Te Pourewa Mātaki
Inspector-General of Intelligence and Security

Review of NZSIS and GCSB Human Rights Risk Assessments

Public report

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INTRODUCTION

1. The New Zealand Security Intelligence Service (NZSIS or the Service) and the Government Communications Security Bureau (GCSB or the Bureau) both regularly cooperate with overseas public authorities in carrying out their functions. Intelligence sharing and cooperation is valuable to both agencies and is a key part of their work. Cooperation with foreign partners can pose a risk of the agencies acting unlawfully under domestic or international legal obligations, including the risk of New Zealand becoming complicit in unlawful conduct by another country, such as someone being subject to torture. The agencies therefore have a legal and policy framework for overseas cooperation.

2. This baseline review examined the NZSIS's and GCSB's carrying out of Human Rights Risk Assessments (HRRAs) to assess the human rights risk of potential cooperation with overseas partners. This review is focussed on HRRAs carried out since December 2021, under the updated Joint Policy Statement on the "Management of Human Rights Risks in Overseas Cooperation" (the "JPS").

3. The review involved considering the relevant law, policy and operational records relating to HRRAs, and assessed a sample of HRRAs carried out over the review timeframe against legal and policy requirements.

LEGAL AND POLICY FRAMEWORK FOR COOPERATION WITH OVERSEAS PARTNERS

4. Section 10 of the Intelligence and Security Act 2017 (ISA) makes it a function of the intelligence and security agencies to collect and analyse intelligence and share it. The agencies can provide intelligence and cooperate with overseas parties where they have been authorised by the Minister responsible for the agencies (an "authorised party").[1] When issuing such an authorisation, the Minister must be satisfied that the agencies will be acting in accordance with New Zealand law and all human rights obligations recognised by New Zealand law.

5. The Ministerial Policy Statement for "Cooperating with overseas public authorities" (the MPS) provides guidance for how GCSB and NZSIS should cooperate with overseas public authorities. The MPS sets out that when making decisions related to foreign cooperation, employees must have regard to the principles set out in the MPS, which includes respect for human rights, necessity, reasonableness, proportionality and oversight.

6. The MPS sets out a framework for assessing the risk of a breach of human rights, which involves:

    6.1 **Assessing the general risk** – the agencies need to assess the country or public authority's record and practice towards human rights and international humanitarian law.

    6.2 **Assessing the risk arising from the proposed cooperation** – the agencies must consider whether the proposed cooperation, whether one-off or ongoing, might result in a real risk of significantly contributing to or being complicit in a breach of human rights. The MPS requires the agencies to take a precautionary approach in making such assessments.

[1] ISA, section 10(1)(b)(iii).

6.3 **Identifying opportunities for mitigating risk** – where a real risk of a human rights breach occurring is identified, the agencies should consider whether the risk can be mitigated.

7. Where there remains a real risk of a human rights breach that the proposed cooperation will significantly contribute to, or amount to complicity in, the MPS requires that cooperation must be refused or referred to the responsible Minister for a decision. My Office must also be notified where a decision is put to the Minister.

8. The MPS also states that the GCSB and NZSIS must not request or use intelligence where they know, or assess there is a real risk that the intelligence was obtained through a serious human rights breach, such as torture, or cruel, inhuman or degrading treatment. The MPS does provide, however, that the agencies may use such information in exceptional circumstances; where the use of the intelligence is necessary to prevent loss of life, significant personal injury or a threat to critical national infrastructure. The agencies may not request further intelligence about the same matter from the party responsible for that breach.

Joint Policy Statement on Management of Human Rights Risks in Overseas Cooperation

9. The JPS sets out the agencies' requirements for identifying and managing human rights risks when cooperating with foreign parties and when receiving intelligence that may give rise to human rights concerns. It applies to all forms of cooperation apart from routine corporate or administrative functions (such as organising conferences). The JPS implements the framework set out in the MPS for assessing human rights.

