

Inspector-General of Defence Bill

Government Bill

As reported from the Foreign Affairs, Defence and Trade Committee

Commentary

Recommendation

The Foreign Affairs, Defence and Trade Committee has examined the Inspector-General of Defence Bill and recommends by majority that it be passed with amendments.

Introduction

This bill would establish the office of the Inspector-General of Defence. This was recommended by the Government Inquiry into Operation Burnham and related matters, which was established to consider allegations against operations of the New Zealand Defence Force in Afghanistan in 2010 and 2011.¹

The Inquiry found that the Defence Force had failed to provide full and accurate information to Ministers and to the public. The Inquiry found that this failure affected ministerial accountability to Parliament and civilian control of the military, as well as the public perception of New Zealand's military.

The bill was introduced with the intention that the Inspector-General of Defence would support the Minister of Defence to oversee the Defence Force.² The establishment of an Inspector-General is also intended to assure the public that activities of the Defence Force have independent oversight.

¹ The full findings of the Inquiry can be found here: <https://operationburnham.inquiry.govt.nz/inquiry-report/>

² Under the Legislation Act 2019, the “Minister” referred to by the bill would be the Minister of the Crown given responsibility by the Prime Minister (or a warrant) to administer the bill. We understand that this would be the Minister of Defence so this commentary refers to the Minister of Defence.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We initially raised some questions concerning the administration of oaths by the Inspector-General, the oversight of the office by the Ombudsman and the Privacy Commissioner, and the requirement to seek the Attorney-General's leave to prosecute a member of the Inspector-General's office for failing to comply with their duty of confidentiality. We are satisfied that our questions have been addressed, and have no issues on these matters to bring to the attention of the House.

We considered the Inspector-General's role in investigating or assessing joint operations, and whether there was duplication between the Inspector-General's investigations and Defence Force Courts of Inquiry. These matters are discussed later in this commentary under "Scope of the Inspector-General's functions".

We also considered whether requiring consultation with the Minister of Defence might affect the independence of the Inspector-General. This is discussed in more detail in that section of the commentary.

Proposed amendments

In this commentary we discuss the main changes we recommend to the bill. We have organised our comments by topic, rather than by following the numerical order of the clauses as they appear in the bill. We do not cover minor or technical changes.

Our main changes cover the following topics:

- Scope of the Inspector-General's functions
- Independence of the Inspector-General
- Notification to the Inspector-General of civilian deaths and injuries
- Providing greater transparency, including the application of the Official Information Act 1982.

Scope of the Inspector-General's functions

The bill as introduced specifies the Defence Force activities that the Inspector-General could investigate or assess, either on their own initiative or at the request of the Minister of Defence, Chief of Defence Force, or Secretary of Defence. We considered what activities and operations would be within or outside the scope of the investigation and assessment functions, including the actions of other countries and agencies during joint operations with the Defence Force. We discuss our proposed amendments below.

Restrictions on activities the Inspector-General could investigate

Clause 8 of the bill sets out the proposed functions of the Inspector-General. These include a function to investigate incidents that have already occurred in the course of the Defence Force's activities, and a function to assess and identify potential improvements to Defence Force policies and procedures. In the clause as introduced,

these functions would be restricted to matters that were specified as being “within scope”.

Subclause (2) specifies which activities of the Defence Force would be within or out of scope for the Inspector-General to examine on their own initiative. Submitters told us they wanted the Inspector-General to be able to examine any aspect of the operation of the New Zealand Defence Force. We agree that restrictions should be removed as to which Defence Force activities the Inspector-General could decide to examine. We consider that this would enhance the Inspector-General’s integrity, independence, and credibility.

We recommend amending clause 8 to allow the Inspector-General to examine, on their own initiative, any Defence Force activity except the activities of Veterans’ Affairs New Zealand. Our amendment would remove subclauses (2) to (4), which specified particular activities as within scope or out of scope of the Inspector-General’s purview. The exception for Veterans’ Affairs would be done via the definition of “Defence Force” in clause 4.

Investigating and reporting on joint operations with other agencies and countries

As introduced, clause 8(3)(a) would preclude the Inspector-General from examining the activities of agencies or other countries that the Defence Force partners with.

In our legislative scrutiny, advice from the Clerk of Committee raised questions about how this would work in practice. Our independent specialist adviser also asked whether this would in practice prevent any examination of Defence Force international activities, as New Zealand rarely acts alone in international conflicts.

It is intended that the Inspector-General could investigate the activities of the New Zealand Defence Force, but not those of the military of other countries, or other agencies. We agree that the Inspector-General should examine the Defence Force’s participation in joint activities, but they should not comment on or make findings about other agencies or countries.

As noted above, we have recommended the removal of clause 8(3)(a) regarding aspects of joint operations being out of scope. Instead, we recommend specifying in clause 20 that the Inspector-General could not make findings or recommendations about other agencies or partner nations.

However, the Inspector-General should be able to refer matters that warrant attention to an appropriate authority. We recommend amending clause 15(3) to specify that the Inspector-General may refer an investigation or assessment, or part of an investigation or assessment, to a foreign public agency or international organisation.

Relationship with other oversight bodies

Clause 10 of the bill as introduced would require the Inspector-General to avoid duplication of scrutiny of the Defence Force. Some submitters recommended the removal of this requirement, saying it would undermine the independence of the Inspector-General. Some also felt it was inconsistent with existing oversight bodies.

For example, the Independent Police Conduct Authority is able to independently examine police conduct at the same time as the New Zealand Police undertake their own examination of the same incident.

It is intended that the Inspector-General should not examine matters that were being considered by a Defence Force Court of Inquiry until that process was concluded. However, we understand that it is not intended that the Inspector-General would be prevented from examining other issues at the same time as reviews of other Defence Force activities conducted by other oversight bodies. In such a situation, we expect that the Inspector-General would consult with other oversight bodies and consider coordinating with them when appropriate.

We recommend amending clauses 10 and 26 to clarify that the Inspector-General would be able to have cooperative relationships with other oversight bodies. In particular, we recommend making clear that the Inspector-General would have an obligation to have regard to the functions of other oversight bodies, and could consult and work cooperatively with them on issues of common concern.

Clause 10(2) lists the roles to which this obligation and ability would apply. We recommend that the Chief of Defence Force be removed from this list. We think that other parts of the bill provide for sufficient consultation with the Chief of Defence Force.

Independence of the Inspector-General

The Inquiry into Operation Burnham recommended the establishment of an independent Inspector-General of Defence, to be located outside the New Zealand Defence Force organisational structure.

We accept that the intention of the bill is to establish such an independent office. This is reflected in clause 3, as introduced, which states that the purpose of the bill would be to provide the Minister with dedicated independent oversight of the New Zealand Defence Force, and also to assure the public that Defence Force activities are subject to independent scrutiny.

However, we consider that some aspects of the bill do not fully accord with this purpose. For example, some submitters commented that requiring consultation with the Defence Force and the Minister of Defence could be seen as compromising the independence of the Inspector-General. We agree, and recommend some changes to ensure the independence of the office of the Inspector-General of Defence.

Obligation to include Minister's changes in work programme

Clause 53(3) as introduced would oblige the Inspector-General to make any change requested by the Minister to the Inspector-General's annual work programme, unless there were compelling reasons not to. We do not think this is appropriate, and we recommend the removal of this requirement from clause 53(3).

Requirement to seek the permission of the Minister of Defence to share reports with other Ministers

As introduced, clause 21(2) would require the Inspector-General to seek the permission of the Minister of Defence before sharing a report with any other Minister of the Crown whose portfolio relates to the subject matter of the report. We consider that it is sufficient that the Inspector-General notifies the Minister if a report is to be shared with any other Minister. We recommend removing from clause 21(2) the requirement to seek the permission of the Minister of Defence before sharing a report with any other Minister.

Notification of civilian deaths and injuries

Clause 27(2) would require the Chief of Defence Force to notify the Inspector-General if the Defence Force caused death or injury to a civilian in a situation of armed conflict.

Our assessment is that, as introduced, this could require the Defence Force to make a final decision about the cause of specific civilian deaths and injuries before the Defence Force notifies the Inspector-General. As the purpose of the Inspector-General is to independently investigate such incidents, this appears to us to limit unduly a core function of the office.

Submitters commented that this requirement should also include civilian deaths or injuries that occur during peacetime. We agree that the Inspector-General should be made aware of any civilian deaths or injuries that occur in the course of Defence Force activities, regardless of the context.

We recommend that clause 27(2) be amended to lower the threshold for reporting civilian deaths or injuries. We consider that this would give the Inspector-General access to information relevant to their functions. We recommend that this include incidents in which the Defence Force causes or contributes to, or appears likely to have caused or contributed to, civilian deaths or injuries.

Providing greater transparency

Ensuring public confidence that there is independent scrutiny of the Defence Force is a key purpose of establishing the office of the Inspector-General of Defence. As part of this, the public would need to be able to see that this scrutiny is taking place. We think this calls for even more transparency of the work of the Inspector-General than provided for in the bill as introduced.

We recognise that a careful balance is needed between the competing demands of openness and confidentiality. These demands include safeguarding the confidentiality of witnesses and protecting sensitive information, alongside providing sufficient transparency to earn the public's confidence in the work of the Inspector-General. We felt the bill as introduced did not get this balance quite right.

We acknowledge that the Inspector-General would need to work with sensitive and confidential material in complex and difficult contexts. However, we feel that the fol-

lowing recommendations would provide more openness while continuing to safeguard sensitive information.

Official Information Act

The bill as introduced would exempt from the Official Information Act (OIA) information that related to any investigation or assessment by the Inspector-General. This would not include information that existed before the commencement of an investigation or assessment.

We carefully considered this exemption from the OIA. We understand that the exemption is intended to protect classified and sensitive information, and to ensure absolute confidentiality for witnesses. We appreciate that it is important to allow the Inspector-General to get to the truth of the matter without concerns that classified, sensitive, or confidential information could be inappropriately disclosed.

