

# Departmental Disclosure Statement

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| Inspector-General of Defence Bill |
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Defence.

The Ministry of Defence certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

19 October 2022

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## Part One: General Policy Statement

### ***Background***

In 2018, the Attorney-General established the Government Inquiry into Operation Burnham and other related matters (the **Inquiry**). The Inquiry examined allegations of wrongdoing by the New Zealand Defence Force (the **Defence Force**) during operations conducted in Afghanistan in 2010 and 2011. It found that the Defence Force's failure to provide full and accurate information to Ministers, and to adequately scrutinise or respond to information, disrupted the principles of democratic oversight of the military and ministerial accountability to Parliament.

The Inquiry recommended establishing an Inspector-General of Defence. This Bill establishes this office, in response to the Inquiry's recommendation.

### ***Purpose, functions and scope of Inspector-General of Defence***

The Bill establishes the offices of the Inspector-General of Defence (**Inspector-General**) and Deputy Inspector-General of Defence (**Deputy Inspector-General**)—

- to assist the Minister of Defence to oversee the Defence Force and account accurately to the House of Representatives for its activities; and
- to assure the public that the activities of the Defence Force are subject to independent scrutiny.

It provides that the Inspector-General's 2 core functions are—

- to investigate and respond to incidents that have occurred; and
- to assess, and identify potential improvements or additions to, Defence Force policies and procedures.

The Bill permits the Inspector-General to exercise those functions—

- on the Inspector-General's own initiative, in relation to defined Defence Force operational activities that have the most potential to cause harm, undermine public confidence in the Defence Force, and carry reputational risks to New Zealand; or
- where an issue has been referred to the Inspector-General for investigation or assessment by the Minister, Chief of Defence Force or Secretary of Defence.

The Bill confirms that functions undertaken by Veterans' Affairs New Zealand, and the actions of foreign partners, coalitions, international entities or domestic agencies that the Defence Force may work with, are outside scope.

### ***Duties of Inspector-General***

To guide the Inspector-General's oversight and support its decision making, the Bill requires the Inspector-General to—

- exercise the functions of the office independently, impartially, and in the public interest;
- have regard to the military context in which the Defence Force operates; and
- take reasonable steps to avoid unnecessary duplication of existing scrutiny of the Defence Force.

### ***Powers and safeguards***

To ensure that the Inspector-General is able to undertake its functions effectively, the Bill requires the Defence Force to provide the Inspector-General with any reasonable assistance the Inspector-General requests. This includes providing information to support the Inspector-General's oversight and knowledge of Defence Force operational activities. The Inspector-General may also access records in the Defence Force's possession or control.

The Bill provides the Inspector-General with additional powers in the context of an investigation—

- to compel a person to provide relevant information, documents, or things;
- to summon and examine a person on oath; and
- to enter defence premises.

The Bill makes the Inspector-General's powers subject to a range of safeguards to protect information and participants, national security, and international relationships. In particular, the Bill—

- imposes a duty on the Inspector-General, and any person that may be employed or engaged by the office of the Inspector-General, not to use, make a record of, or disclose information obtained or received in the course of performing the Inspector-General's functions;
- requires the Inspector-General to secure all information, documents, and other things received, in accordance with protective security requirements;
- permits the Inspector-General to share information with specified oversight bodies, but only for the purposes of performing the Inspector-General's functions, and in the case of certain Defence Force records, only after consulting the Chief of Defence Force; and
- enables the Minister to certify that information cannot be shared, or only shared subject to certain conditions.

### ***Special protections for Defence Force personnel***

To ensure that Defence Force personnel can raise concerns and co-operate with the Inspector-General without fear of reprisal, the Bill:

- confirms that current, former, and prospective Defence Force personnel who raise concerns or otherwise co-operate with the Inspector-General in good faith are protected from discrimination relating to their employment or service; and
- establishes the Inspector-General as the appropriate authority for protected disclosures involving classified defence information and allegations of serious wrongdoing in the Defence Force.

