Feedback from Consultation on Ministerial Policy Statements Review 2019/20

Overseas Cooperation

Paragraph/ Section	New	Agency	Feedback	DPMC Response
Fundamental – Legal Position		MFAT	Main feedback is: • The MPS should not become a statement of New Zealand's position on international law. • The MPS is not a framework for determining what might be lawful or unlawful.	Agree. We have revised the MPS to make it clearer that it applies to lawful activity, and it provides guidance to GCSB and NZSIS on this activity.
General		OPC	We note it may be desirable to consult with the Human Rights Commission on the revised MPS if possible, to gain expert views and insights in relation to human rights assessments.	Agree – have consulted with HRC.
General		Police	Happy with the review presented.	Noted.
General		NZDF	Agree in the main with the concepts, steps and principles in the MPS. Also agree that making it easier to read and digest for the general public who have no background in this area is of real value.	Noted.
General		MoJ	Our primary point is that the objective of upholding human rights is more important in and of itself than mitigating any legal risk from human rights breaches.	Agree. Aligns with MFAT point above. We have revised the MPS to make this clearer
General		Customs	The document covers the release to Overseas Public Authorities which requires prior approval on a case-by-case basis or in the form of a broader standing authorisation. In my experience there will sometimes be in a case-by-case situation where it may not be possible to obtain permission prior to when the information is required or useful.	

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			Agree it is pretty consistent with Customs Policy (Operational Policy: disclosing information to overseas authorities) and certainly significantly reflects recommendations made in the IGIS's Public Report 'Inquiry into the possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme 2001-2009'	
General – Customs Policy		Customs	The Customs Policy document referred to above makes strong points about the use of caveats to reinforce limitations that apply when information is provided to overseas agencies, particularly if personal information is being provided. For example this may include a caveat stating the information is not to be used evidentially or passed to a third party without prior written consent from Customs. These matters may of course be covered in more detailed documents that sit below the MPS but in my view clear guidance on the use of caveats is important. It also involves an assessment of how much confidence there is in the recipient agency abiding by the caveat.	Caveats are referenced to within the MPS (current para 38) and further detailed within Agencies operational policies.
General		HRC	Expand the definition of "overseas public authorities" to include private contractors and agents of those authorities.	Disagree. The definition of public authority is set out in the Act and includes any person or body that performs any public function, duty or power conferred by the laws of the country. No change needed.
General		HRC	Make internal policies, such as the human rights policy, publicly available (except for any sensitive content which if disclosed would constitute a reasonable risk to national security).	Disagree. (See comment re IGIS recommendation below)
General		HRC	Require authorisation for overseas cooperation to be provided by an external independent body.	Disagree. This is beyond the scope of the MPS. Would require legislative change.

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General		HRC	Require agencies to develop a policy that clearly states how they will give effect to best practice monitoring of partner countries, which should include the requirement that for countries with a volatile human rights situation this the review should occur every six months.	Disagree. This has resource implications. The MPS sets out the matters to be considered and we think this is sufficient.
General - "Authorisation"		NZDF	The document appears to repeat the requirement to gain approval from the Minister and removal of that repetition may enable better clarity in the process.	Agree. We have revised this section to make it less repetitive.
Unsolicited Intelligence		Customs	There is some duplication and variation in the draft statement around accepting and use of unsolicited intelligence that indicates a credible national security threat to New Zealand or risk to New Zealanders that has been, or is suspected to have been, obtained through human rights abuses committed by another party.	Agree. We have re-drafted this section to remove duplication
Summary		MFAT	Insert: *"This Ministerial Policy Statement (MPS) provides guidance for GCSB and NZSIS in relation to lawful cooperation."*	Agree.
[1]		IGIS	We consider it important to provide the public with an explanation of how the MPS differs from the agencies' warrants. If these paras have already been standardised across MPSs and are not amendable to change, this sentence could instead be added to para 7 Scope of this MPS. Insert at end: *"MPS govern activities that are lawful if carried out properly. MPS do not provide guidance or authority for activities that need to be carried out under an intelligence warrant and which would otherwise be unlawful."*	Agree – we have included similar wording up front and will make consistent across all MPSs.
[2]		MFAT	*"in accordance with New Zealand law and all human rights obligations recognised by New Zealand law."* - Not sure this is correct. As the Minister noted during the Bill process "Ministerial Policy Statements would not affect the lawfulness or otherwise of an activity, but would be a mechanism to enable the responsible Minister to regulate the lawful activities of the agencies."	This sentence was intended to set out the MPS role in the entire regime. Agree that it is confusing and have revised to clarify.

