



## *Ministerial Policy Statement*

# Creating and maintaining a legal entity under subpart 2 of Part 3 of the Intelligence and Security Act 2017

### **Summary**

It is lawful for Government Communications Security Bureau (GCSB) and the New Zealand Security Intelligence Service (NZSIS) to create and maintain a legal entity. This ministerial policy statement (MPS) provides guidance on the conduct of this activity. In making decisions related to the conduct of creating and maintaining a legal entity, GCSB and NZSIS must have regard to the following principles: necessity, proportionality, appropriateness, good faith, legality, and oversight. Any agency, including a private sector agency, that receives a request for assistance to create or maintain a legal entity also must have regard to this MPS in considering that request, to the extent this MPS is known to that agency. This MPS also specifies certain matters to be included in internal policy and procedures.

### **Definitions**

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

**Actions in relation to a legal entity** means any creation, maintenance or use of a legal entity, and any request for assistance in relation to an entity, under subpart 2 of Part 3 of the Act.

**Agency** means the chief executive of a department, a department, a Registrar or Deputy Registrar appointed under, or in accordance with, any enactment, a Board established under section 8 of the *Charities Act 2005* and a regulatory authority.

**Legal Entity** means an unincorporated body, a body corporate, a corporation sole or a trust.

**GCSB** means the *Government Communications Security Bureau*.

**NZSIS** means the *New Zealand Security Intelligence Service*.

## Purpose

1. This MPS is issued by the Minister Responsible for the GCSB and the Minister in Charge of the NZSIS pursuant to section 206(c) of the Act.
2. The purpose of this MPS is to provide guidance to GCSB and NZSIS on the creation and maintenance of a legal entity under subpart 2 of Part 3 of the Act. The MPS comprises the Minister's expectations for how GCSB and NZSIS should properly perform their functions and establishes a framework for good decision-making and best practice conduct.
3. MPSs are also relevant to oversight of the agencies by the Inspector-General of Intelligence and Security in the exercise of her propriety jurisdiction (the Act requires the Inspector-General of Intelligence and Security to take account of any relevant MPS and the extent to which an agency has had regard to it when conducting any inquiry or review).
4. Every employee making decisions or taking any action related to creating and maintaining a legal entity must have regard to this MPS. Employees should be able to explain how they had regard to the MPS. This might amount to an explanation of their consideration of any relevant internal policy or procedures that reflect the MPS. The Directors-General are responsible for ensuring the MPS is reflected in their agency's internal policies and procedures. If any action or decision is taken that is inconsistent with the MPS, employees must be able to explain why the action was taken and how they had regard to the MPS.
5. Any agency considering whether to grant a request by a Director-General of GCSB or NZSIS for assistance to create or maintain a legal entity must have regard to this MPS to the extent that it is known to that agency (see section 36(3)(b) of the Act). This MPS is not intended to provide specific guidance to assisting agencies to support their decision-making.

## Scope

6. This MPS applies to lawful activities undertaken by GCSB or NZSIS and any agency assisting in the creation and maintenance of a legal entity, under subpart 2 of Part 3 of the Act. This MPS guides the conduct of those activities and will be considered in all decisions made under those provisions. GCSB and NZSIS will have different needs related to legal entities but both agencies will be governed by the MPS and will share policy and procedures where possible.
7. This MPS does not cover legal entities established, maintained or operated under an assumed identity (as allowed for in section 24 (1)(b) of the Act), or under an employee's real identity, without using the provisions of subpart 2 of Part 3. Entities created without the assistance provided for in subpart 2 of Part 3 do not enjoy legal identity, status or capacity that may be conferred through such assistance and are therefore subject to the considerations that apply to using an assumed identity. In those instances the MPS on *Acquiring, using and maintaining an assumed identity* will apply.
8. This MPS does not cover the acquisition, use or maintenance of an individual assumed identity, nor does it cover employees of GCSB or NZSIS making a false or misleading representation about their employment. Each of these activities is guided by its own MPS (see MPSs on *Acquiring, using and maintaining an assumed identity* and *Making false or misleading representations under section 228 of the Act*).

