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Summary of Submissions Report: Proposals for establishing an independent Inspector-General of Defence in New Zealand

May 2022

This publication provides the Summary of Submissions Report that was provided to Cabinet to support their May 2022 decisions on the Inspector-General of Defence proposals.

This pack has been released on the Ministry of Defence website, available at:
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**MANATŪ KAUPAPA
WAONGA**
NEW ZEALAND
MINISTRY OF DEFENCE

Summary of Submissions Report

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

January 2022

Released by the Attorney-General
and Minister of Defence

Contents

Introduction..... 3

Chapter 1: How to calibrate the IGD?..... 4

 The proposal 4

 What we heard from submitters 4

Proposed purpose 4

Proposed expectations 5

Chapter 2: What should the overall scope of the IGD be?..... 6

 The proposal 6

 What we heard from submitters 6

Chapter 3: What should the functions and powers of the IGD be?..... 9

 The proposal for an investigatory function 9

 What we heard from submitters 11

 The proposal regarding assurance functions..... 17

 What we heard from submitters 19

Chapter 4: What should the form and structure of the IGD look like?..... 20

 The proposal regarding the IGD’s form, governance/accountability, structure and appointments 20

 What we heard from submitters 20

Chapter 5: Administrative procedures..... 23

 The proposal regarding administrative procedures 23

 What we heard from submitters 23

Chapter 6: Other matters..... 25

 The proposal regarding other matters 25

 What we heard from submitters 25

Annex A: List of submissions 27

Annex B: Analysis of submissions..... 28

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Introduction

Purpose of this document

1. In July 2020, the Government accepted in principle the recommendation of the Inquiry into Operation Burnham and related matters (the Inquiry) to establish an independent Inspector-General of Defence (IGD) to oversee the activities of the New Zealand Defence Force (NZDF).
2. On 1 November 2021, the Government agreed in principle to the key policy proposals on the scope, functions, powers and form of an IGD. On 16 November, the Ministry of Defence (the Ministry) on behalf of the Government released a targeted consultation document setting out the key policy proposals of the four major design features of the proposed IGD.

PURPOSE Why does the IGD exist?	SCOPE What are the bounds of what the IGD does?
FUNCTIONS AND POWERS What should the IGD do and what arrangements need to be in place to allow it to do it?	FORM AND STRUCTURE How should the IGD be structured to ensure it delivers its functions efficiently and is appropriately accountable?

3. The targeted consultation document (and accompanying Cabinet material) were published on the Ministry's website.¹ The Ministry reached out to seek the views of interested stakeholders with a range of perspectives, including legal experts, academics, organisations that represent Māori and veterans, non-government organisations, the Inquiry authors and the authors of the book *Hit and Run*. In total, 36 individuals and organisations were contacted.
4. 15 submissions were received in total (including a joint submission from two submitters). Eight submissions were received by closing date of 13 December 2021. Seven late submissions were accepted, the last of which was received on 11 January 2022.
5. Responses to the proposals made in the submissions are summarised in the following chapters. A list of the submitters is attached as Annex A. More information on the process by which submissions were analysed is provided at Annex B.

Next steps

6. The Ministry has analysed all of the submissions received and the feedback they contained has been incorporated in advice to support the Government to make final policy decisions on the establishment of the IGD. These submissions will continue to inform the Ministry's ongoing work on this matter.

¹ <https://www.defence.govt.nz/the-latest/story/establishing-an-independent-inspector-general-of-defence>

Chapter 1: How to calibrate the IGD?

The proposal

7. The targeted consultation document proposed the following:
- a. **The purpose of the IGD should be to:**
 - i. assist the Minister of Defence to exercise democratic oversight of the NZDF;
 - ii. provide the Minister of Defence with an avenue, independent of the Defence agencies, to examine and expose failings and gaps in NZDF systems so that steps may be taken to address and prevent problems, and promote system improvements in the NZDF; and
 - iii. assist the Government in assuring Parliament and the public that the activities of the NZDF are subject to enhanced independent scrutiny.
 - b. **There should be expectations that the IGD ensure its actions:**
 - i. are in the public interest, undertaken impartially and directly support the Minister of Defence to exercise democratic oversight of the NZDF and enable ministerial accountability to Parliament;
 - ii. represent an appropriate use of the IGD's resources, in terms of providing value for money to the people of New Zealand, and are proportionate, in terms of time, cost and resources, on the NZDF; and
 - iii. are informed by regular engagement with the Defence agencies, and take account of the military context in which the NZDF operates (for example, the military justice system).
8. The question asked of submitters was:

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

What we heard from submitters

Proposed purpose

9. 13 submissions specifically commented on the proposed purpose, with 11 submissions broadly in support. The proposed statement of purpose was regarded as "appropriate (Submission No 006), well-articulated (Submission No 003), comprehensive and robust (Submission No 013), in line with the recommendations of the Inquiry and findings of the Expert Review Group² (Submission No 011), needed to be made explicit in legislation to guide the IGD (Submission No 004) and could make an important contribution to sustaining public trust and confidence in the NZDF." (Submission No 014).
10. The following comments were made:

² The Inquiry had recommended that an Expert Review Group be appointed to look into the NZDF's organisational structure and record-keeping and retrieval processes. The Group finalised its report and the Government has accepted its recommendations in principle. The Group's report is available on the Ministry's website.

- a. **International responsibilities:** The purpose should “recognise that the IGD has international responsibilities as well as domestic ones” (Submission No 002).
 - b. **Ministerial accountability and public trust:** The purpose should include supporting ministerial accountability to Parliament; promoting and enabling transparency; and building public trust and confidence in the NZDF (Submission No 006).
 - c. **Human rights obligations:** The purpose should link to international and domestic human rights obligations, in the same manner as the purpose of the Inspector-General of Intelligence and Security is set out in the Intelligence and Security Act 2017 (Submission No 009).
11. Two submissions did not support the proposed purpose. One submitter was of the view that it **was too broad** and should be calibrated to “circumstances in which similar failures [to Operation Burnham] might one day recur rather than [take] a blanket approach” (Submission No 001). Another submitter was of the view that it **was too narrow** – that it limits the IGD’s independence and effectiveness, was not what the Inquiry had recommended and should be “to facilitate independent oversight of NZDF and enhance its democratic accountability” noting that “democratic accountability is about much more than assisting ministerial accountability to Parliament” (Submission No 005).

