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Final Regulatory Impact Statement: Establishing the Inspector-General of Defence

May 2022

This publication provides the Regulatory Impact Statement that assisted Cabinet to make final policy decisions in May 2022 on the establishment of the proposed Inspector-General of Defence.

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 where making it available would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand [section 6(a)].

Information is also 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)]
- enable a Minister of the Crown or any public service agency or organisation holding the information to carry out, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations) [section 9(2)(j)].

Regulatory Impact Statement: Establishing the Inspector-General of Defence

Coversheet

Purpose of Document	
Decision sought:	This Regulatory Impact Statement (RIS) will assist Cabinet to make final policy decisions on the design choices of the proposed Inspector-General of Defence.
Advising agencies:	The Ministry of Defence.
Proposing Ministers:	The Attorney-General and the Minister of Defence.
Date finalised:	This RIS was provided to an independent RIA panel consisting of officials from the Ministry of Defence and the Department of Prime Minister and Cabinet on 17 February 2022.
Problem Definition	
<p>The Government has committed to establishing, by legislation, an independent Inspector-General of Defence (IGD) to oversee the activities of the New Zealand Defence Force (NZDF). This commitment follows the <i>Inquiry into Operation Burnham and related matters</i> (the Inquiry), which found that the NZDF's failure to provide full and accurate information to Ministers during and following operations in Afghanistan undermined two core constitutional principles – civilian control of the military and ministerial accountability to Parliament. This highlighted the problem that the legislative and structural oversight arrangements currently in place are not adequate to ensure that the NZDF is providing Ministers with full, accurate and timely information in relation to its operational activities.</p> <p>The establishment of an independent body dedicated to the oversight of the NZDF offers an opportunity to enhance the existing system of oversight. It would support democratic oversight of the military in New Zealand and provide assurance to Ministers, Parliament and the public that the activities of the NZDF are subject to enhanced independent scrutiny.</p>	
Executive Summary	
<p>This RIS focuses on the design choices for the proposed IGD. This is presented as three policy issues, with specific problems and options for each:</p> <ul style="list-style-type: none">• Issue 1: How should the IGD's investigatory functions be calibrated?• Issue 2: What other functions should the IGD have?• Issue 3: What organisational form should the IGD take? <p>In analysing the design choices for the IGD, officials have had regard to: the findings and recommendations of the Inquiry; the unique characteristics of the NZDF; the external oversight that already applies to the NZDF; the constitutional principles of democratic oversight of the military (which is facilitated by the Minister of Defence) and ministerial accountability to Parliament; and comparable domestic and international oversight bodies. For completeness, the RIS also includes analysis of two options to address the problem identified by the Inquiry: amending existing oversight processes; and establishing an IGD.</p> <p>In summary, the proposal is to establish an IGD with the following design elements:</p>	

- **Scope:** The IGD's oversight would cover all activities of the NZDF¹ but would focus on operational activities and have the ability to undertake functions on its own motion² in this area. It would undertake functions in relation to other NZDF activities on referral from the Minister of Defence, Secretary of Defence and the Chief of Defence Force.
- **Functions:** The IGD would have three functions: Investigations (to look into issues if and once they occur), Assessments (to assess processes, procedures and policies and identify any gaps to minimise the risk of issues arising in future) and Enquiries (to gather information that may lead to investigation or assessment).
- **Powers:** The IGD would have statutory powers to support its investigatory function, including the power to summon and examine persons on oath; require persons to provide information; enter a defence area, or a vehicle, ship or aircraft used by the NZDF; access all NZDF databases and information systems, and all records in the custody or control of the NZDF; and require witnesses to disclose information. To support its assessment and enquiry functions, it would have the same access power as for investigations. These are supported by an offence regime, obligations on the NZDF to facilitate the IGD's oversight, safeguards to protect people and information, and obligations on the IGD to report its findings.
- **Form:** The IGD would be an independent statutory officer associated with a ministerial portfolio, supported by a deputy, staff and an advisory panel. Statutory appointments and removals would be made by the Governor-General on recommendation of the House of Representatives. To support accountability, the IGD would produce an annual work programme (which the Minister could provide feedback on) and an annual report, and would be subject to the oversight of the Ombudsman, Privacy Commissioner and the Courts. Some standard oversight mechanisms (such as the Official Information Act 1982 and the Privacy Act 2020) would not apply in full, as the public interest in the IGD's proceedings would be met by the IGD's obligations to publish reports.

The immediate beneficiaries of the proposal are Ministers (the Minister of Defence and Cabinet) with positive flow-on effects to Parliament, the general public of New Zealand and the NZDF. The establishment of a body dedicated to the scrutiny of the NZDF's activities would enable greater Ministerial oversight of the military, ensuring the military are accountable to the democratically elected government. It would also support Ministerial accountability to Parliament, enable transparency and build public trust and confidence in the NZDF.

There are some negative impacts that will be mitigated. These include costs to the Crown in setting up a new body and its ongoing operations, and costs to the NZDF for complying with oversight. The proposal will mainly affect NZDF personnel (and some former NZDF personnel) who may be involved in investigations, assessments or enquiries.

The problem and opportunity, and the proposal to establish the IGD have been subject to consultation at appropriate levels, since the time that the Inquiry began (2018) until the design elements were finalised for Cabinet consideration (in early 2022). Officials considered all the feedback received in the below process and many elements of the proposal were shaped or altered in line with feedback:

- As part of the Inquiry, including in coming to the recommendation to establish an IGD, the Inquiry undertook in-depth consultation with a range of people and organisations,

¹ The IGD's oversight would not include the activities of Veterans Affairs which is a semi-autonomous unit of the NZDF which is accountable to the Minister for Veterans, and operates primarily under the requirements of the Veterans' Support Act 2014.

² That is, without prompting by others.

including the core participants (the NZDF, Nicky Hager, Jon Stephenson, and the former residents of Khak Khuday and Naik villages in Afghanistan), Crown agencies, and former Ministers and NZDF leaders. Members of the public also made submissions to the Inquiry.

- Following the Government’s acceptance in principle of the Inquiry’s recommendations and during the development of the proposal, consultation was undertaken with Public Service agencies, including those with responsibility for machinery of government matters or a portfolio interest in the design.
- Consultation with the NZDF, as the agency most likely to be directly impacted by the proposal, was undertaken during its development. The NZDF has provided views on the nature, scale, and size of the impact the proposal would have on its operational arrangements and framework.
- To better understand the proposal’s compatibility with tikanga and te ao Māori, there has been consultation with the Māori advisory network within NZDF and the Senior Māori Advisor. The feedback received has indicated the proposals are compatible with the tikanga of Pono (acting with integrity and supporting transparency and accountability) and the tikanga of Kaitiakitanga (the practice of applying safe, responsible and ethical practices when managing information and while working with witnesses).
- A range of interested stakeholders were consulted through a targeted consultation process (which included the production and public release online of a targeted consultation document and supporting Cabinet material). 36 individuals and organisations including: the Inquiry authors, the authors of Hit and Run, academics, and NGOs were specifically invited to comment. 15 submissions were received. Overall, submissions generally supported the establishment of the IGD with some recommendations on design features. Submitters’ feedback resulted in a number of changes to the final policy recommendations.
- After the targeted consultation process, the final design of the IGD proposed for Cabinet agreement was tested with other domestic oversight bodies, the Legislation Design Advisory Committee, and a final round of engagement was undertaken with Public Service agencies and the NZDF.
- The establishment and operation of the IGD will have limited direct impact outside of government. As such, wider public consultation was not undertaken, but a copy of the targeted consultation was made publicly available, with information on how to make submissions. No submission from the wider public was received. The public will have the opportunity to provide input during the select committee process (if Cabinet agrees to the proposal).

Limitations and Constraints on Analysis

Decisions made by Cabinet

In July 2020, the Cabinet External Relations Committee (with Power to Act) [ERS-20-MIN-0025, refers]:

- approved the proposed initial government response to the Inquiry report, which accepted in principle all four recommendations (Recommendation Two was “the establishment, by legislation, of an office of the Independent Inspector-General of Defence, to be located outside the NZDF organisational structure”);

- directed officials to undertake analysis of the scope, functions, powers and form of the IGD and establish a senior officials working group to develop a plan for the establishment of the IGD; and
- agreed the Foreign Affairs, Defence and Trade Committee (FADTC) should not be able to refer matters to the IGD.

In February 2021, as part of noting the progress update on the plan for establishment of the IGD [CAB-21-MIN-00076, refers], Cabinet:

- agreed to the Government's intended policy outcome and objectives for the establishment of the IGD (e.g. that the IGD be consistent with similar oversight mechanisms in the national security and intelligence system); and
- invited Ministers to report back with detailed policy proposals on the scope, functions, powers, and form of the IGD.

In November 2021, Cabinet [CAB-21-MIN-0439, refers]:

- agreed in principle to the key design elements of the IGD, subject to targeted consultation; and
- invited the Ministers to report back on the outcome of the targeted consultation process and seek final policy decisions.

Given the decisions made in July 2020 and February 2021, the focus of the analysis in this RIS is limited to the design choices for the IGD to achieve the Government's policy objectives and outcome. It does not consider options for change at a system level (such as making changes to the mandates of existing oversight bodies) because of the Government objective that the IGD should fill a gap within the existing oversight system. Officials recognise that analysis at the more granular design options level (focusing on specific functions and organisational form) is unlikely to produce pronounced differences in the regulatory impact compared with analysis of alternative options to resolve the problem identified by the Inquiry.

Limited data and evidence

Officials have not reconsidered or attempted to duplicate the Inquiry's investigation and refer, throughout the RIS, to the problem identified by the Inquiry (NZDF's current oversight system is not adequate to ensure that full and accurate information is provided to Ministers). The Inquiry was focused on the response to Operation Burnham and related matters, and there is no other baseline data on the scale and prevalence of the problem. This constrains the analysis in terms of the scope of the problem.

There is little evidence that can be quantified in monetary terms to show the impact of the problem or potential benefits of options. Therefore, qualitative objectives and criteria have been used to guide analysis. Accurately quantifying the compliance cost to the NZDF is difficult at this stage as it is dependent on the nature and scope of the IGD's activities once established.

The analysis has been informed by the approach taken by a range of domestic and international oversight bodies. This is in line with the objective that the IGD be consistent with similar oversight mechanisms in the national security and intelligence system. Where relevant, references and comparisons to these bodies are made throughout the RIS. The key bodies identified were: the Inspector-General of Intelligence and Security (IGIS), the Independent Police Conduct Authority (IPCA), the Privacy Commissioner, the Health and Disability Commissioner, the Ombudsman, the Inspectorate of Corrections, the Australian Inspector-General of Defence (IGADF), the Australian Inspector-General of Intelligence and Security, the Australian Defence Ombudsman and the Canadian Ombudsman and American Inspector-Generals.

Overall, there is good but not conclusive evidence to suggest that this proposal would address the problem identified by the Inquiry. Comparative analysis suggests that incentives

created by statutory or quasi-statutory (e.g. directive) functions, powers and form enable efficient and effective oversight of the military. The comparative approach has limitations: each body's approach suits the context in which it was established, the specialised nature of the body it oversees and the legal and constitutional arrangements it sits in. The analysis has explicitly tried to avoid overly broad generalisations but they remain a risk. There is little evidence to suggest that any approach taken by international oversight bodies would be appropriate to address the problem identified here and the varying approaches taken suggest that there is not one set of prescriptive arrangements that is suitable for every military oversight body. The consultation, described above, generally supported the proposal which supports the view that establishing an IGD would address the problem identified by the Inquiry.

Interdependencies with other recommendations

The Inquiry identified other problems and made three other recommendations (attached in full as Appendix A). This proposal is not intended to address all the problems identified by the Inquiry; and any response to the Inquiry's other recommendations need to work as a package of related reforms.

Recommendation Three (that a Defence Force Order should be promulgated setting out how allegations of civilian casualties should be dealt with) is complete and the Order has been incorporated into the functions of the IGD.

In relation to Recommendation One (an Expert Review Group (ERG) be appointed to look into the organisational structure and record-keeping and retrieval processes), the ERG has finalised its report and the Government has accepted its recommendations in principle.³ The proposal for the IGD takes into account the ERG's findings that there needs to be strengthened integration between the NZDF and Ministry of Defence. As such, the design features of the IGD have been designed to ensure the IGD is not only independent of the NZDF but also the Ministry to ensure the IGD is perceived to be as independent as possible.

The Government is yet to make final decisions in relation to Recommendation Four (that the Government should develop and promulgate effective detention policies and procedures).

Timeframes

The timeframes for the establishment of the IGD, and the other interdependent reforms described above, are tight in order to progress them within this Parliamentary term. Given time pressures and interactions with the other reforms, which are progressing in parallel, there is a greater risk of unintended consequences. This risk is being managed by close interagency cooperation with the agencies responsible for the policy reforms (the Ministry of Foreign Affairs and Trade and the NZDF).

Responsible Manager (completed by relevant manager)

Pratima Namasivayam

Director, Inspector-General of Defence Establishment Unit

Ministry of Defence

17 February 2022

³ <https://www.defence.govt.nz/the-latest/story/report-of-the-expert-review-group>

Quality Assurance (completed by QA panel)	
Reviewing Agency:	Ministry of Defence
Panel Assessment & Comment:	<p><i>The independent RIA panel has reviewed the Regulatory Impact Statement. The panel considers that the information and analysis in the Regulatory Impact Statement fully meets the Quality Assurance Criteria.</i></p> <p><i>The panel has concluded that the Regulatory Impact Statement has fully met the consultation requirements in the Quality Assurance criteria and is satisfied that the consultation process demonstrated evidence of efficient and effective consultation with key affected parties and relevant experts. The Panel also considers that any issues raised by submitters have been adequately considered and addressed in the Regulatory Impact Statement.</i></p>

Released by the Attorney-General
and Minister of Defence

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Section 1: Diagnosing the overarching policy problem or opportunity

What is the context behind the policy problem or opportunity and how is the status quo expected to develop?

What is the context to the policy problem or opportunity?

The Inquiry

1. In 2018, the Attorney-General established the *Inquiry into Operation Burnham and related matters* (the Inquiry) to examine allegations of wrongdoing by the New Zealand Defence Force (NZDF) during a series of operations conducted in Afghanistan in 2010 and 2011. The Inquiry reported back in July 2020. It found that:
 - a. there was no organised institutional strategy within the NZDF to “cover up” the NZDF’s role in Operation Burnham or the possibility that there were civilian casualties. The Inquiry considered that if there had been clear evidence of civilian casualties in Operation Burnham, the NZDF “would have faced up to that”.⁴
 - b. NZDF personnel acted lawfully and complied with the rules of engagement and international humanitarian law.⁵
 - c. 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.⁶ This undermined two constitutional principles of fundamental importance, namely civilian control of the military and ministerial accountability to Parliament, both of which depend on the provision of full, timely and accurate information by the NZDF to Ministers. It also undermined public confidence in the NZDF.⁷
2. To address these issues, the Inquiry recommended the establishment of an independent Inspector-General of Defence to oversee the activities of the NZDF to enhance its democratic accountability.⁸

Cabinet decisions

3. In July 2020, the Cabinet External Relations Committee (with Power to Act) agreed in principle with the Inquiry’s recommendation to establish an IGD, but decided that the Foreign Affairs, Defence and Trade Committee (FADTC) should not be able to refer matters to the IGD [ERS-20-MIN-0025, refers].
4. In February 2021, Cabinet agreed a policy outcome and a set of objectives for the establishment of the IGD [CAB-21-MIN-00076, refers]. Cabinet also invited the Attorney-

⁴ The Inquiry Report, Chapter 1, page 28, paragraph 77.

⁵ The Inquiry Report, Chapter 1, page 24, clause 7.1.1.

⁶ The Inquiry Report, Chapter 12, page 368, paragraph 34.

⁷ The Inquiry Report, Chapter 1, page 28, paragraph 78.

⁸ The RIS uses the term ‘democratic oversight’ rather than ‘civilian control’ which was used in the Inquiry report to describe this concept. Democratic oversight better reflects that oversight is facilitated 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.

