Office of the Inspector-General of Intelligence and Security

Legality and propriety of warnings given by the New Zealand Security Intelligence Service

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Public Report

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Inspector-General of Intelligence and Security
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CONTENTS

INTRODUCTION AND SUMMARY

1. In his *2013-2014/01* report, the then Inspector-General investigated a complaint over an incident in which NZSIS officers went to a person's house, conducted an initial interview with him and then proceeded to search the house under warrant and with Police assistance, while at the same time issuing a series of formal warnings.

2. The warnings were intended to deter the person concerned from what NZSIS believed to be his intention to promote politically motivated violence in another country. The *2013-2014/01* report raised a question of whether those warnings were lawful.

3. Following that report, I commenced this wider inquiry into NZSIS practice when warnings are given. In doing so, I recognise that the situation which gave rise to the *2013-2014/01* report was highly unusual, and the type of warnings issued reflected that. Nonetheless, I consider the broader warning topic justifies further consideration for two reasons:

    3.1. The practice of Police and other enforcement and regulatory bodies shows that a warning can be a very useful tool: a warning can allow Police and other officers to address unlawful conduct without resort to arrest, charge or other coercive powers. However, the context for the NZSIS warnings is materially different. The NZSIS is not an enforcement or regulatory body: it is specifically prohibited from taking enforcement measures and, unlike Police and others, has no relevant coercive powers. Further, the conduct at issue may not in itself be unlawful. The result is that, compared to those other bodies, the lawful scope for such NZSIS actions is narrower and more complex.[1]

    3.2. The *2013-2014/01* events illustrated the potential for error or misunderstanding, both on the part of the public and within the NZSIS. That potential arises from the unique legal position of the NZSIS, together with its concern to avoid publicity over its operations and the corresponding lack of public knowledge of the NZSIS, its powers and its activities.

4. The fundamental question that I address in this report is how far the NZSIS can go in making statements designed to affect people's behaviour given it has no enforcement powers. The answer is that it will depend on the circumstances whether a warning is lawful. There is a very fine line between NZSIS offering a legitimate warning about a person's behaviour and an illegitimate warning, and the distinction will turn on all the details of the particular circumstances. This puts the onus clearly on the NZSIS to ensure its officers manage encounters in such a way as to stay on the right side of that precarious line. My recommendations are directed to that end.

5. From the NZSIS perspective, officers from time to time encounter people involved in, or contemplating, activity which could compromise national security if it were to continue, or which it considers to be inconsistent with New Zealand's national or international interests.

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[1] This report has been prepared in terms of the New Zealand Security Intelligence Service Act 1969 (NZSIS Act), but the same issues arise under the recently enacted Intelligence and Security Act 2017, which took effect from 28 September 2017.

NZSIS sees warning those people, in order to "disrupt" that activity, as consistent with its function to collect and communicate intelligence in support of national security.

6. There is no statutory basis for the NZSIS to give warnings. The giving of warnings by NZSIS personnel about certain types of behaviour or personal relationships and the consequences that may occur if the individual does not desist or disassociate themselves arise in a wide range of operational contexts and circumstances. The word "warning" as used in this report is not a technical or precisely defined term, but is intended to capture any statement of advice by an NZSIS officer which is designed to deter a person from certain conduct, or, equally importantly, would reasonably be understood as having that purpose. How pointed, forceful, factual or "advisory" the warning is will vary from case to case. The concern with such statements in principle is that they may appear to suggest that the NZSIS is exercising a power of enforcement with legal consequences.

7. This report covers:

   7.1. The legal parameters of NZSIS warnings, including when it is necessary for the NZSIS instead to pass information to Police or others

   7.2. The broad issues that arise when NZSIS gives warnings, with reference to examples drawn from NZSIS practice and by reference to current NZSIS policy

   7.3. Findings and recommendations with respect to NZSIS warning practice, and

   7.4. Some comments and recommendations which touch NZSIS's general interviewing practice, to ensure it is lawful and proper. I have taken the opportunity here to raise these broader matters because they came to my attention in the context of considering particular NZSIS interviews in which warnings had been given (regardless of whether that was the primary and intended purpose of the interview). My concerns in this respect related to procedural fairness issues, and were not always focused on the warning itself.

8. Some of these findings and recommendations may have implications for other activities of the NZSIS: for instance, questions of procedural fairness can arise when NZSIS officers interview members of the public in many contexts. I expect to pursue those wider implications, alongside the implementation of my recommendations, as part of my office's on-going review of NZSIS practices. I note also that since preparing this report the Ministerial Policy Statement (MPS) on "*Collecting information lawfully from persons without an intelligence warrant*"[2] has been issued. This MPS recognises that collecting information from people is an important and legitimate part of NZSIS's role, but it also affirms the requirement that the NZSIS (as well as the Government Communications Security Bureau) must ensure its interview policy and practices reflect appropriate procedural fairness requirements. It is a welcome additional source of guidance.

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[2] www.nzic.govt.nz/assets/MPSs/Ministerial-Policy-Statement-Collecting-information-lawfully.pdf issued under s 206(d) of the Intelligence and Security Act 2017.

I OUTLINE OF THIS INQUIRY

Scope

9. This inquiry is concerned with overt warnings given to members of the public by NZSIS officers, as follows:

   9.1. An NZSIS officer identifies himself or herself in that capacity to a member of the public and

   9.2. The officer makes a statement to that person that is intended, or is reasonably understood by the recipient, to deter or dissuade the person from an act or omission that the NZSIS considers to be of actual or possible security concern. Such a statement might be the only contact between the NZSIS and the recipient or might arise in the course of a wider interview or series of contacts.

10. This inquiry is not concerned with the covert actions of NZSIS officers — that is, discussions or interactions that an NZSIS officer may have with a member of the public without disclosing that status. It also does not address:

   10.1. Overt discussions or interactions that do not involve deterrence or dissuasion, such as a security briefing to a security clearance holder

   10.2. Discussions or interactions with other governments' intelligence or security officers; or

   10.3. General discussions within an established NZSIS-source relationship.

11. The difference between overt warnings and the kind of interactions listed at paragraph 10 is that the latter do not raise the obligations, and related risks, identified in Part II of this report. For instance, a discussion with an intelligence officer from another government might involve statements intended to deter particular conduct but does not pose the same risk of assertion of powers, or potential for misunderstanding, and/or the corresponding engagement of the interviewee's rights.

12. There are some instances of warning that fall between these two categories, where warnings do not risk assertion of powers, as set out at paragraphs 67.1 and 67.2. The MPS on *Collecting information lawfully from persons without an intelligence warrant*" uses carefully chosen language to reflect this. It states that it "may" be acceptable to give people "advice", including, for instance, advice about the possible consequences of certain conduct, such as travel to participate in violent jihad. In warning or advice situations such as those referred to in this paragraph more limited obligations can apply, but there remains a need for clarity as to what is being conveyed and the capacity in which the NZSIS is speaking.

13. The inquiry has drawn upon available NZSIS records, policy and training material to identify practical examples of the kinds of warning that the NZSIS has given, and may wish to give in future, and the circumstances in which warnings have occurred. However:

13.1. This inquiry is concerned with systemic practices: it has not sought to assess the lawfulness or propriety of particular warnings given in the past, some now several years ago. The passage of time, the lack of records, and reforms made to NZSIS procedures mean that it would be difficult to make any findings in an accurate and fair way. To the extent that the report may question any past actions, it should not be taken to suggest that those actions were in any way in bad faith.

13.2. The particular detail of those instances has not been included in this inquiry report, both because they were not relevant to the inquiry's systemic approach and also because I am satisfied that some of that detail cannot be safely disclosed.[3] The generic descriptions given contain sufficient information to inform the public and to provide a basis for the findings and recommendations made.

Inquiry process

14. When this inquiry began, I requested the NZSIS to provide records of instances of warnings beyond that in the *2013/2014-01* report. Over some time, it became apparent that such records were very difficult to identify.

15. At that time, my office was told by some NZSIS personnel that the planning, formulation and delivery of warnings was largely left to the judgement of NZSIS officers and, possibly, informal internal consultation. There was little governing policy and limited or no documentation of decisions to give warnings; what practical or legal risks might arise; how those risks might be met; and what actually took place.

16. The NZSIS explained that formal warnings (i.e. warnings of the type addressed in the *2013/2014-01* report — see paragraph 64, below) were reasonably uncommon and might not be documented. Given the risks inherent in such overt NZSIS engagement, as well as the prospect of legal and/or media exposure, it was surprising that there were not documented procedures or accessible records of individual operations, not least for the purpose of internal and external accountability.

