



Office of the Inspector-General of Intelligence and Security

Report into a review of GCSB and NZSIS activity and assessments under the
Outer Space and High-altitude Activities Act 2017

Public Report

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20 April 2021

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INTRODUCTION

1. In December 2017 the Government Communications Security Bureau (GCSB or the Bureau) and the New Zealand Security Intelligence Service (NZSIS or the Service) (together, the agencies) assumed a new regulatory role under the Outer Space and High-altitude Activities Act 2017 (OSHAA).¹ To support their Minister's role under OSHAA (as a consultee regarding risks to national security) the agencies conduct national security risk assessments of all licence and permit applications.
2. Our Office has not previously reviewed the agencies' activities in relation to OSHAA. Accordingly, we decided to commence a review to improve our understanding of the agencies' role in this area, the way they conduct their assessments/provide advice to the Minister and to better understand the agencies' internal compliance system in relation to these regulatory activities.²
3. This review has taken the form of a 'baseline review'. The purpose of a baseline review is to provide my Office with an understanding of a particular area of agency activity and, when appropriate, comment on issues we have identified with agency policy and procedures. Baseline reviews are intended to be undertaken in a short period of time. Depending upon what we learn from a baseline review, we may undertake a further, in-depth operational review or a formal assessment of the legality and propriety of a particular activity.
4. Given the role of the New Zealand Space Agency (NZSA) in overseeing the regulatory system for outer space and high-altitude activities and advising the Minister responsible for the administration of OSHAA regarding licence and permit applications, we have consulted them on a draft of this report.

CONTEXT

5. The launching of vehicles into space is a relatively new activity in New Zealand. To facilitate and regulate this burgeoning industry, the government created the NZSA in 2016 to oversee policy, regulation and sector development. The regulatory framework for outer-space activities followed shortly after, in 2017, with the enactment of OSHAA.
6. Under OSHAA, the agencies support their Minister by conducting national security risk assessments of applications for licences or permits made under the Act. Since OSHAA has been in force, a vast majority of the agencies' assessments have related to applications to launch payloads. To date, the agencies have conducted:
 - 24 assessments in the 2017/18 reporting period;
 - 29 assessments in the 2018/19 reporting period; and

¹ Prior to the enactment of OSHAA, launches took place in New Zealand under a contract between the New Zealand Government and Rocket Lab Limited and Rocket Lab USA Inc. The agencies had a role in conducting national security risk assessments under this arrangement.

² See Intelligence and Security Act 2017, s 158(1)(f)(ii).

- 31 assessments in the 2019/20 reporting period.
7. NZSIS and GCSB national security risk assessments are supplied to the Space Activities Risk Assessment Group (SARAG), which seeks a consensus view on the overall national security risk associated with the application. This informs the agencies' final advice to their Minister.

SUMMARY AND RECOMMENDATIONS

8. Overall, the compliance systems within the Service and Bureau that apply to their activities under OSHAA are generally well-developed. As the agencies mature in the performance of their role under OSHAA, we expect their compliance system will undergo further refinement. In conducting this review, we have identified some areas in which it can be improved. These are detailed below. We have not made findings of either compliance or non-compliance with the existing systems. That was not the purpose of this baseline review. However, to be clear we have not identified any systemic non-compliance issues.
9. In summary our review has found:
- Neither OSHAA nor its associated regulations define national security and internal agency policy does not provide any guidance about the scope of national security for the purposes of assessments the agencies conduct under OSHAA. The agencies are not responsible for the absence of a definition of national security in the Act or associated regulations but we think there is scope for them to articulate factors or principles in their internal policy and procedures that will guide their assessment of national security risk. The absence of such guidance may not enable a common understanding of what constitutes a national security risk.
 - While the Service and Bureau are not responsible under OSHAA for advising Ministers about matters associated with the national interest test, the agencies have, on occasion, shared intelligence with the NZSA regarding matters that could raise national interest concerns. Service and Bureau policy does not contain any guidance about what national interest concerns the NZSA is interested in with respect to its role under OSHAA. We think the development of guidance could help ensure relevant intelligence is shared with the NZSA to support their role under OSHAA.
 - It is not clear what framework the agencies apply to assess national security risk when conducting these assessments and how the assessed risk translates to a particular outcome under OSHAA (eg no national security risk identified, a national security risk identified, a significant national security risk identified).
 - The Service, in particular, does not yet have fully developed policy or procedure on its approach to national security risk assessment under OSHAA.
 - The agencies' regulatory roles under OSHAA are amenable to greater transparency and public discussion. They do not require the same level of secrecy

