

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

PROGRESS UPDATE ON THE ESTABLISHMENT OF AN INDEPENDENT INSPECTOR-GENERAL OF DEFENCE: CABINET DOCUMENTS

November 2021

This publication provides documents on Cabinet's November 2021 decision on the proposals to establish an independent Inspector-General of Defence in New Zealand. It comprises:

- the Cabinet minute of decision: *Progress Update on the Establishment of an Independent Inspector-General of Defence* [ERS-21-MIN-0035].
- the Cabinet paper: *Progress Update on the Establishment of an Independent Inspector-General of Defence* [ERS-21-SUB-0035].

This pack has been released on the Ministry of Defence website, available at: 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. Where information is withheld, the relevant sections of the Act are indicated in the body of the document. No public interest has been identified that would outweigh the reasons for withholding it.

Information is withheld in order to:

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



Cabinet External Relations and Security Committee

Minute of Decision

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

Establishing an Independent Inspector-General of Defence

Portfolios **Attorney-General / Defence**

On 26 October 2021, the Cabinet External Relations and Security Committee (ERS):

Background

- 1 **noted** that in July 2020, ERS approved the government response to the report of the *Government Inquiry into Operation Burnham and Related Matters* (the Inquiry), and accepted in principle all of the Inquiry's recommendations, including to establish by legislation an independent Inspector-General of Defence (IGD) to facilitate independent oversight of the New Zealand Defence Force (NZDF) and enhance its democratic accountability [ERS-20-MIN-0025];
- 2 **noted** that in January 2021, the Cabinet Business Committee agreed to the intended policy outcome and objectives for the IGD's establishment, and directed the Minister of Defence and the Attorney-General to report back to ERS with detailed policy proposals on the scope, functions, power and form of the IGD [CBC-21-MIN-0002];

Analysis

- 3 **agreed in principle**, subject to the outcome of targeted consultation, to the key design elements of the IGD:
 - 3.1 **scope**: the IGD would have own motion oversight of defined operational activities, with oversight of any other NZDF matter (except the activities of Veterans Affairs New Zealand) on referral from the Minister of Defence, the Secretary or the Chief of Defence Force;
 - 3.2 **functions**: the IGD would have three functions:
 - 3.2.1 **investigation** – to scrutinise and respond to issues that have occurred;
 - 3.2.2 **assessment** – to assess processes, procedures and policies, and identify gaps to prevent issues from occurring in the future;
 - 3.2.3 **enquiry** – to request information to support its oversight and knowledge of NZDF operational activities;

- 3.3 powers and safeguards: the IGD's functions would be supported by powers, offences and corresponding safeguards:
- 3.3.1 for investigations, the IGD would be able to summon and examine on oath; require persons to provide information; enter any premises or place; access all NZDF records, databases and information systems; and require witnesses to disclose information that may be subject to secrecy or non-disclosure;
 - 3.3.2 to support its assessment and enquiry functions, the IGD would have the power to access all NZDF records, databases and information systems;
 - 3.3.3 the IGD's powers would be supported by an offence regime;
 - 3.3.4 protections and safeguards would protect information and people, national security information, and international relationships, while being as transparent as possible;
- 3.4 form: the IGD would be a small, independent body:
- 3.4.1 the IGD would be headed by an individual statutory officer associated with a Ministerial portfolio, supported by a deputy, staff and an advisory panel;
 - 3.4.2 the IGD and deputy would be appointed by the Governor-General on recommendation of the House;
 - 3.4.3 the IGD would produce an annual work programme and an annual report. These would be presented to the House;

Financial implications

- 4 **noted** that [REDACTED] s9(2)(f)(iv), s9(2)(g)(i)
- 5 **noted** that [REDACTED] s9(2)(f)(iv), s9(2)(g)(i)
- 6 **noted** that the costs set out in paragraphs 4 and 5 above are early indicative costs, and are subject to final policy decisions by Cabinet on the establishment of the IGD;

Legislative implications

- 7 [REDACTED] s9(2)(f)(iv), s9(2)(g)(i)

Next steps

- 8 **invited** the Minister of Defence and the Attorney-General to undertake targeted consultation on the key design elements set out in the paper under ERS-21-SUB-0035 and the additional detailed proposals in the consultation document with selected external stakeholders;

- 9 **agreed** to the release of the document *Proposals for Establishing an Independent Inspector-General of Defence in New Zealand: Targeted Consultation Document*, attached as Appendix 1 to the paper under ERS-21-SUB-0035, subject to any minor or editorial changes that may be authorised by the Minister of Defence and the Attorney-General prior to its release;
- 10 **invited** the Minister of Defence and the Attorney-General to report back to ERS with a paper setting out the outcome of the targeted consultation process, and seeking final policy decisions on the establishment of the IGD, in the first quarter of 2022.