General and Minister of Defence to report back with detailed policy proposals on the scope, functions, powers, and form of the IGD.

5. The policy outcome that Cabinet agreed 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.

6. The objectives that Cabinet agreed for the establishment of the IGD are that it is:

- i. **Independent:** The overseer has complete operational, financial, structural, and reporting independence from the NZDF.
- ii. **Robust:**
 1. The overseer has appropriate powers and resources to undertake its role in an efficient and timely manner.
 2. The overseer's functions and powers are appropriate for the defence environment and the nature of the information it will handle.
 3. The overseer's functions, powers, and resources are proportionate to the complexity, size, and scale of the NZDF's business.
- iii. **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.
- iv. **Transparent set-up process:** Build public trust and confidence in the overseer through a full, open, and unclassified policy process.

7. In November 2021, an interim RIS was produced for the purpose of informing Cabinet's in principle decisions on the design choices for the IGD prior to targeted engagement [CAB-21-MIN-0439, refers]. This RIS has been updated to reflect changes to the IGD's design in response to feedback received through the targeted consultation process, and additional consultation with existing oversight bodies, the NZDF and Public Service agencies. The Final RIS has been designed to support the Government to make final policy decisions on the IGD's design elements and to allow a bill to be drafted to give effect to its decisions.

What is the current state within which the policy problem or opportunity has arisen?

The current regulatory system

8. The NZDF is currently subject to a system of existing internal and external oversight:

- a. **Minister of Defence:** The Minister of Defence facilitates control over the NZDF. This reflects the constitutional principle of democratic oversight⁹ and the ordinary principles of responsible government. While the Minister is generally involved in

⁹ 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).

strategic decisions rather than operational and tactical decisions, they still retain oversight of the operation and administration of the NZDF and remain responsible to both Cabinet and Parliament. They are also indirectly democratically accountable to the public for their decisions. The Minister can decide on their own motion (or following a complaint/referral) to direct a section 24 Defence Act 1990 assessment/audit of the NZDF or can approve one or more assessment/audits as part of a work programme proposed by the Secretary of Defence (the Secretary). Such an assessment/audit is done independently of both the NZDF and the Secretary of Defence.¹⁰

- b. **Foreign Affairs, Defence and Trade Select Committee (FADTC)**: The House of Representatives has power to inquire into any matter that it considers needs investigation in the public interest. In practice, inquiries on defence matters are carried out by FADTC. Most scrutiny is undertaken through estimates examinations and annual reviews - on current operations and performance, and appropriations.
- c. **The Ombudsman** can investigate any decision/recommendation/act/omission related to matters of administration by the NZDF but is not authorised to investigate any matter concerning the terms and conditions of service of a member of the defence force. Neither can it investigate any order, decisions, penalty or punishment given to or affecting that person in their capacity as such a member.
- d. **The Controller and Auditor-General** can audit the NZDF and provide Parliament and the public assurance that the NZDF is operating and accounting for its use of resources and performance in the way Parliament intended. It provides assurance that the expenses and capital expenditure of the NZDF are lawful and within the scope, amount and period of appropriation.
- e. **The Privacy Commissioner** can investigate the NZDF's refusal of requests for personal information, misuse of personal information or breaches of privacy.
- f. **The Human Rights Commission** can inquire generally into any matter if it appears that the matter involves or may involve the infringement of human rights. Also, the Human Rights Commission is designated as the Central National Preventive Mechanisms (NPM) for the Optional Protocol to the Convention Against Torture. It does not monitor places of detention itself but coordinates activities of the other NPMs. The Registrar of the Court Martial, in their role as the Inspector of Service Penal Establishments,¹¹ is the NPM charged with monitoring the NZDF's detention facilities.
- g. **The Human Rights Review Tribunal** hear and determine unlawful discrimination proceedings as well as interference with privacy proceedings.
- h. **The Health and Disability Commissioner** can look into health and disability services consumers' complaints and hold providers to account.
- i. **The Health Practitioner's Disciplinary Tribunal** can hear and determine disciplinary proceedings brought against health practitioners. It deals with cases

¹⁰ The frequency of these assessments has varied but at least one assessment/audit has been undertaken most years and in some years three or four were undertaken.

¹¹ Section 80 of the Court Martial Act 2007.

brought under the Human Rights Act 1993, the Privacy Act 1993 and the Health and Disability Commissioner Act 1994.

- j. **Professional conduct bodies:** Various. For example, professional conduct bodies can look into the conduct of medical professionals and lawyers employed by the NZDF.
 - k. **Civilian Justice System:** Civilian criminal law is applicable to the NZDF, including serious or grave breaches of expected standards and conduct in armed conflict. New Zealand Police retain independent jurisdiction to investigate allegations of offending (including war crimes). Overseas jurisdiction is limited but it can investigate beyond war crimes.
 - l. **WorkSafe New Zealand:** WorkSafe has oversight of the Health and Safety at Work Act 2015 and regulates the NZDF's activities outside of defined operational activities.
 - m. **Military Justice System:** This is a legal framework which applies to service personnel under the Armed Force Discipline Act 1971. The military justice system doesn't replace the civilian criminal justice system, but runs parallel to it and can provide a mechanism for commanding officers to investigate and punish offences that may be considered offences in the civilian system but also offences that are peculiar to service discipline. The system allows for court procedures to be scaled to the appropriate military environment, and includes particular punishments and appeal pathways (e.g. Court Martial Appeal Court, the Court of Appeal and the Supreme Court). The Solicitor-General supervises the NZDF's Director of Military Prosecutions and the Chief Judge of the Court Martial is appointed by the Governor-General.
 - n. **Other internal NZDF systems:** Various. For example, a Court of Inquiry (Col) is an investigatory process established under the Armed Forces Discipline Act 1971 to provide an officer in command with "an expeditious fact finding procedure so that a matter can be promptly investigated and if necessary, prompt, remedial action can be taken". A Col can be conducted into any matter that an Assembling Authority directs, however there are certain incidents on which it is mandatory to conduct an inquiry.
 - o. **International bodies:** Remits vary but include: the International Court of Justice which settles inter-state disputes; the International Criminal Court which can prosecute allegations of war crimes and other international crimes; and the UN Human Rights Committee which monitors implementation of the International Covenant on Civil and Political Rights.
 - p. **The media:** The NZDF is of interest to the media and is subject to its reporting and scrutiny. Media reporting on issues relating to the NZDF may trigger action from oversight bodies. This supports accountability and informing the public.
9. The Inquiry found that the existing structural and legislative framework is insufficient to provide the requisite scrutiny over the NZDF. The existing oversight system was unable, until an Inquiry was set up, to detect that over a number of years the NZDF failed to provide full and accurate information to Ministers and the public about Operation Burnham, and failed to adequately scrutinise or respond to the information available to

them.¹² The Inquiry was clear that despite the existing system, there was a need for increased oversight of the NZDF to ensure these kinds of failures do not occur again.¹³

How is the status quo expected to develop if no action is taken?

10. The counterfactual (that is, the future state where no additional action is taken) would see the status quo continue, as there would be no increased independent oversight of the NZDF. This means that if Ministers have similar concerns to those that generated the Inquiry, there is no appropriate means of addressing them, other than by establishing another inquiry under the Inquiries Act 2013. Concerns regarding whether accurate information is being tendered to Ministers to enable them to discharge their democratic oversight of the military, and ministerial accountability to Parliament, would likely continue until concerns reached the threshold where another inquiry is established. In addition, not taking any action on this matter would forgo the benefits of establishing an IGD and the opportunity it provides to make improvements to the current NZDF oversight system.

What is the policy problem or opportunity?

There is a problem with the current NZDF oversight system

11. As indicated above, the Inquiry has highlighted the problem that the legislative and structural arrangements currently in place do not provide for adequate oversight of the NZDF, to ensure that it is providing Ministers with full, accurate and timely information, particularly in relation to its operational activities. Specifically, this relates to the following matters:

A perceived lack of independence

12. Currently, the standard process to test whether full, accurate and timely information has been provided from the NZDF to Ministers is through the NZDF's internal oversight processes. There is a perception that this internal scrutiny is not adequately independent. This perception has been exacerbated by the findings of the Inquiry. The actual or perceived lack of independence can negatively impact Ministers' and the public's trust and confidence in the NZDF.
13. Internal NZDF scrutiny is not proactively public. It is difficult for the public to trust and have confidence in processes they do not have visibility of. This could contribute to a lack of faith in the findings and recommendations of the NZDF's internal scrutiny in the absence of any additional external oversight.

Quality and timeliness

14. No existing external oversight body is dedicated to solely providing oversight of the NZDF, and therefore their oversight of the NZDF occurs alongside other work and is subject to their internal prioritisation to manage their workload. This risks delays. In addition, the mandates, functions and powers of existing bodies are specific and may only relate to an aspect of the NZDF's overall activities, which makes system-level oversight difficult. For the scale and size of the issue that triggered the Inquiry, the appropriate oversight mechanism was an inquiry established under the Inquiries Act

¹² The Inquiry Report, Chapter 12, page 368, paragraph 34.

¹³ The Inquiry Report, Chapter 12, page 368, paragraph 34.

2013. Inquiries of this nature take time to set up, investigate and report, and are usually costly.

The opportunity to establish an IGD

15. The existence of a new body may not completely alleviate some of the problems set out above. However, an independent, dedicated and proportionately resourced body with a clear focus could materially improve the oversight of the NZDF in line with the problem identified by the Inquiry. Therefore, there is an opportunity to design an oversight body that: addresses issues with the provision of full, accurate and timely information from the NZDF to Ministers; fills a gap in the oversight of the NZDF rather than duplicating or supplanting existing forms of oversight; and is consistent with the outcome and objectives agreed by Cabinet in February 2021 [CAB-21-MIN-00076, refers].

Who are the stakeholders and how are they affected?

16. The key stakeholders who have an interest in the issue are:

- a. **The media and the general public:** The media and the public rely on the Government for accurate information. The Inquiry found that media and the public were misled. The Inquiry commented that the NZDF's response to the allegations "unfairly undermined public confidence in the accuracy of some aspects of the authors'¹⁴ work".¹⁵ The issue relates to constitutional matters that touch on the New Zealand public generally. There is no data to suggest that any population groups would be disproportionately affected.
- b. **The Minister of Defence:** The issue primarily affects the Minister of Defence's ability to facilitate democratic oversight of the NZDF and to be accountable to Parliament. In general, democratic oversight of the military goes further than ordinary ministerial responsibility for government departments, commensurate with national security requirements and the risk that uncontrolled armed forces can present to democracy. In addition, national security objectives may mean that public discussions can be curtailed placing a greater emphasis on the Minister's responsibility.
- c. **The Parliament:** The issue also affects Parliament because it receives information from the Minister of Defence. The Inquiry found that Parliament received inaccurate information from the Minister, which undermined the constitutional principle of ministerial accountability to Parliament.
- d. **International defence partners and international bodies:** New Zealand is party to a number of international treaties or conventions and is bound by customary international law. This means that international defence partners that the NZDF engages with and international bodies to whom the New Zealand Government is accountable will have an interest in both the NZDF's actions and how it's being overseen.
- e. **The NZDF:** The NZDF would be subject to the IGD's oversight in order to address the problem identified by the Inquiry. Being the subject of oversight would require

¹⁴ Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017).

¹⁵ The Inquiry Report, Chapter 1, page 28, paragraph 78.

resourcing from NZDF to meet compliance obligations and may draw attention to its activities from time to time.

What objectives are sought in relation to the policy problem or opportunity?

17. As noted above, the Government has agreed in principle to the regulatory solution of establishing an IGD by legislation and has agreed objectives and an outcome to guide the design of the body. As such, the analysis seeks to achieve the Government's intended outcome and objectives, unless a good reason to depart was identified (for example, there was a better way to achieve the policy intent of the Government).

What consultation has been undertaken?

18. Given the Government had agreed in principle to establishing an IGD, a bespoke consultation process was undertaken to thoroughly test the proposed design elements. In summary, the intent was not to duplicate but to leverage off the consultation undertaken by the Inquiry¹⁶ (which received public submissions) by focusing on filling gaps in evidence, and ensuring the views of the most affected or expert stakeholders were well considered. Working proposals on the design of a military oversight body adapted to the New Zealand legal and constitutional context were informed by desk-based comparative analysis of a range of domestic and international oversight bodies. Officials then tested these proposals with stakeholders to understand how the operations of the future IGD would impact on the NZDF and other organisations that would work closely with it.
19. Consultation was undertaken with the following stakeholders:
 - a. **NZDF:** As the stakeholder that would be most impacted by the proposal, the NZDF was formally consulted at two stages of the policy development process to understand the nature, scale and size of the impact the proposal would have on it. Firstly, on the proposed design of the IGD that informed Cabinet's in principle agreement and the proposal for targeted consultation. Secondly, the NZDF was consulted on the proposed changes to the design of the IGD as a result of the targeted consultation prior to Cabinet making final policy decisions.
 - b. **Public Service agencies:** The establishment of a new government body would have an impact on machinery of government arrangements. Agencies were also consulted at two stages (as with the NZDF), including those who are responsible for machinery of government matters, or have portfolio interest in the design.¹⁷ Consultation also included a cross-agency steering group of senior officials from the Department of the Prime Minister and Cabinet, the Crown Law Office, the Ministry of Justice, Te Kawa Mataaho Public Service Commission, the NZDF and the Ministry of Defence.

¹⁶ In coming to the recommendation to establish an IGD, the Inquiry undertook in-depth consultation with a range of people and organisations, including the core participants (the NZDF, Nicky Hager, Jon Stephenson, and the former residents of Khak Khuday and Naik villages in Afghanistan), Crown agencies, and former Ministers and NZDF leaders. Some members of the public made submissions to the Inquiry which were considered and are available on its website - <https://www.operationburnham.inquiry.govt.nz/about-the-inquiry/questions-and-answers>.

¹⁷ The following Public Service agencies were consulted: Te Kawa Mataaho Public Service Commission, the Ministry of Justice, the Ministry of Foreign Affairs and Trade, the Department of the Prime Minister and Cabinet, the Crown Law Office, the Security and Intelligence Agencies, Police, the Ministry for Primary Industries, and Customs.

- c. **Existing oversight bodies:** Existing oversight bodies (including the IGIS, IPCA, the Privacy Commissioner, the Ombudsman, the Human Rights Commission, and the Auditor-General) have expertise in providing oversight of other organisations in the New Zealand context, and would be likely to work with the IGD once it is established. They were consulted on the design elements of the IGD.
- d. **Inquiry participants, experts and NGOs:** A targeted consultation process was undertaken with a range of interested stakeholders, prior to the Government making final policy decisions:
- i. Targeted consultation opened on 16 November 2021 for 4 weeks. 36 individuals and organisations were specifically invited to comment, including the Inquiry authors and the authors of the book *Hit & Run*, legal experts, academics, veterans' organisations and non-government organisations. The consultation period was extended to 11 January 2022 to enable late submissions.
 - ii. A consultation document which included a form to submit submissions was published online on the Ministry of Defence's website.¹⁸ Relevant Cabinet material and FAQs were also published on the website to provide additional context and information for those interested. While public submissions were not actively sought, information on how to make submissions was made available to enable any member of the public to provide feedback if they wished to. The method of engagement was appropriate and accessible for the types of stakeholders that were specifically targeted, given they have experience in engaging with government departments.
 - iii. In total, 15 submissions were received. Of the 15 submissions, seven were from academics, four from civil society (including legal experts). Submissions were also received from those that had a role in the Inquiry and the Human Rights Commission. No submissions were received from the general public.
 - iv. In general, there was strong support for the establishment of the IGD and its key design features, and changes have been incorporated where appropriate. A Summary of Submissions Report will be provided to Cabinet alongside this RIS to inform decision making.
- e. **Māori:** Specific Te Tiriti o Waitangi interests were not identified as part of this proposal, as the impact on Māori in particular, is expected to be minimal. No submissions were received from Māori organisations as part of the targeted consultation. Officials have consulted the NZDF's Tikanga group and Senior Māori Advisor as the policy has developed, to explore the potential impacts of the proposals on NZDF Māori personnel, and to ensure any adverse or disproportionate impacts are minimised. The feedback received indicates that the proposals would be compatible with the tikanga of Pono (acting with integrity and supporting transparency and accountability) and the tikanga of Kaitiakitanga (the practice of applying safe, responsible and ethical practices when managing information and while working with witnesses).
- f. **Public:** The impact on the public as a result of the proposal is minimal and no public submissions were received via the targeted consultation process. The targeted consultation undertaken provided appropriate insight from those affected by the

18 <https://www.defence.govt.nz/the-latest/story/establishing-an-independent-inspector-general-of-defence>.

proposal and expert stakeholders for the purposes of Cabinet making final policy decisions. In addition, there have been and will be other opportunities for the public to provide feedback, through the Inquiry process and through the Select Committee process (if Cabinet agrees to the proposal).