as intelligence functions, but there is currently little publicly available information about the agencies' roles under OSHAA.

10. We recommend:

- The Service and Bureau develop principles or factors in policy and/or procedure regarding the way the concept of national security applies in the context of OSHAA. We would expect the development of such principles (and others noted below) would be best achieved in coordination with other agencies who have a role under OSHAA.
- Reference to the principles for determining whether something is in New Zealand's national interest (listed below at paragraphs 42 and 43) should be included in their internal guidance.
- Agency policy should include guidance on the framework staff should apply to a national security risk assessment, including how the assessed risk translates to a particular outcome under OSHAA.
- The Service, in particular, should provide more documented policy or procedural guidance to staff about how they are to carry out national security risk assessments under OSHAA..
- The agencies publish information about their role under OSHAA, how they carry out assessments and the role of SARAG in the process.

PROCESS FOR RESPONDING TO FINDINGS AND RECOMMENDATIONS

11. We request the agencies respond to our findings and recommendations within a month of this report being finalised by indicating the extent to which they accept our recommendations along with a timeframe for implementing them. We intend to report on those matters in our next annual report.

LEGISLATIVE FRAMEWORK

12. The primary legislation relevant to this review is OSHAA.³ Below, we outline the key legal tests the agencies are associated with under OSHAA.

National security risk assessments

13. Under OSHAA, s 55(1) the Minister responsible for the GCSB and NZSIS must be consulted by the Minister responsible for the administration of OSHAA (who is also responsible for issuing a

³ The Intelligence and Security Act 2017 (ISA) is also relevant to this review. However, its relevance is limited to the extent it details the powers and procedures of the Inspector-General when inquiring into a complaint about a decision of the Prime Minister to issue a security certificate.

permit or licence for an outer space or high altitude activity) before a decision is made about whether to issue the licence or permit.⁴

14. Both the NZSIS and GCSB conduct their own, independent, assessment of each application the Minister responsible for the Bureau and Service is due to be consulted on. All assessments are then forwarded to SARAG to discuss and seek consensus about the overall national security risk associated with the application. Where no national security risks are assessed to arise from an application, the agencies prepare a joint briefing note to their Minister explaining that conclusion. If national security risks are assessed to arise, the agencies prepare a 'reasons paper' explaining the basis for their conclusion along with a briefing note to the Minister. To date, SARAG has not concluded any applications it has reviewed raised any national security risks.
15. SARAG is comprised of staff from the GCSB and NZSIS (the core working group) along with other members acting in an advisory or consultative capacity. These advisory/consultative members include representatives from the NZSIS's Protective Security Requirements team, the New Zealand Defence Force, the Defence Technology Agency and the Department of Prime Minister and Cabinet.
16. If either the Minister responsible for the GCSB and NZSIS or the Minister responsible for the administration of OSHAA thinks it appropriate for national security reasons, they can refer the application to the Prime Minister for consideration.⁵
17. The Prime Minister is able to issue a security certificate where the proposed activity poses a "significant risk to national security".⁶ Where a security certificate is issued, a licence or permit cannot be granted.⁷ In such cases, the applicant for the licence or permit (or holder of the licence or permit) can complain to my Office in relation to the advice given by an intelligence and security agency to a relevant Minister or the Prime Minister. To date, no security certificates have been issued by the Prime Minister.

