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INTERIM REGULATORY IMPACT STATEMENT: ESTABLISHING THE INSPECTOR-GENERAL OF DEFENCE

November 2021

This publication provides an interim Regulatory Impact Statement that assisted Cabinet to make in-principle policy decisions on the design choices of the proposed Inspector-General of Defence, subject to any changes resulting from targeted consultation. The document will be updated following the targeted consultation and will be presented to Cabinet in its final form in 2022, at the same time as final policy decisions are sought.

This pack has been released on the Ministry of Defence website, available at:
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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)].

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

Coversheet

Purpose of Document	
Decision sought:	This is an interim Regulatory Impact Statement (interim RIS). It will assist Cabinet make in-principle policy decisions on the design choices of the proposed Inspector-General of Defence subject to any changes resulting from targeted consultation, which Cabinet is being asked to approve. The RIS will be updated following the targeted consultation and will be presented to Cabinet in its final form next year, at the same time as final policy decisions are sought.
Advising agencies:	The Ministry of Defence.
Proposing Ministers:	The Attorney-General and the Minister of Defence.
Date finalised:	This interim RIS was provided to the Ministry of Justice RIA panel for review and assessment on 22 September 2021. Initial feedback from the panel has been incorporated into this version.
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).</p> <p>This commitment follows the Inquiry into Operation Burnham and related matters (the Inquiry), which found that 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 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, 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 effective scrutiny.</p>	
Executive Summary	
<p>This Interim 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 exercised by the Minister of Defence) and ministerial accountability to</p>	

Parliament; and comparable domestic and international oversight bodies. For completeness, the interim RIS also includes analysis of two options to address the problem identified by the Inquiry: amending the existing processes; and establishing an IGD.

In summary, the proposal is to establish an IGD with the following design elements:

- **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 from 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 on oath; require persons to provide information; enter any premises or place; access all records, databases and information systems of the NZDF; and require witnesses to disclose information. To support its assessment and enquiry functions, it would have the power to access all records, databases and information systems of the NZDF. These are supported by an offence regime, obligations on the NZDF to facilitate the IGD's oversight, safeguards 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, it would produce an annual work programme (which the Minister could comment on) and an annual report.

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 an oversight 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 and balanced. 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 the NZDF personnel) who may be involved in investigations, assessments or enquiries.

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

² That is, without prompting by others.

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 and powers and form of the IGD and establish a senior officials working to develop a plan for the establishment of the IGD; and
- agreed the Foreign Affairs, Defence and Trade Committee (the Committee), 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 intended policy outcome and objectives for the establishment of the IGD; and
- invited Ministers to report back with detailed policy proposals on the scope, functions, powers, and form of the IGD.

Given these decisions have been made, the focus of the analysis in this interim RIS is limited to the design choices for the IGD to achieve the Government 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 design options level is unlikely to produce pronounced differences in the regulatory impact.

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. Some details of the full monetised costs of the proposal are still being worked through by officials, including the cost of leasing the IGD’s accommodation in a sensitive compartmented information facility (SCIF) and access to appropriate information technology systems. Accurately quantifying the compliance cost to the NZDF is difficult. Updated details will be provided in the final RIS.

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 (the IGIS), the Independent Police Conduct Authority, the Privacy Commissioner, the Health and Disability Commissioner, the Ombudsman, the Inspectorate of Corrections, the Australian Inspector-General of Defence, 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.

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 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. The Government is yet to make final decisions in relation to Recommendation One (an Expert Review Group be appointed to look into the organisational structure and record-keeping and retrieval processes) and Four (that the Government should develop and promulgate effective detention policies and procedures). Any interdependencies will be included in the final RIS.

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). NZDF has also been engaged from the perspective that they are likely to be the most impacted by the proposal.

Further consultation to occur before Cabinet makes final policy decisions and the RIS is finalised

The Inquiry was established in the public interest to examine allegations of wrongdoing made against NZDF in the book *Hit and Run*. During the course of the Inquiry the public were able to make submissions. The proposal to establish the IGD was tested with core participants to the Inquiry, which included the NZDF and the authors of *Hit and Run*, before the final recommendations were made.

Since then, the design elements of the proposal have been developed and tested with Public Service agencies who have a good understanding of the nature of the problem and expertise in issues which are relevant to the proposal. This is because the proposal is focused on the internal administrative or governance arrangements of the New Zealand Government. The establishment and operation of the IGD will have limited direct impacts outside of government. They have also been developed and tested with those who will be directly impacted by the proposal – the NZDF. Consultation with the Māori advisory network within NZDF has also been undertaken to better understand the proposal's compatibility with tikanga and te ao Māori. The group has indicated the draft proposals are compatible with the tikanga of pono (acting with integrity and supporting transparency and accountability).

