA;
  - 64.3. The Privacy Commissioner;
  - 64.4. The Auditor-General;
  - 64.5. The Human Rights Commissioner; and
  - 64.6. The Ombudsman.
65. We further recommend, in recognition of the highly sensitive nature of the information the IGD would have access to, that the IGD could only share information with the above bodies for the purpose of supporting the IGD's functions. This approach aligns with that of the IGIS.<sup>28</sup>
66. It is appropriate for these oversight bodies to have reciprocal arrangements with the IGD (i.e. sharing information to support that body's functions). We therefore note that consequential amendments to the establishing legislation of those bodies may need to be made as necessary. The bodies in paragraph 64 have been consulted and agree with this approach.

#### *Enabling efficient oversight of defence intelligence matters*

67. The NZDF routinely works closely with the intelligence and security agencies (the agencies) on defence intelligence matters, giving rise to a potential overlap of functions between the IGIS who has oversight of the agencies, and the IGD. We therefore recommend that the legislation includes a requirement for the IGD to

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<sup>27</sup> The IGD should be able to reimburse advisory panel members for actual and reasonable travel expenses incurred in carrying out functions as a member. Appointing panel members would be dependent on available funding.

<sup>28</sup> See s 161 of the Intelligence and Security Act 2017 which enables consultation and information sharing between the IGIS and other oversight bodies for the purpose of the IGIS' functions. The sharing of information would be subject to protective security requirements (including ensuring the receiving oversight body has appropriate secure storage facilities and staff with the requisite level of security clearance), and other constraints, such as privacy.

have regard to the IGIS' functions, and to consult the IGIS as appropriate to avoid any potential duplication of investigations into similar matters.

#### *Accountability from other oversight bodies*

68. To equip the IGD to undertake its oversight role effectively, we are proposing to provide it with broad powers and the necessary degree of independence in undertaking its functions. In light of this, the IGD should itself be subject to oversight and accountability mechanisms to provide an additional layer of confidence that it is delivering its functions lawfully, fairly and responsibly.
69. In line with best practice, we recommend the IGD be subject to judicial review, Ombudsman oversight, and Privacy Commissioner oversight. It should also be subject to the Public Records Act 2005 and monitored by Archives New Zealand.
70. We do however propose some exceptions to oversight that would ordinarily apply to new bodies, based on the need to safeguard the IGD's ability to seek and receive information to perform its functions, the IGD's small starting size, the high likelihood of disproportionate administrative burden, and the obligations on the IGD to report publicly on most of its activities. Specifically, we recommend that the IGD should:
  - 70.1. be subject to the Official Information Act 1982, except where information relates to an investigation, assessment or enquiry (including information the IGD receives in evidence, and correspondence with other oversight bodies, public service agencies and Ministers). This would preserve the IGD's ability to seek and receive information in confidence;
  - 70.2. be obliged to protect personal information under the Privacy Act 2020, but exempt from Information Privacy Principles 6 and 7 (obligations to provide access to, and correct, personal information) except where the personal information relates to a current or former IGD employee.<sup>29</sup> This would reduce the risk that requests could be used to access the IGD's investigation files;<sup>30</sup>
  - 70.3. not be a "public entity" under the Public Audit Act 2001, exempting the IGD from annual auditing from the Auditor-General.<sup>31</sup> This is appropriate as the IGD's administering agency would be subject to annual audit;
  - 70.4. be exempted from obligations to prepare end-of-year performance information under the Public Finance Act 1989, as it is not likely to be informative and the IGD's proposed annual expenditure would be less than \$5 million.<sup>32</sup>
71. Lastly, we recommend that there should be an avenue for IGD employees to make protected disclosures about serious wrongdoing in, or by, the IGD to the

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<sup>29</sup> The Ombudsman is not subject to the Privacy Act 2020, and the IGIS and IPCA use mechanisms (e.g. secrecy, privilege and non-publication provisions) to ensure the workability of each scheme is not hampered by the Act.

<sup>30</sup> This is consistent with the Auditor-General.

<sup>31</sup> This is consistent with the IGIS.

<sup>32</sup> This is consistent with the IGIS.



Minister of Defence. This would bring the IGD in line with similar provisions for the IGIS proposed in the Protected Disclosures Bill.<sup>33</sup>

### *Protections for the IGD*

72. In line with other statutory oversight bodies, we recommend that the IGD, deputy IGD, employees, contractors and advisory panel members:
- 72.1. should be protected from personal liability (civil and criminal) for acts or omissions done in good faith, and in performance or intended performance of the IGD's functions; and
  - 72.2. cannot be compelled to give evidence in any court or in proceedings of a judicial nature, in respect of anything that comes into their knowledge when they are performing or exercising their functions and powers.
73. We recommend that the protections set out above would not apply in relation to proceedings for an offence:
- 73.1. relating to a breach of a duty of confidentiality by the IGD, deputy IGD, employees, contractors or advisory panel members;
  - 73.2. against section 78 (*espionage*), 78AA (*wrongful communication, retention, or copying of classified information*), 78A (*wrongful communication, retention, or copying of official information*), 105 (*corruption or bribery of official*), 105A (*corrupt use of official information*), or 105B (*use or disclosure of personal information disclosed in breach of section 105A*) of the Crimes Act 1961;
  - 73.3. of conspiring to commit an offence against any of the above sections of the Crimes Act 1961; or
  - 73.4. of attempting to commit an offence against any of the above sections of the Crimes Act 1961.

### **Financial Implications**

#### *The establishment of the IGD is dependent on new funding*

74. New funding was approved in Budget 2022 for the establishment phase and ongoing operations of the office of the IGD through a tagged contingency. The Minister of Finance, the Minister of Defence, and the Minister of Justice have the authority to draw down from the tagged contingency following enactment of legislation to establish the IGD.
75. Costs for the IGD are made up of:
- 75.1. **Establishment phase costs:** One-off costs are required to support the administering agency to source and prepare physical infrastructure, ICT, hire staff, advise the Minister of Defence on appointments, and begin to get the office operational.

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<sup>33</sup> Protected disclosures about serious wrongdoing in, or by, the office of the IGIS may be made to the Prime Minister in recognition of their role in overseeing the IGIS' work.