New Zealand's national interest

18. In addition to national security risk, OSHAA requires consideration of New Zealand's national interest. If the Minister responsible for the administration of OSHAA does not consider a proposed activity under a licence or permit to be in the national interest they can decline to issue it.⁸
19. While the agencies have no direct role in advising the Minister issuing the permit or licence about New Zealand's national interest, we have seen evidence of the agencies identifying matters they think could be relevant to this assessment. In these instances, the agencies advise the NZSA of the particular circumstances and share the relevant intelligence with them. It is

⁴ The Minister responsible for the administration of OSHAA is the Minister for Economic and Regional Development.

⁵ Outer Space and High-altitude Activities Act 2017, s 55(2).

⁶ Outer Space and High-altitude Activities Act 2017, s 55(3).

⁷ See for example, Outer Space and High-altitude Activities Act 2017, s 17(5).

⁸ See Outer Space and High-altitude Activities Act 2017, s 17(2).

then for the NZSA to consult with other agencies (eg MFAT or NZDF) about the issues raised by the intelligence shared by the NZSIS and GCSB and determine whether they will advise their Minister of them.

Fit and proper person test

20. The Minister responsible for the administration of OSHAA can decline to issue a launch licence or permit where they are not satisfied the applicant is a 'fit and proper person'.⁹ Factors relevant to this assessment are listed in s 52(1) OSHAA. We asked the agencies whether they had been involved in providing any assessment or information in support of the 'fit and proper person' test under s 52 OSHAA. The Bureau stated they have no involvement in this assessment and have expressly excluded it from the work of SARAG. The Service noted it was possible they could contribute to this assessment but had, to date, not done so.

POLICY FRAMEWORK

21. When conducting a review, I am required to have regard to any relevant Ministerial Policy Statement (MPS) and the extent to which an agency has had regard to it (ISA, s 158(2)). There are no MPSs directly relevant to this review. The only MPSs that may be relevant to aspects of the agencies' activities in this context are *Obtaining and using publicly available information* and *The management of information obtained by GCSB and NZSIS*. We have not focussed on these MPSs in our review.
22. The focus of our review is on internal agency policy. Three agency policies are relevant:
- SARAG – *Space Activity Risk Assessment Group Terms of Reference* (23 August 2017) (SARAG TOR).
 - GCSB – *OSHAA Standard Operating Procedures* (21 September 2017) (GCSB SOP).
 - NZSIS – *SI2 – SPACE risk assessment – SOP* (31 August 2017) (NZSIS SOP).

SARAG TOR

23. To ensure SARAG operates to established procedures, the agencies have agreed the SARAG TOR. The initial SARAG TOR were agreed on 23 August 2017. The SARAG TOR are currently being reviewed and a new version should be finalised shortly.
24. The SARAG TOR do a good job of defining the respective roles of the Service and the Bureau when conducting national security risk assessments. The SARAG TOR also provide a clear process by which SARAG will operate and how they will advise the Minister of the outcomes of their assessments. In addition to the SARAG TOR, each agency has in place its own standard operating procedure to guide the way in which national security risk assessments are conducted. These procedures are described below.

⁹ See Outer Space and High-altitude Activities Act 2017, s 9(2).

NZSIS SOP

25. The NZSIS SOP is a short document. It describes the method by which requests for national security risk assessments are made to SARAG, the basic information required to conduct an assessment and a high-level overview of the way in which an assessment should be conducted.
26. The NZSIS SOP remains in draft form. This is despite the fact the Service has conducted risk assessments for three years.
27. The NZSIS SOP provides limited guidance to Service staff about how they are to conduct national security risk assessments in relation to OSHAA. While the NZSIS SOP has a brief description of the parts of an application relevant to a national security risk assessment, it does not describe the extent to which checks need to be conducted (eg the extent to which ultimate beneficial ownership of a payload needs to be identified and assessed).¹⁰ We discuss the SOP in greater detail in the Findings and recommendations section below.

GCSB SOP

28. The GCSB SOP is a detailed document. It provides step-by-step guidance to staff who are required to conduct a national security risk assessment under OSHAA about the entire process. Helpfully, the SOP contains a list of guiding principles for the way in which national security risks assessments will be conducted.
29. On the whole, it is a well-constructed document which provides ample guidance to GCSB staff about the process they are to follow when conducting this regulatory function.