Targeted engagement with interested parties, with a range of perspectives, is proposed to test the proposals. The consultation would be undertaken before Cabinet makes final policy decisions. Targeted engagement (subject to Cabinet agreement) will seek views from the likes of the Inquiry authors, the authors of *Hit and Run*, academics, the IGIS, the Independent Police Conduct Authority, Ombudsman New Zealand, the Red Cross, UNICEF, Council for International Development, Amnesty International, the Council for Civil Liberties, Transparency International, 36th Parallel Assessments, Royal New Zealand Returned and Services Association, New Zealand Law Society and National Council of Women in New Zealand. The final RIS will reflect this consultation. This approach would be consistent with the approach taken for other recommendations of the Inquiry.

While wider public consultation would provide an opportunity for greater engagement, the impact on the public of the design choices for the IGD are minimal. To ensure the transparency of the policy development process, a copy of the targeted consultation document will be made public at the same time as the targeted consultation is occurring. The public will have the opportunity to provide input during the select committee process (if Cabinet agrees to the proposal).

Responsible Manager (completed by relevant manager)

Pratima Namasivayam

Director, Inspector-General of Defence Establishment Unit

Ministry of Defence

1 October 2021

Quality Assurance (completed by QA panel)

Reviewing Agency:

Ministry of Justice

Panel Assessment & Comment:

*A panel within the Ministry of Justice has reviewed the Regulatory Impact Statement and associated supporting material prepared by the Ministry of Defence. The panel considers that the information and analysis summarised in the Regulatory Impact Statement **partially meets** the Quality Assurance criteria.*

The panel concluded that the Regulatory Impact Statement does not fully meet the consultation requirements in the Quality Assurance criteria, and that this has limited the analysis that could be undertaken to make the Regulatory Impact Statement more convincing.

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

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Released by the Minister of Defence and the Attorney-General

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 on Operation Burnham, the NZDF “would have faced up to that”.³ The Inquiry also found that the NZDF acted lawfully and complied with the rules of engagement and international humanitarian law.⁴
 - b. 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.⁵ 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.⁶
2. To address the issues identified, the Inquiry recommended the establishment of an independent Inspector-General of Defence to oversee the activities of the NZDF to enhance its democratic accountability.⁷

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 (the Committee) should not be able to refer matters to the IGD [ERS-20-MIN-0025, refers].

³ The Inquiry Report, Chapter 1, page 28, para 77.

⁴ The Inquiry Report, Chapter 1, page 30, clause 7.7.1.

⁵ The Inquiry Report, Chapter 12, page 368, para 34.

⁶ The Inquiry Report, Chapter 1, page 28, para 78.

⁷ The interim 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 exercised by democratically elected representatives rather than public servants, and enables better differentiation with the Secretary of Defence’s role as ‘principal civilian adviser’ to the Minister.

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-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:
 - a. 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. This interim RIS has been produced for the purpose of informing key in-principle decisions to be taken by Cabinet on the design choices of the IGD, prior to a targeted consultation process.

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 exercises control over the NZDF. This reflects the constitutional principle of democratic oversight⁸ and the ordinary

⁸ 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).

principles of responsible government. While the Minister is generally involved in 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 Ministry of Defence.⁹

- 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, these 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. **Controller and Auditor-General:** Can audit the NZDF and provide Parliament and public assurance that the NZDF is operating and accounting for its use of resources and performance in the way Parliament intended. Provides assurance that the expenses and capital expenditure of the NZDF are lawful and within scope, amount and period of appropriation.
- e. **Privacy Commissioner:** Can investigate the NZDF's refusal of requests for personal information, misuse of private information or breaches of privacy.
- f. **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 Establishments¹⁰, is the NPM charged with monitoring the NZDF's detention facilities.
- g. **Human Rights Review Tribunal:** Can look into unlawful discrimination proceedings as well as interference with privacy proceedings.

⁹ 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.

¹⁰ Section 80 of the Court Martial Act 2007.

- h. **Health and Disability Commission:** Can look into health and disability services consumers' complaints and hold providers to account.
- i. **Health Practitioner's Disciplinary Tribunal:** Can hear and determine disciplinary proceedings brought against health practitioners. Deals with cases 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, 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:** 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 (COI) is an investigatory process established under the Armed Forces Discipline Act 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 COI 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 includes: the International Court of Justice which settles state disputes; the Office of the Prosecutor of the International Criminal Court which can look into allegations of war crimes; and the Human Rights Committee which monitors implementation of International Covenant on Civil and Political Rights.
- p. **The media:** NZDF is of interest to the media and is subject to its reporting and scrutiny. Media reporting on issues relating to 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 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.¹¹ The Inquiry was clear that despite the existing system, there was need for increased oversight of NZDF to ensure failures do not occur again.¹²

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. Therefore, 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 oversight system currently operating over the NZDF.

What is the policy problem or opportunity?