- 75.2. **Operating costs:** Funding is required on an ongoing basis for personnel, premises, ICT, advisory panel, external advice, travel, and costs to an administering agency.
76. Funding approved as part of Budget 2022 is:
- 76.1. \$1.130 million in FY2023/24. This is made up of establishment phase costs of \$0.590 million and part-year operating costs of \$0.540 million.
- 76.2. \$2.254 million ongoing operating costs from FY2024/25, which includes \$0.115 million for the administering agency.
77. There is expected to be fiscal impact on the NZDF in relation to supporting the IGD's functions, liaising with its office, responding to requests for information and implementing any recommendations. There may also be fiscal impact on the Ministry of Defence in respect of referrals or responding to IGD investigations or assessments. Such impacts will depend on the nature and scale of the IGD's work programme and cannot be quantified at this stage.
78. We recommend that the Ministry of Justice be appointed as administering agency for funding of the IGD in the same way it does so for the IGIS.
79. s9(2)(f)(iv), s9(2)(g)(i)

### Legislative Implications

80. An independent IGD will require new establishing legislation, and we seek Cabinet's agreement to issue drafting instructions to the Parliamentary Counsel Office. We also seek Cabinet's agreement to disclose the draft legislation to the IGIS, IPCA, Privacy Commissioner, Auditor-General, Human Rights Commissioner and Ombudsman prior to introduction for the purpose of consulting them on it.
81. s9(2)(f)(iv), s9(2)(g)(i)

### Impact Analysis

#### *Regulatory Impact Statement*

82. A Regulatory Impact Statement (RIS) is attached as **Appendix F**. An independent panel Regulatory Impact Assessment panel has reviewed the RIS. The panel considers that the information and analysis in the RIS fully meets the Quality Assurance criteria. The panel has concluded that the RIS has fully met the consultation requirements in the Quality Assurance criteria and is satisfied that the consultation process demonstrated evidence of efficient and effective consultation with key affected parties and relevant experts. The Panel also considers that any issues raised by submitters have been adequately considered and addressed in the RIS.

### *Climate Implications of Policy Assessment*

83. The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

### **Te Tiriti O Waitangi implications**

84. There are no identified direct Te Tiriti o Waitangi implications arising from the proposals in this paper.
85. Officials have consulted the NZDF's Tikanga group and Senior Māori Advisor as the policy has developed, to explore the potential impacts of the proposals on NZDF Māori personnel, and to ensure that any adverse or disproportionate impacts are minimised. The feedback received indicates that the proposals would be compatible with the tikanga of Pono (acting with integrity and supporting transparency and accountability) and the tikanga of Kaitiakitanga (the practice of applying safe, responsible and ethical practices when managing information and while working with witnesses). Once appointed, the IGD would be expected to consider further how to incorporate tikanga values when determining its detailed procedures for undertaking its functions.

### **Population Implications**

86. The establishment and operation of the IGD will have limited impacts outside of Government. Officials have consulted Veterans' Affairs to ensure that there are no adverse or disproportionate impacts on veterans who may, in time, be required to participate in IGD investigations. Veterans' Affairs is satisfied that it would be excluded from the IGD's overall oversight, and that care would be taken to ensure that in carrying out investigations, the IGD would be mindful of veteran participants' potential vulnerabilities and possible need for support during any proceedings.

### **Human Rights**

87. The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. The proposed powers, offences and penalties have the potential to engage the rights of freedom of expression, unreasonable search and seizure, and liberty of the person, but these are accompanied by protections and safeguards to ensure such rights are limited only in ways that are justifiable in a free and democratic society.

### **Consultation**

88. Targeted consultation opened on 16 November 2021 for a four week consultation period. 36 individuals and organisations with a range of perspectives were specifically invited to comment, and the consultation document was published on the Ministry of Defence's website. The consultation period was extended to 11 January 2022 to enable late submissions.
89. In total, 15 submissions were received (including seven late submissions). Of those submissions, seven were from academics and four from civil society

groups. Submissions were also received from the Inquirers, the authors of Hit and Run, and the Human Rights Commission. Overall, submitters were supportive of the proposal to establish an IGD and of its key design features. The policy has been amended in response to the feedback received.

90. The following agencies have been consulted on this paper: the Department of the Prime Minister and Cabinet, Crown Law Office, Te Kawa Mataaho, Ministry of Justice, NZDF, Ministry of Foreign Affairs and Trade, Ministry for Primary Industries, New Zealand Customs, New Zealand Police, Government Communications Security Bureau, New Zealand Security Intelligence Service, Department of Internal Affairs, the Treasury, Archives New Zealand, and Parliamentary Counsel Office.
91. Consultation has also taken place with Veterans' Affairs, the Inspector-General of Intelligence and Security, the Office of the Ombudsman, the Office of the Auditor-General, the Office of the Privacy Commissioner, the Independent Police Conduct Authority, and the Legislation Design and Advisory Committee (LDAC). The Human Rights Commission has been consulted on the proposals set out in paragraphs 64 – 66 of this paper.

### Communications and Proactive Release

92. We intend to issue a press release about the policy decisions in this paper, and to arrange for this paper (and any relevant material) to be proactively published (subject to redaction as appropriate under the Official Information Act 1982), on the Ministry of Defence's website following Cabinet's agreement to establish the IGD.

### Recommendations

The Attorney-General and the Minister of Defence recommend that the Committee:

- 1 **note** that in November 2021, Cabinet agreed in principle to the key design features of the Inspector-General of Defence (IGD) (i.e. its scope, functions, powers, and form), subject to the outcome of targeted consultation with selected external stakeholders [CAB-21-MIN-0439];
- 2 **note** that the proposals presented in this paper take into account comments resulting from targeted consultation, which showed broad overall support for the design features of the IGD agreed in principle by Cabinet in November 2021;
- 3 **agree** to establish an independent IGD to provide dedicated independent oversight of the New Zealand Defence Force (NZDF);

#### *Purpose*

- 4 **agree** that the IGD's purpose should be set out in legislation to show that the IGD is intended to:
  - 4.1 assist the Minister of Defence to facilitate democratic oversight of the NZDF;
  - 4.2 provide the Minister of Defence with an avenue, independent of the Defence agencies, to examine and expose failings and gaps in NZDF

systems so that steps may be taken to address and prevent problems, and promote system improvements in the NZDF; and

- 4.3 assist the Government in assuring Parliament and the public that the activities of the NZDF are subject to independent scrutiny, including in relation to New Zealand's human rights and international humanitarian law obligations.
- 5 **agree** that principles should be set out in legislation to make clear that in undertaking its functions the IGD should ensure that it:
    - 5.1 acts impartially and in the public interest; and
    - 5.2 takes account of the military context in which the NZDF operates.