Proposed Expectations

12. 10 submissions specifically commented on the proposed expectations with nine submissions broadly in support. Submitters were of the view that the proposals were appropriate to be included as legislative principles (Submission Nos 011 and 015), a useful way to set expectations for the IGD (Submission No 015) given its proposed broad remit and discretion (Submission No 004) and would contribute to sustaining public trust and confidence (Submission No 014).
13. The following comments were made:
- a. **International Communities:** There should be an expectation that the IGD act in the interest of (Submission No 002) or have accountability directed towards (Submission No 008) overseas communities impacted by NZDF operations.
 - b. **Civil society groups:** There should be an expectation that the IGD “should maintain a close working relationship with civil society groups, including NGOs with expertise in civilian protection” and have a “responsibility to engage with international stakeholders, including civil society actors” (Submission No 002).
 - c. **Open and transparent process:** There should be an expectation that the IGD’s processes be as open and transparent as possible (Submission No 006).
 - d. **Value for money:** References to “value for money” should be avoided as “there can be no monetary value placed on the IGD’s work. It should be funded robustly and, with just five personnel, the costs of salaries and investigatory support will be low in any event. Money should not be an object” (Submission No 013).
14. One submission did not support the proposed expectations for similar reasons to those regarding the IGD’s proposed purpose (paragraph 11 above refers). It considered that the proposal is designed in a manner where accountability relies on the Minister. Instead they recommended a “better system has more legs to the accountability, including the public, media, MPs, select committee and... whistle blowers” (Submission No 005).

Chapter 2: What should the overall scope of the IGD be?

The proposal

15. The targeted consultation document proposed the following:
- a. **The scope of the IGD** should include the full range of NZDF's activities (bar that of Veterans' Affairs) and the IGD should:
 - i. have own motion oversight functions into defined "operational activities"; and
 - ii. be able to provide oversight of any other matter on referral.
 - b. **The definition of "operational activities"** should include any domestic or international activity:
 - i. in time of war, armed conflict or any other emergency, whether actual or imminent;
 - ii. authorised by the New Zealand Government and that involves peace support operations, maintenance or restoration of law and order or the functioning of government institutions; or where the New Zealand Government agrees to provide assistance or contribution;
 - iii. declared by the Chief of Defence Force, by notice in writing;
 - iv. including training carried out directly in preparation for any specific activity in i-iii above; and
 - v. including intelligence operations carried out directly in preparation for, or in support, of any specific activity in i-iii above.
16. The question asked of submitters was:

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

What we heard from submitters

Proposed scope

17. 14 submissions specifically commented on the proposed scope, with 12 submissions broadly in support. Submitters considered it was appropriate (012), commenting that it "appears to be robust and sufficiently encompassing to serve its purpose" (013). They were supportive of the IGD's "ability to initiate its own functions into 'operational activities' where the meaning of operational activities is left sufficiently open to permit significant discretion" (Submission No 014), noting the need for own-motion functions to ensure independence (Submission Nos 003 and 011) and the importance of "both own-motion and on-referral" functions (Submission Nos 006 and 015).
18. The following comments were made:
- a. **International obligations:** The IGD's scope should be broadened to "cover protection of non-New Zealand NZDF stakeholders and partners, particularly vulnerable communities within humanitarian settings and operations. If they are to be excluded from the scope of the IGD, a rationale for (lack of) accountability to these groups needs to be made explicit to strengthen IGD transparency" (Submission No 008).

- b. **Narrow scope:** The proposed scope of the IGD "appears narrow when compared with the Australian Inspector-General; whose role includes independent oversight, review and coordination of complaints made under the "Redress of Grievance" process" (Submission No 009).
 - c. **Size of office:** It is "hard to see how [the IGD's own-motion functions] would work in practice given the tiny number of staff" (Submission No 003).
 - d. **Referral matters:** It would be "useful to clarify what kinds of NZDF activity might fall into the 'on referral scope'" (Submission No 004).
19. Two submissions did not support the proposed scope:
- a. One submission commented that the **scope is too broad** for the following reasons:
 - i. Failures identified in the inquiry "are not necessarily "generalisable" into NZDF's broad range of operational activities...There is no evidence provided that the problems relating to NZDF's handling of information and communications related to Operation Burnham applies across the full range of activities that NZDF undertakes" (Submission No 001).
 - ii. It's unlikely that operations similar to Operation Burnham will occur again because of changes in the security context (Submission No 001).
 - b. One submission commented that the **proposed scope is too restrictive** for the following reasons:
 - i. The IGD's focus should not be on matters that have the most potential to affect public confidence in the NZDF and carry reputational risks for NZ. "Measuring worth by public confidence in NZDF and reputational risks is the stuff of Public Relations, not oversight and watchdog roles. Legality and propriety (as with IGIS) are much sounder standards" (Submission No 005).
 - ii. The Inquiry envisaged the IGD would investigate issues going to the prevailing culture or systemic failure to respond to sexual abuse allegations on its own motion. "The IGD should be given the widest scope and allowed to set its own priorities" (Submission No 005).

Proposed definition of operational activities

20. 12 submissions specifically commented on the proposed definition of operational activities, with 10 broadly supportive. There was strong endorsement for the broad definition (Submissions No 002, 004, 006). Submitters considered the definition appropriate (Submission No 011) and commented that it "serves the ultimate objective of democratic accountability but does not impinge on areas that are already the subject of independent oversight" (Submission No 007).
21. The following comments were made:
- a. **Cyber-security matters:** The inclusion of cyber-security matters, which may need particular kinds of technical expertise in the IGD, may stretch the functions and personnel of the IGD too far (Submission No 003).
 - b. **Matters that cut across operational and non-operational activities:** Provision should be made to enable the IGD to investigate issues that are not "strictly operational", i.e. those

that might occur across operational and non-operational activities (such as sexual misconduct and bullying) (Submission No 002).

