



## OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

### International relations: the Inspector-General's process under s 188 ISA for finalising a public inquiry report

The law requires the Inspector-General to make an Inquiry report publicly available on the internet as soon as practicable after completing the report.<sup>1</sup>

The obligation is subject to the legal duty on the Inspector-General, when making the report publicly available, not to **disclose** certain types of information including information **likely to harm** certain identified New Zealand interests.<sup>2</sup>

The relevant harms and New Zealand interests in s 188 of the Intelligence and Security Act 2017 (ISA) mostly reflect those protected by withholding grounds in s 6 of the Official Information Act 1982.

The obligation in s 188 ISA encompasses but goes beyond "classified" material. As a result, judgement is required as to whether s 188(2) is engaged. The Inspector-General must undertake a careful process of evaluation to determine whether any particular information falls within s 188(2).

In some cases it will be necessary to consider whether public disclosures in the report might affect New Zealand's international relations.

This document sets out the Inspector-General's process for publishing within the requirements of s 188(2) and the complementary responsibilities on the Inspector-General and relevant New Zealand government agencies<sup>3</sup> to assist the Inspector-General to meet his or her obligation where international relations might be engaged.

The process and guiding principles will ensure proper consideration can be given to the harms in s 188(2) and will ensure there is a predictable, fair and efficient route to finalising a public Inquiry report.

A handwritten signature in blue ink, appearing to read 'Brendan Horsley'.

Brendan Horsley  
**Inspector-General of Intelligence and Security**  
November 2020

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<sup>1</sup> ISA s 188(1).

<sup>2</sup> ISA s 188(2).

<sup>3</sup> Inspector-General's jurisdiction only covers the New Zealand intelligence and security agencies – the Government Communications Security Bureau (GCSB) and the New Zealand Security Intelligence Service (NZSIS). However, other government agencies may have an interest in the report and partner consultation process given their roles, especially the Ministry of Foreign Affairs and Trade (MFAT), the Department of Prime Minister and Cabinet (DPMC), and others on a case by case basis.

## Guiding principles

- a. The Inspector-General must carry out his or her role in a manner that protects and preserves the **independence** of the office.
- b. The Inspector-General is obliged by law to publish an Inquiry report<sup>4</sup> but must not disclose classified information<sup>5</sup> and also must not disclose information that falls within s 188(2) ISA, Examples of information which commonly has the potential to cause prejudice includes disclosure of:
  - secret or sensitive sources of foreign partner intelligence;
  - specific operational capabilities;
  - classified information sourced from partner material; and/or
  - information provided on an understanding of confidence from a foreign partner.
- c. The prohibition in s 188(2) concerns “**disclosures**” made by the Inspector-General, ie, where the Inspector-General is herself or himself disclosing information to the public.
- d. In the interests of transparency and public accountability the Inspector-General is committed to publishing a **meaningful account** of each Inquiry.
- e. It is for the Inspector-General, after consulting the Directors-General of the intelligence agencies, to determine the classification of a report.<sup>6</sup> The Inspector-General has the authority to regulate his or her Inquiry procedure in the manner he or she thinks fit.<sup>7</sup> This includes the process for finalising a public report.
- f. The Inspector-General’s assessment of what can be published in a report is subject to a direction from the Minister responsible for the intelligence agencies (the Minister). The IGIS must act in accordance with any certificate issued by the Minister that certifies that a relevant New Zealand interest would be likely to be prejudiced if the Inspector-General makes a particular disclosure.<sup>8</sup>
- g. The Inspector-General and the New Zealand agencies should always use best endeavours to ensure that issues around publication are resolved without the need for the agencies to seek a ministerial certificate.
- h. The Inspector-General will consult with the agencies if it reasonably appears that s 188(2) may be engaged by a proposed public report. The Inspector-General will provide timely and adequate opportunities for the agencies to give their views on what can be lawfully and properly published.
- i. The protected interests of New Zealand under s 188(2) may be influenced by concerns of foreign partners. In certain cases the agencies may need to properly understand the foreign partner’s concern and may need to consult with, or advise, a foreign partner on the terms of a proposed disclosure by the Inspector-General prior to the report being finalised for publication. In this

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<sup>4</sup> ISA s 188(1).