Janine Harvey
Committee Secretary

Present:

Rt Hon Jacinda Ardern (Chair)
Hon Grant Robertson
Hon Kelvin Davis
Hon Andrew Little
Hon David Parker
Hon Nanaia Mahuta
Hon Poto Williams
Hon Kris Faafoi
Hon Peeni Henare

Officials present from:

Office of the Prime Minister
Department of the Prime Minister and Cabinet
Officials Committee for ERS

Released by the Minister of Defence and the Attorney-General

Office of the Attorney-General
Office of the Minister of Defence
Chair, External Relations and Security Committee

Establishing an Independent Inspector-General of Defence

Proposal

1. This paper seeks Cabinet's agreement in principle to the scope, functions, powers and form of an independent Inspector-General of Defence (IGD), and seeks approval to consult with selected external stakeholders.
2. If agreed, following the targeted consultation process, a second Cabinet paper will be submitted in 2022. This paper will include the full range of policy decisions required to establish the IGD for Cabinet's consideration.
3. This paper sits alongside a companion paper from the Minister of Defence reporting back on the findings of the Expert Review Group, which was Recommendation 1 of the Government Inquiry into Operation Burnham and related matters (the Inquiry).

Relation to government priorities

4. The establishment of the IGD supports the following government priorities:
 - 4.1. *Objective 1 - to keep New Zealanders safe from COVID-19:* The New Zealand Defence Force (NZDF) is making a significant contribution to the all of Government response to COVID-19 through Operation PROTECT, as well as supporting our Pacific Island neighbours. The proposed IGD would support greater transparency of a range of defence activities, which will have a positive impact on all NZDF outputs.
 - 4.2. *Objective 3 - laying the foundations for a better future:* Establishing the IGD will strengthen public confidence and support New Zealand's international reputation by providing assurance that the NZDF's activities, in a rapidly changing global security context, are subject to independent oversight.

Executive Summary

5. In July 2020, the Cabinet External Relations and Security Committee (ERS), with power to act, accepted in principle the recommendations of the Inquiry. This included the recommendation to establish an IGD to provide independent oversight of the NZDF [ERS-20-MIN-0025]. ERS agreed the intended policy outcome and objectives for the IGD's establishment in February 2021 and requested we report back on detailed policy proposals [CAB-21-MIN-0006].
6. We now seek in principle agreement, subject to the outcome of the proposed targeted consultation, to the following key design elements that form the basis of the IGD:
 - 6.1. **Scope:** the IGD's scope would include all NZDF activities (excluding functions undertaken by Veterans Affairs New Zealand), with own motion oversight of defined operational activities, and of other matters on referral

from the Minister of Defence, the Secretary of Defence (the Secretary) or the Chief of the Defence Force (the CDF);

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

5.2.1 Investigation - to scrutinise and respond to issues that have occurred;

5.2.2 Assessment - to assess processes, procedures and policies, and identify gaps to prevent issues from occurring in future; and

5.2.3 Enquiry - to request information to support its oversight and knowledge of NZDF operational activities.

6.3 **Powers and safeguards:** the IGD would be supported by statutory powers, obligations and offences, with safeguards to protect information and people, national security and international relationships, while being as transparent as possible;

6.4 **Form:** the IGD would be an individual statutory officer associated with a Ministerial portfolio, supported by a deputy, staff and an advisory panel. The IGD and deputy would be appointed by the Governor-General on recommendation of the House of Representatives. For accountability, the IGD would produce an annual work programme and an annual report.

