

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

**Copies of submissions received as part of the targeted consultation process  
on proposals for establishing an independent Inspector-General of Defence in  
New Zealand**

May 2022

This publication provides copies of the submissions received as part of the targeted consultation process on proposals for establishing an independent Inspector-General of Defence in New Zealand.

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. No public interest has been identified that would outweigh the reasons for withholding it.

Information is withheld in order to:

- protect the privacy of natural persons [section 9(2)(a)] and
- protect information which is subject to an obligation of confidence where the making available of information would be likely to prejudice the supply of similar information or information from the same source and is in the public interest that such information should continue to be supplied [section 9(2)(ba)(i)].

# Submission 001 – Professor Robert Ayson, Victoria University of Wellington

## Responses to questions in the consultation document

### Chapter 2: How we propose to calibrate the IGD

	<b>Do you have any feedback on the proposed purpose of the IGD or our expectations as to how it should operate?</b>
<b>Question 1</b>	<p>I have some concerns about the proposed purpose of the IGD in relation to other arguments set out in the consultation document. Page 7 of the consultation document (CD hereafter) indicates that the recommendations are designed “to minimise the possibility of similar failures occurring in the future and to ensure that, if they do occur, they are investigated and resolved in a timely and appropriate manner.” But how generalisable are these failures beyond Operation Burnham? How much are they generalisable to the broad range of “operational activities” broadly defined later in the CD?</p> <p>The failures could be generalisable if it is assumed that there are generic shortcomings within the NZDF which will manifest themselves regardless of the operation embarked on by New Zealand forces and the context and conditions in which this operation occurs. I have not seen an argument in the CD as to why one would expect this to be the case. Instead there is an argument to be considered that these failures resulted from the interaction between the strengths and weaknesses of how the NZDF conducts itself on the one hand, and the particular challenges and demands of the operational environment in which Op. Burnham occurred on the other. This seems a more compelling explanation to me. It requires more thinking about the circumstances in which similar failures might one day recur rather than a blanket approach.</p>

### Chapter 3: Scope of oversight

	<b>Do you agree with the proposals on the scope of the IGD’s oversight? Why/why not?</b>
<b>Question 2</b>	<p>In line with my response to Question 1, I believe the scope of the oversight is too broad. If the intent is to prevent “similar failures from occurring” (see above), then I am not sure why it makes sense to dismiss the idea of “limiting the IGD’s own motion functions to operations similar to Operation Burnham.” (CD, p. 13).</p> <p>The CD defines these similar operations in the following way: “an operation that takes places as part of an extended overseas military deployment, in a complex situation of armed conflict with the potential to impact on a broad array of international and national political and foreign policy interests.” (p. 13). While the CD describes this as a “relatively narrow definition,” it is still too broad. The operational environment in the case of Operation Burnham involved additional factors relating to the conditions and challenges of intrastate conflict which western forces have largely left behind since their withdrawals from Afghanistan and Iraq. The close media attention and political and public disappointment in the NZDF’s accounting for the effects of Operation Burnham related to the especially and understandably sensitive issue of civilian casualties (which operations involving the use of lethal force in complex intrastate conflicts often risk). This operation also reflected the heightened role of Special Forces in external interventions in complex internal conflicts, a feature of the long war period that began for western forces in late 2001 but has since concluded.</p> <p>The CD says the IGD recommendations focus on “matters that have the most potential to undermine public confidence in the NZDF and carry reputational risks for New Zealand” (p. 13). The findings about NZDF information and communication practices regarding civilian casualties</p>

in relation to Operation Burnham clearly meet these criteria. In other words, Operation Burnham was one of those matters with “the most potential”. But it does not necessarily follow that many current and future NZDF operations will generate challenges that meet these criteria.

For example, we could ask in what ways could public confidence and NZ’s reputation be affected in a similar way by the recent NZDF deployment to maritime East Asia? Even following an investigation, would there be a problem affecting Cabinet and public confidence in the legality and propriety of the NZDF’s actions? Similarly, if NZDF units were to get involved in the near future in interstate maritime armed conflict in Southeast or Northeast Asian waters (where much more attention is now focused) there would be different risks and problems, (including loss of life of service people and of ships and aircraft and the potential for serious escalation). But that does not mean these problems will necessarily be similar to the ones that have arisen in regard to Operation Burnham.

Instead of taking a selective approach the CD moves in the opposite direction, suggesting a very broad remit for the IGD to cover: “any domestic or international activity:

1. in time of war, armed conflict or any other emergency, whether actual or imminent;
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;
3. declared by the Chief of Defence Force, by notice in writing;
4. including training carried out directly in preparation for any specific activity in a–c above; and
5. including intelligence operations carried out directly in preparation for, or in support, of any specific activity in a–c.”

I found no indication in the CD as to why the types of problems that became evident in the NZDF’s handling of information and communications relating to Operation Burnham would or might apply across this full range of NZDF operations. We cannot of course rule out that possibility in individual cases. Moreover, none of us possess crystal balls and we do not know today what operations the NZDF will be asked to undertake by future governments, and the specific problems these may generate. But we surely can work out that there are particular types of operations and environments where “similar failures” are most likely to occur. One of these environmental aspects is covered in an early phrase in Defence Force Order 35: “armed conflict is increasingly conducted in areas inhabited by civilians. Military operations are now frequently occurring in urban environments or places in which large numbers of civilians, including refugees and displaced persons, may congregate.”

The difficulty is that the “now” referred to in this statement reflects a period of operations that New Zealand and most of its traditional partners have exited from. In today’s and tomorrow’s “now”, the opportunity for New Zealand to be involved in these types of operations is significantly lower than it was when the first deployment to Afghanistan occurred twenty years ago and also much lower than when Operation Burnham was conducted. There is a real chance that the IGD will be introduced to deal with problems that were more evident in a previous – and now largely superseded – operational context for the NZDF.

#### Chapter 4: Functions and powers

Do you agree with the proposals on IGD investigations? Why/why not?

<b>Question 3</b>	Not specifically. If my concerns about the breadth of the remit are dealt with, one might expect there would be a flow on effect in other areas.
-------------------	--

<b>Question 4</b>	<b>Do you have any feedback on the IGD's proposed assurance functions and powers?</b>
	Not specifically: see answer to Question 3.

## Chapter 5: Form and structure

<b>Question 5</b>	<b>Do you have any feedback on how the IGD is proposed to be set up?</b>
	<p>If the IGD is going to investigate current and future operations which are deemed to carry similar risks to public confidence in the NZDF and reputational risks to New Zealand as have occurred with regard to Operation Burnham, will its workload justify a permanent entity? Is there ongoing work for a permanent staff of five staff members? Instead, could a fixed term IGD, with specific built for purpose objectives, (designed to suit the problems that current missions are more likely to produce and thus draw on specialist knowledge relating to the missions in question) be brought together in the event that the demand seemed especially likely to arise again?</p> <p>That might transpire if the NZDF became especially active in the types of international peace support missions where the use of lethal violence clashes with protection of civilian priorities. Or it might occur in the event (unlikely for the time being) that New Zealand's traditional partners reverse their desire to avoid complex operations in nation-building situations in the face of armed insurgencies. In both situations, or a mixture of them, the legal and ethical challenges that Defence Force Order 35 is designed around are significantly more likely to be faced by the NZDF.</p> <p>This more targeted approach would seem preferable to assumptions that the public will be reassured by an IGD with a very wide remit (which in my view is too broad). As currently proposed in the CD, the IGD risks becoming a unit in search of a practical reason to exist, and the enabling legislation an attempt to shut the stable after the horse has already bolted.</p> <p>If the government is committed to establishing an IGD, efforts need to be made to take a much more tailored approach.</p>

## Chapter 6: Administrative procedures

<b>Question 6</b>	<b>Do you have any feedback on the appropriateness and/or adequacy of the administrative procedures set out on pages 26-28?</b>
	No.

## Other comments/feedback

I appreciate the opportunity to contribute this submission.

# Submission 002 – Dr Thomas Gregory, University of Auckland

## Responses to questions in the consultation document

### Chapter 2: How we propose to calibrate the IGD

<p>Question 1</p>	<p><b>Do you have any feedback on the proposed purpose of the IGD or our expectations as to how it should operate?</b></p> <p>The Burnham Inquiry identified serious deficiencies with how the NZDF responded to allegations of civilian harm, which comprised two core democratic principles: civilian control of the military and ministerial accountability to parliament.<sup>1</sup> Given these concerns, I strongly support the creation of an independent Inspector-General of Defence (IGD), but adjustments need to be made to the proposal to ensure that the IGD is able to achieve its objectives.</p> <p>The purpose of the IGD is generally sound, but its focus is a little parochial. The Burnham Inquiry raised important concerns about how NZDF conduct impacted democratic principles in Aotearoa New Zealand, but it is important to remember that the victims were not New Zealanders. Investigations conducted by the IGD are likely to focus on operational activities taking place overseas and the victims are <u>NOT</u> likely to be New Zealanders.<sup>2</sup> It is imperative that the IGD is cognisant of its international obligations and that provisions are made to ensure that the communities impacted by NZDF operations are consulted – before an investigation is commenced, whilst the investigation is conducted, and once the findings have been released.<sup>3</sup></p> <p><b>Therefore, §31 needs to be amended to recognise that the IGD has international responsibilities as well as domestic ones, and §32 should recognise that the public interest should include both the public in Aotearoa New Zealand and the communities impacted by NZDF operations.</b> This is not an abstract point, but something that will have significant bearing on what is considered an ‘appropriate use of the IGD’s resources’. Failure to acknowledge this international responsibility would be contrary to the principles of accountability, transparency, and justice.<sup>4</sup></p> <p>Furthermore, although the purpose of the IGD outlined in §31 is generally sound, the expectations outlined in §32 are seriously deficient. Whilst it is important for the IGD to engage with NZDF agencies, there are other stakeholders who also need to be engaged on a regular basis – particularly in areas where the NZDF is operating. The IGD will need to maintain a close working relationship with civil society groups, including non-governmental organisations with expertise in civilian protection and other areas that might be pertinent to future operations. The importance of these relations has been well-established in military lessons learned documents from recent conflicts.<sup>5</sup> This includes international non-governmental organisations, such as the Center for Civilians in Conflict, Every Casualty Counts and Human Rights Watch.</p> <p>The IGD will also need to build meaningful relationships with non-governmental organisations working in areas where the NZDF has been deployed. Had the IGD existed when the NZDF was operating in Afghanistan, for example, it would have needed a strong relationship with the United Nations Assistance Mission in Afghanistan and the Afghanistan Independent Human Rights Commission. Similar relationships will need to be built in future conflicts to ensure the IGD is aware of allegations from the outset. This is particularly true when it comes to special forces, which are much harder to monitor because of the secrecy that surrounds their operations.<sup>6</sup> <b>An additional expectation should be added to §32 stipulating that the IGD has a responsibility to engage with international stakeholders, including civil society actors.</b></p> <p><b>References</b></p> <p>1. Inquiry into Operation Burnham, ‘Report of the Government Inquiry into Operation Burnham and Related Matters’. 2020. Available from:</p>
-------------------	--

	<a href="https://operationburnham.inquiry.govt.nz/assets/IOB-Files/Report-of-the-Government-Inquiry-into-Operation-Burnham-print-version.pdf">https://operationburnham.inquiry.govt.nz/assets/IOB-Files/Report-of-the-Government-Inquiry-into-Operation-Burnham-print-version.pdf</a> .
	2. Ministry of Defence, 'Strategic Defence Policy Statement'. 2018. Available from: <a href="https://www.defence.govt.nz/assets/Uploads/8958486b29/Strategic-Defence-Policy-Statement-2018.pdf">https://www.defence.govt.nz/assets/Uploads/8958486b29/Strategic-Defence-Policy-Statement-2018.pdf</a> .
	3. Harvard Law School. 'Acknowledge, Amend, Assist: Addressing Civilian Harm Caused by Armed Conflict and Armed Violence'. 2015. Available from: <a href="http://hrp.law.harvard.edu/wp-content/uploads/2015/04/AcknowledgeAmendAssist.pdf">http://hrp.law.harvard.edu/wp-content/uploads/2015/04/AcknowledgeAmendAssist.pdf</a> .
	4. Following the Brereton Inquiry, the Chief of the Australian Defence Force issued an apology in both Dari and Pashto. To my knowledge, the neither the Burnham Report nor any NZDF statements have been translated into Pashto or Dari. Available from: <a href="https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/CDF-Apology-Pashtu-Translation.pdf">https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/CDF-Apology-Pashtu-Translation.pdf</a>
	5. Center for Civilians in Conflict, 'Civilian Harm Tracking: Analysis of ISAF Efforts in Afghanistan'. 2014. Available from: <a href="https://civiliansinconflict.org/wp-content/uploads/2017/09/ISAF_Civilian_Harm_Tracking.pdf">https://civiliansinconflict.org/wp-content/uploads/2017/09/ISAF_Civilian_Harm_Tracking.pdf</a> . See also, Department of the Army, 'ATP 3-07.6: Protection of Civilians'. 2015. Available from: <a href="https://irp.fas.org/doddir/army/atp3-07-6.pdf">https://irp.fas.org/doddir/army/atp3-07-6.pdf</a> .
	6. Larry Lewis and Sarah Holewinski, 'Changing of the Guard: Civilian Protection for an Evolving Military'. <i>Prism</i> 4(2): 58-62.