### ***Enforcement***

The Bill establishes offences for the following:

- wilfully obstructing, hindering, or resisting the Inspector-General in the exercise of the Inspector-General's functions; and
- wilfully making false statements to, misleading, or attempting to mislead the Inspector-General in the exercise of those functions; and
- wilfully refusing or failing to comply with any lawful requirement of the Inspector-General; and
- wilfully failing to comply with a duty of confidentiality imposed by the Bill; and

- knowingly failing to comply with a confidentiality or privacy order made by the Inspector-General.

### ***Governance and accountability***

The Bill establishes the Inspector-General and Deputy Inspector-General as independent statutory officers, with bespoke governance and accountability arrangements based on the need to safeguard the Inspector-General's ability to seek and receive information, the Inspector-General's small starting size, and the high likelihood of disproportionate administrative burden. To this end,—

- the Bill requires the Inspector-General to report publicly on the Inspector-General's activities in an annual work programme and annual report. These will be shared with the Minister, tabled in the House of Representatives, and published on the Inspector-General's website; and
- the Inspector-General will be subject to Ombudsman and Privacy Commissioner oversight; and
- to protect the Inspector-General's ability to seek and gather information in confidence, the Bill exempts the Inspector-General from the Official Information Act 1982 where information relates to an investigation or assessment (including information the Inspector-General receives in evidence, and correspondence with other oversight bodies, public service agencies, and Ministers).

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

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| <b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>   | <b>YES</b> |
| Establishing an independent Inspector-General of Defence was a recommendation of the <i>Inquiry into Operation Burnham and related matters</i> .<br><br>The Inquiry's report (published in July 2020) is available online at:<br><a href="https://www.operationburnhaminquiry.govt.nz">https://www.operationburnhaminquiry.govt.nz</a> . |            |

### Relevant international treaties

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| <b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b> | <b>NO</b> |
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### Regulatory impact analysis

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| <b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>  | <b>YES</b> |
| "Establishing the Inspector-General of Defence", Ministry of Defence (Feb 2022).<br><br>This Regulatory Impact Statement (RIS) is available online at<br><a href="http://www.defence.govt.nz/publications/publication/establishing-an-independent-inspector-general-of-defence-final-ris">www.defence.govt.nz/publications/publication/establishing-an-independent-inspector-general-of-defence-final-ris</a> . |            |

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| <b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>   | <b>NO</b> |
| The RIS was provided to an independent panel consisting of officials from the Ministry of Defence and the Department of the Prime Minister and Cabinet. The RIA Team in the Treasury agreed that the independent panel was well placed to consider the questions raised by the proposal to establish an independent Inspector-General of Defence. |           |

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| <b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b> | <b>NO</b> |
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### Extent of impact analysis available

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| <b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b> | <b>NO</b> |
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| <b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>   |            |
| <b>(a) the size of the potential costs and benefits?</b>  | <b>YES</b> |
| <b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>   | <b>NO</b>  |
| <p>The costs and benefits of establishing an Inspector-General of Defence are discussed in detail in the RIS, specifically in Section 3.</p> <p>Establishing the Inspector-General of Defence will incur costs to the Crown in setting up a new body and its ongoing operations. There will also be costs to the Defence Force for complying with a new oversight body. Defence Force personnel will be the primary group affected by the Inspector-General's establishment, as they may be involved in the Inspector-General's investigations and assessments.</p> <p>Few of the benefits of establishing an Inspector-General can be monetised. The immediate beneficiaries will be Ministers (the Minister of Defence and Cabinet) with positive flow-on effects to Parliament, and the Defence Force. A new body dedicated to scrutinising the Defence Force's activities will enable greater Ministerial oversight of the military, ensuring the military is accountable to the democratically elected government. It will also support ministerial accountability to Parliament and enable more transparency. Because of this, the establishment of the Inspector-General is expected to increase public trust and confidence in the Defence Force.</p> |            |