7.

s9(2)(f)(iv), s9(2)(g)(i)

8. The proposals for the IGD take into account the findings of the Expert Review Group (whose report Cabinet is considering alongside this paper) that there needs to be strengthened integration between the NZDF and Ministry of Defence to ensure meaningful participation by both agencies in decision-making before, during and after an operational activity. The Expert Review Group also recommends the development of a policy advisor capability that would see Ministry staff deployed on NZDF operations alongside military personnel.

9. If Cabinet agrees in principle to the above key design elements for the IGD, we will undertake targeted consultation with interested parties with a range of perspectives. While the establishment of the IGD does not have significant impacts outside of government, targeted engagement offers a way to test how the proposals meet expectations for an oversight body over the NZDF. A draft consultation document is attached as Appendix 1.

10. We will return to Cabinet in the first quarter of 2022 to report back on the outcome of this consultation, and seek final agreement to the policy to be included in the proposed Bill.

Background

11. In examining allegations of wrongdoing by the NZDF during operations conducted in Afghanistan in 2010 and 2011, the Inquiry found that NZDF's failure to provide full and accurate information to Ministers, and to adequately scrutinise

or respond to information, disrupted the principles of democratic oversight¹ of the military and ministerial accountability of Parliament.

12. The Inquiry recommended establishing an IGD to provide independent, external oversight of the NZDF. ERS, with power to act, accepted this recommendation in principle in July 2020, but determined that the Foreign Affairs, Defence and Trade Committee should not be able to refer specific matters to an IGD [ERS-20-MIN-0025 refers].
13. In February 2021, Cabinet agreed the Government's intended policy outcome and policy objectives for the IGD's establishment (at [Appendix 2](#)) and invited the Attorney-General and Minister of Defence to report back to ERS with detailed policy proposals on the IGD's scope, functions, powers and form [CAB-21-MIN-0006 refers]. At that stage, Cabinet would consider whether to undertake consultation on the detailed policy proposals, given the high level of interest some stakeholders have shown in matters related to the Inquiry. Should Cabinet agree to consultation, then Cabinet would make final policy and any funding decisions following the outcome of that consultation.
14. We now report back seeking Cabinet's in principle decisions on the IGD's key design features (i.e. the scope, functions, powers, and form), subject to the outcome of targeted consultation. The attached consultation document sets out these design features, but also includes additional detail on the proposals to ensure stakeholders have adequate context to provide informed feedback.

Analysis

The IGD is intended to support democratic oversight and ministerial accountability

15. In designing the IGD's scope, functions, powers, and form we have had regard to the findings and recommendations of the Inquiry. The primary issues the Inquiry identified, and which the IGD is intended to address, relate to the principles of democratic oversight of the military and ministerial accountability to Parliament and the consequences (particularly the impact on public confidence) if these principles are undermined. Both of these principles depend on the provision of full, timely and accurate information by NZDF to ministers.
16. In addition, the NZDF is unlike other state organisations in that it engages in a range of activities of varying scale and complexity, both domestically and overseas. It can be asked to do things that other agencies are not permitted to (e.g. the use of lethal force) and its personnel are required to do things that no other employees are required to (e.g. uniformed personnel are subject to military discipline). Because of these unique rights and obligations, effective oversight is necessary. The NZDF also has existing internal oversight that differs from other state organisations, such as the military justice system, and is subject to the oversight of a range of domestic and international external bodies.
17. Given these specificities, we have designed the IGD to:
 - 17.1. assist the Minister of Defence to exercise democratic oversight of the NZDF;

¹ We have used 'democratic oversight' rather than 'civilian control' which was the term used in the Inquiry report to describe this concept. This term better reflects that oversight is exercised by democratically elected representatives rather than public servants, and enables better differentiation with the Secretary of Defence's role as 'principal civilian adviser' to the Minister.