### Chapter 3: Scope of oversight

Do you agree with the proposals on the scope of the IGD's oversight? Why/why not?	
	<p>The proposed scope of the IGD is generally acceptable, but there are some significant gaps that will compromise its ability to hold the NZDF accountable. It is imperative that the IGD has its own motion oversight functions to ensure its independence, as proposed in §37. Whilst it is good that the IGD can take matters on referral from the Minister of Defence, the Chief of Defence Force and/or the Secretary of Defence, it is crucial that the IGD has full discretion to undertake its functions to protect its independence and build public trust. <b>The IGD also needs a framework so that civil society groups, including possible victims, can also raise concerns.</b> An online submission portal would be the absolute minimum, but the IGD needs to recognise the difficulties facing civilians making complaints about civilian harm and take steps to mitigate these problems. This is why connections with international non-governmental organisations and community organisations where the NZDF is operating are so important.<sup>1</sup></p>
Question 2	<p>A lot hinges on the definition of "operational activities". I strongly endorse the proposal in §39 to adopt 'a broad definition of operational activities in order to give the IGD the greatest ability and independence to determine what it does'. Maintaining this broad definition is crucial and it would be a serious mistake to replace it with a narrower definition. The Ministry of Defence/Manatū Kaupapa Waonga is right to be concerned, as stated in §40, that a narrower definition 'would not future-proof the IGD at a time of rapid technological development and security threats' and that 'a broader definition... would better meet public expectations of independent oversight'.</p> <p>It is unclear whether certain issues would fall within the purview of the IGD, even with this broader definition. For example, the Ministry of Defence/Manatū Kaupapa Waonga commissioned an independent review of NZDF efforts to create a culture of dignity and respect following allegations of sexual misconduct and bullying within the ranks.<sup>2</sup> The proposal should clarify whether the IGD would be expected to conduct investigations into issues like this, which might occur across operational and non-operational activities. <b>In my opinion, some</b></p>



provision needs to be made for the IGD to investigate other matters that might arise, which are not strictly operational.

There are some specific details that need clarification because the implications could be quite significant. As stated in §36, the IGD will focus on activities that ‘have the most potential to undermine public confidence in the NZDF and carry reputational risks for New Zealand’. This immediately begs the question: who gets to decide which activities have the potential to undermine public confidence or carry reputational risk? **The composition of the advisory panel (as outlined in §95) is significant as the advisory panel can provide guidance on what activities need to be monitored and ensure civil society voices are recognised.** It is not always obvious which activities are likely to undermine public confidence or carry reputational risk until the damage is done, so proactively engaging with a broad range of stakeholders is crucial.<sup>3</sup>

Finally, I strongly disagree with the position of the Government outlined in footnote 27, which states that the Foreign Affairs, Defence and Trade Select Committee should NOT be able to refer matters to the IGD. **It is crucial that the Foreign Affairs, Defence and Trade Select Committee can refer matters to the IGD to ensure independence and maintain democratic accountability.** This does not mean, however, that the IGD is obliged to accept these referrals, especially if they do not fit the criteria outlined in §32.

#### References

1. Abdurashed Al-Faqih and Kristine Beckerle, ‘US Fails to Acknowledge Killing Yemeni Civilians’. 2020. Available from: <https://www.justsecurity.org/70151/u-s-fails-to-acknowledge-killing-yemeni-civilians/>.
2. Ministry of Defence/Manatū Kaupapa Waonga, ‘Independent Review of the New Zealand Defence Force’s Progress Against its Action Plan for Operation Respect’. 2020. Available from: <https://www.defence.govt.nz/assets/publication/file/Operation-Respect-Review.pdf>.
3. Department of the Army, ‘ATP 3-07.6: Protection of Civilians’. 2015. Available from: <https://irp.fas.org/doddir/army/atp3-07-6.pdf>. See also, Center for Army Lessons Learned, ‘Afghanistan Civilian Casualty Prevention Handbook’. 2012. Available from: <https://info.publicintelligence.net/CALL-AfghanCIVCAS.pdf>.

## Chapter 4: Functions and powers

**Do you agree with the proposals on IGD investigations? Why/why not?**

Question 3

I strongly agree with the functions outlined in §43 – it is vital that the IGD has an investigatory function, an assessment function, and an enquiry function. The assessment function is particularly important as it will enable the IGD to review processes, procedures and policies before problems arise to hopefully prevent these problems arising.<sup>1</sup> **One of the first tasks for the IGD should be to investigate whether NZDF Defence Order 35 is fit for purpose, and to consider what other measures could be put in place to prevent civilian casualties from occurring.**<sup>2</sup> The NZDF is already dangerously out of sync with international best practice.<sup>3</sup>

I strongly support the proposals outlined in §46 through §52. It is crucial that the IGD retains the ‘own motion investigation function’. It is vital that the IGD is given a ‘high level of discretion’. And it is important that the IGD’s discretion is NOT limited with statutory conditions. I am very pleased to see that the IGD’s investigatory powers will NOT be limited to matters of legality and propriety, as stated in §53-§56. Afterall, the Burnham Inquiry made clear that the NZDF managed to jeopardise two fundamental democratic principles without necessarily violating the law. It is crucial, therefore, that the IGD be given an extremely broad scope. Expanding the scope to include recommendations for improvement will align the IGD

with other international best practice, which has emphasised the importance of civilian protection measures that go beyond the letter of the law.<sup>4</sup>

**I am extremely concerned by the limitations outlined in §57-§59, as these could seriously compromise the ability of the IGD to investigate the very matters that led to its creation.** The current proposal – that the IGD notify the Minister of Defence when a request has been declined – is woefully insufficient. Any refusals should be made public, with details of the issue/allegation that the IGD intends to investigate and reasons why the investigation cannot proceed. This would be the bare minimum needed to protect democratic control and ministerial accountability. It is particularly pertinent when it comes to investigating civilian harm, as operations are likely to continue for several years and there is a significant risk of recurrence. Unless suitable safeguards are put in place, it would be a mistake to give the Chief of Defence Force the final decision on whether an investigation can proceed.<sup>5</sup>

I generally agree with the investigatory powers outlined in the proposal, but there are some significant gaps. It is vital that the IGD be given the statutory powers outlined in §60, including access to all NZDF records, databases, and information systems. **Given the problems identified in the Burnham Report, the NZDF should be compelled – as an absolute minimum – to proactively report all information on civilian harm to the IGD, including allegations that the NZDF does not consider credible.**<sup>6</sup>

**In addition, the NZDF should also be compelled to proactively report all instances of NZDF personnel discharging a weapon whilst on operations (in addition to allegations of civilian harm), including on overseas firing ranges where unexploded ordnance could cause harm to civilians.**<sup>7</sup> It is not always obvious when civilians are harmed, so a register of incidents – including the units involved, the weapon fired, and the coordinates where the incident occurred – would enable the IGD to cross-reference allegations with known incidents.<sup>8</sup> Whilst the NZDF might object to sharing sensitive operational information, this information does not need to be made public unless the IGD determines it necessary to do so in specific cases. As explained elsewhere, I also have serious concerns about NZDF Defence Order 35, which does NOT contain sufficient safeguards to prevent another Operation Burnham.<sup>9</sup>

I am concerned that there are no provisions within the proposal for interviewing local witnesses and outside organisations. **The IGD cannot rely solely on evidence provided by the NZDF, so provisions will need to be put in place to ensure that the IGD is able to collect information from other sources.**<sup>10</sup> This will need to be resourced appropriately, including funding set aside to pay for local investigators, translators, and so forth.

#### References

1. Joint and Coalition Operational Analysis, 'Reducing and Mitigating Civilian Casualties: Enduring Lessons'. 2013. Available from: <https://info.publicintelligence.net/JCOA-ReducingCIVCAS.pdf>.
2. Thomas Gregory and Larry Lewis, 'Opportunity Missed: New Zealand Defence Force's Order on Civilian Harm in Wartime'. 2021. Available from: <https://www.justsecurity.org/75605/opportunity-missed-new-zealand-defense-forces-order-on-civilian-harm-in-wartime/>.
3. NATO, 'NATO Policy for the Protection of Civilians'. 2016. Available from: [https://www.nato.int/cps/en/natohq/official\\_texts\\_133945.htm](https://www.nato.int/cps/en/natohq/official_texts_133945.htm). See also, Department of the Army, 'ATP 3-07.6: Protection of Civilians'. 2015. Available from: <https://irp.fas.org/doddir/army/atp3-07-6.pdf>.
4. NATO, 'Protection of Civilians'. 2020. Available from: <https://shape.nato.int/resources/3/website/ACO-Protection-of-Civilians-Handbook.pdf>.
5. Center for Civilians in Conflict, 'In Search of Answers: US Military Investigations and Civilian Harm'. 2020. Available from: <https://civiliansinconflict.org/wp-content/uploads/2020/02/PDF-Report-for-Website.pdf>.



6. Thomas Gregory and Larry Lewis, 'Opportunity Missed: New Zealand Defence Force's Order on Civilian Harm in Wartime'. 2021. Available from: <https://www.justsecurity.org/75605/opportunity-missed-new-zealand-defense-forces-order-on-civilian-harm-in-wartime/>. See also, Ryan Goodman, 'The Pentagon Needs a Better Way to Count Civilian Casualties'. 2018. Available from: <https://www.nytimes.com/2018/04/26/opinion/civilian-casualties-pentagon-military.html>.
7. Columbia Law School and Sana'a Center for Strategic Studies, 'Out of the Shadows: Recommendations to Advance Transparency in the Use of Lethal Warfare'. 2017. Available from: [https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/out\\_of\\_the\\_shadows.pdf](https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/out_of_the_shadows.pdf).
8. Center for Civilians in Conflict, 'In Search of Answers: US Military Investigations and Civilian Harm'. 2020. Available from: <https://civiliansinconflict.org/wp-content/uploads/2020/02/PDF-Report-for-Website.pdf>.
9. Thomas Gregory and Larry Lewis, 'Opportunity Missed: New Zealand Defence Force's Order on Civilian Harm in Wartime'. 2021. Available from: <https://www.justsecurity.org/75605/opportunity-missed-new-zealand-defense-forces-order-on-civilian-harm-in-wartime/>.
10. Center for Civilians in Conflict, 'In Search of Answers: US Military Investigations and Civilian Harm'. 2020. Available from: <https://civiliansinconflict.org/wp-content/uploads/2020/02/PDF-Report-for-Website.pdf>.

#### Do you have any feedback on the IGD's proposed assurance functions and powers?

#### Question 4

I am very concerned about the proposal in §72, which stipulates that the IGD will not be able to investigate a matter where a Court of Inquiry has been established unless there is an unreasonable delay, or the matter has been referred by the Minister of Defence or the Chief of Defence Force. There is a risk that Courts of Inquiry could be used to scupper or delay investigations into politically sensitive issues. As noted in §73, this restriction departs from the Inquiry's vision that the IGD would not be limited to investigating only when internal avenues have been exhausted. **I do NOT believe this restriction is warranted because there is a real danger that it could compromise the effectiveness of the IGD.<sup>1</sup> This restriction must be removed to ensure the IGD can fulfil its purpose and meet its objectives.**

I welcome the provision in §75 that the NZDF will be obliged to notify the IGD about reports of civilian harm, but **the obligation should be expanded to also include all operations where a weapon was discharged, as it is not always apparent to military personnel when civilians are harmed.<sup>2</sup>** This is particularly important when operations involve special forces units, whose involvement might not be widely known – either in New Zealand or the country where they are operating.<sup>3</sup> Such a register would enable the IGD to cross-reference allegations with known operations and their coordinates, without necessarily having to divulge classified information.<sup>2</sup> In Afghanistan, it was common practice for the Civilian Casualty Tracking Cell to receive such reports, even when coalition troops did not believe that civilians had been harmed.<sup>3</sup>

I fully support the decision outlined in §78 to publish investigations online to enhance transparency. However, **provisions should also be made to translate investigations into local languages so that the communities affected can also access these findings.<sup>4</sup>** It might also be necessary to disseminate findings through other culturally appropriate mechanisms, such as community meetings, and adequate resourcing will be necessary.<sup>5</sup>

I fully support the proposals outlined in §81-88, which concern assessments and enquiries. As noted in §84, assessments can help identify relevant standards of best practice that can be implemented in the NZDF to prevent problems before they arise. **The advisory panel will be crucial to this process as it will be able to identify international best practice. It is important that the advisory panel includes experts from non-governmental organisations, such as the Center for Civilians in Conflict.**

The proposal does not discuss what obligations the NZDF has when it comes implementing – or even acknowledging – the recommendations outlined in any IGD investigation, assessment, and enquiry. This is a worrying oversight and needs to be addressed.

#### References

1. Center for Civilians in Conflict, 'In Search of Answers: US Military Investigations and Civilian Harm'. 2020. Available from: <https://civiliansinconflict.org/wp-content/uploads/2020/02/PDF-Report-for-Website.pdf>.
2. Columbia Law School and Sana'a Center for Strategic Studies, 'Out of the Shadows: Recommendations to Advance Transparency in the Use of Lethal Warfare'. 2017. Available from: [https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/out\\_of\\_the\\_shadows.pdf](https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/out_of_the_shadows.pdf).
3. Center for Civilians in Conflict, 'Civilian Harm Tracking: Analysis of ISAF Efforts in Afghanistan'. 2014. Available from: [https://civiliansinconflict.org/wp-content/uploads/2017/09/ISAF\\_Civilian\\_Harm\\_Tracking.pdf](https://civiliansinconflict.org/wp-content/uploads/2017/09/ISAF_Civilian_Harm_Tracking.pdf).
4. Larry Lewis and Sarah Holewinski, 'Changing of the Guard: Civilian Protection for an Evolving Military'. *Prism* 4(2): 58-62.
5. Harvard Law School. 'Acknowledge, Amend, Assist: Addressing Civilian Harm Caused by Armed Conflict and Armed Violence'. 2015. Available from: <http://hrp.law.harvard.edu/wp-content/uploads/2015/04/AcknowledgeAmendAssist.pdf>.

