

HON ANDREW LITTLE, MINISTER OF DEFENCE and

HON DAVID PARKER, ATTORNEY-GENERAL

Inspector-General of Defence Bill: Policy change for Departmental Report

June 2023

This publication provides information on Cabinet's May 2023 decisions on a policy change to the Inspector-General of Defence Bill. It comprises:

- the Cabinet minute of decisions: *Inspector-General of Defence Bill: Policy change for Departmental Report* [DEV-23-MIN-0070].
- the Cabinet paper: *Inspector-General of Defence Bill: Policy change for Departmental Report* [DEV-23-SUB-0070].

This pack has been released on the Ministry of Defence website, available at: www.defence.govt.nz/publications.

It has been necessary to withhold certain information in accordance with the Official Information Act 1982, in order to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials [section 9(2)(f)(iv)].

Where information is withheld, the relevant section of the Act is indicated in the body of the document. No public interest has been identified that would outweigh the reasons for withholding it.



Cabinet Economic Development Committee

DEV-23-MIN-0070

Updated

Minute of Decision

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

Inspector-General of Defence Bill: Policy Change for Departmental Report

Portfolios **Defence / Attorney-General**

On 3 May 2023, the Cabinet Economic Development Committee:

- 1 **noted** that in May 2022, the Cabinet Government Administration and Expenditure Review Committee (GOV) agreed to the key design features of an Inspector-General of Defence (IGD), and authorised drafting instructions to be issued to the Parliamentary Counsel Office [GOV-22-MIN-0009];
- 2 **noted** that new funding to establish the IGD was approved as a tagged contingency in Budget 2022;
- 3 **noted** that in October 2022, the Cabinet Legislation Committee agreed to introduce the IGD Bill to Parliament, and the Bill was referred to the Foreign Affairs, Defence and Trade Committee following its first reading on 10 November 2022 [LEG-22-MIN-0171];
- 4 **noted** that in May 2022, GOV agreed that the IGD could look into any New Zealand Defence Force (NZDF) matter, except the activities of Veterans' Affairs New Zealand, on the referral of the Minister of Defence, the Secretary of Defence or the Chief of Defence Force, and into a more limited range of NZDF matters on the IGD's own initiative [GOV-22-MIN-0009];
- 5 **agreed** to change the existing policy setting, to empower the IGD to examine any NZDF activity (except the activities of Veterans' Affairs New Zealand) on its own initiative;
- 6 **noted** that this change would allow the IGD the discretion to examine any NZDF activity, including training, and workplace culture issues, without a referral from the Minister of Defence, Chief of Defence Force, or Secretary of Defence;
- 7 **invited** the Minister of Defence to direct officials to include the decisions that result from the paper under DEV-23-SUB-0070, as recommendations for inclusion in the Bill, in the Ministry of Defence's Departmental Report to the Foreign Affairs, Defence and Trade Committee;
- 8 **noted** that ^{9(2)(f)(iv)} [REDACTED] and that the Foreign Affairs, Defence and Trade Committee is due to report the Bill back to Parliament by 23 June 2023;

9 **noted** that the Ministry of Justice and the Ministry of Defence are jointly preparing a plan to establish the office of the IGD once the legislation is passed.

Janine Harvey
Committee Secretary

Present:

Hon Dr Megan Woods (Chair)
Hon Michael Wood
Hon Dr Ayesha Verrall
Hon Damien O'Connor
Hon David Parker
Hon Peeni Henare
Hon Ginny Andersen
Hon Barbara Edmonds
Hon Dr Duncan Webb
Hon Dr Deborah Russell
Hon Rachel Brooking
Jo Luxton, MP

Officials present from:

Office of the Prime Minister
Officials Committee for DEV

Released by the Minister of Defence
and Attorney-General

In Confidence

Office of the Minister of Defence

Office of the Attorney-General

Chair, Cabinet Government Administration and Expenditure Review Committee

Inspector-General of Defence Bill: Policy change for Departmental Report

Proposal

- 1 This paper seeks Cabinet's agreement to a policy change to the Inspector-General of Defence Bill (the Bill), in response to issues that have been raised by submitters since the Bill was introduced to Parliament in October 2022.