- 17.2. provide the Minister of Defence with an avenue, independent of the Defence agencies², to examine and expose failings and gaps in NZDF systems so that steps may be taken to address and prevent problems, and promote system improvements in the NZDF; and
 - 17.3. assist the Government in assuring Parliament and the public that the activities of the NZDF are subject to enhanced independent scrutiny.
18. In undertaking its functions and exercising its powers, the IGD would be expected to complement, not duplicate, the functions of other oversight bodies, and ensure its actions:
- 18.1. are in the public interest, undertaken impartially and directly support the Minister of Defence to exercise democratic oversight of the NZDF and support ministerial accountability to Parliament;
 - 18.2. represent an appropriate use of the IGD's resources, in terms of providing value for money to the people of New Zealand, and are proportionate, in terms of time, cost and resources, on the NZDF; and
 - 18.3. are informed by regular engagement with the Defence agencies, and take account of the military context in which the NZDF operates.

Scope

19. The Inquiry envisioned that the IGD would have own motion functions in regard to particular operational activities, and that other matters could be referred by the Minister of Defence, the Secretary, or CDF³.
20. This approach would ensure the IGD is focused on the activities that have the most potential to undermine public confidence in the NZDF, and have reputational costs to New Zealand, while enabling oversight of other NZDF matters, if required. We propose that the IGD could look into any NZDF matter on the referral of the Minister of Defence, Secretary or CDF, and that the IGD should have own motion functions into defined operational activities that would include any domestic or international activity:
- 20.1. in time of war, armed conflict or any other emergency, whether actual or imminent;
 - 20.2. authorised by the NZ Government and that involves peace support operations, maintenance or restoration of law and order or the functioning of government institutions; or where the NZ Government agrees to provide assistance or contribution;
 - 20.3. declared by the CDF, by notice in writing⁴;
 - 20.4. including training carried out directly in preparation for any specific activity in 20.1– 20.3; and
 - 20.5. including intelligence operations carried out directly in preparation for, or in support of, any specific activity in 20.1– 20.3.

² The Ministry of Defence and the NZDF.

³ Note the Inquiry recommended, but Cabinet did not agree, that the Foreign Affairs Defence and Trade Select Committee should be able to refer matters to the IGD. As that committee is a regular Select Committee, it has the ability to initiate its own investigations into NZDF.

⁴ Note this would be similar to the declarations made by the CDF under the Health and Safety at Work Act 2015, which captures activities such as Explosive Ordnance Disposal.

21. We considered, but discounted, limiting the IGD's own motion functions to operations similar to Operation Burnham – i.e. overseas military operations in situations of armed conflict. Such a narrow approach would not future-proof the IGD at a time of rapid technological development and changing security threats (including cyber threats and the use of space-based technologies) or meet public expectations of independent oversight.
22. The IGD's scope would not include the activities of Veterans Affairs New Zealand, which is accountable to the Minister of Veterans Affairs, and operates primarily under the requirements of the Veterans Support Act 2014. The IGD would also not be concerned with the activities of foreign partners, coalitions or international entities, or domestic agencies that the NZDF may work with. However, the actions of NZDF as part of, or resulting from, working with others would fall within the IGD's scope.

Functions

The IGD's functions should directly support effective oversight

23. The Inquiry considered that the IGD's functions should minimise the possibility of similar failures occurring in the future, and ensure that, if they do occur, they are investigated and resolved in a timely and appropriate manner. To this end, we propose the IGD has:
 - 23.1. **investigation functions**, to scrutinise and respond to issues if they were to occur;
 - 23.2. **assessment functions**, to minimise or prevent the risk of issues occurring; and
 - 23.3. **enquiry functions**, to support the IGD's effective oversight.
24. We considered, but discounted, whether the IGD should have additional functions to provide advice or guidance to the Minister or Defence, or to investigate complaints. Neither function would add value to the IGD's oversight, or support delivery of the IGD's intended purpose.
25. An advisory function would risk duplication with the respective roles of the CDF and the Secretary in providing military, and civilian, advice to the Minister of Defence. A complaints function would risk supplanting existing administrative complaints and military justice processes (including the Code of Veterans Rights⁵), duplicating the existing role of other external oversight bodies, and diverting IGD resources from its focus on operational activities. The IGD would be able to receive reports or allegations relating to NZDF operational activities, and investigate these as part of its work.