What do stakeholders think about the problem or opportunity?

20. There was strong support throughout the consultation process for the establishment of an IGD to fill a gap in the oversight of the NZDF. Feedback on the design elements of the IGD through the targeted consultation process revealed a range of views on how the IGD would be best designed and this is discussed in the following sections.

Released by the Attorney-General
and Minister of Defence

Section 2: Considering options to address the problem identified by the Inquiry

21. A specific regulatory solution (to establish an IGD) has been agreed in principle by Cabinet, and this RIS has been drafted to support Cabinet to make decisions on the scope, functions, powers, and form of the IGD. However, for completeness and consistency with Cabinet's Impact Analysis requirements,¹⁹ analysis of alternative options to address the problem identified by the Inquiry is set out below.

What criteria will be used to compare options to the status quo?

22. The objectives agreed to by Cabinet are not directly applicable to this issue because they relate specifically to how the IGD should be designed. As such, the following criteria, which are broadly consistent with the objectives agreed by Cabinet, will be used:

- a. **Actual and perceived independence:** Independence of the entity carrying out the oversight function is critical. Independence supports building and maintaining the trust and confidence that the public have in the institutions of government and their legitimacy.
- b. **Timeliness:** Oversight should be timely and free from unreasonable delays to ensure that matters are not dragged out over a long period providing uncertainty to the public and the organisation being overseen. While inquiries into certain matters would take longer than others, scrutiny should be undertaken in an appropriately timely manner.
- c. **Quality:** The oversight body needs to have adequate functions, powers and resources to undertake their role.
- d. **Transparency:** To ensure legitimacy and credibility, there should be visibility of the oversight body's activities. Parliament and the media can ask the right questions of Ministers when they understand what oversight is happening. This allows Parliament and ultimately the public to hold them to account.

What scope will options be considered within?

23. The scope of the options is limited to amending existing external processes or establishing an IGD, as recommended by the Inquiry. An option to make changes to the NZDF's existing internal oversight processes to ensure their robustness and provide transparency and public scrutiny has not been considered. This option is unlikely to adequately address the problem raised by the Inquiry, or to provide public confidence, given its lack of actual or perceived independence from the NZDF. The status quo is also not considered to be viable for the same reasons and has not been included as an option, although the options have been compared to it, as is the standard for regulatory impact analysis.

What options are being considered?

24. The options are:

- a. **Option One – Amending the existing processes:** This is a non-regulatory option. It would involve changes, primarily providing additional resources (primarily funding) to the current oversight system to build on the processes that already exist. There

¹⁹ www.treasury.govt.nz/information-and-services/regulation/impact-analysis-requirements-regulatory-proposals.

are a range of ways this could be achieved (on a one-off, regular or occasional basis), which could be modified to wholly or partly achieve the objectives:

- i. **Greater use of inquiries under the Inquiries Act 2013:** Resources could be set aside to ensure that inquiries are the routine function used to scrutinise the NZDF when matters arise. These could be one-off or on a more ongoing basis. This would require determining the type of Inquiry (Public, Government or Royal Commission), establishing the terms of reference and appointing Inquirers. Inquiries can be, and often are, launched when there is a matter of significant public concern, in an environment where there is little information and when there is no other appropriate other body to provide scrutiny. Broadly, Inquiries can identify why an issue occurred, how the relevant agency responded, and make recommendations that might minimise the issue from occurring in the future. Inquiries are generally expensive²⁰ and take time, sometimes years.
 - ii. **Providing more resources for existing agency investigations:** Other bodies have the ability to scrutinise particular NZDF matters where they relate to their areas of jurisdiction. For example, the Serious Fraud Office and Police have existing independent powers to investigate and prosecute allegations of criminal activity, and the Office of the Auditor-General has broad-ranging and independent powers to conduct financial or performance audits and can be requested to investigate. Under this option, the Auditor-General could be asked to routinely undertake performance audits into how the NZDF undertakes its functions. Alternatively, there could be a general increase in funding to existing bodies to enable more scrutiny of the NZDF. Whether an existing body could deliver additional oversight functions is considered in Section 3.3.
 - iii. **Greater use of non-statutory inquiries or Ministerial Inquiries:** Ministers can request independent advice on any matter from appropriately qualified or trusted individuals. These types of inquiries provide no coercive powers nor do they give rise to privileges or immunities for participants. The NZDF could also appoint independent reviewers to look into matters and provide external perspectives. This option would use these to provide greater scrutiny of the NZDF.
- b. **Option Two – Establishing an IGD:** This is a regulatory option to set up a new independent body to provide oversight of the NZDF. An IGD would have key design features (scope, functions, powers, and form) that could be calibrated in different ways to meet the objectives.

How do the options compare to the status quo?

25. Detailed analysis of these options is presented in Table 1 in **Annex B**. In summary, Option Two performed best because it would offer quality, transparent oversight in a timely manner with a high degree of independence from the NZDF. The other option would not provide the same integrated and consistent oversight that the Inquiry recommended. It is not consistent with oversight over comparable bodies such as the

²⁰ Government Inquiry into Operation Burnham and Related Matters = \$7 million; Public Inquiry into the Earthquake Commission = \$3.2 million; Government Inquiry into the Auckland Fuel Supply Disruption = \$1.128 million; Government Inquiry into the Appointment process for the Deputy Commissioner of Police = \$0.264 million

Police or the intelligence and security agencies which have a specific oversight body, like an IGD.

26. Public service agencies, other oversight bodies and targeted stakeholders overwhelmingly agreed with Option Two. Only one submission received as part of the targeted consultation indicated a preference for arrangements akin to Option One.²¹

Recommendation

27. Option Two is recommended. Detail of its regulatory impact is provided in the following sections.

²¹ See Summary of Submissions Report – paragraph 59(a).

Section 3.0: Deciding on options to design the IGD

28. In line with the issues described and analysed in Section 1 (and the recommended option of establishing an IGD in Section 2), this section presents the regulatory impact analysis relating to the design of the scope, functions, powers, and form of the IGD.
29. It includes options analysis of significant issues where choices would result in different regulatory impact. Other, more specific issues (where there were not viable options or they had minimally different regulatory impacts) and details are included to show the full impacts of each option, and the proposal as a whole. The analysis on scope, functions, powers, and form of the proposed IGD is presented as three issues:
- a. **Issue 1: How should the IGD's investigatory functions be calibrated? (Section 3.1)** The Inquiry recommended that the IGD must have an own motion power to investigate or inquire into particular operational activities and into other matters on referral. There are choices about how to calibrate these functions to provide efficient and effective oversight. This also includes consideration of associated powers and reporting processes.
 - b. **Issue 2: What other functions should the IGD have? (Section 3.2)** The Inquiry envisioned that the IGD should have a role in minimising the possibility of problems occurring in the future. There are choices about what other functions would enable this vision. This also includes consideration of associated powers and reporting processes.
 - c. **Issue 3: What organisational form should the IGD take? (Section 3.3)** The Inquiry commented that the IGD could be stand-alone or associated with another body but should be independent of the NZDF. There is a choice about which organisational form the body should have to carry out its functions and powers, given the appropriate governance and accountability arrangements. This also includes consideration of organisational structure.
30. In line with Te Kawa Mataaho advice that organisational “form is based on the governance of functions and powers”,²² the analysis of Issue 3 was undertaken once the analysis of Issues 1 and 2 were completed. For the same reason, other regulatory options, such as whether an existing body’s role could be amended to deliver the functions, have been considered at Issue 3. The narrow focus of the regulatory impact analysis of these design choices is not expected to produce pronounced differences in between the options. Information on the financial costs are presented for the entire proposal at Section 3.4.

What criteria will be used for the different issues?

31. Where there were viable options for the issues, they were assessed using a multi-criteria analysis framework. Specific criteria were determined for each issue but all were guided by the outcome and objectives agreed by Cabinet.

²² <https://www.publicservice.govt.nz/resources/reviewing-mog/?e123=1928-approach-to-choosing-organisational-form>.

Section 3.1: Issue 1: How should the IGD's investigatory functions be calibrated?

What is the context for this issue?

32. The Inquiry recommended²³ that the IGD would:
- investigate, either on his or her own motion or by way of a reference, and report on particular operational activities of the NZDF to ascertain whether they were conducted lawfully and with propriety; and
 - investigate and report on such other matters requiring independent scrutiny as are referred to it by the Minister of Defence, the Chief of Defence Force (CDF), the Secretary of Defence or the Defence and Foreign Affairs Select Committee of Parliament.²⁴
33. Analysis has been undertaken on the basis that the IGD should be able to investigate any matter relating to the NZDF on referral of the Minister of Defence, CDF or the Secretary of Defence (except Veterans' Affairs).²⁵ It would also have the ability to undertake investigations on its own motion into "particular operational activities". Targeted consultation undertaken broadly supported this approach.²⁶ In effect, all activities of the NZDF would be within the IGD's scope, but its focus would be on particular operational activities, because they present the greatest risks (such as undermining public confidence in the NZDF or reputational costs to New Zealand) if something goes wrong or there are concerns about the accuracy of information provided to Ministers.
34. The ability to undertake investigations into other matters on referral ensures that separate inquiries²⁷ need not be established. It also has the benefit of future-proofing the IGD's role by ensuring that a wide range of activities, including those that are taken on by the NZDF in the future or that substantially change over time have the potential to be investigated by the IGD on request.
35. Some submitters²⁸ during targeted consultation recommended that the FADTC should be able to refer matters to the IGD. Additional analysis undertaken indicates this is not necessary. FADTC has the ability and strong powers to undertake its own inquiries and therefore is not reliant on another body (like the IGD) to undertake investigations on its behalf. There is nothing to prevent FADTC from bringing matters to the IGD's attention.
36. The IGD would 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 international partners and

²³ The Inquiry report, Chapter 1, page 33, Recommendation 2.

²⁴ As noted previously, Cabinet has agreed to this in principle but decided that the FADTC would not be able to refer matters to the IGD (see above page 3).

²⁵ The scope of the IGD would not include the activities of Veterans' Affairs, which is accountable to the Minister for Veterans, and operates primarily under the requirements of the Veterans' Support Act 2014.

²⁶ See Summary of Submissions Report – paragraphs 17 to 19.

²⁷ Under the Inquiries Act 2013.

²⁸ Five submissions – see Summary of Submissions Report – paragraphs 29(a) and 30.

domestic agencies would fall within the scope of the IGD. This approach was supported during consultation.²⁹

What is the specific policy problem for this issue?

37. The question for this issue, considering the context above, is how should the IGD's discretion to undertake own motion investigations into particular operational activities be calibrated? The discretion could be broad, narrow or in-between. Broad discretion would support the IGD's credibility and role in strengthening democratic oversight and ministerial accountability, and ensure the IGD's work does not rely too heavily on the decisions of others (through referrals).
38. However, a broad discretion could risk a proliferation of investigations that are of low-value or not in the public interest, which would be time, cost, and resource-intensive – on both the IGD itself and on the NZDF. This could cause an unreasonable interference with the efficient and effective use of military professionals.

What criteria was used?

39. The criteria for analysing the options for this issue are:
 - a. **Effective:** The IGD's own motion investigation functions provide for the IGD to determine how to effectively undertake its oversight role while minimising the impact its investigations would have on the NZDF;
 - b. **Future-proof:** The IGD's own motion investigation functions enable it to fulfil its oversight role – both now, and in the future;
 - c. **Empower:** The IGD's own motion investigations should empower the NZDF to own the results of its investigations and implement system improvements;
 - d. **Public Confidence:** The IGD's own motion investigation functions increase public confidence that issues regarding the NZDF's actions are being appropriately investigated;
 - e. **Complement:** The IGD's own motion investigation functions build upon and complement existing oversight mechanisms on defence matters; and
 - f. **Consistent:** The IGD's own motion investigation functions are consistent with similar oversight mechanisms in the national security and intelligence system.
40. Criteria a, b and d have been given double weighting because they are necessary to achieving the policy outcome.

What is the scope of feasible options?

41. The options were modelled on the range of approaches taken by other relevant oversight bodies – domestically and internationally. Some oversight bodies (for example, the IGIS) have full discretion to initiate investigations into a broad range of matters. Others (like the IPCA and the IGADF) have more limited discretion, tied to specific events or conditions being met. Therefore, the options cover the range from broad to narrow, and which identify the most serious issues or events the IGD could reasonably be expected to investigate. The options are mutually exclusive.

²⁹ See Summary of Submissions Report – paragraphs 17 to 19.

What options are being considered on the extent of IGD's discretion when undertaking own motion investigations?

42. The options are:

- a. **Option One – Full discretion:** The IGD has full discretion to initiate investigations into operational activities.
- b. **Option Two – Moderate discretion:** The IGD can initiate investigations into operational activities when it is satisfied that there are reasonable grounds to do so in the public interest, and in the event or reports, of:
 - i. widespread serious misconduct by service personnel indicative of a systemic issue; and/or
 - ii. death or serious bodily harm to civilians; and/or
 - iii. death or serious bodily harm to service personnel, indicative of a systemic issue; and/or
 - iv. deprivation of liberty, infringement of rights or other harm.
- c. **Option Three – Narrow discretion:** The IGD can initiate investigations into operational activities only in the event, or reports, of death or serious bodily harm to civilians.

How do the options compare to the status quo?

43. Detailed analysis of these options is presented in Table 2 in **Annex B**. In summary, Option One, providing the IGD full discretion to initiate investigations into operational activity, performed best because it provides the IGD the most independence, and is most likely to deliver the greatest level of public confidence. Targeted consultation undertaken supported the need for the IGD to have full discretion.³⁰ This approach is future-proof and would empower the IGD to determine the most appropriate way to undertake its oversight based on what it sees and hears – not just what may be in the public domain.
44. Any risks relating to investigations into low-value matters and increased costs are mitigated by limiting own motion investigations to defined operational activities and, like other public entities, the IGD would need to operate within budget, and account for its activities and use of resources, requiring it to prioritise its efforts. An assumption underlining this analysis is that a qualified candidate who exercises good judgement in determining and prioritising what issues require investigation would be appointed as IGD.
45. The other options were not appropriately future-proofed, and risked overly limiting the IGD's discretion, preventing the IGD from initiating an investigation into issues that fail to meet the conditions (i.e. certain events must have occurred or have been reported), but that warrant investigation. This may result in greater responsibility on the Minister of Defence, Secretary of Defence or the CDF to refer matters, which could impact public confidence in the IGD as an independent oversight body.

Recommendation

46. Option One is recommended. Officials have not attempted to quantify the monetised costs and benefits of this issue as it is part of a package of proposals and it would be

³⁰ See Summary of Submissions Report – paragraph 27.

artificial to consider costs in isolation from other functions and costs associated with the governance, organisational form and structure of the IGD. The benefits are not quantifiable in monetary terms. It is expected that there would be non-monetised benefits to the Minister of Defence, Parliament, the NZDF and the New Zealand public through increased confidence that important issues relating to the NZDF's operational activities would be independently scrutinised.

Details relating to this option

47. To appropriately capture the impact of the potential option this section provides an overview of related details that form part of the proposal.