- c. **Cover a range of scenarios:** An expectation that the definition would “have been subjected to scenario testing to check its scope, e.g. events that might cause civilian harm or risks generated by information loss or environmental or damage or hazards” (Submission No 011). IGD oversight and access to “pre-emptive actions [such as administrative or decision-making prior to field operations] should also remain a primary focus” (Submission No 008).
 - d. **Activities not directly related to operations:** “It is not clear to me why ‘preparatory raise, train and sustain activities’ or other activities that do not ‘directly relate’ to an operation are automatically excluded from this definition. I can imagine problems that start with general training or domestic activities bleeding into operational activities (for example around Op Respect). Would the IGD only be able to look at the symptoms as they play out on operations and not go back and look at earlier causes?” (Submission No 014).
 - e. **Ability to investigate historic incidents:** It should be made clear that this definition permits the IGD to investigate historic incidents (Submission No 015).
22. Two submissions did not support the proposed definition. One submission recommended a **more narrow definition** “focused only on operations in an (international) armed conflict with international presence for peace-keeping/national building” (Submission No 001). Another submission considered the proposed the proposed definition “extremely narrow” and recommended that the "IGD should be given the **widest possible scope** and trusted to set its own priorities" (Submission No 005).

Chapter 3: What should the functions and powers of the IGD be?

The proposal for an investigatory function

23. The targeted consultation document proposed the following:
- a. **Investigatory function:** The IGD should be able to investigate, under its own motion, defined operational activities and any matter referred to it by the Minister of Defence, Secretary of Defence or the Chief of Defence Force.
 - b. **Focus of investigations:** The scope of investigatory power should be to establish facts, and make:
 - i. findings (i.e. draw conclusions from the established facts); and, as appropriate
 - ii. recommendations that further steps be taken to determine civil, criminal or disciplinary liability; and/or
 - iii. recommendations for the improvement and benefit of the NZDF relevant to the findings of the investigation.
 - c. **Powers:** The IGD should have the ability to:
 - i. summon and examine any person on oath, and require any person to provide information (including documents or other things);
 - ii. enter, at a reasonable time, any premises or place occupied or used by the NZDF, subject to safety and security considerations (following written notification to the Chief of Defence Force);
 - iii. access all NZDF records, databases and information systems; and
 - iv. require witnesses to disclose information that would otherwise be under an obligation of secrecy without it constituting a breach of any law that requires that secrecy.
 - d. **Special Process:** When operations are ongoing, the Chief of Defence Force should make the decision on whether or not an investigation could proceed (for reasons of safety and security and impact of operations). The IGD would notify the Minister of Defence if its request has been declined. The Chief of Defence Force would inform the IGD if the situation changes or when operations have ceased.
 - e. **Legal offences to prohibit:**
 - i. wilfully obstructing, hindering or resisting the IGD in the exercise of its powers; making false statements, misleading or attempting to mislead the IGD in the exercise of its powers; and refusing or failing to comply with any lawful requirement of the IGD. These acts would be punishable by a maximum fine of \$5,000.
 - ii. publishing or broadcasting, causing the publication or broadcast of, or otherwise distributing or disclosing, decisions relating to, or reports of, IGD investigations without the Minister of Defence's written permission. These acts would be punishable by up to two years' imprisonment and a maximum fine of \$10,000.
 - f. **Protections and Safeguards:** To protect people and information during and after investigations, IGD's access to NZDF records and information systems, premises or

places, natural justice, anti-discriminatory safeguards and protection against self-incrimination for witnesses and investigation participants.

- g. **Confidential or sensitive information:** A special security process before the IGD can require the disclosure of information that has obligations of secrecy or non-disclosure.
- h. **Mechanisms to support the IGD's oversight:** NZDF should be obliged to:
 - i. cooperate and assist the IGD in undertaking its functions; and
 - ii. via the Chief of Defence Force, notify the IGD in the event of the establishment of an internal Court of Inquiry or reports of civilian harm and findings or assessments following NZDF internal processes for responding to reports of civilian harm.
- i. **Relationship to existing oversight:**
 - i. The IGD should be able to consult with other oversight bodies before undertaking an investigation and be able to decline to investigate; defer its investigation until another body has completed its own investigation; or refer the matter to a more appropriate body.
 - ii. The IGD should not be able to investigate where a Court of Inquiry has been established until that process has concluded, unless there is an unreasonable delay in undertaking and concluding that process; or the matter has been referred from the Minister of Defence or the Chief of Defence Force.
- j. **Investigation reports:**
 - i. IGD should determine the classification of finalised reports, in accordance with national classification criteria, and after having taken into account the Chief of Defence Force and Secretary of Defence's views. Where a report quotes or summarises any matter with a classification, it must not be given a lower classification in the IGD's report.
 - ii. IGD should be able to share reports with relevant ministers where they relate to or impact other portfolios, and with the Foreign Affairs, Defence and Trade Committee, subject to security classification, and with permission from the Minister of Defence.
 - iii. IGD should publish its investigation reports online unless there is a good reason not to.
 - iv. Where reports contain classified or other information that cannot be disclosed, the IGD should publish its investigation reports to the extent possible while safeguarding national security, New Zealand's international relations and obligations of confidence, among other matters.
- k. **Outcome of investigations:** the Chief of Defence Force should notify the IGD, the Minister of Defence and the Secretary of Defence of any action to be undertaken to give effect to an IGD recommendation, or the reasons for any proposal to depart from, or not implement, any recommendation.

24. The question asked of submitters was:

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

What we heard from submitters

Proposed investigatory function

25. Eight submissions specifically commented on the proposed investigatory function, with seven submissions broadly in support. Those that supported also asked whether the IGD would be “able to look at the symptoms as they play out on operations and not go back and look at earlier causes?” (Submission Nos 008 and 014) or advise on trends and risks (Submission No 011).
26. One submission did not support the proposal because they considered that there were limitations on the kinds of investigations that the IGD could undertake on its own motion, and because it would lack a complaints function (Submission No 005).

Proposed own motion investigation function

27. Six submissions specifically commented on the proposal, with five submissions broadly in support. Those that supported said it is “vital that the IGD has ‘full discretion’ to investigate operational activities” (Submission No 012), agreed there “shouldn’t be statutory requirements to be met before an investigation can be launched” (Submission No 015) and stated it is “crucial the IGD has an ‘own-motion investigation function’” (Submission No 002).
28. One submission did not support the proposal for similar reasons to those set out in paragraph 27 above (Submission No 005).