10. The JPS covers the following:

10.1 how the agencies apply to the Minister for "Authorised Party" status under section 10 and how these authorisations are reviewed,

10.2 creates a process for the agencies to apply to the Minister for "Approved Party status" alongside a Ministerial authorisation, which enables cooperation with certain overseas partners without having to carry out a Human Rights Risk Assessment each time, except in certain circumstances,

10.3 provides guidance and criteria for staff to determine when an HRRA needs to be undertaken both before cooperation and before the use of intelligence received,

10.4 provides guidance on how to assess human rights risk when carrying out an HRRA and how to apply mitigations, and

10.5 sets out the approval levels for HRRAs depending on the level of risk identified (Real, Speculative or Negligible). HRRAs that identify a real risk must be approved by the Minister.

11. Therefore under the ISA and the JPS, overseas parties can have three different statuses, which determines how the agencies may share intelligence or cooperate with them:

11.1 **No Ministerial authorisation** – no intelligence sharing or cooperation with the overseas party may occur. Approval could be sought from the Minister on a one-off basis

11.2 **Authorised party status** - intelligence sharing or cooperation may occur, but the NZSIS or GCSB will need to determine whether a Human Rights Risk Assessment must be carried out, which will depend on the nature of the sharing or cooperation

11.3 **Authorised and approved party status** - intelligence sharing and cooperation may occur without having to carry out a Human Rights Risk Assessment, except in certain circumstances that indicate a human rights breach has occurred

HOW HRRAS HAVE BEEN MANAGED BY THE AGENCIES

Ministerial authorisations and approved parties

12. As at 7 March 2023, alongside domestic agencies, the NZSIS had ministerial authorisations and approved party status for the public authorities of 27 countries, and ministerial authorisations for a further 40 countries. The GCSB had authorisations and approved party status for 18 countries, while five other countries with just authorised party status. Authorisations may include multiple agencies within a country.

13. Applications for authorisations and approved party status have generally been applied for by the agencies in batches and sometimes applied for jointly.

14. Applications for ministerial authorisations and approved party status tend to follow a standard form that details:

14.1 the purpose for ongoing and regular engagement and intelligence,

14.2 the overall human rights record of the country,

14.3 specific legal and policy setting relevant to human rights, and

14.4 specific intelligence and security issues related to that party.

15. Currently authorisations are short documents which authorise sharing intelligence collected and the analysis of that intelligence with the named country. For example, a March 2023 Authorisation, covering several countries, approved sharing with:

> Any member, officer, or other agent or representative of an institution, body or entity of the government, parliament, judiciary or legislature, taking into account the purpose for sharing consistent with statutory objective.

16. Authorisations and approved party status are generally valid for three years.

On-sharing of intelligence – the third party rule

17. The Five Eyes countries use the "third party rule", which functions as a caveat for intelligence sharing. The rule requires a Five Eyes partner who receives New Zealand intelligence to obtain the consent of the NZSIS or GCSB before that overseas partner may on-share the intelligence to an agency in another country (the third party). The question that arises is whether the third party must also be the subject of a Ministerial authorisation.

18. The position held jointly by the agencies has been that to "provide" intelligence only relates to the sharing of intelligence directly from the New Zealand intelligence agency to another Five Eyes partner agency. In the agencies' view the on-sharing is a decision made by their Five Eyes partner and so no Ministerial authorisation for the third party is required to be in place.

19. The purpose behind a Ministerial authorisation is that it acts as a statutory safeguard; to ensure the relevant Minister can assess any legal, human rights, political and/or reputational risks involved with the NZSIS or GCSB knowingly sharing intelligence with a particular country/agency, prior to it occurring.

20. It is my view that that a Ministerial authorisation should exist for the third party, given that under the third party rule the New Zealand agency has both knowledge of who that party is, and control/consent over whether its intelligence is to be shared with it. This accords with the common meaning of "provide", which is "to make available", and is consistent with the purpose of Ministerial authorisations under section 10.