17. However:

17.1. The NZSIS has now adopted a policy to govern the giving of warnings, which provides a better basis on which to conclude this inquiry. It has also instituted stronger record-keeping practices;

17.2. The NZSIS has amended an information sheet that is provided to some recipients of warnings in light of some of the concerns that this Office raised; and

17.3. While the NZSIS had earlier obtained advice from the Solicitor-General on the prohibition in s 4(2) of the NZSIS Act against NZSIS enforcement measures, as

[3] Inspector-General of Intelligence and Security Act 1996 (IGIS Act), s 25A(2) and Intelligence and Security Act 2017, s 188(2).

recommended in the *2013/2014-01* report, it agreed to seek a review of that advice in response to questions that I raised. Revised advice was provided in April 2017.

18. Further, the NZSIS was more recently able to identify some relevant documents and I was able to supplement these through my office's searches of NZSIS records.

Preparation of this report

19. I provided an initial draft report to the Director of Security in 2015 based on hypothetical examples of warning practices. When I was later able to identify actual examples, I provided a revised draft report in September 2016. Following discussions with the NZSIS and receipt of a copy of the Solicitor-General's revised advice in April 2017, I further amended the report, sought further NZSIS comment and have taken that comment into account in finalising it. I have also consulted the NZSIS on the unclassified content of this report.[4]

20. In the "Comment and Recommendations" section (Part IV) I have noted the extent to which the Director has or has not accepted the inquiry findings and specific recommendations.

[4] IGIS Act, s 25(8).

II LEGAL AND PRACTICAL CONSTRAINTS

Substantive obligations

Prohibition against enforcement and coercive measures

21. The starting point, as noted by the previous Inspector-General in the *2013/2014-01* inquiry, is that NZSIS is prohibited by s 4(2) NZSIS Act from taking any measures to enforce security.[5] The giving of a warning may, depending upon its precise terms and the circumstances in which it is given, amount to an enforcement measure. This point is not straightforward and is dealt with further below at paragraphs 28-32. The NZSIS recognises that there may often be a very fine line between warnings in the nature of enforcement (unlawful) and warnings that in their terms and context advise about facts or seek to influence a person's behaviour but without any real scope for misapprehension as to respective rights and powers, and without any overlay of pressure (lawful). To safeguard rights the NZSIS must not do anything which reasonably implies it has enforcement powers.

22. The question of non-enforcement also raises the broader point that the NZSIS does not have, and must not hold itself out to have, any power of arrest, detention, charge, prosecution or other sanction. The lack of enforcement powers means, for example, that while it is possible that the NZSIS may refer security information to the New Zealand Police, the Police decide whether to pursue charges or take other steps.

Impermissible interference with civil rights

23. A warning must also not unjustifiably infringe the recipient's freedom of expression, association, religious observance and other protected rights. The New Zealand Security Intelligence Service Act 1969 and the Intelligence and Security Act 2017 both confirm the obligation on the NZSIS to respect freedom of expression. Both confirm that conduct in the nature of protest or dissent does not, of itself, justify an intelligence and security agency undertaking surveillance or, as expressed in the 2017 Act, taking "any" action.[6]

24. The potential to infringe those rights may arise if recipients are deterred by improper means from engaging in free expression of their political, ideological or religious views; from assembly or association with particular people; or observance of religion. For example, an NZSIS warning could legitimately discourage unlawful interaction with a proscribed organisation but could not legitimately discourage participation in a community group or attendance at a chosen place of religious observance.[7]

25. Encroachment on civil rights may arise:

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5 The general prohibition against "enforcement" is repeated in s 16 of the Intelligence and Security Act 2017.

6 NZSIS Act 1969, s 2(2) and Intelligence and Security Act 2017, s 19.

7 New Zealand Bill of Rights Act 1990, ss 6 and 14-20, and see, for example, *TVNZ v Police* [1995] 2 NZLR 541 (Police search powers constrained to avoid "chilling" of freedom of expression) and *Gillan v United Kingdom* (2010) 50 EHRR 45 (exercise of counter-terrorism search powers without cause unlawful as undue intrusion into personal autonomy).

25.1. Directly from the particular terms of the warning;

25.2. Where the warning involves disclosure that a recipient is or could be under NZSIS surveillance, the "chilling" effect of that surveillance;[8] or

25.3. From ambiguity in the warning, for example where the warning is in broad terms that leave the recipient unsure as to what conduct is in issue.

Inherently unlawful content

26. A warning may not — in its terms and taking account of the context in which it is given — amount to coercion or blackmail. Similarly, a warning may not suggest the NZSIS would provide information to another government where to do so would give rise to a real risk of torture or other severe mistreatment.

Avoidance of ambiguity

27. It is critical for any warning to be clear in its terms, both as to any conduct that the NZSIS is seeking to discourage and the potential adverse consequence. That is necessary because:

27.1. Any ambiguity on the part of NZSIS creates an unacceptable risk of unlawfulness, for example the risk that the recipient may reasonably believe that the NZSIS has or is exercising enforcement powers or is issuing threats that it has no lawful power to make.

27.2. That ambiguity may prevent or deter members of the public from lawful activity, such as exercise of their rights to freedom of expression or association, contrary to the obligations noted above.

Scope of s 4(2) prohibition against "enforcement"

28. The prohibition against enforcement in s 4(2) of the NZSIS Act, now re-enacted as s 16 of the Intelligence and Security Act 2017, is a significant component of the authorising regime of the NZSIS. It reflects a basic premise that the NZSIS is not a police or paramilitary force or other form of enforcement agency but functions only through the collection, analysis and dissemination of national security information.[9] In New Zealand it is for other State bodies to enforce the law. Similar prohibitions are found in relation to the Australian Security Intelligence Organisation and the Canadian Secret Intelligence Service.

29. The difficult legal question that arises in respect of warnings is identifying the point at which a statement by an NZSIS officer amounts to an enforcement measure. The *2013-2014/01* inquiry concerned warnings of an especially peremptory and formal nature (described in greater

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8 See *TVNZ*, above n 7 and also, for example, *Wood v Commissioner of Police* [2009] 4 All ER 951 (EWCA).

9 There is no specifically relevant precedent or statement in the legislative history. Section 4(2) has, however, since been described in parliamentary debates as reflecting the "very separate roles" of the detection of security risks by the NZSIS and the taking of any enforcement measure, for example by the Police: see (2014) 702 NZPD 1245.

detail at paragraph 64, below). In that context the then Inspector-General interpreted s 4(2) to prohibit the NZSIS from giving warnings of the type described:[10]

> "[The warnings] did not seek intelligence. They sought to influence conduct. While, in the abstract, no-one can object to warnings not to commit serious crime, I have reached a view that in law these warnings were outside the statutory functions and powers of the NZSIS. S.4(1)(a) creates for the NZSIS a general function of obtaining, correlating, and evaluating intelligence relevant to security, and communicating any such intelligence to such persons in such manner as the Director considers to be in the interests of security. Other specific functions have no possible relevance. That stated function is to be read in the light of s 4(2) which specifically states 'It is not a function of the Security Intelligence Service to enforce measures for security.' I do not accept that giving warnings in the way noted above could come within the concept of communicating intelligence. That is directed at communications to Government and other bodies which require it. This, in my view, was action taken to enforce security and was beyond powers."

30. The then Inspector-General recommended that the NZSIS seek the Solicitor-General's advice on the point. In this inquiry, I was provided with an opinion by the Solicitor-General that the NZSIS had obtained in accordance with that recommendation. In the course of the inquiry, I raised questions about that opinion and, in response, the Solicitor-General provided the NZSIS with an amended and consolidated opinion.

31. Because the Solicitor-General's opinion was provided to me under s 20(1) of the IGIS Act, it remains subject to legal privilege and could only be disclosed if the Attorney-General agreed to waive that privilege. While there are aspects of this complex issue that are, in my view, open to debate, I have not considered it necessary to seek waiver in order to set out the contending legal positions, for two reasons:

    31.1. From the perspective of ensuring compliance by the NZSIS, the critical point is that the NZSIS obtains and acts upon comprehensive and considered legal advice where contentious legal issues arise. Here, the NZSIS has obtained successive opinions from the Solicitor-General and will now, as it is required to do,[11] act in accordance with the Solicitor-General's advice.

    31.2. Where there is significant and material disagreement between the Solicitor-General and the Inspector-General or, for example, the Inspector-General considers there to be a need for legislative reform, it may be appropriate to set out the competing legal analyses in a public report. However, I am satisfied that there is now consensus on the core legal issue of what it would take for NZSIS "warning practice" to meet the s 4(2) obligation. Central to this is the agency's acceptance that the NZSIS may seek to influence the behaviour of individuals by giving advice or warning them of possible consequences from their behaviour but must ensure in every case that there could not

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[10] Hon R A McGechan QC, *Report 2013/2014-01* (May 2014) at 11.

