

Review of an NZSIS Warning

Public Report

Brendan Horsley

Inspector-General of Intelligence & Security

18 October 2022

Contents

Summary	1
Introduction	2
Timeline of events for warning	2
Was the warning to NZ1 carried out lawfully?	3
Can the NZSIS issue warnings under the Intelligence and Security Act 2017?	3
Ministerial policy statement relating to warnings	3
When will a warning be enforcement?	4
Did the warning issued to NZ1 amount to enforcement?	5
Was the process followed by the NZSIS in issuing the warning appropriate?	6
Procedural requirements	6
Ministerial policy statement relating to warnings	6
NZSIS Standard Operating Procedure relating to warnings	6
Did the warning follow a proper process?	6
Decision to pursue warning	6
Preparation for operation to issue warning	7
NZSIS engagement with other agencies	7
Is the operating framework for warnings fit for purpose?	8
Standard operating procedures (SOP)	9
When to carry out a warning	9
Roles and responsibilities of other agencies regarding NZSIS activities	10
How a warning should be undertaken	10
Transparency of NZSIS' role in relation to warnings	10
Comments on the ISA provisions	11
Conclusion and recommendations	11
NZSIS response to my draft recommendations	12

SUMMARY

1. I have reviewed the actions of the New Zealand Security Intelligence Service (NZSIS or the Service) in warning a New Zealand citizen, named NZ1 in this review against carrying out foreign interference activities in New Zealand. The review was initiated following a proactive notification from the NZSIS of the operation. My review has considered the circumstances of the warning to NZ1 and the policy framework for such activities.
2. I accept, as did the previous IGIS, that in principle the NZSIS may deliver a warning, provided it is acting in accordance with its functions and the warning does not amount to enforcement in the circumstances. Under s 16 of the Intelligence and Security Act 2017 (ISA) it is not the function of the NZSIS to “enforce measures for national security”, subject to exceptions that do not apply to the warning to NZ1. My review was carried out to examine the practical application of the constraints on the Service’s ability to warn. I consider this an important matter given the Service’s use of what it calls “disruption” activities, of which warnings are an example.
3. The planning of the warning to NZ1 was reasonably thorough and recognised the uniqueness of the operation. The NZSIS took into account relevant factors to ensure the warning was carried out lawfully and properly. The warning itself did not convey the impression of enforcement.
4. I found some deficiencies in planning in relation to consultation with another New Zealand government agency which had an interest in the operation. The nature of the consultation limited the Service’s ability to be well informed on the risks involved from the other agency’s perspective. The risks were mitigated somewhat by the way in which the operation was carried out, but I consider that similar operations in future would be better served by a more formal and robust process. I recommend the NZSIS work to develop such a process with relevant agencies.
5. Following on from this recommendation, I have also identified a need for the NZSIS to develop shared operating procedures with the NZ Police on their respective roles in relation to warnings. The NZSIS’s relationship with the NZ Police is particularly important and warrants this extra level of understanding.
6. I considered the adequacy of the NZSIS’ policies and procedures in relation to warnings. NZSIS is reviewing its current policy guidance and brought this to my attention in August 2021. I agree a review is appropriate and recommend a new policy be developed. A dedicated policy is appropriate when the NZSIS is seeking to carry out more such activities. I have identified issues I think should be addressed in such a policy. I have also observed that the NZSIS could provide information on its website about its role in relation to warnings.

INTRODUCTION

7. This is a review under section 158(f)(ii) of the Intelligence and Security Act 2017 in relation to the NZSIS's issuing of a warning to a target. The review considers the operation itself as well as the wider compliance systems that the NZSIS has in place for warnings, with a particular focus on risk management and legal compliance generally.
8. The NZSIS responsibly notified my office of the warning at issue having been conducted in mid-2021. In referring the matter to my office the NZSIS advised me that it had identified a need to update their internal policies around issuing warnings. In late 2021 I initiated my review into the matter. The review was included in my work programme for 2022-23.
9. This is a public version of the review report with relevant classified information removed. A classified report has also been provided to the NZSIS. The recommendations are the same in both reports.