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[5]		IGIS	We suggest this edit be reinstated, as it is helpful to reference a requirement for "proper performance" by the agencies soon after the reference to the IGIS propriety jurisdiction (at para 3 above). We also consider "cooperation" to be a function (eg, see ISA s 10(2)(a) and s11(2)). Redraft: *"This MPS sets out the Minister's expectations for how GCSB and NZSIS should properly perform their foreign cooperation functions ~~cooperate with foreign partners when performing their functions~~ and establishes a framework for good decision-making and best practice conduct."*	Agree.
[6]		MFAT	We think it could be useful here to explain somewhere that acting inconsistently with the MPS is only possible where that activity is lawful. The MPS should only apply to lawful activity, and while it useful to set out the process in this MPS for determining legality, it is for the purpose of determining the scope of the lawful activities which may be conducted subject to the policy expectations of the Minister. The point is that even though an activity may be lawful, the intelligence agency must have regard to any expectations or limitations set out in this statement by the Minister. Add as final sentence: *"However, this MPS cannot and does not authorize and employee to conduct any unlawful activity."*	Agree. We have added the sentences to the landing page: *They do not act as legal authorisations for these activities...* *Activities which are unlawful may only be carried out to the extent that they can be authorised under an intelligence warrant.*
[7]		MFAT	Insert: *"This MPs applies to GCSB and NZSIS when <u>lawfully</u> cooperating..."*	Agree, redrafted
[16]	14	Customs	*"or helping implement a Protective Security framework in Fiji."* - This seems very specific and it could be better to leave it a bit more open in case a similar situation arises."	Agree – changed this reference from Fiji to a more general example on the Pacific.

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[17]	22	MFAT	Redraft: *This MPS includes guidance on the decision-making framework to ensure the agencies' cooperation with overseas partners does not lead to breaches of New Zealand's human rights obligations. In some circumstances, international law may also require that New Zealand is not complicit in breaches ~~of human rights~~ of international law by other countries (e.g. torture).*	Agree. We will combine this recommendation with the IGIS recommendation for [17].
[17]	22	IGIS	This MPS includes guidance on protecting human rights as part of the agencies' foreign cooperation activities, so is wider than just guidance on cooperation that leads to complicity in those breaches. In other words, the obligation requires more of the agencies than considering complicity alone. In our edits to the MPS we have now consistently used a standard formula "risk of contributing to or being complicit in" breaches of human rights. Redraft: *"...overseas partners does not risk contributing to, or being complicit ~~lead to complicity~~ in breaches of human rights."*	Agree in principle. However, our policy view is that risk should qualified as a "real" risk – and this should be consistent throughout the MPS. We have combined this recommendation with the MFAT recommendation on [17] and moved to a re-drafted para 22.
[17] Complicity footnote		IGIS	Our comments concerns footnote 1 on complicity. We do not consider the definition to be privileged. It is not being provided in the context of confidential legal advice. The first sentence is as edited by the DIGIS in our last feedback. The remaining four elements are in the public domain – see for example the paper available on the Operation Burnham Inquiry website written by (ex-MFAT) consultant Dr Penny Ridings for the Public Hearing Module # 2 (see page 8). We also note that our public Senate Inquiry Report sets out a conservative view of these elements (Appendix D Legal Framework at para 29). Instead of the definition in footnote 1, we propose the use of a plain language description, eg,"The term complicity covers State or personal liability for contributing to certain serious international offences such as breaches of human rights or international humanitarian law."	Agree re complicity definition. We took this from the MFAT complicity piece and MFAT requested we keep in the 'legally privileged' classification until they could see its use. We have revised the definition and removed the 'legally privileged'.

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[17] Complicity Footnote	Footnote in para 2	MFAT	Delete footnote: *"Complicity is a legal term..."*	We have kept this in as think it is an important concept to define. We have changed the wording of the definition to be more plain English.
[18]	18	IGIS	We again seek clarification about what the relationship is between the benefits of overseas cooperation, and the rights of New Zealanders in domestic law (not least because this is under the head of International obligations)? How could those benefits "override" those domestic obligations? We suggest this is a comparison between two disparate elements. Further, human rights under domestic law are available to everyone in NZ and are not contingent on being a NZer. It would seem more likely that it is the human rights of foreign individuals that might be overridden by NZ agencies when adhering to foreign cooperation for perceived benefits. Our edit attempts to make the relationship/balancing logical and realistic. We would be happy to discuss this further, should the agencies indicate what they were seeking to achieve by this sentence. Redraft: *"The many positive benefits of New Zealand's participation in foreign intelligence and security relationships do not override the obligations to act in accordance with the human rights of individuals in New Zealand and, where relevant, in foreign states."*	Agree. Revised.
Proposed [18], original [20]		MFAT	Re-position [20] to [18]	This section has been reworked.
Proposed [19]	5	MFAT	Insert: *"Legal advice should be sought to determine whether a proposed activity is lawful and therefore subject to this MPS."*	We have moved the legality section to within the context, rather than as a principle. The section includes a sentence to seek legal advice if in doubt. We don't necessarily think

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				legal advice will need to be sought before undertaking all cooperation. The internal policies of the agencies will assist in assessing the lawfulness of cooperation.
After Proposed [19]		MFAT	New heading: *"Human Rights"*	Further 'human rights' heading may confuse the document as we already have human rights section later in the document.
Proposed [22]	17	MFAT	Insert: New Zealand is also a long-standing opponent of the death penalty [...]	Agree. We have included text along the lines MFAT suggestion.
[21 - 24] "Decision Making Framework"	After para 22	IGIS	A number of comments on this section to improve consistency and aid clarity for the agencies in undertaking a risk assessment.	Have reworked this section and have accommodated most of the suggested changes.
[24] The Decision Making Framework	After para 22	OPC	We note and support the inclusion of a decision-making framework, as supported by Appendix 2. We would expect that the human rights assessment process would be supported with additional guidance, risk matrix and policy documents so that officers can apply the decision-making framework at a practical level and identify potential risk.	Agree – this will be included in internal policies.
[24.4]		OPC	The threshold for refusing cooperation is a real risk that the cooperation with significantly contribute to a serious breach of human rights. This threshold appears high – we suggest a threshold of serious breach is sufficient without also requiring the contribution to be significant.	Have maintained 'real risk' and made consistent throughout the document.