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| <b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b> |           |
| <b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>                  | <b>NO</b> |
| <b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>                          | <b>NO</b> |

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

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| <b>3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?</b> |
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| The Ministry of Defence has not identified any international obligations that conflict with the policies implemented in the Bill. |
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### Consistency with the government's Treaty of Waitangi obligations

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| <b>3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?</b> |
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| The Ministry of Defence analysed the Bill and did not identify any adverse implications for the rights and interests of Māori protected by the Treaty of Waitangi. |
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| To better understand how establishing the Inspector-General would align with tikanga and te ao Māori, the Ministry of Defence consulted the Defence Force's Māori advisory network, and its senior Māori advisor when developing the policy implemented in the Bill. The feedback received indicated that the Inspector-General's design is compatible with the tikanga of Pono (acting with integrity and supporting transparency and accountability) and the tikanga of Kaitiakitanga (the practice of applying safe, responsible and ethical practices when managing information, and while working with witnesses). |
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### Consistency with the New Zealand Bill of Rights Act 1990

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| <b>3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?</b> |
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| YES |
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### Offences, penalties and court jurisdictions

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| <b>3.4. Does this Bill create, amend, or remove:</b> |
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| <b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b> |
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| YES |
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| <b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b> |
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| Clauses 45 to 47 of the Bill establish new offences for: |
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| <ul style="list-style-type: none"><li>• wilfully obstructing, hindering, or resisting the Inspector-General in the exercise of its functions;</li><li>• wilfully making false statements, misleading or attempting to mislead the Inspector-General in the exercise of its functions;</li><li>• wilfully refusing or failing to comply with any lawful requirement of the Inspector-General;</li><li>• wilfully failing to comply with a duty of confidentiality; and</li><li>• knowingly failing to comply with a confidentiality or privacy order made by the Inspector-General.</li></ul> |
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| <b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>  | <b>YES</b> |
| <p>The Ministry of Justice's Offence and Penalty Vetting team was consulted during the development of these offences. The Ministry of Justice is comfortable that the penalty levels are reasonable and proportionate to the conduct and <i>mens rea</i> required to make out the offence.</p> |            |

### Privacy issues

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| <b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>   | <b>YES</b> |
| <p>The Bill provides the Inspector-General with reasonable and proportionate information-gathering powers which are consistent with the powers available to other oversight bodies.</p> <p>Clause 25 allows the Inspector-General to request information from the Defence Force on activities in scope, in connection with an investigation or assessment, or for the purpose of obtaining information about in scope activities more generally.</p> <p>Clauses 24, 28 and 29 grant the Inspector-General powers to obtain any information it considers relevant to an investigation: to compel any person to provide it with relevant information; to summon and examine any person on oath; and to access relevant Defence Force records.</p> <p>Existing privileges are protected by clause 40. This provision clarifies that the Inspector-General cannot require an individual to produce information that would be protected under Part 2, Subpart 8 of the Evidence Act 2003. The exception is the privilege against self-incrimination – clause 30 confirms that individuals are unable to rely on this privilege to refuse to answer questions, or to produce information, documents, or things that may tend to incriminate them. However, any information, documents or things provided to the Inspector-General would not be admissible as evidence in a subsequent legal or disciplinary proceeding (clause 41).</p> <p>Failure to comply with a request made by the Inspector-General exercising its information-gathering powers is an offence, per clause 45.</p> <p>The consequential amendments in Schedule 3 confirm that the Inspector-General is required to comply with the Privacy Act 2020, with the exception of Information Privacy Principles 6 and 7 (obligations to provide access to, and correct, personal information) in order to reduce the risk that requests for personal information could be used to access the Inspector-General's investigation files. This exemption does not apply where the personal information relates to a current or former employee of the Inspector-General.</p> <p>The Inspector-General, their staff, advisory panel and other ad hoc advisors are all subject, per clause 36, to a duty to keep confidential all information that comes to their knowledge. The Inspector-General is also required to securely store all information it receives in the performance of its functions, in accordance with applicable protective security requirements.</p> |            |