What are NZDF “operational activities” for the purposes of the IGD’s own motion investigation function?

48. The Inquiry envisioned that the IGD would be able to undertake own motion investigations into “particular operational activities”. This needs to be defined for clarity. The policy intent is that a broad range of the NZDF’s activities should be covered by the IGD’s own motion remit, including those often conducted under secrecy, such as intelligence and special operations. Activities that do not directly relate to an operation (e.g. training in general preparation and routine activities) or are adequately covered by other oversight mechanisms should be expressly excluded from the IGD’s own motion remit (but could be covered on referral).
49. The majority of submissions received during the targeted consultation³¹ were broadly supportive of the proposal that “operational activities” would consist of any domestic or international activity:
- a. in time of war, armed conflict or any other emergency, whether actual or imminent;
 - b. 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;
 - c. declared by the CDF by notice in writing (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);
 - 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 above. This may involve collection, surveillance, reconnaissance, processing and dissemination activities.

Two submissions indicated that the approach was either too broad or too narrow.³² No further changes to this approach are recommended following consideration of consultation feedback.

³¹ Ten submitters – see Summary of Submissions Report – paragraph 20.

³² One submitter for each position - see Summary of Submissions Report – paragraph 22.

The scope of the IGD's investigatory power

50. In line with the Inquiry's recommendation,³³ the policy outcome agreed by Cabinet stated that the IGD would investigate the '*legality and propriety*' of the NZDF's actions. On further reflection, officials consider the policy outcome would be better achieved through an approach that also aims to strengthen and improve the NZDF through the identification of implementable system improvements. To that end, the IGD would establish facts, and make:
- findings (i.e. draw conclusions from the established facts); and as appropriate,
 - recommendations that further steps be taken to determine civil, criminal or disciplinary liability; and/or
 - recommendations for the improvement and benefit of the NZDF relevant to the findings of the investigation.³⁴
51. This approach provides an opportunity for resolution, catharsis, holding people and organisations to account, and regenerating public confidence. The IGD could still explore issues of legality and propriety as part of its investigations. This approach 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 approach would not preclude the IGD exploring, as part of an investigation, whether NZDF's actions were undertaken in accordance with New Zealand law, including New Zealand's human rights and international humanitarian obligations. This approach is similar to the Inquiries Act 2013, and the Public Service Act 2020. Those consulted broadly agreed with the approach, apart from one submission received during the targeted consultation who raised concerns that there was not an explicit requirement for the IGD to make findings of "legality and propriety" and questioned whether the IGD would be able to make adverse findings.³⁵ No change is necessary as this option allows for adverse findings, and findings of legality and propriety.

Associated obligations, powers and offences

52. To support its investigatory function, the IGD needs mechanisms to encourage constructive participation in its processes (including powers (with appropriate safeguards) and offences to enforce compliance). Our consultation process elicited constructive feedback which has been incorporated into the following recommendations:
- Obligations on the NZDF:** Some obligations should be put on the NZDF that would enable the IGD to undertake its investigations efficiently and to mitigate any actions or behaviour that would seek to put up barriers to oversight:
 - The NZDF is obliged to cooperate and assist the IGD in undertaking its functions;³⁶ and

³³ The Inquiry Report, Chapter 12, page 373, Recommendation 2.

³⁴ 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).

³⁵ See Summary of Submissions Report – paragraphs 31 and 32.

³⁶ It is expected that further detail on the expectations of cooperation and assistance would be determined between the IGD and NZDF for example, through a Memorandum of Understanding between the two organisations.

- ii. The NZDF, via the CDF, is obliged to notify the IGD in the event of certain things happening, including the establishment of an internal Court of Inquiry and reports of civilian harm and findings or assessments following the NZDF internal processes for responding to reports of civilian harm (such as those established by Defence Force Order 35 following the Inquiry).³⁷

One submission received during the targeted consultation recommended an additional obligation for the NZDF to report all instances where weapons were discharged.³⁸ This is not necessary as any serious issues as a result of discharge would be captured by ii above. Introducing this requirement would have a disproportionate impact on the NZDF and would be unlikely to add significant value to the IGD's work given how often weapons may be discharged in a combat situation.

- b. **Powers:** Taking account of the powers of comparable bodies and the policy objectives agreed by Cabinet, the IGD should have powers to:
 - i. summon and examine on oath any person that the IGD considers is able to give information relevant to their current investigation;
 - ii. require any person to provide information (including documents or other things in their possession or under their control) that the IGD considers is relevant to an investigation;
 - iii. enter, at a reasonable time, a defence area, or a vehicle, ship or aircraft used by the NZDF that the IGD considers to be relevant to an investigation, subject to safety or security conditions imposed under relevant Defence Regulations (following written notification to the CDF of the intent to use this power);
 - iv. access NZDF databases and information systems, and all records in the custody or control of NZDF, that the IGD considers are relevant to the undertaking of its functions;
 - v. require witnesses to disclose information that the IGD considers to be relevant to an investigation, and that would otherwise be under an obligation of secrecy (such as information subject to confidentiality requirements) without it constituting a breach of any law that requires that secrecy; and
 - vi. make orders to protect the confidentiality of witnesses, including orders to prohibit publication of the witness' name, or any other information that would tend to identify the witness.³⁹

Feedback received during targeted consultation indicated strong concerns about an earlier proposal to exclude information sourced from foreign partners and information subject to an obligation of secrecy or 'need to know' requirements from the IGD's power to access NZDF records, databases and information systems. Specifically, submitters commented that such restrictions would delay IGD investigations and undermine its ability to get at the truth.⁴⁰ As a result of this

³⁷ Defence Force Order 35 *New Zealand Defence Force Response to Civilian Harm* nzdf.mil.nz/assets/Uploads/DocumentLibrary/dfo_35.pdf.

³⁸ See Summary of Submissions Report – paragraph 42.

³⁹ This power has been included in direct response to feedback in the targeted consultation that the IGD should be able to issue suppression orders – see Summary of Submissions Report, paragraph 38(c).

⁴⁰ See Summary of Submissions Report, paragraph 40.

feedback, we amended our recommendations to provide the IGD full access to NZDF databases, information systems and records, as set out in iv above. This would be subject to the safeguards detailed below that would limit the dissemination of information by the IGD, but not introduce a barrier to the IGD's oversight.

- c. **Safeguards for information:** The IGD's powers should have corresponding safeguards to ensure their appropriate use, and to protect information during, and after, investigations:
 - i. The IGD's investigations should be conducted in private.
 - ii. Any information, document or thing received by the IGD should be privileged in the same manner as if the IGD's proceedings were a proceeding in a court.
 - iii. Information, documents or things received by the IGD should be safely and securely stored for the duration of the IGD's proceedings, in accordance with protective security requirements.
 - iv. On completion of an investigation, the IGD should return all information, documents or things provided in relation to that investigation obtained from organisations or individuals. All other information, documents or things should be kept in safe custody or disposed of securely.
 - v. The IGD⁴¹ should be subject to duties of confidentiality and non-disclosure.⁴²
 - vi. The IGD should share information only with prescribed oversight bodies and for the purpose of performing its functions.
 - vii. The IGD should consult the CDF prior to sharing particularly sensitive NZDF information in the performance of its functions.⁴³
 - viii. The IGD should not be able to publish certain information⁴⁴ unless the information can be declassified in consultation with the CDF, the Secretary and/or its other government source.
 - ix. The Minister of Defence (in consultation with CDF and any other relevant party) should have the ability to certify that information should not be disclosed, or only disclosed under certain conditions. This would permit the NZDF (or another government agency if they have provided the IGD with the information in question) to escalate concerns about how the IGD proposes to share or publish information, where they have been unable to resolve their concerns directly with the IGD.

⁴¹ Including the IGD, Deputy IGD, employees, contractors and members of the IGD's advisory panel.

⁴² In line with the IGIS and its office (see Intelligence and Security Act 2017, s 219), the IGD, Deputy IGD and IGD's employees, contractors and members of the IGD's advisory panel (in addition to holding an appropriate level of security clearance) should have a duty to keep confidential all information that comes to their knowledge. They should not be able to make a record of, use, or disclose to any other person, NZDF records or information relating to NZDF activities that they receive or access, other than in the performance of their functions.

⁴³ This should include information that, if disclosed, would be likely to endanger a person's safety, information subject to an obligation of secrecy or non-disclosure, or information likely to prejudice a) New Zealand's defence, security or international relations; b) New Zealand's ability to receive intelligence from a foreign partner or international organisation; or c) a defence agency's ability to continue performing its functions.

⁴⁴ As described at footnote 43.

The safeguards above would help to ensure that information obtained by the IGD remains subject to the strongest protections.

- d. **Safeguards for people:** In addition to safeguards to protect information, there should also be measures to protect people participating in IGD investigations (as witnesses or participants). The IGD's powers should have corresponding safeguards to protect people who are involved in investigations, encourage honest and open participation in IGD investigations, and promote transparency. For example:
 - i. Privileges that would ordinarily apply to protect persons in a civil proceeding from responding to requests for, or answering questions about, certain information should apply in IGD investigations.⁴⁵ However, persons should not be able to rely on the privilege against self-incrimination to refuse to answer questions that might tend to incriminate them in an offence. Any self-incriminating statement made to the IGD would not be admissible in any subsequent proceeding.
 - ii. Where the IGD intends to make a comment, finding or recommendation that is adverse to any person, it should provide that person adequate notice of the material it proposes to rely on, and a reasonable opportunity to respond.

Feedback from submitters was generally supportive of the protections that were proposed. Two sought clarity on whether evidence derived from a self-incriminating statement made to the IGD would be admissible in any subsequent criminal proceedings. No changes have been made to the IGD's design in response to this point. Officials consider that this matter would be for the investigating or prosecuting agency to consider.⁴⁶

- e. **Offences:** Legal offences would seek to prohibit and punish certain conduct.⁴⁷ Offences strengthen and provide a legal backstop to the powers. The following offences are proposed to support the IGD's oversight:
 - i. wilfully obstructing, hindering or resisting the IGD in the undertaking of its functions and the exercise of its powers (the penalty would be a fine of up to \$10,000);
 - ii. wilfully making false statements, misleading or attempting to mislead the IGD in its work (the penalty would be a fine of up to \$10,000);
 - iii. wilfully refusing or failing to comply with any lawful requirement of the IGD (the penalty would be a fine of up to \$10,000);
 - iv. knowing or reckless unauthorised publication of IGD information (the penalty would be a fine of up to \$10,000 for individuals and \$100,000 for body corporates). Leave of the Attorney-General would be required before this offence could be prosecuted;

⁴⁵ A full list of the safeguards proposed is contained in Appendix C of the Cabinet paper.

⁴⁶ See Summary of Submissions Report – paragraph 39(b).

⁴⁷ These offences are based on those currently in law for comparable oversight bodies in the NZ system (such as the IGIS and the IPCA) and with regard to the offences and penalty levels in the Inquiries Act 2013 and feedback from submissions. The different penalty level for body corporates was determined with regard to comparable offences in the Criminal Procedure Act 2011, the Terrorism Suppression (Control Orders) Act 2019 and the Broadcasting Act 1989.

- v. wilfully failing to comply with duty of confidentiality or non-disclosure (the penalty would be a fine of up to \$10,000 or up to two years' imprisonment). Leave of the Attorney-General would be required before this offence could be prosecuted;⁴⁸ and
- vi. knowingly failing to comply with a confidentiality order made by the IGD (the penalty would be a fine of up to \$10,000 for individuals and \$100,000 for body corporates).

As a result of feedback from the targeted consultation process that the penalties were too low given the seriousness of the conduct and in comparison to the penalty for the offence described at d(iv), the penalty for the offences described at d(i-iii) has been increased to \$10,000 from an earlier proposal for a maximum fine of \$5,000.⁴⁹ In addition, the offence at d(iv) has been amended to remove the penalty of imprisonment, to include a new mens rea element (to restrict its application to more serious offending), and to increase the fine when the conduct is done by a body corporate (previously there was no distinction made between individuals and body corporates).⁵⁰

- f. **Investigations into ongoing operations:** There may be some circumstances where the IGD's access to an operational theatre as part of an investigation should not take place due to safety or security concerns, or because of the impact the IGD's visit could have on an operation. In these circumstances, it is proposed that the CDF:
 - i. could deny an IGD visit to an operational theatre⁵¹ if it would significantly impede an operation, or risk the safety or security of IGD and/or NZDF personnel;
 - ii. could incorporate conditions on any access to an operational theatre on the same grounds; and⁵²
 - iii. must notify the reasons for such a decision to the IGD and Minister of Defence, and inform the IGD as soon as practicable of any change in the situation that would enable a visit to take place.⁵³

Submitters in the targeted consultation strongly disagreed with an earlier proposal giving the CDF the ability to prevent an investigation into an ongoing or in-theatre operation for safety and security reasons. Specifically, submitters commented that doing so would compromise the IGD's authority and ability to investigate.⁵⁴ As a

⁴⁸ This offence would supplement existing offences in the Crimes Act 1961 which capture knowing or reckless unauthorised disclosure of classified or official information (see sections 78A, 78AA and 105A).

⁴⁹ See Summary of Submissions Report - paragraph 38.

⁵⁰ See Summary of Submissions Report - paragraph 38.

⁵¹ An "Operational theatre" is defined as "a designated geographic area for which an operational-level joint or combined commander is appointed and in which a campaign or a series of major operations is conducted. It encompasses and surrounds the Joint Force Area of Operations within which a joint commander conducts operations". It may include countries that are providing assistance to deployed forces.

⁵² For example, by granting consent to access NZDF areas on a base, but not access to areas where active combat operations may be conducted.

⁵³ Visits to an operational theatre could also be subject to other approval authorities if, e.g., a partner military controls access.

⁵⁴ See Summary of Submissions Report – paragraph 37.

result of this feedback, the proposal has been significantly amended to give the IGD the final say on opening an investigation into ongoing or in-theatre operations, while ensuring that legitimate operational and safety concerns can be taken into account. This seeks to preserve the IGD's independence while recognising the additional safety and operational implications a visit to an operational theatre could give rise to.

Reporting processes

53. 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 information which could compromise national security, international relationships, and obligations of confidence. Reports should be published online. All but one submitter who commented on the reporting processes supported them.
54. Following an IGD investigation, the CDF would be required to notify the Minister of Defence, the IGD and the Secretary of any action to give effect to, or the reasons to depart from – or not implement – any recommendation.
55. Some submitters wanted a greater role for the IGD in relation to monitoring the implementation of its recommendations by the NZDF.⁵⁵ Both the IGIS and IPCA have mechanisms for providing advice (to ministers (IGIS) and the Attorney-General and the House (IPCA)) regarding the receiving body's response to recommendations. For consistency, and to support accountability, the IGD should have a similar ability to inform the Minister of Defence about the adequacy of any remedial or preventative measure taken by the NZDF in response to accepted recommendations.

⁵⁵ See Summary of Submissions Report – paragraph 47.

What are the marginal costs and benefits of aspects of the proposal described under issue one?