[11] *Cabinet Directions for the Conduct of Crown Legal Business* 2016.

reasonably be any misapprehension about the limits of its powers with respect to enforcement.

32. I have made recommendations in this report about what, in practice, the NZSIS needs to do to meet its legal obligations in this regard and also to avoid inadvertent breach of s 4(2), for example through ambiguity. To the extent that any further questions arise in respect of those obligations, I have also recommended that NZSIS officers continue to obtain legal advice on a case by case basis. Given the complexity of these matters and attendant potential risk, it is vital that the NZSIS acts on a clear and considered legal basis. The MPS on "*Collecting information lawfully from persons without an intelligence warrant*" repeats this expectation.[12]

Ancillary obligations

33. If NZSIS seeks within the bounds of s 4(2) to influence an individual's behaviour there are ancillary obligations that relate to the circumstances and manner in which a warning can be given.

Absence of coercive powers and risk of inference of coercion

34. As above, NZSIS lacks any powers to detain, charge or question. The circumstances or manner in which a warning is given may, however, improperly imply such powers.

35. For example, if the recipient of a warning forms a reasonable belief in the circumstances, induced by NZSIS conduct, that he or she cannot leave or will be penalised for leaving, that will constitute a detention even if that was not intended by the officer.[13]

Clarity as to limits of mandatory powers under warrant

36. Where NZSIS does exercise entry and other powers under a warrant, it must ensure that the exercise of those compulsory powers does not give rise to a misapprehension that the NZSIS also has or is exercising powers of detention, questioning or punishment.[14]

37. The NZSIS lacks any power of entry other than under, and for the purpose of, an appropriate warrant.[15] That has two consequences: first, NZSIS officers seeking to enter premises to give a warning must not, even inadvertently, lead members of the public to form a reasonable belief that the officers or assisting Police have any other power of entry; and, second, NZSIS officers who have entered a property under warrant may not remain there to give a warning for another purpose without obtaining the occupant's agreement.

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12 www.nzic.govt.nz/assets/MPSs/Ministerial-Policy-Statement-Collecting-information-lawfully.pdf

13 See, for example, *R v M* (1995) 1 NZLR 247 (CA) (detention was "reasonably held belief induced by Police conduct").

14 *R v M,* above n 13.

15 *Choudry v Attorney-General (No 1)* [1999] 3 NZLR 399.

Other requirements for advice to interviewees

38. To protect against the risk that the interviewee might reasonably misinterpret the NZSIS's powers, advice to interviewees must be in clear terms that the recipient can reasonably understand, taking account of the circumstances, the recipient's proficiency in the English language and any other factors relevant to understanding including, for example, youth.

39. The advice must be provided again if substantial time passes or if there is any indication that a recipient may have forgotten the advice or appears to have misunderstood it.

General obligations at interviews or meetings where recipient's rights or interests potentially affected

Procedural fairness

40. It was apparent from my analysis of past warnings given by NZSIS that they can arise in a range of circumstances, including in situations where giving a warning was not the original or intended purpose of the meeting. Consideration of the wide range of circumstances in which NZSIS warns individuals about possible consequences from their behaviour identified some broader procedural fairness concerns where an interviewee's rights or interests might be affected by the interview itself.

41. When NZSIS interviews a member of the public for the purpose of exercising one of its statutory functions, such as deciding whether to recommend cancellation of that person's passport or to advise on the grant of a visa, NZSIS is making an assessment which it knows will inevitably be highly influential in the statutory decision-maker's ultimate decision. In many cases it will be the determinative factor. In performance of this function NZSIS is subject to procedural fairness obligations given the potential adverse consequences for the individual of its assessment. The procedural fairness obligations include:[16]

    41.1. Being clear about the purpose of the interview;

    41.2. Whether at the interview or by some other means, disclosing any adverse information, or, if sensitive, the thrust of any adverse information, which will influence the assessment. The interviewee must then be given an opportunity to respond;

    41.3. Providing an opportunity for the interviewee to seek legal advice before and during any interview, which will in general require prior notice of interview and/or an opportunity to defer;[17]

    41.4. Where necessary, providing access to an interpreter; and

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[16] See, for example, *Charkaoui v Canada (Citizenship and Immigration)*, [2008] 2 SCR 326 at [28]; see also *HWY v Minister for Immigration and Citizenship* [2007] FCAFC 64 at [75]-[76] (privileges as bar to certain questioning and duty to advise); *Cha v Canada (Minister of Citizenship and Immigration)* [2007] 1 FCR 409 (FCA); and *Mahjoub (Re)* 2013 FC 1095 at [65].

[17] The Australian Inspector-General of Intelligence and Security has published a report on the topic of lawyer attendance at Australian Security Intelligence Service interviews in the immigration context: www.igis.gov.au/sites/default/files/files/Inquiries/docs/legal_representatives_ASIO_Jan2014.pdf

41.5. Providing access to the record of interview, if sought by the interviewee.

42. If the NZSIS believes that the subject of an interview may have committed a criminal offence, it must ensure that any interview does not breach criminal process rights. That risk is more likely to arise if the interview is conducted with Police officers in attendance.[18]

Avoidance of irrelevant purpose

43. If the NZSIS has a discussion with an interviewee in the context of exercising a particular statutory function bearing on the interviewee's rights or interests,[19] it must ensure that it acts consistently with that statutory purpose: it would be unlawful, for example, to hold out the prospect of a favourable or adverse recommendation on a visa application in order to persuade an interviewee to act in a given way unrelated to that application.[20]

Ministerial Policy Statement

44. The recently issued MPS on "*Collecting information lawfully from persons without an intelligence warrant*"[21] also emphasises the need for NZSIS to ensure that in situations where the Service's engagement with an individual will lead to it making an assessment under its statutory functions procedural fairness requirements will apply. The MPS, in relevant part, stipulates that:

44.1. Policies must make it clear that procedural fairness applies, and the types of measures that will be needed in different circumstances to achieve it.

44.2. The agencies must make reasonable efforts to ensure interviewees understand that an interview is an opportunity to provide comment to inform NZSIS's assessment.

44.3. The purpose of the interaction should be made clear.

44.4. The voluntary nature of an interview should be made clear.

44.5. The lack of any enforcement power should be made clear.

44.6. The above procedural information should be available on both agencies' websites.

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[18] The NZSIS is not subject to the *Practice Note – Police Questioning* [2007] 3 NZLR 297 but Police present for an NZSIS interview may be: for example, if Police were present at an interview at a point when there is sufficient evidence to charge, the obligation to caution arises.

[19] Such as making immigration- and citizenship-related recommendations under s 4(1)(bc) NZSIS Act, or s 11(3)(c) of the Intelligence and Security Act 2017.

[20] See, for example, *R v Wichman* [2016] 1 NZLR 753 at [123] (unlawful to exercise powers for separate purpose of inducing cooperation).

[21] www.nzic.govt.nz/assets/MPSs/Ministerial-Policy-Statement-Collecting-information-lawfully.pdf issued under s 206(d) of the Intelligence and Security Act 2017, paragraph 32.

III ASPECTS OF POTENTIAL NZSIS WARNINGS IN PRACTICE

45. As noted, it was not possible in this inquiry to undertake a detailed survey of actual warnings because NZSIS records are not categorised in that way. My office was able to compile some instances of warnings given in recent years but could not establish that the compilation was comprehensive. For this reason, I have treated the instances identified as practical examples that assist in identifying and addressing potential issues of lawfulness and propriety. For completeness sake, I note that despite not being able to locate records to identify all warnings given, I am satisfied from my discussions with the Service that the practice of issuing warnings to members of the public is infrequent.

Process followed

Circumstances in which warnings were given and NZSIS guidance on warnings

2013/2014-01 and related warnings

46. Warnings of the kind that concerned the former Inspector-General involved four steps:

    46.1. The issue of warrants under s 4A of the NZSIS Act to search the homes of individuals believed to be of specific security concern. However, unlike most activities under NZSIS warrants, which occur covertly and without the knowledge of the subject(s), the searches were planned to occur in the subjects' presence.

    46.2. In each instance, before executing the warrant, NZSIS and Police officers went to the subjects' homes and asked to speak to them. Police were present to assist in the search and to provide some protection for the NZSIS officers' safety. In one instance, the subject was not home and the officers did not proceed at all until he was present.

    46.3. At the conclusion of each interview, the NZSIS officers told the subject that the NZSIS had obtained a search warrant and NZSIS and Police officers proceeded to execute it, searching through the subjects' homes.