#### Scope

- 6 **agree** that the IGD could look into any NZDF matter, except the activities of Veterans' Affairs, on the referral of the Minister of Defence, Secretary of Defence (the Secretary) or Chief of Defence Force (CDF);
- 7 **agree** that the IGD should have own motion functions into defined NZDF operational activities that would consist of any domestic or international activity:
  - 7.1 in time of war, armed conflict or any other emergency, whether actual or imminent;
  - 7.2 authorised by the New Zealand Government and that involves peace support operations, maintenance or restoration of law and order or the functioning of government institutions; or where the New Zealand Government agrees to provide assistance or contribution;
  - 7.3 declared by the CDF, by notice in writing;
  - 7.4 including training carried out directly in preparation for any specific activity in recommendation 7.1–7.3; and
  - 7.5 including intelligence operations carried out directly in preparation for, or in support of, any specific activity in recommendation 7.1– 7.3.

#### Functions

- 8 **agree** that the IGD has:
  - 8.1 an investigation function, to scrutinise and respond to issues that have occurred;
  - 8.2 an assessment function, to minimise or prevent the risk of issues occurring; and
  - 8.3 an enquiry function, to support the IGD's effective oversight.
- 9 **note** that the IGD would not have an advisory function, and would not provide advice to the NZDF before or during an event to permit operational flexibility and the appropriate, efficient and effective use of expertise by military professionals, including military legal advice;
- 10 **note** that while the IGD would not have a complaints handling function, any person could bring concerns about potential wrongdoing in, or by, the NZDF to the IGD's attention;

*The IGD's investigation function*

- 11 **agree** that the IGD should be required to follow the administrative procedures in **Appendix C** when commencing own motion investigations;
- 12 **agree** that the IGD should be required to follow the administrative procedures in **Appendix C** when commencing an investigation on referral;
- 13 **agree** that when considering whether to initiate an investigation, the IGD should have the discretion to:
  - 13.1 decline to investigate a matter referred to it by the Minister of Defence, Secretary or CDF;
  - 13.2 defer an investigation until another body has completed its own investigation; and
  - 13.3 refer a matter or part of a matter, to a more appropriate body for investigation.
- 14 **agree** that IGD investigations focus on:
  - 14.1 the establishment of facts and the making of findings; and as appropriate
  - 14.2 making recommendations:
    - 14.2.1 that further steps be taken to determine civil, criminal or disciplinary liability; and/or
    - 14.2.2 for the improvement and benefit of the NZDF, relevant to the findings of the investigation.
- 15 **agree** that the IGD should be:
  - 15.1 the "appropriate authority" for all protected disclosures from current and former NZDF personnel (except those from Veterans' Affairs), including those that contain classified information, and that the IGD would be able to investigate any protected disclosure on its own motion, including into matters ordinarily requiring a referral from the Minister of Defence, the Secretary or the CDF; and
  - 15.2 able to receive disclosures from NZDF personnel about potential wrongdoing, provided they are made in good faith (as determined by the IGD), and that the IGD could investigate disclosures relating to operational activities on its own motion but would need to seek a referral from the Minister of Defence to investigate disclosures on other matters.
- 16 **agree** that NZDF personnel who make a disclosure to the IGD in good faith should be protected from discrimination in relation to their employment or service;
- 17 **agree** that the IGD could investigate matters that have taken place prior to its establishment;
- 18 **agree** that the CDF:
  - 18.1 could prevent an IGD visit to an operational theatre if it would significantly impede an operation, or risk the safety or security of IGD and/or NZDF personnel;



- 18.2 could incorporate conditions on any access to an operational theatre on the same grounds; and
- 18.3 must notify the reasons for such a decision to the IGD and Minister of Defence, and inform the IGD as soon as practicable of any change in the situation that would enable a visit to take place.
- 19 **agree** that the IGD should not be able to investigate a matter related to an operational activity where a Court of Inquiry has been established until that process has concluded, unless there is an unreasonable delay in undertaking and concluding that process, but that the IGD could investigate any matter subject to a Court of Inquiry that has been referred to it by the Minister of Defence or the CDF;
- 20 **agree** that where the IGD commences an investigation into a matter that is or was subject to a Court of Inquiry, the IGD could follow the administrative procedures set out in **Appendix C**, or determine its own procedures;
- 21 **agree** that the NZDF should be required to:
- 21.1 cooperate and assist the IGD in undertaking its functions; and
- 21.2 through the CDF, notify the IGD of the establishment of a Court of Inquiry, and any reports of civilian harm, including the findings and assessments of NZDF internal processes for responding to civilian harm.
- 22 **agree** that the IGD should produce investigation reports that would be made public to the extent possible while safeguarding national security, New Zealand's international relations, and obligations of confidence;
- 23 **agree** that finalised investigation reports should:
- 23.1 include a summary of facts, the IGD's findings, and any recommendations;
- 23.2 be sent to the Minister of Defence, the Secretary and the CDF at the same time;
- 23.3 be shared with the Inspector-General of Intelligence and Security (IGIS) where they include intelligence-related matters;
- 23.4 have an appropriate security classification determined by the IGD, having taken into account the CDF and Secretary's views. Where a report quotes or summarises any classified information, it must not be given a lower classification in the IGD's report; and
- 23.5 subject to recommendation 23.4, be published online as soon as reasonably practicable.
- 24 **agree** that published reports should not include information that would be likely to endanger a person's safety, or to prejudice: New Zealand's defence, security or international relations; New Zealand's ability to receive intelligence from a foreign partner or international organisation; or a defence agency's ability to continue performing its functions. Reports should also not include information the IGD is required to protect under the Privacy Act 2020. Where a report cannot be published, the IGD should consider publishing an unclassified summary;



- 25 **agree** that prior to publication, investigation reports may be shared with relevant Ministers where they relate to or impact other portfolios, and with the Foreign Affairs, Defence and Trade Committee, subject to recommendation 23.4 and 24, and with permission from the Minister of Defence;
- 26 **agree** that following an investigation report, the CDF should be required to notify the Minister of Defence, the IGD and the Secretary of any action to give effect to, or the reasons to depart from – or not implement – any recommendation;
- 27 **agree** that the IGD may inform the Minister of Defence about the adequacy of any remedial or preventative measure taken by the NZDF in response to accepted recommendations;