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| <b>3.5.1. Was the Privacy Commissioner consulted about these provisions?</b>   | <b>YES</b> |
| <p>The Office of the Privacy Commissioner was consulted both during initial departmental consultation on the development of the policy, and in departmental consultation on the draft Bill.</p> <p>The Office of the Privacy Commissioner supported the Inspector-General being provided with reasonable powers to obtain information, and the Inspector-General being subject to the Privacy Act 2020 as described above.</p> |            |

## External consultation

| <b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>  | <b>YES</b> |
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| <p>The proposal to establish the Inspector-General has been subject to external consultation at appropriate levels, since the time that the Operation Burnham Inquiry began (2018) until the design elements were finalised for Cabinet's consideration (in early 2022):</p> <ul style="list-style-type: none"><li>• As part of the Inquiry, including in coming to the recommendation to establish an Inspector-General, the Inquiry undertook in-depth consultation with a range of people and organisations, including the core participants (the Defence Force, Nicky Hager, Jon Stephenson, and the former residents of Khak Khuday and Naik villages in Afghanistan), and former Ministers and Defence Force leaders. Members of the public also made submissions to the Inquiry.</li><li>• A range of interested stakeholders were consulted through a targeted consultation process (which included the production and public release online of a targeted consultation document and supporting Cabinet material). 36 individuals and organisations were approached for feedback including: the Inquirers, the authors of Hit and Run, academics and NGOs. 15 submissions were received. Overall, submissions generally supported the establishment of the Inspector-General with some recommendations on design features. Submitters' feedback resulted in a number of changes to the final policy recommendations.</li></ul> <p>The establishment and operation of the Inspector-General will have limited direct impact outside of government. As such, wider public consultation was not undertaken, but a copy of the targeted consultation was made publicly available, with information on how to make submissions. No submission from the wider public was received.</p> |            |

## Other testing of proposals

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| <b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>   | <b>YES</b> |
| <p>The policy details given effect by this Bill were tested with government stakeholders at two stages of the policy development process, to understand how the operations of the future Inspector-General would impact on the Defence Force and other organisations that would work closely with it:</p> <ul style="list-style-type: none"><li>a. <b>Defence Force:</b> As the stakeholder that would be most impacted by the proposal, the Defence Force was formally consulted to understand the nature, scale and size of the impact the proposal would have on it.</li><li>b. <b>Public Service agencies:</b> The establishment of a new government body would have an impact on machinery of government arrangements. Agencies with responsibility for machinery of government matters, or with a portfolio interest in the design, provided feedback on working policy proposals. Consultation also included a cross-agency steering group of senior officials from the Department of the Prime Minister and Cabinet, the Crown Law Office, the Ministry of Justice, Te Kawa Mataaho Public Service Commission, the Defence Force and the Ministry of Defence.</li><li>c. <b>Existing oversight bodies:</b> Existing oversight bodies (including the Inspector-General of Intelligence and Security, Independent Police Conduct Authority, the Privacy Commissioner, the Ombudsman, the Human Rights Commission, and the Auditor-General) provided feedback on policy proposals drawing on their expertise and experience in providing oversight of other organisations in the New Zealand context.</li></ul> <p>Drafts of the Bill were also disseminated for feedback among these stakeholders before the Bill was finalised for Cabinet approval.</p> |            |

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

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| <b>4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?</b> | <b>NO</b> |
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### Charges in the nature of a tax

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| <b>4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?</b> | <b>NO</b> |
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### Retrospective effect