Paragraph/ Section	New	Agency	Feedback	DPMC Response
[24]		MoJ	*"When cooperating with countries which recognise and have human rights practices comparable to New Zealand"* - This seems pretty self-explanatory, but is there a set criteria for this or a whitelist? May be helpful to have a couple examples of what comparable looks like[	We have deleted this reference in response to the IGIS recommendations.
[24] "The Framework"		MoJ	If you are concerned about improving readability and comprehension is it possible to include a simple infographic/flowchart of the framework to supplement the paragraphs? Point One: It may be helpful to reference the human rights policy bullet on page 11 here. I wasn't sure if there was a standardised process for this assessment because it says factors 'may' be considered but see that on page 11 the human rights policy sets out factors in the decision-making framework that 'must' be considered.	Agree. We will consider as we get the document ready for publishing
[24] "Decision Making Framework"	17	Customs	On the death penalty, this is an issue covered quite extensively in the Customs Policy document with advice on making decisions about whether to share personal information or information that may lead to identification of an individual who could as a result face prosecution the death penalty if convicted.	Agree – text added
[24] "The Framework"		MFAT	s9(2)(h) [redacted]	Noted. We have decided to stick with torture as example but will pass on to agencies to ensure death penalty is included in their internal policies and guidance.
"Ministerial authorisation to cooperate"	7	IGIS	We wonder whether logically this heading and the paras beneath it might sit better before the paras on the decision-making framework?	Agree – this has been moved to before the framework

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[26]		IGIS	Insert: *"for example to provide ~~a wide range of~~ intelligence to a range of overseas public authorities~~y~~."*	Agree.
[27]		IGIS	Insert *"changes to the domestic law, policy or practice"* We suggest this is necessary for a precautionary approach.	Agree.
[28]		IGIS	Redraft: *"Guidance on this is contained in the above decision-making framework at Step 1, and within Appendix Two."* Delete: *"as well as taking into account the principles contained within this MPS."* This deletion is addressed in our later comments regarding para 38, 42 and 43 of the MPS (re the inherent confusion if the MPS proposes two disparate decision-making frameworks applying to the same issue of breaches of human rights).	Agree.
"Principles"		Police	The only additional principle which may be of benefit to consider is "urgency" to ensure that there is a timeliness regarding any overseas cooperation requests.	We discussed with agencies. Considered more appropriate in internal guidance.
"Principles"	21-28	IGIS	We have spent some time on these paras, in an attempt to clarify how the parts of the MPS work together or exist alongside each other, and in particular, how the 4-step risk assessment decision-making framework and the principles of reasonableness and proportionality are engaged. In short, we consider the risk assessment framework is to be used for assessing the level of human rights risk involved in an applicable instance of foreign cooperation. We are seeking to avoid the confusion of the MPS having two disparate decision-making models, while not diminishing the need for these broader general principles (as stated across all MPSs).	Agree. We have reframed so that the risk assessment framework (changed from 'decision-making framework') fits within a 'respect for human rights' principle.
[28]		IGIS	Redraft:	Agree. Have reframed this section

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			The following general principles apply to all overseas cooperation by the agencies. However, where human rights obligations are engaged these principles complement the four-Step decision-making framework [footnote], and are not a substitute for it. ~~constitute a basis for good decision-making and must be taken into account by GCSB and NZSIS when cooperating with overseas public authorities.~~ Cooperation with overseas public authorities for the performance of one or more of the agencies functions should be subject to regular review to ensure cooperation remains consistent with these general principles. [Footnote - Above, at para 24 of this MPS.]	
[28]	9	OPC	The sufficient information regarding human rights practices of the overseas public authority (para 28) to be provided to the Minister could be strengthened so that includes all relevant information to support decision-making.	Noted. We do not expect the agencies will provide all material to the Minister and 'sufficient' information is adequate to capture the information the Minister needs to support his/her decision. Further guidance is provided in Appendix 2. No change
[29]	16	IGIS	We find 'precautionary approach', as repeated here, to convey and require more of the agencies, than a reference to 'caution'. Redraft: *"Ensuring agency action does not trigger legal responsibility or liability requires a precautionary approach:"* *a)* Delete: *"reasonable"* (We appreciate this term was our suggestion but on review of this latest draft of the MPS we consider it to be implied or inherent in the phrase 'grounds to believe', and with the phrase 'grounds to believe' the MPS is reflecting sound overseas practice. We are also keen to avoid the potential to inadvertently create another overt standard or decision-making threshold.)	The legality section has been stripped back to reflect comments that the MPS only applies to lawful activities, therefore should not include a descriptive assessment of legality.