    46.4. NZSIS officers then, either at the same time as the searches or just after the searches had concluded, gave a warning to each subject.

47. In some cases, a recipient's spouse was also present for the interview.

Other warning examples

48. In other instances of interviews where warnings were given:

    48.1. Some warnings occurred in the course of NZSIS interviewing the recipient in respect of a visa or residence application. In one such instance, NZSIS officers used the application as a pretext for the investigation of another issue of security concern.

    48.2. In one instance, the interview was arranged in advance and occurred with the recipient's lawyer present. Other interview situations occurred without prior notice.

Some involved NZSIS officers visiting the recipient's home or office and, in others, NZSIS requested an interview as the recipient cleared border control at an airport.

Past training material

49. My office located what appeared to be references to warnings in NZSIS training material that was in use in early 2014. The training material included statements that:

    49.1. NZSIS did not have powers to enforce measures for security; and

    49.2. NZSIS officers should consider whether their intended actions are unlawful, threatening or harassing.

50. However, the training material also included a reference to "reliance on misapprehension," as discussed separately below.[22]

Current policy

51. Current NZSIS policy documents provide specifically for the giving of warnings by approved NZSIS officers. The policy on warnings is set out in two "Standard Operating Procedure" ("SOP") documents which govern general interview practice. The differences between the SOPs turns on whether the interview (including any warning) is given during the execution of an overt search warrant, or whether the interview/interaction occurs in a "non-warrant" situation.

52. Significantly, both SOPs provide that where it is anticipated that a warning will be given at an interview it should be the subject of an advance plan and NZSIS legal staff must be consulted about that plan. Such a plan must be approved by the section manager. Where the occasion to warn arises unexpectedly in an interview, the policy permits the warning to be given but requires that the interviewer must "account for the decision in detail" when subsequently writing up the interview, and the legal staff must be advised.

Information provided to the recipient of the warning

2013/2014-01 and similar warnings

53. Within this category of warning, the subject of the warning was given an untitled document intended by NZSIS to set out the subject's rights. A copy of that document is at **appendix A**. In some, but not all, of this group of warnings the subject was also shown a copy of the search warrant itself with some information, related to interception of communications, removed for security reasons. In the instance investigated in the *2013/2014-01* report, the recipient could not recall what, if any, document he might have been shown: it appears that he was shown the rights document but not, at the time, the warrant.

54. The subjects were not permitted to retain the information sheet or the warrant. NZSIS officers explained to this inquiry that they believed:

[22] Paragraph 70 below.

54.1. A recipient might be placed in danger if he or she was later found in possession of an NZSIS document: other people might infer that the subject was working with the NZSIS; and/or

54.2. A recipient might seek notoriety by showing an NZSIS document to others.

55. Other issues arose around the provision of information in this category of warning:

55.1. In answer to a subject's question to the NZSIS officer as to whether the alleged actions constituted a crime, the officer replied that the Police were aware but that NZSIS had decided to "stop [those actions] early."

55.2. A translation of the rights document into the subject's first language was provided in one instance, apparently because the subject's English language ability was thought to be limited. An interpreter was not provided for the interview and warning, though the subject's spouse was able to provide some translation.

Information provided in other warning instances

56. The limited records kept of other warnings did not include detail of any background information provided to subjects. It appears likely that the "roles and functions" explanation may have been given in some instances.

Information requirements under current policy

57. As the two SOPs reflect, NZSIS policy differentiates the information that should be provided to the interviewee based on whether a warrant is also being executed at the time of an interview. When warnings are given simultaneously with the execution of a warrant:

57.1. Officers are to explain the NZSIS's "roles and functions", as discussed below.[23]

57.2. An information sheet[24] must be taken by the NZSIS officer to the interview. Prior to interview the sheet should be reviewed and amended as necessary in each warrant case. The interviewee is to be invited to read and sign the sheet, but the sheet must then be taken away.

57.3. The interviewing officer(s) are to ask the interviewee if he or she has any questions about the information sheet; explain "with emphasis as appropriate" the NZSIS's roles and functions; and explain that the interview is voluntary and that the NZSIS has no enforcement powers. Officers are to "separate the compulsory nature of the warrant from the voluntary nature of the interview".

58. A similar procedure applies to warnings given in the non-warrant interview context. However, under the two SOPs there are important differences in information requirements. In the "non-warrant" interview situation an assurance of confidentiality "must" be sought and an information sheet is not available.

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[23] Paragraph 59.

[24] Amended from that used in the *2013/2014-01* events, and attached as **appendix B**.

Roles and functions explanation in current operational policies

59. A "roles and functions" explanation is used by the NZSIS as a "preamble" to any overt discussion between an NZSIS officer and a member of the public. The two SOPs indicate the matters to be covered in the preamble. NZSIS comment provided to this inquiry stressed the efficacy of the preamble as a guard against misapprehension, including when given in the context of warnings. The NZSIS also emphasised that officers are trained to adapt the content and delivery of the preamble to the circumstances. The key components of the preamble are:

    59.1. an outline of the role and functions of the NZSIS, as deemed appropriate;

    59.2. confirmation that the interview is voluntary and NZSIS is not an enforcement agency; and

    59.3. Confidentiality of the interview. In the non-warrant context the SOP emphasises the importance of securing an undertaking of confidentiality. It even refers to a possible "deed" of confidentiality. By contrast, in the combined warrant/interview context the policy indicates that NZSIS officers should use their operational judgment to decide whether to address confidentiality.

60. The SOP governing warnings in the non-warrant scenario specifically refers to two parts of the preamble that may vary from case to case:

    60.1. If an assurance of confidentiality is not forthcoming from the interviewee, officers are to use their "operational judgement" to decide whether to continue with the interview.

    60.2. Officers "may choose to advise" an interviewee that the interview "is an opportunity to provide comment to inform any assessment NZSIS may make", noting that NZSIS's assessment of any security risk "will inevitably be informed by the information" the interviewee provides.

Procedural fairness when forming an assessment

61. The NZSIS accepts that procedural fairness obligations can arise. Our inquiry identified two references to procedural fairness in the Service's documentation:

    61.1. Under current policy, officers "may" choose whether or not to advise an interviewee that the interview is an opportunity to provide comment to inform any assessment NZSIS may make, noting that NZSIS's assessment of any security risk "will inevitably be informed by the information" the interviewee provides.

    61.2. In one interview example I reviewed, an NZSIS officer told a recipient that he was not satisfied with responses that the recipient had given, but would give the recipient another opportunity at a subsequent meeting to provide better responses and would not "sit in judgement" on the earlier unsatisfactory answers.

Interpretation

62. In one instance, the NZSIS believed that the intended recipient of a warning did not have a working understanding of English and a translation of the information sheet was provided. The interview and warning were, however, conducted without an interpreter present, although the recipient's spouse was able to provide some translation. In the records and policies reviewed in this inquiry, there was no other indication of consideration of any need for interpretation either before or during interviews.[25]

Content of warnings

2013/2014-01 and similar warnings

63. The most detailed recorded warnings that my office was able to locate were those mentioned in the *2013/2014-01* inquiry and others given in similar terms.

64. The terms of such warnings had been prepared in advance as a written *aide memoire* for the NZSIS officers. The warning in the *2013/2014-01* incident was typical:

> "[The New Zealand Government] will not tolerate … politically motivated violence, whether in New Zealand or overseas, against the [foreign government].
>
> Those engaged in [politically motivated violence] will be dealt with by [the New Zealand Police] under NZ law: … anyone engaged in politically motivated violence, whether directly or through financing or other support, would be dealt with by the New Zealand Police under New Zealand law.
>
> Carefully consider engaging media/friends/ family given unpredictable reaction of [the foreign government] … if [the foreign government] were to learn of the plan this could result in problems for and harm to people in [that country].
>
> [The New Zealand Government does] not intend to alert [the foreign government] but will if signs of planning continue … if NZSIS saw the plan progressing the New Zealand Government would be forced to inform the [foreign government].
>
> [The New Zealand Government] can't intervene once [the foreign government] becomes aware: … once the [foreign government] was aware of the plans, the New Zealand Government would not be able to intervene, except in order to provide consular assistance to New Zealand nationals."

65. In one instance, the interview, search and warning occurred shortly after news coverage of another similar warning. The NZSIS officer carrying out the interview and warning asked the subject about that earlier news coverage and commented that the coverage was unfortunate, because it would possibly lead a potentially affected foreign government to carry out human rights abuses.

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[25] Current practice, the Service assures me, involves the relevant officer and a manager formally planning the interview, including how to mitigate any language or communication difficulties.