*The IGD's assessment function*

- 28 **agree** that the IGD could undertake assessments into processes, procedures and policies associated with operational activities on its own motion, and into any matter on referral from the Minister of Defence, Secretary or CDF;
- 29 **agree** that the IGD's assessment function should not be used to:
- 29.1 assess NZDF Defence Force Orders and processes, procedures and policies for health and safety compliance;
  - 29.2 assess the cost-effectiveness of the NZDF's processes, procedures and policies;
  - 29.3 review the NZDF's performance in undertaking and delivering its functions from an organisational perspective;
  - 29.4 conduct audits that could reasonably be expected to fall within the purview of the Auditor-General; or
  - 29.5 assess whether defence outputs are delivered or that military advice on operational effectiveness and capability development is tested against wider government objectives (e.g. economic, political, foreign affairs).
- 30 **agree** that when commencing own motion and on referral assessments, the IGD should follow the administrative procedures set out in **Appendix C**;
- 31 **agree** that the IGD's assessment reports should contain the IGD's findings and any recommendations, and that the requirements set out in recommendations 23.2 - 23.5 and 24 would apply to the publication of assessment reports;
- 32 **agree** that following an assessment report, the CDF should be required to notify the Minister of Defence, the IGD and the Secretary of any action to give effect to, or the reasons to depart from – or not implement – any recommendation;
- 33 **agree** that the IGD may inform the Minister of Defence about the adequacy of any remedial or preventative measure taken by the NZDF in response to accepted recommendations following an assessment report;

*The IGD's enquiry function*

- 34 **agree** that the IGD's enquiry function would enable it to seek information from the NZDF about operational activities outside of an investigation or assessment, and that the IGD would not be required to publish its enquiries;

## *Powers and safeguards*

- 35 **agree** that the IGD should have the statutory power to:
- 35.1 summon and examine any person on oath and require any person to provide information (including documents or other things in their possession or under their control and information that would not be admissible in a court of law) that the IGD considers to be relevant to an investigation;
  - 35.2 enter, at a reasonable time, and with prior written notice, a defence area, or a vehicle, ship or aircraft used by the NZDF, that the IGD considers to be relevant to an investigation. This would be subject to any safety and security conditions imposed under applicable defence regulations;
  - 35.3 access NZDF databases and information systems, and records in the NZDF's custody or control, that the IGD considers is relevant for the undertaking of its functions; and
  - 35.4 require witnesses to disclose information that the IGD considers to be relevant to an investigation, and that would otherwise be under an obligation of secrecy (such as confidentiality requirements) without it constituting a breach of any law that requires that secrecy.
- 36 **agree** that the power to access NZDF databases and information systems, and records in the NZDF's custody or control, that the IGD considers is required for the undertaking of its functions (recommendation 35.3) could also be used to support the IGD's assessment and enquiry functions;
- 37 **agree** that the IGD's statutory powers should contain the corresponding set of protections for both people and information, both during, and after, an investigation, set out in **Appendix D**, and that this would include the ability for the IGD to make confidentiality orders to protect witnesses and measures to ensure natural justice;
- 38 **agree** that the IGD should:
- 38.1 access NZDF databases and information systems, and records in NZDF's custody or control, only when required to perform its functions;
  - 38.2 be subject to duties of confidentiality and non-disclosure with an offence for wilfully failing to comply (as described in recommendation 41.2);
  - 38.3 share information only with prescribed oversight bodies for the purpose of performing its functions (as described in recommendation 51); and
  - 38.4 be required to consult the CDF prior to sharing certain NZDF information in the performance of its functions (namely, information that would be likely to endanger a person's safety, or to prejudice: New Zealand's defence, security or international relations; New Zealand's ability to receive intelligence from a foreign partner or international organisation; or a defence agency's ability to continue performing its functions).
- 39 **agree** that the Minister of Defence (in consultation with the CDF and any other relevant party) should have the ability to certify that information should not be disclosed, or only disclosed under certain conditions;

### *Offences and penalties*

- 40 **agree** that it should be an offence, punishable by a maximum fine of \$10,000, for any person that wilfully, without reasonable justification or excuse:
- 40.1 obstructs, hinders, or resists the IGD in the exercise of its powers;
  - 40.2 makes false statements, misleads or attempts to mislead the IGD in the exercise of its powers; and
  - 40.3 refuses or fails to comply with any lawful requirement of the IGD.
- 41 **agree** to the following offences and penalties:
- 41.1 **Knowingly or recklessly disclosing IGD information in an unauthorised manner.** The offence should be punishable by a maximum fine of \$10,000 for individuals and \$100,000 for body corporates. Leave of the Attorney-General should be obtained before this offence could be prosecuted;
  - 41.2 **Wilfully failing to comply with a duty of confidentiality or non-disclosure.** This should be applicable to the IGD (including any person in the IGD's office that holds duties of confidentiality and non-disclosure) and punishable by up to two years' imprisonment, or a maximum fine of \$10,000. Leave of the Attorney-General should be obtained before this offence could be prosecuted;
  - 41.3 **Knowingly failing to comply with a confidentiality order made by the IGD.** The offence should be punishable by a maximum fine of \$10,000 for individuals and \$100,000 for body corporates.

### *Form*

- 42 **agree** that the IGD be established as an independent statutory officer, associated with a ministerial portfolio;
- 43 **agree** that for clarity and accountability, the IGD should:
- 43.1 produce and publish a work programme setting out an unclassified summary of the IGD's strategic priorities and planned activities for the next financial year (specific investigations, assessments and enquiries it plans to undertake);
  - 43.2 produce and publish an annual report, to include an unclassified summary of: the number of investigations, assessments and enquiries undertaken by the IGD during the year; a brief description of the outcome of each of these activities; information on the IGD's financial performance; and any other information the IGD believes necessary;
  - 43.3 consult the Minister of Defence on the draft work programme and take into account the Minister's feedback unless there are clear and compelling reasons not to;
  - 43.4 provide the finalised work programme and annual report to the Minister of Defence, who should present each to the House of Representatives; and