Paragraph/ Section	New	Agency	Feedback	DPMC Response
			Edit: *"with an overseas public authority could contribute significantly or directly to a breach of human rights"* b) Edit: *"cooperation with an overseas public authority risks contributing significantly or directly to a breach of human rights, the agency must"*	
[32]	23	IGIS	Insert: *"GCSB and NZSIS should not request or use information if there is a real risk that the information"*	Agree.
[33]	27	IGIS	Article 2 of UNCAT states "no exceptional circumstances whatsoever … may be invoked as a justification of torture". This obviously refers to the actions of the foreign partner in carrying out torture. But, in keeping with that, we raise for consideration the extent to which in this MPS the Minister may wish to indicate that 'exceptional circumstances' do not relate to the NZ agencies using information that was likely obtained through torture, to better reflect the spirit if not the letter of UNCAT. This is of course a policy decision for the Minister and we have left the following references to 'torture' unchanged. *"Where the use of the information…"* There was a bit of mixture here (to which we unfortunately contributed) between describing the nature/content of the information to be used, and what harms using that information was intended to prevent. For clarity, we have edited it to refer solely to the harms. Redraft: *Where GCSB or NZSIS know or have grounds to believe that information received from an overseas partner (which may be unsolicited intelligence)[1] was obtained through serious human rights abuses, they may only use that information in exceptional circumstances. Such circumstances will be where use of the information is necessary to prevent loss of life, significant personal injury, or a threat to the life of*	Noted. The MPS reflects the position where there are exceptional circumstances in which info likely obtained through torture can be 'used'. This section has been re-framed

[1] 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.

Paragraph/ Section	New	Agency	Feedback	DPMC Response
			the nation, as defined. [Footnote] The reasons for limiting the use of this information in this way are: a) *It ensures consistency with New Zealand's continued opposition to torture and similar mistreatment.* b) *It reflects the high likelihood that information obtained through torture is unreliable.* [Footnote - *A public emergency of this nature is defined as being an actual or imminent event whose effects would involve the whole nation and risk the continuance of the organised life of the community to a level whereby normal measures or restrictions are plainly inadequate."* This added qualification is essentially unworkable. In the context of exceptional circumstances, which require immediacy of action, or even following the conclusion of such circumstances, the agencies are unlikely to be able to assess whether this described situation will occur eg, how will they assess whether the use now of information obtained from human rights abuses will avoid a risk of future complicity in further breaches? What is the agencies' intention in introducing this qualifier to the description/definition of 'extraordinary circumstances'?]	
[33]	17	OPC	A relevant consideration is whether New Zealand co-operation through sharing intelligence contributes to the risk of capital punishment in the partner jurisdiction. We recommend that this be added to the list of factors in appendix 2, and reflected at para 33 as a serious human right abuse. This limit on cooperation has been recognised in the New Zealand law enforcement context (see s 27(2)(ca) of MACMA) and it would be appropriate to apply a parallel limitation in the security and intelligence context.	Agree. Have added new para (17) and reference to MACMA.
[33, 34. 37]	23-28	OPC	Para 33 reflects the limit on using intelligence obtained through human rights abuses, reflecting that the security agencies should not use or disseminate information obtained through torture or other serious human rights abuses.	Agree. This section has been reframed to be clearer.

Paragraph/ Section	New	Agency	Feedback	DPMC Response
			However the following paragraphs introduce scope for the use of tainted intelligence, and need clearer safeguards. The exceptions in para 34 should be clearer as to whether they apply solely in relation to unsolicited intelligence, or express more clearly how para 34 departs from para 33. Para 38 introduces a further exception where there is no complicity risk. However that does not appear consistent with the high level limit on using tainted intelligence (para 33) and we suggest it should be reviewed. If retained, there should be additional safeguards such as sign-off at DG level. The reasonableness and proportionality principle now anticipates serious impacts on human rights including torture – this principle could usefully provide express guidance that serious impacts at this level are unlikely to be reasonable or proportionate. Any mitigations would have to ensure that the impact of the cooperation is not at the level of such serious human rights abuses. As noted at para 34(b) there is a high likelihood of unreliability of this form of intelligence – and potentially engages an assessment under privacy principle 8. Unreliability needs to be considered in relation to the decision making around any use in "exceptional circumstances". Informing the Minister (para 37) should be required before the intelligence is used in any exceptional case, and not limited to sharing with law enforcement agencies so that the Minister would be informed of any potential use of tainted intelligence.	
[35]	27	Customs	Would the people using this MPS be clear on what the difference is between this use of the information, and other uses they might have for the information?	Agree – wording changed to reflect this and IGIS feedback
[35]	27	IGIS	Proposed full deletion. We had several concerns with this para. First, it doesn't seem necessary, as the next para goes on to sufficiently describe what use the intelligence agencies may make of the information obtained through human rights abuses prior to providing the information to the relevant enforcement agency. Second, and more critically, the para essentially describes the intelligence agencies using the information for their business as usual (ie, forming a piece of an	This paragraph has been re-worked to make it clear that it refers to the information that has been passed on, not as BAU.

