

Departmental Disclosure Statement

Crimes (Countering Foreign Interference) Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

17 October 2024.

Contents

Contents.....2

Part One: General Policy Statement.....3

Part Two: Background Material and Policy Information5

Part Three: Testing of Legislative Content.....7

Part Four: Significant Legislative Features 10

Part One: General Policy Statement

The Crimes (Countering Foreign Interference) Amendment Bill strengthens New Zealand's criminal law to better prevent and respond to foreign interference targeting New Zealand.

Foreign interference is an act by a foreign state, often through a proxy, that is intended to disrupt or subvert New Zealand's national interests by covert, deceptive, corruptive, or coercive means.

Interference activity can take many forms. For example, a foreign state can work to suppress the views or peaceful assembly rights of individuals or communities in New Zealand that it perceives as challenging its authority. Foreign-state actors can operate to covertly influence or manipulate government decision-making or electoral processes. State-sponsored cyber-attacks can also enable foreign interference and espionage activity, for example through the collection and misuse of sensitive and personal information.

Foreign interference from any source is unacceptable. It is a national security risk, with wide-reaching implications for New Zealand's sovereignty, security, economy, democracy, and for the safety of people in New Zealand.

Many existing offences cover activities that can harm New Zealand interests. These include offences relating to blackmail, threatening behaviour, and misuse of computer systems.

However, none of those general offences are specifically designed to address foreign-state actors, and those who support them, who are undermining core New Zealand interests. Without this update to the criminal law, existing gaps and limitations will continue to be exploited, likely with increased frequency.

The amendments in the Bill take a multi-pronged approach with 3 key features.

First, the Bill introduces new offences into the Crimes Act 1961 as follows:

- a foreign interference offence to criminalise covert, deceptive, corruptive, or coercive conduct that is undertaken for, or on behalf of, a foreign power to intentionally or recklessly harm a wide range of core New Zealand interests, including security or defence, the conduct of elections, officials' decision-making capability, and the exercise of human rights in New Zealand;
- a new offence, which complements the foreign interference offence, that applies to anyone who commits an imprisonable offence to intentionally or recklessly benefit a foreign power in specified ways;
- new offences to address gaps related to criminal liability for the offences of espionage, treason, and inciting to mutiny. The new offences ensure that, if the relevant requirements are met, a person who owes allegiance to the Sovereign in right of New Zealand can be held liable as a party if they assist others to do or omit acts within or outside New Zealand that would constitute treason, inciting to mutiny, or espionage.

These changes, and a related change to an existing warrantless search power contained in the Search and Surveillance Act 2012, also provide authorities with access to commensurate powers to investigate such offending.

Second, the Bill sets out circumstances in which a person owes allegiance to the Sovereign in right of New Zealand for the purposes of the Crimes Act 1961. This is relevant to a small number of offences under the Crimes Act 1961, including espionage and, while it is not an exhaustive code of the law on owing allegiance, it will provide greater prosecution certainty in charging people for those offences.

Third, the Bill strengthens accountability for unauthorised disclosure of government information by:

- ensuring that existing offences relating to wrongful communication, retention, or copying of information cover information that is held by an expanded list of public bodies; and
- making it explicit that sharing military tactics, techniques, and procedures is covered by the offences; and
- ensuring that information that was, but is no longer, held by one of the listed public bodies is covered by the offences.

These interrelated and complementary amendments to the Crimes Act 1961 will address gaps in the existing criminal law and provide a means to better hold individuals to account for engaging in interference activity intended to harm New Zealand interests.

Legislation alone cannot prevent foreign interference. However, the benefit of these new offences extends beyond the criminal justice system and enhances New Zealand's overall ability to respond.

Foreign interference and espionage are core issues in New Zealand's National Security Strategy 2023-2028. Therefore, it also is important to recognise that this Bill is only one part of a wider response to foreign interference, which includes government agencies working with local government, business, academia, elected officials, and communities to build resilience to foreign interference threats.