The IGD should have full discretion to initiate investigations into operational activities

26. The Inquiry was clear that independence from the NZDF was critical, and that the IGD should be able to determine when to initiate an investigation on its own motion. We therefore propose that the IGD has full discretion to initiate investigations into operational activities, as defined above. This approach would support the IGD's credibility, ensure its work does not rely too heavily on the

⁵ Existing arrangements for complaints made against Veterans Affairs staff (who are members of NZDF) include independent mediation, followed by recourse to the Ombudsman where matters cannot be resolved through internal processes.

decisions of others and is future-proof. It would empower the IGD to determine how to undertake its oversight based on what it sees and hears, not just what may be in the public domain.

The IGD should take a system-improvement based approach to its investigations

27. In line with the Inquiry's recommendation, the policy outcome agreed by Cabinet in February 2021 set out that the IGD would investigate issues regarding the 'legality and propriety' of NZDF's actions. We propose the IGD's investigations focus on:

27.1. the establishment of facts and the making of findings; and as appropriate

27.2. making recommendations:

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

27.2.2. for the improvement and benefit of the NZDF relevant to the findings of the investigation⁶.

28. This is similar to the scope of the investigatory power of the Inquiry. The policy outcome and the Inquiry's vision⁷ would be better achieved through this approach as it provides opportunity for resolution, catharsis, holding individuals and organisations to account, and generating public confidence. While the IGD could still explore issues of legality and propriety as part of its investigations, the above focus would be more likely to create an environment in which NZDF personnel engage openly with the IGD and resultant recommendations contribute to substantial and long-lasting benefits.

The IGD's investigation reports should be published online

29. The Inquiry recommended the IGD report on the outcomes of its investigations. Given the importance of transparency and public accountability, we propose that the IGD should produce reports on investigations that will be made public to the extent possible while safeguarding national security, New Zealand's international relations and obligations of confidence. Reports should be published online. Prior to publication, investigation reports may be shared with relevant Ministers where they relate to or impact other portfolios, and with the Foreign Affairs, Defence and Trade Committee, subject to security classification, and with permission from the Minister of Defence.

30. Following an IGD investigation, the CDF should be required to notify the Minister of Defence of any action to give effect to, or the reasons to depart from, or not implement, any recommendation.

Assurance functions would identify potential problems and prevent their occurrence

31. In addition to investigating matters if something goes wrong, the Inquiry also identified the need for the IGD to minimise the possibility of problems occurring

⁶ Note that the IGD would not be precluded from making recommendations that are critical of the NZDF or that benefit those impacted by NZDF's actions (e.g. recommending an apology be provided).

⁷ The Inquiry commented that "*independent investigations should not be regarded by military personnel in a negative way. External oversight can provide a platform to enhance public understanding of complex legal and operational issues, and to identify good (or bad) practice in a fair, independent and impartial manner. Often, it results in improvements to the way the military operates*", Para 42, page 370 of the Inquiry report.

in the first place. To this end, we propose the IGD has an assessment function to identify and prevent issues, and contribute to system improvement; and an enquiry function to support the IGD's understanding of NZDF's operational activities in an evolving defence context.

32. Assessments would explore relevant standards of best practice, and determine whether the processes, procedures and policies associated with an operational activity meet those standards, including identifying any gaps or potential improvements. The IGD could undertake assessments into operational activities on its own motion, and into other matters on referral from the Minister of Defence, the Secretary or the CDF. For transparency, the IGD should publish assessments undertaken on its own motion, and may publish those undertaken on referral with permission from the referring party. The CDF should be required to notify the Minister of Defence of any action to give effect to, or the reasons to depart from, or not implement, any recommendation.
33. Enquiries would enable the IGD to formally request information from the NZDF outside an investigation or assessment. As they would not involve the undertaking of any evaluation or making findings, the IGD should be able to make enquiries into operational activities on its own motion. The IGD would not be required to publish its enquiries.

Powers and safeguards

34. In line with public inquiries and other oversight bodies, the IGD should have statutory powers. We propose that for investigations, the IGD could summon and examine on oath, require persons to provide information, enter any premises or place, access all NZDF records, databases and information systems, and require witnesses to disclose information. To support assessments and enquiries, the IGD could access all NZDF records, databases and information systems.
35. To ensure effectiveness of these powers, we also propose that actions to obstruct, hinder, resist, mislead or attempt to mislead, fail to comply with the IGD's exercise of its powers, and the unauthorised publication of information, would be an offence. Further information on offences and penalties is set out in the consultation document.⁸
36. The IGD's powers should have corresponding safeguards to ensure their appropriate use, and to protect people and information during, and after, investigations. Safeguards would also encourage honest and open participation in IGD investigations, and promote transparency, without compromising national security interests or relationships with foreign partners. The consultation document sets out additional detail on the protections and safeguards we are proposing, which relate to information provided to the IGD, access to the NZDF's information systems and premises, and witnesses and investigation participants.