TIMELINE OF EVENTS FOR WARNING

10. Prior to the warning at issue, the NZSIS was investigating a New Zealand citizen (NZ1) whom it assessed to be working on behalf of a foreign state. NZ1 was assessed to be collecting intelligence against New Zealand-based people, particularly those with a link to the foreign country. NZSIS assessed that NZ1 used overt and covert means to collect identifying information about these individuals and pass it to the foreign state.
11. In late 2020 the NZSIS considered several options to address NZ1's activities.
12. The NZSIS decided to warn NZ1, while at a meeting with a foreign government official, that it was aware NZ1 was acting on behalf of a foreign state and should stop.
13. As the warning would be witnessed by foreign state officials, NZSIS recognised that it should consult with other domestic government agencies. NZSIS officers briefed these other agencies separately, with different approaches taken for each.
14. The Service prepared an Operational Proposal and Risk Assessment (OPRA), which detailed the proposal to warn NZ1 in a public place. The OPRA contained the form of words of the warning:

[NZ1]

My name is [xxx] from NZSIS. You are not being detained.

Your actions are foreign interference on behalf of the [foreign country]. You are a threat to New Zealand's national security.

You need to stop this foreign interference. We know what you are doing and so do others.

You have been in the media recently and our annual report.

Enjoy your [dinner/coffee/drinks/meeting].

15. The NZSIS officer delivering the warning was to present ID and, when referring to the media and NZSIS annual report, hand copies to NZ1.
16. NZSIS legal advisers were consulted on the proposed warning, reviewed the OPRA and approved the form of words of the warning.

17. The OPRA was approved by a NZSIS manager. She noted that other senior officials had been briefed on and endorsed the plan.
18. An NZSIS officer delivered the warning in mid-2021 at a café while NZ1 was meeting with a foreign government official. As planned, the officer supplied NZ1 with the Service's 2020 annual report and a New Zealand Herald article about them and their activities. The officer delivered the warning as scripted, did not engage with the foreign government official, and left the premises after delivering the warning.
19. Following the delivery of the warning NZSIS also debriefed other government agencies on the operation.

WAS THE WARNING TO NZ1 CARRIED OUT LAWFULLY?

Can the NZSIS issue warnings under the Intelligence and Security Act 2017?

20. The word warning is not a technical or precisely defined term, but is intended to capture a statement of advice by an NZSIS officer which is designed to deter a person from certain conduct or would reasonably be understood as having that purpose. Warnings in the NZSIS context are quite different from those issued by the Police or regulatory agencies due to the law enforcement roles of those agencies.
21. It is important to note that s 16 of the Intelligence and Security Act states it is not a function of the NZSIS (or GCSB) *"to enforce measures for national security"*. That is distinct from stating that the agencies do not have a function to enforce the law, which would read as a more straightforward differentiation from the function of the Police. The agencies' principal statutory objectives include the protection of New Zealand's national security. Many of their activities are measures for national security. Section 16 is therefore a limitation on how the agencies carry out activities that are within their functions, not simply a demarcation between their functions and those of other state agencies. The limitation is that although the agencies can carry out measures for national security, they cannot do so in a manner that amounts to enforcement.
22. The ability of the NZSIS to issue warnings has been considered in the past by this office. NZSIS is also guided by a Crown Law opinion on the matter. While Crown Law and the previous IGIS considered the legality of warnings in the context of the now repealed New Zealand Security Intelligence Service Act 1969, I agree with the previous IGIS's view that the issues are substantively the same under the provisions of the Intelligence and Security Act 2017.
23. I accept, as did the previous IGIS, that under the Intelligence and Security Act the NZSIS can deliver a warning, provided it is in accordance with its functions and does not amount to enforcement of measures for national security. As the previous IGIS noted, the fundamental question is how far the NZSIS can go in making statements designed to affect people's behaviour given it has no enforcement function.
24. The Service also argue that it is authorised by the Minister to share information with the subjects of warnings. Section 10 of the Intelligence and Security Act sets out that the NZSIS' functions include the sharing of intelligence with third parties who are authorised by the Minister. There is a current Ministerial authorisation that authorises the NZSIS to share intelligence with persons and entities for the purpose of *"mitigating actual, suspected or potential threats to the security of New Zealand or any other country"*.