This combination of stronger sanctions and increased likelihood of detection and prosecution will protect New Zealand and our communities from foreign interference and deter future malign activity. The Bill demonstrates that this country is serious about defending its sovereignty from foreign-state activity that harms our interests and undermines our way of life.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p><i>New Zealand's National Security Strategy 2023-2028</i>, New Zealand Government, 2023, DPMC website: https://www.dPMC.govt.nz/our-programmes/national-security/aotearoa-national-security-strategy</p> <p><i>2023 National Security Intelligence Priorities</i>, New Zealand Government, 2023, DPMC website: https://www.dPMC.govt.nz/our-programmes/national-security/national-security-intelligence-priorities</p> <p><i>New Zealand's Security Threat Environment 2023</i>, New Zealand Security Intelligence Service, 2023, NZSIS website: https://www.nzsIs.govt.nz/assets/NZSIS-Documents/New-Zealands-Security-Threat-Environment-2023.pdf</p> <p><i>New Zealand's Security Threat Environment 2024</i>, New Zealand Security Intelligence Service, 2024, NZSIS website: https://www.nzsIs.govt.nz/assets/NZSIS-Documents/New-Zealands-Security-Threat-Environment-2024.pdf</p> <p><i>Let's Talk About Our National Security: National Security Long-term Insights Briefing</i>, Department of the Prime Minister and Cabinet, March 2023, DPMC website: https://www.dPMC.govt.nz/our-programmes/national-security/national-security-long-term-insights-briefing</p> <p><i>2023 National Security Public Survey Report</i>, Department of the Prime Minister and Cabinet, 2023, DPMC website: https://www.dPMC.govt.nz/our-programmes/national-security/national-security-long-term-insights-briefing/2023-national</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
--	-----------

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p><i>Regulatory Impact Statement: Criminal justice proposals to counter foreign interference targeting New Zealand</i>, 2 May 2024, Ministry of Justice Website: https://www.justice.govt.nz/justice-sector-policy/regulatory-stewardship/regulatory-impact-assessments/</p> <p>Some content in the regulatory impact statement has been withheld in accordance with withholding grounds under the Official Information Act 1982.</p>	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
---	-----------

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
Analysis on the potential costs and benefits are available in the Regulatory Impact Statement. The cost and benefit analysis begins at page 33 of the Regulatory Impact Statement which can be found on the Ministry of Justice website: https://www.justice.govt.nz/justice-sector-policy/regulatory-stewardship/regulatory-impact-assessments/	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>It is difficult to assess the likely deterrent effect of the new offences in the Bill, particularly as it amends domestic law, but is intended to also have a cross-jurisdictional effect. However, the extent to which contraventions of the law occur and are detected will affect the costs to the Crown in taking enforcement action and ultimately prosecuting the new offences. If foreign states are deterred by the threat of prosecutions, this will have significant benefits in protecting core New Zealand interests and will not result in additional prosecution costs.</p> <p>Overall, it is difficult to assess the relationship between the actions of the regulators and potential commission of foreign interference offences as this is not comparable with typical regulatory systems.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
--

The Ministry of Justice analysed the Bill and did not identify any international obligations that conflict with the policies contained in the Bill.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Implications for Māori and the Crown's obligations under Te Tiriti o Waitangi in relation to the policy being given effect by this Bill was considered as part of the analysis in the Regulatory Impact Statement. Details are set out at page 20 of the Regulatory Impact Statement, which can be found on the Ministry of Justice website: https://www.justice.govt.nz/justice-sector-policy/regulatory-stewardship/regulatory-impact-assessments/
--

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
---	------------

The Attorney-General's advice will be available on the Ministry of Justice's website upon introduction of the Bill. This will be accessible on the Ministry's website: https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/the-bill-of-rights-act/compliance-reports/
--

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
--	--

(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
--	------------

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
---	------------

The Bill creates new offences:

- | |
|---|
| <ul style="list-style-type: none">• a foreign interference offence• an offence that applies to anyone who commits an imprisonable offence to benefit a foreign power, and• new offences to address gaps related to criminal liability for the offences of espionage, treason, and incitement to mutiny. |
|---|

The first two offences above are category 4 offences under the Criminal Procedure Act 2011. This will mean that if the case proceeds to trial, the trial will generally be a jury trial in the High Court.
--

3.4.1. Was the Ministry of Justice consulted about these provisions?	NO
---	-----------

The provisions were developed in the Ministry of Justice so no separate consultation was necessary.