Form

37. In considering the form of the IGD, the Inquiry suggested that it could be a standalone body or associated with another entity such as the Ministry of

⁸ Page 18 of the targeted consultation document.

Defence. It also noted that while the IGD need not be headed by a person with a military background, it would need access to significant military expertise.

38. We propose the IGD be established as an independent statutory officer associated with a Ministerial portfolio. This bespoke organisational form provides flexibility for the establishing legislation to set out key provisions relating to structure, appointments and reporting obligations. It is also proportionate for the IGD's proposed scope, size and functions, and offers the lowest cost while providing the required independence. A recommendation on the administering agency, to provide support with matters such as appointments and appropriations, will be made for final policy decisions in early 2022.
39. We considered, but discounted, other options such as consolidating the IGD's functions in an existing body, like the IGIS or the Ministry of Defence. These options do not provide the same degree of efficiency or effectiveness as the proposal. They would require changes to the operations of the existing bodies, could have unintended consequences such as affecting the delivery of the bodies' existing functions and may not provide cost savings for Government. The IGIS has been specifically calibrated to oversee the intelligence agencies, whose legal framework, structural arrangements and activities are different to that of the NZDF, and therefore is not a simple scale up opportunity.
40. In theory, the IGD's functions could be undertaken by an independent statutory officer located anywhere, as long as it is independent of NZDF. The Ministry of Defence is not a good strategic fit in practice, given shared responsibilities and well established joint arrangements with NZDF for providing advice to government on defence matters. Furthermore, the Expert Review Group has recommended that integration between the Ministry and NZDF on operational activities should be strengthened, with Ministry policy advisors included in NZDF overseas deployments, alongside military personnel. We also considered and discounted establishing the IGD as an independent Crown entity because of the relatively higher administration costs.
41. To avoid fragmentation, further work will be undertaken to test the possibility of the IGD sharing back-office functions with existing agencies. This will be included in the report back with final policy proposals.

The IGD's structure should be proportionate and cost effective

42. We propose that the initial structure of the office of the IGD would consist of an IGD and deputy IGD who are appointed by the Governor-General on the recommendation of the House. They would be supported by a team of 3 staff. Given the broad range of NZDF operational activities, rapid technological development and changing security threats, the IGD would need to have recourse to specific technical and other specialist advice. We therefore propose the IGD could appoint an advisory panel, as well as procure 'one-off' specialist advice on a case by case basis to support the delivery of its functions.
43. To provide clarity and accountability, we propose that the IGD prepare and publish an annual work programme, and an annual report on its financial and organisational performance. Both documents would be presented to the House.

Targeted consultation on the policy proposals

44. While the detailed policy proposals relating to the establishment of the IGD fall within the internal administrative and governance arrangements of the Government, there has previously been a high level of interest from some stakeholders in matters related to the Inquiry. As such, we propose undertaking targeted consultation with interested parties with diverse perspectives, including relevant legal experts and academics, Māori representatives, service persons and veterans' organisations⁹, the National Council of Women in New Zealand, expert stakeholders¹⁰, the Inquiry authors, and the authors of *Hit and Run*.
45. Targeted consultation, including the facilitation of focused feedback from stakeholders, would inform the final policy for Cabinet's agreement in early 2022. This is consistent with the approach taken for other Inquiry recommendations. There will be opportunity for wider public engagement during the Select Committee process.

Te Tiriti o Waitangi implications

46. There are no identified direct Te Tiriti o Waitangi implications arising from the proposals in this paper.
47. Officials have consulted NZDF's Tikanga group to ensure that NZDF Māori personnel are not adversely or disproportionately affected by the proposals. The group has indicated the proposals are compatible with the tikanga of Pono (acting with integrity and supporting transparency and accountability). Officials will continue to engage with this group as the policy develops to incorporate tikanga Māori considerations, including Kaitiakitanga (the practice of applying responsible and ethical practices when managing information and while working with witnesses) to IGD investigation processes.