Relation to government priorities

- 2 The establishment of the Inspector-General of Defence (IGD) supports the government priority of *laying the foundations for a better future*. Establishing the IGD will strengthen public confidence and support New Zealand's international reputation by providing assurance that the New Zealand Defence Force's (NZDF) activities, in a rapidly changing global context, are subject to dedicated independent oversight.

Executive Summary

- 3 This paper seeks agreement to amend Cabinet's previous policy decision in May 2022 on the NZDF activities the IGD can examine on its own initiative.
- 4 The currently agreed policy, as drafted in the Bill, is that the IGD is able to examine any NZDF activity on referral from the Minister of Defence, Chief of Defence Force or Secretary of Defence. The proposed change would extend the ambit of what the IGD can examine on its own initiative – from only NZDF activities with the most potential to cause harm, undermine public confidence in the NZDF and carry reputational risk to New Zealand, to all NZDF activities (except the activities of Veterans' Affairs New Zealand).
- 5 This change is recommended following analysis of concerns raised by submitters to the Foreign Affairs, Defence and Trade Committee (the Select Committee) during its consideration of the Bill to date. We consider that it would enhance the credibility and independence of the IGD, and better align it with existing oversight mechanisms.
- 6 We seek approval to include this change as a recommendation to amend the Bill in the Ministry of Defence's Departmental Report to the Select Committee, due for submission on 16 May 2023.

Background

- 7 In 2018, the Attorney-General established the Government *Inquiry into Operation Burnham and other related matters* (the Inquiry).
- 8 The Inquiry examined allegations of wrongdoing by the NZDF during operations conducted in Afghanistan in 2010 and 2011. It found that the NZDF's failure to provide full and accurate information to Ministers, and to adequately scrutinise or respond to information, disrupted the principles of democratic oversight of the military and ministerial accountability to Parliament.
- 9 The Inquiry recommended establishing an IGD to provide independent, external oversight of the NZDF. Cabinet External Relations and Security Committee, with power to act, accepted this recommendation in principle in July 2020 [ERS-20-MIN-0025, refers].
- 10 In February 2021, Cabinet agreed the Government's intended policy outcome and policy objectives for the IGD's establishment [CAB-21-MIN-0006, refers], and in November 2021, it agreed in principle to key design elements that would form the basis of the IGD (its scope, functions, powers and form), subject to the outcome of targeted consultation [CAB-21-MIN-0439, refers].
- 11 In May 2022, Cabinet confirmed these key design elements, and authorised drafting instructions to be issued to Parliamentary Counsel Office [CAB-22-MIN-0168, refers].
- 12 In October 2022, Cabinet agreed to introduce the Inspector-General of Defence Bill to Parliament [CAB-22-MIN-0461, refers]. The Bill was referred to the Select Committee for consideration, following the Bill's first reading on 10 November 2022.
- 13 The Select Committee accepted 13 submissions on the Bill, and heard 5 oral submissions. Eleven submissions supported establishing an IGD, and welcomed it as a way to increase the accountability and transparency of the NZDF. One submission opposed establishing the IGD, arguing that it would be "more wastage of taxpayer money on a position that will hardly be used".¹
- 14 The Select Committee also appointed an independent specialist advisor, Sir Kenneth Keith KC.

The IGD should not need a referral to examine non-operational NZDF activities

- 15 As currently drafted, the Bill implements Cabinet's policy decision, in May 2022 [GOV-22-MIN-0009 refers], that:
 - 15.1 the IGD should be able to examine any NZDF activity (except the activities of Veterans' Affairs New Zealand) *on referral* from the Minister of Defence, Chief of Defence Force or Secretary of Defence, and

¹ The last submitter did not expressly support or oppose the IGD's establishment, and instead made unrelated comments on veteran status.