## Chapter 5: Form and structure

### Do you have any feedback on how the IGD is proposed to be set up?

I fully support the proposal to establish the IGD as an independent statutory officer associated with a ministerial portfolio, as stated in §91. I also support the proposal to establish an annual work programme and produce an annual report, as outlined in §93. However, it is unclear from the proposal what consultation the IGD would be expected to undertake when developing this annual work programme. **It is imperative that the IGD be required to undertake broad consultation with stakeholders, including civil society groups and communities in the areas where the NZDF is operating.**

#### Question 5

The composition of the advisory panel is particularly important in this regard. The proposal should establish clear expectations about who should be included on the panel, even if appointees are the responsibility of the IGD (see §94). Civil society involvement is crucial, particularly when it comes to the issue of civilian harm. Whilst international lawyers and former military personnel might be obvious candidates, the panel needs to include other stakeholders and provisions need to be put in place to ensure the communities impacted by NZDF operations are consulted.<sup>1</sup>

I have serious concerns about the proposed structure as five FTE is woefully inadequate. The IGD will need to build and maintain relationships with a variety of external stakeholders, across a wide range of issues. It is worth noting that the Office of the Inspector-General of the Australian Defence Force (IGADF) employed 109 people in 2020.<sup>2</sup> Although the IGADF has a broader remit, the directorates with comparable areas of responsibility to the IGD have 20

permanent staff members in total, plus additional reserve staff and professional service providers. Another 15 staff were also assigned to the Brereton Inquiry.<sup>3</sup> **To be effective, the IGD will need to double the proposed FTE in \$95, with specific investigative and analytical experience (including a data specialist and an expert in international humanitarian law).**

**The IGD will also require additional resources to hire local investigators to assist with investigators outside Aotearoa New Zealand, as well as translators to ensure that findings are disseminated to the communities affected.**<sup>4</sup>

1. Center for Civilians in Conflict, 'In Search of Answers: US Military Investigations and Civilian Harm'. 2020. Available from: <https://civiliansinconflict.org/wp-content/uploads/2020/02/PDF-Report-for-Website.pdf>.
2. IGADF, 'Annual Report, 2019-2020'. 2020. Available from: <https://defence.gov.au/mjs/Master/docs/IGADF-Annual-Report-2019-20.pdf>.
3. *Ibid.*
4. Center for Civilians in Conflict, 'In Search of Answers: US Military Investigations and Civilian Harm'. 2020. Available from: <https://civiliansinconflict.org/wp-content/uploads/2020/02/PDF-Report-for-Website.pdf>

## Chapter 6: Administrative procedures

### Do you have any feedback on the appropriateness and/or adequacy of the administrative procedures set out on pages 26-28?

Question  
6

As previously noted, I strongly agree with the proposal to grant the IGD the discretion to determine its investigations into operational activities, but strong consideration needs to be given to the composition of the advisory panel to ensure appropriate guidance is given to the IGD. The IGD should be expected to establish terms of reference before commencing an investigation, but it is unclear from the proposal what institutional support the IGD will be provided to establish these parameters. The advisory panel will need to be consulted, but I am concerned about the low proposed FTE and significant gaps in expertise.

I have no objection to the IGD consulting the Chief of Defence Force and Secretary of Defence before commencing an investigation or assessment. However, I have serious concerns with the proposal as it stands because it grants the Chief of Defence Force and Secretary of Defence undue influence over investigations into NZDF activities and fails to provide other stakeholders, including possible victims, any influence. **It would be extremely dangerous to grant the Chief of Defence Force and the Secretary of Defence the power to 'correct any factual inaccuracies' given that these facts are likely to be the subject of investigation.**

This is particularly alarming given that the Burnham Inquiry criticised the former Chief of Defence Force for giving undue prominence to location errors in *Hit and Run* whilst ignoring what was accurate in the book.<sup>1</sup> Consulting with the Chief of Defence Force and Secretary of Defence could help to clarify the operations that might need investigating, but giving them the power to correct factual inaccuracies could also be used to impede, limit, or misdirect investigations. **The procedures on consultation need to be amended to ensure all stakeholders are consulted, and the NZDF should NOT be given the power to correct factual errors.**

#### References

1. Inquiry into Operation Burnham, 'Report of the Government Inquiry into Operation Burnham and Related Matters'. 2020. Available from: <https://operationburnham.inquiry.govt.nz/assets/IOB-Files/Report-of-the-Government-Inquiry-into-Operation-Burnham-print-version.pdf>: 273.

## Other comments/feedback

The proposals for the IGD are generally good, but I am concerned about the lack of provision for consultation and engagement with other stakeholders beyond the NZDF, including possible victims. The IGD will need to build and maintain relationships with international non-governmental organisations to ensure that it has access to civilian casualty data that is not provided by the NZDF, can conduct meaningful investigations in allegations of civilian harm, and remains up to date with international best practice in this area. Serious consideration will need to be given to the composition of the advisory panel, which must include experts on civilian protection and community engagement.

I am very concerned that the proposal does not even mention the importance of engaging with non-governmental organisations in areas where the NZDF are operating or ensuring that possible victims are involved in the investigation. This is a complex problem and provisions need to be made in the proposal to ensure that the IGD has the appropriate FTE to ensure that these relationships can be developed and the necessary resources to involve local investigators. The fact that there seems to be no mechanism to translate into local languages and disseminate the findings to the communities impacted by NZDF operations is alarming and could jeopardise the principles of accountability and transparency, which are supposed to be central to the endeavour. Whilst the Burnham Inquiry raised concerns about civilian control of the military and ministerial accountability to Parliament in Aotearoa New Zealand, the operational activities that the IGD is most likely to investigate will be taking place overseas and the IGD has a responsibility to those affected.

My core recommendation, however, is that the NZDF be required to proactively provide the IGD with data on all incidents where weapons have been discharged (including on overseas firing ranges) as well as all reports of civilian harm (including those it does not consider to be credible). This will enable the IGD to cross-reference allegations of civilian harm with NZDF operations quickly and easily. This is not an onerous task – the NZDF should be collecting this data anyway and it is the only way to guarantee that allegations of civilian harm can be investigated quickly and effectively. This is particularly important when special forces operations are being conducted because these operations are normally shrouded in secrecy, which means that the people of Aotearoa New Zealand might not realise when the NZDF is involved and even victims might know who is responsible for causing them harm.

Released by the Attorney General  
and Minister of Defence

## Submission 003 - Professor Janet McLean, University of Auckland

### Responses to questions in the consultation document

#### Chapter 2: How we propose to calibrate the IGD

Question 1	Do you have any feedback on the proposed purpose of the IGD or our expectations as to how it should operate?
	These are appropriate and well articulated.

#### Chapter 3: Scope of oversight

Question 2	Do you agree with the proposals on the scope of the IGD's oversight? Why/why not?
	<p>I am unsure about the inclusion of cyber-security matters. It presumably requires particular kinds of technical expertise in the IGD, particular forensic skills and evidence. I think it may stretch the functions and personnel of the IGD too far.</p> <p>My primary concern is how the IGD's oversight function is triggered. The own motion function is important and I support it but it is hard to see how it would work in practice given the tiny number of staff. In both the existing system and the new system the weakest link is if someone in the chain of command or an international ally blocks investigation. A key question then is whether and how the new process is able to manage that eventuality. Is it envisaged that issues raised under the Defence Force Order 35 also be notified to the IGD, and that the IGD then works out its own criteria for further investigation from among these?</p> <p>Presumably the IGD will, in the main, be reacting to referrals. I would prefer the Select Committee to be included among those able to make referrals as a parliamentary committee does not have the significant powers needed to <i>fully</i> undertake an inquiry of this kind, and the more avenues by which to draw matters to the attention of the IGD the better.</p>

#### Chapter 4: Functions and powers

Question 3	Do you agree with the proposals on IGD investigations? Why/why not?
	<p>I understand why sometimes the timing of an investigation may have to be delayed because of an on-going operation, danger to personnel etc, and hence the decision to give the Chief of the Defence Force the power to stop or delay an investigation that might prejudice an ongoing deployment. It is really important for that decision to be notified to the minister.</p> <p>In addition to notification to the Minister, it may help to spell out more fully in legislation the countervailing matters which need to be weighed by the Chief of Defence as against risk to the operation and to personnel eg the risk that evidence will disappear or be destroyed, risk to NZ's reputation, harm to civilians. The Minister should also be notified of those reasons.</p> <p>Presumably the IGD can resume an investigation after the danger to the operation has passed – and there needs to be a mechanism to signal that.</p>

Question 4	<p><b>Do you have any feedback on the IGD's proposed assurance functions and powers?</b></p> <p>These seem sensible. There is a question of whether the protection against self-incrimination would extend to protect the person from evidence gleaned as a consequence of their disclosures.</p>
---------------	---

#### Chapter 5: Form and structure

Question 5	<p><b>Do you have any feedback on how the IGD is proposed to be set up?</b></p> <p>This is a very small group and expectations about what it will have the capacity to undertake need to be realistic.</p>
---------------	--

#### Chapter 6: Administrative procedures

Question 6	<p><b>Do you have any feedback on the appropriateness and/or adequacy of the administrative procedures set out on pages 26-28?</b></p> <p>[Insert response here]</p>
---------------	--

#### Other comments/feedback

My expertise is in public law but I do not have any detailed knowledge about either military operations, the international laws of war and responsibility, or military law.

Released by the Attorney General  
and Minister of Defence



## Submission 004 – Associate Professor John Ip

### Responses to questions in the consultation document

#### Chapter 2: How we propose to calibrate the IGD

Question 1	<b>Do you have any feedback on the proposed purpose of the IGD or our expectations as to how it should operate?</b>
	Regarding the question posed at para 33: I think that it would be useful to set out the expectations for the office in terms of broad principles in the legislation. If the IGD is to be given a broad remit and broad discretion to decide whether to take action (and there are sound reasons for both), it is possible that, depending on resourcing and the amount of potential activity that might be investigated, choices have to be made. So if the main purpose of setting up the IGD is to enhance civilian oversight of the military and assisting the Minister, then it makes sense to say this explicitly as a general guide to the IGD.

#### Chapter 3: Scope of oversight

Question 2	<b>Do you agree with the proposals on the scope of the IGD's oversight? Why/why not?</b>
	Yes. It might be useful to clarify or illustrate what kinds of NZDF activity might fall into the other category referred to in para 37(b) as I was not clear on this.

#### Chapter 4: Functions and powers

Question 3	<b>Do you agree with the proposals on IGD investigations? Why/why not?</b>
	<p>I have three comments on this part:</p> <ul style="list-style-type: none"><li>- Para 58 regarding IGD investigations in respect of ongoing in-theatre operations: the Chief of the Defence Force can decline the IG's request to investigate when they do not consider that the investigation can be conducted safely, securely and in a way that does not impede military operations. The Minister is notified of this, and the "The Chief of Defence Force would be expected to inform the IGD in the event the situation changes and an investigation becomes possible, or when operations have ceased." It might be useful to specify in more detail how this expectation to inform would work – perhaps the declining would lapse after a certain amount of time, or there might be a periodic obligation to report on whether circumstances might have changed.</li><li>- P19: "The NZDF cannot subject an NZDF person 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." I would think that the need to protect individuals who assist the IGD from retaliation is important, particularly in the context of tight-knit organisations (like military units, police, intelligence establishment etc). I therefore wonder about the wisdom of the inclusion of the "undertaken in good faith" proviso. It will matter a great deal who gets to decide whether the assistance was undertaken in good faith – presumably it ought to be the IGD.</li><li>- P20: "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" This covers use of the statement or information provided (use immunity in American criminal procedure parlance). Is it intended that any evidence derived from the statement or information be admissible (derivative use immunity)?</li></ul>

Question 4	<p><b>Do you have any feedback on the IGD's proposed assurance functions and powers?</b></p> <p>I wonder whether there might be a better term that might be used for "enquiries" (para 88) to capture what seems to amount to capacity building. The generic meaning of enquiry might easily be mistaken for investigation, or also inquiries in the sense of public and government inquiries under the Inquiries Act 2013.</p>
------------	---

## Chapter 5: Form and structure

Question 5	<p><b>Do you have any feedback on how the IGD is proposed to be set up?</b></p> <p>Appointment (paras 90-97): I think the mirroring of the appointment provisions for IGIS under s 157 of the Intelligence and Security Act 2017 makes sense. It is, in my view, essential that the IGD be and be seen to be institutionally separate and independent of the Ministry of Defence. Independence and perception of it matters if the IGD is to be able to fulfil its stated function of enhancing civilian oversight of the military. Any arrangement suggestive of possible regulatory capture ought to be avoided.</p>
------------	--

## Chapter 6: Administrative procedures

Question 6	<p><b>Do you have any feedback on the appropriateness and/or adequacy of the administrative procedures set out on pages 26-28?</b></p> <p>[Insert response here]</p>
------------	--

## Other comments/feedback

[Insert response here]

Released by the Attorney-General  
and Minister of Defence

## Submission 005 – Nicky Hager

Submission on the Proposals for establishing an Independent Inspector-General of Defence in New Zealand

10 December 2021

### 1. Operation Burnham

1.1 First, before getting down to the substance of the proposals, I ask that you do not adopt the NZDF's benign summary of what the Operation Burnham Inquiry found [11]. It found that an NZSAS trooper assaulted a prisoner; that a prisoner was tortured and when news of the torture reached NZDF, it did nothing; that NZSAS officers directed fire from a US helicopter onto civilian houses where woman and children were huddling and running (only avoiding a finding of a breach of international humanitarian law because they had not been fully briefed on the location by the helicopter crew); that a number of apparently unarmed men on a hillside far from the Area of Operations were killed under instructions from the NZSAS officers; that former NZSAS officers misled not only Ministers but the Inquiry itself; and much more. This is why the Inquiry commissioners concluded (Chapter 12/53) that the need for an IGD was "indisputable".

1.2 This means the statement at [15] that the "primary problems found by the Inquiry" were the quality, accuracy and fullness of information provided to Ministers is incorrect. Just as important were issues of legality and propriety. This needs to be corrected to give an accurate account of why an IGD is needed and the scope of issues it is required for. Minimising what the wrongdoing was during Operation Burnham risks leading to a minimising of the IGD's role and powers.