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			intelligence picture, performing their functions, and advising government of security concerns). This BAU approach is contrary to and effectively undermines the preceding paras requiring 'exceptional circumstances' before such 'tainted information' can be used. At the heart of the 'exceptional circumstances' justification is the reasoning, oft repeated, that an agency accepting and using information obtained through serious human rights abuses implicitly affirms and encourages the foreign partner in those breaches. And of course, this runs counter to the logic of Article 41 of the ILC Articles on State responsibility for internationally wrongful acts, which speaks to 'states cooperating to bring to an end through lawful means any serious breach of a peremptory norm of general international law'.	
[36]	25	Customs	It's not clear to me what the 'exceptional circumstances' are here	Exceptional circumstances described in para 25
[37]	28	MFAT	Insert: *"GCSB and NZSIS must mark the information as having been potentially obtained"*	Agree.
[37]		IGIS	Redraft: *"Where information is shared with enforcement agencies that is known to be of this nature, or where there are grounds to believe it is, the responsible Minister and the Inspector-General..."*	Agree.
[38]		MoJ	*"a less egregious breach of human rights..."* Is there an example of what this means? If you leave this to the imagination it still hits a bit hard. Also it's a bit hard to follow, does the 'no risk of complicity' relate to complicity in further serious human rights breaches or all types of complicity including less egregious breaches?	This paragraph has been deleted.
[38]		IGIS	We continue to view this para as something of a minefield. Regarding the deleted reference to the principles, we are not aware of the reason why the agencies might seek two decision-making frameworks for the same human rights (ie, the risk assessment decision-making framework; and the principles). The para is solely	This paragraph has been deleted.

Paragraph/ Section	New	Agency	Feedback	DPMC Response
			referring to post-receipt handling of information and currently the JPS HRRM uses the risk assessment framework to review (HRRR) such information and how to mitigate a recurrence. This is fit for purpose and should continue. Use of the framework also means that the MPS will not need to refer to less serious" or now "less egregious" breaches of human rights. We had serious concerns about the criteria would be used to interpret that phrase in the MPS. We observed a real difficulty with identifying "lesser" breaches with any level of precision. For example, brief detention without cause in the UK will be very different from brief detention without cause by the Afghanistan NDS, where this is the prime time period for torture to obtain a 'confession'. Temporarily removing access to the internet/social media so blogs cannot be posted may be a short term frustration in Canada, but in China might be the time during which the blogger disappears without an ability to alert others. Context is everything, and the 4-Step decision-making framework allows that consideration. Redraft: *"There may also be circumstances where the agencies know information received from an overseas public authority (including unsolicited intelligence) has been obtained through a breach of human rights but there is no risk of having contributed to or being complicit in that breach. In such circumstances, the agencies must use the 4-Step decision-making framework to assess whether use of this information will attract risk of future human rights breaches."*	
[39]		IGIS	Delete "*and for the purposes of performing their functions.*" Cooperation with public authorities is a function (see for example ISA s10(2)(a) and 11(2)).	Agree.
[40]		IGIS	Deleted references to "functions" – same as [39].	Agree.

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[42]		IGIS	Proposed full deletion. As per our comment on para 38. This level of detail is not necessary (and sorry, we realise that our intention to clarify what a proportionality assessment comprises led to some of this!)	Agree.
[43]		IGIS	We have attempted to broaden the focus of the list to potentially cover all areas of foreign cooperation eg, secondments; deployments to conflict zones; international arrangements. Redraft: *The reasonableness and proportionality of cooperation with an overseas public authority will require GCSB and NZSIS to have a clear understanding of:* a) *the purpose and likely outcome of the cooperation;* b) *the volume and detail of information to be shared as part of the cooperation;* c) *the nature of the cooperation;* d) *the appropriate or necessary protections and/or restrictions in relation to the cooperation, including protections for New Zealanders;* e) *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; and* f) *the reputational and/or political risk of the cooperation.*	Agree.
[47]		MoJ	What about in the event of a breach or unauthorised on-sharing? Section 114 of the Privacy Act would apply (agency to notify the Privacy Commissioner of notifiable privacy breach).	Agree.

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[48] Oversight principle		OPC	Information about how human rights assessments are applied to specific instances of cooperation should be recorded as part of the decision-making process and be available to the Inspector-General. This could be noted in the oversight principle.	Noted. Our view is that this level of detail is not necessary in the oversight section. This information will be available to the IGIS.
[50]		MoJ	An example of General MOJ comment above at para 50. The policy is important so that security agency personnel do not perform criminal acts, but this is not an end in itself. The higher-order objective is that they actively uphold and protect NZ's human rights framework. (We prefer the words uphold and protect as opposed to "comply" or similar phrases because the essence of our framework is not about meeting a minimum standard of rights compliance).	Agree. This relates to the overall point made by MFAT and others and we have made the MPS clearer in that it applies to policy threshold that is beyond just being about legality.
[50] – Human Rights Policy		IGIS	Insert: *"GCSB and NZSIS must have a policy setting out the factors in the decision-making framework (at para 24)..."* *"...Security Committee for noting. The agencies should publish an unclassified version of it."* Delete: *"The policy must reflect the principles set out in this MPS".*	Disagree. Our view is that the MPS sets out publicly available guidance for the agencies. The primary purpose of the JPS is to provide detailed, frank guidance to the agencies on assessing human rights risk. There are risks if the agencies draft the JPS with it being public in mind, as it could detract from its primary purpose and mean it is less useful to staff. Once the agencies have drafted the JPS the agencies could consider whether it is appropriate for it to be made public.