- 15.2 on its *own initiative*, the IGD should be able to examine only NZDF activities with the most potential to cause harm, undermine public confidence in the NZDF and carry reputational risk to New Zealand.
- 16 Without a referral, the IGD is not able to examine:
- 16.1 the NZDF's general training (including exercises for combat readiness), disciplinary matters the NZDF is pursuing in the military justice system, and day-to-day administrative matters (such as workforce planning and activities relating to workplace culture) except as the administrative matters relate to a specific operation.
- 16.2 an incident that is already the subject of an NZDF Court of Inquiry until it has concluded, unless the IGD is satisfied that there has been an unreasonable delay to the Court of Inquiry's proceedings.
- 17 The Select Committee received submissions on the limitations on the IGD's oversight when it performs functions on its own initiative. Submitters recommended removing all restrictions on the kinds of activities the IGD could examine on its own initiative, to better align the IGD with existing oversight bodies. The submitters contended that any restrictions would undermine the credibility and independence of the office.
- 18 Other comments from submitters suggest that the Bill's current drafting is confusing, and does not make it clear that the IGD would be able to examine the NZDF's operational activities, including its reporting and record-keeping related to specific operations. One submitter, for example, incorrectly read the Bill to mean that the IGD would be restricted to examining only pre-deployment training and intelligence collection on its own initiative.
- 19 The current policy position is tenable, in that it directs the IGD to focus on the NZDF activities that are most likely to be of concern to the public. However, drafting legislation to clearly delineate the IGD's jurisdictional boundaries has proven complex. It is clear from submitters' comments that, as currently drafted, the Bill leaves a degree of doubt on this matter.
- 20 On balance, given the advantages of greater public confidence in the independence of the IGD and noting the greater certainty that would likely result, we recommend adjusting Cabinet's May 2022 policy decision, to empower the IGD to examine all NZDF activities (except the activities of Veterans' Affairs New Zealand) on its own initiative.
- 21 The IGD would be free to choose the subject of the investigations or assessments it launches on its own initiative. It could choose to examine, for example, training and administrative matters, including the NZDF's workplace culture, without a referral from the Minister of Defence, Chief of Defence Force, or Secretary of Defence. The Bill would continue:
- 21.1 to require the IGD to consider whether launching the investigation or assessment is in the public interest (including whether it would be a good use of its available resources).

- 21.2 to require the IGD to have regard to the functions of other oversight bodies, and enable the IGD to launch a joint investigation with others if appropriate.
- 21.3 to bar the IGD from examining matters on its own initiative that are already subject to an NZDF Court of Inquiry until that process has concluded (unless there has been an unreasonable delay).
- 21.4 to allow the IGD to examine an incident from a systems-improvement perspective, including where that incident is already the subject of prosecution or disciplinary proceedings in the military justice system. The IGD would be able to make findings and recommendations on NZDF processes and procedures. It would not, however, be able to comment on the criminal or disciplinary liability of individuals.
- 22 We do not propose a change to the IGD's settings in relation to NZDF Courts of Inquiry or military justice proceedings. These settings acknowledge the need for the NZDF to own, investigate and resolve issues itself, in line with Cabinet's May 2022 policy decisions. They also ensure that the IGD does not interfere with judicial processes, and that it does not become a mechanism to appeal the outcome of military discipline proceedings.
- 23 Adjusting the current policy setting would significantly expand the scope of the IGD's oversight when acting on its own initiative. However, when compared to retaining the current policy setting, we consider that allowing the IGD discretion to examine any NZDF activity performs better:
- 23.1 **Consistent:** It would make the IGD more consistent with the settings of other oversight bodies. The Inspector-General of Intelligence and Security, for example, has full discretion to conduct inquiries on its own initiative into any matter concerning the activities of the intelligence and security agencies.²
- 23.2 **Public confidence:** It would enhance the IGD's credibility and independence, and allow the public to have greater confidence that issues regarding the NZDF's actions are being appropriately examined.
- 23.3 **Future-proof:** It would provide more flexibility for the IGD to fulfil its oversight role, both now, and in the future.
- 23.4 **Effective:** It would reduce the IGD's reliance on referrals from the Minister of Defence, Chief of Defence Force, or Secretary of Defence, and thereby improve its efficiency and effectiveness.
- 24 Enabling the IGD to examine all NZDF activities would increase risks of overreach, and of jurisdictional overlap with existing scrutiny of the NZDF. It could