Financial Implications

Expected costs of the IGD based on current estimates

48. Funding would be required for the establishment phase and ongoing operating costs of the IGD. Based on current estimates, we expect the costs to be:

48.1. [Redacted] s9(2)(f)(iv), s9(2)(g)(i)

48.2. [Redacted] s9(2)(f)(iv), s9(2)(g)(i)

49. Funding of approximately:

49.1. [Redacted] s9(2)(f)(iv), s9(2)(g)(i)

⁹ Such as the Royal New Zealand Returned and Services Association.

¹⁰ Such as the Law Society, 36th Parallel Assessments, New Zealand Red Cross, Amnesty International, the Council for International Development, UNICEF, the Council for Civil Liberties, and Transparency International.

49.2. [Redacted] s9(2)(f)(iv), s9(2)(g)(i)

How the costs are expected to be funded

50. [Redacted] s9(2)(f)(iv), s9(2)(g)(i)

Legislative Implications

51. An independent IGD will require new establishing legislation. [Redacted] s9(2)(f)(iv), s9(2)(g)(i)

52. The proposed Bill will include a provision that the Act will bind the Crown.

Regulatory Impact Statement

53. An interim Regulatory Impact Statement (RIS) is attached as Appendix 3. A final RIS will be provided at the time of seeking final policy decisions in early 2022.

54. A panel within the Ministry of Justice has reviewed the RIS and associated supporting material prepared by the Ministry of Defence. The panel considers that the information and analysis summarised in the RIS **partially meets** the Quality Assurance criteria. The panel concluded that the RIS does not fully meet the consultation requirements in the Quality Assurance criteria, and that this has limited the analysis that could be undertaken to make the RIS more convincing.

55. The Panel took into account that this is an interim RIS, intended to assess design choices to support previous decisions for which a RIS was not required, and that further consultation is planned. The planned consultation appears to be adequate for the purpose of the regulatory impact analysis and would likely lead to a more solid foundation for the final RIS to meet the Quality Assurance criteria.

Population Implications

56. The establishment and operation of the IGD will have limited impacts outside of government. Officials have consulted, and will continue to consult, Veterans Affairs on the draft proposals to ensure that as the detailed policy develops there are no adverse or disproportionate impacts on veterans who may, in time, be required to participate in IGD investigations.

Human Rights

57. The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. The proposals seek to provide

oversight of NZDF operations which may at times touch on rights such as the right not to be deprived of life, the right to be free from unreasonable search and seizure, and the liberty of the person. The proposed powers and offences have the potential to engage the rights of freedom of expression, unreasonable search and seizure and liberty of the person, but only limit them in ways that are justifiable in a free and democratic society.

Consultation

58. The following agencies have been consulted on this paper: the Department of the Prime Minister and Cabinet, Crown Law Office, Te Kawa Mataaho Public Services Commission, Ministry of Justice, NZDF, Ministry of Foreign Affairs and Trade, Ministry for Primary Industries, the Treasury, Parliamentary Counsel Office, Veterans Affairs NZ, NZ Customs, NZ Police, and the IGIS.

59.

s9(2)(f)(iv), s9(2)(g)(i)

Communications and proactive release

60. Subject to Cabinet's agreement, the Ministry of Defence will publish the consultation document at Appendix 1 and any associated resources on its website. It will advise stakeholders by email when the consultation materials are released.

61. This paper, the February 2021 Cabinet paper [CAB-21-0006], and the Interim RIS, will be proactively released at the same time as the targeted consultation document is published, subject to redaction as appropriate under the Official Information Act 1982.