Ministerial policy statement relating to warnings

25. Section 206 of the Intelligence and Security Act provides for ministerial policy statements to be issued by the Minister responsible for NZSIS to provide guidance in relation to a number of matters. Section 209 requires the Director-General of the NZSIS to have regard to a relevant ministerial policy statement in making any decision or taking any action.

26. The Ministerial Policy Statement “Collecting human intelligence” contains relevant guidance on the issuing of warnings. It states at [32]:

It may be acceptable, in some cases, for declared employees to make a statement to persons they engage with that is designed, intended, or would reasonably be understood to be intended, to deter a person from a specific course of conduct. For example, an employee may warn that plans to travel to participate in politically motivated violence may be dangerous, illegal, and may result in the government taking action to prevent travel. Employees must take care to ensure that a warning does not constitute enforcement action, which is not a function of GCSB and NZSIS (Section 16 of the Act).

Where such action is contemplated, GCSB and NZSIS employees should consider whether the warning would be more appropriately delivered by the Police or another agency with enforcement functions.

Internal policies should require legal advice and any other advice to be sought where appropriate.

When will a warning be enforcement?

27. When a warning will constitute enforcement will depend on the circumstances. As the previous IGIS noted in her report:

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.

28. I consider that “enforce” can be interpreted in the usual way as *“the use of, or threat of using, lawfully available powers or processes to compel the person to act in a certain way”*.
29. A warning by the NZSIS therefore must be delivered in a way that does not leave scope for the recipient of the warning to consider that their rights are infringed upon or that the NZSIS is holding itself out as having powers of compulsory questioning, arrest, detention, charge, prosecution or other sanction. The actions cannot be akin to warnings that are given by the New Zealand Police or a regulatory enforcement agency, with the express or implied prospect of coercive powers being applied if the warning is not heeded.
30. A warning by NZSIS also must not unjustifiably limit civil rights such as freedom of expression or association or amount to unlawful conduct (such as coercion or blackmail). Its wording must be clear both as to any conduct that the NZSIS is seeking to discourage and the potential risks for the person being warned. There are also fairness and propriety concerns that may arise, particularly where there are potential impacts on the target from the warning, such as for their employment or community relationships.
31. Additionally, where the NZSIS is overtly exercising warranted powers such as entry and search of a premise, care should be taken if a warning is to be given at the same time. Such a warning can easily be conflated with enforcement given the coercive nature of the entry, search, and potential seizure activity.
32. The circumstances of the person receiving the warning is a highly relevant consideration in determining whether a warning amounts to enforcement. For example, issuing a warning in a counter-espionage context may be substantially different to a counter-terrorism context, with the former likely involving more sophisticated actors who have a better understanding of the role of the NZSIS and counter-intelligence generally, whereas a counter-terrorism target may come from a wholly different background.

Factors such as mental health, language, age, or cultural background¹ may all play a role in giving the subject of the warning the impression that the NZSIS is carrying out an enforcement role or limiting their rights.

Did the warning issued to NZ1 amount to enforcement?

