

TARGETED CONSULTATION DOCUMENT

Proposals for establishing an independent Inspector-General of Defence in New Zealand

November 2021



**MANATŪ KAUPAPA
WAONGA**
NEW ZEALAND
MINISTRY OF DEFENCE

Te Kāwanatanga o Aotearoa
New Zealand Government

Ministerial Foreword

Tēnā koutou

We are inviting your thoughts on a matter of constitutional significance to our country – the design of the Inspector-General of Defence to provide oversight of the New Zealand Defence Force (NZDF).

The findings of the Government Inquiry into Operation Burnham and related matters (the Inquiry) released in July 2020 highlighted the need for independent and external scrutiny of the NZDF's activities.

The Government's proposed Inspector-General of Defence aims to strengthen the existing system of oversight over the NZDF. It has been designed to provide the Minister of Defence with an avenue, independent of the NZDF and Ministry of Defence, to examine and expose failings and gaps. Importantly, it will provide ways to address and prevent problems, and promote continuous system improvement.

The service people of the NZDF support peace and security efforts at home and around the world. In many instances, they are the face of New Zealand abroad. They are known for their integrity, commitment and professionalism. We hope that the establishment of the Inspector-General of Defence will support enhanced transparency and understanding of New Zealand's military activities and help to ensure that New Zealand continues to have an international reputation we can be proud of.

The genesis of the proposals in this document come from the matters identified by the Inquiry and its vision for the Inspector-General of Defence. We welcome your views on what is proposed and expect to share the consultation findings with you early next year.

Ngā mihi maioha

Hon David Parker
Attorney-General

Hon Peeni Henare
Minister of Defence

November 2021

How to have your say

Consultation process

The Ministry of Defence (the Ministry) is seeking written submissions to the questions posed in this targeted consultation paper by **5pm on Monday 13 December 2021**. Your submission may respond to any or all of the questions, and you can also provide comment on any other part of this document if you wish. A consolidated list of questions is provided at Annex A.

When making a submission, **please use the template provided** at Annex B.

Send your submission as a Microsoft Word document to **IGDconsultation@defence.govt.nz**.

Alternatively, you can post your submission to:

Inspector-General of Defence Establishment Unit
Ministry of Defence
34 Bowen St
Wellington 6011
New Zealand

If you have any questions about the submissions process, please direct them to **IGDconsultation@defence.govt.nz**.

Use and release of information

The information provided in submissions will be used to inform the Ministry's policy development process and advice to Ministers.

The Ministry intends to upload a report containing a summary of all submissions received to its website at www.defence.govt.nz. If your submission contains any information that is confidential or that you otherwise wish not to be published, please indicate this clearly on your submission.

Submissions are subject to request under the Official Information Act 1982. Please set out clearly in your submission or in an email or letter accompanying your submission if you have any objection to the release of any information in the submission. If you consider that any parts of your submission should be withheld, please indicate which parts and the reasons for withholding. The Ministry will take these reasons into account and consult with submitters when responding to requests under the Official Information Act 1982.

Privacy of information

The Privacy Act 2020 sets out certain principles in relation to the collection, storage, use and disclosure of personal information. Any personal information you provide to the Ministry in the course of making a submission will only be used for the purpose of assisting in the development of policy advice to establish an Inspector-General of Defence. Please clearly indicate on your submission if you do not wish your name to be included in any summary of submissions that will be published.

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Why we are seeking your views

Purpose of this document

1. In July 2020, the Government accepted in principle the recommendation of the Inquiry into Operation Burnham and related matters (the Inquiry) to establish an independent Inspector-General of Defence (IGD) to oversee the activities of the New Zealand Defence Force (NZDF).
2. On 1 November 2021, the Government agreed in principle to the key policy proposals on the scope, functions, powers and form of an IGD. This means the Government thinks the changes proposed are generally a good idea, but wants to hear what others think before making final decisions. The proposals in this document are expected to change based on the feedback received during this targeted consultation process.
3. Accordingly, the Ministry of Defence (the Ministry) seeks feedback from interested individuals and organisations on the key policy proposals of the four major design features of the proposed IGD.

| | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>PURPOSE</p> <p>Proposal addresses: <i>Why does the IGD exist?</i></p> | <p>SCOPE</p> <p>Proposal addresses: <i>What are the bounds of what the IGD does?</i></p> |
| <p>FUNCTIONS AND POWERS</p> <p>Proposal addresses: <i>What should the IGD do and what arrangements need to be in place to allow it to do it?</i></p> | <p>FORM AND STRUCTURE</p> <p>Proposal addresses: <i>How should the IGD be structured to ensure it delivers its functions efficiently and is appropriately accountable?</i></p> |

Next steps

4. Once submissions have been received by **5pm on Monday 13 December 2021**, they will be analysed and form the basis of a submissions summary report.
5. Following consideration of the submissions summary report, the Government will make final decisions on the proposals. Legislation would be needed to give effect to them.

Summary of the proposal to establish an IGD

6. This section provides a high-level summary of the proposal to establish a new entity called the Inspector-General of Defence to provide oversight of the New Zealand Defence Force (NZDF). The proposal is described in more detail throughout the rest of this document.

Context

7. The Inquiry recommended that an independent IGD be established to enhance oversight of the NZDF. This was recommended because the Inquiry found problems relating to the quality, accuracy and fullness of information provided by the NZDF to ministers and through them to Parliament. This undermined the constitutional principles of democratic oversight of the military and ministerial accountability to Parliament. The Government agreed with that recommendation in principle and has since developed the following proposals for establishing an IGD.

The proposals at a glance

8. The IGD is intended to assist the Minister of Defence to exercise democratic oversight of the NZDF. It is proposed to be a complementary oversight mechanism that strengthens the existing system of NZDF oversight within current constitutional arrangements. The IGD would not be a 'catch-all' oversight body that displaces or supersedes other entities' roles. The IGD is proposed to have the following design elements:
 - a. **Scope:** The IGD's oversight is proposed to cover all activities of the NZDF (except those of Veterans' Affairs New Zealand) but focus on operational activities and have the ability to undertake its functions on its own motion in this area. It is proposed that the IGD would undertake its functions in relation to other NZDF activities on referral from the Minister of Defence, the Secretary of Defence or the Chief of Defence Force.
 - b. **Functions:** The IGD is proposed to have three functions: an investigatory function (to look into issues if and when they occur), an assessment function (to assess processes, procedures and policies and identify any gaps to minimise the risk of issues arising in future) and an enquiry function (to request information to support its oversight and knowledge of NZDF operational activities).
 - c. **Powers:** The IGD is proposed to have appropriate powers to support its investigatory function, including the power to: summon and examine persons on oath; require persons to provide information; enter premises or places; access all records, databases and information systems of the NZDF; and require witnesses to disclose information. To support its assessment and enquiry functions, it is proposed the IGD would have the power to access all NZDF records, databases and information systems. These powers would need to be supported by an offence regime; obligations on the NZDF to facilitate the IGD's oversight; and relevant protections and safeguards to ensure its powers are used appropriately.
 - d. **Form and structure:** The IGD is proposed to be an independent statutory officer, supported by a deputy, requisite staff, and if needed, an advisory panel. Statutory appointments and removals are proposed to be made by the Governor-General on recommendation of the House of Representatives. It is proposed the IGD would produce an annual work programme and an annual report to facilitate accountability.

