



Ministerial Policy Statement

Cooperating with overseas public authorities

Summary

It is important for New Zealand's security for GCSB and NZSIS to cooperate with overseas public authorities, including overseas intelligence agencies.

This Ministerial Policy Statement (MPS) provides guidance for GCSB and NZSIS in relation to cooperation with overseas public authorities. In making decisions related to foreign cooperation, employees must have regard to the following principles: respect for human rights, necessity, reasonableness and proportionality, protections for New Zealanders, information management and oversight. This MPS also specifies additional matters to be included in internal policy and procedures.

Definitions

The Act means the *Intelligence and Security Act 2017*.

Cooperation means to work together, and includes sharing intelligence and providing/receiving services, advice or assistance (including training, methodology and technology). This may be reciprocated or unreciprocated.

Overseas public authority means a foreign person or body that performs or exercises any public function, duty, or power conferred on that person or body by or under law.

Personal information means information about an identifiable individual.

This MPS provides guidance on overseas cooperation

1. New Zealand has a robust legislative framework to govern the activities of GCSB and NZSIS, including activities that involve cooperation with overseas public authorities. The Act includes obligations for GCSB and NZSIS to act in accordance with New Zealand law and all human rights obligations recognised by New Zealand law,¹ independently and impartially, with integrity and professionalism and in a manner that facilitates effective oversight.

¹ Sections 10(3), 12(7), 17(a) and 18(b) of the Act.

2. Cooperation with foreign partners can sometimes pose a risk of acting unlawfully in respect of both domestic legal obligations and international obligations, including a risk that New Zealand could become complicit in some forms of unlawful conduct by another country.² When undertaking overseas cooperation there is also a range of policy, human rights and reputational risks which need to be considered and managed. Consistent with New Zealand's respect for, and promotion of human rights, this MPS therefore provides policy guidance to, and sets expectations on, GCSB and NZSIS that extend beyond their legal obligations.

Scope of this MPS

3. This MPS applies to GCSB and NZSIS when cooperating with an overseas public authority (whether individually, jointly or with other government agencies). Cooperation may occur in relation to the performance of any of the functions of GCSB and NZSIS in sections 10 to 15 of the Act.
4. Cooperation must be lawful to be within scope of this MPS. Before and during foreign cooperation, GCSB and NZSIS must ensure their actions are consistent with their legal obligations. If in doubt, legal advice must be sought. Failure to act in accordance with New Zealand law could lead to possible criminal responsibility for employees of GCSB and NZSIS.

Context

Ministerial authorisation to cooperate

5. GCSB and NZSIS must obtain Ministerial authorisation where foreign cooperation involves the provision of intelligence, analysis or threat reporting.³ Ministerial authorisation can be sought on a case-by-case basis, for example to provide specific intelligence during a conference or event (such as APEC). Alternatively, Ministerial authorisation can be sought on a standing basis to provide intelligence to a range of overseas public authorities on an on-going basis.
6. Standing authorisations must be reviewed regularly to ensure that cooperation undertaken under the authorisation remains consistent with the principles in this MPS. In particular, if there are increased risks for ongoing cooperation either from changes to the domestic law, policy or practice of the overseas public authority subject to a standing authorisation, or from evidence they have carried out a significant breach of human rights, the standing authorisation must be reviewed by the responsible Minister on advice by GCSB and NZSIS.
7. GCSB and NZSIS must ensure sufficient information regarding the human rights practices of the overseas public authority is provided to the Minister to support decision-making. Guidance on this is contained within Appendix One.

New Zealand's intelligence and security relationships

8. New Zealand gains significant value from cooperating with overseas public authorities, particularly within the current climate of global and transnational threats. Close and reliable intelligence relationships help GCSB and NZSIS prioritise and focus their resources on the

² *Complicity is a legal term which recognises that while a state did not carry out the wrongful act, if it knowingly aided or assisted another state to commit that wrongful act, it may be liable by law.*

³ *By contrast, GCSB and NZSIS may provide protective security services to any public authority in New Zealand or overseas without requiring Ministerial authorisation (in accordance with section 11(1)(a) of the Act).*

areas most important to New Zealand, while having access to a much greater pool of information, skills and technology that would not otherwise be available to New Zealand.