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[50] – Human Rights Policy	22	OPC	In relation to the foreign human rights assessments, there is a risk that if an assessment has not been undertaken ahead of the need to cooperate arising, or there is no initial ground work for an assessment available, there may not be sufficient time for a robust assessment. The MPS could reflect an expectation that human rights assessments should be sufficiently robust, and require regular proactive monitoring of the human rights records of overseas partners, so that regular reporting is available to inform particular instances of cooperation. This could be noted in the human rights policy section on page 11.	The MPS is clear that the risk assessment needs to be undertaken prior to cooperation and the internal policy will provide more guidance on when and how to apply.
[50] – Consultation with MFAT		IGIS	Delete: *"and when weighing up factors related to"*	Agree.
[50] – Consultation with MFAT		OPC	Para 34 of the current MPS notes the potential assistance of the Ministry of Justice and MFAT and we support retaining these links to wider expertise within the NZ government. This could be noted in the section on consulting MFAT on page 11.	Consultation with MFAT retained
[50] - written Basis		IGIS	Insert: *"This includes any new arrangement entered into with an existing partner, or significant modification or development in an existing arrangement"*	Agree. Have made clear though that the arrangements still need to meet the 4 bullet point threshold.
[51]		MoJ	It would be good to also mention the essence of s 212(2) of the Act i.e. the Minister can amend, revoke, replace the MPS as they see fit, though must only be done in consultation with the Inspector-General and relevant Ministers and have regard to the outcome of that consultation. This point is safeguarded in the Act, but the MPS could mention it in a sentence if it's going to mention the power to revoke etc to give the reader peace of mind.	Agree – added to landing page.

Inspector-General of Intelligence Security feedback to DPMC on the second consultation draft of the MPS on Foreign Cooperation – 17 November 2020

Thank you for the opportunity for IGIS to provide further comments on the draft MPS on Foreign Cooperation (and to do so several days later than expected). Thanks also for the feedback table, which was helpful in tracking the developments and in particular in understanding DPMC's reasoning. We consider this redraft of the MPS to be a significant advancement on earlier versions (and on the 2017 version of this MPS), and appreciate the work it must have taken to reshape it in this way. The structure and sequence is more logical, with a clear focus for the guidance being provided.

The introductory Landing webpage/Coversheet provides a useful framework for all the MPSs. In particular, by way of example, we noted and appreciated the updated headings and the additions/changes made at paragraphs (using the para numbers of this latest version) 2 and 3; the shift forward for the paras on Ministerial authorisations; 18; footnote 2; 25; 28; 31; 31.1; 31.2; 31.4; 38; 40 and 41.

Our further comments predominantly relate to: one aspect of the Risk Assessment Framework; the use of intelligence obtained by breaches of human rights and the role of imminence in exceptional circumstances; the descriptor for the human rights policy, and an example for international arrangements. We have suggested amendments to the paragraphs listed below along with our reasons. For clarity, we have made our proposals as tracked changes in the attached version of the MPS.

- **Para 17**: The feedback table noted DPMC had agreed to change the last sentence of this para (previously para 26) but it seems it may have been overlooked. The change was to reflect actual agency practice, ie, that the standing Ministerial authorisations are composites – covering a broad range of countries.

- **Para 29**: We appreciate the inclusion of "good decision-making" in this para, but propose it be accompanied by "best practice conduct", given these phrases address different but equally desirable and proper agency action.

- **Para 31.3**: We are concerned that a recent edit to the last sentence of this third limb of the Risk Assessment Framework, changes the nature of the assessment being contemplated, in relation to the potential effectiveness of mitigation. The change is essentially from an assessment of the risk of breaching any human rights, to an assessment of whether the Service thinks the risk of breach of a human right is a serious breach or not. We provide here some further explanation of our concern.

  In the last consultation round IGIS proposed the last sentence in the third limb of the Risk Assessment Framework be expressed as "Risks of human rights breaches, assessed to be low or negligible risks in the context of this cooperation, are more likely to be amenable to mitigation." A low level risk might be, for example, a recipient agency for the NZ cooperation that has no record of abusing human rights of individuals, or the cooperation does not provide any information relating to an individual which could be used to locate the individual and so provides no opportunity to breach

their rights. However the last sentence in this new version of the MPS now refers to risks of human rights breaches "that involve a less egregious human rights breach…". As noted above, these two sentences/phrases reference different schemes of analysis.

Our proposed sentence is identifying where mitigation strategies are most likely to succeed because (using limbs one and two of the Risk Assessment Framework) there is an assessed low level of risk that any human right will be breached in connection with the foreign cooperation. This accords with the legal obligation on the intelligence agencies to carry out their functions in accordance with "NZ law and all human rights obligations recognised by NZ law". The newly included phrase – of a less egregious breach of human rights - is referencing a risk of breaching a human right that has been assessed by some unexplained hierarchy of human rights as less important if breached and identified using unknown criteria. We suggest again that a simplistic approach of 'less egregious/serious breaches of human rights' is something of a minefield and – as the examples we provided in the last round illustrated – includes a real practical difficulty of identifying what amounts to a less "less egregious" or "less serious" breach of a human right. For example, the same breach of the same human right – of an individual's detention of one day without cause – could be vastly different depending on whether the detention is by authorities in the UK, or by authorities in Afghanistan where this is the key period for torture of detainees to obtain 'confessions'.