### 2. Proposed purpose of IGD

2.1 The consultation document says [8] "The IGD is intended to assist the Minister of Defence to exercise democratic oversight of the NZDF." This is not what the Operation Burnham Inquiry report recommended and it is inconsistent with the closest precedent, the IGIS. Limiting the purpose of the IGD in this way would immediately limit its independence and effectiveness.

2.2 The purpose should return to what the Inquiry stated: "The purpose of this office would be to facilitate independent oversight of NZDF and enhance its democratic accountability." This does not limit the purpose to assisting the Minister of Defence. Democratic accountability is much more than assisting ministerial accountability to Parliament.

2.3 The consultation paper section [32], which says the IGD should be "require[d]" to "ensure" its actions "directly support the Minister of Defence to exercise democratic oversight", should be removed. These words imply that if the Minister does not want an investigation, the IGD should not prioritise conducting it.

2.4 Also, the Operation Burnham Inquiry recommendation says the IGD investigations would be "to ascertain whether [activities of NZDF] were conducted lawfully and with propriety." I am concerned that this is replaced by assisting the Minister. Lawfulness and propriety should

be defining parts of the IGD's purposes and the consultation paper's argument at [53] does not change that. These do not have to be the only parts of the purposes but it is essential that they are part of the purposes/functions.

2.5 The consultation paper does not take up the Inquiry's suggestion that the FA&D Select Committee should also be able refer matters to the IGD. I strongly disagree with excluding the select committee. This seems to be part of the construct that democratic accountability will be served by the Minister reporting to Parliament. There is a solid precedent in the IGIS legislation for the select committee being allowed to request IGD inquiries (eg s.156 ISA and s.171 (4) ISA) and both of these sections of the ISA should be adopted for the IGD. This includes MPs separate from a select committee. The IGD would not have to follow up every complaint/referral but at least he or she would hear about them. Surely the point is to make as robust a system as possible.

2.6 I will give an example of why limiting referrals to the Minister of Defence and defence officials is unsound. The example is Operation Burnham itself.

2011 TVNZ received a tip off about civilian casualties. The Minister of Defence was assured by defence officials that the allegation was unfounded and accepted that there was no need for an inquiry.

2014 A whistle blower came to me about the civilian casualties. He had earlier raised concerns with his bosses and was ignored. The minister was apparently not even told about the whistle blower.

2017 After years of work, a book on the civilian casualties was published. CDF denied everything and told the Minister of Defence there was no need for an inquiry. The minister accepted this.

2.7 In other words your proposed system, where accountability relies on the Minister, did not work. Ministers, who do not have their own investigative resources, tend to be reliant on officials. This was the problem with the ministers who believed the allegations of civilian casualties were unfounded. Contrary to the consultation paper, eg [24], the Minister of Defence can be a single point of failure. A cynic would say that a system of accountability limited to the minister would be a the system of choice for senior defence officials, because of the uncontested influence they have. A better system has more legs to the accountability, including the public, media, MPs, select committee and, as in the next paragraph, whistle blowers.

2.8 The Operation Burnham example raises another important issue concerning the IGD. The most hopeful option for a IGD to learn about the Operation Burnham civilian casualty allegations would have been from present and former NZDF staff. But there is no provision for this in your model. I urge that you include in the plans an amendment to the Protected Disclosures Act that gives the IGD the same status as the IGIS, where staff can come and make protected disclosures. This means an equivalent of s.171 of the ISA.

2.9 Nothing in the setup and legislation for the IGD should stop anyone proposing a subject for an IGD inquiry. The IGD can then make his or her decision whether to initiate an own-motion review.

2.10 I find the proposals in [31] and [32] very troubling for the reasons above.

### 3. Proposed scope of IGD

3.1 Paragraphs [34] and [37] appear to be an effort to restrict the scope of the IGD's own motion functions. [34] says "The Inquiry envisioned that the IGD should have own motion functions in respect of particular operational activities." [41] then gives an extremely narrow definition of what operational activities means. I am at a loss to understand why you would want that, unless it is deliberately to minimise the oversight and review that NZDF will receive.

3.2 Please note that this is not what the Inquiry commissioners had in mind. For instance, Chapter 12, para 48, of the Inquiry report envisages the IGD investigating "issues going to the prevailing culture within NZDF" and "systemic failure to respond to sexual abuse allegations appropriately"-- with no suggestion that these would only be possible if the Minister of Defence or defence officials requested them.

3.3 I strongly oppose the idea that all other matters apart from the narrow [41] scope can be addressed only on referral by the Minister of Defence and MoD and NZDF heads.

3.4 IGD should be given the widest possible scope and be trusted to set priorities.

3.5 [36] says IGD's focus should be on matters that have the most potential to affect public confidence in the NZDF and carry reputational risks for New Zealand. Measuring worth by public confidence in NZDF and reputational risks is the stuff of Public Relations, not oversight and watchdog roles. Legality and propriety (as with the IGIS) are much sounder standards.

### 4. Functions of IGD

4.1 The next unsound proposal in the consultation document is that [44] the IGD should not have powers to investigate complaints made by NZDF personnel. This is very concerning. NZDF staff are far more likely to be in a position to raise important issues of legality and propriety than a minister. The staff are literally and figuratively on the front line. It is essential that -- like IGIS which is the primary model from the IGD -- the IGD can receive complaints from all NZDF staff, military and civilian.

4.2 [45] presents excuses for why the IGD functions should be limited. Essentially they come down to an unwillingness by senior defence personnel to have the IGD contradict their authority. [45] says the IGD might "supplant existing NZDF administrative complaints avenues... and military justice processes." These arguments miss the point that the Operation Burnham Inquiry recommended an "independent and external" IGD (Chapter 12 para 45). The existing NZDF complaints processes and military justice processes are not independent and not external.

4.3 It is surprising that the consultation paper makes proposals that directly contradict the precise attributes of a IGD that the commissioners thought were most important.

4.4 The section of the consultation document concerning function again argues for limiting the scope of the IGD's powers (eg [48]-[52]. It states [49] "We consider that a high level of

discretion would support the IGD's credibility" but then at [51] says "It is important to balance broad discretion" followed by a series of excuses for not having broad discretion! All these efforts to minimise the IGD's role should be removed from the proposals.

4.5 Re [53]: legality and propriety, like the IGIS for intelligence agencies, should be defining parts of the IGD functions.

4.6 [54] and [55] appear to be an effort to steer the IGD into "a system improvement approach" rather than making adverse findings. The structure of the IGD should not restrict how the IGD chooses to respond to issues. As the Operation Burnham Inquiry commissioners wrote, the IGD should have the power to make findings of fact "or fault", and the power to make recommendations.

4.7 [57]-[59] give the CDF discretion over whether the IGD can investigate current operations. This is dangerous and unnecessary. All that is required is to require that the IGD "consult with" CDF on operations that are underway. The IGD will be able to make sound but still independent decisions.

4.8 [60] covers investigative powers. It is important to add that, like IGIS, the IGD staff should be empowered to access NZDF records, databases and information systems *directly* and search for themselves. There should be no requirement to request information from NZDF staff.

4.9 [66], creating an offence of two years imprisonment for publishing IGD decisions and reports, should be removed. This is heavy handed and unnecessary. This section has been lifted from the IGIS legislation, but intelligence agencies are much more secret than the NZDF. NZDF already has a problem, identified by the Operation Burnham Inquiry, of systematic over-classification. The Inquiry was told by NZDF that virtually all Operation Burnham documents had to remain secret from the public. When the Inquiry had them independently reviewed, most were able to be declassified and posted on the Inquiry website. The IGD legislation should not formalise unnecessary secrecy. If there is genuinely sensitive material, the IGD can make orders accordingly. There is no need for blanket threats of imprisonment, just as there is no equivalent offence for most other parts of the public sector. Finally, IGD legislation is not the appropriate place for anti-whistleblower legislation of this kind.

4.10 In the table on p.19, section "IGD's access to NZDF records", the first proposal seeks to limit the IGD's automatic access to information. This proposal should be rejected. The IGD should have the same open access as the IGIS. It is unrealistic to imagine that the IGD would seek information that wasn't necessary for his or her legitimate investigations. Therefore no restrictions are required. This is an unnecessary and illegitimate restriction of an independent watchdog.

4.11 Likewise [68] and [69] should be rejected. This is an intolerable restriction of the IGD's authority. It is essential that the IGD can view all documentation held by NZDF and that he or she be trusted to do so professionally. The Operation Burnham Inquiry could view all NZDF material irrespective of source and there is no justification for the IGD not having equivalent powers.

5. Ancillary investigation functions matters



5.1 [70]-[73] These are yet more unjustified restrictions on the IGD. Most concerning is [72] “the IGD should not be able to investigate a matter where a Court of Inquiry has been established until that process has concluded” unless there is unreasonable delay or it is referred the Minister of Defence or CDF. Thus the proposal is that the non-independent process has priority over the independent process, even where a IGD believed an independent investigation was required.

5.2 As the consultation document notes [73], this “restriction” contradicts what the Operation Burnham Inquiry commissioners recommended (Chapter 12 para 46). They said “The Inspector-General would not be limited to investigating only where internal avenues had been exhausted.... The Inspector-General would operate separately and independently from any internal oversight processes, and should be able to investigate whenever he or she consider it appropriate.”

5.3 The IGD powers should not be narrower than what the commissioners recommended. The idea that “balance” [73] is required between what the commissioners recommended and what NZDF would prefer is unsound.

5.4 I read [76] with the strong memory of the NZDF fighting at every stage of the Operation Burnham Inquiry to keep everything possible secret. The IGD should not have negotiate every word of their investigation reports with NZDF. This is just another example of the NZDF not accepting the independence of the IGD. Also, military matters are not as sensitive as NZDF claims.

5.5 Re [77]: No permission from the Minister of Defence should be required for IGD investigation reports being provided to the FA&D select committee.

## 6. Form and Structure

6.1 Re [91], the IGD should not be “associated with a ministerial portfolio”, especially as this could be practice provide a back door by which NZDF could have an influence over the activities of its watchdog.

6.2 Re [93(a)], footnote 54, the IGD decisions on what to publish of his or her work plan should not be based on the OIA wording, as proposed. The OIA is weak on military information. The IGD should be empowered to make his or her own decisions.

6.3 Very Important. Re [95] The five person staff is far too small for the role that the IGD has been given. Five staff would set it up to fail, as indeed was the case with the understaffed IGIS office in its early years. IGIS, with a staff of eight people, oversees agencies with about 850 staff. The consultation document proposes five IGD staff for an agency (the NZDF) with 12,600 staff, 15 times larger than the intelligence agencies. There is no good reason to [94] “start small”. This would only make it harder for the IGD to get underway, be effective and establish its legitimacy.

6.4 By way of comparison the NZDF established a Special Inquiry Office of 13 staff just to interact with the single Operation Burnham Inquiry. The Australian Defence Force IG has 109 staff. A realistic and workable number for the new New Zealand IGD is 20 staff.

## 7. Administrative procedures

7.1 The three pages of proposals pp. 26-28, giving NZDF a role in the initiation and framing of IGD investigations, should be entirely rejected. They are called “Administrative procedures” but they would more accurately be called “Procedures to allow NZDF to influence the conduct of IGD investigations into the NZDF”.

7.2 Clearly these proposals have come from NZDF itself. There is simply no legitimate reason for the NZDF to be given these privileges. In fact, it fundamentally undermines the concept of an “independent and external” watchdog. It must be rejected.

## 8. Conclusions

8.1 There is a consistent pattern to nearly all the proposals in the consultation document: the anxieties of NZDF officers about having an independent watchdog have led to a succession of proposals to limit and minimise the powers, functions and scope of the IGD. A process based on having the best possible IGD would not reach the conclusions in the consultation document.

The footprints of the NZDF can be seen in each case. I assume NZDF (and like minded officials in other department) were consulted on or was part of the development of these proposals and got their way.

8.2 This is offensive considering that the misdeeds documented in the Operation Burnham Inquiry were mostly actions of NZDF and its staff. A two and a half year inquiry, costing many millions of dollars, urged, out of all the possible recommendations, establishment of an independent and external IGD. But the proposal has been systematically minimised in the consultation document.

8.3 NZDF had already done the same with other Operation Burnham Inquiry recommendations. New rules written for civilian casualty reporting by NZDF are similarly minimised in nearly every respect. NZDF was given discretion to decide what action to take about NZSAS officers who misled ministers, and an NZSAS trooper who assaulted the prisoner, and in all cases it decided to do nothing. The wishes of the Inquiry commissioners are being largely watered down or ignored.

8.4 I wonder if the Ministry of Defence staff involved in IGD establishment have noticed that at every stage the proposals in the consultation document seek to reduce and minimise the powers, functions and scope of the IGD. If adopted, the new IGD would be much less capable than the IGIS, even though the latter works in the more constrained and secretive area of the intelligence agencies. I wonder if you’ve noticed that whenever the consultation report talks of “balance”, it means watering down the proposals to be more acceptable to NZDF.

8.5 I want to be able to welcome the creation of the IGD publicly. Please empower and resource the new office to be admirable and trustworthy: independent and external, focussed on legality and propriety, with full and unconstrained powers and discretion. Let it be accessible to complaints and suggestions from the public, MPs, Parliament, past and present NZDF staff and the government (meaning not just the Minister of Defence but the Prime Minister and other ministers). There is no downside from having the best IGD possible.

8.6 Clearly my feedback is very different to what you received from NZDF and others earlier in the process. If you are receptive to what I have written here, I would be happy to meet and discuss the issues further.