## Context

9. GCSB's and NZSIS's objectives are set out in the Act. Both agencies contribute to:
  - a) The protection of New Zealand's national security;
  - b) The international relations and well-being of New Zealand; and
  - c) The economic well-being of New Zealand.
10. GCSB and NZSIS do this through the performance of their statutory functions, which include:
  - a) Intelligence collection and analysis; and
  - b) The provision of protective security services, advice and assistance.
11. MPSs are an important component of the measures put in place by the Act to ensure the functions of GCSB and NZSIS are performed with propriety and in accordance with New Zealand law and all human rights obligations recognised by New Zealand law.
12. In order to effectively perform their statutory functions, GCSB and NZSIS often need to carry out their activities in secret. Secrecy is often necessary to:
  - avoid parties stopping or interfering with sources of information or other methods of collection used by GCSB and NZSIS;
  - protect the identity of employees, or those who support them, to minimise the danger to the life and safety of persons carrying out activities on behalf of the agencies; and
  - minimise the risks to the reputation of GCSB, NZSIS, and the New Zealand Government associated with those activities.

### *Use of legal entities*

13. One method of avoiding activities being attributed to GCSB or NZSIS is to establish legal entities through which GCSB or NZSIS conduct transactions. These legal entities appear to the observer to be wholly independent of GCSB or NZSIS. For example, an incorporated company may be created that has directors that are unconnected with GCSB or NZSIS; has a place of business not associated with GCSB or NZSIS; or relate to an apparently unconnected business. This company could then be used to conduct transactions that also appear to be unconnected to GCSB or NZSIS, or to help an assumed identity look convincing and withstand scrutiny.
14. Section 33 of the Act gives GCSB and NZSIS the ability to create and maintain a legal entity through which it conducts transactions for the purposes of facilitating the ability of GCSB or NZSIS to maintain the secrecy of those activities. It may not do so for any other purpose.

### *Establishing legal entities*

15. Legal entities created for these purposes may need to be very detailed, supported by convincing evidence, and have an established history in order to ensure any links between the entity and GCSB or NZSIS is effectively hidden. For example, an entity may need very strong evidence of an established trading history to prevent an adversary foreign intelligence agency (which may have significant resources available to it) from knowing the entity is conducting transactions on behalf of GCSB or NZSIS.
16. In order to establish convincing legal entities, section 35 of the Act gives GCSB and NZSIS the ability to request another agency to take action to confer a legal identity, status or capacity

on an entity or to provide evidence of an identity, status or capacity having been conferred on an entity. In order to do this, assisting agencies may alter any register or other publicly available records. Such actions could include:

- Incorporating a company or a charitable trust board and issuing a certificate of incorporation;
  - Registering an entity as a charitable entity or a financial service provider;
  - Allocating an entity a New Zealand Business Number or a GST registration number and recording that number in the relevant register.
17. Requests to assist in conferring legal identity, status or capacity, or to provide evidence of that legal identity, status or capacity must set out certain information specified in section 35(2) of the Act and confirm that the request is made for the purpose of facilitating the ability of the agency to carry out its activities while maintaining the secrecy of those activities. It is recognised that GCSB and NZSIS may not always be able to share specific details when making such a request, as they will often relate to secret modes of operation or specific operations. They must provide, however, those details that are necessary in order for the assisting agency to provide the assistance requested.
18. An agency that receives a request for assistance may choose to grant the request or decline it if the agency is not satisfied that GCSB or NZSIS will use appropriately any legal identity, status, capacity or unique identifier conferred on the entity or if the agency thinks it otherwise appropriate to decline the request (section 36(2) of the Act). This is important as agencies who may be asked to assist have statutory responsibilities with respect to the integrity of the schemes they administer. An agency should make further inquiries or decline a request if it has concerns about the proposed use of the legal entity or the impact on the relevant scheme the agency administers, to the extent that these concerns arise from the information made available to them.

### *Maintenance of legal entities*

19. When use of a legal entity continues over time, maintenance of that entity may be required. This may include changes to the legal identity, status, or capacity of the entity or changes to a register or publicly available record related to that entity. GCSB and NZSIS may request assistance from another agency to undertake this maintenance (section 37), and that assisting agency may choose to grant the request or decline the request if it is not satisfied it is appropriate to provide the assistance. Assisting agencies must have regard to any impact on members of the public from such changes.