CHAPTER 1

Situating this work – the Inquiry into Operation Burnham

9. In their 2017 book *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour*, Nicky Hager and Jon Stephenson questioned the conduct of NZDF personnel during both Operation Burnham and its aftermath.¹ In particular, Hager and Stephenson accused the NZDF of not investigating the reports of civilian casualties and damage to civilian property following Operation Burnham, but rather trying to cover up what had happened.
10. In April 2018, the Government announced an inquiry into Operation Burnham and related matters (the Inquiry)² to examine allegations of wrongdoing by the NZDF during a series of operations conducted in Afghanistan in 2010 and 2011.³
11. The Inquiry found that NZDF personnel on the ground during Operation Burnham acted lawfully and professionally,⁴ and the problems that emerged were not related to matters of military capability.⁵ It further found there was no organised institutional strategy to cover up the possibility of civilian casualties⁶ and had there been clear evidence of civilian casualties on Operation Burnham at the time, the NZDF would have faced up to the consequences of that.⁷ However, the Inquiry found that there were significant shortcomings in the way in which the NZDF dealt with and reported on allegations of civilian casualties.⁸
12. The primary problem was that NZDF personnel failed to provide full and accurate information to Ministers and the public, and to adequately scrutinise or respond to the information available to them.⁹ This meant that, over time, the NZDF made a series of inaccurate and misleading public statements regarding the possibility of civilian casualties.¹⁰ From 2010 to 2017, the NZDF and multiple Ministers of Defence consistently and publicly stated that reports of civilian casualties had been investigated and were “baseless” or “unfounded”.¹¹ Inaccurate information was also provided in response to an Official Information Act request¹² and the Minister of Defence provided an incorrect answer to a written parliamentary question and made false statements in media interviews.¹³ The Inquiry found this was due to failures of organisational structure and systems, including the failure to keep proper records and inadequate information storage and retrieval processes, and of culture.¹⁴ Crucially, these failures undermined the effective operation of two mutually reinforcing constitutional principles – civilian control of the military and ministerial accountability to Parliament – exercised by the Minister of Defence.¹⁵
13. The Inquiry made four recommendations. A summary of the Recommendations can be found at Annex C. Recommendation Two (which is detailed on the next page) was that an Inspector-General of Defence be established to provide independent and external oversight of the NZDF’s activities. The Inquiry considered this role necessary 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.¹⁶

1 Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, 2017).

2 Sir Terence Arnold and Sir Geoffrey Palmer *Report of the Government Inquiry into Operation Burnham and Related Matters* (2020). The report is available online at <https://operationburnham.inquiry.govt.nz/inquiry-report/>.

3 See *Terms of Reference: Government Inquiry into Operation Burnham and related matters (11 April 2018)*, above n 2, in Appendix 1 at page 387.

4 The Inquiry’s findings on Operations Burnham and Nova are summarised in Chapter 1 of the report, above n 2, at pages 24–25.

5 Above n 2, at page 360, paragraph 2.

6 The Inquiry’s findings on the alleged cover-up are recorded in Chapter 1 of the report, above n 2, at pages 29–30.

7 Above n 2, at page 28, paragraph 77.

8 Above n 2, at page 28, paragraph 78, and page 30.

9 Above n 2, at page 368, paragraph 34.

10 Above n 2, at pages 27 and 28, paragraphs 76 and 78.

11 Above n 2, at page 27, paragraph 76.

12 Above n 2, at page 28, paragraph 76(c).

13 Above n 2, at page 27, paragraph 76(b).

14 Above n 2, at page 30.

15 Above n 2, at page 28, paragraph 78.

16 Above n 2, at page 367, paragraph 31. See also at pages 371–373.

14. Recommendation Two:¹⁷

“We recommend the establishment, by legislation, of an office of the Independent Inspector-General of Defence, to be located outside the NZDF organisational structure.

The purpose of the office would be to facilitate independent oversight of NZDF and enhance its democratic accountability.

The functions of the Inspector-General would include:

- i. investigating, either on his or her own motion or by way of a reference, and reporting on particular operational activities of NZDF to ascertain whether they were conducted lawfully and with propriety;
- ii. investigating and reporting on such other matters requiring independent scrutiny as are referred to it by the Minister of Defence, the Chief of Defence Force, the Secretary of Defence or the Defence and Foreign Affairs Select Committee of Parliament;¹⁸ and
- iii. providing an annual report to the Minister of Defence and to the Defence and Foreign Affairs Select Committee of Parliament.”

¹⁷ Above n 2, at page 33.

¹⁸ The Government did not agree that the Foreign Affairs, Defence and Trade Select Committee should be able to refer matters to the IGD. Given that committee is a regular Select Committee, it has the ability to initiate its own investigations into the NZDF.

Overarching considerations for establishing an Inspector-General of Defence

Why is there a need for independent oversight of the NZDF's activities?

Democratic oversight of the military and ministerial accountability to Parliament

15. The nature of the primary problems found by the Inquiry concerned the quality, accuracy and fullness of information provided by the NZDF to ministers and through them to Parliament.¹⁹ This disrupted the effective operation of two mutually reinforcing constitutional principles that are fundamental to the proper functioning of New Zealand's democracy – democratic oversight of the military;²⁰ and ministerial accountability to Parliament. In addition, failures in information flows also affected the ability of the media, which plays a critical role in democracies, to hold the Government and government organisations to account.²¹
16. It is important to note from the outset that it is not disputed that it is vital to protect certain information about operational activities – doing so can literally be a matter of life and death for NZDF personnel.
17. However, the Inquiry highlighted the secrecy surrounding some of the NZDF's operational activities. In particular, those carried out in high-risk, dynamic and politically sensitive operational environments with strict classification requirements, means that accountability and transparency are often unable to be achieved through ordinary mechanisms for responsible government.²²
18. Other organisations that have a similar need for secrecy and exercise comparable powers – such as the Government Communications Security Bureau and the New Zealand Security Intelligence Service – are subject to independent external oversight bodies.²³

Strengthening and maintaining trust and confidence

19. The Inquiry's findings served to highlight the need for greater external scrutiny. Achieving appropriate transparency of military activities is critical to strengthening and maintaining public trust and confidence that significant issues in relation to the NZDF will be properly investigated. The Inquiry was clear that independent investigations should not be regarded negatively by NZDF personnel; oversight should enhance public understanding of what the NZDF does and identify areas for improvement in a fair and impartial way to enhance operational effectiveness.²⁴

19 Above n 2, at page 360, paragraph 3.

20 We have used 'democratic oversight' rather than 'civilian control', the latter of which was used in the Inquiry's report. We consider that 'democratic oversight' more clearly reflects that oversight is exercised by democratically elected representatives (the Minister, Cabinet and Parliament), not by public servants.

21 Above n 2, at page 277, paragraph 144.

22 Above n 2, at page 369, paragraph 37.

23 The intelligence agencies have been subject to the jurisdiction of the Inspector-General of Intelligence and Security since 1996. For more information go to <https://www.igis.govt.nz>.

24 Above n 2, at page 370, paragraph 42.

Key design considerations

20. It was determined early on that, to be effective, the role of an IGD needs to be configured to:
- a. ensure the NZDF's compliance and accountability, while permitting operational flexibility and timely deployment of military expertise; and
 - b. fit within an existing oversight system of complementary mechanisms, each with distinct and defined roles and responsibilities.
21. These key considerations are captured and addressed in the intended policy outcome and objectives as agreed by Government in February 2021.²⁵ The rationale behind the intended outcome and objectives are referred to throughout this document as we explain why the key policy proposals are aligned with the Inquiry's report, or necessarily differ.

Intended policy outcome

22. '[A]n 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.'

Objectives

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.

²⁵ In February 2021, Cabinet agreed the intended policy outcome and objectives for the establishment of the IGD, based on the issues raised in the Inquiry and Recommendation 2 as outlined on page 8 of this document [CAB-21-MIN-0006 refers].