SECURITY ASSESSMENTS

30. To understand how the Service and Bureau carry out their activities under OSHAA and obtain a high-level understanding of the security assessments completed, we looked at four case studies:
 - **BlackSky Global LLC (Global-4).**
 - **Mexico Secretariat of National Defence (Painani-1).**
 - **Canon Electronics Inc (CE-SAT-IIB).**
 - **National Reconnaissance Office ((AG2)).**
31. By comparing the way the agencies assessed these payload launch applications we sought to understand how the agencies conduct their national security risk assessments in a variety of contexts.

¹⁰ This can be particularly problematic in some multinational organisation structures which apply various holding companies, trusts and partnerships within their ownership structure.

BlackSky Global LLC (Global-4)¹¹

32. BlackSky Global LLC is a United States company that deploys satellites in order to offer imaging as a service as part of their global intelligence platform. The Global-4 satellite was launched to be part of a BlackSky satellite constellation. The satellites are equipped with a SpaceView-24 imager which can take up to 1000 images per day. The satellite constellation allows BlackSky's customers to monitor and derive insights into world events. BlackSky offers information in close to real time.

Mexico Secretariat of National Defence (Painani-1)¹²

33. The Mexico Secretariat of National Defence (SEDENA) sponsors one university project annually to advance digital imaging technology. The project for 2019 involved the launch of a 3U CubeSat. The satellite was equipped with four 'web-camera' like sensors for remote imaging. The imagery produced would only be made available to SEDENA and students involved in the programme. It was intended that the programme would allow students to conduct digital image processing and software improvement experiments as part of their study.

Canon Electronics Inc (CE-SAT-IIB)¹³

34. Canon Electronics Inc. (CEI) is a Japanese multinational corporation which specialises in manufacturing imaging and optical products such as photocopiers, printers and cameras. CEI began developing satellite technology recently.
35. CE-SAT-IIB is a microsatellite bus system developed using Canon components. It has three on-board cameras each with different resolutions, fields of view and sensitivities. This satellite was intended to operate as a technical demonstration of a microsatellite and takes images of the earth to demonstrate microsatellite capabilities.

National Reconnaissance Office (AG2)¹⁴

36. The National Reconnaissance Office (NRO) is a United States intelligence agency responsible for developing, acquiring, launching and operating signals, imagery and communications satellites. NRO data is used to inform decision-making by national policy makers and military/civil users in the United States and in US partner nations (including New Zealand). The AG-2 launch carries payloads designed, built and operated by the NRO to support the agency's national security mission.

¹¹ New Zealand Space Agency "Permitting Decision Summary: Global-4, BlackSky Global LLC" (18 April 2019) <www.mbie.govt.nz>.

¹² New Zealand Space Agency "Permitting Decision Summary: Painani-1, Mexico Secretariat of National Defence" (18 June 2019) <www.mbie.govt.nz>.

¹³ New Zealand Space Agency "Permitting Decision Summary: CE-SAT-IIB, Canon Electronics Inc" (17 September 2019) <www.mbie.govt.nz>.

¹⁴ New Zealand Space Agency "Permitting Decision Summary: AG-2 National Reconnaissance Office" (11 February 2020) <www.mbie.govt.nz>.