Other examples of warning content

66. Our review of other warnings identified further possible practices:

66.1. Some warnings involved possible consequences through administrative actions by the NZSIS or by other government agencies, with or without reference to the role of that other agency. In one instance, the NZSIS commenced an interview on the pretext that it concerned the subject's residence application, but it was in fact for the purpose of an intelligence investigation. The NZSIS record does not document a warning having been given, but comments by the interviewee indicated that there may have been some discussion of what actions might put the interviewee's residence application at risk. In another instance a recipient who held a New Zealand passport and may have intended to travel to a war zone to become a foreign fighter was told that others who had attempted such travel had had their passports cancelled.

66.2. Other warnings related to potential criminal activity, with or without reference to the Police. For example, the NZSIS gave a warning that it is a crime to belong to, fund or support an entity prescribed under the Terrorism Suppression Act and also commented that "we do not want" members of the entity in New Zealand.

66.3. Some warnings referred to other practical consequences: for example, one warning included a statement that association with a particular group might see him ostracised by his community.

66.4. Some warnings referred to potential consequences in other countries. For example, some warnings included the possibility that the recipient might find it difficult to travel through other countries if he or she engaged in certain activities.

Factual and implicit warnings

67. In warnings of the kinds described in the preceding paragraphs, the NZSIS officer set out potential consequences that would or could be initiated or pursued by the NZSIS and/or that affect the individual's rights, such as passport cancellation, referral for prosecution or notification to another government. However, some warnings do not involve such consequences:

67.1. Some warnings were essentially factual and did not involve any potential action by NZSIS or direct impact on the rights of the interviewee. For example, the NZSIS warned several people who may have intended to travel to a war zone of the risk that they might be killed or taken hostage.

67.2. Some warnings were also implicit. For example, NZSIS officers have overtly approached members of the public whom the NZSIS believes to be connected with a foreign government's intelligence or security activity. While no express warning is given, one objective of such an approach may be to alert a person of NZSIS' interest and so deter or dissuade such connection.

68. Because factual and implicit warnings of this type do not involve consequences initiated or pursued by the NZSIS, and are unlikely to affect rights, they do not engage all of the same obligations, risks and attendant safeguards. However, NZSIS officers need to be cognisant of the very real risk of their purpose and words being misunderstood. To protect against this, they should be clear about the kind of warning they are giving.

Past training material

69. Other than the training material discussed below and the policy documents referred to above, my office identified no specific training material on the topic of giving warnings.

Possible suggestion of reliance on misunderstandings/threats

70. Specific NZSIS training documentation used in early 2014 included apparent references to warnings:

> "Capitalise on foreign subjects' perceptions of government/intelligence agencies; …
>
> Imply additional authority or threat – useful in disruption"

71. I was concerned that training materials included the suggestion that NZSIS staff might "imply additional authority or threat." Any potential for the role or powers of the NZSIS to be misrepresented, or for members of the public to be misled, would be a serious matter. NZSIS officers explained that these statements did not relate to the giving of warnings or, if so, related to interaction with intelligence personnel of an unfriendly government. However, there was no other reference to that effect in the training material itself.

72. The Director-General of Security in turn has made extensive inquiries into this training material, about which she too expressed concern. I was assured that the training material did not intend to overstate or misrepresent the NZSIS's powers, and that was not how the particular training, or any other training, was ever presented to staff. Ultimately I am satisfied that this document was a "one off", and there is no suggestion it had any on-going influence in the operational training of NZSIS staff.

Reference to provision of information to other governments

73. The NZSIS training material also commented that if information may be provided to a foreign government agency, an officer should consider how it will be used and whether people would be subject to arbitrary detention or torture overseas. This would seem to be an example of poor drafting in the particular training document. NZSIS policy is and always has been that in such situations information cannot be shared with overseas partners.

Current policy

74. Current NZSIS policy as set out in the two SOPs (discussed above) describe the content of warnings as follows:

> "… Case Officers (only) may give advice to interviewees, sometimes described as 'warnings'. A warning means the provision of advice about the wisdom of doing a particular activity. For example, if an interviewee indicates they are planning to travel to participate in violent Jihad overseas, a Case Officer may 'warn' the interviewee that engaging in that activity is a bad idea because of certain facts, for example, it is dangerous, illegal and might result in the Government taking action to prevent the travel."

75. NZSIS legal personnel must be consulted in the planning of any warning, or, if the interviewer had not anticipated giving a warning but does so, the reasons for the decision must be recorded and the legal team advised.

76. In the course of this inquiry, the NZSIS has indicated that it accepts the following:

    76.1. It will plan the precise language and circumstances of any warning to avoid stating or implying that the NZSIS has or will exercise coercive powers. These steps are not to be left solely to NZSIS officers' operational judgement. In the unplanned warning scenario, the officer's operational judgement will be informed by appropriate training and policies;

    76.2. Where a warning is given, the information provided to the recipient will include the explanation that the NZSIS function is limited to collecting and passing on intelligence information. Where the NZSIS wishes to refer to the exercise of coercive powers by another body — for example, the NZSIS might warn that, if certain conduct continues, it will refer that conduct to the Police — the warning will explain that the decision to use such powers will rest with that other body;

    76.3. In order to address the risk of misunderstanding when NZSIS officers are accompanied by government officials with enforcement or regulatory powers — for example, if Police are present to prevent a breach of the peace when a warning is given — their different roles will be explained;

    76.4. NZSIS officers will ensure that they do not assert coercive powers such as a power of entry or detention or, even inadvertently, lead or allow members of the public to reasonably infer such powers; and

    76.5. The terms of a warning may not amount to blackmail or threats.

77. The NZSIS has also accepted the need to develop specific guidance for NZSIS officers that recognises the potentially fine distinction between permissible and impermissible warnings and that ensures respect for recipients' rights to natural justice.

Other practical issues from the warning/interview context

78. Our review of NZSIS practice and discussion with NZSIS officers also raised other practical issues that bear on the delivery of warnings:

78.1. **Prior notification/opportunity to defer:** In one instance, a warning was given in the course of a prearranged interview with the recipient and the recipient's lawyer. For the most part, however, warnings were given in interviews conducted without prior notice. The NZSIS indicated to the inquiry that officers would not want to defer any interview, citing the risk to officers' safety if the time and location of an interview was known in advance.

78.2. **Record-keeping by the NZSIS:** A Service policy currently provides for destruction of certain interview material except where special circumstances exist.[26] The Service assured me, however, that present policy and practice ensures that an official record of any meetings is kept.

78.3. **Record-keeping by the recipient:** NZSIS officers indicated that they would not in practice agree to the recipient of a warning making a record of the warning or the overall interview. In the *2013/2014-01* incident, the responsible NZSIS officers did not permit the recipient to retain his mobile phone. I understood from the NZSIS officers that they regarded the making of any record as a risk to the safety of those officers and/or as risking disclosure of NZSIS operational practices.

78.4. **Identification and risk of impersonation:** In one instance, comment made by a recipient suggested that she was not sure that the NZSIS officers were not, in fact, impersonators working for another government. In response to this comment, NZSIS officers indicated that, in practice, they regard presentation of an identity card as sufficient. When my office asked how a member of the public could verify such a card, they indicated that they would recommend using the phone book to find the NZSIS number and call to verify. They could not confirm, however, whether the NZSIS would verify the officers' identities or what would happen outside normal business hours.

[26] *HUMINT – Recording meetings – SOP* but see, for example, *Charkaoui* above n 16, [42]ff.

IV COMMENT AND RECOMMENDATIONS

Recommendation 1: Separating warnings from warrants

79. The duty rests with the NZSIS to ensure that, when objectively judged, there can be no misapprehension by the recipient of a warning as to the Service's lack of enforcement powers. The duty applies in every case a warning is given. It is important that the NZSIS ensures its policies, practices, and training materials are all designed to respect and reflect this obligation fully. The duty applies regardless of the context in which a warning is given, by which I mean it applies whether the particular warning is planned or unplanned; delivered in the context of an interview, or in the context of the execution of a warrant, or not; verbal or written.

80. The risk of misunderstanding as to the nature and character of any warning is particularly great when a warning is given at the same time as the overt execution of a warrant. NZSIS must exercise special care to guard against misapprehension in this situation because:

    80.1. The execution of any search warrant is inherently coercive, and, from the perspective of the affected member(s) of the public, a worrying if not distressing measure. The individual's state of mind will be highly relevant to their ability to comprehend their situation and accurately digest information.