33. I consider that the warning issued to NZ1 did not amount to enforcement in the circumstances. I see the following factors as being relevant to this conclusion:
 - 33.1. NZ1 was familiar with the role of NZSIS in New Zealand.
 - 33.2. The warning was explicit about NZ1 not being detained and there were no express or implied threats of enforcement or possible further action against them. The wording clearly conveyed a desire to deter behavior within the remit of the NZSIS, i.e. countering foreign interference and protecting New Zealand's national security, without any substantive implications as to criminal offending.
 - 33.3. The delivery of the warning in a public setting, while potentially confronting and raising the risk of being overheard, did not give an impression of a formal process where the NZSIS was using powers to deter NZ1. No police officer was present.
 - 33.4. The duration of the interaction between the NZSIS officer and NZ1 was very short, approximately 30 seconds, and there was no discussion between the parties. This was consistent with giving an impression of a message being delivered, without any implication that NZ1 was being detained or impeded.
 - 33.5. While espionage is an offence under section 78 of the Crimes Act 1961, no reference was made to espionage or criminal offending in the warning. It is apparent from the planning process that no thought was given by the NZSIS to offending under section 78.
34. A contrary factor is the possibility that NZ1 might have understood an approach from the NZSIS in New Zealand as akin to an approach from a foreign government intelligence agency, and therefore inherently threatening and coercive. I think this was likely mitigated, at least in NZ1's case, by their knowledge of the New Zealand environment.
35. I have also considered whether the fact that the foreign official was present unjustifiably infringed on NZ1's right to freedom of association.² Given the wording of the warning and its specific reference to foreign interference, with no implication of detention or being charged, I do not think that it was an unreasonable limit on this right. It would have been reasonably clear that the limit on their freedom of association with the foreign official was in relation to associating with them for the purpose of foreign interference, rather than general association.
36. I note that giving a warning in a public setting should be approached with care, as it can heighten the risk of interfering with the recipient's rights, particularly when done amongst their community. There is a risk of unintended consequences from someone overhearing the interaction, which could give rise to concerns about fairness and propriety.
37. While not determinative, one aspect of the wording of the warning raised a minor concern, namely the reference to "others" (besides NZSIS) knowing about NZ1's foreign interference. While a statement of

¹ I note that overseas equivalents of the NZSIS can have substantially different powers to disrupt and enforce, therefore a person's understanding may be influenced by this background

² Section 17 of the New Zealand Bill of Rights Act 1990

fact, there was potential for this to be taken as a threat that an enforcement agency such as the Police was aware and might take action. This was mitigated to an extent, as noted above, by avoiding any reference to espionage or any other crime. Nonetheless, the reference to others did not appear necessary for the purpose of the warning.

WAS THE PROCESS FOLLOWED BY THE NZSIS IN ISSUING THE WARNING APPROPRIATE?

38. Having found that the warning did not constitute enforcement, I also reviewed the process followed by the NZSIS in planning and carrying out this warning, and whether the compliance controls for warnings generally are fit for purpose.

Procedural requirements

Ministerial policy statement relating to warnings

39. As set out above, the Ministerial Policy Statement (MPS) *“Collecting human intelligence”* contains guidance on the issuing of warnings, which the NZSIS must have regard to. The MPS sets out that where warning action is contemplated, GCSB and NZSIS employees *“should consider whether the warning would be more appropriately delivered by the Police or another agency with enforcement functions”*. The MPS states that legal and other advice should be sought by the NZSIS where it is appropriate.

NZSIS Standard Operating Procedure relating to warnings

40. While not having a procedure for warnings generally, the NZSIS has a Standard Operating Procedure (SOP) for *“Declared interviews with individuals of security interest or concern”* which includes specific requirements for interviews where a warning is issued. This was developed in light of Crown Law’s advice and the previous IGIS’ report, and was reviewed by the previous IGIS. At the time the focus was on warnings issued in the context of interviews being conducted by NZSIS staff. That policy was not well suited to the warning given in this case and the NZSIS has recognised the need to update its guidance in this area. I understand that this SOP is currently under review.
41. Legal advice must also be obtained on the warning. Differing levels of approvals may also be required depending on the nature of the operation and the target.
42. Other requirements placed on officers by the SOP are:
- 42.1. where the warning has potential enforcement actions, consideration should be given to whether the particular warning would be more appropriately delivered by an enforcement agency
 - 42.2. interviewers must take steps to ensure the interviewee understands the interview is voluntary
 - 42.3. officers must be clear that NZSIS has no enforcement powers, and in particular not indicate any sort of enforcement action is inevitable

Did the warning follow a proper process?