### *Cancellation of legal entities*

20. GCSB and NZSIS may also need to protect the fact that a legal entity was used by them previously, even when that entity is no longer in use, in order to protect sources and methods, employees and the reputation of New Zealand. There may be rare circumstances when GCSB and NZSIS may direct agencies that have assisted them to cancel publicly available evidence of a legal entity. This could include negating the effect of earlier actions taken (such as removing a company from the companies register), or expunging any record of an earlier action having been taken.
21. This does not affect legal obligations to retain information (such as record keeping obligations arising under tax legislation and the Public Records Act 2005). Even though it

could now appear from publicly available records that the legal entity did not exist or had not existed in the past, the Act requires the Directors-Generals to keep a register of all legal entities established; information that must be kept include details about cancellation and directions to restrict access to information. This means there will still be records of cancelled legal entities, which will support oversight by the responsible Minister(s) and the Inspector-General of Intelligence and Security.

### *Exemptions from compliance with requirements*

22. Section 42 provides that an entity, or officer of that entity, that has been conferred with any legal identity, status, or capacity, may be exempted from any requirements or duties that relate to that particular legal identity, status or capacity. For example, if GCSB or NZSIS has sought assistance to create an incorporated company, the Director-General of the agency may also request that the company be exempt from complying with Director's obligations and reporting obligations under the Companies Act.
23. Such an exemption may only be granted by the agency with regulatory responsibility for that requirement or duty. The regulatory agency making the decision must be satisfied that granting the exemption will not have a significant negative impact on members of the public. In reaching this view the agency must have regard to the purposes of the legislation under which the requirement or duty is made. An agency may decline the request if it is not satisfied that it is appropriate to grant the exemption.

### *Immunities*

24. The Act confers protection from criminal and civil liability for both the legal entity (section 44) and persons who provide assistance in relation to a request associated with the legal entity (section 43). These immunities only apply to acts and omissions which have been done in good faith and with reasonable care and are limited so as to exclude actions that are unreasonable or undertaken in bad faith.
25. The immunities conferred on a legal entity do not include anything that is in breach of a contractual arrangement (unless the breach is a necessary consequence of creating or maintaining the legal entity), in order to protect the rights of third parties who may have dealings with the legal entity. The immunities also do not include protection for actions that require the holding of a qualification and the entity does not hold that qualification. For example, a person who is not qualified to provide a financial service is not authorised to do so even though he or she has acquired such a licence under subpart 2 of Part 3. This is to protect from unwarranted risk in areas that are subject to regulation.

## **Principles**

26. The following principles constitute a framework for good decision-making and must be taken into account by GCSB and NZSIS when taking actions in relations to a legal entity. The maintenance of a legal entity, and any transactions conducted through the legal entity, should be subject to ongoing review as to whether that use and maintenance continues to be consistent with these principles.
27. Where an agency is assessing a request to assist with actions in relation to legal entities, they are not required to make their own assessments of whether a request meets the below principles. Their obligation extends only as far as being assured, on the information provided, that they have no concerns about the proposed use of the legal entity.

### *Necessity*

28. A Director-General of GCSB or NZSIS may only request the creation or maintenance of a legal entity when there is a clear need aligned with the purpose for which such an entity may be created or maintained – that is, to facilitate the ability of the agency to carry out its activities while maintaining the secrecy of those activities.
29. A legal entity may be created in advance of an activity, or maintained and used after the activity for which it was originally created ceases, if done so with a clearly defined purpose. For example, a legal entity may be created for future use in order to first build convincing cover; or a legal entity may continue to be maintained in order to establish a history over a longer period of time. In either case, this use is consistent with the purposes of ensuring that the entity's link to GCSB or NZSIS is not compromised. In circumstances where a legal entity is being maintained for this purpose, periodic review should be undertaken by GCSB or NZSIS to ensure the entity is still required. Should the legal entity no longer be necessary for the purposes above, the Director-General should direct that the entity be no longer used.