There is a problem with the current oversight system for the NZDF

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 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 delay. In addition, the mandate, functions and powers of existing bodies are specific and may only

¹¹ The Inquiry Report, Chapter 12, page 368, para 34.

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

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. 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 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 author's¹³ work".¹⁴ 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 exercise democratic oversight of the NZDF and in being 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 and the Minister is responsible to Parliament. 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 commentators:** 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 New Zealand Government is

¹³ Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017).

¹⁴ The Inquiry Report, Chapter 1, page 28, para 78.

accountable to will have an interest in both the NZDF's actions but how it's being overseen. At the stage, there has been no comment about the problem identified by the Inquiry from these stakeholders.

- 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 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, 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, a better way to achieve the policy intent of the Government).

Released by the Minister of Defence and the Attorney-General

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

18. A specific regulatory solution (to establish an IGD) has been agreed in principle by Cabinet, and this interim 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,¹⁵ 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?

19. 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. **Transparent:** 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?

20. 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 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. Therefore this option has not been considered. 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.

¹⁵ www.treasury.govt.nz/sites/default/files/2020-06/guide-cabinet-ia-requirements-june2020.pdf

What options are being considered?

21. 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 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 the in the future. Inquiries are generally expensive¹⁶ 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 it functions or alternatively, there could be a general increase in funding to existing bodies would lead to more scrutiny of NZDF. Consideration of 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 NZDF.
- b. **Option Two – Establishing an IGD:** This is a regulatory option to set up a new independent body to provide oversight of NZDF. An IGD would have key design

¹⁶ Government Inquiry into Operation Burnham and Related Matters = \$7million, Public Inquiry into the Earthquake Commission = \$3.2million, Government Inquiry into the Auckland Fuel Supply Disruption = \$1.128 million, Government Inquiry into the Appointment process for the Deputy Commissioner of Police = \$.264 million

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?

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

Recommendation

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

Released by the Minister of Defence and the Attorney-General

Section 3.0: Deciding on options to design the IGD

24. 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.
25. 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 the 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 the associated powers and reporting processes.
 - c. **Issue 3: What organisational form should the IGD take? (Section 3.1)** 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.
26. In line with Te Kawa Mataaho advice, that organisational "form is based on the governance of functions and powers"¹⁷, 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 on 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?

27. 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.

17 <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?

28. The Inquiry recommended¹⁸ that the IGD would:
- a. 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
 - b. investigate and report on such other matters requiring independent scrutiny as are referred to it by the Minister of Defence, the CDF, the Secretary or the Defence and Foreign Affairs Select Committee of Parliament.¹⁹
29. Analysis has been undertaken on the basis that the IGD should be able to investigate any matters relating to the NZDF on referral of the Minister of Defence, CDF or the Secretary. It would also have the ability to undertake investigations on its own motion into "particular operational activities". 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.
30. The ability to undertake investigations into other matters on referral ensures that separate inquiries²⁰ need not be established. It also has the benefit of future-proofing the IGD 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.
31. The scope of the IGD would not include the activities of Veterans Affairs New Zealand, which is accountable to the Minister of Veterans Affairs, and operates primarily under the requirements of the Veterans Support Act 2014. The IGD would 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 domestic agencies would fall within the scope of the IGD.

What is the specific policy problem for this issue?

32. 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

¹⁸ The Inquiry report, Chapter 1, page 33, Recommendation 2.

¹⁹ As noted previously, Cabinet has agreed to this in principle but decided that the Foreign Affairs Defence Trade Select Committee would not be able to refer matters to the IGD. The Committee has the ability to undertake its own inquiries.

²⁰ Under the Inquiries Act 2013.

ministerial accountability, and ensure the IGD's work does not rely too heavily on the decisions of others (through referrals).

33. 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?

34. The criteria for analysing the options for this issue are:
- a. **Effective:** The IGD's own 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 investigations should empower the NZDF to own the results of its investigations and implement system improvements;
 - d. **Public Confidence:** The IGD's 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.
35. 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?

36. 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.

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

37. 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 in the event, or reports, of death, or serious bodily harm to civilians.

How do the options compare to the status quo?

38. 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. 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.
39. 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.
40. 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 or the CDF to refer matters, which could impact public confidence in the IGD as an independent oversight body.

Recommendation

41. 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 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.

Associated detail relating to this option

42. 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?

43. 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 NZDF 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).

44. The following should be included as operational activities - 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 (e.g. for the purposes of the Health and Safety at Work Act 2015 which would capture activities like Explosive Ordnance Disposal (the work of the bomb disposal squad), and declared support for other Government agencies);
 - 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.

The scope of the IGD's investigatory power

45. In line with the Inquiry's recommendation, 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 aims to strengthen and improve the NZDF through the identification of implementable system improvements.²¹ The proposed scope is the establishment of facts, findings and recommendations. Under this option the IGD would establish facts, and make:

- a. findings (i.e. draw conclusions from the established facts); and as appropriate,
- b. recommendations that further steps be taken to determine civil, criminal or disciplinary liability; and/or
- c. recommendations for the improvement and benefit of the NZDF relevant to the findings of the investigation²².