CHAPTER 2

How we propose to calibrate the IGD

23. As noted earlier in this document, the IGD is intended to be a complementary oversight mechanism that will strengthen the existing system of NZDF oversight within current constitutional arrangements.
24. Within New Zealand's constitutional arrangements, democratic oversight of the military is exercised by the Minister of Defence. It includes the usual chain of responsibility through the Chief Executive (the Chief of Defence Force) to the Minister of Defence, to Parliament. The Chief of Defence Force and the Secretary of Defence (the Ministry's Chief Executive) have equal status as advisors to ministers as prescribed by the provisions of the Defence Act 1990.
25. The modern approach to democratic oversight assumes that the purpose of the armed forces is to further civilian government policy. While deployment of the armed forces remains a prerogative power, in practice this is exercised on the advice of ministers (i.e. Cabinet). The reality is that often when national security objectives are engaged, ordinary mechanisms for responsible government will not provide a complete check and balance on executive power. For example, discussion of some military operations in Parliament, or even in Cabinet, will be constrained in order to meet operational security requirements or to protect classified information. This places greater emphasis on the Minister's own responsibility to Cabinet, Parliament and the people of New Zealand.
26. The IGD will not be a 'catch-all' oversight body that displaces or supersedes other entities' roles. Accordingly, it will not be a replacement or substitute for the Minister's responsibility to Parliament or the public. Furthermore, it will not supplant the Chief of Defence Force and Secretary of Defence's roles and responsibilities as the respective principal military and civilian advisers to Ministers on defence matters.²⁶
27. The IGD will not override or take precedence over other independent oversight bodies' functions. There are at least 10 independent oversight bodies that undertake a range of oversight functions over the NZDF, including the Auditor-General and the Ombudsman (Officers of Parliament), the Privacy Commissioner and the Human Rights Commissioner (independent Crown entities) and WorkSafe New Zealand (a regulatory agency).
28. The IGD will not override the role of the New Zealand Police. The IGD will also not duplicate or interfere with the role of the judiciary.
29. Below we outline the proposed purpose of the IGD. The chapters that follow set out the design elements of the proposed scope, functions, powers, form and structure of the IGD.

Purpose

30. The primary issues identified by the Inquiry, 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 if these principles are undermined. The NZDF engages in a variety of activities of varying scale and complexity, both domestically and overseas. It has a range of internal oversight systems and processes, including the military justice system. It is also subject to high levels of external oversight in relation to a wide range of its activities.
31. Given these factors, the IGD's purpose should situate it within the broader context of oversight and reflect the basis for the IGD's functions, powers and associated administrative procedures. As such, we propose the purpose of the IGD should be to:
 - a. assist the Minister of Defence to exercise democratic oversight of the NZDF;
 - b. provide the Minister of Defence with an avenue, independent of the Defence agencies, to examine and expose failings and gaps in NZDF systems so that steps may be taken to address and prevent problems, and promote system improvements in the NZDF; and
 - c. assist the Government in assuring Parliament and the public that the activities of the NZDF are subject to enhanced independent scrutiny.

26 See sections 24 and 25 of the Defence Act 1990 for more about the legislative roles of the Chief of Defence Force and Secretary of Defence.

32. For the IGD to deliver on its purpose, it will have to weigh up and make many decisions in terms of what it does and why, and how it prioritises its efforts and utilises its resources. We propose the following expectations that would require the IGD to ensure its actions:
- a. are in the public interest, undertaken impartially and directly support the Minister of Defence to exercise democratic oversight of the NZDF and enable ministerial accountability to Parliament;
 - b. 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
 - c. are informed by regular engagement with the Defence agencies, and take account of the military context in which the NZDF operates (for example, the military justice system).
33. Pending your feedback, we intend to consider whether it would be useful to reflect some or all of these expectations as overarching legislative principles. This could be a useful way to require the IGD to take into account certain matters when making decisions. Principles enshrined in legislation would provide both ministers and the public with a level of certainty as to how the IGD will operate.

1

Do you have any feedback on the proposed purpose of the IGD or our expectations as to how it should operate?

CHAPTER 3

Scope of oversight

What should the overall scope of the IGD be?

34. The Inquiry envisioned that the IGD should have own motion functions in respect of particular operational activities and 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.²⁷
35. In accordance with the proposed purpose above at paragraph 31, we consider that the overall scope of the IGD's oversight should include the full range of the NZDF's activities. We are conscious that for an organisation like the NZDF, the breadth of its activities span a broad spectrum. At one end, its activities are of the routine type that would be expected of any government organisation. At the other end, its activities are extremely specialised in order to protect New Zealanders and contribute to global peace and security.
36. We consider 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.
37. We propose that the IGD have **own motion** oversight functions into defined operational activities, and be able to provide oversight of **any other matter on referral**.
 - a. **Own motion:** The IGD has full discretion to undertake its functions²⁸ into defined operational activities. This means the IGD can undertake its functions without prompting from any other person.
 - b. **On referral:** The IGD can undertake its functions into any NZDF matter referred to it by the Minister of Defence, the Chief of Defence Force or the Secretary of Defence.
38. The proposed scope of the IGD's oversight would not include the activities of Veterans' Affairs New Zealand, which is accountable to the Minister for 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 the NZDF as part of, or resulting from, working with others would fall within the IGD's scope.

Proposed definition of "operational activities"

39. The Inquiry did not elaborate on what "particular operational activities" could be. There are a number of ways this term could be defined. We propose a broad definition of operational activities in order to give the IGD the greatest ability and independence to determine what it does.
40. We considered, but discounted, limiting the IGD's own motion functions to operations similar to Operation Burnham – that is, an operation that takes place 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. However, a relatively narrow definition such as this 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 services). Therefore, in order to address the evolving nature of security threats the NZDF may encounter outside situations of traditional armed conflict, we consider that a broader definition of "operational activities" is more appropriate and would better meet public expectations of independent oversight.

27 The Government did not agree that the Foreign Affairs, Defence and Trade Select Committee should be able to refer matters to the IGD. Given that committee is a regular Select Committee, it has the ability to initiate its own investigations into NZDF activities.

28 You will find an outline of the IGD's proposed functions from paragraph 43.

41. We therefore propose that the definition of operational activities should include any domestic or international activity:
- a. in time of war, armed conflict or any other emergency, whether actual or imminent;
 - b. 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;
 - c. declared by the Chief of Defence Force, by notice in writing;²⁹
 - d. including training carried out directly in preparation for any specific activity in a–c above; and
 - e. including intelligence operations carried out directly in preparation for, or in support, of any specific activity in a–c.
42. This definition would capture a broad range of NZDF operational activities, including those undertaken with secrecy requirements, while excluding activities that do not directly relate to the carrying out of an operation (e.g. preparatory raise, train and sustain activities) or those adequately covered by other bodies such as WorkSafe New Zealand or New Zealand Police.

2

Do you agree with the proposals on the scope of the IGD's oversight? Why/why not?

²⁹ For example, this would be similar to the declaration that can be made by the CDF under the Health and Safety at Work Act 2015, which captures activities such as Explosive Ordnance Disposal.

CHAPTER 4

Functions and powers

43. The Inquiry envisioned that the IGD should be able to investigate if issues occur and minimise the possibility of issues occurring in the future.³⁰ Bearing that in mind, and to be able to deliver on its purpose as articulated above, we propose that the IGD should have:
- investigation functions**, with appropriate supporting powers, to scrutinise and respond to issues that have occurred;
 - assessment functions**, to assess processes, procedures and policies, and identify gaps to prevent issues from occurring in the future; and
 - enquiry functions**, to request information to support the IGD's understanding of the NZDF's operational activities in an evolving defence context.
44. We also considered whether the IGD should have any additional functions (for example, to provide advice or guidance to the Minister or Defence, the Secretary of Defence or the Chief of Defence Force, or to investigate complaints made by NZDF personnel). We consider that additional functions would not add value to the IGD's oversight role in terms of addressing the problems found by the Inquiry, or in supporting delivery of the IGD's proposed purpose.
45. Furthermore, there are risks with additional functions. For example, an advisory function would risk duplication with the respective roles of the Chief of Defence Force and the Secretary of Defence in providing military and civilian advice to the Minister of Defence. A complaints handling function would risk diverting IGD resources from its focus on operational activities and supplanting existing NZDF administrative complaints avenues (including the Code of Veterans' Rights³¹) and military justice processes (which includes the courts). It would also risk duplicating the roles of other external oversight bodies – for example, mechanisms already exist for complaints to be made to the Ombudsman (excluding terms and conditions of service or penalties or punishments), the Human Rights Commission (bullying, harassment or discrimination), the Health and Disability Commissioner (health or disability), the Privacy Commissioner (privacy), WorkSafe (health and safety), the Government Actuary (superannuation) or a Member of Parliament. The IGD would be able to receive reports or allegations relating to NZDF operational activities, and investigate these as part of its work.