Submitters commented that section 6 of the OIA already provides for the withholding of information that could prejudice national security or the maintenance of the law, or that endangers the safety of any person. Section 9 of the OIA also gives grounds for the withholding of information that is subject to an obligation of confidence where its disclosure may damage the supply of information or the public interest.

Our independent specialist adviser noted that an additional safeguard is also found in section 20 of the Ombudsmen Act 1975. This gives power to the Attorney-General to certify any information that might prejudice this country's security, defence, or international relations, or the investigation of offences, among other matters. If such a certificate were given, an Ombudsman must not require that the information be released. We note also that section 31 of the OIA allows the Prime Minister and Attorney-General to certify that an Ombudsman cannot recommend release of information on certain grounds.

After receiving additional advice and considering different options, we are satisfied that there are already sufficient protections within the OIA and Ombudsmen Act to safeguard sensitive, classified, and confidential information. We do not think there is a need for an additional exemption from the OIA. We therefore recommend deleting the exemption to the OIA provided in Schedule 3.

We also recommend deleting clause 36(4) to (6) which would provide for a process by which sensitive information could be certified by the Minister for protection. We consider that the parallel power given to the Attorney-General in the Ombudsmen Act is sufficient.

Openness of investigations

Clause 39 of the bill as introduced would require every investigation to be conducted in private.

We note that the intention of this requirement is to secure the free and frank participation of Defence Force personnel in the Inspector-General's proceedings. However, we think that there are times when it could be appropriate or desirable to hold public hearings. We note that the Inquiry into Operation Burnham had many days of public

hearings, which included public evidence by two Ministers of Defence, two Chiefs of Defence Force, and legal experts.

We think it is possible to guarantee confidentiality to Defence Force personnel while also permitting public hearings when appropriate. We recommend that clause 39 be amended to require investigations to be held in public unless the Inspector-General decides otherwise.

Publication of reports

Clause 21 as introduced would require the Inspector-General to publish reports on a publicly accessible internet site, unless a report included sensitive information or if publication would be in breach of the report's security classification. Clause 21(4) allows, but does not require, publication of a summary when a report is not able to be released in full.

Submitters suggested that if the Inspector-General is unable to publish a report in full it should be compulsory to publish a summary of the report.

We recommend that clause 21(4) be strengthened to require the Inspector-General to publish a summary of an investigation or assessment report when a full report is unable to be released.

Publication of progress on implementing recommendations

Clause 22 of the bill as introduced would require the Chief of Defence Force to notify the Minister, the Inspector-General, and the Secretary of Defence of any proposed action to implement a recommendation by the Inspector-General. However, there is no specific mention of how the public would learn about the progress of recommendations. Submitters suggested that it should be mandatory for the Inspector-General to report publicly on the Defence Force's progress in implementing recommendations.

We recommend amending clause 21 to clarify that the Inspector-General could publish information on the internet about the Defence Force's progress in implementing a recommendation. However, publication must not contain sensitive information or breach a security classification.

Information on matters declined, deferred, or referred

The bill would require the Inspector-General to provide an annual report to the Minister. Under clause 54, the annual report would be required to include the number of investigations and assessments undertaken, and a brief explanation of each.

Submitters suggested that the annual report should also include reporting on decisions made by the Inspector-General to decline or defer a request for an investigation or assessment, or to refer it to another agency. We agree that this would increase public visibility of all the work of the Inspector-General.

We recommend amending clause 54 to require the Inspector-General to include in their annual reporting the number of occasions on which requests to carry out an investigation or assessment were declined, deferred, or referred to other oversight bodies.

Appendix

Committee process

The Inspector-General of Defence Bill was referred to the committee on 9 November 2022.

We called for submissions on the bill with a closing date of 31 January 2023. We received and considered submissions from 13 interested groups and individuals. We heard oral evidence from 5 submitters.

We received advice on the bill from the Ministry of Defence and our independent specialist adviser, Sir Kenneth Keith. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Hon Jenny Salesa (Chairperson)

Hon Gerry Brownlee

Golriz Ghahraman

Ingrid Leary (to 8 February 2023)

Hon Todd McClay (to 29 March 2023)

Todd Muller (from 29 March 2023)

Ibrahim Omer

Dan Rosewarne (from 8 February 2023)

Key to symbols used in reprinted bill

As reported from a select committee

text inserted by a majority

~~text deleted by a majority~~

Hon Andrew Little

Inspector-General of Defence Bill

Government Bill

Contents

		Page
1	Title	4
2	Commencement	4
Part 1		
Preliminary provisions		
3	Purpose	4
4	Interpretation	4
5	Transitional, savings, and related provisions	6
6	Act binds the Crown	6
Part 2		
Appointment and functions of Inspector-General and Deputy Inspector-General		
<i>Inspector-General of Defence</i>		
7	Appointment of Inspector-General	7
8	Functions of Inspector-General	7
9	Inspector-General must act impartially and in public interest and have regard to military context	8
10	Inspector-General must seek to avoid duplication of scrutiny <u>Relationship with other oversight bodies</u>	8
<i>Deputy Inspector-General of Defence</i>		
11	Appointment of Deputy Inspector-General	9
12	Functions of Deputy Inspector-General	9
<i>Administrative provisions</i>		
13	Administrative provisions relating to Inspector-General and Deputy Inspector-General	10

Part 3
Investigations and assessments

14	Inspector-General may carry out investigation or assessment on own initiative or on request	10
15	Inspector-General may decline to carry out investigation or assessment	10
16	Initiation of investigation or assessment by Inspector-General	11
17	Commencement of investigation or assessment on request	12
18	Inspector-General may regulate own procedure	12
19	Inspector-General must prepare report of investigation or assessment	12
20	Findings of fault, etc	13
21	Publication of report	13
22	Action following report	14

Part 4
Inspector-General's powers to obtain information and assistance

General powers

23	Person may bring matter to Inspector-General's attention	15
24	Inspector-General may access defence records directly	15
25	Defence Force must provide information and assistance on request	15
26	Inspector-General may consult and co-operate with others <u>overseas counterparts</u>	15
27	Chief of Defence Force must notify Inspector-General of courts of inquiry and civilian deaths and injuries	16

Additional powers in investigations

28	Inspector-General may examine witnesses	17
29	Inspector-General may require provision of information, document, or other thing	17
30	Disclosure may be required despite self-incrimination	18
31	Inspector-General may enter Defence Force premises	18
32	Special procedure for visiting operational theatres	18

Disclosure of confidential material

33	Disclosure may be required despite obligation of secrecy	19
----	--	----

Protection of information, etc

34	Security of material received by Inspector-General	20
35	Protection of material disclosed by Inspector-General to others	20
36	Duty of confidentiality	20
37	Inspector-General and others not compellable witnesses	21
38	Inspector-General may make order protecting privacy or confidentiality	22

Additional protections for investigations and investigation participants

39	Investigations must be conducted in private <u>public unless Inspector-General decides otherwise</u>	23
40	Immunities and privileges of investigation participants	23
41	Evidence provided in investigation not admissible in other proceedings	24
42	Right of response	24
43	Return, disposal, or retention of material after investigation	24

Protection of Defence Force workers

44	Protection against retaliation for co-operating with Inspector-General	25
----	--	----

**Part 5
Offences**

45	Obstructing, hindering, resisting, or deceiving Inspector-General	25
46	Failing to comply with duty of confidentiality	25
47	Failing to comply with confidentiality or privacy order	26

**Part 6
Miscellaneous provisions and consequential amendments**

Advisors and staff

48	Advisory panel	26
49	Other advisors	27
50	Administrative provisions relating to advisors	27
51	Staff	27
52	Delegations	28

Reporting and liability

53	Annual work programme	28
54	Annual report	29
55	Inspector-General and others protected against liability	29

Consequential amendments

56	Consequential amendments	30
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**Schedule 1
Transitional, savings, and related provisions**

Schedule 2	Administrative provisions relating to Inspector-General and Deputy Inspector-General	32
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Schedule 3	Consequential amendments	34
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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Inspector-General of Defence Act **2023**.

2 Commencement

- (1) This Act comes into force— 5
- (a) on a date set by Order in Council; or
 - (b) to the extent not brought into force earlier, ~~on the first anniversary of the date on which the Act receives the Royal assent~~ 18 months after Royal Assent.
- (2) An Order in Council made under this section is secondary legislation (*see* 10
Part 3 of the Legislation Act 2019 for publication requirements).

Part 1
Preliminary provisions

3 Purpose

- (1) The purpose of this Act is to— 15
- (a) provide the Minister with dedicated independent oversight of the New Zealand Defence Force; and
 - (b) ~~help the Minister account accurately~~ support the Minister in their responsibility to the House of Representatives for the activities of the Defence Force; and 20
 - (c) assure the public that the activities of the Defence Force are subject to independent scrutiny, including in relation to the Defence Force's compliance with New Zealand's obligations under international law.
- (2) To fulfil that purpose, this Act—
- (a) creates the offices of Inspector-General of Defence and Deputy 25
Inspector-General of Defence; and
 - (b) confers functions on those offices and makes other provision in relation to them.