Affected groups	Comment <i>Nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks.</i>	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	Evidence/Certainty <i>High, medium, or low, and explain reasoning in comment column.</i>
Additional costs of the preferred option compared to taking no action			
Regulated groups:			
The NZDF	<p>There would be one-off financial costs to the NZDF when it is subject to investigation. These would be inconsistent as there would not always be investigations ongoing and investigations would vary in terms of their depth and length which would affect the compliance cost for the NZDF.</p> <p>There would be financial costs to the NZDF when considering, responding to and implementing recommendations the IGD might make. These will be inconsistent as they depend on the nature of the recommendations. They may be one-off or ongoing.</p> <p>There are potential reputational costs to the NZDF and its personnel if an investigation were to make negative comments about its conduct or practices. There is no evidence to suggest this is likely. The assumption is made because it could happen in the future and was an impact of the Inquiry.</p>	Uncertain monetised impact. Uncertain monetised impact. Uncertain non-monetised impact.	Medium Low Low
Other people involved in investigations or captured by offences	<p>These costs are likely to be one-off for individuals involved in particular investigations. It may require them to spend time and resources (e.g. travel, legal costs, other support) when participating in an investigation.</p> <p>There would be an impact on individuals who may be subject to the IGD's powers or offences. This could impact them through requiring them to be examined on oath which infringes on their freedom of expression. Those who do certain conduct may be charged with offences which come with a fine or in the case of IGD staff or appointees breaching their obligation of confidence, the possibility of imprisonment which infringes on their freedom of movement.</p>	Uncertain (likely low) monetised impact.	Low
Regulators:			
IGD	Investigations have operational financial costs for the IGD to undertake.	Uncertain monetised impact. It would be artificial to quantify the cost for this function alone.	Medium
Police	There may be one-off costs to the Police as a result of investigations and prosecutions under the new offences. It is not possible to quantify this but it is expected to be low because investigations are likely to be infrequent, powers are intended to act as a backstop, and other oversight bodies have rarely needed to rely on their offences.	Uncertain	Low
Ministry of Justice	There may be costs for court proceedings and potentially legal aid as a result of the creation of new offences. It is not possible to predict the number of cases that would be heard by the District Court (or subsequent appeals) but officials expect this to be low because other oversight bodies have rarely needed to rely on their offences and investigations are expected to be infrequent.	Uncertain	Low

Others	There may be costs on the Ministry of Defence of supporting the Secretary to undertake their role in relation to referrals.	Uncertain (likely low) monetised impact.	Medium
Crown	There may be costs to the Crown for funding the IGD through new budget funding or through reprioritisation within the baselines.	Uncertain monetised impact. Funding would either come from new spending or baselines which could have subsequent cost pressures and indirectly impact taxpayers.	Medium
Total monetised costs		See tables at Section 3.4 for detail on the monetised cost of the entire proposal.	Low
Non-monetised costs		Low	Low
Additional benefits of the preferred option compared to taking no action			
Regulated groups: The NZDF	The creation of an investigatory function (and associated obligations, powers, offences, and reporting) is likely to benefit the NZDF through increased transparency, potentially resulting in greater public trust and confidence. There are potential benefits to the NZDF's reputation if an investigation report were to make positive comments about its past conduct or practices, especially where there had been allegations of wrongdoing that were false.	Low non-monetised impact.	Low
Regulators: Ministers	Investigations would improve the quality of information to the Minister of Defence (and Ministers in Cabinet) which would enable them to better facilitate democratic oversight of the NZDF. Investigations will improve information quality and it is up to Ministers to determine how to exercise control.	Low non-monetised impact.	Medium
Others:			
Parliament	Improved quality of information received by Ministers and provided in IGD reports would benefit Parliament supporting their constitutional role in holding ministers accountable.	Low non-monetised impact.	Medium
Public	The IGD could deliver public confidence that the NZDF is operating appropriately and that if matters of concern occur they are independently investigated.	Low non-monetised impact.	Low
Wider government	An additional commitment to transparency and constitutional principles such as democratic oversight of the military and ministerial accountability to Parliament has reputational benefits for New Zealand.	Low non-monetised impact.	Low
Total monetised benefits	N/A	N/A	N/A
Non-monetised benefits		Low	Low

Section 3.2: Issue 2 - What other functions should the IGD have?

What is the context for this issue?

56. The Inquiry envisioned that the IGD would have a role in minimising the possibility of similar problems to those identified by the Inquiry from occurring in the future, but was not explicit about the other functions it could have.

What is the specific policy problem for this issue?

57. The question is what additional oversight functions would provide the requisite health-check on NZDF, without supplanting or duplicating functions currently undertaken by other oversight bodies. If not calibrated appropriately, there is a risk that the additional function is of low value, creates unnecessary jurisdictional overlap and uncertainty for existing bodies in the system, requires the NZDF to respond to multiple forms of oversight from different bodies on the same issue and duplicate information going to Ministers, Parliament and public, all at additional cost.

What criteria will be used to compare options to the status quo?

58. The criteria for analysing Issue 2 are:

- a. **Improvement:** The additional function supports system improvement by the NZDF, identifying or addressing potential issues;
- b. **Balanced:** The additional function supports the IGD's ability to effectively undertake its oversight role while minimising the impact its activities will have on the NZDF;
- c. **Flexible:** The additional function provides for flexibility and adaptability of the IGD's oversight role over time;
- d. **Confidence:** The additional function increases public confidence that issues regarding the NZDF's actions are being appropriately investigated;
- e. **Complement:** The additional function builds upon and complements existing oversight mechanisms on defence matters; and
- f. **Consistent:** The additional function is consistent with similar oversight mechanisms in the national security and intelligence system.

59. Criteria a, b and d, have been given double weighting because they are necessary to achieving the policy outcome.

What is the scope of feasible options?

60. Looking across domestic and international oversight bodies, common functions that would address the problem consideration (specifically, an assessment function, enquiry function and advisory function) were identified for further consideration. The options are not mutually exclusive.
61. The other potential functions that were considered and dismissed from further analysis (because they do not directly relate to the problem so would produce limited benefit for additional cost) were: a complaints-handling function (investigating individual complaints from the public or NZDF personnel), military justice functions (a mechanism to address any injustices in the military justice system), coronial-type functions (to inquire into the

death of service member), and advocacy/promotion functions (to promote certain values within the NZDF or to the public).

62. Some of those consulted expressed concern that the lack of a specific complaints-handling function would mean that the IGD would be unable to receive and act on reports or allegations of misconduct from NZDF military and civilian personnel, officials in the Ministry of Defence, Members of Parliament, or the public.⁵⁶
63. Nothing in the proposal precludes any person from being able to raise allegations of wrongdoing in or by the NZDF to the IGD's attention. If the IGD considers the matter warrants action, the IGD would be able to, for example, launch an investigation, if it relates to operational activities, or seek a referral from the Minister of Defence, the Secretary of Defence or CDF if the matter falls outside the scope of its own motion investigatory power.
64. Having taken into consideration feedback received in targeted consultation, a new role for the IGD to receive disclosures from NZDF personnel has been included. Though anyone would be able to draw matters to the IGD's attention, it is imperative that current and former NZDF personnel in particular feel confident in doing so, and are protected from adverse impacts relating to their employment or service. This additional role for the IGD provides additional clarity about its ability to have concerns about potential wrongdoing reported to it, addressing some of the concerns raised. The proposals on disclosures are set out in paragraph 72 below.

Options for other functions the IGD should have

65. The options are:

- a. **Option One – An assessment function:** The IGD could undertake assessments of defined operational activities on its own initiative and other matters on referral from the Minister, Secretary or the CDF. The purpose of the function is for the IGD to undertake routine assurance activity to assess processes, procedures and policies, and identify any gaps to prevent issues from occurring in future (e.g. a system health check). This approach replicates the operational activities and other activities split that exists for investigations and as such reinforces the IGD's focus on operational activities while allowing a broad coverage of the NZDF's business if needed.
- b. **Option Two – An enquiry function:** The IGD could make enquiries about NZDF operational activities. This function would allow the IGD to make information-gathering enquiries into NZDF activities to support its oversight role.
- c. **Option Three – An advisory function:** The IGD would develop and provide advice or guidance to Ministers, government, or the wider sector.

How do the options compare to the status quo?

66. Detailed analysis of these options is presented in Table 3 in **Annex B**. In summary, Options One and Two performed well. Option One (Assessments) would build the IGD's understanding of the NZDF's business, enhancing its oversight ability and leading to improved quality and relevance of findings and recommendations in investigations. Option Two (Enquiries) would enable the IGD to gather information outside of a formal investigation or assessment. This would ensure the IGD has a sound understanding of

⁵⁶ Four submitters - see Summary of Submissions Report – paragraph 74(a).

the tools and techniques used by the NZDF, particularly in light of a fast evolving international context and technological advancements in defence and security. Option Three (Advice) performed poorly in the analysis because it would provide limited value given that the IGD would be able to make recommendations under its other functions.

Recommendation

67. Option One and Two are recommended because assessment and enquiry functions would contribute to the NZDF's system improvement, identifying potential problems and preventing their occurrence, rather than only investigating when something has gone wrong. Targeted consultation undertaken supported these functions – no submitters suggested that the IGD should not have assurance functions as part of its oversight role.⁵⁷
68. It is assumed that across the NZDF there are systems and issues that would benefit from external assurance and that without other functions the IGD would be limited in its understanding of the NZDF and awareness of potential issues. These proposals would have impacts on the NZDF in terms of the costs of complying with the functions but would benefit the NZDF by identifying issues before they become problems that could require investigation. The benefit of this function is that it would provide assurance to the Minister of Defence, Parliament and the public of New Zealand that routine and independent system level health-checks of the NZDF are occurring. There is also benefit to the NZDF that it has an independent body actively considering how its systems can be improved upon. As with all proposals, officials do not anticipate any disproportionate impacts on population groups beyond NZDF.

Detail relating to this option

69. To appropriately capture the impact of the potential option this section provides an overview of related details that form part of the proposal.

Obligations, powers and offences

70. To give effect to the recommended options, the following obligations, powers, and offences are recommended:
 - a. **Obligations:** the obligations set out at paragraph 52(a) in section 3.1 of the RIS, in relation to the IGD's investigation function would also apply.
 - b. **Powers and safeguards:** the power for the IGD to access NZDF databases and information systems, and all records in the custody or control of NZDF, that the IGD considers are relevant, should apply to the exercise of all of the IGD's functions (including assessments and enquiries) to ensure the IGD has access to all required information. The safeguards described at paragraph 52(c) in section 3.1 in relation to investigations would apply here too.
 - c. **Offences:** the offences set out at paragraph 52(e) in section 3.1 in relation to the IGD's investigation function would also apply.

⁵⁷ See Summary of Submissions Report – paragraph 51.

Reporting processes

71. The following processes should apply:

- a. **Assessments:** As is the case with investigation reports, the IGD should publish its assessment reports online to promote transparency. The IGD's assessment reports should contain the IGD's findings and any recommendations and follow the same administrative process for finalisation as investigation reports.
- b. **Enquiries:** There should be no requirement for the IGD to publish its enquiries because it is essentially an information-gathering function which may lead to an assessment or investigation (the results of which would be published).

Protected disclosures

72. In response to feedback from submitters who raised concerns about the ability of NZDF whistle-blowers to provide information to the IGD,⁵⁸ the IGD should have a formal role in the protected disclosures system. While any person would be able to bring concerns about the NZDF's activities to the IGD's attention, NZDF personnel⁵⁹ are best placed to identify potential problems within the organisation. We therefore want to ensure there is an avenue for NZDF personnel to raise concerns about potential wrongdoing without fear of reprisal. The IGD should:

- a. be the “appropriate authority” for all protected disclosures made by NZDF personnel (except those relating to Veterans' Affairs), whether the information is classified or not. This would ensure that:
 - i. it is clear which entity disclosures related to the NZDF should be made to;
 - ii. NZDF personnel feel confident that they will receive appropriate protections; and
 - iii. disclosures are received and acted upon by a body with the appropriate functions, powers, expertise and relationships.
- b. be able to receive any disclosures from NZDF personnel (except those relating to Veterans Affairs). Providing the disclosure is made in good faith (as determined by the IGD), the NZDF personnel should be protected from any penalty or discriminatory treatment by the NZDF relating to their employment or service. This would encourage the reporting of any wrongdoing to the IGD, including issues which either do not meet, or are not perceived to meet, the threshold of “serious wrongdoing” set out in the protected disclosures regime.

73. Where a disclosure made in good faith relates to an operational activity, the IGD would have full discretion to investigate it on its own motion. Where a disclosure made in good faith relates to a matter outside of the IGD's own motion scope (and the IGD considers an investigation is warranted), the IGD would need to seek a referral to investigate from the Minister of Defence.⁶⁰

⁵⁸ See Summary of Submissions Report – paragraph 74(b).

⁵⁹ Includes members of the services and civil staff (as defined in the Defence Act 1990, sections 2, 11 and 61A), persons seconded to the organisation (from other militaries or other domestic organisations), individuals engaged or contracted for services (contractors), and volunteers.

⁶⁰ This differs from the IGIS, as the IGIS has a broad scope to investigate any matter on its own motion.

What are the marginal costs and benefits of the recommended options for Issue 2?

Affected groups (identify)	Comment <i>nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks.</i>	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	Evidence Certainty <i>High, medium, or low, and explain reasoning in comment column.</i>
Additional costs of the preferred option compared to taking no action			
Regulated groups:			
The NZDF	<p>There would be ongoing costs to the NZDF of being subject to assessments and enquiries. The impact on the NZDF would be less intensive than investigations but would be ongoing and would vary in terms of their depth and length, which would affect the compliance cost for the NZDF. Assessments would have a greater impact than enquiries.</p> <p>There are potential flow-on impacts for the NZDF's reputation if assessments identify problems.</p>	<p>Uncertain monetised impact.</p> <p>Uncertain low non-monetised impact.</p>	<p>High</p> <p>Low</p>
The NZDF personnel who may be subject to the IGD's powers or offences	There would be an impact on individuals who may be subject to the IGD's powers or offences. There are fewer associated powers and offences for these functions than for investigations and less of a chance they would apply to people outside the NZDF. The maximum penalty for the offences is a fine.	Uncertain low monetised and non-monetised impact.	Low
Regulators:			
IGD	Carrying out these functions and associated obligations, powers, offences and reporting would have operational costs for the IGD.	Uncertain monetised impact.	Medium
Police	There may be one-off costs to the Police as a result of investigations and prosecutions under the new offences. It is not possible to quantify this but it is expected to be low because other oversight bodies have rarely needed to rely on their offences.	Uncertain.	Low
Ministry of Justice	There may be costs for court proceedings and potentially legal aid as a result of the creation of new offences. It is not possible to predict the number of cases that would be heard by the District Court (or subsequent appeals) but officials expect this to be low as they apply to a very narrow range of conduct.	Uncertain.	Low
Others Ministry of Defence	There may be cost to the Ministry of Defence of supporting Secretary to undertake their role in relation to referrals.	Uncertain (likely low) monetised impact.	Medium
Crown	There would be costs to the Crown for funding the IGD through new budget funding or through reprioritisation within the baselines.	Uncertain monetised impact. Funding would either come from as new spending or baselines which could have subsequent cost pressures and indirectly impact on taxpayers.	Medium

Total monetised costs		See tables at Section 3.4 for detail on the monetised cost of the entire proposal.	Low
Non-monetised costs		<i>Low</i>	<i>Low</i>
Additional benefits of the preferred option compared to taking no action			
Regulated group: The NZDF	Assessments could reduce the need for the IGD to undertake investigations, and provide greater sense that the NZDF is performing well.	Low non-monetised impact.	Low
	Assessments are likely to benefit the NZDF through increased trust and confidence from the public because they know that there is an additional mechanism for identifying issues before problems arise.	Low non-monetised impact.	Low
	There are potential reputational and other benefits to the NZDF if an assessment were to identify an issue and lead to positive change such as improving safety.	Low non-monetised impact.	Low
Regulators:			
Ministers	Additional functions could provide increased confidence for the Minister of Defence (and Ministers in Cabinet) that there are independent checks on NZDF systems that will support the maintenance of a well-functioning and resilient defence force.	Low non-monetised impact.	Medium
IGD	The Assessment function could benefit the IGD by identifying issues that require investigation. The Enquiry function enables the IGD to ask a question without starting an assessment or an investigation.	Low non-monetised impact.	Low
Others			
Public	Additional IGD functions could provide benefits to the public by improving public confidence that the NZDF is operating appropriately and that if matters of concern occur they are independently scrutinised.	Low non-monetised.	Low
Wider government	An additional commitment to transparency and constitutional principles such as democratic oversight of the military and ministerial accountability to Parliament has reputational benefits for New Zealand.	Low non-monetised impact.	Low
Total monetised benefits	N/A	N/A	N/A
Non-monetised benefits		<i>Low</i>	<i>Low</i>

Section 3.3: Issue 3 – What organisational form should the IGD take?

What is the context for this issue?