Proposed on referral investigation function

29. Seven submissions specifically commented on the proposal, with six submissions broadly in support. The following comments were made:
 - a. **Select Committee should have ability to refer:** Submitters recommended that the Foreign Affairs, Defence and Trade Select Committee be able to refer matters to the IGD (Submission Nos 002, 003, 012 and 015) because of a view that the Committee “is, and has been, an ineffective forum for holding the NZDF to account. (Submission No 015), “does not have the significant powers to fully undertake an inquiry of this kind, and the more avenues by which to draw matters to the attention of the IGD the better” (Submission No 003) and it would “ensure independence and maintain democratic accountability” (Submission No 002).
 - b. **More individuals or organisations should be able to bring matters to the IGD’s attention:** Submitters recommended that concerns should be able to be raised by civil society groups (including possible victims) (Submission No 002), any member of NZDF or Ministry of Defence (Submission No 013) and the public (Submission No 015). It was suggested that the IGD should be able to initiate an “own motion” investigation based on a request to investigate, or disclosure of information, from a member of the public, provided that such a complaint or request to investigate meets the same threshold that would justify an investigation “on referral” by the Minister of Defence, the Secretary of Defence, or the Chief of Defence Force (Submission No 015). It was also recommended that other oversight bodies should be able to refer matters to IGD following consultation with IGD and following its agreement (Submission No 006).
30. One submission did not support the proposal because of a view that the “proposed system, where accountability relies on the Minister[’s referral], did not work [when allegations arose about Operation Burnham” because Ministers are reliant on senior defence officials (Submission No 005). In addition to the points made at paragraph 29 a and b, it recommended

that "a better system has more legs to the accountability, including the public, media, MPs, select committee and whistle-blowers" and that "nothing in the setup and legislation for the IGD should stop anyone proposing a subject for an IGD inquiry".

Proposed focus of investigations

31. Of the six submissions that commented on the proposed focus of investigation or the scope of the investigatory power, five of the submissions were broadly in support. The following comments were made:
 - a. **There should be an ability to provide redress or compensation for human rights violations:** "What would the functions of the IGD be in the event an investigation leads to a finding of that human rights may have violated [*sic*]? There appears to be no mention of accountability or remedial functions", noting that the New Zealand Inspector-General of Intelligence and Security can provide recommendations for redress (Submission No 009).
 - b. **There should be an ability to identify gaps and risks:** "Should the IGD have the ability to advise on risks and trends arising from a range of investigations?" (Submission No 011).
32. One submission did not support the proposal and considered that "lawfulness and propriety should be defining parts of the IGD's purposes...These do not have to be the only parts of the purposes, but it is essential that they are part of the purposes/functions...[the IGD] should have the 'power to make findings of fact or fault, and the power to make recommendations'". The submission was concerned that current settings steer the IGD into a "system improvement approach" rather than making "adverse findings" (Submission No 005).

Proposed Powers

33. Of the seven submissions that commented on the proposed investigatory powers, six submissions were broadly in support. Feedback was that statutory powers are needed (Submission No 006), are broadly consistent with the Inquiries Act (Submission No 010), and "look comprehensive and similar to those held by equivalent actors" (Submission No 014).
34. Those that supported also made three comments: One, that the proposed powers should be linked to the intended purpose and functions of the IGD (Submission No 006). Two, that there should be an additional power for the IGD to have warrantless search and seizure authority and "if warrants are deemed necessary, they should be authorised by legal authorities outside the NZDF/MoD" (Submission No 013). Three, care should be taken not to undermine the Evidence Act privilege that can be asserted by media in legal proceedings (i.e. with respect to confidential sources or source-related information), and with requiring witnesses to disclosure information under obligation of secrecy) (Submission No 015).
35. One submission did not support the proposed powers due to concerns over restrictions to the IGD's ability to access NZDF information (Submission No 005). These are set out further in paragraph 40.

Proposed Special Process

36. Of the nine submissions who commented on the proposed special process, five were broadly in support. The following comments were made:
- a. **Decision of the Chief of Defence Force should be reported** along with reasons. This includes to the Minister (Submission Nos 003, 011 and 015), Foreign Affairs, Defence and Trade Committee and the public (Submission No 015).
 - b. **Additional mechanisms to guide the decision-making would be required.** This included setting out countervailing matters or principles, in legislation, which need to be weighed by the Chief of Defence Force against risk to the operation and to personnel (Submission No 003) or additional principles about how that discretion is to be exercised (Submission No 014). Legislative principles should specify that a high threshold of danger or risk must be met before a request can be declined (Submission No 015).
 - c. **There should be a mechanism to resume investigation:** There needed to be a mechanism to signal that an operation can start after issue has passed (Submission Nos 003 and 004) e.g. the Chief of Defence Force's decision lapses after a specific time or a periodic obligation to report when circumstances change.
37. Four submissions did not agree with the proposal for the following reasons:
- a. **A special process would unduly delay IGD investigations.** "While we agree that there are legitimate concerns about conducting an investigation in theatre while an operation is ongoing, we do not think [the Chief of Defence Force] should have the ability to refuse to allow an investigation to proceed." The submission considered that an investigation could be opened and embarked upon even though the ability to conduct the investigation may be limited. It recommended that concerns could be accommodated by requiring the IGD to consult with the Chief of Defence Force about how an investigation can be progressed in a way that causes least operational disruption (Submission No 007).
 - b. **A special process would "seriously compromise the ability of the IGD to investigate".** "Refusals should be made public, with details of the issue/allegation that the IGD intends to investigate and reasons why the investigation cannot proceed" (Submission No 002).
 - c. **Giving the Chief of Defence Force discretion to make the decision is inappropriate.** Instead, one submission recommended the IGD simply to be required to "consult" the Chief of Defence Force on operations that are underway (Submission No 005).
 - d. **The "final call should rest with the political leadership** - either the Minister of Defence or the Prime Minister" (Submission No 013).

Proposed Legal Offences

38. All six submissions which commented on the proposed offences were broadly in support. The following comments were made:
- a. **Whether contrast between proposed penalties was justified:** There is a contrast between the penalties proposed [for publishing/disclosing] and [other proposed offences] (Submission Nos 007, 014 and 013), and similar provisions in the Inquiries Act 2013 and Commerce Act 1986. "However, if it is anticipated that the Crimes Act offences

will also be available (perjury etc) as it is in other analogous situations that might mitigate the problem" (Submission No 007).