    80.2. For the NZSIS, the overt execution of a warrant is the one exception to the broad absence of any publicly visible coercive powers on the part of the NZSIS. Linking the non-enforceable warning with an enforceable warrant creates a special risk of unfairness and misunderstanding. For example, the subject of a search may not appreciate that the NZSIS has a legal right to enter premises for the purpose of the search but not, without the occupier's consent, to enter for the purpose of a warning or interview. The distinctions between these forms of state conduct, when they occur at the same time, are not distinctions that members of the public are well positioned to make in the heat of the moment.

    80.3. If Police are present in support of the NZSIS, as I understand is normal practice, the potential for confusion around whether the recipient is at risk of enforcement measures, and for unfairness in any ensuing interview with the recipient, is further heightened. For many members of the public — including those who have encountered paramilitary security forces in another country — it may be practically very difficult, and even impossible, to dispel any misapprehension.

81. I acknowledge that, in some circumstances, it may be practically necessary to undertake an overt search and, in the course of the same operation, convey a warning to the subject of that search. However, given the particular risk of misunderstanding, it should be avoided wherever possible.

R1 I recommend that, except where unavoidable, warnings should not be given at the same time as overt execution of a warrant. Where that is unavoidable, particular care should be taken to separate the two steps and to explain the distinction between the mandatory

execution of the warrant and the consensual nature of any interview and lack of enforcement powers.

NZSIS position on R1:

82. The Service acknowledges that linking the overt execution of a warrant with the giving of a warning raises the risk of the recipient misunderstanding the legal differences between the respective activities. The Service supports a position wherein the two acts must be separated only where that is "operationally possible". The Service accepts that it must take steps to ensure that the person being interviewed clearly understands the difference between the mandatory nature of a warrant and the voluntary nature of an interview that might include a warning.

83. I have considered the Service's response to R1, but I maintain the terms of my recommendation. The Service's position does not, in my view, acknowledge that separation of the two activities should be the default. I am also not satisfied that a test of "operationally possible" is adequate. I am reluctant to accept that wording, given the risk that NZSIS officers may read in too much operational discretion, including discretion to achieve "operational convenience" by combining the two actions. I consider a genuine effort is required on the part of the Service to separate the two acts.

Recommendation 2: Content of warnings

84. In every instance a warning is given the NZSIS must ensure that, having regard to all of the circumstances of the matter, there can be no reasonable misapprehension that the Service can enforce the recipient's behaviour induced by NZSIS conduct. In addition to this guiding principle, and the points accepted by the NZSIS in the course of this inquiry,[27] including the important safeguard that legal advice should be sought before any warning is given, the content of warnings must avoid:[28]

84.1. Undue interference with civil rights, such as warning a recipient not to attend a place of religious observance or protest;

84.2. Ambiguity, for example referring to potential adverse consequences in broad terms that leave the recipient to speculate;

84.3. Improper purpose, for example suggesting that the NZSIS may act favourably or unfavourably in relation to a recipient's immigration application when the content of the warning is not related to that application; and

84.4. Inherently unlawful statements, such as threats to share information with a foreign government at real risk of engaging in torture as a result.

R2 I recommend that the NZSIS incorporate the above constraints on the content of warnings into its guidance and operational practice.

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[27] Paragraphs 76-77 above.

[28] Paragraphs 23-27 above.

NZSIS position on R2:

85. Accepted.

Recommendation 3: Interpretation in the context of warnings

86. There is no current indication that an interpreter and translated documents will be provided, where necessary, at any interview in which a warning is given, although a translated document was provided in one case and the recipient's spouse asked to act as a translator.

87. While these may be legally required only in some situations where procedural fairness applies, it is good practice in any case where the NZSIS has reason to believe that the recipient may not fully understand a warning given in English or where he or she requests it.

R3 I recommend that NZSIS policy includes provision for interpreters and translated documents in warning procedures.

NZSIS position on R 3:

88. Accepted.

Recommendation 4: Information sheet in the context of warnings

Provision of the sheet

89. The provision of an information sheet is a straightforward, and in some circumstances necessary, means to help manage the risk of unlawfulness; to achieve genuine clarity as to rights, and to facilitate a fair and effective discussion with the recipient/interviewee. An interview with the NZSIS can be assumed to be a stressful event from the perspective of the interviewee. It may also take some time, and the interviewee's position may change during the course of it. In many cases youth and language difficulties will be relevant factors. These will further increase the chance that the interviewee may misunderstand their position or the limited powers of the NZSIS.

90. I am not convinced that the use made of the information sheet reflects sound practice. Once provided and read, the sheet is taken back from the subject. In my assessment this is counter-productive if the Service's aim is to convey information effectively at a critical time:

90.1. Seeking a signature and taking the sheet back risks appearing heavy-handed and unjustified, and may thus increase the potential for misunderstanding. It may also interfere with the interviewee's capacity to seek subsequent advice, make a complaint or — as in the *2013/2014-01* events — clearly recollect what information was provided. While, in some circumstances, there might be a distinct cause for concern over either safety or notoriety,[29] those reasons do not apply in every case. In cases where that is an issue, any such problems could be addressed by showing the recipient a copy of the information sheet during any

[29] Above at para 54.

interaction, and directing them to identical information held on the NZSIS website for any future reference.

90.2. Taking back the information sheet in the course of the interview necessarily means that the recipient does not have it for continuing reference at the time it is most valuable. If, by contrast, the recipient has the information sheet throughout, there is much less risk that the information provided by the NZSIS will be disregarded or incorrectly recalled as the interview progresses.

91. I am also concerned that the NZSIS only provides an information sheet in those instances where a warning is given simultaneously with the execution of a warrant. Fundamentally, I do not accept that provision of written information about what is happening, and about an individual's rights, should be limited to that situation. I am far from persuaded that differences in the Service's operational policies and practices around warnings should hinge on a distinction between the warrant and non-warrant scenarios.

92. I have made the point, above, that the risk of misunderstanding NZSIS powers is greater when a warrant is executed. However, given the inherent risk of misunderstanding in any engagement with NZSIS officers, the potential gravity of a warning, and the fine line between "lawful" and "unlawful" warnings, provision of clear information in writing is a prudent safeguard on every occasion a warning to influence or deter behaviour is given. Even if information is also provided orally, written information will reinforce it; will mitigate the risk of misunderstanding, and will lessen the likelihood of subsequent disputes as to whether information was clearly and accurately conveyed. As noted above, at para 89.1, in specific cases where provision of a hard copy would not be sensible on genuine and articulated operational or safety grounds, a clear referral to the website may be sufficient.

Content of information sheet

93. The information sheet includes useful information and was further refined in the course of this inquiry, as seen in appendices A and B, but omits some necessary information. In particular:

93.1. The sheet does not explain or describe what is occurring: it does not state, for example, that the NZSIS wishes to speak to the recipient or otherwise explain why the sheet has been provided.

93.2. The information sheet does not explain that the NZSIS has a legal right to enter the premises for the purpose of the search but not, without the occupier's consent, for the purpose of a warning and interview.

93.3. Because the information sheet is currently provided to recipients of warnings only where a warrant is executed, it does not address the position of NZSIS officers conducting an interview in any other circumstances.

93.4. There is no indication of what the recipient should do if, for example, he or she does not understand anything, or wishes to reschedule the interview, or if he or she wants to have a lawyer or support person present.

94. In the course of the inquiry, NZSIS personnel suggested that it was unnecessary to include some of this information in the information sheet either because it would be addressed in the "roles and functions" discussion, as adapted, or because the recipient would raise or the NZSIS officer identify any sign of misunderstanding.

95. The short point is that it is good practice, when seeking to convey critical information, particularly when doing so at times of stress, to provide the same information by more than one means. Provision of the information, in writing, will go a long way to reduce the risk of the recipient misunderstanding the advice and the NZSIS's role.

96. It is also prudent to provide such information as a matter of course, rather than relying upon the recipient to ask questions or the NZSIS officer to perceive any difficulty. I note, for instance, that while the interviewing NZSIS officer in the *2013-2014/01* events believed that the situation was clearly understood by the recipient, the recipient stated that he did not understand much of what occurred and did not recall some information that he was said to have been given.

97. There is also some content that is not relevant and should be removed to avoid distraction: in particular, the two paragraph description of the statutory character and wider functions of the NZSIS is not practically relevant.

R4 An information sheet should be provided in every case where it is anticipated that a warning will be given, unless there is evidence of a specific safety risk from doing so. Provision of the sheet should not turn on whether a warrant is being executed at the same time.

Recommendation 5: Template information sheets

R5 The NZSIS should develop improved template information sheets for use in the warnings situation, and in interviews generally. These should reflect the relevant concerns around warnings, natural justice protections, and the principles in the Ministerial Policy Statement (MPS) on *Collecting Information lawfully from persons without an intelligence warrant*.