46. 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 and this approach would be

²¹ The Inquiry Report, Chapter 12, page 371, para 47.

²² 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).

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. This approach is similar to the Inquiries Act 2013, and the Public Service Act 2020.

Associated obligations, powers and offences

47. To support the IGD's investigatory function, the following obligations, powers and offences are recommended:

- a. **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. These are:
 - i. The NZDF is obliged to cooperate and assist the IGD in undertaking its functions;
 - 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 Inquiry²³); and
 - iii. Any NZDF service person or staff must not be subjected to any penalty or discriminatory treatment of any kind in relation to their employment or service because of assisting the IGD, when it was undertaken in good faith.
- b. **Powers:** Taking account of the powers of comparable bodies and the policy objectives agreed by Cabinet, the IGD should have the power to:²⁴
 - 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 likely to be relevant to an investigation;
 - iii. enter, at a reasonable time, any premises or place occupied or used by NZDF, subject to safety and security considerations (following written notification to the CDF of the intent to use this power);
 - iv. access all NZDF records, databases and information systems as required for the undertaking or exercise of its functions and powers; and

²³ Defence Force Order 35 New Zealand Defence Force Response to Civilian Harm nzdf.mil.nz/assets/publications/dfo_35.pdf.

²⁴ These powers are identical to those of the Inspector General of Intelligence and Security and similar to those of the IPCA, the Ombudsman, the Controller and Auditor-General, and the Privacy Commissioner. The proposed powers are also in keeping with those of the Inspector-General of the Australian Defence Force (IGADF) (Although as the IGADF is part of the Australian Defence Force (ADF) some powers around access to premises and information are not required.)

- v. require witnesses to disclose information that would otherwise be under an obligation of secrecy (such as classified information) without it constituting a breach of any law that requires that secrecy.²⁵
 - c. **Offences:** Legal offences would seek to prohibit and punish certain conduct.²⁶ Offences strengthen and provide a legal backstop to the powers.
 - 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 \$5000);
 - ii. wilfully making false statements, misleading or attempting to mislead the IGD in its work (the penalty would be a fine of up to \$5000);
 - iii. wilfully refusing or failing to comply with any lawful requirement of the IGD (the penalty would be a fine of up to \$5000); and
 - iv. publishing or broadcasting, causing the publication or broadcast of, or otherwise distributing or disclosing, decisions relating to, or reports of, IGD investigations without written permission of the Minister of Defence (the penalty would be up to two years in prison or a fine of up to \$10,000).²⁷
48. The IGD's powers would have corresponding safeguards to ensure their appropriate use, and to protect people and information during, and after, investigations. Safeguards would also encourage honest and open participation in IGD investigations, and promote transparency, without compromising national security interests or relationships with foreign partners.

Reporting processes

49. 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 public to the extent possible while safeguarding national security, New Zealand's international relations and obligations of confidence.
50. Reports should be published online. Prior to publication, investigation reports may be shared with relevant Ministers where they relate to or impact other portfolios, and with the Foreign Affairs, Defence and Trade Committee, subject to security classification, and with permission from the Minister of Defence. There is a balance to be struck between transparency and national security.

²⁵ This would require special security processes. Witnesses would also have the same privileges as those in a court of law in giving evidence or providing information to the IGD as part of an investigation.

²⁶ These offences are based on those currently in law for comparable oversight bodies in the NZ system (such as the IGIS and the IPCA). The penalties matched those for the IGIS because the conduct is of an equivalent seriousness and that Act was reviewed more recently (in 2017) than some other oversight bodies.

²⁷ Detail of the recommended 'mens rea' element of this offence will be included in the final RIS.

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	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.	Uncertain monetised impact.	Medium
	There would be one-off 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	Uncertain monetised impact.	Low
	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.	Uncertain non-monetised impact.	Low
Other people involved in investigations or captured by offences	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.	Uncertain (likely low) monetised impact.	Low
	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 comes with a fine or in the case of one offence the possibility of imprisonment which infringes on their freedom of movement.	Uncertain low monetised and non-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 expected to be low because investigations are expected to be infrequent 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 Ministry of Defence	Cost on Ministry of Defence of supporting the Secretary to undertake their role in relation to referrals.	Uncertain (likely low) monetised impact	Medium
Crown	Costs to 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 from taxpayers 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 groups: the NZDF	The creation of an investigatory function (and associated obligations, powers, offences and reporting) is likely to benefit the NZDF through increased trust and confidence from the public.	Low non-monetised impact.	Low
	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 exercise 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 reports would benefit Parliament supporting their constitutional role in holding ministers accountable.	Low non-monetised impact	Medium
Public	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	Additional commitment to transparency and constitutional principles such as democratic oversight of the military and ministerial accountability to Parliament which 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 3.2: Issue 2 - What other functions should the IGD have?