- b. **Penalties and fines too strong or too weak:** Two submissions commented that the maximum fine of \$5,000 for some offences was not effective to deter behaviour (Submission Nos 013 and 015). Recommendations included "6 figures for the NZDF/MoD and jail terms of up to 10 years for individuals engaged in obstruction of IGD work" (Submission 013) and a "maximum penalty of \$10,000" and "a period of imprisonment" (Submission 015). One submission commented that penalties for the publication/disclosure offence should be lower than that of the obstruction related offences (Submission No 013).
- c. **Media freedom:** One submission expressed concern that the disclosure/publication offence "is not interpreted in a manner that compromises media freedom" as it has the "potential to inhibit reporting by media on matters of public interest and needs further elaboration; it raises BORA issues, and it would make sense to invite submissions on this matter from media and media freedom organisations" (Submission No 015). One submission specifically did not support this offence considering it "heavy handed and unnecessary...If there is genuinely sensitive material, the IGD can make orders accordingly" (Submission No 005).
- d. **Natural Justice:** One submission noted that it expected "that natural justice tests will be considered in relation to any legal offences." (Submission No 011).

Proposed Protections and Safeguards

39. All five submissions who commented on the proposed protections and safeguards were broadly in support. The following comments were made:
- a. **The IGD should make the decision on whether a disclosure made by NZDF personnel** (who would then be protected from penalty or discriminatory treatment) was done in good faith (Submission No 004).
 - b. **Clarification is needed on whether the privilege against self-incrimination would protect the person from evidence gleaned as a consequence of their disclosures** to the IGD (Submission Nos 003 and 004).
 - c. **Some protections have the potential to obstruct the IGD** (for example information being withheld unnecessarily) (Submission No 015).
 - d. **Specific concerns around restricting the IGD's ability to access NZDF information** which is further discussed in the next section below (Submission No 005).

Proposed protections and safeguards for confidential or sensitive information

40. Of the five submissions who commented on the proposed protections and safeguards for confidential or sensitive information, three submissions did not support the proposal for the following reasons:
- a. **Concerns about obstruction:** "The emphasis on avoiding '[prejudice or impairment to] existing relationships with foreign partners, coalitions, international entities or domestic agencies who share information with NZDF' could lead to important information being withheld unnecessarily. On more than one occasion during the Inquiry into Operation Burnham, information was obtained by the Inquiry from individuals or organisations who had a right over that information after participants in the Inquiry had insisted that

those who had a right over the information weren't prepared to release it" (Submission No 015).

- b. **Concerns about Ministerial involvement:** "Ministers rely on agencies...such as the NZDF and MFAT for advice on matters relating to security, defence and international relations, and as the findings of the Inquiry into Operation Burnham demonstrate, ministers were given incorrect or seriously flawed advice on several issues over an extended period." "Ministers could potentially be motivated by the wish to avoid the political fallout from an IGD investigation, and all too eager to certify that disclos[ur]e would prejudice a particular interest" (Submission No 015).
 - c. **Appropriate safeguards already exist (including Ministerial involvement):** "The IGD will, of course, hold the information on conditions of confidentiality and any report produced will not be made public unless the Minister decides that is appropriate"(Submission No 007).
 - d. **Restrictions to the IGD's authority:** "It is essential that the IGD can view all documentation held by NZDF and that he or she be trusted to do so professionally. The Op Burnham Inquiry could view all NZDF material irrespective of source and there is no justification for the IGD not having equivalent powers" (Submission No 005).
 - e. **Impact on investigations:** "Requiring the IGD to obtain the permission of the overseas partner which supplied the information initially before having access to it will greatly delay the investigative process, as it did in the case of Operation Burnham, and may well undermine the IGD's ability to get at the truth... We think it inconsistent with NZ's sovereignty, and with NZ law, for a blanket requirement such as that proposed to be applied" (Submission No 007).
41. Two submissions were broadly in support. One expressed the view that access to material with national security implications can only be declined by an appropriate Minister (Submission No 010). Another considered that while "the thinking behind this is sound" seeking permission from those who have a right over it has the potential to slow down or block an investigation process (Submission No 011).

Proposed mechanisms to support IGD's oversight

42. All four submissions that commented on the proposed obligations on NZDF supported the proposal in general. Views included that corresponding obligations on the NZDF ought also to be included in the establishing legislation (Submission No 006), "information on civilian harm", including allegations not considered credible by NZDF, should be reported to the NZDF, asking if the IGD can work out its own criteria for further investigation (Submission No 003) and a recommendation for an additional obligation for NZDF to report all operations where weapons were discharged (Submission No 002).

Proposed relationship to existing oversight

43. Of the five submissions that commented on the proposed relationship between the IGD and other existing oversight, four submissions were broadly in support. The following comments were made:
- a. **Allow the IGD full discretion to investigate matters being considered by a Court of Inquiry,** otherwise the current proposal "could be used to scupper or delay investigations into politically sensitive issues" (Submission No 002).

- b. **Existing oversight bodies should be able to refer matters to IGD** “following consultation with the IGD and its agreement” (Submission No 006).
 - c. **“The triaging and interface with these independent bodies”** where there is overlap “will be key to the accountability and success of the IGD function” (Submission No 008). It was suggested that any rigid application of different oversight bodies’ functions could lead to a fragmented oversight framework. “It is not appropriate for affected persons to have to make complaints about the same issue to multiple oversight bodies. An ability to refer matters would strengthen oversight, rather than fragment it” (Submission No 006).
 - d. **IGD’s decisions to decline, defer an investigation, or refer a matter should be made public**, with an explanation of why a particular decision was reached. It was also recommended that where the publication of such a decision would compromise an ongoing investigation by another body, it should be made as soon as possible after that investigation has concluded. Where publication of the details of a decision is not possible due to the sensitivity of some information, a summary should be published in which the reasons for withholding the information are outlined” (Submission No 015).
44. One submission did not support the proposal, and described it as “yet more unjustified restrictions on the IGD”. The submission was most concerned about the IGD being unable to investigate until a Court of Inquiry process has concluded. It considered that this gives a “non-independent process priority over the independent process, even where an IGD believed an independent investigation was required” (Submission No 005).