Recommendation 6: Recipient of a warning

R6 The default position should be that the recipient of a warning is given a copy of the information sheet to retain. In those cases where the NZSIS has identified a specific safety risk from retention of the information sheet it should:

a) be provided to the recipient for the entire course of the interview before being taken back and

b) the recipient should be told that the information is available to the public on the NZSIS website.

NZSIS position on Rs 4-6:

98. The Service will re-examine its policies and practices around warnings in light of the MPS and will re-draft them as appropriate. It accepts it must be clear about the purpose of an interview and its voluntary nature, and the Service's lack of enforcement powers. It should explain its role in a relevant and succinct way. The Service does not accept my specific recommendation to provide individuals with hardcopy information sheets in almost all warning and interview situations, and to leave it with them. The Service maintains its view that an information sheet is only necessary in a warning or interview situation if a warrant is being executed. In other situations the Service proposes that officers will determine the best way to convey key information (whether in person, or directing the interviewee to the NZSIS website, or using a mobile phone to show the recipient/interviewee a copy of the relevant NZSIS website page.)

99. I agree that the ability to convey this information via a range of media would be an improvement on current practice but it is not sufficient in my view. It does not leave the individual with information during the course of the engagement which reinforces their rights and their understanding at that critical time. Further, the justification is elusive. The Service's preference for website over hardcopy information is premised on operational concerns which, as explained to me, are not compelling, and which I assess would not apply in every, or even most, cases.

Recommendation 7: The current roles and functions preamble in the warning context

100. As set out above, the roles and functions preamble contains a general introduction to the NZSIS and is used for overt interactions with members of the public. However, reliance on that general preamble in the context of warnings raises several concerns.

101. First, giving an overt warning is quite different from carrying out a general information-gathering interview. The former gives rise to different and more serious risks for the recipient: the recipient of a warning is inherently at risk of some adverse consequence unless he or she alters his or her conduct in some way. That is a different, and more vulnerable, position than a member of the public who is deciding whether or not to share information with the NZSIS.

102. That difficulty can be seen in respect of particular passages of the preamble that are not well-suited to the giving of a warning:

    102.1. The general information set out in the preamble about the role of the NZSIS and the broad purpose of NZSIS interviews is essentially irrelevant and potentially distracting to a recipient of a warning. Any statement of roles and functions should be succinct and tailored to the context of the particular interview.

    102.2. The treatment of "confidentiality" is problematic. In the non-warrant scenario the interviewer is meant to seek confidentiality from the interviewee and assure them that the interview will be kept confidential by the NZSIS. In the warrant scenario, confidentiality is a matter for the operational discretion of the officer. However, the concept of an arrangement for mutual confidentiality, as described, is simply not

appropriate for a number of reasons. First, for its part, NZSIS may well not keep the interview confidential - information from the interview may be used in the exercise of a statutory function, such as recommending withdrawal of the subject's passport. Further, from the perspective of the interviewee, the suggestion that they "should" keep the interview confidential including reference to a "deed of confidentiality," will likely be confusing as to their rights. It is appropriate, given the gravity of a warning concerning national security matters, that a recipient is aware they may seek advice from a lawyer, or other support person — for example, a family member, his or her Member of Parliament or other adviser or advocate. Where the NZSIS's desire for confidentiality reflects a concern for a person's safety, the "recommendation" from the interviewer that the interviewee maintains confidentiality ought to be clearly couched and explained as such. Overall, the NZSIS must avoid suggesting that the recipient is obliged to keep the interaction confidential, as that is not correct.

103. The overall content is also inappropriate to the delivery of a warning in some common circumstances:

103.1. If the warning is given immediately prior to or simultaneously with the execution of a warrant, it is incongruous to stress the lack of enforcement or coercive powers and the confidentiality of an interview at the same time that the NZSIS exercises mandatory powers of entry and search.

103.2. If Police are present, whether to assist in the execution of a warrant or for physical safety, it is again incongruous to stress the lack of such powers and, further, the separation of the NZSIS from the Police. A separate and much more careful explanation is required.

103.3. Where procedural fairness obligations arise, what is needed is an explanation of the decision that the NZSIS is making — for example, whether to make an adverse recommendation to Immigration New Zealand; the information that the NZSIS wishes to obtain; and the rights of the subject to comment upon adverse information and to seek advice or other assistance. That is quite distinct from the general information-gathering approach described in the roles and functions preamble.

104. In short, the roles and functions preamble is designed for a quite different form of interaction with members of the public. Further, some parts conflict with the requirements that the NZSIS must meet when a warning is given. For that reason, and also given the accepted need for preparation, clarity and procedural consistency when warnings are given, it is not adequate to rely upon individual NZSIS officers to undertake the necessary tailoring on the job.

105. The background information on the NZSIS's role and functions that is useful in the context of a warning is in fact quite limited if properly tailored, assuming there are no issues around interpretation. Use of the information sheet has the benefit of conveying consistent information both orally and in writing, and should provide the template from which any verbal advice is given.

R7 I recommend that NZSIS produces a redrafted preamble for inclusion in the information sheet. NZSIS must not seek to compel confidentiality. The preamble should be succinct and tailored specifically to the information that a recipient of a warning ought to know about the role and functions of the Service, and should accurately state their rights. It can be further tailored to accommodate any specific circumstances of the particular case. Any verbal advice should follow this template. The sheet should be checked by the Service's legal team in each case before use.

NZSIS position on R 7:

106. Accepted, subject to the Service's comments set out in response to recommendations 4-6.

107. The MPS on *Collecting information lawfully from persons without an intelligence warrant*[30] provides an additional authoritative guide to NZSIS interaction with members of the public. It requires both the Service and the GCSB to have internal policies in place which "require legal advice to be sought (including from Crown Law, where appropriate)" in every case where a warning action is contemplated. Compliance with this requirement will go much of the way towards meeting my concerns.

Recommendation 8: Procedural fairness where an interviewee's rights are in issue

108. Current NZSIS policy and practice for warnings includes, at the responsible NZSIS officer's discretion, advice to the recipient that the interview is the recipient's opportunity to inform any security assessment. However, if there is a likelihood that information about the person's behaviour (which prompted the warning in the particular case) may influence an *adverse* assessment, that statement of advice is not enough. In any NZSIS interview context, whether involving a warning or otherwise, it would fall short of the procedural fairness obligations that apply where a recipient's rights or interests — in particular, immigration status and/or access to a passport — are at potential risk from an adverse assessment.[31] I note that the NZSIS has accepted in broad terms that its policy must ensure procedural fairness.[32]

R8 I recommend that the NZSIS incorporate the procedural fairness obligations I have identified into its guidance for interviews where rights or interests are in issue. Further, as a matter of good practice, I recommend general guidance for interviews should address how to provide for prior notice of the interview and/or deferral, and advice on the right to a lawyer. There should be specific guidance on dealing with children and young people, and other vulnerable interviewees.

NZSIS position on R8:

109. The NZSIS response accepted the need for procedural fairness in certain circumstances, but also noted that prior notice or third party involvement may not always be operationally appropriate or required. The Service's response to this recommendation has been to a degree

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30 Footnote 2 above.
31 Paragraph 40 above.
32 Paragraph 77 above.

superseded by the MPS on *Collecting information lawfully from persons without an intelligence warrant*.[33] This MPS confirms the need to have suitably tailored policies and practices in place to ensure procedural fairness at all interviews where the NZSIS make an "assessment". I have set out my view on the procedural standards required for adverse assessments at paragraph 41, above. I have also set out the general procedural fairness expectations from the MPS that I consider of most relevance at paragraph 44. In addition, the MPS places clear obligations on the Service when dealing with "Sensitive Category Individuals", including young people. The combination of my report and the MPS provide helpful source material for the NZSIS to draw on when drafting its internal policies and procedures.

Other practical safeguards

110. From my review of practice and policy for this inquiry, I also identified some practical issues in the planning and delivery of warnings.

Recommendation 9: Referral to Police or other agency

111. On occasion difficulties can arise when the NZSIS wishes to give a warning because of conflict between the legal and/or practical limits of NZSIS operations and the requirements of some types of warning. For example:

111.1. It may be difficult for the NZSIS to afford procedural fairness protections, such as the need to have an interpreter or support person present, while at the same time avoiding unwanted publicity and/or putting NZSIS officers at risk through delay or prior warning; and

111.2. Similarly, where the NZSIS wishes to warn a recipient that his or her conduct might lead to criminal law enforcement, immigration, passport or other consequences, it may be difficult for an NZSIS officer to give and explain that warning when any actual decision rests with another agency.