### *Proportionality*

30. The use of an entity with legal identity, status or capacity should be proportionate to the benefit achieved and the risks related to any particular activity. When assessing proportionality GCSB and NZSIS should, at a minimum, consider the scope of the proposed use of the legal entity, any intrusive impact on the public, the risk the activity poses to employees acting through or associated with the legal entity and the risk to any agency that provided assistance in support of that entity, and the reputational risk to GCSB/NZSIS and the New Zealand Government more broadly if the activity is compromised in some way.

### *Appropriateness*

31. A Director-General of GCSB or NZSIS may only request an agency create or maintain a legal entity, for the specific purpose outlined in section 33 of the Act. A legal entity must not be used by GCSB or NZSIS for any purpose or activity that is not reasonably related to maintaining the secrecy of its activities. A legal entity must not be used for purely personal gain or personal purposes. GCSB and NZSIS must have suitable protections in place, including ongoing monitoring and training, to ensure a legal entity created for this purpose is used appropriately.
32. In deciding whether to assist GCSB or NZSIS in creating or maintaining a legal entity, an agency should consider whether the legal entity will be used appropriately, on the basis of the information provided to them, and should have regard to the protections that are in place to ensure appropriate use. GCSB and NZSIS must make all endeavours to establish and maintain good relationships with agencies they request assistance from in order to ensure this can be achieved. Where necessary, arrangements should be made for employees in assisting agencies to receive the relevant national security clearance to enable them to receive the required information.

### *Good faith*

33. The Directors-General of GCSB and NZSIS must act in good faith and with reasonable care at all times when requesting an agency to assist with the creation and maintenance of a legal entity. This includes providing, subject to security requirements, sufficient information for an agency to decide whether to grant the request, and confirmation that the legal entity to

be created or maintained meets the specified purpose. At a minimum, such information should include assurances that the activity is required for approved purposes, has been subject to the appropriate internal authorisations, will be carried out by trained and approved employees, and general descriptions of how the entity will be used.

34. Once created, any actions taken by or through the legal entity must also be undertaken in good faith and with reasonable care. Actions in relation to legal entities will generally be considered to have been made in good faith and with reasonable care if they are consistent with the following, as applicable:
- Acting in accordance with statutory obligations;
  - Acting in accordance with authorisations;
  - Acting in accordance with this MPS and any internal policies, guidelines and procedures which reflect this MPS;
  - Acting consistently with managerial expectations;
  - Acting as part of a legitimate function of the role the employee is undertaking or the agency they are employed by;
  - Demonstrating sound professional judgement and responsible behavior in taking any actions in relation to legal entities and
  - Acting in accordance with any agreement in place with another agency regarding assistance related to legal entities.

### *Legality*

35. GCSB and NZSIS must ensure that the creation and maintenance of legal entities is carried out in accordance with the law. Where appropriate, legal advice should be sought. Outside the terms of the immunity in section 44, legal entities created or maintained remain subject to New Zealand law, including the law of contract and criminal law.
36. For the purposes of the Public Finance Act 1989, any legal entities created under subpart 2 of Part 3 should be considered to be part of the relevant agency for reporting purposes. Any expenses and capital expenditure incurred by a legal entity will be covered by the relevant agency's single-line appropriation. As such, the basic principles for public spending (transparency, fairness, legality, accountability and value for money) will apply. Any procurement activities conducted through a legal entity should comply with the [Government Rules of Sourcing](#) and [Principles of Government Procurement](#).
37. Where the creation or maintenance of a legal entity gives rise to a legal requirement or duty on that entity (or its officers), the Directors-General of GCSB and NZSIS may request an exemption from the government agency responsible for enforcing the relevant requirement or duty (as contemplated by section 42 of the Act). Examples of legal requirements or duties that may arise, and therefore may require a request for exemption, include customer due diligence and reporting obligations under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, or duties applying to company directors under the Companies Act 1993.
38. In requesting assistance from other government agencies in the creation and maintenance of legal entities, GCSB and NZSIS should engage fully with assisting agencies in order to understand the legal and regulatory consequences of that entity being created or

maintained. This will in turn allow GCSB and NZSIS to request appropriate exemptions. Such engagement will also provide an opportunity for GCSB and NZSIS to draw to the attention of assisting agencies the scope for immunities and exemptions (and their relevant limitations) as set out in the Act.