Decision to pursue warning

43. The Service decided in 2020 that, following intelligence gained during investigation, some form of mitigation activity to disrupt NZ1 might be appropriate. The NZSIS undertook a planning process for a potential operation, which included the consideration of options and consideration of the need to consult relevant NZ agencies.

44. The development of options that occurred in this case was an appropriate step and it was apparent that the Service's approach developed under analysis. The consideration of options identified other agencies that could have been involved and some options related to their jurisdictions.
45. There was a lack of analysis, however, of any potential criminal offending that might have been relevant, i.e. espionage under s 78 of the Crimes Act 1961, and whether this should have been a matter for the NZ Police. While it appears that the NZSIS did not consider this met the threshold for NZ Police investigation, the option of a referral to Police warranted more in-depth consideration. This would have been consistent with the requirement in the Ministerial Policy Statement for consideration of other agencies' statutory roles.
46. I also consider that the development of options would have been an appropriate stage to seek the views of relevant agencies. While consultation occurred once the mitigation operation was being planned, which is discussed later in this report, earlier engagement would have informed the Service's analysis of options and their potential viability. It is difficult for consulted parties to influence a course of action when consultation occurs late in the process.

Preparation for operation to issue warning

47. As required by the NZSIS SOP, an Operational Proposal and Risk Assessment (OPRA) was prepared for the operation. Preparation of the OPRA included seeking advice from the NZSIS legal team. Legal advice was ultimately provided by the NZSIS General Counsel.
48. The OPRA appropriately identified risks involved with the operation. In my view, there was a gap in the recorded analysis in relation to NZ1's personal circumstances. In particular, whether NZ1 had any personal vulnerabilities and what the potential negative impacts of the operation for NZ1 might be. For example interference with their rights. The NZSIS could have documented relevant factors and included them in its analysis, to demonstrate the proportionality of its proposed actions with reference to the impact on NZ1, if any was identified.
49. The OPRA could also have more explicitly articulated the risk of the warning being perceived as enforcement action and how this risk would be managed or mitigated. Comments from Legal touched on this, but operational staff should be prompted to consider this issue in planning a warning. This would be a useful step in the preparation for future warnings.
50. The OPRA was approved by a Manager in the NZSIS, which aligned with the SOP. However the Manager took care to note that the plan had been reviewed and endorsed by more senior staff. I think this showed an awareness that the proposed operation raised issues that demanded the attention of decision-makers more senior than the SOP required. I consider that, given the risks and the potential to stray into enforcement, a higher level sign-off, should have been formally required. The broader point of approval levels in the NZSIS' policies is discussed later in this report.

NZSIS engagement with other agencies

51. A key aspect of this operation was how the NZSIS engaged with interested agencies.
52. NZSIS did not engage with the New Zealand Police on its plan to warn NZ1 as it considered their activities to be an intelligence matter that did not meet the threshold for referral to law enforcement.
53. NZSIS officials met with other government agencies during the planning of the operation. The approach varied between these agencies, with a thorough briefing undertaken for one agency and a more informal approach taken for the other.