Proposed investigation reports

45. Of the eight submissions who commented on the proposal, seven were broadly supportive. The following comments were made:
- a. **Reports should be translated** “into local languages so that the communities affected can also access these findings” (Submission No 002).
 - b. **Reports must not be required to be vetted by the parties under investigation** (Submission No 013).
 - c. **There are significant issues regarding the “over-classification” of information** and “transparency must be the default setting if the IGD’s office is to establish and maintain credibility as an effective watchdog” (Submission No 015).
 - d. **Reports must be shared with relevant ministers** where they relate to or impact other portfolios, unless there is a compelling reason not to do so (Submission No 015).
 - e. **Removing the discretion the IGD has to not publish its investigation report** if there is good reason not to (Submission No 015).
 - f. **Asking for specificity** on what matters would constitute a reason for withholding information from public release (Submission No 015).
46. One submission did not support the proposal because of concerns that the requirement that the IGD consult with the NZDF on classification of its reports because “the IGD should not have to negotiate every word of their investigation reports with NZDF” (Submission No 005). The submission also comments that “no permission from the Ministry of Defence should be required for IGD investigation reports being provided to the FA&D select committee”.

Proposed outcome of investigations

47. Of the six submissions who commented on the proposed outcome of investigations, five were broadly in support. The following comments were made:
- a. **Obligations on NZDF in relation to implementation.** One submission recommended that public reporting and notification on actions taken in response to a recommendation, or the reasons for any proposal to depart from, or not implement, any recommendation, is needed (Submission No 006). Another submission was of the view that proposals need to set out obligations on NZDF to implement or acknowledge IGD recommendations (Submission No 002).
 - b. **If recommendations are accepted,** "how often will [the Chief of Defence Force] report on actions being undertaken? Who would track progress over time?" (Submission No 014).
48. It was unclear whether one submission supported the proposal or not. It noted that "it does not follow that issues similar to Operation Burnham will not occur unless the recommendations of the IGD is accepted by those concerned" (Submission No 012).

The proposal regarding assurance functions

49. The targeted consultation document proposed the following:
- a. **Functions:** The IGD should have assessment and enquiry functions. It can undertake these functions under its own motion when it relates to operational activities and any other matter on referral from the Minister, Secretary of Defence and the Chief of Defence Force. The assessment function will not be used for the following activities because they come within the jurisdiction of other bodies:
 - i. assessing NZDF Defence Force Orders and processes, procedures and policies for health and safety compliance;
 - ii. assessing the cost-effectiveness of the NZDF's processes, procedures and policies;
 - iii. reviewing the NZDF's performance in undertaking and delivering its functions from an organisational perspective;
 - iv. conducting audits that could reasonably be expected to fall within the purview of the Auditor-General;
 - v. assessing whether defence outputs are delivered or that military advice on operational effectiveness; and
 - vi. capability development is tested against wider government objectives (e.g. economic, political, foreign affairs).
 - b. **Powers:** the IGD should have the power to access all NZDF records, databases and information systems at all times. The proposed offences described above at paragraph 23(e) also apply.
 - c. **Assessment reports:** unless there is a good reason not to, the IGD should publish its own motion assessments online (subject to security classification determinations), and may publish assessments undertaken on referral with permission from the referring party.

50. The question asked of submitters was:

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

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What we heard from submitters

Proposed assessment functions

51. All five submissions who commented on the proposed assurance functions were broadly in support. The following comments were made:
- a. **There is a risk that assessment “will be discretionary, ad hoc and not systematic”** which would not be effective or in line with UN Basic Principles (Submission No 009).
 - b. **IGD should be able to comment on matters that are within the jurisdiction of other bodies** as long as that is not the purpose of the assessment (Submission No 015).

Proposed own motion assessment and referral function

52. All three submissions who commented on the proposed own motion and referral assurance function were broadly in support.

Proposed assessment powers

53. All four submissions who commented on the proposed assurance functions were broadly in support. A view was expressed that the powers “may need to be wider. It will be essential to also have active, and meaningful, cooperation with both the SIS and GCSB as needed. Also, if possible, linkages to overseas partners should be facilitated” (Submission No 010).

Proposed assessment reports

54. All four submissions who commented on the proposed assurance functions were broadly in support. The following comments were made:
- a. **Assessment reports should be made public with as much information disclosed** as possible, unless a matter of national security (Submission No 010).
 - b. **The final decision on whether on referral assessment reports are published** should not rest with the referring party to ensure transparency (Submission No 015).
 - c. **There should be obligations on NZDF to implement or acknowledge IGD recommendations** (Submission No 002).

Proposed enquiry function

55. All six submissions who commented on the proposed enquiry function were broadly in support. The following comments were made:
- a. **Whether there might be a better term** that might be used for “enquiries” to capture what seems to amount to capacity building (Submission No 003).
 - b. **IGD should be able to publish a general summary of enquiries**, especially when it does not involve any confidential or protected information (Submission No 015).

Chapter 4: What should the form and structure of the IGD look like?

The proposal regarding the IGD's form, governance/accountability, structure and appointments

56. The targeted consultation document proposed the following:
- a. **Form:** The IGD should be established as an independent statutory officer, associated with a ministerial portfolio.
 - b. **Governance and accountability:**
 - i. The IGD should have an annual work programme. The IGD would be required to take into account the Minister's feedback on the final work programme unless there are clear and compelling reasons not to. The finalised work programme would then be provided to the Minister, who would in turn present it to the House of Representatives. The IGD would also publish it on its website.
 - ii. The IGD should produce an annual report: The annual report would be required to be provided to the Minister of Defence, who would in turn present a copy to the House of Representatives. The IGD would also publish it online.
 - c. **Structure:** The initial structure of the office of the IGD should comprise five FTE staff (including the IGD and deputy IGD) to provide proportionate and cost-effective oversight. This means it could scale up as required once the office has a sense of its work programme. It would have recourse to an Advisory Panel and also able to procure "one-off" specialist advice on a case by case basis.
 - d. **Appointments:** The IGD and deputy IGD would be appointed by the Governor-General on the recommendation of the House of Representatives.
57. The question asked of submitters was

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

What we heard from submitters

Proposed form

58. Of the seven submissions that commented on the proposed form, five were broadly in support. The following comments were made:
- a. **It is essential that IGD is seen to be separate from the Ministry of Defence** to avoid an arrangement suggestive of regulatory capture (Submission No 004).
 - b. **There is advantage in locating the IGD in Defence House** as a visible reminder of the IGD's oversight function (Submission No 013).
 - c. **It is not clear why there is no detail as to which ministerial portfolio** is most suitable. If it is the Ministry of Defence, it would be critical to ensure it received the resources needed to effectively support the IGD." (Submission No 015).
59. Two submissions opposed the proposal for different reasons:
- a. **The IGD should not be a standing body:** One submission suggests that "investigations of NZDF misconduct - in operations similar to Op Burnham only - should be stood up on an ad hoc basis" (Submission No 001).