21. I have raised with the previous Minister responsible for the agencies my disagreement with the agencies but it has not progressed beyond the divergent positions stated above.

22. The JPS addresses this issue by requiring the agencies to carry out an HRRA where the agencies are cooperating with an approved party which directly involves sharing with a third party and any of the criteria in the JPS apply (such as if the intelligence identifies an individual). It also requires that any HRRA that involves a "real risk" of causing or significantly contributing to a breach of human rights be approved by the Minister. The MPS on cooperation does not address these situations.

23. I have raised the issue again because most HRRAs considered by the review involved the GCSB sharing intelligence under the "third party rule".

NZSIS HRRA practice

24. My office reviewed a sample of HRRAs that the NZSIS have carried out under the new JPS. From this sample, I had the following broader observations:

    24.1 The overall level of detail in the NZSIS's analysis varied. As expected, the more comprehensive analysis tended to be found in the HRRAs that involved more involved cooperation. Conversely, as expected, one-off, lower risk sharing tended to have very brief risk assessments. The outcomes of all of the HRRAs reviewed seemed reasonable in the circumstances. I had some concerns about the level of analysis for one in-depth HRRA which related to the Service's cooperation with an intelligence centre based offshore.

    24.2 In many cases it was not apparent what sources had been used to assess the human rights record of the overseas party as reports tended not to provide clear references, if references were provided at all. Despite the JPS stating that in "most cases" staff should use at least three credible sources to inform the assessment, it did not appear that this was standard practice. While I can see that there may be reasons for why three sources may not be necessary in some cases, NZSIS may want to consider whether the expectation in the JPS of consulting three sources in most cases is fit for purpose.

Standing HRRAs

25. NZSIS advised the review that it has four "standing HRRAs". These are HRRAs for operations that cover longer periods of time to enable ongoing cooperation with overseas partners rather than a discrete instances of cooperation or intelligence sharing.

26. There is a reference to the potential for standing HRRAs in the MPS, where at [22] it is noted:[2]

> [r]isk arising from the proposed cooperation: Consider whether the proposed cooperation, **whether one-off or ongoing**, 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. [Emphasis added]

27. The JPS provides for standing HRRAs at para [26]:

> In a HRRA ahead of proposed cooperation, staff are assessing the risk of the agencies' cooperation causing or significantly contributing to a human rights breach. HRRAs may cover one-off (i.e. to share a piece of intelligence) **or ongoing cooperation** (i.e. sharing a type of intelligence over time). **Ongoing HRRAs may be appropriate where the recipient, form of cooperation, risks and mitigations are unlikely to change. The agencies must review ongoing HRRAs annually or earlier if relevant factors change**. [Emphasis added]

28. There are no specific provisions for the carrying out of "standing HRRAs" in the JPS as opposed to any other HRRA, beyond the requirement for reviewing a standing HRRA annually. Standing HRRAs are approved at the same Manager level as a one-off HRRA.

29. I considered two "standing HRRAs" in detail as part of the review. These are classified so I am unable to detail them in this report.

GCSB HRRA practice

30. The GCSB shares a significant amount of intelligence with foreign parties. This includes a considerable amount of intelligence in accordance with the third party rule (i.e. the GCSB consenting to a Five Eyes partner on-sharing GCSB intelligence with a party not authorised under section 10 of the ISA). As per the JPS, the GCSB carries out HRRAs for each proposed on sharing of intelligence. When the GCSB considers requests to share intelligence, it considers human rights risks alongside other considerations, such as whether the intelligence sharing may disclose intelligence sources or methods, or provide support to military operations.

31. The review assessed a sample of 25 HRRAs carried out by the GCSB under the current JPS and where the intelligence was approved for release. Most requests to share intelligence are approved. Of those that are declined, most are declined for reasons other than human rights risk. For this review we also reviewed all requests to share intelligence that were declined (under the current JPS) due to the risk the cooperation could contribute to a breach of human rights.