We provided those illustrative examples last time in relation to the old para 38 of the MPS and the feedback table notes DPMC's agreement with IGIS and MoJ in this respect and para 38 was deleted. We strongly suggest that in the latest version of the MPS this 'egregious' phrase in 31.3 be replaced with the IGIS proposed amendment, which is now included as a tracked change to para 31.3 in the accompanying version of the MPS, for your consideration.

- **Paras 32 to 34**: For clarity and certainty we suggest that the new phrase "know or assess" in para 32, and in following paras 33 and 34, be explicitly linked to the Risk Assessment Framework.
  We note para 32 now includes a footnote with a definition of "use". We suggest that this definition is unnecessary and should be removed. The term "use" in paras 32 and 34 has a clear plain-English meaning, sufficiently clarified and/or constrained by the surrounding context of each paragraph. As such we consider the term is adequately captured in the MPS, as is. We also had some concerns that the definition of "use", when considered in the context of paras following para 32, had some potential to broaden agencies' activities with regard to information obtained by torture to include activities that comprise business as usual.

- **Paras 34 and 35**: A key component of "exceptional circumstances" (also addressed in caselaw as a public emergency that threatens the nation) is the imminence of those anticipated serious circumstances, such that BAU intelligence and security agency practices are insufficient and the use of intelligence obtained through a grave abuse of human rights is considered – for whether it is justifiable - by the responsible Minister. We therefore suggest "imminence" is a necessary factor to be added to paras 34 and 35.

We also suggest that the final sentence in para 37 be moved up to form the final sentence in para 35, as a better fit, and have made this tracked change to the attached MPS, for your consideration.

- **Paras 36 and 37**: We have suggested that the term "further" be removed from two places in the first sentence of para 36, to confirm the intention of this para to direct/limit agency activity to what is strictly necessary to inform the threat picture, to assist the relevant law enforcement agency. We also removed the potentially broader reference – to investigating a security concern or risk in order to advise Government – from that first sentence, because with the edit we propose to para 35 the Minister will have been informed. We note DPMC agreed with this point at p 13 on the feedback table.
  As mentioned above, we suggest the final sentence of para 37 be moved to the end of para 35. Paras 36 and 37 could then be merged into one para.

- **Para 49: Human rights policy**: We suggest updating the description to refer now to the "Risk Assessment Framework". At the end of this first para under the bullet point, we thought the reference to reflecting the MPS principles in the human rights policy was both unnecessary, and too general and broad for a human rights risk assessment policy. It potentially required that rights policy to do too much work with regard to foreign cooperation. We therefore suggest that sentence be deleted.

- **Para 49: Consultation with the Ministry of Foreign Affairs and Trade**: We suggest removing the phrase "weighing up factors related to" ratification of international human rights treaties, as in our view the status of a country's ratification or not of such treaties tells the necessary story for the intelligence agencies (plus it is unclear to us what the "factors" requiring "weighing" would be). We see that the feedback table at page 18 (re the old para 50) notes DPMC agrees to this deletion, so its retention may just be an oversight.

- **Para 49: Written basis for new formal arrangements**: With regard to the final bullet point in the second para, we understand that an example of this point could be useful and so have added one suggestion into the footnote. We expect that whether this example retains "collect" as well as "cooperate" will depend on the agencies' response on classification. We will email you on the high-side (on Tuesday morning) to give a bit more context to this bullet point/example.

To: **Department of Prime Minister and Cabinet (DPMC)**

From: **Human Rights Commission**

Re: **Comments on 2020 Draft Ministerial Policy Statement – Co-operation of New Zealand intelligence and security agencies with overseas public authorities**

Date: **22 September 2020**

Introduction

1. Thank you for the opportunity to provide DPMC with comments on the 2020 Draft Ministerial Policy Statement (MPS) on the co-operation of New Zealand intelligence and security agencies with overseas public authorities.

2. In particular, DPMC seeks the Commission's view on whether the MPS provides sufficient high-level guidance to the agencies in assessing the risk of contributing to human rights abuses and whether there are any factors that we would expect the agencies (GCSB and NZSIS) to consider when engaging in overseas cooperation.

3. As we did in 2017, the Commission wishes to acknowledge the focus of the MPS on human rights, and, in particular, the strengthened decision-making guidance to agencies for assessing the risk of contributing to human rights abuses.

4. However, we consider that the human rights compatibility of the MPS can be further strengthened on the basis of the following recommendations:

    a. Expand the definition of "overseas public authorities" to include private contractors and agents of those authorities.
    b. Make internal policies, such as the human rights policy, publicly available (except for any sensitive content which if disclosed would constitute a reasonable risk to national security).
    c. Require authorisation for overseas cooperation to be provided by an external independent body.
    d. Require agencies to develop a policy that clearly states how they will give effect to best practice monitoring of partner countries, which should include the requirement that for countries with a volatile human rights situation this the review should occur every six months.

5. The Commission also recommends that as part of the targeted public consultation that relevant NGOs are consulted, if they haven't been already.