What is the context for this issue?

51. 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?

52. 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?

53. 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. **Complements:** 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.

54. 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?

55. Looking across domestic and international oversight bodies, common functions that would address the problem were identified for further consideration. The options are not mutually exclusive.

56. 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) are: complaints handling (investigating complaints from the public or service people), 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).

Options for other functions the IGD should have

57. The options are:

- a. **Option One – An assessment function:** The IGD can undertake assessments of defined operational activities on its own initiative and other matters on referral from 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 can 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 develops and provides advice or guidance to Ministers, government, or the wider sector.

How do the options compare to the status quo?

58. Detailed analysis of these options is presented in Table 3 in Annex B. In summary, Options Two and Three 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 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 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

59. Option One and Two are recommended because assessment and enquiry functions would contribute to the NZDF's system improvement, identifying potential problems and prevent their occurrence rather than only investigating when something has gone wrong.

60. 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 NZDF are occurring. There is also benefit to NZDF that it has an independent body actively considering how its systems can be improved upon. As with all proposals, there should not be any disproportional impacts on population groups beyond NZDF.

Associated detail relating to this option

61. 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

62. To give effect to the recommended options, the following obligations, powers, and offences are recommended:

- a. **Powers:** the power for the IGD to access all records, databases and information systems across the NZDF at all times should apply to the exercise of all of the IGD's functions to ensure the IGD has access to all required information.
- b. **Obligations:** the following obligations would also apply to these functions:
 - i. The NZDF is obliged to cooperate and assist the IGD in undertaking its functions;
 - ii. The NZDF, via the CDF, is obliged to notify the IGD in the event of certain things happening, including:
 1. the establishment of an internal Court of Inquiry;
 2. 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); and
 - iii. Any NZDF service person or staff must not be subjected to any penalty or discriminatory treatment of any kind in relation to their employment or service because of assisting the IGD, when it was undertaken in good faith
- c. **Offences:** the following offences would apply for the exercise of the power described at sub-paragraph a:
 - i. Wilfully obstructing, hindering or resisting the IGD in the exercise of their powers (the penalty would be a fine of up to \$5000);
 - ii. Wilfully making false statements, misleading or attempting to mislead the IGD in the exercise of their powers (the penalty would be a fine of up to \$5000);
 - iii. Wilfully refusing or failing to comply with any lawful requirement of the IGD (the penalty would be a fine of up to \$5000).

Reporting processes

63. The following processes would apply:

- a. **Assessments:** Unless there is a good reason not to, the IGD should publish assessments undertaken on its own motion, subject to security classifications, as soon as reasonably practicable after sharing them with the Minister of Defence, the Secretary, and the CDF. Assessments undertaken on referral may be published, subject to security classifications, with the agreement of the referring party; and
- b. **Enquiries:** There is 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).

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	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.	Uncertain monetised impact	High
	There are potential flow on impacts for the NZDF's reputation if assessments identify problems.	Uncertain low non-monetised impact	Low
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 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 small range of conduct.	Uncertain	Low
Others Ministry of Defence	Cost on Ministry of Defence of supporting Secretary to undertake their role in relation to referrals.	Uncertain (likely low) monetised impact	Medium
Crown	Costs to 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 (from taxpayers) 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	Could reduce the need for the IGD to undertake investigations, provide greater sense that the NZDF is performing well.	Low non-monetised impact	Low.
	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 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	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	Could benefit the IGD by identifying issues through assessments 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	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	Additional commitment to transparency and constitutional principles such as democratic oversight of the military and ministerial accountability to Parliament which has reputational benefits for New Zealand.	Low non-monetised impact	Low
Total monetised benefits	<i>N/A</i>	<i>N/A</i>	<i>N/A</i>
Non-monetised benefits		<i>Low</i>	<i>Low</i>

Released by the Minister of Defence and the Attorney-General

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

What is the context for this issue?

64. 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”.²⁸ It did not propose a particular organisational form.
65. To assist in determining the best organisational form for the IGD, officials developed the following governance and accountability arrangements which are proposed 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.

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 could 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.

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 should present the IGD’s work programme and annual report to the House of Representatives.

²⁸ The Inquiry Report, Chapter 12, page 372, para 50.

What is the specific policy problem for this issue?

66. In previous sections the interim 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?

67. 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 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 & objectives; 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?

68. 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?

69. 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.²⁹ The options are mutually exclusive.

Options for the IGD's organisational form

70. 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 act³⁰ or to have regard for government policy³¹) 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

²⁹ 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).

³⁰ Section 105 of the Crown Entities Act 2004.

³¹ Section 113 of the Crown Entities Act 2004.

(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?