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[2] The Service advised my office that it considered that paragraph [43] of the MPS also referenced standing HRRAs, however I consider that reference to a standing authorization is in relation to an authorization granted by the Minister under section 10.

ASSESSMENT

32. I have found that the MPS and JPS on human rights provides a generally robust framework for the agencies' sharing of intelligence and cooperation with overseas parties. Determining when an HRRA is required for particular work can be complex, however the policy and process requirements are logical and provide reasonable safeguards. The varying levels of approval required depending on the category of risk provide an appropriate escalation for when concerns are identified.

ASSESSMENT OF NZSIS PRACTICE

33. In relation to applications for section 10 authorisations and approved party status, the quality and detail provided to the Minister has improved over time, with the 2023 applications providing more in-depth and specific human rights analysis. The inclusion of information about the types of sharing that the NZSIS has done with those parties is useful for understanding the application, although more detail could be provided about specific instances of intelligence sharing. In the sample of HRRAs reviewed, I found that the Service generally carried them out in accordance with the MPS and the JPS and with reasonable quality.

34. I consider that the JPS could provide a more detailed framework for "standing" HRRAs to account for the higher level and uniqueness of risk associated with approving an HRRA for a non-approved party over a long period of time. Care needs to be taken to make sure that a standing HRRA does not become de facto approved party status due to the HRRA having too broad a scope. I observed one NZSIS standing HRRA which raises these concerns.

35. Standing HRRAs for non-approved parties inherently raise greater risks than a discrete instance of sharing or cooperation. The applications for these will need to have more detailed analysis and consideration of the safeguards in place to ensure that human rights risks are regularly monitored, which generally the Service has done. I consider that the JPS should reflect a more cautious approach by setting out a specific framework that includes:

    35.1 that an application for a standing HRRA includes details how the Service will monitor activities to ensure that the cooperation is within the boundaries of the HRRA and that different human rights risks are not arising;

    35.2 what regular reporting needs to be done on activities under the standing HRRA, to ensure there is effective control and oversight of the activities.

> **NZSIS Recommendation 1:** I recommended that the JPS on Human Rights Risk Management be amended to include a clearer, explicit framework for standing HRRAs that takes into account the points I have raised in this report.

36. The NZSIS has accepted my recommendation and has now updated its policy.

37. The effectiveness of the HRRA framework relies on NZSIS staff having a good awareness of the requirements of the MPS and JPS so that they identify that intelligence sharing or cooperation

requires an HRRA to be carried out based on the facts of the particular case. In 2022 the Service had a compliance incident where it had carried out significant activities over a period of time without an HRRA. It concerned me that such involved cooperation was not recognised as requiring an HRRA to be undertaken from the outset, and reflected a lack of awareness of the framework.

38. The training that the Service provides for staff provides a good base for general awareness of the requirements of the JPS and the legal team provides briefings for particular operations that may raise a greater risk. The Service may also want to put in place other regular measures to ensure that there is awareness of the framework across the Service.

39. I see that there is a need for regular reviews of HRRAs to ensure that the Service is carrying these out as thoroughly as intended under the JPS. The Service advised the review that it does not currently have any process of retrospectively reviewing HRRAs through audits or other types of review.[3]

NZSIS Recommendation 2: I recommend that the Service undertake an audit of a sample of HRRAs once every three years.

40. The NZSIS has accepted this recommendation and has an audit scheduled.

41. The lack of a centralised repository or register for HRRAs makes it difficult to oversee how these are carried out. Oversight must rely on manual searches, which is not ideal. This also makes it difficult for the Service to monitor compliance with the JPS to ensure that staff are carrying out HRRAs appropriately.

42. I consider that a centralised register of all HRRAs completed by the Service would be a useful step to enable effective oversight.

NZSIS Recommendation 3: I recommend that the Service implement a register or centralised repository for all HRRAs to enable effective oversight.