54. NZSIS appropriately identified these agencies' interests in the matter and sought their views. I consider the steps taken for one of these agencies were not sufficient to properly inform the operation and identify risks from their point of view. The initial email notifying of the operation was brief and lacked detail and the follow up conversation between officials was a brief aside to a different meeting.
55. While operational sensitivities can limit what information NZSIS can share, I think there would be real value in a more formal process of providing interested agencies with a concise written briefing before an operation with risks and impacts relevant to them. Ad hoc conversations, while potentially preferable to the NZSIS, leave the consulted agency in a difficult position to provide meaningful input and assess risks. There was sufficient time in the planning for this operation for more thorough consultation to occur. That will not always be the case, noting some activities necessarily move at pace, but where practicable a more robust consultation process will benefit NZSIS planning.
56. I also consider that given the potential for criminal offending in this case, the NZSIS should have more thoroughly considered the New Zealand Police's potential role in the matter and consulted with the New Zealand Police on whether they sought to be involved.
57. To this end, I **recommend** that the NZSIS engage with relevant domestic agencies to determine some standard procedures for how NZSIS will consult with them on planned warnings that engage their interests. These procedures should clarify what interests in general will prompt consultation, who NZSIS is to consult, at what tier, and when consultation should occur.
58. Additionally, while the NZ Police were ultimately not consulted in this case, having observed NZSIS working with the NZ Police in other cases I consider that there is a need for a shared operating procedure between these two agencies for how they will work together on matters such as warnings. Where the NZSIS are considering issuing a warning there will likely be NZ Police enforcement questions for the conduct, which need to be properly explored in line with the MPS, and a higher level of understanding between the agencies will be beneficial. There may also be instances where the NZSIS seek an NZ Police presence during an operation, which needs to be coordinated.
59. A shared operating procedure will provide for more robust processes which can give both agencies greater certainty. It will also make it easier to engage with and, when necessary, obtain the co-operation of NZ Police. I understand that the NZSIS are currently engaging with the NZ Police to formalise arrangements between the agencies. I therefore **recommend** that the NZSIS continue to engage with the NZ Police to develop shared operating procedures that include details on a process for warnings.
60. A lack of formality or over-reliance on established relationships can lead to misunderstandings and issues after the fact, and I consider more formalised processes will provide benefits to all agencies. The form that such arrangements take will depend on the nature of the relationships and the agencies' preferences, so I do not want to be overly prescriptive with these recommendations.
61. These recommendations align with the principle within the intelligence agencies' Risk Management Policy, which recognises that *"appropriate and timely involvement of stakeholders at all levels enables their knowledge, views and perceptions to be considered, resulting in improved awareness and informed risk management"*.

IS THE OPERATING FRAMEWORK FOR WARNINGS FIT FOR PURPOSE?

62. I now turn more generally to the procedures, guidance and other resources that the NZSIS has for warnings.

63. I note from the outset that the NZSIS has indicated to me that it is considering warnings activity in general. Given the use of this kind of activity, it is vital that the NZSIS has an appropriate operating framework to guide these activities, given the complexities involved with the law and potential harms to individuals and to wider New Zealand interests.

Standard operating procedures (SOP)

64. As identified by NZSIS in 2021, and referred to me, I consider that the NZSIS should develop a wider SOP that deals with warnings and other actions it considers it can do as “disruption” activities. The current interview SOP was too specific for the NZ1 warning, but could be adapted to deal with wider approaches to warnings. The inadequacies in the SOP for the situation were ameliorated by the cautious and thorough approach taken in preparing the NZ1 warning.
65. A dedicated SOP also could provide greater guidance to staff around the issue of when a warning may be appropriate, as opposed to other agencies carrying out their functions, as well as ensuring that a warning does not amount to enforcement. It would be useful for guidance and procedures to be in place to enable staff to understand what can and cannot be done within the NZSIS’ mandate. This would also interpret and apply the aspects of the MPS relating to warnings. The SOP should also set the relevant approval levels within the NZSIS.
66. In my view, an appropriate SOP should take into account:
- 66.1. Whether a warning is the appropriate course of action as opposed to courses of action available to other agencies.
 - 66.2. The roles and responsibilities of other agencies in relation to a warning and what consultation is expected.
 - 66.3. How a warning should be undertaken.
67. I make some comment on each area below.