<sup>5</sup> Including quoting or summarising it in a report with a lower security classification: ISA s 185(7).

<sup>6</sup> ISA s 185(6), subject to the obligation in s 185(7).

<sup>7</sup> ISA s 176(5).

<sup>8</sup> ISA 218(3).

situation the Inspector-General will ensure that there is sufficient time, prior to finalising the report and prior to publication, for the foreign partner's concern to be properly assessed and managed.

## **Responsibilities on the Inspector-General in finalising a draft public Inquiry report**

- j. In publishing an Inquiry report the Inspector-General must act lawfully. The Inspector-General will not and must not disclose information contrary to s 188(2) or include quoted or summarised classified matters at a lower classification contrary to s 185(7). Within the bounds of the law the Inspector-General will seek to enhance the transparency of the Inspector-General's own work and that of the intelligence agencies subject to the inquiry by publishing reports with sufficient supporting details so that they are meaningful accounts of the matter.
- k. In deciding whether a matter in a draft public Inquiry report constitutes a "disclosure" the Inspector-General will consider all the <sup>9</sup>relevant circumstances. In particular, the Inspector-General will consider whether the information is already in the public domain through authoritative and reliable sources. Reference to authoritative information already in the public domain is unlikely to constitute a "disclosure by" the Inspector-General.
- l. The Inspector-General will share a proposed public Inquiry report with the agencies in sufficient time for them to identify, or contribute to the assessment of whether there are, any international relations interests protected by s 188(2). The Inspector-General may directly consult the Ministry of Foreign Affairs and Trade (MFAT) about the likely implications of a proposed report, or may permit the intelligence agencies to share the proposed report with MFAT for this purpose.
- m. The Inspector-General recognises that suitable timeframes and broader consultation procedures are likely to be important procedural safeguards for both the agencies and for the Inspector-General in considering whether international relations may be prejudiced.
- n. On the request of a relevant New Zealand government agency the Inspector-General will consider whether it would be reasonable for the agency to provide a foreign partner with an account of, section from, or copy of the Inspector-General's draft public Inquiry report.<sup>10</sup> The Inspector-General will allow this on a case by case basis where sharing the report, or part of it, in advance is likely to materially assist the agency to better understand the partner's concern, and/or where it appears it might help to determine the application of s 188(2). The Inspector-General will allow adequate time for this process to occur, taking into account timeframes identified by the New Zealand agencies as necessary.
- o. It is unlikely to be consistent with the independence of the Inspector-General's role, and the appearance of independence, for the Inspector-General to engage directly with the agencies' foreign partners on any requested changes to a draft report. The Inspector-General will consider

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<sup>9</sup> There are relevant precedents for this approach. See for example, the Government Inquiry into Operation Burnham *Procedural protocol for review of classified information / claims to withhold information from disclosure* (20 February 2019). Link to this *Protocol* available <https://www.igis.govt.nz/assets/Uploads/Govt-Inquiry-Op-Burnham-Procedural-Protocol.pdf>.

<sup>10</sup> ISA s 191(1)(c).

requests for changes made by New Zealand agencies where they make the case that New Zealand's interests under s 188(2) are at risk.

## **Responsibilities on the New Zealand agencies with respect to draft public Inquiry reports**

### ***Identify issues early***

- q. To assist the Inspector-General meet his or her obligations, agencies should take the earliest practicable opportunity to inform the Inspector-General that they consider sharing a draft public report (or part of it) with foreign partners, or consultation with them, is likely to be necessary. Early notification will allow the Inspector-General to take the particular issue into account in the overall process of report planning and drafting.
- r. Generally, the agencies will be 'on notice' for this possibility even prior to their receipt of a draft report due to their participation in the Inquiry and/or the specific terms of reference for an Inquiry. The agencies will in most cases be able to raise potential issues with their partners at an early stage, well before a draft public report has been prepared.