FINDINGS AND RECOMMENDATIONS

Finding one – guidance regarding national security and national interest

37. Two important concepts in OSHAA for granting of a licence or permit are those of national security risk and national interest. Under OSHAA, the Service and Bureau are responsible for advising their Minister when national security risks arise. The NZSA is responsible for advising the Minister for Economic and Regional Development regarding matters to do with New Zealand's national interest.
38. Neither OSHAA nor its associated regulations define national security and internal agency policy does not provide any guidance about the scope of national security for the purposes of assessments the agencies conduct under OSHAA.¹⁵ The agencies are not responsible for the absence of a definition of national security in OSHAA or associated regulations and must work within the legislative parameters set by Parliament. We think, however, there is scope for them to articulate factors or principles within their internal policy and procedures that will guide their assessment of national security risks. The absence of guidance regarding the scope of national security and national interest creates some uncertainty about the agencies' role in the regulatory system. The uncertainty presents three issues:
- applicants will be unclear about the factors against which their application is being assessed with respect to national security risks;
 - it is not clear how the Service and Bureau are distinguishing national security and national interest matters when they make their assessments of OSHAA applications and provide intelligence to the NZSA; and
 - if an applicant was to complain to my Office (eg upon the issuance of a security certificate by the Prime Minister) it would not be readily apparent what standard we would assess the national security risk assessment against.
39. We asked the agencies to indicate what definition of national security they were operating to when conducting national security risk assessments. In their response, the agencies stated that they have not adopted a specific definition of the term but understand it in accordance with its "plain meaning". We think that if its meaning is plain, it should be possible to articulate the concerns and considerations the agencies are typically interested in when undertaking a national security risk assessment.
40. The articulation of factors or principles regarding the way the concept of national security applies in the context of OSHAA could be done at a high level similar to how the matters that will guide the assessment of the national interest have been articulated by the Minister for Economic Development (discussed further at paragraphs 42 and 43). This would have the dual benefits of clearly articulating some relevant factors the agencies should consider as part of the

¹⁵ We discuss below some guidance regarding the concept of national interest that was included in a Cabinet Paper by then Minister for Economic Development, Hon Phil Twyford.

national security risk assessment while giving flexibility to the agencies about what specific risks are relevant.

41. As noted above, the Service and Bureau do not have a direct role in advising their Minister about matters associated with the national interest. However, the agencies have, on occasion, identified matters associated with New Zealand’s national interest while conducting a national security risk assessment and provided relevant intelligence to the NZSA in accordance with their intelligence collection and assessment function (s 10 ISA). This is an appropriate action for the Service and Bureau to take and allows the NZSA to advise the Minister for Economic and Regional Development about matters relevant to his role under OSHAA.
42. The NZSA published a Cabinet Paper which details information about the role of the Minister for Economic and Regional Development under OSHAA including discussion of the matters that would guide the assessment of whether an application is in the national interest. That paper outlines the following principles to guide the assessment of the national interest:¹⁶
- Responsibility – space activities from New Zealand should promote an orbital environment where users avoid causing harm or interference within the activities of others.
 - Sustainability – space activities from New Zealand should preserve the benefits of space for future generations through adherence to sustainable benefits.
 - Safety – space activities from New Zealand should not jeopardise the safety of people on the ground or in space.
 - Space activities authorised by the Government should reflect New Zealand’s values and interests, and align with broader policy settings.
43. The Cabinet Paper also details what types of matters would not be in New Zealand’s national interest:¹⁷
- Payloads that contribute to nuclear weapons programmes or capabilities.
 - Payloads that have the intended use of harming, interfering with or destroying other spacecraft or systems on Earth.
 - Payloads with the intended end use of supporting or enabling specific defence, security or intelligence operations contrary to government policy.
 - Payloads where the intended end use is likely to cause serious or irreversible harm to the environment.

¹⁶ Minister for Economic Development “Approach to payload assessments under the Outer Space and High-altitude Activities Act” (25 November 2019) at [9].

¹⁷ Minister for Economic Development “Approach to payload assessments under the Outer Space and High-altitude Activities Act” (25 November 2019) at [11].

44. We think the Service and Bureau's policy could be improved by including reference to the principles outlined above, so that staff are aware of the matters the NZSA is interested in when conducting its role under OSHAA and can share relevant intelligence.

Recommendation one

45. We recommend:
- The Service and Bureau develop principles or factors in policy and/or procedure regarding the way the concept of national security applies in the context of OSHAA. We would expect the development of such principles (and others noted below) would be best achieved in coordination with other agencies who have a role under OSHAA.
 - The Service and Bureau should include reference the principles for determining whether something is in New Zealand's national interest (listed above at paragraphs 42 and 43) in their internal guidance.