- 43.5 publish the finalised work programme and annual report online.
- 44 **agree** that the IGD's initial structure would consist of an IGD and deputy IGD, supported by a team of three FTEs;
- 45 **agree** that to enhance the perceived independence and standing of the IGD, the IGD and deputy IGD would be statutory officers:
- 45.1 appointed by the Governor-General on the recommendation of the House of Representatives; and
- 45.2 able to be removed or suspended from office by the Governor-General on the recommendation of the House of Representatives for incapacity, bankruptcy, neglect of duty, misconduct, or failure to hold the appropriate security clearance, as determined by the Minister of Defence.
- 46 **agree** that the IGD be appointed for a first term of a maximum of five years, with the potential to be reappointed once for a maximum of three years, and that the deputy IGD be appointed for terms of no more than three years, with no limit to the number of times they could be reappointed;
- 47 **agree** that the remuneration for the IGD and deputy IGD should be set by the remuneration authority;
- 48 **agree** that the IGD:
- 48.1 should be able to appoint employees on a full-time, part-time, temporary (including contractors) or fixed-term basis, provided they are able to obtain and maintain an appropriate security clearance;
- 48.2 should be able to remove employees, subject to the conditions of employment;
- 48.3 must determine the terms and conditions, salary and allowances, of its employees, following consultation with the Secretary of its administering agency; and
- 48.4 must operate an employment policy that complies with the principles of being a good employer (as set out in section 118 of the Crown Entities Act 2004).
- 49 **agree** that the IGD be able to:
- 49.1 appoint an advisory panel to provide comprehensive advice that takes account of the wider context over time; and
- 49.2 procure "one-off" specialist advice on a case by case basis to support the delivery of its functions.
- 50 **agree** that the IGD would have discretion to determine the panel's terms of reference, remuneration for panel members in line with the Cabinet Fees Framework, and the appropriate number of panel members. The IGD would also be required to report publicly on panel appointments, to ensure transparency and avoid perceptions of bias;

### *Other matters*

- 51 **agree** that the IGD be able to consult, and share information, with:
- 51.1 The Inspector-General of Intelligence and Security (IGIS);
  - 51.2 The Independent Police Conduct Authority (IPCA);
  - 51.3 The Privacy Commissioner;
  - 51.4 The Auditor-General;
  - 51.5 The Human Rights Commissioner; and
  - 51.6 The Ombudsman.
- 52 **agree** that, in recognition of the highly sensitive nature of the information the IGD would have access to, the IGD could only share information with the bodies in recommendation 51 for the purpose of supporting the IGD's functions;
- 53 **note** that consequential amendments may be required to the establishing legislation of the bodies listed in recommendation 51, to enable reciprocal information sharing arrangements with the IGD;
- 54 **agree** that the IGD be required to have regard to the IGIS' functions, and to consult the IGIS as appropriate to avoid any potential duplication of investigations into similar matters;

### *Accountability from other oversight bodies*

- 55 **agree** that the IGD should be subject to judicial review, Ombudsman oversight, and Privacy Commissioner oversight. It should also be subject to the Public Records Act 2005 and monitored by Archives New Zealand;
- 56 **agree** that the IGD should:
- 56.1 be subject to the Official Information Act 1982, except where information relates to its investigations, assessments or enquiries (including information it receives in evidence, and correspondence with other oversight bodies, public service agencies and Ministers);
  - 56.2 be obliged to protect personal information under the Privacy Act 2020, but exempt from Information Privacy Principles 6 and 7 (obligations to provide access to, and correct, personal information) except where the personal information relates to a current or former IGD employee;
  - 56.3 not be a "public entity" under the Public Audit Act 2001, exempting the IGD from annual auditing by the Auditor-General;
  - 56.4 be exempted from obligations to prepare end-of-year performance information under the Public Finance Act 1989.
- 57 **agree** that IGD employees could make protected disclosures about serious wrongdoing in, or by, the IGD to the Minister of Defence;

### Protections for the IGD

58 **agree** that the IGD, deputy IGD, employees, contractors and advisory panel members:

58.1 should be protected from personal liability (civil and criminal) for acts or omissions done in good faith and in performance or intended performance of the IGD's functions; and

58.2 cannot be compelled to give evidence in any court or in proceedings of a judicial nature, in respect of anything that comes to their knowledge when they are performing or exercising their functions and powers.

59 **agree** that the protections set out in recommendation 58 would not apply in relation to proceedings for an offence:

59.1 relating to a breach of a duty of confidentiality by the IGD, deputy IGD, employees, contractors or advisory panel members;

59.2 against section 78 (*espionage*), 78AA (*wrongful communication, retention, or copying of classified information*), 78A (*wrongful communication, retention, or copying of official information*), 105 (*corruption or bribery of official*), 105A (*corrupt use of official information*), or 105B (*use or disclosure of personal information disclosed in breach of section 105A*) of the Crimes Act 1961;

59.3 of conspiring to commit an offence against any of the above sections of the Crimes Act 1961; or

59.4 of attempting to commit an offence against any of the above sections of the Crimes Act 1961.

### Financial implications

60 **note** that new funding to establish and operate the IGD was approved as a tagged contingency in Budget 2022;

61 **note** the amount of new operating funding approved in Budget 2022 for the establishment and ongoing operations of the IGD is illustrated here:

	2021/22	2022/23	2023/24	2024/25	2025/26 & Outyears
Operating Expenditure	-	-	1.130	2.254	2.254

62 **note** that [REDACTED] s9(2)(f)(iv), s9(2)(g)(i)

63 **note** that the Ministry of Justice will be the administering agency for the IGD;



### *Legislative implications*

- 64 **note** that [REDACTED] s9(2)(f)(iv), s9(2)(g)(i)  
[REDACTED]
- 65 **invite** the Attorney-General and Minister of Defence to issue drafting instructions to the Parliamentary Counsel Office to give effect to these policy decisions;
- 66 **authorise** the Attorney-General and Minister of Defence to approve matters of detail in relation to the drafting of legislation, which are consistent with the general policy intent of this paper, without further reference to Cabinet;
- 67 **authorise** the Attorney-General and Minister of Defence to disclose draft legislation giving effect to policy decisions in this paper to the IGIS, IPCA, Privacy Commissioner, Auditor-General, Human Rights Commissioner and the Ombudsman, in accordance with the Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown annexed to Cabinet Office Circular (19) 2; and

### *Communications and Proactive Release*

- 68 **note** that the Attorney-General and Minister of Defence will issue a press release about the policy decisions in this paper, and arrange for this paper (and any relevant material) to be proactively published on the Ministry of Defence's website, following Cabinet's agreement to establish the IGD.