### ***Make the case for why the proposed report should be shared with foreign partners***

- s. The agency should set out in writing the terms on which any foreign partner should be advised of, provided with a copy of, or consulted by the New Zealand agency on specific content of the draft report and the reason for that. Such requests to share the Inspector-General's draft report should be no broader than is necessary.
- t. Where the Inspector-General consents to the agencies sharing part of the draft report with a foreign partner, they must then independently and responsibly assess and determine the concerns of the foreign partner, having regard to factors properly relevant to the assessment under s 188 (or s 185(7) if relevant). The main factors are set out below.

### ***Recognise the independence of the Inspector-General during consultation with foreign partners***

- u. In undertaking any consultation with foreign partners on the Inspector-General's proposed public report and in presenting a view back to the Inspector-General, the agencies should ensure that the process does not itself put improper pressure on the Inspector-General to change parts of the report. To this end, if the need arises, the agencies should explain that the Inspector-General holds an independent statutory oversight office and has the discretion to determine what to publish so long as it is lawful.

### ***Make the case for why New Zealand's interests are at risk under s 188(2)***

- v. After consultation with a foreign partner, if the agencies then seek changes to a proposed public report based on foreign partner interests under s 188(2), the agencies should:

- make the case in writing to the Inspector-General for any changes to the text. This will ensure that the agency’s concern is clearly expressed; the reasoning is sound in terms of s 188(2); and there is a documentary record of the request.
  - identify the specific word(s)/passage(s) of the public report that engage the agency’s concern.
  - explain first, precisely how the passage(s) concerns a matter in s 188(2); and second, for those matters with a “likely” element, whether there is a serious or substantial risk that the harm would eventuate.
- w. A sound case for “harm” or “prejudice” under s 188(2) to New Zealand’s interests would not be made if the agencies were to merely “convey” a foreign partner’s concerns to the Inspector-General.
- x. The agencies should properly consider, as part of their analysis, what relevant material is already authoritatively in the public domain. Questions of classification of material in a draft public report are to be determined according to New Zealand law and principles governing classification. Particular scrutiny must be given to a claim that information already authoritatively in the public domain should be redacted or is classified.

## **Factors relevant to assessments under s 188(2) ISA**

Relevant concerns for the Inspector-General in all matters of proposed publication are: accuracy of the factual account; the requirements of natural justice; and the appropriate classification of reports. The Inspector-General, after consulting the intelligence and security agencies, will determine the security classification of his or her report.<sup>11</sup> If the Inspector-General redacts a proposed public report at the request of a New Zealand agency or as a result of a Ministerial certificate the Inspector-General may choose to note on the public report that certain text has been redacted and why.

In assessing requests for redactions to a report on the basis of foreign partner concerns or international relations, the Inspector-General will take account of a wide range of matters including:

- Whether the statement in the report is a “disclosure”, or whether it is more in the nature of a comment on or cited reference to pre-published information.
- Section 188(2) should be interpreted to reflect the established New Zealand approach under s 6 of the Official Information Act 1982 (OIA), to the extent it is relevant.
- The implications of other sources of law or legal guidance as relevant (eg the New Zealand Bill of Rights; case law; Ombudsman’s Casenotes) or principle.
- That New Zealand agencies act in the best interests of the New Zealand government, and that international partnerships are of significant value to New Zealand but are such that each partner acts in their best interests and partners expect to be able to disagree on specific matters.
- Natural justice and fairness to Inquiry participants and interested parties.
- Timeliness and efficiency in publishing a report, and the nature and complexity of issues covered by the report.
- Any public interest factor or any other relevant matters brought to her/his attention.

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<sup>11</sup> ISA 185(6).