4 Interpretation

- (1) In this Act, unless the context otherwise requires,— 30
- advisory panel** means a panel appointed under **clause 48**
- assessment function** has the meaning given in **section 8(1)(b)** and **assessment** has a corresponding meaning
- Auditor-General** means the Controller and Auditor-General appointed under section 7 of the Public Audit Act 2001 35

Chief of Defence Force means the officer appointed as Chief of Defence Force under section 8 of the Defence Act 1990

Defence Force means the New Zealand Defence Force constituted by section 11(1) of the Defence Act 1990 excluding Veterans' Affairs New Zealand

defence record means a record of any kind that is made or received by the Defence Force, including— 5

- (a) a paper, document, register, book, map, plan, drawing, photograph, film, sound recording, or electronic storage medium; or
- (b) a record received from another government agency, a foreign public agency, or an international organisation; or 10
- (c) a copy of a record

Deputy Inspector-General means the Deputy Inspector-General of Defence appointed under **section 11(2)**

foreign public agency means a body or other person performing a public function conferred on it by or under the laws of a foreign country 15

function includes a duty or a power, and a reference to the conferral or performance of a function includes a reference to the imposition or performance of a duty or the conferral or exercise of a power

Human Rights Commissioner means a member of the Human Rights Commission that is continued by section 4 of the Human Rights Act 1993 20

Independent Police Conduct Authority means the Authority established ~~under~~ by section 4 of the Independent Police Conduct Authority Act 1988

Inspector-General means the Inspector-General of Defence appointed under **section 7(2)** (but *see also* **sections 12(2) and 52(4)(b)**, which provide for some references to the Inspector-General to be read as including references to the Deputy Inspector-General or a delegate) 25

investigation function has the meaning given in **section 8(1)(a)** and **investigation** has a corresponding meaning

member of the Defence Force has the meaning given in section 2(1) of the Defence Act 1990 30

New Zealand Security Intelligence Service means the New Zealand Security Intelligence Service continued by section 7 of the Intelligence and Security Act 2017

Ombudsman means an Ombudsman appointed under the Ombudsmen Act 1975 35

person working for the Defence Force means a member of the Defence Force or a contractor of, or secondee to, the Defence Force

Privacy Commissioner means the Privacy Commissioner continued ~~under~~ by section 13 of the Privacy Act 2020

- protective security requirements** means the New Zealand Government protective security requirements that are published on a publicly accessible Internet site maintained by or on behalf of the New Zealand Security Intelligence Service
- Secretary of Defence** means the chief executive of the Ministry of Defence 5
- security classification** means a classification under the New Zealand Government information security classification system that is published on a publicly accessible Internet site maintained by or on behalf of the New Zealand Security Intelligence Service
- sensitive** means likely, if publicly disclosed, to— 10
- (a) endanger the safety of a person; or
 - (b) infringe the privacy of a natural person (including a deceased natural person) in a way, or to an extent, not outweighed by the public interest in disclosure; or
 - (c) prejudice— 15
 - ~~(i) the continued performance of the functions of the Defence Force or the Ministry; or~~
 - (ii) the security or defence of New Zealand; or
 - (iii) the international relations of the New Zealand Government; or
 - (iv) the entrusting of information to the New Zealand Government on a basis of confidence by the Government of another country or by a foreign public agency or an international organisation 20
- WorkSafe** means WorkSafe New Zealand established by section 5 of the WorkSafe New Zealand Act 2013.
- (2) In this Act, unless the context otherwise requires, a reference to an activity, act, or omission of the Defence Force includes a reference to an activity, act, or omission of a person working for the Defence Force. 25
- 5 Transitional, savings, and related provisions**
- The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms. 30
- 6 Act binds the Crown**
- This Act binds the Crown.

Part 2

Appointment and functions of Inspector-General and Deputy Inspector-General

Inspector-General of Defence

- 7 Appointment of Inspector-General** 5
- (1) The office of Inspector-General of Defence is established.
 - (2) The Governor-General may appoint a person as Inspector-General of Defence on the recommendation of the House of Representatives.
 - (3) The person appointed must hold a government-sponsored security clearance of a level determined by the Minister. 10
- 8 Functions of Inspector-General**
- (1) The functions of the Inspector-General are—
 - (a) to investigate—
 - (i) incidents that have occurred in the course of activities of the Defence Force ~~that are within scope~~; and 15
 - (ii) any subsequent acts or omissions of the Defence Force in relation to those incidents
 (the **investigation function**):
 - (b) to assess, and identify potential improvements or additions to, Defence Force policies and procedures governing activities of the Defence Force ~~that are within scope~~ (the **assessment function**): 20
 - (c) any other function conferred on the Inspector-General by this Act or by any other legislation or rule of law.
 - ~~(2) In this section, the following activities are **within scope**:~~
 - ~~(a) an activity carried out in New Zealand or elsewhere in direct furtherance of a purpose listed in section 5 of the Defence Act 1990:~~ 25
 - ~~(b) an activity that the Chief of Defence Force has declared under section 7 of the Health and Safety at Work Act 2015 to be an operational activity for the purposes of that section:~~
 - ~~(c) an activity that is the subject of, or otherwise relates to, a protected disclosure made or referred to the Inspector-General under the Protected Disclosures (Protection of Whistleblowers) Act 2022:~~ 30
 - ~~(d) in the case of an investigation or assessment requested by the Minister, the Secretary of Defence, or the Chief of Defence Force (rather than initiated by the Inspector-General), any activity:~~ 35
 - ~~(3) However, despite **subsection (2)**,~~

- (a) ~~an activity carried out jointly with another party (for example, in partnership with another government agency, a foreign public agency, or an international organisation), is **within scope** only to the extent that it is carried out by the Defence Force and not the other party:~~
- (b) ~~an activity of Veterans' Affairs New Zealand is not **within scope**:~~ 5
- (4) ~~For the purposes of **subsection (2)(a)**,~~
- (a) ~~activities in **direct furtherance** of a purpose listed in section 5 of the Defence Act 1990 include—~~
- (i) ~~training carried out in preparation for a specific operation:~~
- (ii) ~~intelligence activities carried out in preparation for, or in support of, a specific operation:~~ 10
- (b) ~~the following activities are not in **direct furtherance** of a purpose listed in section 5 of the Defence Act 1990:~~
- (i) ~~general training, including exercises for combat readiness:~~
- (ii) ~~disciplinary matters under the Armed Forces Discipline Act 1971:~~ 15
- (iii) ~~the day to day administration of the Defence Force (such as work force planning and activities relating to workplace culture) except as it relates to a specific operation.~~
- 9 **Inspector-General must act impartially and in public interest and have regard to military context** 20
- The Inspector-General must, when performing the Inspector-General's functions,—
- (a) act impartially, fairly, independently, and in the public interest; and
- (b) have regard to the military context in which the Defence Force operates.
- 10 ~~**Inspector-General must seek to avoid duplication of scrutiny**~~ **Relationship with other oversight bodies** 25
- (1) ~~The Inspector-General must, when performing the Inspector-General's functions,—~~
- (a) must, when performing the Inspector-General's functions, have regard to the functions of the people specified in **subsection (2)**; and 30
- (b) ~~take reasonable steps to avoid any unnecessary duplication of scrutiny of the Defence Force.~~
- (b) may consult those people about any matter relating to the Inspector-General's functions; and
- (c) may co-operate with them with a view to— 35
- (i) avoiding unnecessary duplication of scrutiny of the same matter; and

- (ii) taking a co-ordinated approach to examining issues of common concern; and
 - (d) may (subject to **section 35**) disclose to them any information, document, or other thing that the Inspector-General considers necessary for the purposes of the consultation or co-operation. 5
- (2) The people are—
 - (a) the Secretary of Defence:
 - ~~(b) the Chief of Defence Force:~~
 - (c) WorkSafe:
 - (d) the Auditor-General: 10
 - (e) the Inspector-General of Intelligence and Security:
 - (f) the Privacy Commissioner:
 - (g) a Human Rights Commissioner:
 - (h) an Ombudsman:
 - (i) the Independent Police Conduct Authority. 15

Deputy Inspector-General of Defence

11 Appointment of Deputy Inspector-General

- (1) The office of Deputy Inspector-General of Defence is established.
- (2) The Governor-General may appoint a person as Deputy Inspector-General of Defence on the recommendation of the House of Representatives. 20
- (3) The person appointed must hold a government-sponsored security clearance of a level determined by the Minister.

12 Functions of Deputy Inspector-General

- (1) The Deputy Inspector-General—
 - (a) has all the functions of the Inspector-General; and 25
 - (b) may perform those functions in the same manner, subject to the same restrictions, and with the same effect, as if they were performed by the Inspector-General.
- (2) Accordingly, a reference to the Inspector-General in **section 9 or 10** or any of **Parts 3 to 6** includes a reference to the Deputy Inspector-General unless the context otherwise requires. 30
- (3) However, the performance by the Deputy Inspector-General of the Inspector-General's functions is subject to the control of the Inspector-General unless—
 - (a) the office of Inspector-General is vacant; or
 - (b) the Inspector-General is absent from duty. 35

- (4) The fact that the Deputy Inspector-General performs a function of the Inspector-General is, in the absence of evidence to the contrary, conclusive evidence of the Deputy Inspector-General's authority to do so.

Administrative provisions

13 Administrative provisions relating to Inspector-General and Deputy Inspector-General 5

Schedule 2 applies in relation to the offices of Inspector-General and Deputy Inspector-General.

Part 3
Investigations and assessments 10

14 Inspector-General may carry out investigation or assessment on own initiative or on request

- (1) The Inspector-General may carry out an investigation or assessment—
- (a) on the Inspector-General's own initiative, including as a result of information obtained under **section 10 or Part 4** or disclosed to the Inspector-General under the Protected Disclosures (Protection of Whistleblowers) Act 2022; or 15
 - (b) at the request of the Minister, the Secretary of Defence, or the Chief of Defence Force.
- (2) However, if an incident has been referred to a court of inquiry assembled under the Armed Forces Discipline Act 1971, the Inspector-General must not carry out an investigation in relation to it unless— 20
- (a) the investigation is on the Inspector-General's own initiative and the inquiry has concluded or has, in the Inspector-General's opinion, been unreasonably delayed; or 25
 - (b) the investigation is at the request of the Minister or the Chief of Defence Force.