9. For example, an overseas partner may have specific linguistic or technical capabilities that GCSB and NZSIS need in order to obtain or assess intelligence relevant to New Zealand's security and intelligence priorities. Similarly, GCSB or NZSIS may provide intelligence to an overseas public authority to alert them to a potential threat to their security, which helps contribute to international security and New Zealand's overall international relations with that country.
10. In the context of protective security services, advice and assistance, GCSB or NZSIS may provide technology or expertise to an overseas public authority to develop, implement or improve upon their protective security arrangements - for example, providing expertise on conducting a security vetting assessment, information security systems or detecting and protecting against cybersecurity threats. Such cooperation helps overseas authorities store and protect New Zealand Government information, contributes to the recipient's national security and the security of their region.
11. The closest relationships GCSB and NZSIS have with overseas public authorities are those with equivalent agencies from Australia, Canada, the United Kingdom and the United States (often referred to as the "Five Eyes" partners). The relationships between Five Eyes partners are long-running, reciprocal, cover a wide range of topics, and involve a high degree of mutual trust, honesty and respect. The relationships provide New Zealand with knowledge and capability far beyond what we can afford on our own. These relationships work effectively due to the shared values and histories of the five countries and the strong relations between the governments of those countries. The depth of the Five Eyes relationship means that disparities in size, power and influence do not prevent any member from acting in the best interests of their own government, and members expect to be able to disagree on specific matters without damaging the broader relationship.
12. The GCSB and NZSIS may cooperate with overseas public authorities from countries beyond the Five Eyes. This cooperation may occur on an ongoing, relatively informal, or one-off basis. The reasons for cooperating with such authorities vary widely and may occur while performing any of the agencies' functions and as part of contributing to their objectives. Examples include providing support to a major event such as APEC or the Olympic Games, or helping implement a Protective Security framework with an overseas public authority.

International and domestic obligations

13. New Zealand's core human rights obligations are detailed at Appendix Two. These include the right to life, the right not to be subjected to torture, the right not to be subjected to cruel, inhuman or degrading treatment or punishment, and the right to liberty and security of the person. New Zealand is also subject to other international obligations. These can be from a range of sources, including customary law obligations or binding United Nations resolutions. These obligations can range in nature from requiring action, prohibiting conduct or recognising rights.
14. The New Zealand Government has a long-standing and strong opposition to the use of torture, cruel, inhuman or degrading treatment or punishment in all cases and under all circumstances, including in response to threats to national security. The prohibition of torture is non-derogable -it can never be violated by states under any circumstances.

New Zealand is opposed to the use of torture in all circumstances and will not commit torture nor be complicit in torture committed by others.

15. New Zealand is also a long-standing opponent of the death penalty. New Zealand has abolished the death penalty within its jurisdiction and is committed to promoting global prohibition.⁴ The position of the government is that the death penalty is the ultimate form of cruel, inhuman and degrading treatment. New Zealand will not cooperate on specific investigations where the cooperation will lead to a person being sentenced to death, unless there are appropriate assurances that the death penalty will not be carried out.⁵
16. The many positive benefits of New Zealand's participation in foreign intelligence and security relationships do not override New Zealand's legal obligations with respect to human rights.

Guidance for GCSB and NZSIS

17. This section sets out guidance for the agencies when undertaking foreign cooperation. All cooperation must be carried out in accordance with New Zealand law and the principles contained within this MPS. Cooperation with overseas public authorities should be regularly reviewed to ensure cooperation remains consistent with the principles below.

Principles

18. The following principles constitute a basis for good decision-making and best practice conduct. They need to be considered before, during and after cooperation with overseas public authorities.

Respect for human rights

19. GCSB and NZSIS must ensure that their cooperation with overseas public authorities is in accordance with all human rights obligations recognised by New Zealand law. The Directors-General of GCSB and NZSIS must ensure the agencies remain informed of the human rights practices and potential risks related to cooperation with overseas public authorities.
20. There is an expectation that GCSB and NZSIS will undertake critical assessments of human rights risks and have a policy in place to ensure employees know how to assess risk and respond appropriately. To ensure the agencies' cooperation will not result in a real risk of contributing to, or being complicit in, a breach of human rights, this policy must address the risk assessment framework set out below, and provide guidance on when and how the framework is to be applied.

Risk assessment framework

21. *Assess general risk:* Assess the country or public authority's record and practice towards human rights and international humanitarian law. This assessment can include the country or public authority's stability, and where relevant, the success of any previous mitigation efforts that have been applied by New Zealand or close international partners when cooperating with the country or authority. See Appendix One for other factors the agencies should take into account.