Nicky Hager

Released by the Attorney-General  
and Minister of Defence

## Submission 006 – Aimee Bryant, Manager Law Reform and Advocacy, New Zealand Law Society

### Responses to questions in the Consultation Document

#### Chapter 2: How we propose to calibrate the IGD

Question 1	<b>Do you have any feedback on the proposed purpose of the IGD or our expectations as to how it should operate?</b>
	<p>The purposes set out at paragraph 31 of the Consultation Document seem appropriate for achieving the intended aim of strengthening democratic oversight of the NZDF.</p> <p>The overarching objectives and purpose should be set out very clearly in the legislation that establishes the IGD. This should include the following:</p> <ul style="list-style-type: none"><li>• Supporting ministerial accountability to Parliament.</li><li>• Promoting and enabling transparency.</li><li>• Building public trust and confidence in the NZDF.</li></ul> <p>The functional relationships and accountabilities also need to be clearly defined in the establishing legislation. It would also be useful to reflect the expectations required of the IGD, including a requirement for the IGD's processes to be as open and transparent as possible.</p>

#### Chapter 3: Scope of oversight

Question 2	<b>Do you agree with the proposals on the scope of the IGD's oversight? Why/why not?</b>
	<p>The proposal for the IGD to carry out inquiries both on its own motion and on referral from the Minister of Defence, the Chief of Defence, or the Secretary of Defence, is fundamental. The definition of 'operational activities' should be as broad as possible to meet public expectations of effective oversight.</p> <p>It may also be appropriate to enable other oversight bodies to refer matters to the IGD, following consultation with IGD and/or its agreement. Chapter 4 of the Consultation Document suggests that the IGD should not be exercising functions in areas where other oversight mechanisms exist (such as rights of complaint to the Ombudsman, Human Rights Commission, Privacy Commissioner). There is a risk that rigid application of functions could lead to a fragmented oversight framework. It is not appropriate for affected persons to have to make complaints about the same issue to multiple oversight bodies. An ability to refer matters would strengthen oversight, rather than fragment it.</p> <p>For some bodies, such as the Ombudsman, a statutory power<sup>1</sup> to refer complaints to the IGD would be required. This would ensure that the Ombudsman can lawfully 'pass on' a complaint to the IGD (where agreed to between the Ombudsman and the IGD), rather</p>

<sup>1</sup> For example, see section 14(4) of the Independent Police Conduct Authority Act 1988.

	<p>than relying on section 17(1)(a) of the Ombudsmen Act to refuse to investigate the complaint, requiring the affected person to then make the complaint again to the IGD.</p> <p>The Law Society also recommends consideration of the IGD's role within the Protected Disclosures regime. The IGD may be the 'appropriate authority' best placed to deal with protected disclosures relating to NZDF, where a discloser does not wish to make the protected disclosure internally (or has already attempted to do so). Currently, that disclosure would likely have to be made to the Ombudsman.<sup>2</sup> However, the Ombudsman would not have jurisdiction to investigate the use of retaliatory penalties and punishment against 'whistleblowers',<sup>3</sup> and it is not clear who (externally to NZDF) would investigate the substantive matters concerning a protected disclosure, where that disclosure relates to operational activities. The IGD could assist in this regard. Such a role would be consistent with international guidance on good governance in the defence sector (see below under 'other comments').</p>
--	---

## Chapter 4: Functions and powers

	<b>Do you agree with the proposals on IGD investigations? Why/why not?</b>
<b>Question 3</b>	<p>See above comments in respect of Question 2.</p> <p>The Law Society agrees that statutory powers should be provided for the IGD to support its investigation functions. Those powers should be linked to the intended purpose and functions of the IGD.</p> <p>It is also appropriate for the legislation to provide the suggested protections and safeguards.</p>

	<b>Do you have any feedback on the IGD's proposed assurance functions and powers?</b>
<b>Question 4</b>	<p>There should be a clear and transparent reporting process for the finalised reports of the IGD, set out in the proposed legislation.</p> <p>Corresponding obligations on the NZDF ought also to be included in the establishing legislation. Actions taken in response to a recommendation, or the reasons for any proposal to depart from, or not implement, any recommendation, should be reported and publicly notified.</p> <p>The IGD should also report annually to Parliament on its activities and the outcome of its recommendations.</p>

## Chapter 5: Form and structure

	<b>Do you have any feedback on how the IGD is proposed to be set up?</b>
--	--

<sup>2</sup> Section 13, Protected Disclosures Act 2000. The Protected Disclosures (Protection of Whistleblowers) Bill does not appear to contain this requirement. <sup>3</sup> Section 13(8) Ombudsmen Act 1975.

The proposal to establish the IGD as an independent statutory office with an associated ministerial portfolio seems appropriate.

There will need to be a clear and appropriate process for funding the office in order to ensure that it has adequate resources and staff to carry out its functions.

## Chapter 6: Administrative procedures

	Do you have any feedback on the appropriateness and/or adequacy of the administrative procedures set out on pages 26-28?
Question 6	<p>The IGD should be able to determine its own processes for carrying out its investigation. The establishing legislation could provide high-level principles concerning fair process and include a requirement that the IGD publish its general procedures.</p> <p>While the Consultation Document sets out a proposal for the procedure for own motion investigations, it would be more consistent with the principle of independence for the IDG to develop its own processes.</p>

### Other comments/feedback

The proposal appears to be a good step forward for improving oversight of NZDF activities.

There are international standards for good governance in the defence sector, and the appointment of an independent Inspector General or 'Defence Ombudsman' is one of the recognised mechanisms for building integrity. The work of the Centre for Integrity in the Defence Sector (Norway), for example, has developed criteria<sup>3</sup> used by NATO within its 'Building Integrity Programme' for Southeastern Europe.

<sup>3</sup> <https://cids.no/wp-content/uploads/pdf/7215-Criteria-for-Good-Governance-in-the-Defence-Sector6.pdf>



# Submission 007 – Sir Terence Arnold and Sir Geoffrey Palmer

## Responses to questions in the consultation document

### Chapter 2: How we propose to calibrate the IGD

	Do you have any feedback on the proposed purpose of the IGD or our expectations as to how it should operate?
Question 1	We agree with the statements of purpose in para 31 of the Consultation Document. It is vital that the public have confidence in NZDF. Democratic accountability is critical to developing and maintaining public confidence.

### Chapter 3: Scope of oversight

	Do you agree with the proposals on the scope of the IGD's oversight? Why/why not?
Question 2	We agree with the broad definition of "operational activities" that is proposed. A broad definition serves the ultimate objective of democratic accountability but does not impinge on areas that are already the subject of independent oversight.

### Chapter 4: Functions and powers

	Do you agree with the proposals on IGD investigations? Why/why not?
Question 3	<p>We agree with the proposals in relation to IGD investigations, except in three respects. Our first reservation relates to the special process for investigations into ongoing and in-theatre operations. While we agree that there are legitimate concerns about conducting an investigation in theatre while an operation is ongoing, we do not think CDF should have the ability to refuse to allow an investigation to proceed.</p> <p>There are two reasons for this. First, an investigation into a particular incident can be opened and embarked upon even though the ability to conduct "in-theatre" investigations may be limited. For example, there will be contemporaneous intelligence that the IGD can begin gathering from NZDF and other NZ agencies while in NZ; imagery and video footage can also be obtained and preserved; reports from officers in theatre to NZDF HQ can be obtained and so on. Investigations are most effective when opened soon after the incident to be investigated; delay leads to the loss of important contemporaneous sources of evidence, as our experience with the Operation Burnham Inquiry showed. Second, depending on how it is interpreted, what is proposed would enable the CDF to prevent IGD from investigating incidents for an extended period. For example, the NZSAS was deployed to Afghanistan in 2009 under the name "Operation Wātea". Under the umbrella of Operation Wātea, the NZSAS conducted many individual operations against suspects or groups of suspects. Often there was little turn-around time (a day or two) between these operations. Given the small size of the NZSAS group deployed, CDF could legitimately say that an investigation into a particular incident would be unduly disruptive of the umbrella operation, Operation Wātea. In one sense, such a claim might be justifiable, but because it would undermine the IGD's capacity to conduct an effective investigation, it would not promote public confidence and would thus undermine an important goals of the office.</p> <p>In summary, while we accept that the concern identified is a legitimate one, we think it can be accommodated in a way that better accords with the reasons for having an IGD and with investigative realities. In this type of situation, the IGD should be required to consult with CDF about how an investigation can be progressed in a way that causes least operational disruption.</p>

	<p>The legislation could, for example, direct the IGD to consult with the CDF and have regard to operational needs when opening and conducting an investigation in these circumstances.</p> <p>Our second reservation concerns the proposed penalties for offences. There is a dramatic contrast between the penalties proposed for the offence recommended in paras [65]-[66] and those referred to in paras [62]-[64], and between the \$5,000 fine proposed and the \$10,000 provided for in a similar provision in the Inquiries Act 2013 (ss 29(1) and 30) and the \$100,000 fine for individuals in the Commerce Act 1986 (s 103(4)(a)). However, if it is anticipated that the Crimes Act offences will also be available (perjury etc) as it is in other analogous situations, that might mitigate the problem.</p> <p>Our third reservation relates to information held by NZDF or other NZ agencies that was provided by overseas partners. At p 19 of the Consultation Document, it is proposed that information of this type would be excluded from the IGD's automatic access. This is elaborated on in paras [68]-[69], where it is suggested that there be a requirement that the consent of the provider of the information be sought to its release to the IGD.</p> <p>NZ 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 - eg, 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. Often overseas partner-sourced information will be critical to undertaking a thorough investigation of an incident.</p> <p>We consider that if information sourced from overseas partners is held by NZ agencies, it should be made available to the IGD as of right. The IGD will, of course, hold the information on conditions of confidentiality and any report produced will not be made public unless the Minister decides that is appropriate.</p> <p>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. The kind of difficulty this issue raises is addressed in Minute No 25 of the Inquiry, which is available on the Inquiry's website. We think it inconsistent with NZ's sovereignty, and with NZ law, for a blanket requirement such as that proposed to be applied.</p> <p>We cannot emphasise enough how significant a limitation this is for the conduct of timely and effective investigations.</p>
--	---

<b>Question 4</b>	<b>Do you have any feedback on the IGD's proposed assurance functions and powers?</b>
	We have no comments.

## Chapter 5: Form and structure

<b>Question 5</b>	<b>Do you have any feedback on how the IGD is proposed to be set up?</b>
	We have no comments.

## Chapter 6: Administrative procedures

	<b>Do you have any feedback on the appropriateness and/or adequacy of the administrative procedures set out on pages 26-28?</b>
--	---

**Question  
6**

We have no comments

### **Other comments/feedback**

Overall, we think the Consultation Document is excellent. That said, as we have indicated in our responses, we think there are several important respects in which the proposals made should be amended so as to enable the office to achieve its objectives effectively and efficiently. If it would assist, we would welcome the opportunity to discuss these comments further with you.

Released by the Attorney-General  
and Minister of Defence

## Submission 008 – Aaron Davy, Standards & Humanitarian Manager, Council for International Development (CID)

### Responses to questions in the consultation document

#### Chapter 2: How we propose to calibrate the IGD

Question 1	Do you have any feedback on the proposed purpose of the IGD or our expectations as to how it should operate?
	<p>It is understandable that in terms of legal jurisdiction and influence, the Inspector-General of Defence (IGD) should ensure they meet the expectations of public interest and ministers <u>within</u> New Zealand.</p> <p>In the case of NZDF operations being undertaken outside New Zealand, it would be important to understand how accountability might be articulated and directed towards international communities (specifically civilian and non-combatant), stakeholders and partners, who in some cases are more impacted by NZDF operations.</p>

#### Chapter 3: Scope of oversight

Question 2	Do you agree with the proposals on the scope of the IGD's oversight? Why/why not?
	<p><b>Clause 41</b> covers a range of definitions that might be characterised more as operational contexts. However, it is still unclear what the definition of 'operational' might cover in terms of the internal division within NZDF, i.e. administrative or decision-making functions prior to 'field operations' taking place. IGD oversight and access to these pre-emptive actions should also remain a primary focus.</p> <p>If preparatory and training exercises are to also be covered by WorkSafe New Zealand and New Zealand Police, the triaging and interface with these independent bodies will be key to the accountability and success of the IGD function.</p> <p><b>Clause 35 &amp; 36</b> refer to "protect New Zealanders" and "reputational risks for New Zealand". It will be important to make explicit how the scope of the IGD might be broadened to cover protection of non-New Zealand NZDF stakeholders and partners, particularly vulnerable communities within humanitarian settings and operations. If they are to be excluded from the scope of the IGD, a rationale for (lack of) accountability to these groups needs to be made explicit to strengthen IGD transparency.</p>

#### Chapter 4: Functions and powers

Question 3	Do you agree with the proposals on IGD investigations? Why/why not?
	<p>Concerns regarding (the protection of) 'whistle-blowers' are not mentioned in the Targeted Consultation document once. It is noted however they reference is made to 'whistle-blower' is mentioned (one time) in the <b>clause 3.01.c.(6)</b> of the Defence Force Order 35.</p> <p>As a membership organisation whose partners often share the same field-based 'humanitarian space' (emergency response) with NZDF, greater inclusion and articulation within the document regarding protection of whistle-blowers in critical. This includes reference to how the privacy and identifiable aspects of such categories of people are protected within the IGD investigation process.</p>

	<p>The IGD needs to have in place an internal and external processes for safe reporting of 'whistle blowing' or wrongdoing that includes:</p> <ol style="list-style-type: none"> <li>1. Publicised points of confidential contact (including at least one member of the governing body);</li> <li>2. A process for investigation and escalation; and</li> <li>3. Prescribed timeframes for investigation and response.</li> </ol>
<b>Question 4</b>	<p><b>Do you have any feedback on the IGD's proposed assurance functions and powers?</b></p> <p>No further comment.</p>

## Chapter 5: Form and structure

<b>Question 5</b>	<p><b>Do you have any feedback on how the IGD is proposed to be set up?</b></p> <p>No further comment.</p>
-------------------	--