15 Inspector-General may decline to carry out investigation or assessment

- (1) The Inspector-General may do any of the following in relation to an investigation or assessment, or part of an investigation or assessment, that has been requested by the Minister, the Secretary of Defence, or the Chief of Defence Force: 30
- (a) decline to carry it out:
 - (b) defer it:
 - (c) (subject to section 35) refer it to a person the Inspector-General considers more appropriate to carry it out. 35

- (2) The Inspector-General must notify the Minister, the Secretary of Defence, or the Chief of Defence Force (as applicable) of—
- (a) any decision by the Inspector-General under **subsection (1)** to decline to carry out all or part of an investigation or assessment that they have requested, or to defer it or refer it to another person; and 5
 - (b) the reason for the decision.
- (3) The people to whom an investigation or assessment, or part of an investigation or assessment, may be referred under **subsection (1)(c)** include those specified in **section 10(2)**, ~~and the New Zealand Police, a foreign public agency, and an international organisation.~~ 10
- (4) A person to whom an investigation or assessment, or part of an investigation or assessment, is referred under **subsection (1)(c)** is not required to carry it out, or do anything else, just because of the referral.
- 16 Initiation of investigation or assessment by Inspector-General**
- (1) When initiating an investigation or assessment, the Inspector-General must— 15
- (a) develop draft terms of reference for it, including statements regarding—
 - (i) the purpose of the investigation or assessment; and
 - (ii) how the Inspector-General has had regard to the obligations in **section 9** in relation to the investigation or assessment; and
 - (iii) the key issues to be considered; and 20
 - (iv) the Inspector-General’s proposed approach to the investigation or assessment; and
 - (v) in the case of an assessment, any legislation, policies, processes, ~~or standards,~~ or obligations owed by New Zealand under international law by reference to which the assessment will be conducted; and 25
 - (vi) an estimated time frame for completing the investigation or assessment; and
 - (b) consult the Secretary of Defence and the Chief of Defence Force on the draft terms of reference; and 30
 - (c) finalise the terms of reference, having regard to any comments provided by the Secretary of Defence and the Chief of Defence Force; and
 - (d) notify the Minister, the Secretary of Defence, and the Chief of Defence Force of the Inspector-General’s intention to begin the investigation or assessment, unless it is included in the Inspector-General’s annual work programme under **section 53**. 35
- (2) A notification under **subsection (1)(d)** must include—
- (a) the finalised terms of reference; and

- (b) at least 5 working days' notice of any public announcement of the investigation or assessment.

17 Commencement of investigation or assessment on request

- (1) When requesting an investigation or assessment, the Minister, the Secretary of Defence, or the Chief of Defence Force must— 5
 - (a) provide the Inspector-General with draft terms of reference for the investigation or assessment, including statements regarding—
 - (i) the reason for the request; and
 - (ii) ~~in the case of an investigation, the key issues to be considered as part of the investigation;~~ and 10
 - (iii) in the case of an assessment, any legislation, policies, processes, ~~or standards,~~ or obligations owed by New Zealand under international law by reference to which the assessment will be conducted; and
 - (iv) a proposed time frame for completing the investigation or assessment; and 15
 - (b) consult the Inspector-General on the draft terms of reference; and
 - (c) finalise the terms of reference, having regard to any comments provided by the Inspector-General; and
 - (d) notify the other relevant parties of the request. 20
- (2) A notification under **subsection (1)(d)** must include the finalised terms of reference.
- (3) If the Inspector-General decides to carry out the investigation or assessment, they must give the relevant parties at least 5 working days' notice of any public announcement of it. 25
- (4) In this section, **relevant parties** means the Minister, the Secretary of Defence, and the Chief of Defence Force.

18 Inspector-General may regulate own procedure

When carrying out an investigation or assessment, the Inspector-General may adopt any procedure the Inspector-General considers appropriate that is consistent with this Act. 30

19 Inspector-General must prepare report of investigation or assessment

- (1) On completing an investigation or assessment, the Inspector-General must prepare a written report containing the Inspector-General's findings and recommendations. 35
- (2) The Inspector-General must send the report to the Minister, the Secretary of Defence, and the Chief of Defence Force.

- (3) If the report includes information relating to the activities of an intelligence and security agency, the Inspector-General must also send it to the Inspector-General of Intelligence and Security.
- (4) The Inspector-General may, after consulting the Secretary of Defence and the Chief of Defence Force, determine an appropriate security classification for the report or any part of the report. 5
- (5) Despite **subsection (4)**, if the report quotes or summarises any matter that has a security classification, the quote or summary must not be given a lower security classification.
- (6) In this section, **intelligence and security agency** means— 10
 - (a) the New Zealand Security Intelligence Service; or
 - (b) the Government Communications Security Bureau continued by section 8 of the Intelligence and Security Act 2017.

20 Findings of fault, etc

- (1) A report of an investigation under **section 19** may, among other things, include— 15
 - (a) findings of fault and other findings of fact and law:
 - (b) recommendations that further steps be taken to determine liability:
 - (c) recommendations adverse to the Defence Force, ~~such as a recommendation that it apologise to a person:~~ 20
 - (d) recommendations for the improvement or benefit of the Defence Force.
- (2) However, the report must not include ~~a determination of a person's civil, criminal, or disciplinary liability:—~~
 - (a) a determination of a person's civil, criminal, or disciplinary liability:
 - (b) a finding or recommendation relating to any party with which the New Zealand Defence Force carried out an activity jointly, including another government agency, a foreign public agency, or an international organisation. 25

21 Publication of report

- (1) As soon as practicable after sending a report and making any determination as to its security classification under **section 19**, the Inspector-General must publish the report on a publicly accessible Internet site maintained by or on behalf of the Inspector-General. 30
- (2) The Inspector-General may also, ~~with the Minister's permission,~~ send the report to any Minister of the Crown whose portfolio relates to, or is affected by, the report or the report's subject matter. 35
- (3) However, a report, or part of a report,—

- (a) ~~a report, or part of a report,~~ must not be published under **subsection (1)**, or sent under **subsection (2)**, if doing so would breach its security classification; and
- (b) ~~a report, or part of a report,~~ must not be published under **subsection (1)** must not include if it includes sensitive information. 5
- (4) ~~If **subsection (3)** prevents the publication or sending of a report, or of part of a report, the Inspector-General may instead publish or send a summarised version of the report or part~~ prevents the publication of a report, or of part of a report, the Inspector-General must instead publish a summarised version of the report or part that is unclassified and that does not contain sensitive information. 10
- (a) ~~that is unclassified; and~~
- (b) ~~that, in the case of publication, does not contain sensitive information.~~
- (5) If **subsection (3)** prevents the sending of a report, or of part of a report, the Inspector-General may instead send a summarised version of the report or part that is unclassified. 15
- 22 Action following report**
- (1) The Chief of Defence Force must, as soon as practicable after receiving a recommendation of the Inspector-General under **section 19**,—
- (a) notify the Minister, the Inspector-General, and the Secretary of Defence of any action proposed to be taken to implement the recommendation; and 20
- (b) give reasons for any proposal not to implement, or otherwise to depart from, the recommendation.
- (1A) The Inspector-General may publish on a publicly accessible Internet site maintained by or on behalf of the Inspector-General information about the Defence Force's progress in implementing a recommendation included in a report under **section 19**. 25
- (1B) However, information must not be published under **subsection (1A)** if doing so would breach its security classification or if it is sensitive. 30
- (2) The Inspector-General may advise the Minister on the adequacy of any remedial or preventative measures taken by the Defence Force following an investigation or assessment.

Part 4

Inspector-General's powers to obtain information and assistance

General powers

23 Person may bring matter to Inspector-General's attention

Any person, including a person working for the Defence Force, may bring any matter to the Inspector-General's attention that the person considers may be relevant to the performance of the Inspector-General's functions. 5

24 Inspector-General may access defence records directly

- (1) The Inspector-General may access directly all defence records that are in the possession or control of the Defence Force and that the Inspector-General considers may be relevant to the performance of the Inspector-General's functions. 10
- (2) The Defence Force must provide the Inspector-General with full and direct access to those records, including by enabling the Inspector-General to browse and search Defence Force databases (and must not make access in any particular case dependent on a request, an approval, or any other administrative step that is not reasonably necessary). 15

25 Defence Force must provide information and assistance on request

- (1) The Defence Force must, on request, provide the Inspector-General with—
 - (a) information about ~~the~~ activities of the Defence Force ~~that are within scope~~ and about incidents that have occurred in the course of those activities: 20
 - (b) any other assistance that the Inspector-General reasonably requires for the performance of the Inspector-General's functions.
- (2) A request under this section may—
 - (a) relate to a particular investigation or assessment; or 25
 - (b) be made for the purpose of obtaining information about the Defence Force's activities more generally.

~~(3) In this section, **within scope** has the same meaning as in **section 8**.~~

26 Inspector-General may consult ~~and co-operate with others~~ overseas counterparts

- (1) The Inspector-General may—
 - (a) consult ~~any of the people specified in **subsection (2)**~~ a foreign public agency, or an international organisation, that has military oversight functions about any matter relating to the Inspector-General's functions; and 30
 - ~~(b) co-operate with any of those people in connection with any matter relating to the functions of the Inspector-General (for example, by carrying~~ 35

- ~~out an investigation or assessment in co-ordination with an inquiry being carried out by the other person into the same matter); and~~
- (c) disclose to ~~any of those people~~ the agency or organisation any information, document, or other thing that the Inspector-General considers necessary for the purposes of the consultation ~~or co-operation~~. 5
- (2) ~~The people are—~~
- ~~(a) the Secretary of Defence;~~
 - ~~(b) the Chief of Defence Force;~~
 - ~~(c) WorkSafe;~~
 - ~~(d) the Auditor General;~~ 10
 - ~~(e) the Inspector General of Intelligence and Security;~~
 - ~~(f) the Privacy Commissioner;~~
 - ~~(g) a Human Rights Commissioner;~~
 - ~~(h) an Ombudsman;~~
 - ~~(i) the Independent Police Conduct Authority.~~ 15
- (3) This section is subject to **section 35**.
- 27 Chief of Defence Force must notify Inspector-General of courts of inquiry and civilian deaths and injuries**
- (1) The Chief of Defence Force must, as soon as practicable, notify the Inspector-General of— 20
- (a) any court of inquiry assembled under the Armed Forces Discipline Act 1971; and
 - (b) the purpose for which the court of inquiry is assembled and its terms of reference.
- (2) If the Defence Force causes or contributes to, or appears likely to have caused or contributed to, death or injury to a civilian ~~in a situation of armed conflict~~, the Chief of Defence Force must as soon as practicable notify the Inspector-General of— 25
- (a) the details of the incident in which the death or injury occurred; and
 - (b) the findings of any Defence Force procedure for responding to the incident. 30
- (3) In this section, **civilian**, in relation to death or injury in a situation of armed conflict, has the same meaning as in the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (*see* paragraph 1 of Article 50 of that Protocol, as set out in Schedule 5 of the Geneva Conventions Act 1958). 35

*Additional powers in investigations***28 Inspector-General may examine witnesses**

- (1) The Inspector-General may—
 - (a) examine a person on oath if the Inspector-General considers the person may be able to provide information relevant to an investigation; and 5
 - (b) summon, and administer an oath to, a person for that purpose.
- (2) **Subsection (1)** applies—
 - (a) to a person working for the Defence Force or to any other person:
 - (b) whether or not the information would be admissible in a court of law.
- (3) For the purposes of section 109 of the Crimes Act 1961 (which relates to perjury), an examination under this section must be treated as a **judicial proceeding** within the meaning of section 108 of that Act. 10
- (4) The Inspector-General may pay fees, allowances, and expenses to anyone who appears as a witness before the Inspector-General.
- (5) Any fees, allowances, and expenses paid under this section must be as set out in the scales prescribed by regulations made under the Criminal Procedure Act 2011. 15
- (6) Despite **subsection (5)**, the Inspector-General may disallow part of a sum payable to a witness under this section.