Authorised for lodgement

Hon David Parker  
Attorney-General

Hon Peeni Henare  
Minister of Defence

### Attached:

**Appendix A:** Summary of Submissions Report

**Appendix B:** Summary of Final Proposals

**Appendix C:** Proposed Administrative Procedures

**Appendix D:** Proposed Safeguards and Protections

**Appendix E:** Summary of the Operation Burnham Inquirers' submission on the IGD's ability to access NZDF information

**Appendix F:** Regulatory Impact Statement

## Annex A: Summary of Submissions Report

This annex is published separately on the Ministry of Defence website:  
<https://defence.govt.nz/publications>.

Released by the Attorney-General  
and Minister of Defence

## Appendix B: Summary of Final Proposals

### ESTABLISHING THE INSPECTOR-GENERAL OF DEFENCE: SUMMARY OF FINAL PROPOSALS

*Key changes recommended in response to targeted consultation feedback are underlined*

<b>PURPOSE</b>	<ul style="list-style-type: none"> <li>To assist the Minister of Defence to <u>facilitate</u> democratic oversight of the NZDF.</li> <li>To provide the Minister of Defence with an avenue, independent of Defence agencies, to examine and expose failings and gaps in NZDF systems so that steps may be taken to address and prevent problems; and promote system improvements in the NZDF.</li> <li>To assist the Government in assuring Parliament and the public that the activities of the NZDF are subject to enhanced independent scrutiny, <u>including in relation to New Zealand's human rights and international humanitarian law obligations.</u></li> </ul>			
<b>GUIDING PRINCIPLES</b>	<p>The IGD should ensure its actions:</p> <ul style="list-style-type: none"> <li>are in the public interest and undertaken impartially, and</li> <li>take account of the military context in which the NZDF operates (e.g. the military justice system).</li> </ul> <p><u>[previous principle to ensure its actions represent an appropriate use of the IGD's resources, in terms of providing value for money to the people of New Zealand, and are proportionate, in terms of time, cost and resources, on the NZDF – removed].</u></p>			
<b>SCOPE</b>	All NZDF activities (bar those of Veterans' Affairs). The IGD's focus will be to scrutinise NZDF operational activities. Any matter may be referred by the Minister of Defence, Secretary of Defence or the Chief of Defence Force.			
<b>FUNCTIONS</b>	<table border="0" style="width: 100%;"> <tr> <td style="width: 33%; background-color: #e1efda; padding: 5px;"> <p><b>INVESTIGATION FUNCTION:</b></p> <ul style="list-style-type: none"> <li>An investigation after something has happened, including historic incidents.</li> <li>To establish facts, make findings, and make recommendations that further steps be taken to determine liability and/or for the improvement of NZDF.</li> <li>Can investigate, on its own motion, defined operational activities.</li> <li>Investigation on any other matter on referral from the Minister of Defence, Secretary of Defence, or Chief of Defence Force.</li> </ul> </td> <td style="width: 33%; background-color: #e1efda; padding: 5px;"> <p><b>ASSESSMENT FUNCTION:</b></p> <ul style="list-style-type: none"> <li>To routinely assess processes, procedures and policies, and identify any gaps to prevent issues from occurring in future (e.g. a system health check).</li> <li>Assessment on own motion into defined operational activities.</li> <li>Assessment on any other matter on referral from the Minister of Defence, Secretary of Defence or Chief of Defence Force.</li> </ul> </td> <td style="width: 33%; background-color: #e1efda; padding: 5px;"> <p><b>ENQUIRY FUNCTION:</b></p> <ul style="list-style-type: none"> <li>Formal information gathering about an NZDF operational activity to assist understanding.</li> <li>Could (but will not necessarily) lead to an assessment or investigation.</li> </ul> </td> </tr> </table>	<p><b>INVESTIGATION FUNCTION:</b></p> <ul style="list-style-type: none"> <li>An investigation after something has happened, including historic incidents.</li> <li>To establish facts, make findings, and make recommendations that further steps be taken to determine liability and/or for the improvement of NZDF.</li> <li>Can investigate, on its own motion, defined operational activities.</li> <li>Investigation on any other matter on referral from the Minister of Defence, Secretary of Defence, or Chief of Defence Force.</li> </ul>	<p><b>ASSESSMENT FUNCTION:</b></p> <ul style="list-style-type: none"> <li>To routinely assess processes, procedures and policies, and identify any gaps to prevent issues from occurring in future (e.g. a system health check).</li> <li>Assessment on own motion into defined operational activities.</li> <li>Assessment on any other matter on referral from the Minister of Defence, Secretary of Defence or Chief of Defence Force.</li> </ul>	<p><b>ENQUIRY FUNCTION:</b></p> <ul style="list-style-type: none"> <li>Formal information gathering about an NZDF operational activity to assist understanding.</li> <li>Could (but will not necessarily) lead to an assessment or investigation.</li> </ul>
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<b>FORM</b>	<ul style="list-style-type: none"> <li>Independent statutory officer associated with a ministerial portfolio. Small, 5 FTE (IGD, Deputy IGD and 3 staff). IGD able to appoint an advisory panel to provide specialised advice.</li> <li>IGD and Deputy appointed by the Governor-General on recommendation of the House of Representatives.</li> <li>Annual work programme and annual report tabled in the House and published online.</li> </ul>			
<b>KEY PROCEDURES</b>	<p><b>IGD to be the "appropriate authority" for all protected disclosures</b> made by current or former NZDF personnel (except those relating to Veterans' Affairs).</p> <p><b>IGD cannot disclose or share information</b> it accesses or receives in evidence, except with a specified oversight body for the performance of its functions.</p> <p><b>Reporting:</b></p> <ul style="list-style-type: none"> <li>Finalised reports shared with relevant Ministers (where they relate to or impact on portfolios) and with FADTC, subject to security classification and with permission from the Minister of Defence. IGD to publish its investigation reports online unless there is a good reason not to. Where reports can't be disclosed, IGD publishes an unclassified summary of the report.</li> <li>IGD to publish its own motion assessment reports online unless there is a good reason not to. It can publish assessment reports undertaken on referral <u>[with permission from the referring party removed]</u>. IGD would not publish its enquiries.</li> </ul> <p><b>IGD has final say on opening an investigation, and a special process applies for proposed visits to an operational theatre.</b> Chief of Defence Force can decline an IGD request to visit on safety, security and operational effectiveness grounds.</p> <p><b>IGD to finalise security classification of report</b> in accordance with national classification criteria, and after having taken into account the Chief of Defence and Secretary of Defence's views.</p> <p><b>IGD has the ability to inform the Minister of Defence</b> about the adequacy of any remedial or preventative measures taken by the NZDF in response to <u>accepted recommendations.</u></p>			