Investigation functions and powers

46. The Inquiry envisioned that the IGD's functions would include:
- "...investigating, either on his or her own motion or by way of a reference, and reporting on particular operational activities of NZDF to ascertain whether they were conducted lawfully and with propriety;
 - investigating and reporting on such other matters requiring independent scrutiny as are referred to it by the Minister of Defence, the Chief of Defence Force, the Secretary of Defence or the Foreign Affairs, Defence and Trade Select Committee of Parliament;..."³²
47. Accordingly, we propose that the IGD have an **own motion** investigation function into defined operational activities, and be able to investigate **any other matter on referral** from the Minister of Defence, the Chief of Defence Force or the Secretary of Defence.

30 Above n 2, at page 367, paragraph 31.

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

32 Above n 2, at page 33.

Discretion to initiate investigations on the IGD's own motion

48. The amount of discretion afforded to the IGD is a key consideration in designing the IGD's own motion investigation functions.
49. We consider that a high level of discretion would support the IGD's credibility. It would ensure the IGD's work does not rely too heavily on the decisions of others or mean that it has to wait for certain conditions to be met (e.g. for certain types of harm to have occurred). This would help to increase public confidence that the NZDF's operational activities are subject to independent, robust scrutiny.
50. Furthermore, 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. This is particularly important given that some of the NZDF's operational activities are classified or not known to the public. It would also provide 'future-proofing' and ensure that a range of potentially adverse effects (including mental distress, loss or damage to property, possessions or livelihood, or to services or infrastructure) could always be investigated on the IGD's own motion. We therefore propose that the IGD have full discretion to initiate investigations on its own motion into defined operational activities (as defined in paragraph 41).
51. It is important to balance broad discretion with the need for the IGD to support ministerial accountability to Parliament, and practical considerations including cost, resourcing and the resulting impact broad discretion could have. We consider that such risks are mitigated by:
 - a. limiting own motion investigations to defined operational activities;
 - b. the usual requirements applicable to all public bodies to operate within budget; and to account for their activities and use of resources; and
 - c. setting out expectations like those outlined above at paragraph 32 that the IGD must have regard to in undertaking its functions and exercising its powers.
52. We considered, but discounted, limiting the IGD's discretion by requiring a set of statutory conditions³³ to be met before an investigation could be initiated. This would provide additional clarity about the types of matters the IGD could be expected to investigate on its own motion, but we considered that an overly prescriptive approach may fail to future-proof the IGD's oversight. In addition, there are risks that other issues not covered by the conditions would then require referral from the Minister of Defence, the Secretary of Defence or the Chief of Defence Force before they could be investigated. This could impact public confidence in the robustness of the IGD's oversight.

Focus of investigations

53. Calibrating the IGD's investigation powers to only matters of legality and propriety may not be the best way to achieve the desired policy outcome. Instead, we consider that the focus of investigations or scope of the IGD's investigatory powers should be similar to the one the Inquiry itself had.
54. We therefore propose the IGD would establish facts, and make:
 - a. findings (i.e. draw conclusions from the established facts); and, as appropriate
 - b. recommendations that further steps be taken to determine civil, criminal or disciplinary liability; and/or
 - c. recommendations for the improvement and benefit of the NZDF relevant to the findings of the investigation.
55. Scoping the focus in this manner allows for the establishment of facts and learning from events, thereby providing opportunity for resolution, catharsis, holding people and organisations to account, and reassuring and regenerating public confidence. There would be nothing stopping the IGD from looking into the legality and propriety of issues, nor precluding it from making recommendations that are critical of the NZDF or benefit those impacted by the NZDF's actions (for example, recommending an apology be provided). The proposed approach explicitly asks the IGD to take a system improvement-based approach to its investigations, which is more likely to create an environment in which NZDF personnel engage openly with the IGD, and ensure resultant recommendations contribute to substantial and long-lasting benefits.

³³ For example, statutory conditions could require that the IGD is able to initiate investigations into operational activities when it is satisfied there are reasonable grounds to do so in the public interest, and in the event of report of: widespread serious misconduct by service personnel indicative of a systemic issue; and/or death or serious bodily harm to civilians; and/or death or serious bodily harm to service personnel, indicative of a systemic issue; and/or deprivation of liberty, infringement of rights or other harm.

56. We also considered other ways to calibrate IGD's focus, for example, by focusing on the validity and correctness of decision-making – that is, the IGD would review the process by which the decisions in question were reached to ensure validity. Alternatively, another option would be to stay silent on what the focus of IGD investigations should be. However, we dismissed these options because we considered it was important to be clear about what the focus of the IGD's investigations should be and ensure that the IGD will have sufficient scope to be of maximum value.

Special process for IGD investigations into ongoing and in-theatre operations

57. There may be occasions where the IGD needs to investigate an operational activity that has concluded, but that is part of an active ongoing operation. In such circumstances, the urgent need for an investigation must be balanced with the impact the investigation would have on the NZDF's operational effectiveness. There will also need to be consideration of the safety and security of IGD and NZDF personnel if an investigation required a visit to an operational theatre.
58. For investigations into events when operations are ongoing, we propose three things.
- The Chief of Defence Force makes the final decision on whether or not an investigation could proceed.³⁴ This approach is consistent with the Office of National Defence and Canadian Armed Forces Ombudsman, where the Canadian Chief of the Defence Staff (equivalent to the Chief of Defence Force) makes the decision on whether such an investigation can proceed, weighing up *'the need to support the Ombudsman's activities, the need to avoid impacting on operational priorities, and the need to protect the safety of all personnel.'*³⁵
 - Where the Chief of Defence Force considers an IGD investigation could be conducted safely and securely, and without significantly impeding NZDF operations, the normal process for commencing an investigation would apply.
 - Where the Chief of Defence Force does not consider that an IGD investigation could be conducted safely and securely, and without significantly impeding NZDF operations, the IGD would notify the Minister of Defence that a request has been made and declined. 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.
59. The above proposals recognise that when operations are still underway, particularly during ongoing hostilities, the IGD would have to consider the gravity of the incident, the need to react quickly, the likelihood of recurrence and, in determining whether to investigate, how to do so without impeding NZDF operational effectiveness.³⁶ The Chief of Defence Force would also need to assess the operational impact of the proposed investigation, and the safety and security of IGD and NZDF personnel.

Investigation powers

60. In line with public inquiries and other oversight bodies such as the Inspector-General of Intelligence and Security (IGIS) and the Independent Police Conduct Authority (IPCA), the IGD requires appropriate statutory powers to support its investigation functions. In order to best achieve the intent of the Inquiry and the intended policy outcome, we propose the IGD should have the following statutory powers 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);
 - enter, at a reasonable time, any premises or place occupied or used by the NZDF, subject to safety and security considerations (following written notification to the Chief of Defence Force of the intent to use this power);
 - access all NZDF records, databases and information systems as required for the undertaking or exercise of its functions and powers; and

³⁴ This is because the Chief of Defence Force has the power of command of the armed forces and operational decisions will generally sit with them.

³⁵ Government of Canada, Office of the Ombudsman, Canadian Defence Administrative Order and Directive (DAOD) 5047-1, available online at <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/defence-administrative-orders-directives/5000-series/5047-1-office-of-the-ombudsman.html>.

³⁶ For example by considering: whether a visit to operational theatre is absolutely necessary; whether parts of the investigation can be prioritised (e.g. evidence collection or eyewitness interviews) with other elements deferred; extending the usual timeframes for responding to information requests or attending interviews; and conducting written or remote, rather than in-person, enquiries.

- d. require witnesses to disclose information that would otherwise be under an obligation of secrecy (such as information subject to confidentiality requirements) without it constituting a breach of any law that requires that secrecy.