2 Specifically, the IGIS can examine (a) any matter relating to an intelligence and security agency's compliance with New Zealand law; (b) any matter where it appears a New Zealander has been or may be adversely affected by an act, omission, practice, policy or procedure of an intelligence and security agency; and (c) the propriety of the activities of an intelligence and security agency.

also increase the impact on the NZDF in relation to supporting the IGD's functions, liaising with its office, responding to requests for information, and implementing any recommendations.

25 However, we consider that these risks can be managed by the Bill's current settings, described above at paragraph 21.1 – 21.4. Like all public entities, the IGD would also need to operate within budget, and account for its activities and use of resources, requiring it to prioritise its efforts.

Financial implications

26 New funding was approved in Budget 2022 for the establishment phase and ongoing operations of the office of the IGD through a tagged contingency. The Minister of Finance, the Minister of Defence, and the Minister of Justice have the authority to draw down from the tagged contingency following enactment of legislation to establish the IGD.

27 Costs for the IGD are made up of:

27.1 **Establishment phase costs:** One-off costs are required to support the administering agency to source and prepare physical infrastructure, ICT, hire staff, advise the Minister of Defence on appointments, and begin to get the office operational.

27.2 **Operating costs:** Funding is required on an ongoing basis for personnel, premises, ICT, advisory panel, external advice, travel, and costs to an administering agency.

28 Funding approved as part of Budget 2022 is:

28.1 \$1.130 million in FY2023/24. This is made up of establishment phase costs of \$0.590 million and part-year operating costs of \$0.540 million.

28.2 \$2.254 million ongoing operating costs from FY2024/25, which includes \$0.115 million for the administering agency.

29 We do not seek additional funding as a result of the change proposed in this paper.

30 Once the IGD is up and running, there may be a need to seek additional funding:

30.1 **To scale up the IGD's resources** and support a larger work programme if required.

30.2 **To enable the NZDF and Ministry of Defence to support and respond to the IGD.** As noted above, there is expected to be fiscal impact on the NZDF in relation to supporting the IGD's functions, liaising with its office, responding to requests for information and implementing any recommendations. There may also be fiscal impact on the Ministry of Defence in respect of referrals or responding to IGD investigations or assessments. Such impacts will depend on the nature and scale of the IGD's work programme and cannot be quantified at this stage.

31 In May 2022, Cabinet agreed that the Ministry of Justice would administer the office of the IGD. Officials from the Ministry of Defence and the Ministry of Justice are jointly preparing a plan to set up the office of the IGD, once the legislation is enacted.

Legislative implications

32 New legislation is required to establish the IGD. The Bill is now with the Select Committee for consideration. 9(2)(f)(iv)

33 The Select Committee requested an extension to its deadline to report the Bill back to Parliament. It is now due on 23 June 2023.

Impact Analysis

Regulatory Impact Analysis

34 The Treasury's Regulatory Impact Analysis Team has determined that the proposal to expand the NZDF activities that the Inspector-General of Defence can examine of its own initiative to include non-operational activities is exempt from the requirement to prepare a regulatory impact statement (RIS). This exemption is on the basis that there is relevant existing impact analysis produced for a previous Cabinet decision [CAB-22-MIN-0168, refers]³, and there would be no or minor further impacts resulting from this proposal on businesses, individuals, and not-for-profit entities.

Climate Implications of Policy Assessment

35 The Climate Implications of Policy Assessment (CIPA) team was consulted on this change and confirmed that the CIPA requirements do not apply to this proposal as it is not expected to result in any significant, direct emissions impacts.