74. The Inquiry commented that the IGD could be stand-alone or associated with another body, specifically a “separate unit of the Ministry of Defence,” but must be “located outside the NZDF”.⁶¹ It did not propose a particular organisational form.
75. To assist in determining the best organisational form for the IGD, officials developed the following governance and accountability arrangements for the IGD. These are common features of bodies who have functions inside the Executive branch of government, do not undertake any functions on behalf of the House of Representatives, require decision-makers to be independent from ministerial influence, and where public trust and confidence is paramount. These arrangements were broadly supported during consultation.

Operational independence from Ministers

- a. **The IGD should not be required to give effect, or have regard, to Government policy:** The IGD is not intended to be a vehicle for delivering the Government’s policy priorities as they change over time. It must carry out its statutory functions and powers independently.
- b. **The IGD should be appointed, and removed, by the Governor-General on the recommendation of the House of Representatives:** This is in line with the appointment of the IGIS and IPCA. Democratic oversight of the military may be strengthened by the House having a say in the appointment of the IGD. This would enhance the perceived independence and standing of the body.
- c. **When determining its annual work programme, the IGD should take the views of the Minister of Defence into account:** For clarity and accountability, the IGD should be required to set out its strategic priorities and intended programme of work for the year ahead on an annual basis. The Minister of Defence should be consulted on the work programme and may provide feedback which the IGD should take into account unless there are clear and compelling reasons not to. The Minister of Defence should table the IGD’s work programme in the House of Representatives.

Organisational effectiveness and public accountability

- a. **The IGD should have a fused governance and executive role:** The IGD should be structured as an individual undertaking both a governance and executive role (like the IGIS and Privacy Commissioner) rather than a multi-person board (like the IPCA).
- b. **The IGD should produce an annual report:** An annual report, focussing 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 Minister of Defence should table the IGD’s annual report in the House of Representatives.

⁶¹ The Inquiry Report, Chapter 12, page 372, paragraph 50.

What is the specific policy problem for this issue?

76. In previous sections the RIS has addressed what functions and powers the IGD should have. The remaining substantive issue is whether an existing body should be given the IGD's functions and powers or, if a new entity is established, what organisational form it should take.

What criteria will be used to compare options to the status quo?

77. The criteria used to consider the appropriate form of the IGD are:

- a. **Strategic fit:** Proposed purpose and role are compatible with and fit within the outcome framework of the prospective agency (now and for the foreseeable future);
- b. **Compatibility of functions:** Compatibility of functions and activities with the prospective agency's output framework and functions. Any 'conflict of interest'?
- c. **Compatibility of powers:** Compatibility of any powers required to perform functions with the prospective agency's role and mandate;
- d. **Reputation, relationships & responsiveness:** Agency has trust and credibility in the particular field, strong relationships with relevant agencies, groups and individuals, responsiveness to stakeholder needs and expectations;
- e. **Special characteristics:** Agency has the ability to preserve/maintain any special characteristics associated with functions and objectives (e.g. fit with purpose, nature, membership and needs of particular groups; 'empathy' with stakeholders). In this instance, these are *independence* and having regard to *military context*;
- f. **Proportionate:** Form is appropriate for the scale and size of functions and powers;
- g. **People:** Agency has the skills, knowledge, experience required to perform functions and achieve desired outcomes;
- h. **Culture:** Agency has a culture which recognises the value/contribution of the role and functions and willingness to pursue their advancement;
- i. **Processes and technology:** Agency has the availability of systems and processes to support the functions and objectives, and the capability to ensure systems are kept up to date and to ensure good practice;
- j. **Physical assets:** Agency has the availability and maintenance of resources for people to do the job required; and
- k. **Internal structure:** How effectively is the prospective agency organised e.g. would the function be at risk of being 'buried' or would it have the critical mass to flourish?

78. Criteria a, b, c, e, f and j have been given double weighting because they are necessary to achieving the policy outcome.

What is the scope of feasible options?

79. Consideration has been given to whether the IGD's functions and powers could be consolidated into an existing body and what organisational form it would take if it were a new entity. The only new options being analysed are those that would suit the governance and

accountability arrangements described above. Therefore, several organisational form options have been dismissed from further analysis.⁶² The options are mutually exclusive.

Options for the IGD's organisational form

80. The options are:

- a. **Option One – IGIS:** The IGIS would undertake the proposed IGD functions, consolidating new functions in an existing body.
- b. **Option Two – Ministry of Defence:** The IGD would be established as an independent statutory officer within the Ministry of Defence to undertake all functions proposed for the IGD. This option was specifically mentioned by the Inquiry as a possibility.
- c. **Option Three – Independent Crown entity:** The IGD would be established as a new independent Crown entity (ICE). The ICE organisational form, established by the Crown Entities Act 2004, provides strong independence (ICEs cannot be directed in regard to their statutorily independent functions or to do any act⁶³ or to have regard for government policy)⁶⁴ and has set reporting obligations (a three-yearly statement of intent, an annual statement of performance expectations and an annual report). A department would need to undertake a performance-monitoring role to assist the Minister. These requirements have compliance costs to both the entity and the monitoring department. The IGD would require approximately two additional FTE staff and the monitoring department (assuming it has an existing monitoring function) would need an additional one FTE staff.
- d. **Option Four – Independent statutory officer:** The IGD would be established as a new independent statutory officer associated with a ministerial portfolio. This is a bespoke organisational form, with all aspects of structure, appointments and reporting obligations set out in an establishing Act. This would follow the precedent of the Intelligence and Security Act 2017, which sets out the IGIS's functions, powers, governance arrangements and reporting obligations (including the preparation of an annual work programme and an annual report). The bespoke form also allows for ensuring the IGD has a strong degree of real and perceived independence. This model would require an administering department to provide advice to Ministers on appropriations and appointments. The IGD could meet its compliance obligations without additional staff but the administering department (assuming it currently undertakes this function) would require an additional 0.5 FTE staff for the administration and 0.5 FTE staff for two months each time an appointment process is undertaken.

How do the options compare to the status quo?

81. Detailed analysis of these options is presented in Table 4 in **Annex B**. In summary, analysis showed that neither Option One (IGIS) nor Two (Ministry of Defence) was worth pursuing. Option One scored poorly because the IGIS has been calibrated to oversee the intelligence

⁶² Options dismissed include: The IPCA undertaking all functions was dismissed as it is primarily a complaints handling body and the IGD will not have this function; providing functions relating to military intelligence to the IGIS and the rest to the IPCA was dismissed as it would frustrate coherent oversight of the NZDF as a whole, as investigations may cover operations that had involved both intelligence and non-intelligence aspects; the following forms were dismissed from further analysis: department, departmental agency and Crown agent (as there is high degree of Ministerial control or oversight over these agencies), autonomous Crown entity and Public Finance Act Schedule 4 Organisation (as there is still too high a degree of Ministerial influence), and Office of Parliament (as IGD does not have functions outside the Executive branch).

⁶³ Section 105 of the Crown Entities Act 2004.

⁶⁴ Section 113 of the Crown Entities Act 2004.

agencies, which are very different to the NZDF. Furthermore, the IGIS is currently structurally and technologically reliant on the NZDF which would affect perceptions of independence.

82. Option Two scored poorly because the IGD's functions are not a good strategic fit with the Ministry's, given the bespoke structural, legislative and constitutional arrangements between both the Ministry and the NZDF. The Secretary and the CDF enjoy equal status as servants of the Minister - their skills are complementary and fused in partnership and the Ministry exercises its statutory functions in an integrated manner with the NZDF (including in relation to operational activities). As such, this Option could lead to perceptions of a conflict of interest. This risk is exacerbated by the recommendation of the Expert Review Group (ERG) that there needs to be strengthened integration between the NZDF and Ministry of Defence so that there is meaningful participation by both agencies in decision-making before, during and after an operational activity. The ERG also recommended the development of a policy adviser capability that would see Ministry staff deployed on NZDF operations alongside military personnel. Additionally, the Ministry is co-located with the NZDF and shares Information Management and IT systems.
83. Options Three (Independent Crown Entity) and Four (Independent statutory officer) both performed well, however Option Four scored best because it provides a strong degree of independence and its reporting requirements are more proportionate to the proposed size of the IGD.⁶⁵ While the bespoke form of Option Four allows for any level of independence, the proposed governance and accountability arrangements would make its level of independence very similar to an ICE (Option Three).⁶⁶ It could not be directed in terms of government policy or the undertaking of its functions but the Minister would have a role in providing feedback on its work programme and would have an interest in supporting its organisational performance.
84. The reporting obligations under Option Four would be more proportionate, and would not require additional staff for the IGD or monitoring department to meet them. This makes Option Four less resource-intensive than Option Three. The governance documents that the IGD would need to produce under Option Four (an annual work programme and annual report) are less onerous than Option Three but still provide for appropriate accountability.

Recommendation

85. Option Four is recommended and targeted consultation has shown support for this approach, especially in relation to the need for the IGD's form to enable strong independence for the IGD in undertaking its functions.⁶⁷ It is expected that there would be non-monetised benefits to the Minister of Defence, Parliament and the New Zealand public. The key benefit of the recommended option is that it balances the need for the IGD to be sufficiently independent to deliver its functions and maintain public confidence, but also to perform its role to support the Minister to uphold their obligations in respect of democratic oversight and ministerial accountability. While the Minister would have the ability to comment on the IGD's annual work programme, the IGD would have responsibility for finalising it, and would undertake its functions and exercise its powers independently of ministers. Targeted consultation showed support for the accountability arrangements, including, in particular, the IGD's ability to finalise its work programme.⁶⁸

⁶⁵ See paragraphs 88 to 91 for discussion of the structure and size of the IGD's office.

⁶⁶ Ministers have a narrow ability to direct ICEs as a group to comply with requirements for the purposes of a "whole of government approach" (per section 107 of the Crown Entities Act 2004) but this would not meaningfully affect their independence.

⁶⁷ See Summary of Submissions Report – paragraph 61.

⁶⁸ See Summary of Submissions Report – paragraph 60.

86. There are monetised costs for: operational funding for the IGD to produce an annual work programme and annual report; for the administering department for the work required for appointments; and for the NZDF and MoD in supporting Ministers, in providing feedback on the annual work programme. Benefits would include public accountability through the work programme and the annual report, which would also support public confidence in the IGD. This should not affect any population groups more than others. Information on the monetised costs is provided in Section 3.4.

Detail relating to the option

87. To appropriately capture the impact of the potential option, this section provides an overview of related details that form part of the proposal but where multi-criteria options analysis is not required as there are minimal differences in terms of regulatory impact or there were not viable options.

Structure of the IGD's office

88. The experience or skill set of the IGD or deputy IGD would not be prescribed in legislation but would be addressed through the appointments process. Some submitters were of the view that former NZDF personnel or Ministry of Defence employees should not be eligible to be appointed as the IGD.⁶⁹ Like the approach undertaken with the IGIS, it is important not to limit the pool of suitable candidates (such as current Judges who had served in the NZDF very early in their career) and appropriateness should be judged on a case by case basis through the appointments process.

89. It is recommended that the IGD office be established with a small size of five FTE. Three submissions were concerned that this was too few staff and / or further resources should be made available to it.⁷⁰ The proposed starting size will provide proportionate and cost-effective oversight, and there is opportunity for the office to scale up and seek any additional resources as needed.

90. In summary, officials recommend, and those consulted broadly support, that the IGD is established with the following structural arrangements:

- a. **The IGD:** would be an appointed statutory officer (for a term of up to five years, and could be reappointed once for a second term of up to three years).⁷¹
- b. **The Deputy IGD:** would be an appointed statutory officer to support the IGD (for an initial term of up to three years and could be reappointed for further terms).⁷²
- c. **Three other staff (one office manager and two investigators):** It is difficult to accurately estimate the number of FTEs that would be required to support the IGD in the exercise of their functions. The level of investigative, analytical and administrative support may be less in the first six-to-twelve months of the IGD's establishment, compared to following years as the expertise, knowledge and understanding of the NZDF's business grows and evolves.

⁶⁹ Three submitters were opposed to the IGD being a former NZDF Service person, and two of them were also opposed to the IGD being a former Ministry of Defence official. See Summary of Submissions Report – paragraph 64.

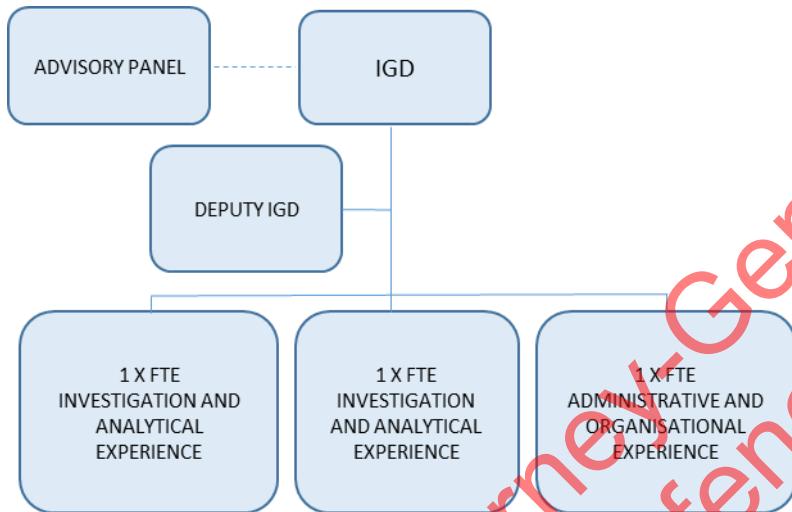
⁷⁰ See Summary of Submissions Report – paragraphs 62 and 63.

⁷¹ This term length is in line with that of the IGIS.

⁷² This term length is in line with that of the Deputy IGIS.

- d. **Specialist technical expertise:** 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 or other specialist advice⁷³ where it is not available within the skillset of the IGD or their staff. Therefore, the IGD would be able to appoint an advisory panel; and also procure specialist advice on a case by case basis.

91. This is represented visually below:



Accountability and oversight

92. Two submitters had questions regarding who the IGD would be accountable to. To equip the IGD to undertake its oversight role effectively, we are proposing to provide it with broad powers and the necessary degree of independence in undertaking its functions. In light of this, the IGD should itself be subject to oversight and accountability mechanisms to provide an additional layer of confidence that it is delivering its functions lawfully, fairly and responsibly.
93. These settings have been developed in consultation with relevant oversight bodies and are in line with comparative analysis of existing oversight bodies, the principle that oversight mechanisms should apply unless there is a good reason. Some exceptions to oversight that would ordinarily apply to new bodies are proposed because of the need to safeguard the IGD's ability to seek and receive information to perform its functions, the IGD's small starting size, the high likelihood of disproportionate administrative burden, and the obligations on the IGD to report publicly on most of its activities. The following settings are recommended:
- a. **Avenues to challenge IGD decisions:** The IGD should be subject to judicial review, Ombudsman oversight, and Privacy Commissioner oversight;
 - b. **Privacy Act 2020:** The IGD should be obliged to protect personal information under the Privacy Act 2020, but exempt from the Information Privacy Principles 6 and 7 (obligations to provide access to, and correct, personal information) except where the personal information relates to a current or former IGD employee.⁷⁴ This would reduce the risk that requests could be used to access the IGD's investigation files;

⁷³ E.g. technology (such as cybersecurity, AI, machine learning), engineering or legal expertise (in defence, intelligence and security, technology, international humanitarian law or detention).

⁷⁴ This position is consistent with that for the Auditor-General however, the Ombudsman is not subject to the Privacy Act, and the IGIS and IPCA use various mechanisms (e.g. secrecy, privilege and non-publication provisions) to ensure the workability of each scheme is not hampered.