71. Detailed analysis of these options is presented in Table 4 in Annex B. In summary, analysis showed that neither Option One or Two was worth pursuing. Option One scored poorly because the IGIS has been calibrated to oversee the intelligence 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.
72. 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 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). Therefore this Option could lead to perceptions of a conflict of interest. This risk is exacerbated by the recommendation of the Expert Review Group 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 Expert Review Group also recommends 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.
73. Options Three and Four 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 size of the IGD. 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)³². 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.
74. The reporting obligations under Option Four would be more proportionate, not requiring 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

75. Option Four is recommended. 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

³² Ministers have a narrow ability to direct ICE's 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.

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 still formulate its work programme, undertake its functions and exercise its powers independently of ministers.

76. 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, the CDF and the Secretary in providing feedback on the annual work programme. Public accountability through the work programme and the annual report 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.

Associated detail relating to the option

77. 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

78. 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. In summary, officials recommend 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 reappointed once for a second term of up to three years)³³
 - 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)³⁴.
 - 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.
 - 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 advice³⁵ where it is not available within the skillset of the IGD or their staff. Therefore, the IGD would

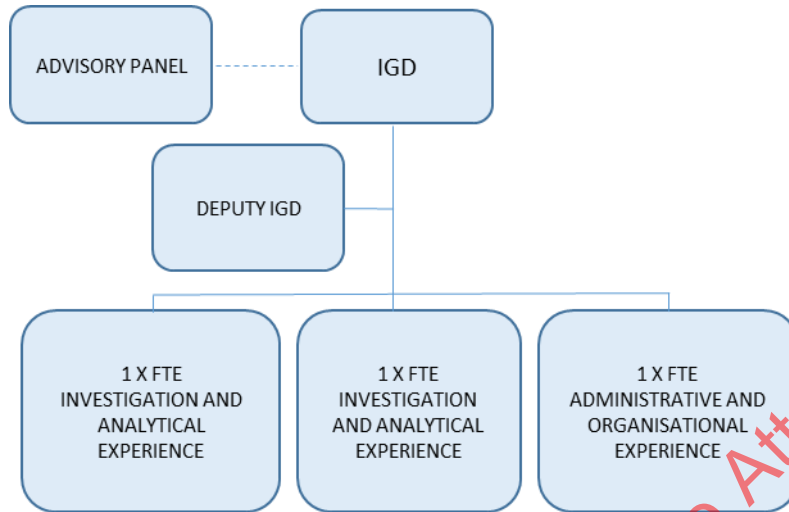
³³ This term length is in line with that for the IGIS.

³⁴ This term length is in line with that for the Deputy IGIS.

³⁵ E.g. technology (such as cybersecurity, AI, machine learning), engineering or legal expertise (in defence, intelligence and security, technology, humanitarian law or detention).

be able to appoint an advisory panel; and also procure specialist advice on a case by case basis.

79. This is represented visually below:



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

Affected groups (identify)	Comment nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks.	Impact \$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.	Evidence Certainty High, medium, or low, and explain reasoning in comment column.
Additional costs of the preferred option compared to taking no action			
Regulated groups: NZDF	There is a cost to NZDF for supporting the CDF to undertake their role in relation to work programme and referrals.	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 taxpayers or baselines which could have subsequent cost pressures.	Medium
Others: 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. It is not yet clear which department would play this role. s9(2)(f)(iv), s9(2)(g)(i)	Uncertain monetised impact.	Medium

Ministry of Defence	Cost on Ministry of Defence of supporting Secretary to undertake their role in relation to work programme and referrals.	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		<i>Low</i>	
Additional benefits of the preferred option compared to taking no action			
Regulated groups: NZDF	NZDF is 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 work programme while maintaining a strong degree of independence for the IGD which supports public confidence.	Low non-monetised impact	Medium
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		<i>Low</i>	<i>Low</i>

Released by the Minister of Defence and the Attorney-General

Section 3.4: Financial information for the entire proposal

80. This table shows our initial modelling for the financial impact of the entire proposal. It will be updated for the final RIS.

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

Released by the Minister of Defence and the Attorney-General

Released by the Minister of Defence and the Attorney-General

Section 4: Delivering an option

How would the new arrangements be implemented?