## Appendix C: Proposed Administrative Procedures

### Own motion investigations

RATIONALE	PROPOSED PROCEDURE
<b>OWN MOTION INVESTIGATIONS</b>	
<p>The IGD should have discretion to determine its investigations into operational activities. The purpose and legislative principles will guide the IGD's approach at a high level. However, to ensure additional clarity, the following procedures relating to the commencement of an investigation on the IGD's own motion are proposed to apply:</p>	
<p><b>Terms of Reference:</b></p> <p>Before starting an investigation, the IGD would need to determine its proposed process. For example, it would plan its approach to an investigation and consider the resources and information it needs to undertake it. Requiring the IGD to develop a terms of reference simply formalises this and ensures that own motion investigations have a sound basis.</p>	<p>The IGD must develop a draft terms of reference that sets out the:</p> <ul style="list-style-type: none"> <li>- purpose of investigation</li> <li>- rationale for investigation (including how the IGD has had regard to any legislative principles)</li> <li>- key issues to be considered</li> <li>- proposed approach</li> <li>- estimated timeframes</li> <li>- proposed outcomes.</li> </ul>
<p><b>Consultation:</b></p> <p>We are proposing that the IGD consults the Chief of Defence Force and Secretary of Defence on the draft terms of reference. The IGD would be required to 'have regard' to comments, but would retain the ability to finalise the terms of reference and decide whether or not to commence an investigation.</p>	<p>The IGD must consult the Chief of Defence Force and the Secretary of Defence on the draft terms of reference.</p> <p>The IGD must have regard to comments provided by Chief of Defence Force or Secretary in finalising its terms of reference.</p>
<p><b>Formal notification:</b></p> <p>The IGD would be required to notify the Minister of Defence of any own motion investigations, including any planned press release or announcement of the investigation.</p> <p>A minimum timeframe would allow the Minister's office, the NZDF and the Ministry of Defence to prepare for any media interest. It would not prevent the IGD from commencing an investigation following notification.</p>	<p>The IGD must formally notify the Minister of Defence, the Chief of Defence Force and the Secretary of Defence of its intention to commence an investigation.</p> <p>Notification must include the final terms of reference as well as any planned press release or announcement of the investigation.</p> <p>There must be a minimum of five working days after notification before any press release or announcement.</p>

## On referral investigations and assessments

RATIONALE	PROPOSED PROCEDURE
<b>ON REFERRAL INVESTIGATIONS AND ASSESSMENTS</b>	
<p>The IGD should have the ability to determine whether or not to undertake an investigation or assessment following a referral from the Minister of Defence, the Secretary of Defence or the Chief of Defence Force, having regard to its purpose and legislative principles.</p> <p>Where the Minister of Defence, the Secretary of Defence or the Chief of Defence Force refers a matter to the IGD that is within its own motion jurisdiction, the IGD could decide*:</p> <ul style="list-style-type: none"> <li>- to undertake an investigation or assessment</li> <li>- not to undertake an investigation or assessment</li> <li>- to refer the matter, or part of the matter, to another body</li> <li>- to defer an investigation or assessment until a later time.</li> </ul> <p><i>*to inform its decision, the IGD could consult other bodies or make initial enquiries.</i></p>	
<p><b>Terms of Reference:</b></p> <p>If the Minister of Defence, the Chief of Defence Force or the Secretary of Defence (the referring parties) intend to refer a matter to the IGD for investigation or assessment, a draft terms of reference should be provided. This would ensure that the IGD is clear about what it is being asked to do and why.</p>	<p>Terms of reference for investigations must include the:</p> <ul style="list-style-type: none"> <li>• purpose of the investigation</li> <li>• rationale for the investigation</li> <li>• key issues to be considered</li> <li>• any timing expectations.</li> </ul> <p>Terms of reference for assessments must include the:</p> <ul style="list-style-type: none"> <li>• purpose of the assessment</li> <li>• rationale for the assessment</li> <li>• legislation, policies, processes or standards the matter will be assessed against</li> <li>• expected timeframes.</li> </ul>
<p><b>Consultation:</b></p> <p>The IGD (and any other referring party) should be able to propose changes to the draft terms of reference as appropriate, though it should be up to the referring party to determine whether or not to accept them.</p>	<p>The IGD may provide comments on the draft terms of reference and request any required changes.</p>
<p><b>Formal notification and decision by IGD:</b></p> <p>The IGD should have the power to determine whether to undertake an investigation or assessment or not - there may be situations where it is more appropriate for another body to act, or where the IGD considers that an investigation or assessment would be at odds with its purpose or any legislative principles.</p>	<p>The referring party could determine whether or not to accept any changes proposed, and must share the final terms of reference with the IGD and the other referring parties.</p> <p>Notification should also include any planned press release or announcement.</p> <p>There must be a minimum of five working days after notification before any press release or announcement.</p> <p>The IGD may agree to investigate or undertake an assessment; decline to investigate or undertake an assessment; defer its investigation or assessment to a later time; or refer the matter to another body as appropriate.</p>

## Own motion assessments

RATIONALE	PROPOSED PROCEDURE
<b>OWN MOTION ASSESSMENTS</b>	
<p>In general, the IGD should be identifying the assessments it intends to conduct in its annual work programme, but there should also be provision for the IGD to undertake assessments into matters on an as needed basis. The following procedures are proposed to apply for own motion assessments:</p>	
<p><b>Terms of Reference:</b></p> <p>Before starting an assessment, the IGD will need to determine its proposed process, including identifying the legislation or standards the matter will be assessed against. The terms of reference will formalise this process.</p>	<p>The IGD must develop a draft terms of reference that sets out the:</p> <ul style="list-style-type: none"> <li>- purpose of the assessment</li> <li>- rationale for the assessment (including how the IGD has had regard to any expectations set as legislative principles)</li> <li>- legislation, policies, processes or standards the matter will be assessed against</li> <li>- proposed approach</li> <li>- estimated timeframes.</li> </ul>
<p><b>Consultation:</b></p> <p>As with investigations, the IGD must consult the Chief of Defence Force and Secretary of Defence on the draft terms of reference. The IGD would be required to 'have regard' to comments, but would retain the ability to decide whether or not to commence an assessment.</p>	<p>The IGD must consult the Chief of Defence Force and the Secretary of Defence on the draft terms of reference.</p> <p>The IGD must have regard to comments provided by the Chief of Defence Force or Secretary of Defence in finalising its terms of reference.</p>
<p><b>Formal notification:</b></p> <p>As an additional check and balance, we have included a requirement for the IGD to notify the Minister of Defence of any own motion assessments that were not included on the annual work programme.</p> <p>As with own motion investigations, any planned publicity or announcement would be included in the notification.</p> <p>A minimum timeframe would allow the Minister's office, the NZDF and the Ministry of Defence to prepare for any media interest.</p>	<p>For any assessment not included in its annual work programme, the IGD must formally notify the Minister of Defence, the Chief of Defence Force and the Secretary of Defence of its intention to undertake an assessment.</p> <p>Notification must include the final terms of reference as well as any planned press release or announcement.</p> <p>There must be a minimum of five working days after notification before any press release or announcement.</p>