- c. **Public Records Act 2005:** The IGD should be subject to the Act and monitored by Archives NZ which is consistent with all existing oversight bodies, including the IGIS, IPCA and Ombudsman;
- d. **Official Information Act 1982:** The IGD should be subject to the Act, except where information relates to an investigation, assessment or enquiry (including information the IGD receives in evidence, and correspondence with other oversight bodies, public service agencies and Ministers), to preserve the IGD's ability to seek and receive information in confidence.⁷⁵ Public transparency of the IGD's activities would also be supported by the IGD's obligations to publish its work programme and annual report, and to report publicly on investigations and assessments;
- e. **Public Audit Act 2001:** The IGD should not be a “public entity” under this Act. This means its financial performance would not be subject to annual auditing by Auditor-General. This is appropriate given the IGD’s administering agency will be subject to annual audit;⁷⁶
- f. **Public Finance Act 1989:** The IGD should be exempted from obligations to prepare end-of-year performance information under this Act, as it is not likely to be informative, and the IGD’s proposed annual expenditure is less than \$5 million;⁷⁷ and
- g. **Protected Disclosures:** IGD employees should be able to make protected disclosures about serious wrongdoing in, or by, the IGD to the Minister of Defence. This proposal differs from the IGIS, in that IGIS employees direct their disclosures to the Prime Minister. We consider the Minister of Defence appropriate because the current IGD design features do not propose a role for the Prime Minister similar to that exercised under the Intelligence and Security Act 2017.

The position in relation to the application of the OIA has been amended following consultation with the Office of the Ombudsman to provide a greater ability for people to make requests for information without compromising the IGD’s ability to seek and receive information in confidence. The original position was that the OIA would not apply to the IGD but that requests about it could be made to its administering department that would hold information about it.

⁷⁵ This position would differ from the IGIS and IPCA (which are both exempt from the OIA).

⁷⁶ This would be consistent with the IGIS.

⁷⁷ This would be consistent with the IGIS.

What are the marginal costs and benefits of the suite of proposals for Issue 3?

Affected groups (identify)	Comment <i>nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks.</i>	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	Evidence Certainty <i>High, medium, or low, and explain reasoning in comment column.</i>
Additional costs of the preferred option compared to taking no action			
Regulated groups: The NZDF	Cost on the NZDF of supporting CDF to undertake their role in relation to referrals and supporting the Minister as required in commenting on the Annual Work Programme.	Uncertain (likely low) monetised impact.	Medium
Regulators:			
IGD	Developing the work programme, annual reporting, staffing, advisory panel and other organisational aspects would have operational costs for the IGD.	Uncertain (likely low) monetised impact. It would be artificial to quantify the cost for this function alone.	Medium
Crown	Costs to Crown will depend on how the establishment and operating costs of the IGD is funded (e.g. through new budget funding or through reprioritisation within the baselines).	Uncertain (likely low) monetised impact. Funding would either come from new spending or baselines which could have subsequent cost pressures and indirectly impact on taxpayers.	Medium
Others:			
Ministry of Justice as Administering department	There would be a cost for the administering department of providing services to the IGD such as running the appointments process, assisting with appropriations and other services that may be provided.	Certain monetised impact - \$115,000 per annum (modelled on cost of providing services to IGIS).	Medium
Ministry of Defence	Cost on Ministry of Defence of supporting Secretary to undertake their role in relation to referrals and supporting the Minister as required in commenting on the Annual Work Programme.	Uncertain (likely low) monetised impact.	Medium
Total monetised costs		See the table at Section 3.4 for detail on the monetised costs of the entire proposal.	
Non-monetised costs		Low	
Additional benefits of the preferred option compared to taking no action			
Regulated groups: The NZDF	The NZDF are likely to play a role in supporting the Minister to provide input into the IGD's annual work programme which would enable them to use the IGD to assist with system improvement	Low non-monetised impact.	Low
Regulators:			
Minister	This has benefits for the Minister as they can influence the IGD's performance through their involvement in the appointments process, referring matters for investigation or assessment, and providing feedback on the annual	Low non-monetised impact.	Medium

	work programme while maintaining a strong degree of independence for the IGD which supports public confidence.		
Others:			
Public	These proposals would have positive impacts for the public as they provide a strong level of independence for the IGD in carrying out its role which would support the delivery of its functions.	Low non-monetised impact.	Low
Total monetised benefits	N/A	N/A	N/A
Non-monetised benefits		Low	Low

Released by the Attorney-General
and Minister of Defence

Section 3.4: Financial information for the entire proposal

94. This table shows our modelling for the financial impact of the entire proposal.

Cost type	Estimated Cost
IGD operational costs	s9(2)(f)(iv), s9(2)(g)(i), s9(2)(j)
Costs for other bodies	

Released by the Attorney-General
and Minister of Defence

Section 4: Delivering an option

How would the new arrangements be implemented?

95. [REDACTED] s9(2)(f)(iv), s9(2)(g)(i)
- Funding for the establishment of the IGD will follow a separate process and funding decisions would be undertaken via regular Budget processes. These processes are being led by the Ministry of Defence and any legislation enacted is expected to be administered by the Ministry.
96. It is proposed that the Ministry of Justice should be the administering agency for the IGD, as described in Section 3.3 (providing support for appointments and appropriations). As the Ministry of Justice has previous experience in undertaking the function for the IGIS, a relatively seamless operationalisation of the policy proposal is expected if appropriate funding is made available to it.
97. A transition period is expected between the passage of any legislation and the operation of the IGD's office. In this interim period, it is expected that the administering agency would need a small team to establish the IGD. This team would support Ministers and the House to appoint the IGD and Deputy IGD and support the IGD to recruit its staff. It would ensure that the IGD has access to physical infrastructure, ICT, invoicing and HR support. Appointments of the IGD, Deputy IGD and its investigators would be subject to successful security vetting which is expected to take months, as is standard process.
98. [REDACTED] s9(2)(f)(iv), s9(2)(g)(i)
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
99. The implementation would primarily impact the NZDF. Officials have worked with the NZDF throughout the development of the policy and will continue to do so as the policy is implemented to ensure successful operationalisation. Once the office of the IGD is up and running, then it is expected that it may choose to enter into a memorandum of understanding with the NZDF to agree to operational and administrative procedural matters that have not been set out in legislation. It is also expected that both the IGD and the NZDF would create their separate individual policies to guide staff on how to interact with the oversight body and the body being overseen.

How will the new arrangements be monitored, evaluated, and reviewed?

100. Monitoring of the IGD's performance is established through the preferred option. It would prepare an annual work programme and then report on its activities to the Minister and the public in an annual report.
101. A post-implementation review of the legislation or the body has not been recommended. Officials expect the Ministry, through its regulatory stewardship responsibilities, would monitor the operation of any legislation and recommend amendments to the Minister if needed. It is also expected that reviews regarding funding and operational needs will occur organically as the IGD and the administering agency look to the additional growth needs of the IGD. The IGD is expected to use its discretion to undertake reviews as it sees fit to assess user outcomes to understand its impact on the oversight system.

Annex A: 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 B: Multi-criteria options analysis tables

This annex contains the following tables:

- Table 1: Multi-criteria analysis of options to address the problem identified by the Inquiry.
- Table 2: Multi-criteria analysis of options for own motion functions.
- Table 3: Multi-criteria analysis of options for additional functions.
- Table 4: Multi-criteria analysis of form options.

For all tables the following key has been used.

Key for qualitative judgements:

- ++++ much better than doing nothing/the status quo/counterfactual
- +++ better than doing nothing/the status quo/counterfactual
- ++ somewhat better than doing nothing/the status quo/counterfactual
- + slightly better than doing nothing/the status quo/counterfactual
- 0 about the same as doing nothing/the status quo/counterfactual
- slightly worse than doing nothing/the status quo/counterfactual
- somewhat worse than doing nothing/the status quo/counterfactual
- worse than doing nothing/the status quo/counterfactual
- much worse than doing nothing/the status quo/counterfactual

Table 1: Multi-criteria analysis of options to address the problem identified by the Inquiry

	Option One (a) Inquiries Act	Option One (b) Existing bodies	Option One (c) Non-statutory inquiries	Option Two – Establishing an IGD
Criteria 1: Actual and perceived independence from the NZDF	++ <i>High degree of independence. While it is arguable that this depends on who the inquirers are, inquirers have a duty to act independently, impartially and fairly per Section 10 of the Inquiries Act.</i>	++ <i>High degree of independence as functions would be undertaken by bodies outside the NZDF.</i>	+ <i>Degree of independence. While this is better than status quo, there is some risk that non-statutory inquiries (whether they are commissioned by the Minister or the NZDF) would not be perceived as affording the same degree of independence as Inquiries under the Inquiries Act or other statutory oversight functions undertaken by other external bodies.</i>	++ <i>High degree of independence: It could be designed to afford high degree of independence from the NZDF.</i>
Criteria 2: Timeliness	++ <i>Takes time to establish, appoint Inquirers, find premises to set up, ensure there is secretariat support and access to SCIF etc., and come up to speed.</i>	+++ <i>Timeliness would not be disrupted by establishment delays and the need to come up to speed, however scrutiny would be competing against other work programme priorities that they have.</i>	+ <i>Takes time to establish, appoint Inquirers, find premises to set up, ensure there is secretariat support and access to SCIF etc. and come up to speed. This option does not overcome the challenge of being reliant on cooperation to be provided with the necessary information.</i>	+++ <i>Once the IGD is established, it would not face the same delays as option 1(a) and (c) and because it would be dedicated to the NZDF, there is no risk of delay due to competing priorities.</i>
Criteria 3: Quality	++ <i>Inquiries will have dedicated resource, functions and powers so likely to provide high quality scrutiny. If the terms of reference gave the Inquiry an investigative focus it would allow the appointment of people with a more diverse, and relevant skillset, on a case by cases basis which may improve the quality of oversight.</i>	+ <i>If additional resources were provided, especially for routine audits, then this option would have the dedicated people, functions and powers to produce quality scrutiny. However, existing bodies have different oversight jurisdiction and it appears that for the problems that triggered the Inquiry, these existing bodies did not have the appropriate jurisdiction or functions and powers to undertake the independent scrutiny required.</i>	+ <i>Does not have the requisite coercive powers of the Inquiries to afford the same rigour of scrutiny.</i>	+++ <i>Would have the benefits of all the options, and could have functions to ensure that it can both investigate matters when they occur, but also prevent issues from occurring, through new assurance functions. It could have standing capability to provide oversight over the NZDF and also enable expertise to be brought in on a case by case basis (without the same time delay of option 1(a)).</i>
Criteria 4: Transparent	++ <i>High degree of transparency: Inquiries allow for significant transparency. It however does not allow complete transparency when national security issues are at play. So while there may be an increase in public understanding of the process, not all of the considerations may be assessable to everyone remains complex and decisions to refer are not accessible to the public.</i>	++ <i>High degree of transparency: allows for significant transparency. It however does not allow complete transparency when national security issues are at play. So while there may be an increase in public understanding of the process, not all of the considerations may be assessable to everyone remains complex and decisions to refer are not accessible to the public.</i>	+ <i>A degree of transparency. While this option can show transparency in terms of its own process, because it will be limited by the type of information it has, any transparency it can afford to others is more limited than the other options. May be more limited transparency with this option as commissioning party (i.e. Minister or the NZDF) would be under no obligation to publish all or part of the findings but they would be subject to the Official Information Act.</i>	++ <i>High degree of transparency through could be achieved through its reporting and accountability obligations. It would have similar constraints in relation to classified information but this could be mitigated, for example, through an obligation to produce unclassified versions of reports.</i>
Overall assessment	Total: 8 (out of 16) <i>Inquiries are transparent and support public confidence but are slow and costly.</i>	Total: 8 (out of 16) <i>This option leverages existing systems but fails to provide coherent organisation-wide oversight over the NZDF.</i>	Total: 4 (out of 16) <i>This option is flexible but does not provide any additional powers, relying on the consent of the NZDF. It would not adequately support public trust and confidence.</i>	Total: 12 (out of 16) <i>This option supports quality, thorough and independent oversight focused on the NZDF, allowing organisation-wide oversight. It would support public trust and confidence.</i>

Table 2: Multi-criteria analysis of options for own motion functions

	Option One – Full discretion for IGD to initiate investigations into operational activities	Option Two – IGD can initiate investigations into operational activities when it is satisfied that there are reasonable grounds to do so in the public interest, and in the event or reports of certain things... (see options section above for full list)	Option Three – IGD can initiate investigations into operational activities in the event, or reports, of death, or serious bodily harm to civilians
Criteria 1: Effective The IGD can determine how it undertakes its oversight role while minimising the impact its investigations will have on the NZDF	+++ (x2) <i>Supports independence as no need for approvals or other conditions to be met to undertake investigations. Limited certainty for the NZDF as regards when/on what matters IGD will investigate. Risk of high impact on the NZDF if proliferation of low-value investigations (but IGD's own \$ and resource constraints should limit this as well as general requirements for IGD to account for use of own resources).</i>	+++ (x2) <i>Narrows discretion to some degree. However, breadth of conditions, including 'infringement of rights' and 'other harm' likely includes the majority of circumstances that IGD could be expected to investigate. Greater certainty for the NZDF as regards the matters IGD will investigate, though 'other harm' could be interpreted broadly. Reduced risk of high impact on the NZDF (time, cost, resource) as low-value investigations less likely.</i>	+ (x2) <i>Imposes a significant limitation on IGD's discretion. IGD would not be able to investigate on its own motion operational activities that resulted in anything other than death or serious bodily harm, unless referred by the Minister, Secretary or the CDF. Provides a high degree of certainty to the NZDF as regards the matters IGD will investigate and limits the impact on the NZDF (time, \$, resource) as number of investigations likely to be lower.</i>
Criteria 2: Future proof Investigation functions provide flexibility for IGD to fulfil its oversight role – both now, and in the future	++++ (x2) <i>Future-proof and flexible.</i>	+++ (x2) <i>Not entirely future proof. Risk that new scenarios and circumstances (as a result of the changing nature of conflict) that do not result in traditionally understood notions of harm will not be covered, thus greater reliance on referral from Minister, Secretary or the CDF to investigate in these circumstances.</i>	+ (x2) <i>Fails to take account of the current and changing nature of the NZDF. For example, an increased reliance on technology that may not result in death or serious bodily harm but may warrant investigation by IGD on own motion rather than referral.</i>
Criteria 3: Empower Investigation functions empower the NZDF to own the results of its investigations and implement system improvements	++ <i>If IGD undertakes investigations on what could be perceived as frivolous or minor matters, then there is risk that investigations are regarded as unnecessary, and any recommendations not being embraced.</i>	++ <i>Depends to some degree on how the IGD interprets the 'infringement of rights' and 'other harm'.</i>	+++ <i>More likely that recommendations will be embraced under this option as they would be rare in only in the gravest of circumstances.</i>
Criteria 4: Public confidence Investigation functions increase public confidence that issues regarding the NZDF's actions are being appropriately investigated	+++ (x2) <i>Allowing IGD full discretion will provide public confidence re: oversight of the NZDF operational activities.</i>	+++ (x2) <i>Doesn't provide total public confidence, as in some instances, IGD will be reliant on a referral before it can investigate issues. However, the breadth of conditions provides relatively broad discretion to initiate investigations into a range of issues, which would provide public confidence re: oversight of NZDF operational activities.</i>	+ (x2) <i>Issues of concern to the public that do not meet the conditions can't be investigated by the IGD on own motion. IGD therefore would need to wait for a referral. This transfers responsibility for the initiation of investigations on any other matter not covered by conditions from IGD to the Minister, Secretary and the CDF, risking the IGD's credibility.</i>
Criteria 5: Complement Investigation functions build upon and complement existing oversight mechanisms on defence matters	++ <i>Risk of some overlap with the statutory functions of other agencies, depending on specific matters being investigated. Can be managed through consultation and other requirements (e.g. refer to other body, defer until other body has completed own investigation, decline to investigate).</i>	++ <i>Similar risk of some overlap with the statutory functions of other agencies, depending on specific matters being investigated. But can be managed through consultation and other requirements (e.g. refer to other body, defer until other body has completed own investigation, decline to investigate).</i>	++ <i>Limited risk of overlap with statutory functions of other bodies given the conditions that must be met (though still a risk given Courts of Inquiry would be stood up; possible WorkSafe or NZ Police interest also).</i>
Criteria 6: Consistent Investigation functions are consistent with and as robust as those in the national security system	0 <i>IGIS own motion has extremely broad scope; IPCA own motion is more limited as mostly complaints driven.</i>	0 <i>IGIS own motion has extremely broad scope; IPCA own motion is more limited as mostly complaints driven.</i>	0 <i>IGIS own motion has extremely broad scope; IPCA own motion is more limited as mostly complaints driven.</i>
Overall assessment	Total: 26 (out of 36) Democratic accountability and increased public confidence likely to be achieved.	Total: 22 (out of 36) Democratic accountability likely to be achieved but risk of reduced public confidence by including limitations on own motion investigation function. Some risk of reduced future proofing as no own motion into matters that fall short of specified conditions, though 'infringement of rights' and 'other harm' can be interpreted broadly.	Total: 13 (out of 36) Greater risk of not achieving democratic accountability and increased public confidence given limited scope. Risk that option fails to take account of the NZDF's business in the future (technological developments etc.) meaning increasing reliance on referrals for IGD.