⁴ Under the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty.

⁵ See s27(2)(ca) Mutual Assistance in Criminal Matters Act and s30(3) of the Extradition Act 1999.

22. Risk arising from the proposed cooperation: Consider whether the proposed cooperation, whether one-off or on-going, might result in a real risk of significantly contributing to or being complicit in a breach of human rights. The agencies must take a precautionary approach in making such assessments.
23. Opportunity for mitigating risk: Where it is identified that there is a real risk of a human rights breach occurring as a result of the proposed cooperation, GCSB and NZSIS should consider whether the risk can be mitigated, for example through conditions or restrictions on the cooperation provided, or through assurances or caveats on the intelligence exchanged.
24. *Response to a real risk of human rights breach:* If, following the steps above, there remains a real risk that the cooperation will significantly contribute to, or amount to complicity in, a breach of human rights, cooperation must be refused or referred to the Minister Responsible for the GCSB and NZSIS for a decision. To inform the Minister's decision-making, the information identified in the steps above must be documented and provided to the Minister, along with a clear statement on the purpose of the proposed cooperation. In circumstances where a decision is put to the Minister, the agencies will notify the Inspector-General of Intelligence and Security.

Use of intelligence obtained through human rights breaches

25. GCSB and NZSIS must not request or use intelligence where they know, or assess there is a real risk the intelligence was obtained through a serious human rights breach – such as torture, or cruel, inhuman or degrading treatment.
26. There may be circumstances where GCSB or NZSIS know or assess there is a real risk that intelligence received, including unsolicited intelligence,⁶ was gained through a serious human rights breach. In such circumstances GCSB and NZSIS must not take action that would contribute to a further human rights breach – for example, by requesting further intelligence about the same matter from the party responsible for that breach.
27. Where GCSB or NZSIS know or assess there is a real risk that intelligence received from an overseas partner was obtained through serious human rights breaches, the agencies may only use that intelligence in exceptional circumstances. Such circumstances are where the use of the intelligence is necessary to prevent loss of life, significant personal injury or a threat to critical national infrastructure. The reasons for limiting the use of intelligence in this way are:
 - a) It is consistent with New Zealand's opposition to torture and similar mistreatment.
 - b) There is a high likelihood that intelligence obtained through torture is unreliable.
28. GCSB and NZSIS do not have an enforcement function. Therefore, in such exceptional circumstances, the agencies must provide the intelligence to the relevant enforcement agency so that those agencies can take the action necessary to prevent the loss of life, significant personal injury, or threat to critical national infrastructure. In these circumstances, the responsible Minister and the Inspector-General of Intelligence and Security must be informed as soon as practicable.

⁶ *Unsolicited intelligence is intelligence received that was not specifically requested nor otherwise sought, but was received in the course of general intelligence sharing or cooperation with foreign partners.*

29. GCSB and NZSIS may still be required to undertake inquiries and investigate the intelligence that was passed to the relevant enforcement agency in order to inform the threat picture (for example, to identify the persons involved) or to provide advice to the Government on the particular security concern or risk.
30. When sharing such intelligence with law enforcement agencies, GCSB and NZSIS must mark the intelligence as having been potentially obtained as a result of torture and notify the recipient to ensure the intelligence is not used as evidence in legal proceedings.

Necessity

31. Cooperation with overseas public authorities must be for the purpose of contributing to the protection of New Zealand's national security, the international relations and well-being of New Zealand, or the economic well-being of New Zealand.
32. This may include cooperation to establish or maintain an international relationship. For example, establishing a new relationship in order to obtain intelligence relating to one (or more) of the Government's priorities may be considered necessary to enable the agencies to provide relevant intelligence and advice to the New Zealand government.

Reasonableness and proportionality

33. Cooperation with overseas public authorities, including any specific activities carried out as part of that cooperation, should be reasonable and proportionate to the purpose for carrying out that cooperation, the benefit gained from the cooperation, and the reputational risk to GCSB, NZSIS or the New Zealand Government.
34. Relevant factors in determining the reasonableness and proportionality of cooperation with an overseas public authority include:
 - c) the purpose and likely outcome of the cooperation;
 - d) the volume and detail of intelligence to be shared as part of the cooperation;
 - e) the nature of the cooperation;
 - f) the appropriate or necessary protections and/or restrictions in relation to the cooperation, including protections for New Zealanders; and
 - g) the status of New Zealand's bilateral relationship with that country, including any issues or areas of sensitivity that could have a bearing on the proposed cooperation.