## Chapter 6: Administrative procedures

<b>Question 6</b>	<p><b>Do you have any feedback on the appropriateness and/or adequacy of the administrative procedures set out on pages 26-28?</b></p> <p>No further comment.</p>
-------------------	---

## Other comments/feedback

[Insert response here]

Released by the Attorney-General  
and Minister of Defence

# Submission 009 – John Hancock, Chief Legal Adviser, Human Rights Commission

## Responses to questions in the consultation document

### Chapter 2: How we propose to calibrate the IGD?

Question 1	<b>Do you have any feedback on the proposed purpose of the IGD or our expectations as to how it should operate?</b>
	<p>We note that the discussion document does not appear to refer to human rights compliance as part of the IGD's purposive mandate. Instead, the document refers to "democratic oversight", under which human rights compliance would need to be implied. Nor is there any reference to obligations under international humanitarian instruments.</p>
	<p>We note that the purpose provision of the Intelligence and Security Act 2017, which establishes the IGIS among other things, provides at s 3(c)(i) that a purpose is to ensure that the functions of intelligence and security agencies are "performed in accordance with New Zealand and all human rights obligations recognised by New Zealand law."</p>
	<p>We recommend that a similar purposive provision is included in any establishing legislation. This not only aligns this aspect of the purpose provisions of the IS and DF sectors, it also links the purpose of the IGD to the commitments New Zealand has under international humanitarian law and in international human rights instruments, such as the International Covenant on Civil and Political Rights, as well as UN resolutions such as General Assembly resolution A/RES/3012 (XXVIII) on respect for human rights in armed conflict and resolution 60/147, 16 December 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (see Chapter 1, clause 2(a)).</p> <p>The UN Human Rights Committee has held that uses of force infringing upon international humanitarian law also constitutes a violation of the right to life under article 6 of ICCPR (General Comment No 36, 2018).</p>

### Chapter 3: Scope of oversight

Question 2	<b>Do you agree with the proposals on the scope of the IGD's oversight? Why/why not?</b>
	<p>We note that the proposed scope of the IGD, as expressed in the discussion document, appears narrow when compared with the Australian Inspector-General; whose role includes independent oversight, review and coordination of complaints made under the "Redress of Grievance" process</p> <p>The right to redress for human rights violations is provided for under art 2.3 of ICCPR. There appears to be no mention of redress issues in the discussion document. The UN Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law</p>

### Chapter 4: Functions and powers

Question 3	<b>Do you agree with the proposals on IGD investigations? Why/why not?</b>
	<p>Following on from the above, we note that chapter 4 does not appear to provide an indication of what the functions of the IGD might be in the event an investigation leads to a finding of that</p>



	<p>human rights may have violated. There appears to be no mention of accountability or remedial functions.</p> <p>We note further that under s 158 of the IS Act 2017, the IGIS may conduct an inquiry into “any matter relating to an intelligence and security agency’s compliance with New Zealand law, including human rights law” and under s 185, following an inquiry may issue a report that “may include any recommendations for the redress of that complaint that the Inspector-General considers appropriate (including remedies that involve the payment of compensation).”</p>
--	--

	<p><b>Do you have any feedback on the IGD’s proposed assurance functions and powers?</b></p>
Question 4	<p>We agree that effective oversight requires a preventative or minimisation approach. We note that this proposal is to have a two-fold approach; assessments of practices, policies etc and enquiries where data or information is requested from NZDF. However, the proposal is limited in the sense that it proposes only own-motion and Minister or NZDF referred assessments. This indicates that assessments will be discretionary, ad hoc and not systematic. We consider that a regularised, systematic approach would be more effective and in line with the preventative approach under the UN Basic Principles at IX, cl 23. This would enable codes of conduct to be regularly reviewed and training identified (see UN Basic Principles IX, cl 23 at (e) and (f).)</p>

## Chapter 5: Form and structure

	<p><b>Do you have any feedback on how the IGD is proposed to be set up?</b></p>
Question 5	<p>We note the IGD and Deputy IGD are proposed to be appointed by the Governor-General, providing structural independence from the Minister. However, we note that the Minister will provide feedback on the work programme of the IGD which will be required to be taken into account, so the degree of actual functional independence proposed is not clear. We note the IGIS under s 160 of the IS Act is merely required to consult with the Minister when preparing an annual work programme. We recommend that a similar approach is taken to ensure independence.</p>

## Chapter 6: Administrative procedures

	<p><b>Do you have any feedback on the appropriateness and/or adequacy of the administrative procedures set out on pages 26-28?</b></p>
Question 6	<p>See our feedback on question 4 above</p>

## Other comments/feedback

While the establishment of To conclude, we note the lack of any mention of human rights or international humanitarian law in the proposal document. This is surprising given the subject matter, findings and recommendations of the Inquiry into Operation Burnham.

We would recommend that work is done to expressly recognise and align the legal and policy framework underpinning the IGD with New Zealand’s international human rights and humanitarian law obligations. In this respect there should be alignment between the IDG and the IGIS functions under the IS Act 2017.

# Submission 010 – Professor Alexander Gillespie, Waikato University

## Responses to questions in the consultation document

### Chapter 2: How we propose to calibrate the IGD

	Do you have any feedback on the proposed purpose of the IGD or our expectations as to how it should operate?
Question 1	The need for an IGD is, following the Inquiry, axiomatic. It is the minimum requirement that must be satisfied so as to ensure that similar mistakes do not repeat themselves. It is also essential so that an improved service is created going forward so that the honour and integrity of the Armed Forces is upheld; and most critically of all – that there is effective democratic oversight of the military.

### Chapter 3: Scope of oversight

	Do you agree with the proposals on the scope of the IGD's oversight? Why/why not?
Question 2	<p>Mostly this look good, but it is essential that the IGD has the ability to go beyond the ability to respond to matters referred to it by referral from the Minister of Defence, the Secretary of Defence or the Chief of the Defence Force. Two factors should be added. First, (and I do realise that the 'Own Motion' Assessments are an option: the IGD must have independent powers to initiate their own investigations – not only those that are handed to it. Second, it needs to have a type of 'postbox' function, so that would be able to deal with concerns raised by both those within the military (to which rules for 'whistleblowers' must be created) and also – with concerns raised by the other outside public, of which people like journalists, should be foremost. Indeed, it the recent Inquiry tells us one thing – it was the critical function of journalists in getting the story into the open: and that pathway now needs to be cemented.</p> <p>One further point – the IGD will need to provide annual reports, and reports on special topics, as needed. These should be made public, with (unless a matter of national security) as much information disclosed as possible. Transparency is one of the keys, if this is to work. While I recognise you have pegged an Annual Report as an output – these need to be as open and full as possible to be of value. The starting point for this should be a comparative analysis of reports from similar organisations.</p>

### Chapter 4: Functions and powers

	Do you agree with the proposals on IGD investigations? Why/why not?
Question 3	These powers look good. They should be akin to a Royal Commission, in their ability to access material, and not be unreasonably denied access to what they require. Having said that, if there are significant matters of national security at play, there will need to be a final safety-switch, in which the appropriate Minister (possibly the PM) has the ability to decline access to material. That red-light function, if it is included, can only be at the absolute top of democratic/parliament (not the military) framework.

<b>Question 4</b>	<p><b>Do you have any feedback on the IGD's proposed assurance functions and powers?</b></p> <p>The powers look good – but you they may need to be wider. It will be essential to also have active, and meaningful, cooperation with both the SIS and GCSB as needed. Also, if possible, linkages to overseas partners should be facilitated.</p> <p>In terms of setting up the rules for the NZDF, to ensure compliance – these will have to be carefully calibrated with fundamental rules of law, to ensure that all three parts – the IGD, military law, and basic common law, all coincide correctly.</p>
-------------------	--

## Chapter 5: Form and structure

<b>Question 5</b>	<p><b>Do you have any feedback on how the IGD is proposed to be set up?</b></p> <p>You need someone who is familiar with the system, but not part of it. For independence to be assured, the person selected to run the operation, should not be a former member of the club that they are about to provide oversight of.</p> <p>An Advisory Panel makes good sense, as does a deputy, and a set period in the job.</p>
-------------------	---

## Chapter 6: Administrative procedures

<b>Question 6</b>	<p><b>Do you have any feedback on the appropriateness and/or adequacy of the administrative procedures set out on pages 26-28?</b></p> <p>No.</p>
-------------------	---

## Other comments/feedback

I regret that I do not have more time to offer some feedback on Defence Force Order 35. From the initial examination I have made, it looks good. I hope that the accompanying document on Detentions, is equally pleasing.

Two aspects I would add – it would benefit from being anchored to the international obligations in this space, with what the basic rules and obligations are under the Geneva Conventions. Although the 'legal framework/guiding principles' part is correct, it is somewhat light, and should not appear that these are measures undertaken out of the goodness of our hearts, but rather, that these are strict, internationally binding, legal obligations.

Second – it would be good to juxtapose what the NZ practice is with comparable, likeminded, countries, to see where we are doing less/the same/more than others. Such a review should be across the board, right down to topics like compensation – to ensure that our response is defensible, via best practice elsewhere.

# Submission 011 – Julie Haggie, Transparency International New Zealand

## Responses to questions in the consultation document

### Chapter 2: How we propose to calibrate the IGD

Question 1	<b>Do you have any feedback on the proposed purpose of the IGD or our expectations as to how it should operate?</b>
	The proposal is in line with the recommendations of the Burnham inquiry, and also with the reflections of the Expert Review Group (arising from that inquiry), on the accountability and transparency needed by Defence to maintain its social licence.
	Under point 31, dealing with the purpose of the IGD, is there a need for the IGD to be able to report on trends/risks outside of the Annual Report or on individual investigations?
	It seems appropriate to include legislative principles as outlined in 32.

### Chapter 3: Scope of oversight

Question 2	<b>Do you agree with the proposals on the scope of the IGD's oversight? Why/why not?</b>
	It is appropriate that the IGD has independence to be able to undertake its own functions.
	We agree with the broadening of the definition of 'operational activities'. The definition in point 41 seems appropriate. We expect it will have been subjected to scenario testing to check its scope, eg events that might cause civilian harm or risks generated by information loss or environmental or damage or hazards.

### Chapter 4: Functions and powers

Question 3	<b>Do you agree with the proposals on IGD investigations? Why/why not?</b>
	Yes. Under 43, we see from point 54 that reporting and recommending are implicit in the assessment. Should identifying risks be included (as well as gaps)?
	Whilst we agree with the consideration of 44 and 45, should the IGD have the ability to advise on risks and trends arising from a range of investigations?
	Re 57-59, will there be a reporting loop back to the Minister about why the Chief of Defence Force considers an investigation can be or can't be made.
	We expect that natural justice tests will be considered in relation to any legal offences.
	Points 68.69. The thinking behind this is sound. A requirement set out in the second sentence of 69 has the potential to slow down or block an investigation process.

Question 4	<b>Do you have any feedback on the IGD's proposed assurance functions and powers?</b>
	We agree with the transparency and reporting provisions set out in 76-79, and the report back function on outcomes in 80. Other provisions seem reasonable in relation to the powers of an investigatory/enquiry body.

## Chapter 5: Form and structure

Question 5	Do you have any feedback on how the IGD is proposed to be set up?
	Who manages the performance of the IGD and the Deputy IGD? To whom are they accountable? How can they be removed?

## Chapter 6: Administrative procedures

Question 6	Do you have any feedback on the appropriateness and/or adequacy of the administrative procedures set out on pages 26-28?
	No comment

### Other comments/feedback

[Insert response here]

Released by the Attorney-General  
and Minister of Defence

## Submission 012 – Professor Robert Patman, University of Otago

### Responses to questions in the consultation document

#### Chapter 2: How we propose to calibrate the IGD

Question 1	Do you have any feedback on the proposed purpose of the IGD or our expectations as to how it should operate?
	My feedback is very positive. I think the proposed idea of an independent Inspector-General of Defence is an excellent one.

#### Chapter 3: Scope of oversight

Question 2	Do you agree with the proposals on the scope of the IGD's oversight? Why/why not?
	Given that the overall scope of the proposed IGD's oversight should include the full range of the NZDF's activities, I think that is appropriate. It is important for everyone working in the NZDF to recognise there is a need for accountability within and outside of the organisation.

#### Chapter 4: Functions and powers

Question 3	Do you agree with the proposals on IGD investigations? Why/why not?
	Yes, I do. I think it is vital that the IGD has "full discretion" to investigate operational activities, and also on other matters on referral from the Minister of Defence, the Secretary of Defence, the Chief of Defence Force or the Foreign Affairs, Defence and Trade Select Committee. These proposals give the proposed IGD role some real autonomy and 'teeth'.

Question 4	Do you have any feedback on the IGD's proposed assurance functions and powers?
	It is envisioned that the IGD should be able to investigate "if issues occur and minimise the possibility of issues occurring in the future." This wording is quite vague. The proposed IGD can clearly investigate issues either on his/her own initiative or by referral from senior offices in the Ministry of Defence. But it does not automatically follow that such investigations will prevent similar issues re-occurring in the future unless the recommendations of the proposed IGD are accepted by all concerned.

#### Chapter 5: Form and structure

Question 5	Do you have any feedback on how the IGD is proposed to be set up?
	No, the plans for the initial structure underpinning the establishment of the IGD seem feasible to me and seem to have the potential for additional growth in the event of an expanding work programme.

## Chapter 6: Administrative procedures

<b>Question 6</b>	<p><b>Do you have any feedback on the appropriateness and/or adequacy of the administrative procedures set out on pages 26-28?</b></p> <p>There seems to be a certain tension between some of the elements listed in the proposed Terms of Reference for the IGD to undertake an ‘own motion assessment’. For example, the “purpose of the assessment” may be to identify and investigate something that appears to be a cause for concern in the NZDF. But I do not see how a IGD could define the “proposed outcomes” even before such an investigation had taken place. That is to say, an issue in the NZDF may actually prove to be a symptom of a much bigger problem during the investigation, but that will not be knowable in advance before the investigation has taken place and so it is somewhat premature to speak of “proposed outcomes” at the beginning of the investigation.</p>
-------------------	--

### Other comments/feedback

As you can see, I think the proposed appointment of an IGD is a very positive development and has the potential to prevent the repetition of the sort of circumstances that originally led to the Burnham Inquiry. New Zealand has a critical stake in an international rules-based order and it is important that this country ‘walks the talk’ at home. The establishment of an IGD is a demonstration of this country’s firm commitment to the rule of law and democratic accountability.