Recommendations

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

Background

1 **note** that in July 2020 ERS, with power to act, accepted in principle the Inquiry recommendation to establish an independent IGD to oversee the NZDF, following its findings that the NZDF's actions undermined the constitutional principles of democratic oversight of the military and ministerial accountability to Parliament [ERS-20-MIN-0025];

2 **note** that in February 2021, Cabinet agreed the intended policy outcome and objectives for the IGD's establishment, and directed the Minister of Defence and the Attorney-General to report-back to ERS with detailed policy proposals on the scope, functions, power and form of the IGD [CAB-21-MIN-0006];

Analysis

3 **agree in principle**, subject to the outcome of targeted consultation, to the key design elements of the IGD:

3.1 **Scope:** the IGD would have own motion oversight of defined operational activities, with oversight of any other NZDF matter (except the activities

of Veterans Affairs New Zealand) on referral from the Minister of Defence, the Secretary or the CDF;

3.2 **Functions:** the IGD would have three functions:

3.2.1 investigation - to scrutinise and respond to issues that have occurred;

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3.2.3 enquiry - to request information to support its oversight and knowledge of NZDF operational activities;

3.3 **Powers and safeguards:** the IGD's functions would be supported by powers, offences and corresponding safeguards:

3.3.1 For investigations, the IGD would be able to summon and examine on oath; require persons to provide information; enter any premises or place; access all NZDF records, databases and information systems; and require witnesses to disclose information that may be subject to secrecy or non-disclosure;

3.3.2 To support its assessment and enquiry functions, the IGD would have the power to access all NZDF records, databases and information systems;

3.3.3 The IGD's powers would be supported by an offence regime;

3.3.4 Protections and safeguards would protect information and people, national security information, and international relationships, while being as transparent as possible;

3.4 **Form:** the IGD would be a small, independent body:

3.4.1 The IGD would be headed by an individual statutory officer associated with a Ministerial portfolio, supported by a deputy, staff and an advisory panel;

3.4.2 The IGD and deputy would be appointed by the Governor-General on recommendation of the House;

3.4.3 The IGD would produce an annual work programme and an annual report. These would be presented to the House;

Financial implications

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

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

- 6 **note** that the costs set out in recommendations 5 and 6 are early indicative costs and are subject to final policy decisions by Cabinet on the establishment of the IGD;

Legislative implications

- 7 s9(2)(f)(iv), s9(2)(g)(i)


Communications and proactive release

- 8 **invite** the Minister of Defence and the Attorney-General to undertake targeted consultation on the key design elements set out in this paper and the additional detailed proposals in the consultation document with selected external stakeholders;
- 9 **agree** to release the consultation document at Appendix 1;
- 10 **authorise** the Minister of Defence and the Attorney-General to approve editorial or minor content changes to the consultation document prior to its release;

Next steps

- 11 **invite** the Minister of Defence and the Attorney-General to return to Cabinet with a paper setting out the outcome of the targeted consultation process, and seeking final policy decisions on the establishment of the IGD, in the first quarter of 2022.

Authorised for lodgement

Hon David Parker
Attorney-General

Hon Peeni Henare
Minister of Defence

Appendix 1: Targeted consultation document

Attached separately.

Released by the Minister of Defence and the Attorney-General

Appendix 2: Overview of Cabinet agreement to policy outcomes and objectives

In February 2021, Cabinet [CAB-21-MIN-0006, refers]:

- a. **agreed that the Government's intended policy outcome** for the establishment of the IGD is:

An oversight function, independent of the NZDF, that will strengthen democratic accountability and civilian control of the military and increase public confidence that issues regarding the legality and propriety of its actions are able to be appropriately investigated, with the flexibility and durability to respond to the complexity of the NZDF's business now and in the future.

- b. **agreed that the Government's objectives** for the establishment of the IGD are:

- **Independent:** the overseer has complete operational, financial, structural, and reporting independence from the NZDF.
- **Robust:**
 - the overseer has appropriate powers and resources to undertake its role in an efficient and timely manner.
 - the overseer's functions and powers are appropriate for the defence environment and the nature of the information it will handle.
 - the overseer's functions, powers, and resources are proportionate to the complexity, size, and scale of the NZDF's business.
- **Systems approach:** the overseer builds upon and complements existing oversight mechanisms on defence matters and is consistent with similar oversight mechanisms in the national security and intelligence system.
- **Transparent set-up process:** build public trust and confidence in the overseer through a full, open, and unclassified policy process.

Appendix 3: Interim Regulatory Impact Statement

Attached separately.

Released by the Minister of Defence and the Attorney-General