- b. **The IGD should not be associated with a Ministerial portfolio:** One submission considered that "the IGD should not be associated with a ministerial portfolio, especially as this could [in] practice provide a back door by which NZDF could have an influence over the activities of its watchdog" (Submission No 005).

Proposed Governance and Accountability

60. All eight submissions that commented on the proposed governance and accountability proposals were broadly in support. The following comments were made:

a. **Annual work programme:**

- i. **IGD must "be required to undertake broad consultation with stakeholders** including civil society groups and communities in the areas where the NZDF is operating" (Submission No 002).
- ii. **IGD should not be required to take into account the Minister of Defence's feedback** to ensure clarity of functional independence (Submission No 009).
- iii. **Legislation should make clear that the IGD's views on the annual work programme** should be determinative (Submission No 015).
- iv. **"The IGD's decisions on what to publish of his or her work programme should not be based on the OIA wording** as proposed. The OIA is weak on military information. The IGD should be empowered to make his/her own decisions" (Submission No 005).

b. **Annual reporting to Parliament:**

- i. **IGD's annual report should include the outcome of its recommendations** (Submission No 006).
- ii. **IGD should be able to provide reports on special topics as needed in addition to its annual report.** "These should be made public, with (unless a matter of national security) as much information disclosed as possible" (Submission No 010).
- iii. **Legislation should make clear that "nothing in the requirement** to produce an annual report precludes the IGD from producing reports during the year on an investigation or investigations" (Submission No 015).

c. **Accountability of the IGD:**

- i. **"Who manages the performance of the IGD and the Deputy IGD? To whom are they accountable?"** (Submission No 011).
- ii. **"Some reference to the IGD reporting directly to FADTC.** At the very least it should have to present and discuss its work programme and its annual report to the Select Committee" (Submission No 014).

Proposed Structure

61. Of the eight submissions that commented on the proposed form, six were broadly in support.

62. The following comments were made:

- a. **Size of body:** A range of views were provided:

- i. **"plans for the initial structure ...seem feasible ...and seem to have the potential for additional growth in the event of an expanding work programme"** (Submission No 012).
 - ii. **the office should not have fewer than five FTE staff** and provision should be made for additional staff to be retained within the first year of the office's operation, if more staff are necessary" (Submission No 015).
 - iii. **initial structure of five FTEs was too small** (Submission Nos 002 and 003). It was recommended that the number be doubled and should include a data specialist and an expert in international humanitarian law (Submission No 002) and that "expectations about what it will have the capacity to undertake need to be realistic" (Submission No 003).
 - iv. **need for a clear and appropriate process for funding the office** to ensure that it has adequate resources and staff to carry out its functions (Submission No 006).
 - v. **need for additional resources to hire local investigators** to assist with investigations overseas, as well as translators (Submission No 002).
- b. **Composition of advisory panel:** One submission noted the need to establish clear expectations about who should be on the panel, and civil society involvement is key (Submission No 002).
63. Two submissions did not support the proposal. One submission noted that size of the IGD was small compared to similar bodies in Australia and New Zealand, and recommended its size be 20 staff (Submission No 005). One submission noted that there will not be ongoing work for a permanent staff of five members and was of the view that the "the IGD risks becoming a unit in search of a practical reason to exist" (Submission No 001).

Proposed Appointments

64. All six submissions who commented on appointments broadly agreed with the proposals. The following comments were made:
- a. **Potential appointees:** a view that it needs to be "someone who is familiar with the system but not part of it" (Submission No 010) and should not be ex Ministry of Defence officials (Submission No 010 and Submission No 013) or ex NZDF staff (Submission Nos 010, 013 and 015).
 - b. **Appointment details:** Questions on how appointees can be removed (Submission No 011) and expected duration of appointments (Submission No 015).

Chapter 5: Administrative procedures

The proposal regarding administrative procedures

65. The proposal set out in the targeted consultation document is as follows:
- a. **Own motion investigations and assessments:** The IGD would be required to develop a draft terms of reference and consult the Chief of Defence Force and the Secretary of Defence and have regard to those comments before finalising its terms of reference.³ The IGD would notify the Minister of Defence, the Chief of Defence Force and the Secretary of Defence of any own motion investigations. There would need to be a minimum of five working days after notification before any public release or announcement.
 - b. **On referral investigations and assessments:** If the Minister of Defence, the Chief of Defence Force or the Secretary of Defence (the referring parties) intend to refer a matter to the IGD for investigation or assessment, a draft terms of reference should be provided).⁴ For on referral assessments, the IGD may provide comments on the draft terms of reference and request any required changes. The referring party would be required to share the final terms of reference with the IGD and the other referring parties. Notification should also include any planned public release or announcement. There would need to be a minimum of five working days after notification before any public release or announcement.
66. The question asked of submitters was:

6. Do you have any feedback on the appropriateness and/or adequacy of the administrative procedures set out on pages 29-30?

What we heard from submitters

Proposed procedures for own motion investigations

67. Of the five submissions who commented on the proposal, four were broadly in support. The following comments were made:
- a. **The Chief of Defence Force and Secretary of Defence should not be able to 'correct any factual inaccuracies'** given those facts are likely to be the subject of the investigation (Submission No 002).
 - b. **The process for launching own motion investigations or assessments needs streamlining.** It was recommended that the procedures include notification, consultation and timeframes and a concern was expressed that there is a risk that the

³ Terms of reference for an own motion investigation would include: purpose of investigation, rationale for investigation (including how the IGD has had regard to any legislative principles), key issues to be considered, proposed approach, estimated timeframes, and proposed outcomes. The terms of reference for an own motion assessment is the same except instead of key issues to be considered, it would need to set out the legislation, policies, processes or procedures the matter would be assessed against.

⁴ Terms of reference for on referral investigations would include purpose of the investigation, rationale for the investigation, key issues to be considered and any timing expectations. Terms of reference for assessments would be required to include the purpose of the assessment, rationale for the assessment, legislation, policies, processes or procedures the matter would be assessed against, expected timeframes, approach, and expected outcomes.

procedure would enable types of activities such as the destruction of evidence, coordination of responses (Submission No 013).