61. Protections and safeguards in respect of the investigation powers are set out below from paragraph 67 below.

Legal offences

62. As well as having appropriate statutory powers to support its investigations, we consider that legal offences will be required. Legal offences would strengthen and provide a backstop to the IGD's powers by reflecting that non-compliance or attempts to interfere with investigations is considered wrong. The ability to prohibit and punish certain acts is also common across all oversight bodies in the domestic context. The offences outlined below are identical to those that apply to the IGIS in the Intelligence and Security Act 2017 (ISA), and are commensurate with those in the Independent Police Conduct Authority Act 1988. The proposed penalties match those for equivalent offences in the ISA that relate to the IGIS because the conduct captured by the offences is of an equivalent seriousness. Furthermore, the ISA was passed in 2017 (more recently than the legislation for other oversight bodies) meaning the proposed penalties are in line with current standards.
63. We propose legal offences to prohibit and punish, without reasonable justification or excuse, the acts of wilfully:
 - a. obstructing, hindering or resisting the IGD in the exercise of its powers;
 - b. making false statements, misleading or attempting to mislead the IGD in the exercise of its powers; and
 - c. refusing or failing to comply with any lawful requirement of the IGD.
64. These offences would be punishable by a maximum fine of \$5,000.
65. To 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, we are considering including an additional offence.
66. This offence would prohibit publishing or broadcasting, causing the publication or broadcast of, or otherwise distributing or disclosing, decisions relating to, or reports of, IGD investigations that haven't been released through the established process without written permission of the Minister of Defence. This mirrors a similar strict liability offence applicable to the IGIS that does not provide a mental element (such as intention). This offence would be punishable by up to 2 years imprisonment and a maximum fine of \$10,000.

Protections and safeguards

67. The proposal for the IGD to have appropriate powers and associated offences to support its investigation functions requires corresponding safeguards to protect people and information during and after investigations. Safeguards would also be important to provide incentives for honest and open participation, and to promote transparency without compromising national security interests or relationships with international partners. Given the nature of the NZDF's activities there is also a need to consider operational safety and security. As such, we propose the following protections and safeguards.

| PROTECTIONS AND SAFEGUARDS | PROPOSALS |
|-------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Information provided to the IGD | <ul style="list-style-type: none"> • IGD investigations must be conducted in private.³⁷ • The IGD may receive in evidence any information, document, communications or thing that may assist with an investigation, whether or not it would be admissible in a court of law.³⁸ • Any information, document, communications or thing is privileged in the same manner as if the investigation were a proceeding in a court.³⁹ • On completion of an investigation, the IGD must return all information, documents or things provided in relation to the investigation obtained from organisations or individuals. All other information, documents or things must be kept in safe custody or disposed of securely.⁴⁰ • The protections that apply to privileged information in the Inquiries Act 2013 should apply to IGD investigations. |
| IGD's access to NZDF records and information systems | <ul style="list-style-type: none"> • The IGD should only have automatic access to information or material that is required for the performance or exercise of its functions and powers. 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) should be excluded from the IGD's automatic access.⁴¹ • The IGD is required to safely and securely store classified or sensitive information.⁴² • The IGD must keep confidential all information that comes to its knowledge, and must not make a record of, or use or disclose that information (except in the carrying out of its functions).⁴³ |
| IGD's access to NZDF's premises or places | <ul style="list-style-type: none"> • The IGD can only enter any premises or place occupied or used by the NZDF 'at a reasonable time'; and the IGD must give prior written notice to the Chief of Defence Force of the intention to exercise this power.⁴⁴ |
| Witnesses and investigation participants (Natural Justice) | <ul style="list-style-type: none"> • The IGD should not make comment that is adverse to any person unless they have been given an opportunity to be heard. The IGD should be required to share draft investigation reports with individuals where those reports include comment about them, and to have regard to any comments from them in finalising the report. |
| Witnesses and investigation participants (Discrimination) | <ul style="list-style-type: none"> • 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. |

37 This is consistent with the provisions governing the IGIS and IPCA. See Intelligence and Security Act 2017, section 176, and Independent Police Conduct Authority Act 1988, section 23.

38 This is consistent with the provisions governing the IGIS. See Intelligence and Security Act 2017, section 176(2).

39 This is consistent with the provisions governing the IGIS and IPCA. See Intelligence and Security Act 2017, section 182, and Independent Police Conduct Authority Act 1988, section 33(3).

40 This is consistent with the provisions governing the IGIS.

41 This differs from the IGIS, but aligns with the IPCA's access to Police information.

42 This is the same as the IGIS.

43 This is consistent with the IGIS and IPCA, and with Government security clearance requirements.

44 This is consistent with the provisions governing the IGIS.

| PROTECTIONS AND SAFEGUARDS | PROPOSALS |
|----------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Witnesses and investigation participants (Self-Incrimination)</p> | <ul style="list-style-type: none"> • A person is not excused from giving evidence, disclosing information, communications, documents or things to the IGD on the grounds that doing so may or would incriminate them.⁴⁵ • Any self-incriminating statement made or information provided would not be admissible as evidence against the person in any court, tribunal, inquiry or other proceeding (including disciplinary proceedings under the military justice system). Evidence could, however be used against that person for the prosecution of that person for perjury under the Crimes Act 1961 or in respect of prosecuting the offences proposed at paragraphs 63–66 above.⁴⁶ • A person is not required to answer a question if the answer to the question might tend to incriminate them in respect of an offence with which the person has been charged, and in respect of which the charge has not been finally dealt with by a court or otherwise disposed of.⁴⁷ • If the IGD hears or receives information or material or things that are self-incriminatory, it has the ability to suppress access to certain material, and/or to choose how the matter is reported (if at all). |

IGD protections and safeguards for confidential or otherwise sensitive information

68. The way the IGD’s powers are currently proposed to be configured, the IGD can require the disclosure of information notwithstanding any existing obligation of secrecy or non-disclosure. For this power to be effective, its implementation must not prejudice or impair existing relationships with foreign partners, coalitions, international entities or domestic agencies who share information with NZDF.
69. We propose that a special security process be designed to clarify the implementation of this proposed power. For example, one approach could be to place a requirement on witnesses or investigation participants to consult with, and seek agreement from, those who have a right over the information or thing to be disclosed. Another approach could be to require a minister to certify that disclosure would not prejudice a particular interest (for example, security, defence, international relations, or the proceedings of Cabinet).

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

45 This is consistent with section 27 of the Inquiries Act 2013 and section 25 of the Independent Police Conduct Authority Act 1998.

46 As above.

47 This is consistent with the approach taken by the Australian Inspector-General of Defence (Regulation 32), Inspector-General of the Australian Defence Force Regulations 2016.

Ancillary investigation functions matters

Situating the IGD in the context of existing oversight

70. There may be instances where other agencies have a function that relates to a matter that is, or could be, investigated by the IGD. To ensure the IGD's investigation functions build on and complement existing oversight mechanisms on NZDF matters, we propose two things.
71. Firstly, the IGD should be able to consult with other oversight bodies before undertaking an investigation. 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.⁴⁸ This would provide the IGD with the discretion to decide not to investigate; wait until other agencies' processes have concluded before deciding to investigate; or investigate in parallel with other agencies, looking at different aspects of the incident.⁴⁹
72. Secondly, the IGD should not be able to investigate a matter where a Court of Inquiry⁵⁰ has been established until that process has concluded, unless:
- a. there is an unreasonable delay in undertaking and concluding that process; or
 - b. the matter has been referred from the Minister of Defence or the Chief of Defence Force.
73. We recognise this restriction on the IGD departs from the Inquiry's vision that the IGD would not be limited to investigating only when internal avenues have been exhausted. We consider the above arrangement balances the need to ensure the NZDF must continue to be empowered to own, investigate and resolve issues when something goes wrong with the ability for that to be overridden when there is a sufficiently high level of public concern and a need for independence and increased transparency. This recognises that there may be times when it is appropriate for the IGD to investigate in parallel to, or in place of, a NZDF Court of Inquiry.

Mechanisms to support the IGD's oversight

74. Complementary to the proposed powers and offences above, we consider there should be other mechanisms to support the IGD's oversight and ensure the IGD is kept abreast of developing matters.
75. As such, we propose there should be the following obligations on the NZDF:
- a. The NZDF is obliged to cooperate and assist the IGD in undertaking its functions;
 - b. The NZDF, via the Chief of Defence Force, is obliged to notify the IGD in the event of certain things happening, including:
 - i. the establishment of an internal Court of Inquiry
 - ii. reports of civilian harm and findings or assessments following NZDF internal processes for responding to reports of civilian harm (such as those established by Defence Force Order (DFO) 35 in response to the Inquiry).⁵¹

48 This is consistent with sections 161–162 of the Intelligence and Security Act 2017, which requires the IGIS to consult with specific bodies, have regard to the functions of the Auditor-General, and preserves the existing jurisdiction of the Courts and any other agency.