43. The NZSIS has accepted this recommendation and has set up a register to assist with oversight.

ASSESSMENT OF GCSB PRACTICE

44. Overall, I found that the Bureau's HRRAs are of a consistent quality. Of the HRRAs reviewed, generally I saw logical assessments, justifications, and (where relevant) mitigations. However, I observed some areas which could be improved and I comment on below.

[3] Email from Service to IGIS office 25 May 2023.

Sources used for HRRAs

45. The JPS sets out that staff should "in most cases" consult at least three credible sources for the HRRA. It did not appear this was standard practice for the Bureau in the sample we reviewed. Most HRRAS reviewed only relied on one source. The GCSB told my office that it sometimes only relies on one source for HRRAs if that source provides comprehensive information about a country's poor human rights record.

46. Using three sources is not only the advised standard under the JPS but it enhances the robustness of the assessment, but I can see why three sources may not always be necessary. If that is the case, the Bureau may want to consider whether the expectation in the JPS of consulting this specific number of sources is fit for purpose.

47. While the Bureau has collated a number of resources to carry out HRRAs. The only resources that appear to be updated regularly are the United States of America's State Department country reports, which may be why I observed an over-reliance on these documents.

Relevance of the assessment of human rights record to the intelligence

48. In my classified report I set out some concerns I held about the analysis that was set out in some of the HRRAs, in that it was difficult at times to see how GCSB had applied the assessed human rights record of the country to the particular facts of the proposed sharing of intelligence. I have advised the GCSB how I consider these could be improved. I did not, however, have any concerns about the ultimate decision reached by the GCSB in each of these cases.

Guidance for staff

49. The HRRA guidance for staff is easily located and understandable. I also note that more complex HRRAS involve consultation with GCSB Legal (and require higher sign-off).

50. However, parts of the GCSB guidance is now outdated and refers to the previous JPS. In my view the working aids should be updated to provide the up to date guidance which will assist with compliance. Updates to the guidance should include (if possible) uploading a new set of HRRA examples that have been carried out under the updated JPS.

GCSB Recommendation 1: I recommend that the GCSB update the guidance and working aids to align with the current *Human Rights Risk Management Policy* Joint Policy Statement.

51. The GCSB has agreed with this recommendation.

Amenable to oversight

52. The GCSB's recordkeeping practices for HRRAs are commendable. All HRRAs and accompanying decisions are in a centralised repository. Each request is assigned a unique reference number which is easily searchable.

53. The Bureau also maintains a comprehensive register which, among other things, records key information about the request. The robust recordkeeping system was amenable to my oversight, and enabled me to carry out this baseline review efficiently and without needing to rely on requesting information. However, I consider that the register would benefit from recording the level of risk determined in the HRRA. This would assist any internal oversight (from management, Compliance or Legal) as well as oversight from my office. For example, it would easily enable GCSB Compliance to carry out another compliance audit, or a spot check on cooperation assessed as giving rise to a real or speculative risk of contributing to a human rights breach.

GCSB Recommendation 2: I recommend that the GCSB record the HRRA assessed level of risk in its register going forward.

54. The GCSB has agreed with this recommendation and has implemented this change.

Follow up on cooperation with high risk

55. The Bureau told me it does not have a formal process to follow up on co-operation where the risk was assessed as a real or speculative risk the interaction could contribute to a human rights breach. In the absence of this process, GCSB reiterates its expectations to partners about monitoring their relationships with entities and individuals they co-operate with and human rights adherence.

56. In my view it is unlikely to be an onerous task to follow up on whether intelligence was acted on where the risk to human rights is assessed as real or speculative to see if the risks have manifested or not. Few HRRAs meet the real or speculative risk threshold. While the JPS requires that higher risk sharing involves more senior sign-off, including Ministerial approval for sharing with a “real” risk, which provides for greater accountability for decisions, I still consider a post-facto review would assist in informing future GCSB decisions on information sharing and cooperation. I intend to discuss the workability of this further with the GCSB.