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| <b>4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?</b>  | <b>YES</b> |
| <p>There are Bill of Rights Act 1990 implications arising from the Bill. Specifically, the Inspector-General's information-gathering powers engage section 14 (freedom of expression) and section 21 (unreasonable search and seizure), by requiring individuals to answer questions posed by the Inspector-General, and/or to provide it with information. These have retrospective effect, in that the Inspector-General would have jurisdiction to investigate matters prior to its establishment. These powers seek to achieve, and are rationally connected to, the Bill's key objective – establishing an independent oversight function that will strengthen democratic accountability and civilian control of the military, and increase public confidence in the Defence Force. The restrictions on freedom of expression and the right to be free from unreasonable search and seizure are proportionate and reasonably necessary to achieve this objective.</p> |            |

## Strict liability or reversal of the usual burden of proof for offences

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| <b>4.4. Does this Bill:</b>  |           |
| <b>(a) create or amend a strict or absolute liability offence?</b>   | <b>NO</b> |
| <b>(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?</b> | <b>NO</b> |

## Civil or criminal immunity

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| <b>4.5. Does this Bill create or amend a civil or criminal immunity for any person?</b>   | <b>YES</b> |
| <p>Clause 33 provides that it is not an offence to comply with an Inspector-General request for information where disclosure would otherwise breach an obligation of secrecy or non-disclosure.</p> <p>Clause 55 gives the Inspector-General, their staff and their advisors immunity from civil or criminal liability for actions or omissions in good faith performance of the Inspector-General's functions. This immunity does not apply in relation to proceedings for an offence:</p> <ol style="list-style-type: none"> <li>a. relating to a breach of a duty of confidentiality by the Inspector-General, Deputy Inspector-General, employees, contractors or advisory panel members;</li> <li>b. against section 78 (<i>espionage</i>), 78AA (<i>wrongful communication, retention, or copying of classified information</i>), 78A (<i>wrongful communication, retention, or copying of official information</i>), 105 (<i>corruption or bribery of official</i>), 105A (<i>corrupt use of official information</i>), or 105B (<i>use or disclosure of personal information disclosed in breach of section 105A</i>) of the Crimes Act 1961;</li> <li>c. of conspiring to commit an offence against any of the above sections of the Crimes Act 1961; or</li> <li>d. of attempting to commit an offence against any of the above sections of the Crimes Act 1961.</li> </ol> |            |

## Significant decision-making powers

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| <b>4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</b>  | <b>NO</b> |
| <p>The Bill gives the Inspector-General the ability to issue findings and non-binding recommendations on the activities of the Defence Force in the context of an investigation or assessment. It does not grant the Inspector-General the power to determine a person's civil, criminal or disciplinary liability. The Inspector-General could make a recommendation that further steps be taken to determine these matters.</p> |           |

## Powers to make delegated legislation

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| <b>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</b> | <b>NO</b> |
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| <b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b> | <b>NO</b> |
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## Any other unusual provisions or features

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| <b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b> | <b>YES</b> |
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The Bill establishes the Inspector-General and Deputy Inspector-General as independent statutory officers, and creates bespoke governance and accountability arrangements:

- Clauses 53 and 54 require the Inspector-General to report publicly on its activities in an annual work programme and annual report. The Bill requires these to be shared with the Minister of Defence, tabled in the House of Representatives, and published on the Inspector-General's website.
- The Bill confirms that the Inspector-General will be subject to the Official Information Act 1982, except where information relates to an investigation or assessment (including information the Inspector-General receives in evidence, and correspondence with other oversight bodies, public service agencies and Ministers). It also exempts the Inspector-General from Information Privacy Principles 6 and 7 under the Privacy Act 2020 (obligations to provide access to, and correct, personal information), except where the personal information relates to a current or former employee of the Inspector-General. This protects the Inspector-General's ability to seek and gather information in confidence.

The Bill specifies that the Inspector-General of Defence Act will commence on a date set by Order in Council or on the first anniversary of the date on which the Act receives Royal assent. This transitional period is required to allow an Inspector-General to be appointed, and for the office of the Inspector-General to be stood up, before the Inspector-General will be required to begin exercising its functions.