Protections for New Zealanders

35. When cooperating with overseas public authorities, GCSB and NZSIS must continue to apply the same protections that would normally apply in New Zealand in relation to the specific activity. GCSB and NZSIS must not cooperate with an overseas public authority for the purposes of avoiding or circumventing those protections.
36. Where cooperation with an overseas public authority involves the sharing of intelligence or personal information relating to New Zealanders, GCSB and NZSIS will have particular regard to privacy interests when determining whether to disclose that personal information to, or when requesting such information from, overseas public authorities. This includes adherence to the [privacy principles](#) contained in Part 3 of the Privacy Act 2020 as they apply to GCSB and NZSIS.

Information management

37. GCSB and NZSIS must be satisfied that the overseas public authority has adequate protections in place for the use and storage of information, including adequate protections against on-sharing with third parties without express consent from GCSB or NZSIS. These protections will be consistent with the principles in this MPS and the MPS on *Information management*. In the event of a privacy breach, including the unauthorised on-sharing of information with third parties, the agencies will act in accordance with Part 6 of the Privacy Act 2020.

Oversight

38. GCSB and NZSIS must carry out all cooperation with overseas public authorities in a manner that facilitates effective accountability, transparency and oversight, including that of the Inspector-General of Intelligence and Security. This includes:
 - appropriate record-keeping, in accordance with the Public Records Act 2005, which clearly outlines assessments and decision-making,
 - maintaining up-to-date internal policies, procedures and guidance for staff, and
 - reporting to the responsible Minister on the nature and outcomes of cooperation with overseas public authorities.
39. Reporting must include a specific section in GCSB and NZSIS annual reports on the agencies' intelligence and security relationships with overseas partners.

Matters to be reflected in internal policies and procedures

40. As public service agencies, GCSB and NZSIS must comply with policies and procedures common to all New Zealand public service agencies.⁷
41. In addition, GCSB and NZSIS must have, and act in compliance with, internal policies and procedures that are consistent with the requirements and principles of this MPS and have systems in place to support and monitor compliance.
42. These policies and procedures must also address the following matters:

Human rights policy

43. GCSB and NZSIS must have a policy setting out the factors in the Risk Assessment Framework. These factors must be considered when assessing whether a real risk of human rights breaches may exist in connection with cooperation with overseas public authorities, whether the cooperation is one off or ongoing. This policy must also include what specific information is required to be provided to the responsible Minister to inform decision-making when seeking authorisation (either on a case-by-case basis or in the form of a broader standing authorisation) to provide intelligence or analysis to an overseas public authority.
44. The policy must be forwarded in draft to the Inspector-General of Intelligence and Security for comment. The final version must be referred to the Intelligence and Security Committee (ISC) for noting.

⁷ This includes the Public Service Act 2020 and the Health and Safety at Work Act 2015.

45. This policy is important to ensure that employees act consistently with legal obligations and the Risk Assessment Framework in this MPS.

Consultation with the Ministry of Foreign Affairs and Trade

46. The Ministry of Foreign Affairs and Trade is to be consulted on arrangements with foreign jurisdictions or international organisations. Foreign policy objectives should be considered in the development and framing of cooperation arrangements with foreign partners.
47. GCSB and NZSIS should have regard to any information available from the Ministry of Foreign Affairs and Trade on the status of the bilateral relationship with a country, a country's ratification of international human rights treaties and the human rights practices of a particular country.

Written basis for new formal arrangements

48. In order to support greater transparency and enable a level of Parliamentary oversight, certain newly entered arrangements⁸ relating to cooperation with an overseas public authority, including any significant new arrangement entered into with an existing partner, or significant modification to an existing arrangement, must be referred to the ISC for noting in accordance with the considerations below. Such arrangements should be recorded in writing.
49. An arrangement that meets one of the following criteria must be referred to the ISC for noting:
- is likely to have significant implications for New Zealand's foreign policy or international relations;
 - results in a significant change to the agencies' priorities or intelligence focus;
 - involves significant expenditure of funds; and / or
 - is seen to be inconsistent with Government objectives or priorities.
50. This includes arrangements that involve other government departments where GCSB and NZSIS are acting as the lead agency/agencies to the arrangement or the arrangement creates specific roles or obligations for the agencies. If there is any doubt whether the arrangement should be referred to the ISC, the arrangement must be referred to the Chair of the ISC for decision.