When to carry out a warning

68. The decision around when it is appropriate to issue a warning is a key area where guidance is necessary. As I have discussed above, the decision to carry out such activities can overlap with the law enforcement or diplomatic mandates of other agencies and questions arise about who is the most appropriate agency to act in that case.
69. For example, where the activity involves potential serious criminal offending, the NZSIS should generally not be solely carrying out its activities in place of the NZ Police taking action. I do not see it as a justification on its own for the NZSIS to issue a warning, or take any other action, simply because it assumes the NZ Police will not act, or the case will not meet the threshold for a prosecution. The processes the Police have for assessing what action they will take are well established and NZSIS actions are not a replacement for these. It may be that the Police consider no action is warranted and they may be best placed to make that determination. There needs to be a specific NZSIS purpose for acting that is not a concern about criminal offending.
70. I recommend the NZSIS develop criteria for deciding whether to issue a warning or take some other deterrent action. NZ1 provides a good example where the warning issued was aiming to counter foreign interference. This is clearly related to NZSIS’s functions and, while espionage is a criminal offence, it is

clear from the purpose of the operation that preventing such offending and holding the person to account was not the objective.

71. When the NZSIS has observed concerning behaviour from a target, there are a range of options across government, one of which may include the Service issuing a warning. The SOP could take into account the various alternative options that may be available (e.g. referral to NZ Police, MFAT, or social-related services) and in what circumstances these other options may be more appropriate or may occur alongside NZSIS action. This is particularly important for counter-terrorism cases where the range of options can be broad and the aggravating factors for the individual can be multi-faceted. The NZSIS will need to be cognisant of the bigger picture and circumstances of the target outside of its specific role and guidance within the SOP will assist with that.
72. This is also where I consider a policy could be more explicit about consideration of the impact of proposed NZSIS activity on the target(s) themselves and others that may be affected. This is also highly relevant when the Service is considering issuing a warning to associates of a target. Given the potential unilateral nature of conveying a warning, and the fairness concerns that arise with that, the NZSIS needs to be cognisant of avoiding inadvertent consequences on the target which may result from the warning or the manner in which it was conveyed.
73. Providing a decision-making framework for when a warning is to be carried out will provide consistency to the NZSIS' approach and help to avoid irrelevant considerations coming into play for decision-making.

Roles and responsibilities of other agencies regarding NZSIS activities

74. Alongside the decision-making process for NZSIS activities, the SOP could also provide details and procedures for when and how NZSIS will consult with affected agencies when conducting their operations. This ties in with my recommendation above about having standard consultation procedures with relevant agencies. This may include when NZSIS considers that certain agencies could be involved in the warning themselves.
75. Providing clear expectations for when consultation may be necessary will help to ensure that NZSIS staff are aware of potential concerns as a result of their actions.

How a warning should be undertaken

76. As canvassed earlier in this report, the manner in which a warning is carried out is complex in how it correlates to the NZSIS's functions and the restriction on carrying out enforcement. It is vital that staff understand the bounds of the NZSIS's ability to convey a warning.
77. The current SOP already provides commentary on how a warning should be conducted, but with a focus on an interview. This could be modified to take into account a wider range of circumstances that a warning may take place, and also better take into account the circumstances of the warnings and the target themselves.

Transparency of NZSIS' role in relation to warnings

78. I have also observed a gap in the information that the NZSIS has made available on this aspect of its activities. While a small part of its role, warnings are designed to have an impact on the targets themselves and they may seek a better understanding of the NZSIS's role and the limits of it. It can be difficult to rely on targets understanding this in the moment and providing some reassurances around the NZSIS' role may help mitigate concerns that a target misapprehends that the NZSIS has a role in enforcement and therefore further sanctions are on the way.

79. The only information relating to warnings on the NZSIS's website is a press release in relation to the previous IGIS' report on warnings and associated 'information sheets' for interviews.³ While this does acknowledge the role that the NZSIS might play, it would be valuable to have some dedicated information that people may access on NZSIS's roles and functions as relates to warnings. The NZSIS currently has a frequently asked questions document for interviews. Similar guidance may achieve greater transparency.
80. I therefore **recommend** that the NZSIS provide more information on its website about its role in relation to warnings. I note that the timing of this may be influenced by the ongoing review of the ISA, so implementing this recommendation may need to be cognisant of this.