Finding two – guidance on assessing risk

46. From our discussions with the agencies, we understand there are three possible outcomes that can result from a national security risk assessment:
- no national security risk is identified;
 - a national security risk is identified; and
 - a significant national security risk is identified.
47. Which of these outcomes applies in any given case is a product of the level of national security risk that arises from the assessment the agencies conduct. After reviewing the NZSIS SOP, GCSB SOP and SARAG TOR, it is not clear what framework the agencies apply to assess national security risk when conducting these assessments and how the assessed risk translates to a particular outcome under OSHAA.
48. In one case study we reviewed, the agencies concluded there was a "remote possibility" of harm to New Zealand's national security. However, this risk did not reach the threshold for the agencies to raise a national security risk with the Minister. It is clear from the Briefing Note to the Minister the agencies adopted some threshold for determining whether to report a national security risk to the Minister. What is less clear is what decision-making framework the agencies applied when making this assessment and how that assessment translated into a decision not to advise the Minister that a national security risk arose in relation to the application. Articulating a risk assessment framework will ensure decisions are made about risk against a consistent, objective, reference point in all national security risk assessments.

Recommendation two

49. We recommend agency policy includes guidance for staff conducting a national security risk assessment regarding the framework staff should apply to assess national security risk when

conducting these assessments and how the assessed risk translates to a particular outcome under OSHAA.

Finding three - NZSIS guidance

50. The NZSIS SOP has not been finalised and remains in draft form. Relative to the GCSB SOP, it contains limited guidance about the way in which Service staff are expected to undertake national security risk assessments. Given the regulatory role the Service performs in relation to OSHAA, we consider it is important the Service have in place clear, finalised, guidance about how its staff will perform national security risk assessments.

Recommendation three

51. We recommend the Service develop and finalise policy or procedure for its OSHAA functions and consider including the following, in particular, as part of that process:¹⁸

- What national security risks (at a high level) the Service is interested in.
- The extent to which research should be conducted (eg do Service staff need to identify the ultimate beneficial owner(s) of each of the entities involved in the launch?).
- The risk assessment framework that applies to assessing national security risks with a focus on what amounts to a “national security risk” and a “significant risk to national security” (which can trigger the Prime Minister’s issuance of a security certificate).
- Whether there is a peer review or sign-off process for any assessment conducted and what that process is.

52. From what we have seen of the way the Service carries out its national security risk assessments, some of these factors are already considered in practice. This recommendation could be given effect by finalising the SOP with additional guidance incorporated, or by some other combination of new or revised policy and/or procedure.

Finding four - public information on regulatory roles

53. Unlike the agencies’ intelligence collection and analysis function under ISA, much of which occurs in a covert fashion, the agencies’ regulatory function under OSHAA is capable of greater transparency and public discussion.

54. The Treasury has a role in overseeing and administering regulatory activities by government and has published updated guidance regarding government expectations for good regulatory practice (Guidelines).¹⁹ The Guidelines state the government expects regulatory agencies to:²⁰

¹⁸ The structure and content in the GCSB SOP could be a useful comparator for any such review.

¹⁹ Treasury “Government Expectations for Good Regulatory Practice” (April 2017).

²⁰ Treasury “Government Expectations for Good Regulatory Practice” (April 2017) at 5.

- “provide accessible, timely information and support to help regulated parties understand and meet their regulatory obligations”; and
- “maintain and publish up-to-date information about their regulatory decision-making processes, including timelines and the information or principles that inform their regulatory decisions”.

55. The advice the agencies provide following a national security risk assessment could potentially have an adverse effect on an applicant under OSHAA. As OSHAA is silent about the way in which the agencies will conduct their assessments and because the agencies have not published any guidance about their role, applicants currently have no information about how a national security risk assessment will be conducted. Given the potential for adverse consequences for applicants, we think natural justice and good regulatory practice require the agencies to publish guidance about their approach to national security risk assessments.

Recommendation four

56. We recommend the agencies publish information about their role under OSHAA, the process by which they will conduct their regulatory functions and the role of SARAG in the process.

Copy to:

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

Minister for Economic and Regional Development.

New Zealand Space Agency