29 Inspector-General may require provision of information, document, or other thing 20

- (1) A person must, on request, provide the Inspector-General with any information, document, or other thing that is in the person's possession or control and that the Inspector-General considers may be relevant to an investigation.
- (2) This section applies— 25
 - (a) to a person working for the Defence Force or (subject to **subsection (3)**) to any other person:
 - (b) whether or not the information, document, or other thing would be admissible in a court of law.
- (3) However, this section does not apply to— 30
 - (a) any court information or judicial information, as those terms are used in section 236 of the District Court Act 2016 and section 173 of the Senior Courts Act 2016; or
 - (b) any information, document, or other thing in the possession or control of a court, or of a tribunal in relation to its judicial functions. 35

30 Disclosure may be required despite self-incrimination

A person is not excused from providing any information, document, or other thing to the Inspector-General in the course of an investigation just because doing so may incriminate or tend to incriminate the person in respect of any offence.

5

31 Inspector-General may enter Defence Force premises

- (1) The Inspector-General may, at any reasonable time, enter any of the following places if the Inspector-General considers that the place is relevant to an investigation:

- (a) a defence area:
- (b) a naval ship:
- (c) any other ship, aircraft, or vehicle used by the Defence Force.

10

- (2) The Inspector-General must give the Chief of Defence Force prior written notice of an entry under this section.

- (3) When entering a place under this section, the Inspector-General must comply with any conditions of entry that the officer in charge of the place imposes under regulations made under section 101 of the Defence Act 1990 for the purposes of section 93 of that Act (which relates to security of defence areas).

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- (4) In this section, **aircraft**, **defence area**, **naval ship**, **officer**, and **ship** have the meanings given in section 2(1) of the Defence Act 1990.

20

- (5) This section is subject to **section 32**.

32 Special procedure for visiting operational theatres

- (1) The Inspector-General must not visit an operational theatre unless the Chief of Defence Force has consented to the visit.

- (2) The Chief of Defence Force must consent to a request by the Inspector-General to visit an operational theatre unless the Chief of Defence Force considers that the visit would—

25

- (a) significantly impede a military operation; or
- (b) risk the security of a defence area or the safety of the Inspector-General or a person working for the Defence Force.

30

- (3) Consent to a visit under this section may be given subject to any conditions that the Chief of Defence Force considers necessary to prevent the visit from—

- (a) significantly impeding a military operation; or
- (b) risking the security of a defence area or the safety of the Inspector-General or a person working for the Defence Force.

35

- (4) If consent under this section to visit an operational theatre is refused or is given subject to conditions, the Chief of Defence Force must—

- (a) inform the Inspector-General of the reason for the refusal or conditions; and
- (b) if a change in circumstances means that the reason no longer applies, ~~reconsider the Inspector-General's request in the light of the change of circumstances and notify the Inspector-General of any change in the~~ Chief of Defence Force's decision. 5
- (i) reconsider the Inspector-General's request in the light of the change of circumstances; and
- (ii) notify the Inspector-General of any change in the Chief of Defence Force's decision; and 10
- (iii) if the outcome of the reconsideration is that consent to the visit is still refused or given subject to conditions, inform the Inspector-General of the reason for the continued refusal or conditions.
- (5) If, after being refused consent or given consent subject to conditions to visit an operational theatre, the Inspector-General decides that they no longer wish to visit it, they must inform the Chief of Defence Force of that fact. 15
- (6) **Subsection (4)(b)** does not apply if the Inspector-General has informed the Chief of Defence Force that the Inspector-General no longer wishes to visit the operational theatre.
- (7) In this section,— 20
- defence area** has the meaning given in section 2(1) of the Defence Act 1990
- operational theatre** means a geographic area in which a military campaign or a series of major military operations is being conducted.

Disclosure of confidential material

- 33 Disclosure may be required despite obligation of secrecy** 25
- (1) A requirement under this Act to provide information, a document, or another thing to the Inspector-General overrides any obligation (under legislation or otherwise) of non-disclosure or secrecy and, accordingly,—
- (a) the person subject to the requirement must comply with ~~the requirement~~ it; and 30
- (b) compliance with the requirement is not to be treated as a breach of the obligation of non-disclosure or secrecy or of any legislation by which the obligation is imposed.
- (2) This section is subject to **section 40**.

*Protection of information, etc***34 Security of material received by Inspector-General**

The Inspector-General must ensure that all information, documents, and other things received by the Inspector-General under this Act, including defence records accessed under **section 24**, are kept secure in accordance with protective security requirements. 5

35 Protection of material disclosed by Inspector-General to others

Before disclosing information, a document, or another thing under ~~section 26~~ **section 10, 15(1)(c), or 26**, the Inspector-General must—

- (a) confirm that the recipient has appropriate arrangements in place to keep it secure in accordance with protective security requirements; and 10
- (b) consult the Chief of Defence Force if the information, document, or other thing—
 - (i) was provided by the Defence Force; and
 - (ii) is sensitive or is subject to an obligation of secrecy or non-disclosure. 15

36 Duty of confidentiality

- (1) This section applies to any information, document, or other thing that is—
 - (a) obtained by the Inspector-General under any of ~~sections 23 to 34~~ **sections 10 and 23 to 31**; or 20
 - (b) otherwise received for the purposes of, or in the course of performing, the investigation function or the assessment function.

(protected material).
- (2) The people specified in **subsection (3)** must not use, make a record of, or disclose protected material unless the use, record, or disclosure— 25
 - ~~(a) is for or to the Minister, or is for the purpose of performing the Inspector-General's functions or working for, or providing a service to, the Inspector-General; and~~
 - ~~(b) does not contravene subsection (4).~~
 - (a) is for or to the Minister; or 30
 - (b) is for the purpose of performing the Inspector-General's functions or working for, or providing a service to, the Inspector-General.
- (3) The people are—
 - (a) the Inspector-General:
 - (b) the Deputy Inspector-General: 35
 - (c) an employee or a contractor of, or a secondee to, the Inspector-General:

- (d) an independent person to whom any information, document, or other thing is referred under **section 40(2)**:
 - (e) a member of an advisory panel:
 - (f) an advisor appointed under **section 49**:
 - (g) a person who was formerly a person within any of **paragraphs (a) to (f)**. 5
- (4) ~~The people specified in **subsection (3)** must not disclose protected material if—~~
- ~~(a) the Minister has certified under **subsection (5)** that it should not be disclosed; or~~ 10
 - ~~(b) the Minister has certified under **subsection (5)** that it should be disclosed only on specified terms and conditions and the disclosure would not be on those terms and conditions.~~
- (5) ~~The Minister may certify that protected material should not be disclosed, or that it should be disclosed only on terms and conditions specified in the certificate, if the Minister considers that the disclosure of the material, or its disclosure otherwise than on those terms or conditions, would be likely to—~~ 15
- ~~(a) endanger the safety of any person; or~~
 - ~~(b) infringe the privacy of a natural person (including a deceased natural person); or~~ 20
 - ~~(c) prejudice—~~
 - ~~(i) the continued performance of the functions of the Defence Force or the Ministry; or~~
 - ~~(ii) the security or defence of New Zealand; or~~
 - ~~(iii) the international relations of the New Zealand Government; or~~ 25
 - ~~(iv) the entrusting of information to the New Zealand Government on a basis of confidence by the Government of another country or by a foreign public agency or an international organisation.~~
- (6) ~~The Minister must not give a certificate under **subsection (5)** unless the Minister has consulted—~~ 30
- ~~(a) the Chief of Defence Force; and~~
 - ~~(b) anyone else the Minister considers capable of helping determine the relevant circumstances and information.~~

37 Inspector-General and others not compellable witnesses

- (1) The following people cannot be required to give evidence in court, or in other proceedings of a judicial nature, in respect of anything that comes to their knowledge in the course of performing the Inspector-General's functions or working for, or providing a service to, the Inspector-General: 35

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- (a) the Inspector-General:
 - (b) the Deputy Inspector-General:
 - (c) an employee or a contractor of, or a secondee to, the Inspector-General:
 - (d) an independent person to whom any information, document, or other thing is referred under **section 40(2)**: 5
 - (e) a member of an advisory panel:
 - (f) an advisor appointed under **section 49**:
 - (g) a person who was formerly a person within any of **paragraphs (a) to (f)**.
- (2) The people specified in **subsection (1)(a) to (g)** cannot be required to provide to a court, or in other proceedings of a judicial nature, any working document or internal record, or any other information, document, or other thing, that is created in the course of— 10
- (a) performing the Inspector-General’s functions; or
 - (b) working for, or providing a service to, the Inspector-General. 15
- (3) **Subsections (1) and (2)** do not apply to proceedings for—
- (a) an offence against **section 46**:
 - (b) an offence against section 78, 78AA(1), 78A(1), 105, 105A, or 105B of the Crimes Act 1961:
 - (c) an offence of conspiring to commit an offence against any of those sections of the Crimes Act 1961: 20
 - (d) an offence of attempting to commit an offence against any of those sections of the Crimes Act 1961.
- 38 Inspector-General may make order protecting privacy or confidentiality**
- (1) The Inspector-General may make an order prohibiting the publication, broadcast, distribution, or other disclosure of— 25
- (a) any matter that is the subject of, or otherwise relates to, an investigation or assessment:
 - (b) any information, document, or other thing provided~~;~~ to the Inspector-General in the course of an investigation or assessment, or any report of the information, document, or other thing: 30
 - (c) the name of a person participating in an investigation or assessment or other details likely to lead to the person’s identification:
 - (d) a finding, recommendation, or other decision of the Inspector-General relating to an investigation or assessment: 35
 - (e) a report of an investigation or assessment:
 - (f) a decision of the Minister relating to an investigation or assessment.

