

14 October 2022

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Inspector-General of Defence Bill**

### **Purpose**

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1. We have considered whether the Inspector-General of Defence Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 23476/7.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with section 14 (freedom of expression), section 21 (freedom from unreasonable search and seizure), and section 25(d) (right not to be compelled to be a witness or to confess guilt). Our analysis is set out below.

### **The Bill**

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4. The Bill establishes the offices of Inspector-General of Defence (IGD) and Deputy Inspector-General of Defence. These new roles aim to:
  - a. help the Minister of Defence account accurately to the House of Representatives for the activities of the New Zealand Defence Force (NZDF), and
  - b. assure the public that the activities of the NZDF are subject to independent scrutiny, including in relation to New Zealand's obligations under international law.
5. The Bill is part of the response to the Government *Inquiry into Operation Burnham and other related matters* (the Inquiry) established in 2018. 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.
6. The Bill sets out the two core functions of the IGD: to investigate incidents that have occurred in the course of NZDF activities that are within the specified scope; and to assess, and identify potential improvements or additions to, NZDF policies and procedures governing those activities.
7. The Bill provides for a range of powers and duties to enable the IGD to carry out their functions. It gives the IGD powers to obtain information and requires the IGD to publish reports about their work. The Bill also creates offences for obstructing, hindering, resisting or deceiving the IGD and for breaching confidentiality requirements that govern information associated with the IGD's work.

## Consistency of the Bill with the Bill of Rights Act

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### Section 14 – Freedom of expression

8. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>1</sup>
9. The Bill includes many provisions that appear to limit the right to freedom of expression, namely by:
  - a. requiring the IGD (or Deputy IGD) to provide, notify other parties of, or consult other parties on, specified decisions, intended actions, findings, or other specified material; and to publish certain information;<sup>2</sup>
  - b. requiring other public actors, including the Minister of Defence, Secretary of Defence, Chief of Defence Force, or the NZDF, to provide or present, notify, or consult the IGD and others of actions, incidents, reasons, or other specified information or material: for example, the Defence Force must provide the IGD with full and direct access to specified records;<sup>3</sup>
  - c. limiting the disclosure of information, including by order of the IGD.<sup>4</sup> The Bill creates offences for wilfully failing to comply with a requirement under clause 35 restricting the use, recording or disclosure of information, documents or other things; and for knowingly publishing something that the IGD has ordered under clause 37 must not be published.
10. Where these requirements fall on specified public actors and prescribe how they may do the work they are required to do, section 14 of the Bill of Rights Act may not be engaged. However, some of these requirements, such as the limits on disclosure of information, apply more broadly.

### *Is the limitation justified and proportionate under section 5 of the Bill of Rights Act?*

11. Where a provision is found to limit any particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is demonstrably justifiable in terms of section 5 of that Act. The section 5 inquiry is approached as follows:<sup>5</sup>
  - a. Does the provision serve an objective sufficiently important to justify some limitation on the right or freedom?
  - b. If so, then:

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<sup>1</sup> See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

<sup>2</sup> See clauses 14(2), 15, 16(3), 18, 20, 30(2), 31(5), 34(b), 42(a), 48(4), 55, 57, and 58.

<sup>3</sup> See clauses 16, 21, 23(2), 24, 26, 31(4), 35(6), 57, and 58.

<sup>4</sup> See clauses 19(2), 20(3), 35(2), and 37; and Schedule 2.

<sup>5</sup> *Hansen v R* [2007] NZSC 7.

- i. is the limit rationally connected to the objective?
  - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
  - iii. is the limit in due proportion to the importance of the objective?
12. We have assessed the justifiability of all provisions in the Bill that may engage section 14 of the Bill of Rights Act, including for completeness those that fall on public actors as well as those that apply more broadly.
13. We consider the limits imposed by these provisions to be justifiable:
- a. Requiring the IGD to share or publish certain information is rationally linked to the important objective of ensuring effective functioning of the IGD role and oversight of the NZDF, including by ensuring that parties who may be affected by the IGD's work are aware of and can consider the IGD's findings and decisions. These provisions are minimally impairing and proportionate because they apply only to information that relates to the IGD's functions.
  - b. Requiring other public actors to provide information to the IGD is rationally connected to the important objective of increasing transparency over the NZDF's activities because it ensures the IGD has the information needed to undertake this role effectively. The requirements are minimally impairing and proportionate because they require only the sharing of information that would be relevant to the IGD's functions.
  - c. Limiting disclosure of information is rationally connected to the important objectives of supporting the effective functioning of the IGD and the NZDF and mitigating risks to privacy and security. It is minimally impairing and proportionate because it appears likely to apply only to information and circumstances in which disclosure may undermine these objectives.