81. This interim RIS is for an in-principle agreement by Cabinet to enable targeted consultation with experts. As such, it is expected that proposals will be amended or expanded upon, with new matters considered post consultation. A final RIS will set out the finalised proposal that officials will recommend to Cabinet for agreement. Should Cabinet agree, then the proposal is expected to be given effect through a bill for introduction in 2022, which would either create new legislation, or amend the Defence Act 1990, to establish an IGD. Funding for the establishment of the IGD will follow a separate process and funding decisions would be undertaken via regular Budget processes. These processes would be led by the Ministry of Defence. Any legislation enacted is expected to be administered by the Ministry.
82. A current unknown at the time of writing the interim RIS is which agency will be the ongoing administering agency for the IGD as described in Section 3.3 (providing support for appointments and appropriations). If the administering agency has previous experience in undertaking the function, then a relatively seamless operationalisation of the policy proposal is expected. If it is not, then work needs to be undertaken by the administering agency to understand its responsibility and develop standard operating procedures to undertake its function.
83. A transition period is expected between any passage of 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.
84. 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.
85. [REDACTED] s9(2)(f)(iv), s9(2)(g)(i)
[REDACTED]
[REDACTED]
Decisions on this are expected to be made at the same time as final policy decisions on the proposal are being made by Cabinet.
86. This proposal would primarily impact the NZDF. Officials have worked with the NZDF throughout the development of policy and will continue to do so as the policy is implemented to ensure successful operationalisation.

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

87. Monitoring of the IGD 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.

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 much 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 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 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 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: 6 <i>Inquiries are transparent and support public confidence but are slow and costly.</i>	Total: 6 <i>This option leverages existing systems but fails to provide coherent organisation-wide oversight over NZDF.</i>	Total: 4 <i>This option is flexible but does not provide any additional powers, relying on the consent of NZDF. It would not adequately support public trust and confidence.</i>	Total: 12 <i>This option supports quality, thorough and independent oversight focused on 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
<p>Criteria 1: Effective</p> <p>The IGD can determine how it undertakes its oversight role while minimising the impact its investigations will have on the NZDF</p>	<p>+++ (x2)</p> <p><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></p>	<p>+++ (x2)</p> <p><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></p>	<p>+ (x2)</p> <p><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></p>
<p>Criteria 2: Future proof</p> <p>Investigation functions provide flexibility for IGD to fulfil its oversight role – both now, and in the future</p>	<p>++++ (x2)</p> <p><i>Future-proof and flexible.</i></p>	<p>+++ (x2)</p> <p><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></p>	<p>+ (x2)</p> <p><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></p>
<p>Criteria 3: Empower</p> <p>Investigation functions empower the NZDF to own the results of its investigations and implement system improvements</p>	<p>++</p> <p><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></p>	<p>++</p> <p><i>Depends to some degree on how the IGD interprets the 'infringement of rights' and 'other harm'.</i></p>	<p>++++</p> <p><i>More likely that recommendations will be embraced under this option as they would be rare in only in the gravest of circumstances.</i></p>
<p>Criteria 4: Public confidence</p> <p>Investigation functions increase public confidence that issues regarding the NZDF's actions are being appropriately investigated</p>	<p>++++ (x2)</p> <p><i>Allowing IGD full discretion will provide public confidence re: oversight of the NZDF operational activities.</i></p>	<p>+++ (x2)</p> <p><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 the NZDF operational activities.</i></p>	<p>+ (x2)</p> <p><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></p>
<p>Criteria 5: Complement</p> <p>Investigation functions build upon and complement existing oversight mechanisms on defence matters</p>	<p>++</p> <p><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></p>	<p>++</p> <p><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></p>	<p>+++</p> <p><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></p>
<p>Criteria 6: Consistent</p> <p>Investigation functions are consistent with and as robust as the those in the national security system</p>	<p>0</p> <p><i>IGIS own-motion has extremely broad scope; IPCA own-motion is more limited as mostly complaints driven.</i></p>	<p>0</p> <p><i>IGIS own-motion has extremely broad scope; IPCA own-motion is more limited as mostly complaints driven.</i></p>	<p>0</p> <p><i>IGIS own-motion has extremely broad scope; IPCA own-motion is more limited as mostly complaints driven.</i></p>
<p>Overall assessment</p>	<p>Total: 26</p> <p><i>Democratic accountability and increased public confidence likely to be achieved.</i></p>	<p>Total: 22</p> <p><i>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.</i></p>	<p>Total: 13</p> <p><i>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.</i></p>