- (2) Before making an order under this section, the Inspector-General must be satisfied that the matter or other thing covered by the order is sensitive, or that its public disclosure would—
- (a) breach its security classification; or
 - (b) be likely to prejudice the Inspector-General's ability to carry out an investigation or assessment. 5
- (3) A prohibition imposed by an order under this section may be permanent or for a period specified in the order.
- (4) An order under this section does not apply to ~~a report or programme published under **section 21, 53, or 54**, or anything included in such a report or programme.~~ 10
- (a) a report or programme published under **section 21, 53, or 54**:
 - (b) anything included in such a report or programme:
 - (c) the communication or reporting of proceedings in Parliament.

Additional protections for investigations and investigation participants 15

39 Investigations must be conducted in ~~private~~ public unless Inspector-General decides otherwise

- (1) Every investigation must be conducted in ~~private~~ public, except as provided by **subsections (2) and (3)**.
- (2) The Inspector-General may decide to conduct an investigation, or part of an investigation, in private. 20
- (3) Before making a decision under **subsection (2)**, the Inspector-General must have regard to—
- (a) the benefits of observing the principle of open justice, and the risk to public confidence in an investigation of conducting it in private: 25
 - (b) the need for the investigation to ascertain the facts properly:
 - (c) the risk that conducting the investigation in public would result in the public disclosure of sensitive information or the disclosure of information in breach of its security classification:
 - (d) whether conducting the investigation in public would interfere with the administration of justice, including a person's right to a fair trial: 30
 - (e) any other consideration that the Inspector-General considers relevant.

40 Immunities and privileges of investigation participants

- (1) A person participating in an investigation has the same immunities and privileges as if they were appearing in civil proceedings, and subpart 8 of Part 2 of the Evidence Act 2006 applies to the investigation, to the extent that it is relevant, as if— 35

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- (a) the investigation were a civil proceeding; and
 - (b) every reference to a Judge were a reference to the Inspector-General.
 - (2) The Inspector-General may examine any information, document, or other thing for which privilege is claimed, or refer the information, document, or other thing to an independent person, to determine whether— 5
 - (a) the person claiming privilege has a justifiable reason for maintaining the privilege; or
 - (b) the information, document, or other thing should be disclosed.
 - (3) This section is subject to **section 30**.
 - 41 Evidence provided in investigation not admissible in other proceedings** 10

Any information, document, or other thing provided to the Inspector-General in the course of an investigation is not admissible as evidence in—

 - (a) disciplinary proceedings for an offence against Part 2 of the Armed Forces Discipline Act 1971:
 - (b) any other proceedings against a person, except proceedings against the person who provided the information, document, or other thing for— 15
 - (i) perjury as defined in section 108 of the Crimes Act 1961; or
 - (ii) an offence against **section 45**.
 - 42 Right of response**

The Inspector-General must not, in a report of an investigation, make a comment, finding, or recommendation that affects a person without providing them with— 20

 - (a) adequate notice of the material that the Inspector-General proposes to rely on in making the comment, finding, or recommendation; and
 - (b) an opportunity to be heard. 25
 - 43 Return, disposal, or retention of material after investigation**
 - (1) **Subsection (2)** applies to any document or other thing provided to the Inspector-General for the purposes of an investigation.
 - (2) On completion of the investigation, the Inspector-General must ~~either~~—
 - (a) return the document or other thing to the person who provided it; or 30
 - (b) if the document or other thing is a copy of a document or other thing held by the person who provided it, return it to the person or dispose of it in accordance with secure disposal procedures.
 - (3) All other information, documents, and other things held by the Inspector-General and relating to the investigation must, subject to the requirements of the Public Records Act 2005, be— 35

- (a) kept secure by the Inspector-General in accordance with protective security requirements; or
- (b) disposed of by the Inspector-General in accordance with secure disposal procedures.

Protection of Defence Force workers

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44 Protection against retaliation for co-operating with Inspector-General

- (1) This section applies to anyone who does any of the following things:
 - (a) brings a matter to the Inspector-General's attention under **section 23**:
 - (b) helps to provide the Inspector-General with access to defence records under **section 24** or information or assistance under **section 25**: 10
 - (c) submits to examination by the Inspector-General under **section 28**:
 - (d) provides the Inspector-General with information, a document, or another thing under **section 29**.
- (2) The Defence Force must not, by reason of the person's having done the thing, subject them to a penalty, or to discriminatory treatment of any kind, in relation to any work that they do, or propose to do, for the Defence Force. 15
- (3) However, **subsection (2)** does not apply if the Inspector-General determines that the person ~~acted~~ did the thing in **subsection (1)** in bad faith.

Part 5
Offences

20

45 Obstructing, hindering, resisting, or deceiving Inspector-General

- (1) A person commits an offence if the person wilfully, without reasonable excuse,—
 - (a) obstructs, hinders, or resists the Inspector-General in the performance of the Inspector-General's functions: 25
 - (b) refuses or fails to comply with a lawful requirement of the Inspector-General:
 - (c) makes a false statement to, or misleads or attempts to mislead, the Inspector-General.
- (2) A person who commits an offence against this section is liable on conviction to a fine not exceeding \$10,000. 30

46 Failing to comply with duty of confidentiality

- (1) A person commits an offence if the person wilfully fails to comply with a requirement under **section 36** not to use, make a record of, or disclose any information, document, or other thing.— 35

- ~~(a) not to use, make a record of, or disclose any information, document, or other thing; or~~
- ~~(b) to disclose any information, document, or other thing only in accordance with specified terms and conditions.~~
- (2) A person who commits an offence against this section is liable on conviction to imprisonment for a term not exceeding 2 years or a fine not exceeding \$10,000, or both. 5
- (3) A prosecution for an offence against this section must not be commenced without the leave of the Attorney-General.
- 47 Failing to comply with confidentiality or privacy order** 10
- (1) A person commits an offence if the person knowingly fails to comply with an order under **section 38**.
- (2) A person who commits an offence against this section is liable on conviction to a fine not exceeding—
 - (a) \$10,000 if the person is an individual: 15
 - (b) \$100,000 in any other case.

Part 6

Miscellaneous provisions and consequential amendments

Advisors and staff

- 48 Advisory panel** 20
- (1) The Inspector-General may appoint an advisory panel of 2 or more people to provide the Inspector-General with advice on an ongoing basis.
- (2) The advisory panel may provide its advice—
 - (a) at the Inspector-General's request; or
 - (b) on its own initiative. 25
- (3) Each member of the advisory panel must hold a government-sponsored security clearance of a level determined by the Minister.
- (4) The Inspector-General must publish details of a person's appointment under this section on a publicly accessible Internet site maintained by or on behalf of the Inspector-General. 30
- (5) The Inspector-General may—
 - (a) set the advisory panel's terms of reference;
 - (b) determine the panel's procedure;
 - (c) give the panel any information that the Inspector-General considers may help the panel to provide the Inspector-General with advice. 35

- (6) Subject to **subsection (5)(b)**, the advisory panel may determine its own procedure.

49 Other advisors

- (1) The Inspector-General may, from time to time, appoint advisors to provide the Inspector-General with advice on a case-by-case basis. 5
- (2) Advisors appointed under this section must hold a government-sponsored security clearance of a level determined by the Minister.
- (3) The Inspector-General may give advisors appointed under this section any information that the Inspector-General considers may help them to provide their advice. 10

50 Administrative provisions relating to advisors

- (1) The terms of a person's appointment under **section 48 or 49** are as determined by the Inspector-General.
- (2) Those terms may include— 15
- (a) the term for which the person is appointed:
 - (b) the circumstances in which the person may be removed from office:
 - (c) remuneration for the person's services or reimbursement of their expenses.
- (3) Any remuneration or reimbursement under **subsection (2)(c)** must be in accordance with the framework determined by the Government for the classification and remuneration of statutory and other bodies in which the Crown has an interest. 20

51 Staff

- (1) The Inspector-General may appoint any employees that the Inspector-General considers necessary for the efficient performance of the Inspector-General's functions. 25
- (2) The power conferred by **subsection (1)** includes the power to appoint employees on a part-time or temporary basis, or for any period that the Inspector-General and an employee agree.
- (3) An employee under this section is employed on the terms and conditions, and paid the salary and allowances, that the Inspector-General determines in consultation with the Secretary for Justice. 30
- (4) The Inspector-General must operate an employment policy that complies with the principle of being a good employer as set out in section 118 of the Crown Entities Act 2004. 35
- (5) Employees appointed under this section must hold a government-sponsored security clearance of a level determined by the Minister.