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO
---	-----------

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Privacy Commissioner was consulted as part of the Bill's departmental consultation process. The Commissioner provided the following comment:</p> <p><i>The proposed new foreign interference offences are very broad in scope and create an ability for Police to use search and surveillance powers in relation to activities that may not currently be subject to such powers. Given the privacy implications of such search and surveillance powers, I have concerns about whether the proposed new offences are appropriately targeted to address harm and to avoid unreasonably limiting the right to privacy.</i></p> <p>The Bill contains several protective elements to ensure that the new offences are targeted, and that relevant investigations and prosecutions are appropriate and in the public interest.</p> <p>The new offences are designed to only target harmful foreign-interference activity or strengthen existing criminal sanctions. For example, to ensure that only people who commit foreign interference are captured, the new foreign interference offence does not criminalise the activities of people who:</p> <ul style="list-style-type: none"> • are not acting for a foreign state • do not know, or have no reasonable way of knowing, that they are being used by a foreign state to undertake foreign interference against New Zealand, or • are acting for a foreign state in an open, transparent, and lawful manner. <p>The limits on the use of police powers are described at 4.9. The safeguard related to proceedings is described at 4.6.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>Targeted engagement with a small number of representatives of ethnic and faith-based communities was undertaken during the policy development stage. This engagement was intended to identify communities' experiences with foreign interference in New Zealand.</p> <p>These discussions highlighted the need to ensure communities can participate in public discussions about foreign interference safely, without fear of retribution (or other interference/influence) from foreign states. The discussions also identified a risk that raising these issues may contribute to some ethnic and faith-based communities being negatively targeted by other New Zealanders due to their cultural or familial ties to named states that undertake foreign interference activity. This harm can be exacerbated by the spread of disinformation about the communities or disinformation about the policy contained in the Bill.</p> <p>Beyond these discussions, the policy in the Bill was not consulted externally due to the sensitive nature of the work involved. It is expected that public consultation will take place at the Select Committee stage.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
The Ministry of Justice has worked closely with relevant agencies to ensure that the provisions in the Bill are workable and can be operationalised.	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
---	----

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
---	----

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
--	----

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
<p>A key element of the new foreign interference offence is that a person must be engaging in activity “for, or on behalf of, a foreign power”.</p> <p>The offence excludes activities that constitute the lawful performance of a person’s functions or duties as an employee, contractor, authorised representative, or agent of the Government of New Zealand from this definition. This is to ensure that when a New Zealand officer/official is working in collaboration with a foreign power and the safety or security of a person who may be engaging in malign conduct against New Zealand is impacted, the officers/officials are not inadvertently captured by the scope of the offence.</p>	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>Attorney-General consent to proceedings</p> <p>The new foreign interference offence and the committing an imprisonable offence to benefit a foreign power offence require the Attorney-General to consent to proceedings. This is similar to the existing espionage offence and wrongful communication of official and classified information offences.</p> <p>The approach is in line with the Solicitor-General's Prosecution Guidelines¹ as the offences involve matters of national security and foreign relations. This safeguard helps to protect individuals from potential punishment by providing an extra check in the criminal justice process.</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p>Police use of an existing warrantless search power</p> <p>To support the enforcement of the two new foreign interference-related offences, the Bill enables the New Zealand Police to use an existing warrantless search power contained in section 25 of the Search and Surveillance Act 2012. The power enables Police to act swiftly to avoid the loss of key evidence, but is also constrained and can only be exercised if a constable has reasonable grounds to:</p> <ul style="list-style-type: none"> • suspect that one of the new offences has been, is being, or will be committed and that there is great urgency requiring immediate action; and • believe that there is evidence in a place, vehicle, or other thing that relates to the suspected offending. <p>Currently, this power only applies to the offences of espionage and wrongful communication, retention, or copying of classified information. Given the similarities in conduct involved in foreign interference and the scale of potential harms involved, it is appropriate that Police have the same power to obtain evidence of acts against the new offences. Where a warrantless power exists, the courts apply a warrant-preference approach to determine whether there was sufficient time for Police to apply for a warrant.</p>	

¹ <https://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/Solicitor-Generals-Prosecution-Guidelines-20248189315.1.pdf>