Te Tiriti o Waitangi

36 There are no identified direct Te Tiriti o Waitangi implications arising from the IGD's establishment.

37 Officials consulted the NZDF's Tikanga group and Senior Māori Advisor during policy development in 2021 to 2022, to explore the potential impacts of the proposals on NZDF Māori personnel, and to ensure that any adverse or disproportionate impacts are minimised. The feedback received indicated that establishing the IGD would be compatible with the tikanga of Pono (acting with integrity and supporting transparency and accountability) and the tikanga of

3 The Regulatory Impact Statement is available online at:
www.defence.govt.nz/publications/publication/establishing-an-independent-inspector-general-of-defence-final-ris.

Kaitiakitanga (the practice of applying safe, responsible and ethical practices when managing information and while working with witnesses). Once appointed, the IGD would consider further how to incorporate tikanga values when determining its detailed procedures for undertaking its functions.

Population implications

38 The establishment and operation of the IGD will have limited impacts outside of Government. Officials consulted Veterans' Affairs during policy development in 2021 to 2022 to ensure that there are no adverse or disproportionate impacts on veterans who may, in time, be required to participate in IGD investigations. Veterans' Affairs was satisfied that it would be excluded from the IGD's overall oversight, and that care would be taken to ensure that in carrying out investigations, the IGD would be mindful of veteran participants' potential vulnerabilities and possible need for support during any proceedings. The change proposed in this paper does not affect this analysis.

Human Rights

39 The Inspector-General of Defence Bill is consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. The Bill's proposed powers, offences and penalties have the potential to engage the rights of freedom of expression, unreasonable search and seizure, and liberty of the person, but these are accompanied by protections and safeguards to ensure such rights are limited only in ways that are justifiable in a free and democratic society.

Consultation

40 The following agencies have been consulted on this paper: the Department of the Prime Minister and Cabinet, Crown Law Office, Public Service Commission, Ministry of Justice, NZDF, Parliamentary Counsel Office, New Zealand Police, New Zealand Security Intelligence Service, Government Communications Security Bureau, the Treasury, Ministry of Foreign Affairs and Trade, Ministry for Primary Industries, and New Zealand Customs.

Communications and Proactive Release

41 We intend to arrange for this paper to be proactively published (subject to redaction as appropriate under the Official Information Act 1982), on the Ministry of Defence's website, after the Foreign Affairs, Defence and Trade Committee has reported the Bill back to Parliament.

42 We also intend to issue a press release once the Bill is enacted.

Recommendations

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

- 1 **note** that in May 2022, Cabinet agreed to the key design features of an Inspector-General of Defence, and authorised drafting instructions to be

issued to Parliamentary Counsel Office;

- 2 **note** that new funding to establish the Inspector-General of Defence was approved as a tagged contingency in Budget 2022;
- 3 **note** that in October 2022, Cabinet agreed to introduce the Inspector-General of Defence Bill to Parliament, and the Bill was referred to the Foreign Affairs, Defence and Trade Committee following its first reading on 10 November 2022;
- 4 **agree** to change the existing policy setting, to empower the Inspector-General to examine any New Zealand Defence Force activity (except the activities of Veterans' Affairs New Zealand) on its own initiative;
- 5 **note** that this change would allow the Inspector-General of Defence the discretion to examine any New Zealand Defence Force activity, including training, and workplace culture issues, without a referral from the Minister of Defence, Chief of Defence Force, or Secretary of Defence;
- 6 **invite** the Minister of Defence to direct officials to include the decisions that result from this paper as recommendations for inclusion in the Bill in the Ministry of Defence's Departmental Report to the Foreign Affairs, Defence and Trade Committee;
- 7 **note** that 9(2)(f)(iv) and that the Foreign Affairs, Defence and Trade Committee is due to report the Bill back to Parliament by 23 June 2023;
- 8 **note** that the Ministry of Justice and the Ministry of Defence are jointly preparing a plan to establish the office of the Inspector-General of Defence once the legislation is passed;
- 9 **note** that the Minister of Defence and Attorney-General will arrange for this paper to be proactively released on the Ministry of Defence's website, after the Inspector-General of Defence Bill is reported back to Parliament in June 2023.

Authorised for lodgement

Hon Andrew Little
Minister of Defence

Hon David Parker
Attorney-General