52 Delegations

- (1) The Inspector-General may, either generally or particularly, delegate functions of the Inspector-General to employees appointed under **section 51**.
- (2) However, the Inspector-General must not delegate the power under this section to make delegations. 5
- (3) A delegation under this section must be in writing.
- (4) Subject to any general or special directions given, or conditions imposed, by the Inspector-General,—
 - (a) an employee to whom a function is delegated under this section may perform the delegated function in the same manner, subject to the same restrictions, and with the same effect as if it were performed by the Inspector-General; and 10
 - (b) accordingly, a reference in any of the following provisions to the Inspector-General, in relation to the delegated function or anything done or omitted to be done in the performance of, or otherwise in connection with, the delegated function, includes a reference to the employee unless the context otherwise requires: 15
 - (i) **sections 9 and 10:**
 - (ii) **Parts 3 to 5:**
 - (iii) a provision of this Part other than this section. 20
- (5) The employee must, in the absence of evidence to the contrary, be presumed to be acting within the terms of the delegation.
- (6) The delegation does not affect or prevent the performance of the delegated function by the Inspector-General or affect the Inspector-General's responsibility for the actions of the employee. 25

*Reporting and liability***53 Annual work programme**

- (1) At least 60 days before the beginning of each financial year, the Inspector-General must—
 - (a) prepare a draft proposed work programme for that year; and 30
 - (b) consult the Minister about the proposed work programme.
- (2) The Inspector-General must finalise the programme after having regard to any comments received from the Minister.
- (3) The finalised programme must not include sensitive information.—
 - ~~(a) must include any change requested by the Minister under subsection (4)(b) unless the Inspector-General considers that there is a compelling reason against its inclusion; and~~ 35
 - ~~(b) must not include sensitive information.~~

- (4) As soon as practicable after the programme is finalised, the Inspector-General must—
- (a) give a copy to the Minister; and
 - (b) publish it on a publicly accessible Internet site maintained by or on behalf of the Inspector-General. 5
- (5) The Minister must present a copy of the annual work programme to the House of Representatives—
- (a) as soon as practicable after receiving it; or
 - (b) at the same time that the annual report for the preceding financial year is presented under **section 54(4)**. 10

54 Annual report

- (1) As soon as practicable after the end of each financial year, the Inspector-General must provide a report of the Inspector-General's operations during that year to the Minister.
- (2) The report must— 15
- (a) specify the number of investigations and assessments undertaken during the year; and
 - (b) contain a brief description of the outcome of each investigation or assessment; and
 - (ba) specify the number of occasions during the year on which, under section 15, the Inspector-General declined to carry out an investigation or assessment or part of an investigation or assessment, or deferred it or referred it to another person; and 20
 - (bb) contain a brief description of each of those occasions; and
 - (c) contain information on the Inspector-General's financial performance; and 25
 - (d) contain any other information that the Inspector-General ~~believes is con-~~
siders necessary.
- (3) The report must not include sensitive information.
- (4) As soon as practicable after receiving the report, the Minister must present a copy of it to the House of Representatives. 30
- (5) As soon as practicable after a copy of the report is presented to the House of Representatives under **subsection (4)**, the Inspector-General must publish the report on a publicly accessible Internet site maintained by or on behalf of the Inspector-General. 35

55 Inspector-General and others protected against liability

- (1) The following people are not personally liable for doing, or omitting to do, an act in the performance or intended performance of the Inspector-General's

functions, or in the course of working for or providing a service to the Inspector-General, if the act or omission was in good faith:

- (a) the Inspector-General:
- (b) the Deputy Inspector-General:
- (c) an employee or a contractor of, or a secondee to, the Inspector-General: 5
- (d) an independent person to whom any information, document, or other thing is referred under **section 40(2)**:
- (e) a member of an advisory panel:
- (f) an advisor appointed under **section 49**.
- (2) **Subsection (1)** does not apply to proceedings for— 10
 - (a) an offence against **section 46**:
 - (b) an offence against section 78, 78AA(1), 78A(1), 105, 105A, or 105B of the Crimes Act 1961:
 - (c) an offence of conspiring to commit an offence against any of those sections of the Crimes Act 1961: 15
 - (d) an offence of attempting to commit an offence against any of those sections of the Crimes Act 1961.

Consequential amendments

56 Consequential amendments

Amend the Acts specified in **Schedule 3** as set out in that schedule. 20

Schedule 1
Transitional, savings, and related provisions

s 5

Part 1
Provisions relating to this Act as enacted

5

1 Incidents occurring before commencement of this Act

This Act applies to incidents that occur before the commencement of its provisions (as well as incidents that occur afterwards).

Schedule 2

Administrative provisions relating to Inspector-General and Deputy Inspector-General

s 13

- 1 Term of office of Inspector-General and Deputy Inspector-General** 5
- (1) A person holds office as the Inspector-General for an initial term (which must not be more than 5 years) that the Governor-General, on the recommendation of the House of Representatives, specifies in the person's appointment.
- (2) A person holding office as the Inspector-General may be reappointed for 1 further term of not more than 3 years. 10
- (3) A person holds office as the Deputy Inspector-General for an initial term (which must be not more than 3 years) that the Governor-General, on the recommendation of the House of Representatives, specifies in the person's appointment.
- (4) A person holding office as the Deputy Inspector-General may be reappointed for 1 or more further terms of not more than 3 years each. 15
- (5) Unless they have died, resigned, or been removed, a person holding office as the Inspector-General or the Deputy Inspector-General continues to hold office until one of the following occurs, even if the term for which they were appointed has ended: 20
- (a) the person is reappointed;
- (b) the person's successor is appointed.
- (6) The Inspector-General and Deputy Inspector-General may at any time resign by written notice to the Governor-General.
- (7) A notice of resignation under **subclause (6)** must state the date on which the resignation takes effect. 25
- 2 Filling of vacancy**
- (1) If the office of Inspector-General becomes vacant, the vacancy must be filled by the appointment of a successor in accordance with **section 7(2) and (3)**.
- (2) If the office of Deputy Inspector-General becomes vacant, the vacancy must be filled by the appointment of a successor in accordance with **section 11(2) and (3)**. 30
- (3) **Subclause (4)** applies if—
- (a) the office of Inspector-General or Deputy Inspector-General becomes vacant while Parliament is not in session, or is vacant at the close of a session; and 35
- (b) the House of Representatives has not recommended an appointment to fill the vacancy.

- (4) When this subclause applies, the vacancy may, at any time before the commencement of the next session of Parliament, be filled by the appointment of a successor by the Governor-General in Council.
- (5) An appointment made under **subclause (4)** lapses and the office again becomes vacant unless, before the end of the 24th sitting day of the House of Representatives following the date of the appointment, the House confirms the appointment. 5
- 3 Removal or suspension from office**
- (1) The Inspector-General or Deputy Inspector-General may be removed or suspended from office by the Governor-General, acting on an address from the House of Representatives, for any of the following: 10
- (a) incapacity:
 - (b) bankruptcy:
 - (c) neglect of duty:
 - (d) misconduct: 15
 - (e) failure to hold the appropriate security clearance.
- (2) ~~If the Inspector-General or Deputy Inspector-General is suspended from office while Parliament is not in session, the suspension~~ At any time when Parliament is not in session, the Inspector-General or Deputy Inspector-General may be suspended from office by the Governor-General for any of the reasons specified in **subclause (1)(a) to (e)**, but a suspension under this subclause does not continue in force beyond 2 months after the beginning of the next session of Parliament. 20
- 4 Remuneration and expenses**
- (1) The Inspector-General and Deputy Inspector-General must be paid, out of public money and without further appropriation than this clause,— 25
- (a) salaries at the rates determined by the Remuneration Authority; and
 - (b) allowances (if any) determined by the Remuneration Authority.
- (2) The Inspector-General and Deputy Inspector-General are entitled to receive from the funds of the Inspector-General's office the actual and reasonable costs for travelling and other expenses that relate to the performance of their functions. 30
- 5 Disclosure of interests**
- The Inspector-General and the Deputy Inspector-General must each give written notice to the Minister of all financial and other interests that they have or acquire that could conflict with the proper performance of their functions. 35

Schedule 3

Consequential amendments

s 56

Corrections Act 2004 (2004 No 50)

In section 3(1), definition of **official agency**, after paragraph (k), insert: 5

- (l) the Inspector-General of Defence

Health Act 1956 (1956 No 65)

After section 22C(2)(l), insert:

- (m) the Inspector-General of Defence, for the purposes of exercising or performing any of that person's powers, duties, or functions under the Inspector-General of Defence Act **2023**. 10

Intelligence and Security Act 2017 (2017 No 10)

After section 161(3)(f), insert:

- (g) the Inspector-General of Defence.

In section 161(4), replace “or the Public Service Commissioner” with “the Public Service Commissioner, or the Inspector-General of Defence”. 15

Mental Health (Compulsory Assessment and Treatment) Act 1992 (1992 No 46)

After section 123(3)(h), insert:

- (i) the Inspector-General of Defence.

~~**Official Information Act 1982 (1982 No 156)**~~

20

~~In section 2(1), definition of **official information**, after paragraph (m), insert:~~

- ~~(n) does not include information that relates to any investigation or assessment under the Inspector-General of Defence Act **2023**, other than information that existed before the commencement of that investigation or assessment~~ 25

Ombudsmen Act 1975 (1975 No 9)

After section 21C, insert:

21D Consultation with Inspector-General of Defence

Notwithstanding anything in section 21, an Ombudsman may from time to time undertake consultation with the Inspector-General of Defence holding office under **section 7** of the Inspector-General of Defence Act **2023** in relation to any matter, including (without limitation) consultation— 30

- (a) in relation to any matter arising out of or in the course of an investigation under this Act or any other enactment:

Ombudsmen Act 1975 (1975 No 9)—*continued*

- (b) in relation to any matter that is within the jurisdiction of the Inspector-General of Defence, whether or not the matter arises out of a particular complaint made under this Act,—

and for the purposes of any such consultation, an Ombudsman may disclose to the Inspector-General of Defence such information as the Ombudsman considers necessary for that purpose.

5

In Schedule 1, Part 2, insert in its appropriate alphabetical order:

Inspector-General of Defence

Privacy Act 2020 (2020 No 31)

After section 29(1)(e), insert:

10

- (f) personal information held by the Inspector-General of Defence, the Deputy Inspector-General of Defence, or any employee of the Inspector-General of Defence in connection with the performance or exercise of the Inspector-General of Defence's functions, duties, or powers that is not personal information about any employee or former employee of the Inspector-General of Defence in their capacity as an employee.