49 For example, NZ Police would undertake any criminal investigation and WorkSafe would investigate from a health and safety perspective.

50 Courts of Inquiry are stood up by the NZDF in the event of death or serious injury to a member of the armed forces in peacetime, aircraft accidents and other matters of sufficient gravity.

51 DFO 35 is attached as Annex D.

Investigation reports

76. We propose that the IGD's finalised investigation reports should have an appropriate classification determined by the IGD, in accordance with national classification criteria, and after having taken into account the Chief of Defence Force and Secretary of Defence's views on classification. Where a report quotes or summarises any matter with a classification, it must not be given a lower classification in the IGD's report.
77. 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.
78. We propose that, unless there is a good reason not to, the IGD should 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 would apply to both own motion investigations and investigations undertaken on referral.
79. Where investigation reports contain classified or other information that cannot be disclosed, we propose that the IGD be required to publish its investigation reports to the extent possible while safeguarding national security, New Zealand's international relations and obligations of confidence, among other matters.⁵²

The outcome of investigations

80. Following an IGD investigation, we propose that the Chief of Defence Force should be required to notify the IGD, the Minister of Defence and the Secretary of Defence of any action to be undertaken to give effect to a recommendation, or the reasons for any proposal to depart from, or not implement, any recommendation.

Assurance functions and powers

81. In addition to reactive investigation functions if something goes wrong, effective oversight requires a preventative or minimisation approach to identify potential problems and prevent their occurrence or escalation in the first place. To do this, the IGD needs to have a comprehensive and up-to-date understanding of the NZDF and the tools and techniques it uses in its operations.
82. As such, we propose that the IGD has two assurance functions to contribute to system improvement in the NZDF and support effective oversight:
 - a. **assessments** – to assess processes, procedures and policies, and identify gaps to prevent issues from occurring in future; and
 - b. **enquiries** – to request information from the NZDF about operational activities to enhance the IGD's institutional knowledge.
83. Both assessments and enquiries would build the IGD's knowledge of the NZDF's business, thereby enhancing its oversight and potentially leading to the improved quality and relevance of its findings and recommendations in investigations.

⁵² This is consistent with the practice of the IGIS (see section 188 of the Intelligence and Security Act 2017).

Assessments

84. 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. Assessments would be similar in nature to the compliance/operational review functions undertaken by the IGIS. Assessments could also be used to provide an independent view on the overall health of parts of the system. We propose that the IGD should be able to undertake assessments into:
- operational activities on its **own motion**; and
 - any other matter **on referral** from the Minister of Defence, the Secretary of Defence or the Chief of Defence Force.
85. For clarity we note that the IGD's assessment function will not be used for the following activities because they come within the jurisdiction of other bodies:
- assessing NZDF Defence Force Orders and processes, procedures and policies for health and safety compliance;
 - assessing the cost-effectiveness of the NZDF's processes, procedures and policies;
 - reviewing the NZDF's performance in undertaking and delivering its functions from an organisational perspective;
 - conducting audits that could reasonably be expected to fall within the purview of the Auditor-General; and
 - assessing whether defence outputs are delivered or that military advice on operational effectiveness and capability development is tested against wider government objectives (e.g. economic, political, foreign affairs).
86. This would ensure the IGD's assessment functions supplement a gap in oversight, with limited jurisdictional overlap or duplication with other oversight bodies.

Assessment reports

87. We propose that, unless there is a good reason not to, the IGD should publish its own motion assessments online (subject to security classification determinations), and may publish assessments undertaken on referral with permission from the referring party.

Enquiries

88. To provide comprehensive oversight and to support ministerial accountability, the IGD must fully understand the NZDF's operational activities. This will be essential as tools and techniques evolve in a changing landscape of technological advancements in defence and security. Enquiries will enable the IGD to formally request information from the NZDF outside of an investigation or assessment in order to build institutional knowledge and expertise. As enquiries would not involve the IGD undertaking any evaluation or making findings, we propose that the IGD should be able to make enquiries into operational activities on its **own motion**. We propose the IGD would not be required to publish its enquiries.

Assurance powers

89. We propose that the IGD should have the statutory power, in relation to its assurance functions, to access all NZDF records, databases and information systems at all times. The proposed offences described above at paragraph 63 are also proposed to apply to the IGD's assurance functions.

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

CHAPTER 5

Form and structure

What did the Inquiry say about the form of the IGD?

90. In considering the organisational form of the proposed IGD, the Inquiry suggested that the IGD could be a stand-alone body or associated with another entity such as the Ministry of Defence.⁵³

Form

91. We propose that the IGD be established as an independent statutory officer, associated with a ministerial portfolio. This bespoke organisational form provides the necessary flexibility for the establishing legislation to set out key provisions relating to structure, appointments and reporting obligations. It is also a proportionate form for the proposed scope, size and functions of the IGD, and offers the lowest cost while providing the required independence. A government department would be required to act as the administering agency, providing support for matters such as appointments and appropriations.
92. We considered, but discounted, other options, including establishing the IGD as an independent Crown entity, like the IPCA, or consolidating the proposed functions and powers of the IGD within the IGIS, or creating an independent statutory officer within the Ministry of Defence. The first two options had relatively higher administration costs than our proposal and the Ministry of Defence is not a good strategic fit to house the IGD, as the two Defence agencies have shared responsibilities and well-established joint arrangements for providing advice to government on defence matters that would potentially create a perception that the IGD is not independent from the NZDF.

Governance and accountability

93. It is important that the IGD, like other public bodies, operates as an effective organisation, and that its activities (whether own motion or on referral) and performance are easily visible to both Parliament and the public. We propose the following.
- a. **Annual work programme:** an annual work programme would set out areas of strategic focus and the IGD's proposed investigations (if any) and assurance activities for that year. The IGD would be required to take into account the Minister's feedback on the final work programme unless there are clear and compelling reasons not to. The finalised work programme would then be provided to the Minister, who would in turn present it to the House of Representatives. The IGD would also publish it on its website.⁵⁴
 - b. **The IGD should produce an annual report:** an annual report focusing on the IGD's activities at the end of each year would provide transparency and accountability to the public and ministers for the IGD's financial and organisational performance, and the delivery of its functions. The annual report would be required to be provided to the Minister of Defence, who would in turn present a copy to the House of Representatives. The IGD would also publish it online.⁵⁵

⁵³ Above n 2, at page 372, paragraph 50.

⁵⁴ Note that redactions to the version that is presented to the House of Representatives and published online might be required. This would be, for example, so as to not prejudice the security or defence of New Zealand or the international relations of the Government; or to prejudice the entrusting of information; or to endanger the safety of any person.

⁵⁵ As above.

Structure

94. We propose that the IGD’s structure be streamlined with the ability to scale up as required. At this stage, it is difficult to predict what a future IGD would wish to investigate or undertake assurance functions on, so the scale of the IGD’s yearly work programme is unknown. However, what we know from past experience is that oversight bodies, once they have been established and are operational, tend to grow as they get a better sense of how they wish to undertake their yearly work programme. We consider it is prudent to start small, allow the office to get a sense of its work programme, and then scale its size accordingly.
95. We therefore propose that the initial structure of the office of the IGD should comprise five FTE staff (including the IGD and deputy IGD) to provide proportionate and cost-effective oversight.