Table 3: Multi-criteria analysis of options for additional functions

	Option One – Assessments	Option Two – Enquiries	Option Three – Advisory
Criteria 1: Improvement - The additional function supports system improvement by the NZDF, identifying or addressing potential issues	<p>+++ (x2)</p> <p>The IGD could play a key role in providing independent assessment of NZDF activities. For example, assessing whether policies and processes are in line with best practice standards, or generally assessing the overall health of part/s of the system (e.g. military justice). Risk of relationship damage and lower likelihood of the NZDF embracing the outcome of an assessment if proliferation.</p>	<p>+++ (x2)</p> <p>Information obtained from enquiries may flag potential concerns about the way in which operational activities are being undertaken.</p>	<p>+ (x2)</p> <p>Could support system improvement by the NZDF [and others]. However, the IGD's investigation reports would essentially contain advice in the form of recommendations for change which the NZDF will be required to consider</p>
Criteria 2: Balanced - The additional function supports the IGD's ability to effectively undertake its oversight role while minimising the impact its activities will have on the NZDF	<p>++ (x2)</p> <p>Information obtained from audits and assessments may flag potential concerns about the way in which operational activities are being undertaken, which will inform the IGD's investigation function. Will inform IGD's own knowledge and understanding of the NZDF's business, enhancing oversight ability and likely to improve quality/relevance of findings and recommendations in investigations. Risk of administrative burden on the NZDF (time, cost, resource), especially if there is a proliferation.</p>	<p>++++ (x2)</p> <p>Will inform IGD's knowledge and understanding of the NZDF's business, enhancing oversight ability and likely to improve quality/relevance of findings and recommendations in investigations. Information obtained from enquiries may flag potential concerns about the way in which operational activities are being undertaken. Risk of some administrative burden on the NZDF (time, cost, resource), especially if proliferation of information gathering requests.</p>	<p>0 (x2)</p> <p>An advisory function does not support the IGD's oversight role</p>
Criteria 3: Flexible The additional function provides for flexibility and adaptability of the IGD's oversight role over time.	<p>+++</p> <p>Future-proof and flexible.</p>	<p>+++</p> <p>Future-proof and flexible, although limiting enquiries to operational activities may prevent the IGD from understanding other NZDF activities in depth which could be of benefit if the NZDF, and/or the IGD's role, is required to adapt in the future.</p>	<p>0</p> <p>Neither supports or reduces flexibility.</p>
Criteria 4: Confidence The additional function increases public confidence that issues regarding the NZDF's actions are being appropriately investigated	<p>+++ (x2)</p> <p>Providing the IGD the ability to assess NZDF activities, particularly those with limited transparency will provide assurance re: oversight of NZDF activities and Ministerial accountability.</p>	<p>+++ (x2)</p> <p>Providing the IGD the ability to gather information on NZDF activities, particularly those with limited transparency will provide assurance re: oversight of NZDF activities and Ministerial accountability.</p>	<p>0 (x2)</p> <p>Unlikely to support public confidence as different function.</p>
Criteria 5: Complements The additional function builds upon and complements existing oversight mechanisms on defence matters	<p>--</p> <p>Risk of some overlap with statutory functions of other agencies (Secretary s24 Defence Act functions and Role of Auditor-General), depending on specific matters being assessed, but risk is reduced as own initiation assessments limited to operational activities only. Risk can also be managed through consultation and other requirements.</p>	<p>+</p> <p>Risk that this function would overlap with the role of the FADTC Select Committee who can seek information from NZDF but the IGD's focus would be different.</p>	<p>-----</p> <p>Risk that this function would overlap with the role of the Secretary and CDF in providing civilian and military advice on defence matters.</p>
Criteria 6: Consistent The additional function is consistent with similar oversight mechanisms in the national security and intelligence system.	<p>+++</p> <p>Own motion assessments into operational activities are akin to the IGIS review and audit functions and, would support oversight and system improvement. Directly contributes to minimising issues occurring in future by identifying potential problems early. Likely to increase public confidence and strengthen democratic oversight and ministerial accountability.</p>	<p>+++</p> <p>Limiting enquiries to operational activities only differs from the scope of the IGIS who has a number of additional functions, including the ability to review a broad range of activities of the intelligence and security agencies. Note that IGIS' review functions are scoped and defined quite broadly. For example, they also cover the formal review of warrants (determining the efficacy of a decision made).</p>	<p>-----</p> <p>IGD will provide advice and system improvement recommendations following its investigations. Limited value in having an explicit function. An advisory function would be more consistent with IGIS, whose role includes the provision of advice to the Government and Intelligence and Security Committee. The IPCA doesn't have a specific advisory function but does provide advice and views, including suggestions for legislative change, directly to the responsible Minister (e.g. via Briefing to Incoming Minister)</p>
Overall assessment	<p>Total: 20 (out of 36)</p> <p>Own motion assessments into operational activities will support oversight and system improvement</p>	<p>Total: 27 (out of 36)</p> <p>Directly supports IGD oversight role with low impact on the NZDF</p>	<p>Total: -6 (out of 36)</p> <p>Distracts from IGD's core role, has limited effect on democratic accountability or public confidence</p>

Table 4: Multi-criteria analysis of form options

	Option One – IGIS	Option Two – Statutory officer in MoD	Option Three – Independent Crown entity	Option Four – Independent statutory officer
Criteria 1: Strategic fit	<p>+++ (x2) The IGD and the IGIS have some strategic compatibility as they both oversee bodies in the security sector and would have to regularly handle classified information but it is not four ticks due to the difference in nature of the security and intelligence agencies and the NZDF.</p>	<p>- (x2) While they are not completely incompatible, the outcomes the IGD seeks to achieve (providing oversight) are different to those of the MoD (providing civilian advice to the Minister, including on the NZDF operational activities and arranging for audits and assessments). This model is similar to the Inspectorate of Corrections, although that is an internal oversight body.</p>	<p>+++ (x2) There is a strong strategic fit between the proposed functions of the IGD and the form of an ICE. The ICE form suits bodies that require independence and there is precedent for other oversight bodies in the national security sector having this form (the IPCA).</p>	<p>+++ (x2) There is a strong strategic fit between the proposed functions of the IGD and this option. This form provides appropriate independence and there is precedent for other oversight bodies in the national security sector having this form (the IGIS).</p>
Criteria 2: Compatibility of functions	<p>++ (x2) There is compatibility across the functions. However, the IGD's functions do not extend into the NZDF to the same extent that the IGIS' extends into the intelligence agencies, the approach to oversight is calibrated differently, and the bodies being overseen are very different. There are risks that the unique IGD role is lost and subsumed into its existing oversight approach.</p>	<p>- - (x2) IGD's functions are not compatible with the MoD's functions and output framework. MoD has no oversight role over the NZDF. Instead, its functions require the MoD to provide civilian advice to the Government on operational activities (alongside the military advice provided by the CDF). This option could create the perception of a conflict of interest due to MoD's involvement in work the IGD may investigate. This risk is exacerbated given the recommendation of the Expert Review Group to further strengthen integration between both agencies on operational activities. Financial independence could be protected by including separate appropriations for the IGD.</p>	<p>+++ (x2) The IGD's proposed functions would fit well within an outcome framework of an ICE model.</p>	<p>+++ (x2) The IGD's proposed functions are compatible within an outcome framework of a body taking this form. The IGIS has the same form and similar functions.</p>
Criteria 3: Compatibility of powers	<p>++ (x2) The powers are compatible apart from scope of investigations and what the IGIS and IGD can find.</p>	<p>- - (x2) The IGD's statutory powers are not compatible with the MoD's role and mandate. The powers strongly intrude into the NZDF. MoD has no existing powers over the NZDF (only obligations to consult). In fact, MoD's role has been statutorily calibrated to consult with the NZDF, rather than ask it "do" things.</p>	<p>+++ (x2) The IGD's proposed powers would fit well within an outcome framework of an ICE model.</p>	<p>+++ (x2) These functions are compatible within an outcome framework of a body taking this form. The IGIS has the same form and almost identical powers.</p>
Criteria 4: Reputation, relationships & responsiveness	<p>++ The IGIS has credibility as an oversight body. It would need to build strong relationships with the NZDF and demonstrate that it understands the difference between the way the NZDF and intelligence agencies function, to ensure that it can build trust with stakeholders that it will be a fair and robust oversight body of the military.</p>	<p>- - While MoD has good relationships with the NZDF and defence stakeholders, it is not perceived as an oversight body over the NZDF. Many stakeholder consider the NZDF and MoD to be one body and do not appreciate the different functions. In that respect, there could be a justifiable perception of a conflict of interest should MoD house an independent oversight function over the NZDF.</p>	<p>++ This option would provide a strong degree of real and perceived independence from the defence agencies and Ministers. This form option has credibility in the field of oversight. Strong relationships would need to be built.</p>	<p>++ This option would provide a strong degree of real and perceived independence from the defence agencies and Ministers. This form option has credibility in the field of oversight. Strong relationships would need to be built.</p>
Criteria 5: Special characteristics	<p>++ (x2) The IGIS is completely independent of the Executive branch. There is a risk that its approach does not appreciate the special characteristics of the NZDF or blurs it with the intelligence agencies and delivers the IGD's functions without regard to the military context. This could be mitigated through the hiring of staff with military experience.</p>	<p>- - (x2) There will be a perception that the IGD cannot maintain its critical special characteristic of independence. The IGD is expected to have credibility with a wide range of stakeholders who may have starkly different views. Most importantly, it would need to be seen as being able to undertake its functions at arm's length from the Defence agencies and from Ministers, and without needing their approval or endorsement. This risk is exacerbated given the recommendation of the Expert Review Group to further strengthen integration between both agencies on operational activities.</p>	<p>+++ (x2) This option supports real and perceived independence from Defence and from any external interference in undertaking its functions. The option would allow for the IGD to develop an understanding of the NZDF and the military context. It provides a clear and well understood accountability framework.</p>	<p>++ (x2) This option supports real and perceived independence from Defence and from any external interference in undertaking its functions. The option would allow for the IGD to develop an understanding of the NZDF and the military context. It provides a clear accountability framework but it is less commonly used than that for Option 1. It also requires fewer reporting documents (no statement of intent) and its reports are likely to have less detail on performance measures.</p>

	Option One – IGIS	Option Two – Statutory officer in MoD	Option Three – Independent Crown entity	Option Four – Independent statutory officer
Criteria 6: Proportionate	<p style="text-align: center;">+++ (x2)</p> <p><i>The IGD's accountability could be combined with the IGIS. The agency that provides administering support to the IGIS would take on the functions. This may require some additional resourcing to support extra work.</i></p>	<p style="text-align: center;">+++ (x2)</p> <p><i>The IGD's accountability processes could be combined with MoD's. Given the small size of MoD, this would require some increased additional resourcing.</i></p>	<p style="text-align: center;">--- (x2)</p> <p><i>This form option comes with established accountability documents (statement of intent, statement of performance expectations, and annual report) which require time and effort to produce which may be disproportionate and overly burdensome for the size of the IGD. These requirements do not scale down significantly depending on the entities size and would still require significant work. Early indications are that 1-2 FTEs within the ICE would be required to undertake reporting obligations which would either add cost or reduce the capacity of the IGD to deliver its functions. A department would be required to undertake monitoring which would require additional resource.</i></p>	<p style="text-align: center;">+++ (x2)</p> <p><i>This option provides a low level of compliance costs that could be achieved without additional FTE. The IGD would need to produce an annual work programme and an annual report but these would be simpler to produce than the documents under Option 1. Under this option, there would be no monitoring agency but an administering agency would be required to provide support with appointments and appropriations.</i></p>
Criteria 7: People	<p style="text-align: center;">+</p> <p><i>The IGIS and staff has skills, knowledge, experience required to undertake functions related to intelligence activities. These skills are largely transferable. It would need to upskill its knowledge on the military and its new functions, and it can't undertake the new actions within its current capacity. Additional resource and expertise is required across all options in this paper.</i></p>	<p style="text-align: center;">0</p> <p><i>While MoD has knowledge of the NZDF, it does not have skills, knowledge, experience required to perform an investigatory oversight function. It would need to build capability afresh. This is expected to be the same across all options in this paper.</i></p>	<p style="text-align: center;">0</p> <p><i>This option would require building capacity from scratch.</i></p>	<p style="text-align: center;">0</p> <p><i>This option would require building capacity from scratch.</i></p>
Criteria 8: Culture	<p style="text-align: center;">++</p> <p><i>The IGIS has a strong culture that recognises the importance of providing oversight and it's expected that this culture would transfer across if it oversaw the NZDF. Not four ticks as it does not have an existing culture relating to military context and functions.</i></p>	<p style="text-align: center;">---</p> <p><i>MoD does not have a culture of overseeing the NZDF. It has a culture of working in partnership in integrated teams. While the IGD unit could build the right culture, it would need to coexist with the rest of MoD having a different culture and sharing working and social spaces with the NZDF. This could put at risk the collaborative relationship between MoD and the NZDF, which is necessary for the performance of its current statutory functions.</i></p>	<p style="text-align: center;">0</p> <p><i>There is no existing culture so it would be required to be built from scratch.</i></p>	<p style="text-align: center;">0</p> <p><i>There is no existing culture so it would be required to be built from scratch.</i></p>
Criteria 9: Processes and technology	<p style="text-align: center;">-</p> <p><i>s6(a), s9(2)(f)(iv), s9(2)(g)(i)</i></p>	<p><i>Released by the Attorney-General and Minister of Defence</i></p>		

	Option One – IGIS	Option Two – Statutory officer in MoD	Option Three – Independent Crown entity	Option Four – Independent statutory officer
Criteria 10: Physical assets	- - - (x2) s6(a), s9(2)(f)(iv), s9(2)(g)(i)	0 (x2)	0 (x2) <i>It would need new premises or another agency to host it. This means cost but ensures the necessary physical assets.</i>	0 (x2) <i>It would need new premises or another agency to host it. This means cost but ensures the necessary physical assets.</i>
Criteria 11: Internal structure	+++ s6(a), s9(2)(f)(iv), s9(2)(g)(i)	++	This would be the only function, so there is no risk of it being buried. +++	++++ This would be the only function, so there is no risk of it being buried.
Overall assessment	Total: 27 (out of 68) While the option scores well, this option is likely to require significant changes to the IGIS' current arrangements.	Total: -19 (out of 68) This option is based on the idea that locating the IGD function in an existing organisation could be economical and reduce fragmentation across government, while at the same time preserving statutory independence. The option scores poorly because of the bespoke arrangements between Ministry and NZDF. There are serious principled and practical issues that could undermine MoD's other functions and would result in the IGD not being perceived as truly independent.	Total: 33 (out of 68) This option performs well against the criteria but due to the size of the IGD, requires disproportionate effort for reporting that either requires more funding or would reduce the IGD's ability to deliver to its core functions.	Total: 43 (out of 68) This option performs best against the criteria. Its form is agile and has proportionate reporting obligations. The primary negative is that this form is less common and understood across government than Option 3.

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