### *Oversight*

39. GCSB and NZSIS must carry out all activities in a manner that facilitates effective oversight, including through the keeping of appropriate records about the creation and maintenance of legal entities.
40. Section 45 of the Act requires the agencies to maintain a detailed register of the legal entities created and maintained and specifies the information to be recorded. All of the information in this register may be accessed at any time by the responsible Minister and the Inspector-General of Intelligence and Security. This requirement is in addition to general record-keeping requirements otherwise applying to GCSB and NZSIS.

### **Matters to be reflected in internal policies and procedures**

41. GCSB and NZSIS must have, and act in compliance with, internal policies and procedures that are consistent with the requirements and principles above, and must have systems in place to support and monitor compliance. Those policies and procedures must also address the following matters:

#### **Agreements with assisting agencies**

Where GCSB and NZSIS are likely to regularly request assistance from a specific agency to assist with actions in relation to a legal entity, an agreement should be in place between the Directors-General and the chief executive of the assisting agency. This agreement should include provisions for how requests will be made, processes for providing the relevant assurances to the assisting agency to allow them to judge whether to grant or decline the request, and processes for managing any disputes that may arise if a request is declined.

#### **Periods of review**

GCSB and NZSIS must have in place periods of review to ensure that assessments of the ongoing necessity of maintaining each legal entity is undertaken (ie whether there continues to be a clear purpose and need for the legal entity).

#### **Compliance with State Services Code of Conduct**

The Directors-General must issue policies and procedures that reflect their agencies' obligations under the State Sector Act 1988.

#### **Health and safety**

The creation, maintenance and use of legal entities must be undertaken consistently with GCSB's and NZSIS's obligations under the Health and Safety at Work Act 2015.

#### **Information management**

Information related to legal entities will be among some of the more sensitive information held by GCSB and NZSIS, given their purpose in protecting the secrecy of their activities. This information, including the register of legal entities, must be stored at an appropriate level of classification with clear access controls that correspond to the sensitivity of the information. The MPS on Information management will also apply in relation to this information.

### **Training**

All employees involved in the creation, maintenance and use of a legal entity created under subpart 2, Part 3 of the Act must be appropriately trained for the role they are expected to play, and on the relevant law, policies and procedures that apply. This training should be provided before employees carry out work involving legal entities, and whenever there are changes or update to the policies and procedures, to ensure that at all times employees are aware of current practices.

### **Authorisation procedures**

42. Approval to create and maintain a legal entity should be authorised at a level of seniority within GCSB or NZSIS that is commensurate with the level of operational, reputational, legal and health and safety risks involved. Risk assessments must include consideration of the risk to agencies that may assist in the creation and maintenance of the legal entity and possible impacts on the integrity of statutory and regulatory schemes under which the assistance is being provided. The Directors-General of both agencies should have delegations in place for such authorisations.
43. The Directors-General must establish processes for approving the creation and maintenance of legal entities. These processes should require applications for legal entities to identify the purpose for which they are required.
44. GCSB and NZSIS must have a dedicated team (either individually, or shared between the agencies) that is responsible for all processes associated with acquiring and maintaining legal entities (this may be the same team that is responsible for assumed identities). Legal entities should not be created by anyone that is outside this team(s) unless authorised to do so. The dedicated team(s) should be responsible for maintaining relationships with assisting agencies involved in conferring legal identity, status, or capacity on an entity. Before being approved, the team(s) should assess any risks that a proposed entity poses to the security of any other legal entities or assumed identities used by authorised persons of either agency.

### **Duration of ministerial policy statement**

45. This MPS will take effect from 28 September 2017 for a period of three years. The Minister who issued an MPS may, at any time, amend, revoke or replace the MPS.

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Ministerial Policy Statement issued by:



Hon Christopher Finlayson  
Minister responsible for the Government Communications Security Service  
Minister in charge of the New Zealand Security Intelligence Service

September 2017