Released by the Attorney-General  
and Minister of Defence



### Submission 013

This submitter requested that their submission and personal information not be proactively released.

Released by the Attorney-General  
and Minister of Defence

# Submission 014 – Professor David Capie, Victoria University of Wellington

## Responses to questions in the consultation document

### Chapter 2: How we propose to calibrate the IGD

Question 1	<b>Do you have any feedback on the proposed purpose of the IGD or our expectations as to how it should operate?</b>
	<p>I welcome this proposal. New Zealand has been out of step with our closest partners in not having an Inspector General or Ombudsman for the armed forces. I support the stated purpose and proposed objectives and believe this new office could make an important contribution to sustaining public trust and confidence in the NZDF. I do have some questions about the proposal, however, in particular around the relationship between the IGD and the Minister of Defence. I also think there are opportunities to clarify some aspects of the proposal and to enhance the connection to Parliament to permit greater democratic oversight of the NZDF.</p>

### Chapter 3: Scope of oversight

Question 2	<b>Do you agree with the proposals on the scope of the IGD's oversight? Why/why not?</b>
	<p>I support the idea that the IGD should have the ability to initiate its own functions into 'operational activities', where the meaning of operational activities is left sufficiently open to permit significant discretion. This would allow for the evolving nature of military activities. However, it is not clear to me why "preparatory raise, train and sustain activities" or other activities that do not "directly relate" to an operation are automatically excluded from this definition. I can imagine problems that start with general training or domestic activities bleeding into operational activities (for example around Op Respect). Would the IGD only be able to look at the symptoms as they play out on operations and not go back and look at earlier causes?</p>

### Chapter 4: Functions and powers

Question 3	<b>Do you agree with the proposals on IGD investigations? Why/why not?</b>
	<p>The powers granted to the IGD look comprehensive and similar to those held by equivalent actors such as the Auditor General. However, I had a number of questions about chapter 4 of the consultation document:</p> <p>(1) Para 45 rejects a 'complaints handling' function. I can understand this might stress the limited resources of the IGD and some of this work could certainly be better handled by other agencies. However, it seems likely that some issues will only come to the attention of the IGD via complaints or whistleblowers. What is meant by "reports and allegations" in this para? Will the IGD have broad discretion to take these up?</p> <p>(2) I understand and support the need to balance the desire to conduct an urgent investigation into an operational activity, against the risk that any such investigation might present for IGD or NZDF personnel. CDF is the right person to exercise judgment on those risks. However, as framed, the consultation document gives CDF broad powers to prevent any in-theatre investigation proceeding. Would anyone scrutinize CDF's decision? Here I think it might be useful to include some additional principles about how that discretion is to be exercised, for example, suggesting that the least restrictive option should be granted where security permits, e.g. interviewing participants via video link, if possible.</p>

	<p>(3) The consultation document proposes two classes of offenses around IGD investigations and reports, but with markedly different punishments. It strikes me as incongruous that the act of wilfully obstructing an IGD investigation or providing false statements should be punishable by a maximum of a fine of up to \$5000, while publishing a completed IGD report not released through the established process and without the permission of the Minister of Defence could be punishable by up to 2 years imprisonment.</p> <p>(4) Related, why is the Minister of Defence given such a central role in approving the release of an IGD report? Why can't the IGD release a report itself after appropriate consultation? This seems potentially to cut across the independence of the office.</p> <p>(5) Why would the IGD have different powers to access records compared to the IGIS (see footnote 41, page 19)?</p> <p>(6) Outcome of investigations. Following an IGD investigation, a CDF might agree there is a problem and begin a programme of change to implement recommendations. However, change can take time, often years. How often will CDF report on actions being undertaken? Who would track progress over time?</p>
--	--

<b>Question 4</b>	<b>Do you have any feedback on the IGD's proposed assurance functions and powers?</b>
	No

## Chapter 5: Form and structure

<b>Question 5</b>	<b>Do you have any feedback on how the IGD is proposed to be set up?</b>
	<p>I think there is an opportunity here to improve democratic oversight by establishing a more direct line between the IGD and Parliament. As proposed the minister mediates almost all interactions between the IGD and Parliament. I understand the proposal is very much framed around improving ministerial accountability, but any minister is going to rely heavily on advice from MOD and NZDF, meaning this could potentially cut across the independence of the Inspector General. I would like to see some reference to the IGD reporting directly to FADT. At the very least it should have to present and discuss its work programme and its annual report to the Select Committee.</p>

## Chapter 6: Administrative procedures

<b>Question 6</b>	<b>Do you have any feedback on the appropriateness and/or adequacy of the administrative procedures set out on pages 26-28?</b>
	<p>What happens when the IGD begins an investigation on referral, but once underway discovers additional new information about serious issues that go beyond the original terms of reference? At present the section under 'consultation' (p.28) seems to suggest the referring party (e.g. CDF) could refuse to allow changes to the terms of reference and thus prevent the investigation. This seems contrary to the broader spirit of the consultation document.</p>

## Other comments/feedback

Thank you for the opportunity to provide feedback. As I say, I welcome this proposal and I hope my comments and questions prove useful in the design of an effective Inspector General Defence.

## Submission 015

This submitter requested that their personal information not be proactively released.

### Responses to questions in the consultation document

#### Chapter 2: How we propose to calibrate the IGD

	Do you have any feedback on the proposed purpose of the IGD or our expectations as to how it should operate?
Question 1	<p>I support the proposed purpose of the IGD as outlined at paragraph 31 (a), (b) and (c) of the Targeted Consultation Document (TCD).</p> <p>I agree with the expectations listed at paragraph 32 (a), (b) and (c) in the TCD as to how the IGD should operate.</p> <p>In my view, it would be useful – indeed, essential – to reflect all of these expectations as overarching legislative principles, on the basis that, as the TCD states at paragraph 33, “Principles enshrined in legislation would provide both ministers and the public with a level of certainty as to how the IGD will operate.”</p>

#### Chapter 3: Scope of oversight

	Do you agree with the proposals on the scope of the IGD’s oversight? Why/why not?
Question 2	<p>I strongly support the proposal in paragraph 35 of the TCD “that the overall scope of the IGD’s oversight should include the full range of the NZDF’s activities.”</p> <p>I agree that “the IGD’s focus should be targeted on NZDF activities in respect of which democratic oversight and ministerial accountability to Parliament are of the most importance. Namely, those matters that have the most potential to undermine public confidence in the NZDF and carry reputational risks for New Zealand” (paragraph 36).</p> <p>I support the proposal in paragraph 37 of the TCD that the IGD have “own motion” oversight functions as well as an “on referral” function, with the following provisos:</p> <p>(a) It should be made clear in the legislation or the legislative principles relating to the IGD that there is nothing to prevent the IGD initiating an “own motion” investigation based on a request to investigate, or disclosure of information, from a member of the public, provided that such a complaint or request to investigate meets the same threshold that would justify an investigation “on referral” by the Minister of Defence, the Secretary of Defence, or the Chief of Defence Force.</p> <p>(b) Further consideration should be given to allowing the Foreign Affairs, Defence and Trade (FADT) Select Committee to refer matters to the IGD. In my experience, the FADT Select Committee is, and has been, an ineffective forum for holding the NZDF to account. There are relatively few FADT Select Committee hearings; the time allotted for questioning of defence officers or officials by members is limited; and it is rare that the Committee initiates significant inquiries or inquiries that result in substantive change. At a minimum, non-government members of the FADT Select Committee should be asked for their views on this matter.</p> <p>I agree with the definition of “operational activities” proposed in paragraph 41 of the TCD; however, it should be made clear that this definition permits the IGD to investigate historic</p>

incidents. For instance: the IGD should have jurisdiction to investigate allegations like those relating to events in Afghanistan that were the subject of a recent investigation by the Australian Defence Force Inspector General. See <https://defence.gov.au/mjs/igadf-afghanistan-inquiry.asp>

#### Chapter 4: Functions and powers

##### Do you agree with the proposals on IGD investigations? Why/why not?

With respect to “Investigation function and powers,” I agree with the recommendations of the Inquiry into Operation Burnham, as summarised in paragraph 46 (a) and (b) of the TCD. As mentioned in my response to Question (2) above, I believe that the Foreign Affairs, Defence and Trade Select Committee should have the authority to refer matters to the IGD. I support the proposal in paragraph 47, with the proviso that the IGD be able to investigate any other matter on referral from the FADT Select Committee as well as the Minister of Defence, the Chief of Defence Force or the Secretary of Defence.”

I strongly support the statement in paragraph 49 of the TCD “that a high level of discretion would support the IGD’s credibility”; and I strongly support the statement in paragraph 50 that “a high level of discretion would empower the IGD to determine the most appropriate way of undertaking its oversight based on what it sees and hears – not just based on what may be in the public domain.”

Accordingly, I strongly support the proposal in paragraph 50 that “the IDG have full discretion to initiate investigations on its own motion into defined operational activities (as defined in paragraph 41).”

For the reasons outlined in paragraph 52, I agree that the IGD’s discretion should not be limited by imposing a set of statutory conditions to be met before an investigation could be limited. As the paragraph suggests, an overly prescriptive approach “could impact public confidence in the robustness of the IGD’s oversight.”

I agree with the proposal in paragraph 53 of the TCD that “the focus of investigations or scope of the IGD’s investigatory powers should be similar to the one that the Inquiry itself had.” I support the proposals in paragraph 54 and the intentions expressed in paragraph 55.

With respect to the proposed process for IGD investigations into ongoing and in-theatre operations, I acknowledge that “the urgent need for an investigation must be balanced with the impact the investigation would have on the NZDF’s operational effectiveness” and the “[need to consider] the safety and security of IGD and NZDF personnel if an investigation required a visit to an operational theatre” (paragraph 57). Also, I note that the Inquiry into Operation Burnham was able to produce a robust report into events that occurred in Afghanistan almost a decade earlier, without travelling to that country – albeit with the assistance of people in Afghanistan who conducted investigations in that country on the Inquiry’s behalf.

However, I am troubled by the proposal in paragraph 58 (a) that the Chief of Defence Force be vested with the authority to make the “final decision” on whether or not an IGD investigation can proceed, notwithstanding the fact that such an investigation involves an “ongoing operational activity.” Having the Chief of Defence Force as the final decision-maker when it is his or her forces that are being investigated creates at least the appearance of a conflict of interest, if not an actual conflict of interest. This clearly has the potential to undermine the public’s faith in the robustness of IGD investigations. It is worth noting that, with respect to the allegations made in the book *Hit and Run*, that the previous Chief of Defence Force argued repeatedly that there was, so to speak, “nothing to see here.” It scarcely needs stating that the Inquiry reached a very different conclusion.

Question  
3

It is also worth noting that many areas where military operations are ongoing are conflict zones, and that conflict zones are by nature dangerous areas. In such areas there will always be a degree of risk to the safety and security of the IGD and/or his or her staff, as well as to the safety and security of any NZDF personnel assigned to assist or support the IGD and/or his or her staff during their investigation in an operational area; however, the work of the Australian Defence Force Inspector-General's office in Afghanistan in recent years has demonstrated that it is possible to undertake complex investigations in high-risk conflict zones.

In short, the legislation or legislative principles relating to the IGD should specify that a high threshold of danger or risk must be met before any decision is made that an investigation by the IGD in an area of ongoing operations cannot proceed.

Also, consideration should be given to giving the Minister of Defence not the Chief of Defence Force, the authority to make the decision as to whether an investigation in an area of ongoing operations can proceed, after taking into account the views of the IGD and the Chief of Defence Force.

If authority to prevent the IGD conducting an in-theatre investigation is vested with the Chief of Defence Force, and the Chief of Defence Force considers that an IGD investigation cannot be conducted safely and securely without significantly impeding NZDF operations (paragraph 48 (c)), he or she should be required not only to notify the Minister of Defence in writing but to outline the reasons for his or her decision and attest to the accuracy of his or her statement by way of a statutory declaration.

The reasons for the Chief of Defence Force's decision should be conveyed to the IGD as well as to the minister. In addition, the FADT Select Committee should be notified of the decision and the Chief of Defence Force should be required to answer questions before the committee if he or she is asked to do so.

Moreover, consideration should be given to making public, at the earliest opportunity, the fact that such a notice has been issued by the Chief of Defence Force, provided no details are released that could jeopardise the IGD's ongoing investigation or the safety and security of New Zealand personnel.

With respect to the IGD's investigation powers, I agree that the IGD should be given appropriate statutory powers, including those that are outlined in paragraph 60 (a), (b), (c) and (d). Indeed, the IGD would be unable to do its work without such powers; however, as always, the devil is in the detail. Notwithstanding the fact that the TCD is a general statement and not a legal instrument, care should be taken to articulate any powers with far greater precision than is the case in the document.

For instance, the power outlined in 60 (a) – for the IGD to “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) – should refer to “relevant information” or to “information relevant to the IGD's investigation.”

Also, in drafting legislation or any legislative principles, care should be taken not to undermine the Evidence Act privilege that can be asserted by media in legal proceedings (i.e., with respect to confidential sources or source-related information). Similarly, the ramifications of the powers outlined in 60 (d) need greater scrutiny.

I support the proposal in paragraph 62 of the TCD to establish legal offences to “strengthen and provide a backstop to the IGD's powers by reflecting that noncompliance or attempts to interfere with investigations is considered wrong”; and I support the proposed legal offences outlined in paragraph 63 (a), (b) and (c).