Training

51. GCSB and NZSIS employees making decisions or taking any action relating to cooperation with an overseas public authority for the purpose of performing the agencies functions must be provided training on all relevant law, policies and procedures in relation to human rights obligations. This training should be provided to existing employees and new employees, and must be updated whenever there are changes or updates to the policies and procedures to ensure that at all times employees are aware of their obligations and how to apply them in practice.

⁸ *An arrangement refers to an international instrument of less-than-treaty status (that is, it is not intended to be legally binding, but can still create important political commitments). For the purposes of this MPS, treaties where there has been a treaty examination waiver issued are also to be included within this definition.*

Duration of ministerial policy statement

52. This MPS will take effect from 1 March 2022 for a period of three years. The Minister who issued an MPS may, at any time, amend, revoke or replace the MPS.

Ministerial Policy Statement issued by:

A handwritten signature in blue ink that reads "Andrew Little". The signature is written in a cursive, flowing style.

Hon Andrew Little

Minister Responsible for the Government Communications Security Bureau
Minister Responsible for the New Zealand Security Intelligence Service

01 March 2022

Appendix One – Human Rights Information

A request to obtain Ministerial authorisation, whether a request for a one-off or standing authorisation, must include information regarding:

- the purpose of the intelligence sharing, including how it contributes to GCSB's and NZSIS's statutory objectives and functions; and
- any particular risks to human rights associated with the proposed cooperation and how likely it is that breaches could occur; and
- where risk is identified, the factors that mitigate the likelihood of the human rights breach occurring. Such factors might include:
 - the existence and effectiveness of mechanisms for monitoring or reviewing compliance with human rights obligations,
 - the reliability of any assurances provided by the foreign partner about how information will be used or how information to be provided was obtained, and
 - how likely the foreign partner is to comply with caveats associated with cooperation or use of information.

To assess the human rights practices of a country or public authority, in order to inform Ministerial authorisations and other actions by the agencies, GCSB and NZSIS should consider the following factors, as relevant:

- the human rights record of the country or public authority, and any other country or public authority that may also be involved, including consideration of reports from credible international, governmental and non-governmental organisation sources;
- whether the country has ratified relevant international human rights treaties, including any reservations that may have been made;
- whether the country has mechanisms for independently investigating breaches of human rights;
- whether the country has an independent judiciary with jurisdiction to hear cases relating to breaches of human rights;
- whether the country has an established history of compliance with human rights obligations;
- whether the country has an established history of investigating and prosecuting human rights breaches; and
- whether the country has a legal framework and institutional arrangements that guide and appropriately constrain the activities of the country's intelligence and security sector.

Appendix Two: New Zealand's Core Human Rights Obligations

Domestic law

To ensure that New Zealand meets its human rights obligations, GCSB and NZSIS employees must act consistently with domestic law under (but not limited to) the following statutes:

- New Zealand Bill of Rights Act 1990
- Human Rights Act 1993
- Privacy Act 2020
- Crimes Act 1961
- Crimes of Torture Act 1989
- Geneva Conventions Act 1958
- International Crimes and International Criminal Court Act 2000

International Obligations

New Zealand is a party to the following core international human rights instruments of the United Nations, and in doing so is bound by, and must regularly report on implementation and compliance with the obligations within those instruments. Actions or activities that run contrary to the obligations within these instruments may constitute a human rights breach in the context of this MPS.

- The International Covenant on Civil and Political Rights
- Second Optional Protocol to the International Covenant on Civil and Political Rights
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- The International Covenant on Economic, Social and Cultural Rights
- The Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Rights of Persons with Disabilities
- Convention on the Elimination of all Forms of Discrimination against Women
- Convention Relating the Status of Refugees
- Convention on the Rights of the Child

New Zealand is also a party to other international criminal and international humanitarian instruments, of which the following may be relevant in the context of GCSB and NZSIS cooperating with overseas public authorities:

- Rome Statute of the International Criminal Court
- Geneva Conventions and their protocols

New Zealand may also have other relevant obligations under customary international law.