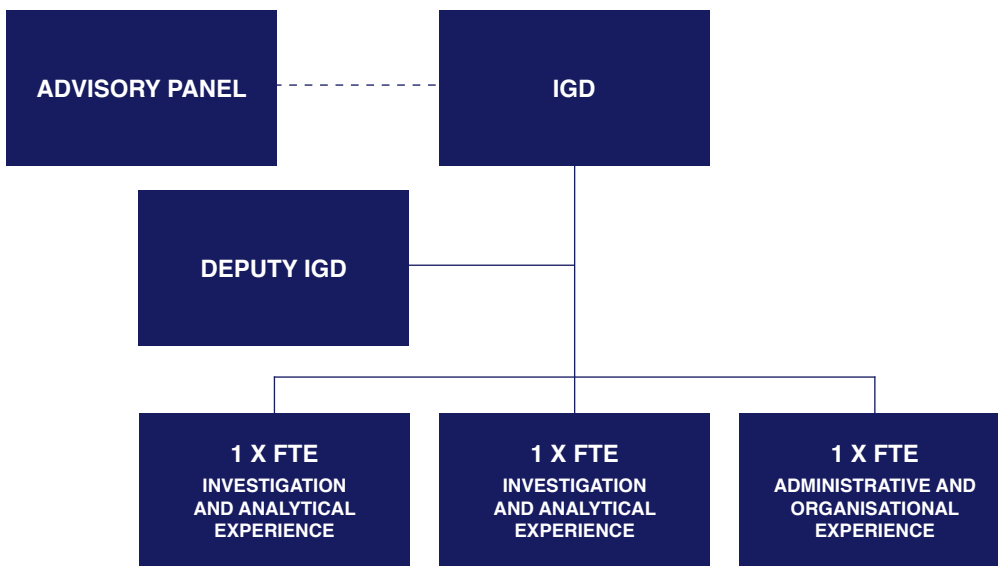


Figure 1: Proposed (initial) structure of the office of the IGD

96. Given the broad range of NZDF operational activities, rapid technological development and changing security threats, the IGD would need to have on-hand access to specific technical and other specialist advice. We therefore propose that the establishing legislation enables the IGD to appoint an advisory panel to provide specialist advice that takes account of the wider context of the IGD’s work. The IGD may also procure ‘one-off’ specialist advice on a case-by-case basis to support the delivery of its functions.

Appointments

97. We propose that the IGD would be an individual undertaking both a governance and executive role. This approach is in line with the IGIS and Privacy Commissioner, and is more proportionate than a multi-person board given the IGD’s proposed size. The IGD would be accountable for the delivery of investigation and assurance functions, and responsible for building and managing relationships with the Minister of Defence, the Chief of Defence Force and the Secretary of Defence. To provide transparency, and to reflect its role in supporting ministerial accountability, we propose the IGD be appointed by the Governor-General on recommendation of the House of Representatives.
98. We propose the appointment of a deputy IGD with the statutory authority to act in the IGD’s role during periods of leave, or in the instance of a vacancy. As with the IGD, we propose that the deputy IGD would be appointed by the Governor-General on recommendation of the House of Representatives.

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

CHAPTER 6

Administrative procedures

99. We also propose the following procedures to ensure clarity of approach to the IGD's functions.

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

RATIONALE

PROPOSED PROCEDURE

OWN MOTION INVESTIGATIONS

The IGD should have discretion to determine its investigations into operational activities. The purpose and any expectations set as legislative principles would guide the IGD's approach at a high level. However, to ensure additional clarity, the following procedures relating to the commencement of an investigation on the IGD's own motion are proposed to apply:

Terms of Reference:

Before starting an investigation, the IGD would need to determine its proposed process. For example, it would plan its approach to an investigation and consider the resources and information it would need to undertake it. Requiring the IGD to develop a terms of reference simply formalises this and ensures that own motion investigations have a sound basis.

The IGD would be required to develop a draft terms of reference that sets out the:

- purpose of investigation
- rationale for investigation (including how the IGD has had regard to any legislative principles)
- key issues to be considered
- proposed approach
- estimated timeframes
- proposed outcomes

Consultation:

We are proposing that the IGD consult the Chief of Defence Force and Secretary of Defence on the draft terms of reference to enable them to correct any factual inaccuracies or provide any other relevant information. The IGD would be required to 'have regard' to comments, but would retain the ability to decide whether or not to commence an investigation.

The IGD would be required to consult the Chief of Defence Force (with regard to operational matters) and the Secretary of Defence (with regard to any policy matters) on the draft terms of reference.

The IGD would be required to have regard to comments provided by Chief of Defence Force or Secretary of Defence in finalising its terms of reference.

Formal notification:

The IGD would be required to notify the Minister of Defence of any own motion investigations, including any planned public release or announcement of the investigation.

A minimum timeframe would allow the Minister's office, the NZDF and the Ministry of Defence to prepare for any media interest.

The IGD would be required to formally notify the Minister of Defence, the Chief of Defence Force and the Secretary of Defence of its intention to commence an investigation.

Notification would be required to include the final terms of reference as well as any planned public release or announcement of the investigation.

There would need to be a minimum of five working days after notification before any public release or announcement.

OWN MOTION ASSESSMENTS

In general, the IGD would identify the assessments it intends to conduct in its annual work programme, but there should also be provision for the IGD to undertake assessments into matters on an as needed basis. The following procedures are proposed to apply:

Terms of Reference:

Before starting an assessment, the IGD would need to determine its proposed process, including identifying the legislation or standards the matter would be assessed against. The terms of reference would formalise this process.

The IGD would be required to develop a draft terms of reference that sets out the:

- purpose of the assessment
- rationale for the assessment (including how the IGD has had regard to any expectations set as legislative principles)
- legislation, policies, processes or procedures the matter would be assessed against
- proposed approach
- estimated timeframes
- proposed outcomes.

Consultation:

As with investigations, the IGD would be required to consult the Chief of Defence Force and Secretary of Defence on the draft terms of reference to enable them to correct any factual inaccuracies or provide any other relevant information. The IGD would be required to 'have regard' to comments, but would retain the ability to decide whether or not to commence an assessment.

The IGD would be required to consult the Chief of Defence Force (with regard to operational matters) and the Secretary of Defence (with regard to policy matters) on the draft terms of reference.

The IGD would be required to have regard to comments provided by the Chief of Defence Force or Secretary of Defence in finalising its terms of reference.

Formal notification:

As an additional check and balance, we propose including a requirement for the IGD to notify the Minister of Defence of any own motion assessments that were not included on the annual work programme.

As with own motion investigations, any planned publicity or announcement would be included in the notification.

A minimum timeframe would allow the Minister's office, the NZDF and the Ministry of Defence to prepare for any media interest.

For any assessment not included in its annual work programme, the IGD would be required to formally notify the Minister of Defence, the Chief of Defence Force and the Secretary of Defence of its intention to undertake an assessment.

Notification would include the final terms of reference as well as any planned public release or announcement.

There would need to be a minimum of five working days after notification before any public release or announcement

ON-REFERRAL INVESTIGATIONS & ASSESSMENTS

The IGD would have the ability to determine whether or not to undertake an investigation or assessment following a referral from the Minister of Defence, the Secretary of Defence or the Chief of Defence Force, having regard to its purpose and expectations that may be set as legislative principles.

Terms of Reference:

We propose that if the Minister of Defence, the Chief of Defence Force or the Secretary of Defence (the referring parties) intend to refer a matter to the IGD for investigation or assessment, a draft terms of reference should be provided. This would ensure that the IGD is clear about what it is being asked to do and why.

Terms of reference for investigations would be required to include the:

- purpose of the investigation
- rationale for the investigation
- key issues to be considered
- any timing expectations.

Terms of reference for assessments would be required to include the:

- purpose of the assessment
- rationale for the assessment
- legislation, policies, processes or procedures the matter would be assessed against
- expected timeframes approach
- expected outcomes.

Consultation:

The IGD (and any other referring party) would be able to propose changes to the draft terms of reference as appropriate, though it should be up to the referring party to determine whether or not to accept them.

The IGD may provide comments on the draft terms of reference and request any required changes.

Formal notification and decision by IGD:

The IGD would have the power to determine whether to undertake an investigation or assessment or not – there may be situations where it is more appropriate for another body to act, or where the IGD considers that an investigation or assessment would be at odds with its purpose or any legislative principles.

The referring party would be required to share the final terms of reference (whether or not they have been amended as a result of any comments or changes) with the IGD and the other referring parties.

Notification should also include any planned public release or announcement.

There would need to be a minimum of five working days after notification before any public release or announcement.