## Appendix D: Proposed Safeguards and Protections

ADDITIONAL PROTECTIONS AND SAFEGUARDS PROPOSED	
<b>Information provided to the IGD</b>	<ul style="list-style-type: none"> <li>- The IGD's investigations must be conducted in private, in line with the IGD's obligations to keep information that comes to its knowledge strictly confidential.</li> <li>- Any information, document, communication or thing will be privileged in the same manner as if the IGD's proceedings were a proceeding in a court. The protections that apply to privileged information in the Inquiries Act 2013 should also apply to IGD investigations.</li> <li>- All information, documents or things received by the IGD must be kept in safe custody for the duration of the IGD's proceedings, in accordance with protective security requirements.</li> <li>- On completion of an investigation, the IGD must return all information, documents or things provided in relation to the investigation obtained from organisations or individuals. All other information, documents or things must be kept in safe custody or disposed of securely.</li> </ul>
<b>Witnesses and investigation participants</b>	<ul style="list-style-type: none"> <li>- The IGD should have the power to make orders to protect a witness' or other participant's confidentiality. Specifically, the IGD should be able to forbid publication of the whole or any part of any evidence; any report or account of the evidence; or the name or particulars likely to lead to the witness' or other participant's identification.</li> <li>- A person must comply with requests for information and answer any questions put to them by the IGD, unless the request or questions relate to information that would otherwise be privileged in a civil proceeding (in accordance with subpart 8, part 2 Evidence Act 2006).</li> <li>- Nonetheless, a person is not excused from providing information or answering questions on the grounds that doing so may or would incriminate them in an offence (i.e. the privilege against self-incrimination does not apply).</li> <li>- A person is not required to answer a question if the answer might tend to incriminate them in respect of an offence with which the person has been charged, and in respect of which the charge has not been finally dealt with by a court or otherwise disposed of.</li> <li>- Any self-incriminating statement made or information provided would not be admissible as evidence against the person in any court, tribunal, inquiry or other proceeding (including disciplinary proceedings under the military justice system). Evidence could, however, be used against the person for the prosecution of that person for perjury under the Crimes Act 1961, or for the prosecution of an offence proposed at paragraphs 53 and 54.</li> <li>- If the IGD hears or receives information or material or things that are self-incriminatory, it has the ability to suppress access to certain material and/or to choose how the matter is reported (if at all).</li> <li>- The IGD must not make a comment, or make a finding or recommendation that affects any person, without providing them a) adequate notice of the material it proposes to rely on (subject to confidentiality or protective security constraints); and b) a reasonable opportunity to respond. The IGD should have discretion to determine specific procedures to give effect to this requirement, in accordance with the circumstances.</li> <li>- The IGD should be required to reimburse the reasonable costs and travel expenses of witnesses who appear before it under a summons, and it should have the discretion to reimburse any other person participating in its proceedings.</li> <li>- The NZDF cannot subject NZDF personnel to any penalty or discriminatory treatment of any kind in relation to his or her employment or service because of assisting the IGD, when it was undertaken in good faith.</li> </ul>

## Appendix E: Summary of the Operation Burnham Inquirers' submission on the IGD's ability to access NZDF information

In November 2021, for the purposes of targeted consultation, Cabinet agreed in principle that the IGD should not be able to automatically access information provided to the NZDF by:

- a) foreign partners; and
- b) protected sources that is subject to confidentiality or 'need to know' requirements [CAB-21-MIN-0439].

These exclusions were originally proposed to safeguard the NZDF's ability to receive information in confidence from foreign partners, coalitions, international entities and domestic agencies.

In their submission on this proposal, Sir Terence Arnold and Sir Geoffrey Palmer commented that "[o]ften partner-sourced information will be critical to undertaking a thorough investigation of an incident":

*"New Zealand has nearly always participated in armed conflict overseas as a member of some coalition, group of allies etc. For size reasons, NZ forces are often merged into larger fighting entities. Further, NZ does not have independent capacity in some areas – e.g. some forms of intelligence-gathering, drone surveillance, air assets and their associated weapons video etc – and so must rely on information gathered/equipment provided by overseas partners to conduct operations and to conduct comprehensive investigations into operations".*

They recommended that information held by the NZDF that is sourced from overseas partners "should be made available to the IGD as of right". They reasoned that:

*"Requiring the IGD to obtain the permission of the overseas partner which supplied the information initially before having access to it will greatly delay the investigative process, as it did in the case of Operation Burnham, and may well undermine the IGD's ability to get at the truth. [...]"*

*We think it inconsistent with NZ's sovereignty, and with NZ law, for a blanket requirement such as that proposed to be applied. We cannot emphasise enough how significant a limitation this is for the conduct of timely and effective investigations".*

The Inquiry into Operation Burnham experienced delays because an overseas partner's consent needed to be obtained before certain information could be disclosed. In their final report, the Inquirers commented that this "impacted the Inquiry's ability to make timely progress on some issues" and "caused significant difficulties".<sup>1</sup>

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<sup>1</sup> See paragraph 37 in Chapter 1a and paragraph 90 in Chapter 12 of the Inquiry's final report: [www.operationburnhaminquiry.govt.nz/inquiry-report/](http://www.operationburnhaminquiry.govt.nz/inquiry-report/).

## **Annex F: Regulatory Impact Statement: Establishing the Inspector-General of Defence**

This annex is published separately on the Ministry of Defence website:  
<https://defence.govt.nz/publications>.

Released by the Attorney-General  
and Minister of Defence