Comments on the ISA provisions

81. It is not a part of my role to make suggestions for changes to the law when conducting a review or inquiry. However, I do wish to note some observations on how the law deals with warnings, given the current review of the ISA.
82. This review shows that the issue of warnings by the NZSIS remains complex and the law as it stands creates some uncertainties and vulnerability for these activities and any others the Service might wish to undertake under the banner of "disruption". Similar countries to New Zealand have had different approaches to prescribing the ability of their security and intelligence agencies to carry out such activities. The Canadian Security Intelligence Service Act 1985, for example, provides an authorising framework for disruption activities similar to the provision for intelligence warrants under the ISA.
83. If as a matter of policy the Government and Parliament considered that the scope for "disruption" activities by the NZSIS should be clarified or expanded, the potential for a similar authorising framework in New Zealand could be explored. This could enable more effective oversight over such activities while requiring more consistency and rigour in their planning and providing greater transparency for the public about the NZSIS' role.

CONCLUSION AND RECOMMENDATIONS

84. My review has considered the circumstances of the warning given to NZ1 and the wider policy framework for such activities.
85. I accept, as did the previous IGIS, that in principle the NZSIS may deliver a warning, provided it is acting in accordance with its functions and the warning does not amount to enforcement in the circumstances. Under s 16 of the Intelligence and Security Act it is not the function of the NZSIS to "enforce measures for national security", subject to exceptions that do not apply to the warning to NZ1. My review was carried out to examine the practical application of the constraints on the Service's ability to warn. Given the Service's use of disruption activities, of which warnings are an example, this is an important matter to consider.
86. The planning of the warning to NZ1 was reasonably thorough and recognised the uniqueness of the operation. The NZSIS took into account relevant factors to ensure the warning was carried out lawfully and properly. The warning itself did not convey the impression of enforcement.
87. I have found some deficiencies in planning in relation to consultation with other agencies which had an interest in the operation. The nature of the consultation limited the Service's ability to be well informed on the risks involved from the other perspective. The risks were mitigated somewhat by the way in which

³ "NZSIS welcomes the Inspector-General's report" 13 December 2017, retrieved from www.nzsis.govt.nz/news/yciidw10mwammqdd

the operation was carried out, but I consider that similar operations in future would be better served by a more formal and robust process.

88. I considered the adequacy of the NZSIS' policies and procedures in relation to warnings. I find they require review and recommend a new policy be developed. A dedicated policy is appropriate when the NZSIS is seeking to carry out such activities. I have identified issues I think should be addressed in such a policy. I have also observed that the NZSIS could provide information on its website about its role in relation to warnings.
89. I have therefore recommended that the NZSIS:
 - 89.1. Engage with relevant domestic agencies to develop arrangements that cover appropriate points of contacts, levels of sign-off, times for consultation, and other consultation procedures in relation to warnings.
 - 89.2. Engage with the NZ Police to develop shared operating procedures that covers these scenarios.
 - 89.3. Review its policies and procedures that deal with warnings and develop a new SOP that deals with warnings, taking into account my comments in this report.
 - 89.4. Provide information on its website in relation to its role in issuing warnings following its policy review.

NZSIS RESPONSE TO MY DRAFT RECOMMENDATIONS

90. I provided the NZSIS with a copy of my report so that it may comment on the contents and my recommendations.
91. The NZSIS has agreed that it will look to develop arrangements with relevant domestic agencies to ensure that there is better understanding of the process and contacts for consultation when considering the use of a warning.
92. In relation to the NZ Police, the NZSIS has ongoing work regarding information sharing with the NZ Police, which relates to a separate inquiry my office is undertaking, and will look to include guidance as to contacts and process for warnings within that.
93. As proactively raised by NZSIS to my office in 2021, the NZSIS agree that the current policy and procedure for warnings is too narrowly focussed on interview settings and have advised that the policy will be revised.
94. Finally, the NZSIS agreed that more publicly available information about the NZSIS' role in the delivery of the warning is desirable, however the NZSIS noted that the ongoing review of the ISA raises a question of appropriate timing. The NZSIS noted that its website is currently being reviewed and would therefore look at whether information can be included in that update, which can later be enhanced following the ISA Reviewer's findings.