However, I strongly disagree with the proposal in paragraph 64 that the offences listed at 63 (a), (b) and (c) be punishable by a maximum fine of \$5,000.

One of the stated purposes of the IGD is to ensure a greater degree of transparency and accountability on the part of the NZDF, bearing in mind the defence force's woeful record in this regard, as revealed by the Inquiry into Operation Burnham. Given this background, a penalty of \$5,000 for any person who wilfully obstructs, resists, or misleads the IGD, or who refuses to comply with a lawful direction by the IGD, is grossly inadequate. Faced with an investigation into civilian casualties or possible war crimes in Afghanistan, for example, any member of the NZDF could simply refuse to cooperate in the knowledge that, at the worst, they would only be fined a relatively modest sum.

I am not persuaded that the penalties prescribed in the ISA have proved effective and are a good model for the IGD. If the reports of certain commentators are accurate, which I believe they are, the previous Inspector-General of Intelligence and Security (IGIS) was, on occasion, obstructed or resisted with near-impunity by some members of the intelligence community, due in large part to the ineffective penalties for doing so that are prescribed by the ISA.

It would be unfortunate if the reported problems faced by the IGIS in this regard were also experienced by the IGD. To underscore the seriousness of the offences listed at 63 (a), (b) and (c), consideration should be given to providing for a maximum penalty of \$10,000 and to providing for a period of imprisonment for these offences. This would act as a strong deterrent.

I agree with the suggestion in paragraph 65 that it is important "[t]o protect the integrity of the IGD's investigations and the established process it should follow: the interests of the NZDF and individuals involved in investigations; and to protect sensitive information from being released outside of established processes..." – with the proviso that great care must be taken to ensure that "[protecting] sensitive information from being released outside of established processes" is not interpreted in a manner that compromises media freedom. For example, if as part of an IGD investigation a journalist was asked, and agreed, to provide confidential material, that should not prevent the journalist from continuing to report on the information contained in or relating to that material.

The offence proposed in paragraph 66 of the TCD, which carries the significant maximum penalty of two years imprisonment, appears to have the potential to inhibit reporting by media on matters of public interest and needs further elaboration; it raises BORA issues, and it would make sense to invite submissions on this matter from media and media freedom organisations.

As to Protections and Safeguards, I broadly agree with the principles that are outlined in paragraph 67. However, I am concerned that the desire to avoid compromising "national security interests or relationships with international partners" could be used as a way of attempting to obstruct an investigation by the IGD, as it was at times during the Inquiry into Operation Burnham.

In terms of the proposals in this section, it is not clear what will be covered by "Certain information (for example, personal information, or information provided to NZDF from foreign partners or protected sources that is subject to confidentiality or need-to-know requirements)", and it is not at all clear why such information should be excluded from the IGD's automatic access. (See: "IGD's access to NZDF's records and information systems.") On some readings of this proposal, there would appear to be potential for information to be withheld unnecessarily from the IGD.

Similarly, I am concerned, with respect to IGD protections and safeguards for confidential or otherwise sensitive information, that the emphasis on avoiding "[prejudice or impairment to] existing relationships with foreign partners, coalitions, international entities or domestic agencies who share information with NZDF" could lead to important information being withheld unnecessarily.



These concerns are not allayed by the suggestion, in paragraph 69, that witnesses or investigation participants must “consult with, and seek agreement from, those who have a right over the information or thing to be disclosed.” On more than one occasion during the Inquiry into Operation Burnham, information was obtained by the Inquiry from individuals or organisations who had a right over that information after participants in the Inquiry had insisted that those who had a right over the information weren’t prepared to release it.

Neither are my concerns allayed by the suggestion of requiring a minister “to certify that disclosure would not prejudice a particular interest (for example, security, defence, international relations, or the proceedings of Cabinet).” Ministers rely on agencies such as the NZDF and MFAT for advice on matters relating to security, defence and international relations, and as the findings of the Inquiry into Operation Burnham demonstrate, ministers were given incorrect or seriously flawed advice on several issues over an extended period.

Moreover, a minister could potentially be motivated by the wish to avoid the political fallout from an IGD investigation, and all too eager to certify that disclosure would prejudice a particular interest. Again, it is worth recalling that several ministers, including the then-prime minister at the time *Hit and Run* was published, declined, on the basis of information and advice they received from the then-Chief of Defence Force and other officials, to order an inquiry into allegations relating to Operation Burnham.

With respect to the important issue of protection for witnesses and investigation participants (discrimination), I strongly support the safeguard that is proposed. Specifically, that “The NZDF cannot subject an NZDF person to any penalty or discriminatory treatment of any kind in relation to his or her employment or service because of assisting the IGD, when [that assistance] was undertaken in good faith.” A robust safeguard of this nature is in my view essential if the IGD is to receive the full and active cooperation of NZDF personnel during investigations.

In terms of “Situating the IGD in the context of existing oversight,” I agree that “There may be instances where other agencies have a function that relates to a matter that is, or could be, investigated by the IGD” (paragraph 70). It is almost inevitable that this will be the case, as was evident during the Inquiry into Operation Burnham, where the NZSIS, GCSB, and MFAT were involved as well as the NZDF.

I agree with the proposal in paragraph 71 of the TCD that “the IGD should be able to consult with other oversight bodies before undertaking its own investigation.” I broadly agree that “It should be able to decline to investigate a matter; defer its investigation until another body has completed its own investigation; or refer the matter to a more appropriate body” (paragraph 71), with the proviso that transparency should be the default position with respect to any such decisions. A decision by the IGD to decline to investigate, defer an investigation, or refer a matter to a more appropriate body should be made public, with an explanation of why a particular decision was reached.

Where the publication of such a decision would compromise an ongoing investigation by another body, it should be made as soon as possible after that investigation has concluded. Where publication of the details of a decision to decline or defer a matter, or to refer a matter to a more appropriate body, is not possible due to the sensitivity of some information, a summary should be published in which the reasons for withholding the information are outlined.

I agree with the proposals outlined in paragraph 72 (a) and (b) of the TCD, for the reasons outlined in paragraph 73.

With respect to “Mechanisms to support the IGD’s oversight,” I agree with the assessment in paragraph 74 and strongly support the proposals in paragraph 75 (a) and (b).

With respect to “Investigation reports,” I have some concerns with the proposal in paragraph 76 that “the IGD’s finalised investigation reports should have an appropriate classification

determined by the IGD, in accordance with national classification criteria, after having taking into account the Chief of Defence Force and Secretary of Defence's views on classification." I am concerned, too, about the proposal in paragraph 76 that, "Where a report quotes or summarises any matter with a classification, it must not be given a lower classification in the IGD's report."

While I understand the need to protect sensitive information, these proposal have the potential to undermine the public's trust in the robustness and transparency of the IGD's work. Transparency must be the default setting if the IGD's office is to establish and maintain credibility as an effective watchdog of the NZDF.

It is well-established that there are significant issues regarding the "over-classification" of information by the defence and intelligence communities in New Zealand and overseas jurisdictions. In the report of the Inquiry into Operation Burnham, a considerable amount of material that had previously been withheld by the NZDF, under the OIA, for example, was declassified or otherwise made available by way of a summary. To the best of my knowledge, there is no evidence that the national security of New Zealand or its international partners or New Zealand's relationship with international partners has been adversely affected as a result.

With respect to paragraph 77, it is my view that investigations reports *must* be shared with relevant ministers where they relate to or impact other portfolios, unless there is a compelling reason not to do so. With respect to paragraph 78, the IGD *must* publish its investigation reports online "in order to provide transparency of the NZDF's activities and deliver increased public trust and confidence that the NZDF's activities are being appropriately overseen." This must apply to investigations undertaken on referral as well as to own-motion investigations.

I agree that, in the case of reports that contain legitimately classified information or other information that cannot be disclosed, the IGD must publish its investigation reports "to the extent possible," as stated in paragraph 79, while safeguarding the interests referred to in that paragraph. However, the reasons for withholding information need to be more clearly defined and not rely on vague expressions like "other matters."

I support the proposal outlined in paragraph 80 with reference to "The Outcome of Investigations."

#### Do you have any feedback on the IGD's proposed assurance functions and powers?

I agree with the principles and proposals with respect to "Assurance Functions and powers" that are outlined in paragraphs 81, 82 and 83, with the proviso that the IGD receive adequate resources to effectively perform these functions.

Broadly speaking, I agree with the principles and proposals relating to "Assessments" which are outlined in paragraphs 84, 85 and 86. It is not entirely clear to me, however, why the IGD should not have discretion to comment on matters that fall within the jurisdiction of other bodies, as specified in paragraphs 85 (a)-(e), provided such feedback is incidental to (as opposed to the focus of) an IGD investigation.

With reference to "Assessment reports," I agree that "unless there is a good reason not to, the IGD should publish its own motion assessments online" (paragraph 87); however, I do not agree that the final decision as to whether on-referral reports are published should rest with the referring party. Yet again, I would argue that transparency must be the default position. It should not be possible for the Secretary of Defence, the Chief of Defence Force, or the Minister of Defence to circumvent transparency on tenuous grounds.

Question  
4

For example, if media reports were published of civilian casualties, similar in nature to those that were the subject of the Inquiry into Operation Burnham, a Chief of Defence Force or Minister of Defence might decide to pre-empt an own-motion investigation by the IGD by referring that matter to the IGD. Then, if the IGD's inquiries confirmed the allegations, the referring party – for instance, the Chief of Defence Force or Minister of Defence – could withhold permission for the IGD's findings to be published.

This scenario would appear to be the very opposite of what the Inquiry into Operation Burnham was seeking to achieve in recommending the establishment of the IGD. It is submitted that greater consideration should be given to how the appropriate balance between transparency and accountability on the one hand, and the protection of sensitive information on the other, can be achieved.

With respect to "Enquiries," I broadly agree with the principles and the proposals outlined in paragraph 88, including that "the IGD should be able to make enquiries into operational activities on its own motion." However, again it is unclear why the IGD should not have discretion to publish a general summary of his or her inquiries, if not the details, especially where such publication would not involve any confidential or protected information.

With respect to the proposal outlined at paragraph 89 – "Assurance powers" – I agree the IGD should have the statutory power to access all NZDF records, databases and information systems at all times." Also, I agree that the proposed offences outlined at paragraph 63 also apply to the IGD's assurance functions.

## Chapter 5: Form and structure

### Do you have any feedback on how the IGD is proposed to be set up?

I agree with the proposal outlined in paragraph 91 of the TCD that "the IGD be established as an independent statutory officer, associated with a ministerial portfolio." However, it is not clear why there is no detail as to which ministerial portfolio is most suitable.

If the Ministry of Defence is the portfolio the authors of the TCD had in mind, an issue of resourcing arises; the Ministry of Defence is a relatively small ministry with few staff and a limited budget, so it would be critical to ensure it received the resources needed to effectively support the IGD.

I broadly agree with the proposals relating to governance and accountability that are outlined in paragraph 93 (a) and (b), with the following provisos:

With respect to 93 (a), to maintain the independence of the IGD's office and avoid any perception of political interference, it should be made clear in the establishing legislation that the views of the IGD regarding the Annual Work Programme are determinative.

With respect to 93 (b), it should be made clear in the establishing legislation that nothing in the requirement to produce an annual report precludes the IGD from producing reports during the year on an investigation or investigations.

I broadly agree with the principles relating to the structure of the IGD's office that are outlined in paragraph 94 – in particular, the notion that "it is prudent to start small, allow the office to get a sense of its work programme, and then scale its size accordingly."

That said, given the size of the NZDF and the range of potential issues the IGD may be called on, or decide, to investigate, the IGD's office should not be established with fewer than five FTE staff, as proposed in paragraph 95. Provision should be made for additional staff to be retained within the first year of the office's operation, if more staff are necessary.

I agree with the proposals relating to “Appointments” outlined in paragraphs 97 and 98; however, I note there is no detail provided regarding the preferred background of IGD appointees, nor any reference to the expected duration of each appointment. With respect to the former point it is submitted that, to preserve the independence of the IGD’s office, no person who is serving or has served with the NZDF should be eligible for appointment as IGD or Deputy IGD.

## Chapter 6: Administrative procedures

### Do you have any feedback on the appropriateness and/or adequacy of the administrative procedures set out on pages 26-28?

Question  
6

I broadly agree with the “Administrative procedures” outlined in paragraph 99 on pages 26-28 of the TCD, but make the following comments:

With respect to “Consultation” on the draft terms of reference for the IGD’s own-motion investigations, care should be taken that the proposal that the Chief of Defence Force and Secretary of Defence be able to “correct any factual inaccuracies or provide any other relevant information” is not interpreted in a way that allows them to subvert the investigation the IGD intends to undertake. That is to say, any “correction of factual inaccuracies” or provision of “other relevant information” must not prejudice the determination of facts that the IGD’s investigation is seeking to establish or to dissuade the IGD from proceeding with an investigation where he or she believes there are reasonable grounds to investigate.

With respect to the “Formal notification” of the IGD’s own-motion investigations (page 26), it is not clear why five working days’ notice is required. It is submitted that provision be made for urgent IGD investigations to commence with a shorter notice period.

With respect to “Consultation” on the draft terms of reference of the IGD’s own-motion assessments (page 27), I would re-iterate the points made above regarding own-motion investigations.

With respect to the “Formal notification” of the IGD’s own-motion assessments (page 27), I repeat the points made above regarding the formal notification of own-motion investigations.

With respect to “On-referral investigations and assessments” (page 28), it should be made clear in the legislation or legislative principles that nothing in this section precludes the IGD from commencing an own-motion investigation. For example, if there were disagreement between the Chief of Defence Force and the IGD as to the terms of reference of an on-referral request (for instance, where the IGD felt the proposed terms of reference were unduly restrictive), the IGD would retain the ability to commence an own-motion investigation with his own terms of reference.

## Other comments/feedback

[Insert response here]