The IGD may agree to investigate or undertake an assessment; decline to investigate or undertake an assessment; defer its investigation or assessment to a later time; or refer the matter to another body as appropriate.

Related work not discussed in this document

100. This consultation document has focused on one of the Inquiry's recommendations (Recommendation 2).

101. The Government is carrying out or has finished carrying out a range of related work in response to the Inquiry's other three recommendations. Recommendations 1, 3 and 4 of the Inquiry are summarised below with information about their implementation.

- a. Minister of Defence establish an expert review group to enable the Minister to satisfy him or herself that NZDF's (a) organisational structure and (b) record-keeping and retrieval processes are in accordance with international best practice and are sufficient to remove or reduce the possibility of organisational and administrative failings of the type identified in [the Inquiry's] report. The Expert Review Group was established in October 2020 and provided its final report to the Minister of Defence on 10 September 2021.⁵⁶ The report is available from the Ministry of Defence's website.
- b. Promulgate a Defence Force Order setting out on how allegations of civilian casualties should be dealt with both in theatre and at Headquarters NZDF. The Chief of Defence Force issued Defence Force Order 35: New Zealand Defence Force Response to Civilian Harm on 21 January 2021.⁵⁷
- c. Develop and promulgate effective detention policies and procedures for a) people detained by New Zealand forces in operations overseas, b) people detained in operations overseas where New Zealand forces are involved with the forces of another country, and c) the treatment of allegations that detainees in either category have been mistreated or tortured in detention, including by New Zealand personnel. The Ministry of Foreign Affairs and Trade is leading the work to implement this recommendation.

⁵⁶ The Expert Review Group terms of reference can be found on the Ministry of Defence's website: <https://www.defence.govt.nz/publications/publication/operation-burnham-inquiry-terms-of-reference-review-of-organisational-structure-and-record-keeping-and-retrieval-processes>.

⁵⁷ DFO 35 is attached as Annex D.

Annex A: List of questions

- 1** *Do you have any feedback on the proposed purpose of the IGD or our expectations as to how it should operate?*
- 2** *Do you agree with the proposals on the scope of the IGD's oversight?
Why/why not?*
- 3** *Do you agree with the proposals on IGD investigations?
Why/why not?*
- 4** *Do you have any feedback on the IGD's proposed assurance functions and powers?*
- 5** *Do you have any feedback on how the IGD is proposed to be set up?*
- 6** *Do you have any feedback on the appropriateness and/or adequacy of the administrative procedures set out on pages 26–28?*

Annex B: Submission template



Submission template

Proposals for establishing an independent Inspector-General of Defence in New Zealand

Instructions

This is the template for those wanting to submit feedback on the proposals within the targeted consultation document: *Proposals for establishing an independent Inspector-General of Defence in New Zealand*.

The Ministry of Defence (the Ministry) seeks written submissions on the proposals by **5pm on Monday 13 December 2021**. Please make your submission as follows:

- Fill out your name and organisation in the table, “Your name and organisation” on the next page.
- Fill out your responses to the discussion document questions in the table, “Responses to discussion document questions”. Your submission may respond to any or all of the questions in the discussion document. Where possible, please include evidence to support your views (e.g. references to independent research or relevant examples).
- If you would like to make any other comments that are not covered by any of the questions, please provide these in the “Other comments” section.
- When sending your submission, please:
 - a. Delete this first page of instructions.
 - b. Include your e-mail address and phone number in the e-mail accompanying your submission – we may contact submitters directly if we require clarification of any matters in submissions.
 - c. If your submission contains any confidential information:
 - i. Please state this in the e-mail accompanying your submission, and set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 that you believe apply. The Ministry will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982.
 - ii. Indicate this on the front of your submission (e.g. the first page header may state “In Confidence”). Any confidential information should be clearly marked within the text of your submission (preferably as Microsoft Word comments).
- Note that submissions are subject to the Official Information Act 1982 and may, therefore, be released in part or full. The Privacy Act 1993 also applies.
- Send your submission as a Microsoft Word document to IGDconsultation@defence.govt.nz
- Please direct any questions that you have in relation to the submissions process to IGDconsultation@defence.govt.nz

Submission template

Proposals for establishing an independent Inspector-General of Defence in New Zealand

Your name and organisation

| | |
|------------------------------|--|
| Name | |
| Email | |
| Organisation (if applicable) | |

[Double click on check boxes, then select 'checked' if you wish to select any of the following]

- The Privacy Act 1993 applies to submissions. Please check the box if you do not wish your name or other personal information to be included in any information about submissions that the Ministry may publish.
- The Ministry intends to upload submissions received to its website at www.defence.govt.nz. If you do not want your submission to be placed on our website, please check the box and type an explanation below.

I do not want my submission placed on the Ministry's website because...

Please check if your submission contains confidential information:

- I would like my submission (or identified parts of my submission) to be kept confidential, and **have stated below** my reasons and grounds under the Official Information Act 1982 that I believe apply, for consideration by the Ministry.

I would like my submission (or identified parts of my submission) to be kept confidential because...

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? |
| | |

Chapter 3: Scope of oversight

| | |
|-------------------|------------------------------------------------------------------------------------------|
| Question 2 | Do you agree with the proposals on the scope of the IGD’s oversight? Why/why not? |
| | |

Chapter 4: Functions and powers

| | |
|-------------------|----------------------------------------------------------------------------|
| Question 3 | Do you agree with the proposals on IGD investigations? Why/why not? |
| | |

| | |
|-------------------|---------------------------------------------------------------------------------------|
| Question 4 | Do you have any feedback on the IGD’s proposed assurance functions and powers? |
| | |

Chapter 5: Form and structure

| | |
|-------------------|--------------------------------------------------------------------------|
| Question 5 | Do you have any feedback on how the IGD is proposed to be set up? |
| | |

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? |
| | |

Other comments/feedback

Annex C: List of recommendations made by the Inquiry into Operation Burnham and related matters

RECOMMENDATION ONE

We recommend that the Minister of Defence take steps to satisfy him or herself that NZDF's (a) organisational structure and (b) record-keeping and retrieval processes are in accordance with international best practice and are sufficient to remove or reduce the possibility of organisational and administrative failings of the type identified in this report. To enable the Minister to do so, and to ensure public confidence in the outcome, we recommend the appointment of an expert review group comprising people from within and outside NZDF, including overseas military personnel with relevant expertise.

RECOMMENDATION TWO

We recommend the establishment, by legislation, of an office of the Independent Inspector-General of Defence, to be located outside the NZDF organisational structure.

The purpose of the office would be to facilitate independent oversight of NZDF and enhance its democratic accountability.

The functions of the Inspector-General would include:

- a. investigating, either on his or her own motion or by way of a reference, and reporting on particular operational activities of NZDF to ascertain whether they were conducted lawfully and with propriety;
- b. investigating and reporting on such other matters requiring independent scrutiny as are referred to it by the Minister of Defence, the Chief of Defence Force, the Secretary of Defence or the Defence and Foreign Affairs Select Committee of Parliament; and
- c. providing an annual report to the Minister of Defence and to the Defence and Foreign Affairs Select Committee of Parliament

RECOMMENDATION THREE

We recommend that a Defence Force Order be promulgated setting out how allegations of civilian casualties should be dealt with, both in-theatre and at New Zealand Defence Force Headquarters.

RECOMMENDATION FOUR

We recommend:

- a. The Government should develop and promulgate effective detention policies and procedures (including for reporting to ministers) in relation to:
 - i. persons detained by New Zealand forces in operations they conduct overseas;
 - ii. persons detained in overseas operations in which New Zealand forces are involved together with the forces of another country; and
 - iii. the treatment of allegations that detainees in either of the first two categories have been tortured or mistreated in detention (including allegations that New Zealand personnel may have mistreated detainees).
- b. The draft policies and procedures referred to should be made public, with an opportunity for public comment.
- c. Training programmes should be developed to ensure that military, intelligence, diplomatic and other personnel understand the policies and the procedures and their responsibilities under them.
- d. Once finalised, the detention policies and procedures should be reviewed periodically to ensure they remain effective.

Annex D: Defence Force Order 35