15

After section 208(1)(~~ed~~), insert:

- (~~de~~) the Inspector-General of Defence.

Protected Disclosures (Protection of Whistleblowers) Act 2022 (2022 No 20)

In section 4, insert in its appropriate alphabetical order:

20

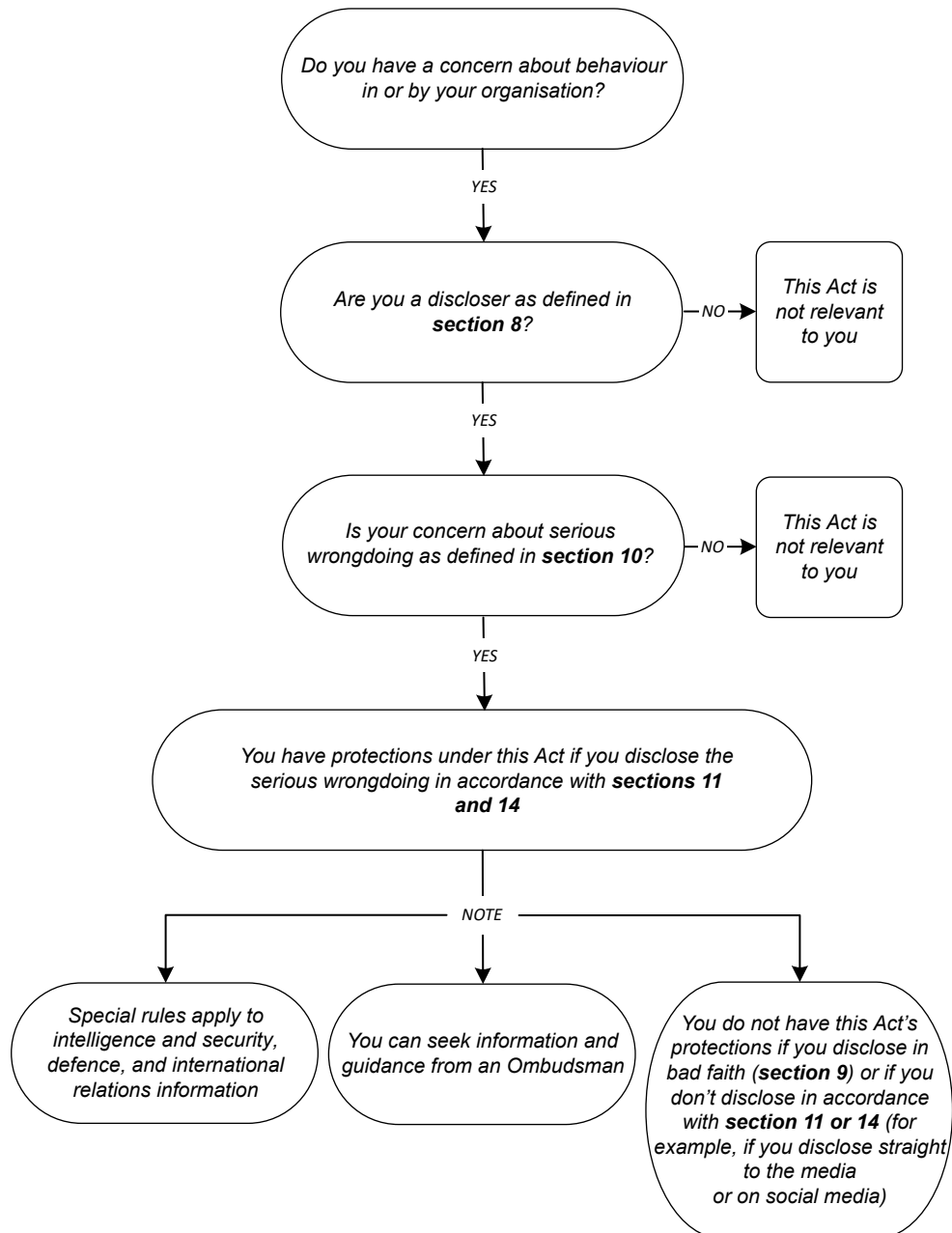
defence information means information that relates to the activities of the New Zealand Defence Force other than activities of Veterans' Affairs New Zealand

In section 4, definition of **international relations agency**, revoke paragraph (d).

In section 7(1), replace the flowchart with:

25

Protected Disclosures (Protection of Whistleblowers) Act 2022 (2022 No 20)—
continued



Replace section 11(5) with:

- (5) If the disclosure is or includes intelligence and security information, defence information, or international relations information, this section is subject to sections 25(2), 27, **27A**, and 28.

Replace section 14(5) with:

Protected Disclosures (Protection of Whistleblowers) Act 2022 (2022 No 20)—
continued

- (5) However, if the disclosure is or includes intelligence and security information, defence information, or international relations information, this section is subject to sections 27, **27A**, and 28.

After section 16(7), insert:

- (8) The Inspector-General of Defence may refer a disclosure under this section in a way that is consistent with **section 27A(1)**. 5

In section 17(7), after “information”, insert “and **section 27A** for special rules relating to defence information”.

In section 18(2)(c), replace “section 27” with “sections 27 and **27A**”.

Replace section 25(2)(b)(i) and (ii) with: 10

- (i) section 27(3) for a disclosure relating to serious wrongdoing in or by the office of the Inspector-General of Intelligence and Security:
- (ii) section 16(7) for the ability of the Inspector-General of Intelligence and Security to refer:

After section 25(2)(b), insert: 15

- (c) the **appropriate authority** for a protected disclosure that is or includes defence information is the Inspector-General of Defence only. *See—*
 - (i) section **27A(3)** for a disclosure relating to serious wrongdoing in or by the office of the Inspector-General of Defence:
 - (ii) section 16(8) for the ability of the Inspector-General of Defence to refer: 20
 - (iii) sections 14 and **27A** for the discloser’s entitlement to disclose further.

After section 27, insert:

27A Special rules for defence information 25

- (1) A person may only disclose defence information to someone who holds an appropriate security clearance and is authorised to have access to the information.
- (2) A discloser who has made, or is considering making, a protected disclosure that is or includes defence information may seek information and guidance from the Inspector-General of Defence only (and not from an Ombudsman). 30
- (3) A discloser is entitled to protection under this Act for a protected disclosure made to the Minister responsible for defence if the disclosure—
 - (a) is or includes defence information; and
 - (b) relates to serious wrongdoing in or by the office of the Inspector-General of Defence— 35

Protected Disclosures (Protection of Whistleblowers) Act 2022 (2022 No 20)—
continued

- and sections 11(4) and 12 apply accordingly.
- (4) The New Zealand Defence Force, and any other public sector organisation that holds or has access to defence information, must—
- (a) have internal procedures that reflect **subsections (1) to (3)**; and
 - (b) apply sections 13, 17, and 29 in a way that is consistent with this section (in relation to defence information).
- (5) The Inspector-General of Defence may disclose defence information disclosed or referred under this Act only in accordance with the Inspector-General of Defence Act **2023**.
- (6) This section overrides section 17(5).
- (7) For the purposes of section 14(2), the only Minister a discloser may disclose defence information to is the Prime Minister or the Minister responsible for defence.
- After section 30(4), insert:
- (5) This section does not apply to a disclosure that is or includes defence information (and **section 27A** applies instead).
- Replace section 31(2) with:
- (2) However,—
- (a) the Inspector-General of Intelligence and Security, and not an Ombudsman, has the power described in subsection (1) in relation to an intelligence and security agency; and
 - (b) the Inspector-General of Defence, and not an Ombudsman, has the power described in subsection (1) in relation to the New Zealand Defence Force.
- After section 32(5), insert:
- (5A) This section does not apply if a disclosure is or includes defence information (and **section 27A** applies instead).
- Replace section 33(3) with:
- (3) However,—
- (a) this section does not apply to a disclosure that is or includes intelligence and security information (and section 27 applies instead); and
 - (b) this section does not apply to a disclosure that is or includes defence information (and **section 27A** applies instead).
- Replace section 34(2) with:
- (2) However,—

Protected Disclosures (Protection of Whistleblowers) Act 2022 (2022 No 20)—
continued

- (a) subsection (1) does not apply to a disclosure that is or includes intelligence and security information (and section 27 applies instead); and
- (b) subsection (1) does not apply to a disclosure that is or includes defence information (and **section 27A** applies instead).

In Schedule 1,—

5

- (a) insert the following Part as the last Part; and
- (b) make all necessary consequential amendments.

Part 2

Provision relating to the Inspector-General of Defence Act 2023

3 Disclosures made before appointment of Inspector-General of Defence 10

- (1) This clause applies to any protected disclosure made to the Inspector-General of Intelligence and Security before the amendments made to this Act by the Inspector-General of Defence Act **2023** (the **relevant amendments**) come into force.
- (2) The Inspector-General of Intelligence and Security may refer the disclosure to the Inspector-General of Defence in accordance with section 16, in which case this Act as amended by the relevant amendments applies to the disclosure from the time of the referral. 15
- (3) If no referral is made as described in **subclause (2)**, this Act continues to apply to the disclosure as if the relevant amendments had not been made. 20
- (4) The Inspector-General of Intelligence and Security may consult the Inspector-General of Defence before deciding whether or not to refer the disclosure to the Inspector-General of Defence.

In Schedule 2, after the item relating to crime, insert:

Defence information	Inspector-General of Defence only (<i>see</i> section 27A)
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Remuneration Authority Act 1977 (1977 No 110)

25

In Schedule 4, insert in its appropriate alphabetical order:

The Inspector-General of Defence and the Deputy Inspector-General of Defence

Legislative history

27 October 2022
 9 November 2022

Introduction (Bill 178–1)
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 Committee

Inspector-General of Defence Bill

Wellington, New Zealand:

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