112. In such instances, it is appropriate for the NZSIS to consider whether the particular situation would be better managed by referral to another relevant agency. For example, a situation that is perceived to involve a serious and possibly imminent risk of criminal acts — akin to that in the *2013/2014-01* events — may well be better dealt with by the Police. The potential benefit of Police involvement in such a case would include:

112.1. Police officers could use standard interview procedures;

112.2. If the recipient of a warning were to make an admission or otherwise provide evidence of offending, Police caution procedures would be available and such evidence is then likely available for the purpose of criminal prosecution, if needed;

[33] Footnote 2, above.

112.3. Police officers could address any other questions over potential criminal law enforcement measures directly;

112.4. Should any need for enforcement powers arise — for example, if there were cause for a search of the recipient without warrant or for an arrest — Police could exercise those powers immediately; and

112.5. The difficulties faced by NZSIS officers over, for example, potential publicity would not arise.

113. Similar benefits may arise in other instances through referral to immigration or other officials.

114. I acknowledge that, in some instances, the NZSIS will be acting on the basis of information that it may not disclose or may be seeking to address national security issues that do not, or have not yet, reached the threshold for referral. I also recognise that, in some circumstances, the other agency may not wish to act.

R9 I recommend that, in deciding whether to give a warning, the NZSIS consider whether the particular warning may be more appropriately given by another agency.

NZSIS position on R9:

115. Accepted.

Recommendation 10: Responses to questions

116. The review of NZSIS practice indicated some instances in which the recipients of warnings had asked questions, for example around whether their alleged conduct amounted to an offence, and that answers were sometimes given. The available records do not provide an adequate basis on which to assess the adequacy of any particular answers. However, there was also no indication that officers had been provided with prepared answers to foreseeable questions.

117. In the course of this inquiry, an NZSIS officer indicated that she was aware of practice in a counterpart agency of providing officers with a standard script for frequently asked questions, with answers prepared in consultation with legal advisers.

R10 I recommend that the NZSIS provide officers with prepared answers to common questions.

NZSIS position on R10:

118. Accepted, and NZSIS intends to place relevant Frequently Asked Questions on its website.

Recommendation 11: Record-keeping by the NZSIS

R11 Because of the need for clarity around how and in what terms a warning is given and the potential consequences for the recipient if the warning is not heeded, I recommend that a full record is made at the time and retained.

NZSIS position on R11:

119. Accepted.

Recommendation 12: Record-keeping by the recipient

120. While NZSIS officers were concerned by the prospect that a recipient might keep a record or wish to keep a record of any interview:

120.1. Given the potential gravity of at least some NZSIS warnings — for example, those where the recipient's immigration status, passport or other rights or interests may be adversely affected — there is no principled basis not to allow a recipient to keep a record; and

120.2. In any case, there is no legal or practical means of preventing the recipient from making a record, short of deciding not to proceed with the interview at all: for instance, a recipient could, in practice and within the existing law, whether with or without the knowledge of the NZSIS officer(s), use a mobile phone or other device to make an audio or video recording of any interview.

R12 NZSIS policy should clarify that NZSIS officers have no power to prevent a record being kept and set out how any concern over safety, publicity or other matters can be addressed when planning an interview.

NZSIS position on R12:

121. Accepted.

Recommendation 13: Risk of impersonation

R13 I recommend incorporating in written policy some further safeguard against impersonation, and to alleviate concern for that possibility in the mind of the interviewee.

NZSIS position on R13:

122. Accepted. NZSIS says that current practice now is for the interviewing officer to show his or her ID card, and to provide an NZSIS phone number for the member of the public to call if they wish to confirm the contact is legitimate. Future guidance will include a reference to the NZSIS website which will provide general information regarding NZSIS.

Recommendation 14: Procedures for factual and implicit warnings

123. Where a warning is only factual or implicit, as in the examples in paragraphs 67.1 and 67.2, provided that it is made clear that the warning is not in the nature of enforcing behaviour, and does not involve consequences initiated by the NZSIS, and/or does not affect the recipient's rights, more limited safeguards can be applied. To that end:

123.1. The scope of the warning must be clear: In warnings of the kinds at paragraphs 67.1 and 67.2, for instance, the NZSIS officer should include an explanation to the recipient that the warning does *not* involve steps such as the potential cancellation of a passport

or visa — any such steps could be considered only with a more formal interview that meets relevant procedural safeguards; and

123.2. The NZSIS officer should refer the recipient to the NZSIS website for details of the rights of members of the public when dealing with NZSIS officers; limits of NZSIS powers; and the NZSIS's role, for instance, in passport and visa matters. The NZSIS will need to update its website to include this information.

124. Provided that those steps are taken, only some of the procedural safeguards set out in this report are necessary for factual and implicit warnings. In my view:

124.1. They should not be given during the execution of a warrant;

124.2. It is not necessary to provide an information sheet;

124.3. The roles and functions preamble may be useful, if suitably tailored, to provide context for the communication;

124.4. Procedural fairness obligations are unlikely to arise; but

124.5. Interpretation should be provided where the recipient has language difficulties;

124.6. Consideration should be given to whether it is nonetheless more appropriate for another state agency to deliver the communication;

124.7. NZSIS officers should be equipped to answer predictable questions;

124.8. The NZSIS officer should keep a record of what was said, and in general there should be no objection to the recipient keeping some form of contemporary record too.

R14 I recommend that the NZSIS incorporate the safeguards I have identified here into its procedures and provide accessible guidance on the NZSIS website for the public about interactions with NZSIS officers.

NZSIS position on R14:

125. NZSIS accepts it is appropriate that its operational guidance provides for more limited procedures and safeguards applicable where a warning is of a merely factual or implicit type.

Next steps

126. This inquiry has taken some time, including the unfortunate length of time initially required to locate relevant records and, more recently, time for the NZSIS to obtain revised legal advice in light of questions that I had raised. However:

126.1. That time has permitted the NZSIS to develop relevant internal policies and procedures and make some changes to operational practice, including as a result of discussions in this inquiry. These are welcome developments; and

126.2. The decision by the NZSIS to obtain revised legal advice has resolved several potentially difficult points that had arisen in the course of the inquiry.

127. The implementation of some of these recommendations will require further operational policy work and, possibly, the need for further legal advice. I did not consider it appropriate to defer publication of this report pending those further steps. Rather, I anticipate that my office will work with the NZSIS to progress these matters, as part of our monitoring of implementation, and will make further public report if necessary.

APPENDICES

Appendix A — Untitled information sheet provided in 2013-2014/01 events

The New Zealand Security Intelligence Service (NZSIS) is an intelligence and security organisation. The NZSIS' functions and powers are governed by the NZSIS Act 1969.

The NZSIS' key functions are to obtain and evaluate intelligence relevant to security and to provide information and advice to other government agencies, international partners and the wider community in order to enhance and defend New Zealand's security.

Powers

The NZSIS does not have any powers to compel you to speak to the NZSIS. The NZSIS also does not have any powers of arrest or detention.

The NZSIS has a warrant in respect of you and your property, which we have shown you.

This authorises the NZSIS to take or copy communications, documents and things relevant to security and to enter and search your premises for this purpose. This includes searching your residence and any vehicle which you own or use.

This warrant does not have any impact on your rights of cooperation. You are under no obligation to speak to us and may leave at any time you wish.

Acknowledgement

I have read and understand the above.

Signed

[Signature of recipient]

Date

Appendix B - Current information sheet

Information sheet

NZSIS's role

The New Zealand Security Intelligence Service (NZSIS) is an intelligence and security organisation. NZSIS's functions and powers are governed by the NZSIS Act 1969.

NZSIS's key functions are to obtain and evaluate intelligence relevant to security and to provide information and advice to other government agencies, international partners and the wider community in order to enhance and defend New Zealand's security.

Warrant Powers

NZSIS has a warrant in respect of you and your property, which we have shown you.

This warrant authorises NZSIS to take or copy any of your written or electronic communications and any documents or things, including but not limited to, electronic media in your possession or control. It also authorises NZSIS to enter and search any premises owned or occupied by you for this purpose.

The New Zealand Police are present to assist NZSIS in the execution of this warrant.

Either:[[34]]

> You are not compelled to speak to NZSIS.
>
> NZSIS does not have any powers of arrest or detention.

Or:

> You are free to decide whether or not to speak to the NZSIS. There is no requirement to speak with the NZSIS and no penalty for not speaking with the NZSIS. If you decide to speak to the NZSIS, you may decide to stop at any time.
>
> You are not under arrest or being detained. NZSIS cannot arrest, detain or charge you.

You may leave at any time if you wish.

Acknowledgement

I have read and understand the above.

Signed

Date

[34] The latter wording was more recently used by the NZSIS, following discussion of such wording in a draft report of this inquiry.