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

	Option One – Assessments	Option Two – Enquiries	Option Three – Advisory
<p>Criteria 1: Improvement - The additional function supports system improvement by the NZDF, identifying or addressing potential issues</p>	<p>++++ (x2) <i>The IGD could play a key role in providing independent assessment of the 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.</i></p>	<p>+++ (x2) <i>Information obtained from enquiries may flag potential concerns about the way in which operational activities are being undertaken.</i></p>	<p>+ (x2) <i>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</i></p>
<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>	<p>++ (x2) <i>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.</i></p>	<p>++++ (x2) <i>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.</i></p>	<p>0 (x2) <i>An advisory function does not support the IGD's oversight role</i></p>
<p>Criteria 3: Flexible The additional function provides for flexibility and adaptability of the IGD's oversight role over time.</p>	<p>+++ <i>Future-proof and flexible.</i></p>	<p>+++ <i>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.</i></p>	<p>0 <i>Neither supports or reduces flexibility.</i></p>
<p>Criteria 4: Confidence The additional function increases public confidence that issues regarding the NZDF's actions are being appropriately investigated</p>	<p>+++ (x2) <i>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.</i></p>	<p>+++ (x2) <i>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.</i></p>	<p>0 (x2) <i>Unlikely to support public confidence as different function.</i></p>
<p>Criteria 5: Complements The additional function builds upon and complements existing oversight mechanisms on defence matters</p>	<p>-- <i>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.</i></p>	<p>+ <i>More consistent with IGIS.</i></p>	<p>+ <i>Consistent with IGIS. IPCA doesn't have explicit function but it does provide advice and views, including suggestions for legislative change, directly to the Minister (e.g. via Briefing to Incoming Minister)</i></p>
<p>Criteria 6: Consistent The additional function is consistent with similar oversight mechanisms in the national security and intelligence system.</p>	<p>+++ <i>Own motion assessments into operational activities will 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.</i></p>	<p>+++ <i>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).</i></p>	<p>---- <i>IGD will provide advice and system improvement recommendations following its investigations, and assessments. Limited value in having an explicit function.</i></p>
<p>Overall assessment</p>	<p>Total: 20 <i>Own motion assessments into operational activities will support oversight and system improvement</i></p>	<p>Total: 27 <i>Directly supports IGD oversight role with low impact on the NZDF</i></p>	<p>Total: -6 <i>Distracts from IGD's core role, has limited effect on democratic accountability or public confidence</i></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)</p> <p>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)</p> <p>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)</p> <p>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)</p> <p>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)</p> <p>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. (x2)</p>	<p>--- (x2)</p> <p>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. (x2)</p>	<p>++++ (x2)</p> <p>The IGD's proposed functions would fit well within an outcome framework of an ICE model.</p>	<p>++++ (x2)</p> <p>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)</p> <p>The powers are compatible apart from scope of investigations and what the IGIS and IGD can find.</p>	<p>--- (x2)</p> <p>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. (x2)</p>	<p>++++ (x2)</p> <p>The IGD's proposed powers would fit well within an outcome framework of an ICE model.</p>	<p>++++ (x2)</p> <p>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>+++</p> <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>---</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>+++</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>+++</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)</p> <p>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)</p> <p>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)</p> <p>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)</p> <p>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>+++ (x2)</p> <p>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.</p>	<p>+++ (x2)</p> <p>The IGD's accountability processes could be combined with MoD's. Given the small size of MoD, this would require some increased additional resourcing.</p>	<p>--- (x2)</p> <p>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.</p>	<p>+++ (x2)</p> <p>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.</p>
Criteria 7: People	<p>+</p> <p>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.</p>	<p>0</p> <p>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.</p>	<p>0</p> <p>This option would require building capacity from scratch.</p>	<p>0</p> <p>This option would require building capacity from scratch.</p>
Criteria 8: Culture	<p>+++</p> <p>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.</p>	<p>---</p> <p>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.</p>	<p>0</p> <p>There is no existing culture so it would be required to be built from scratch.</p>	<p>0</p> <p>There is no existing culture so it would be required to be built from scratch.</p>
Criteria 9: Processes and technology	<p>-</p> <p>s6(a), s9(2)(f)(iv), s9(2)(g)(i)</p>	<p>-</p> <p>s6(a), s9(2)(f)(iv), s9(2)(g)(i)</p>	<p>0</p> <p>s6(a), s9(2)(f)(iv), s9(2)(g)(i)</p>	<p>0</p> <p>s6(a), s9(2)(f)(iv), s9(2)(g)(i)</p>

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	Option One – IGIS	Option Two – Statutory officer in MoD	Option Three – Independent Crown entity	Option Four – Independent statutory officer
Criteria 10: Physical assets	<p>--- (x2)</p> <p>s6(a), s9(2)(f)(iv), s9(2)(g)(i)</p>	<p>0 (x2)</p>	<p>0 (x2)</p> <p>It would need new premises or another agency to host it. This means cost but ensures the necessary physical assets.</p>	<p>0 (x2)</p> <p>It would need new premises or another agency to host it. This means cost but ensures the necessary physical assets.</p>
Criteria 11: Internal structure	<p>+++</p> <p>s6(a), s9(2)(f)(iv), s9(2)(g)(i)</p>	<p>++</p> <p>s6(a), s9(2)(f)(iv), s9(2)(g)(i)</p>	<p>++++</p> <p>This would be the only function, so there is no risk of it being buried.</p>	<p>++++</p> <p>This would be the only function, so there is no risk of it being buried.</p>
Overall assessment	<p>Total: 27 out of 68</p> <p>While the option scores well, this option is likely to require significant changes to the IGIS' current arrangements.</p>	<p>Total: -19 out of 68</p> <p>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.</p>	<p>Total: 33 out of 68</p> <p>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.</p>	<p>Total: 43 out of 68</p> <p>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.</p>

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