Definition "overseas public authority"

6. As with the current version, the draft MPS defines an "overseas public authority" as one which "performs or exercises any public function, duty or power…by or under law". As we noted in our 2017 comments, this definition does not, on its face, extend to cover private contractors or agents of an overseas public authority, such as a company providing technological support and solutions to a state's intelligence apparatus. It is important that the scope of the MPS is sufficient to ensure that its intent is not circumvented by the use of third-party actors by overseas public authorities.

We recommend that the definition of "overseas public authorities" is amended to include private contractors and agents of those authorities.

Transparency

7. The Commission is pleased to see that the MPS is made publicly available on the websites of the agencies.

8. The Commission notes that the MPS also provides that the agencies must have internal policies and procedures in place that are consistent with the principles of the MPS, including a human rights policy. In particular, the MPS provides that a draft of the agencies' human rights policy will be provided to the Inspector-General of Intelligence and Security (IGIS) for comment and a final version referred to the Intelligence and Security Committee.

9. However, there is no requirement for the internal policies and procedures, such as the human rights policy, to be made publicly available. The Commission considers that such policies should be made publicly available, except any sensitive content which, if disclosed, would constitute a reasonable risk to New Zealand's national security interests.

We recommend that internal policies and procedures are made publicly available, except for any sensitive content which if disclosed would constitute a reasonable risk to New Zealand's national security interests.

Independent authorisation

10. International human rights bodies have emphasised prior independent authorisation, preferably judicial, as a key mechanism for "ensuring the effectiveness and independence of a monitoring system for surveillance activities."[1] The UN Human Rights Committee has further recognised the importance of prior independent authorisation in the context of intelligence sharing, indicating that "robust oversight systems over surveillance, interception and intelligence-sharing of personal communications activities" should include "providing for judicial involvement in the authorisation of such measures in all cases".[2]

11. Furthermore, the July 2019 report by the Inspector-General of Intelligence and Security on its Inquiry into possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme 2001-2009[3] ("the IGIS Report") noted that good practice would include consideration of establishing a separate evaluative body for information sharing.

12. In this respect, the IGIS Report at paragraph 240 found that:

> *An external or cross-government body for approval can ensure transparent, robust and documented decision-making, and avoids the risk that agencies may conflate their operational or relationship objectives with the quite separate question of whether particular information sharing or cooperation is lawful or proper in any particular case.*

[1] UN Human Rights Committee, Concluding Observations on the Fifth Periodic Report of France, UN Doc. CCPR/C/FRA/CO/5, 17 Aug. 2015, para. 12. See also UN High Commissioner for Human Rights' report on the right to privacy in the digital age, U.N. Doc. A/HRC/39/29 (3 August 2018), para. 39.
[2] UN Human Rights Committee, Seventh Periodic Report of the United Kingdom, at para. 24.
[3] http://www.igis.govt.nz/assets/Inquiries/CIA-Detention-Programme.pdf

We recommend that authorisation for overseas cooperation is provided by an external independent body.

Decision-making framework - ongoing review

13. The Commission welcomes the clarity and detail provided in the section on the decision-making framework for agencies. We welcome the requirement at paragraph 21 of the MPS that the agencies are to maintain an awareness of the human rights practices and potential risks related to cooperation with overseas public authorities. We also welcome the requirement at paragraph 27 that standing authorisations must be subject to regular review.

14. However, the Commission notes the absence of detail in the MPS for how regular review and monitoring will take place and the absence of a requirement for a policy to ensure ongoing review of overseas cooperation.

15. The IGIS Report notes concern with practices regarding "broadly framed, standing authorisations" from the Minister, prior assurances and Approved Parties. At paragraph 277, the IGIS Report expressed concern that such authorisations *"approve many countries for 'in principle' sharing without the Minister having been provided with any material on which to base even a high-level human rights assessment."*

16. Furthermore, with regard to Approved Parties for overseas cooperation, the IGIS Report noted at paragraph 302 that the Joint Policy Statement on 'Human Rights Risk Management' establishes no requirement for regular monitoring of the human rights records of parties who are Approved Parties. The IGIS Report highlighted that this calls into doubt whether the necessary "specific indication" of a human rights breach will be identified, or identified in a timely manner.

17. The IGIS Report also observed at paragraph 245 that "a country's record on human rights requires regular as well as responsive review" and that best practice involves robust monitoring, regular reviews and adequate record-keeping. The IGIS Report went on to recommend at paragraph 335:

> *Active and ongoing monitoring of partner country (including Five Eyes) political and legal developments and any changes to working practices is critical if New Zealand is to engage in information-sharing and cooperation with its eyes wide open. Ignorance and wilful blindness are not an excuse where relevant information is readily available to be discovered. I recommend that:*
>
> *G. Best practice monitoring: Both agencies should develop a policy that clearly states how they will give effect to best practice monitoring of partner countries. The policy should provide for reassessment of a country's human rights record every six months for countries where the political or human rights situation is volatile or in a state of flux*.

We recommend that the IGIS recommendation is adopted i.e. that the MPS requires the agencies to develop a policy that clearly states how they will give effect to best practice monitoring of partner countries, which should include the requirement that for countries with a volatile human rights situation the review should occur every six months.

External Consultation

18. As recommended by the IGIS Report at recommendation A of paragraph 331, we reiterate that NGOs are consulted in respect of the review of this MPS.