### **Section 21 – Freedom from unreasonable search and seizure**

14. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise. The right protects a number of values including personal property, dignity, and privacy.<sup>6</sup>
15. The Bill includes several provisions that we consider to be search and seizure powers under the Bill of Rights Act:
- a. The IGD may directly access defence records in the NZDF's possession or control (clause 23(1)).
  - b. The IGD may examine a person on oath if the IGD considers that the person may be able to provide information relevant to an investigation (clause 27).
  - c. A person must, on request, provide the IGD with any information, document, or other thing that is within the person's possession or control and that the IGD considers may be relevant to an investigation (clause 28).

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<sup>6</sup> See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

- d. The IGD may enter NZDF premises (clause 30).
  - e. The IGD may examine any document or other thing to determine privilege (clause 39(2)).
  - f. The IGD may request from an organisation specified information about its internal procedures, although there is no requirement for the organisation to comply unless it is a public sector agency (Schedule 2, new section 31(2)(b) of the Protected Disclosures (Protection of Whistleblowers) Act 2022).
16. The requirement to provide information, a document, or another thing to the IGD overrides any obligation of non-disclosure or secrecy (clause 32), subject to the immunities and privileges conferred by clause 39. A person is not excused from providing any information, document or other thing to the IGD in the course of an investigation just because doing so may incriminate or tend to incriminate the person (clause 29).<sup>7</sup>
17. The Bill creates new offences for wilfully obstructing, hindering, resisting or deceiving the IGD. A person convicted of such an offence may be fined up to \$10,000 (clause 45).

*Are the search and seizure powers reasonable?*

18. Ordinarily, a provision found to limit a particular right or freedom may be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of section 5 of that Act. However, the Supreme Court has held that an unreasonable search logically cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.<sup>8</sup> Rather, section 21 is self-limiting in that the assessment to be undertaken is whether the search power is reasonable. The reasonableness of a search and seizure can be assessed with reference to the purpose of the search and seizure and the degree of intrusion on the values which the right seeks to protect.
19. We consider these provisions reasonable in this context. While the powers are broad, they appear necessary to enable the IGD to fulfil its functions of increasing transparency and accountability in relation to NZDF activities. The powers are limited in several ways:
- a. Only records that the IGD considers relevant to the performance of its functions may be accessed under clause 23(1).
  - b. Similarly, the ability to require information, documents or things under clauses 27 and 28 applies only to information, documents and things that the IGD considers relevant to an investigation, and only to documents or things that are under the person's possession or control. Documents or things must be returned to the person once the investigation is finished (unless they are a copy held by the person who provided it, in which case they can be disposed of).
  - c. When entering Defence Force premises, the IGD must give prior written notice and comply with any conditions of entry imposed under regulations.
  - d. Only public sector organisations are required to comply with a requirement to provide information under new section 31(2)(b) of the Protected Disclosures (Protection of Whistleblowers) Act 2022.

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<sup>7</sup> Clause 29 is also discussed below as a limitation on section 25(d) of the Bill of Rights Act.

<sup>8</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [162] per Blanchard J.

## **Section 25(d) – Right not to be compelled to be a witness or to confess guilt**

20. Section 25(d) of the Bill of Rights Act states that everyone who is charged with an offence has, in relation to the determination of the charge, the right not to be compelled to be a witness or to confess guilt.
21. Clause 29 of the Bill states that a person is not excused from providing information, documents, and other things to the Inspector-General for the purposes of an investigation just because doing so may tend to incriminate them in respect of an offence. This limits the right under section 25(d) of the Bill of Rights Act for a person who has been charged with an offence.
22. We consider this limit justified. We understand the objective of this provision is to encourage full participation in IGD proceedings and align settings with those in NZDF Courts of Inquiry. The limit is rationally connected with this objective and appears minimally impairing and proportionate, given that evidence presented in an investigation cannot be used in other proceedings except for proceedings for perjury or for an offence under clause 45 of this Bill (clause 40).

## **Conclusion**

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23. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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