- c. **Legislation could provide high-level principles concerning fair process and include a requirement for the IGD to publish its general procedures**, rather than set out the detailed procedures. (Submission No 006).
 - d. **"Any 'correction of factual inaccuracies' or provision of 'other relevant information' must not prejudice the determination of facts** that the IGD's investigation is seeking to establish or to dissuade the IGD from proceeding with an investigation where he or she believes there are reasonable grounds to investigate" (Submission No 015).
 - e. **Five working days is an excessive notification timeframe** and that "provision be made for urgent IGD investigations to commence with a shorter notice period." (Submission No 015).
68. One submission did not support the proposal, describing the procedures as "giving NZDF a role in the initiation and framing of IGD investigations" and therefore "procedures to allow NZDF to influence the conduct of IGD investigations into the NZDF". It considered that this "fundamentally undermines the concept of an 'independent and external' watchdog" (Submission No 005).

Proposed procedures for own motion assessments

- 69. Of the six submissions that commented on the proposal, five submissions were broadly in support. The comments were identical to those made on the previous proposals (for own motion investigations) with the additional comment that it is premature to ask the IGD to set out proposed outcomes before an assessment has taken place because the issue "may actually prove to be a symptom of a much bigger problem" (Submission No 012).
- 70. One submission did not support the proposals for reasons identical to those they made in relation proposals for own motion investigations (see paragraph 68) (Submission No 005).

Proposed procedures for on referral investigations and assessment

- 71. Of the five submissions that commented on the proposal, four were broadly in support. The following comments were made:
 - a. **The Chief of Defence Force and Secretary of Defence should not be able to 'correct any factual inaccuracies'** (Submission No 002).
 - b. **What happens when new information comes to light, that goes beyond the original terms of reference?** (Submission No 014).
 - c. **The proposals seems to suggest that the referring party** could refuse to allow changes to the terms of reference and thus prevent the investigation (Submission No 014).
 - d. **IGD should be able to commence an own motion investigation**, if there were disagreement between the Chief of Defence Force and the IGD as to the terms of reference of an on referral request (Submission No 015).
- 72. One submission did not support the proposals for reasons identical to those made in relation to proposals for own motion investigations (see paragraph 68) (Submission No 005).

Chapter 6: Other matters

The proposal regarding other matters

73. Submitters were asked if they had any additional feedback to provide.

What we heard from submitters

74. Themes raised in the submissions were:

a. **Complaints:**

- i. **“Secure and confidential email and telephone lines to the IGD” should be available for rank and file troops and Ministry of Defence officials to raise complaints about** “serious unit, systemic and/or organisational command-and-control problems that violate or undermine the principle of civilian control of the military, or when potential war crimes, crimes against humanity or other violations of jus in bello have occurred.” “These are not “normal’ soldiering complaints or referrals about common crimes that can be addressed by the military judicial system or via normal military and civil service administrative processes and procedure” (Submission No 013).
- ii. **There should be a “postbox function’... to deal with concerns** raised by both those within the military (to which rules for ‘whistle-blowers’ must be created) and also – with concerns raised by the other outside public, of which people like journalists, should be foremost” (Submission No 010).
- iii. **Like the IGIS,** “the IGD should be able to receive complaints from all NZDF staff, military and civilian” (Submission No 005).
- iv. **IGD should be able to investigate based on a request to investigate, or disclosure of information, from a member of the public,** provided that such a complaint or request to investigate meets the same threshold that would justify an investigation “on referral” by the Minister of Defence, the Secretary of Defence, or the Chief of Defence Force” (Submission No 015).

b. **Whistle blowers**

- i. **IGD should be included in the new Protected Disclosures** legislation with the same status as the IGIS. (Submission Nos 005 and 006).
- ii. **Whistle blowers should be protected,** including reference to how the privacy and identifiable aspects of such categories of people are protected within the IGD investigation process (Submission No 008).
- iii. **There should be “internal and external processes for safe reporting** of ‘whistle blowing’ or wrongdoing that includes: publicised points of confidential contact (including at least one member of the governing body), a process for investigation and escalation; and prescribed timeframes for investigation and response.” (Submission No 008).

75. Other comments included:

- a. **The primary problem identified was incorrect and proposals watered down** to benefit NZDF (Submission 005).

- b. **The IGD's Advisory Panel** should have a role in identifying international best practice (Submission No 002).
 - c. **"The IGD must be seen as the third branch of the Defence establishment**, co-equal with the MoD and NZDF Command" (Submission No 013).
 - d. **The weakest link in the existing system and in the proposed system is** "if someone in the chain of command or an international ally blocks investigation. A key question then is whether and how the new process is able to manage that eventuality" (Submission No 003).
76. There was also one suggestion about Defence Force Order 35 itself which is not included in this report (Submission No 010).

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Annex A: List of submissions

SUBMISSION NO	SUBMITTER
001	Professor Robert Ayson
002	Dr Thomas Gregory
003	Professor Janet Mclean
004	Associate Professor John Ip
005	Mr Nicky Hager
006	The New Zealand Law Society
007	Sir Geoffrey Palmer and Sir Terence Arnold
008	The Council for International Development
009	The New Zealand Human Rights Commission
010	Professor Alexander Gillespie
011	Transparency International New Zealand
012	Professor Robert Patman
013	[Redacted at submitter's request]
014	Professor David Capie
015	[Redacted at submitter's request]

Annex B: Analysis of submissions

Processing submissions

77. All but one submitter used the submission form attached to the targeted consultation document to provide their submission. All submissions were received via email.
78. Each submission was given a unique identification number and classified according to a category (e.g. academic, non-governmental organisation). Submissions were entered into an excel workbook and then peer reviewed three times to ensure information was captured consistently across all submissions. Every effort was made to accurately summarise the overall feedback but this report may not reflect every view received.

Conventions used

79. Submissions did not always identify whether they agreed, partially agreed, disagreed or were undecided about the proposals. As such where this report indicates that submissions supported or opposed specific proposals, these are based on the Ministry of Defence's interpretation of the submissions, subject to internal protocols to ensure consistency in interpretation. The term "broadly supports" is used to group responses marked as "supports" and "partially supports".
80. Quotations from submissions have been used where it was difficult to paraphrase without losing the original meaning. Inclusion does not mean these submissions were given more weight.

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