

# Regulatory Impact Statement: Criminal justice proposals to counter foreign interference targeting New Zealand

## Coversheet

Purpose of Document	
Decision sought:	This analysis was produced to inform final Cabinet decisions on proposals to amend the Crimes Act 1961.
Advising agencies:	The Ministry of Justice is responsible for the development of this Regulatory Impact Statement.
Proposing Ministers:	Minister of Justice
Date finalised:	2 May 2024
Problem Definition	
<p>Foreign interference activity constitutes a threat to New Zealand as an independent sovereign State.</p> <p>Without appropriate criminal justice legislation, New Zealand’s ability to successfully detect and address foreign interference and espionage risks is limited. This allows unwanted activity to persist and results in ongoing, and potentially increasing, negative outcomes for New Zealand.</p>	
Executive Summary	
<p>Foreign interference is an act by a foreign state, often through a proxy, which is intended to improperly influence, disrupt, or subvert a country’s interests by deceptive, corruptive, or coercive means.</p> <p>This definition encompasses a wide spectrum of activities – some currently legal, and others illegal under New Zealand law and subject to criminal sanctions.</p> <p>Regardless of its legal status, foreign interference represents a deliberate attempt by another state to undermine New Zealand as an independent sovereign State.</p> <p>Interference activity has potentially wide-reaching negative implications for New Zealand’s security, international relations, economy, democratic institutions and processes, and undermines the safety and security of those under New Zealand’s protection.</p> <p>A broad range of existing regulatory and non-regulatory measures work to protect New Zealand from foreign interference. The Government also maintains a Countering Foreign Interference Work Programme to increase New Zealand’s resilience to interference activity. This cross-agency work programme is intended to protect New Zealand’s economy, democratic institutions, and the expression of civil and political rights by boosting awareness, increasing transparency of certain activities, and strengthening regulatory settings.</p> <p>As part of this work programme, the previous Minister of Justice directed the Ministry of Justice to develop policy proposals for legislative change to support a criminal justice</p>	

response to foreign interference targeting New Zealand and New Zealanders. This work is continued by the current Minister of Justice.

Without well-calibrated criminal justice legislation, it can be difficult to detect, investigate and prosecute foreign interference and espionage activity. Individuals engaged in such activity can continue their behaviours – even if reported by communities and confronted by agencies – as the activity is often not unlawful.

Left unaddressed, such activity is likely to continue and New Zealand may become a more favourable target for interference by a wider range of states. This results in ongoing negative outcomes for New Zealand and New Zealanders and increases the likelihood that a significant foreign interference event will occur.

As part of our work, we undertook a comprehensive review of New Zealand’s criminal offence regime. We also examined international approaches to foreign-interference criminal offences and regulatory regimes designed to provide transparency of foreign influence activities, and engaged with impacted communities and a range of government agencies. We confirmed that criminal justice legislation may help as part of a coordinated effort to respond to foreign interference. We also identified some gaps and limitations in New Zealand’s criminal offence regime with respect to espionage and interference activity.

After evaluating a range of considerations and interests, we worked with relevant agencies to develop policy options to achieve the following objectives:

- safeguard New Zealand’s sovereignty from foreign interference and espionage activity, and
- protect those in New Zealand from being negatively impacted by foreign interference.

Three broad policy options are considered in this Regulatory Impact Statement, they are:

- Option 1: retain the status quo and rely on existing mechanisms and tools, including those being developed as part of the Countering Foreign Interference Work Programme.
- Option 2: modify existing criminal offences to address gaps and limitations we identified in our review of criminal law.
- Option 3: amend existing criminal offences in line with their current scope and purpose, and create two new bespoke offences to address identified gaps and limitations in New Zealand’s criminal offence regime to address foreign interference and espionage risks.

Our preferred option is Option 3. We prefer this option because it is most consistent with New Zealand’s constitutional principles and current approaches to regulation. It is also tailored to foreign interference activity which helps ensure it can continue to be fit for purpose even if interference techniques and tools change over time.

In the options analysis, we recognise that the preferred option has a degree of ambiguity and may expose a small number of people that engaged in certain types of legitimate conduct to potential criminal liability – centering on individuals or entities that undertake activities on behalf of, or in collaboration with, foreign states. However, after receiving feedback from targeted stakeholders (ie academics), we consider this risk can be sufficiently mitigated by incorporating legislative safeguards and through other non-legislative work by agencies contributing to the Countering Foreign Interference Work programme.

## Limitations and Constraints on Analysis

Agencies contributing to the Countering Foreign Interference Work Programme represent a broad range of sectors and interests. Their work includes regulatory and non-regulatory interventions to strengthen New Zealand's resilience to risks arising from foreign interference. This ranges from strengthening New Zealand cyber security and improving controls on exports and investments, to providing guidance and information on foreign interference risks to potential targets of interference, such as elected officials, researchers, ethnic and religious communities, and the general public.

Our work does not engage with all possible reform options that can be undertaken as part of this work programme. Rather, Cabinet and Ministerial direction has focused our work on one aspect of this broad and complex issue – legislative options to support a criminal justice response to foreign interference, focusing on foreign-state-sponsored activity.

However, given its part of a wider work programme and because other agencies will be involved in applying and operationalising the criminal justice response, we created a cross-agency working group to inform policy option development. The group included perspectives from the intelligence, enforcement, and defence sectors, and also from foreign affairs, ethnic communities, media regulation, and academia.

In recognition of the national security issues involved and a pressing need to address legislative gaps, we received Ministerial direction to engage in targeted consultation on the work and policy options. This meant engaging with government entities **S6(a)** and a small number of ethnic and religious community representatives that agencies confirmed were targets of foreign interference activity.

Engagement with members of impacted communities helped to shape what individual-level interests and impacts we considered as part of options development. In addition, it will also inform future public communications on the work to ensure it is undertaken in a manner that respects communities' safety and wellbeing.

This targeted-engagement approach meant that consultation with a wider range of stakeholders outside of government did not occur. To account for this, we sought feedback on the options from entities within government that hold key constitutional or independent roles and/or relevant sector specific insights. This included engagement with the Office of the Ombudsman, the Privacy Commission and Universities New Zealand.

Other countries have identified similar limitations or gaps in their own criminal offence regimes related to foreign interference and espionage activity. In developing options, we also considered recent legislative changes by a range of jurisdictions, with a focus on developments in Australia, the United Kingdom and Canada. **S6(a)**

### *Assumptions*

Intelligence and security agencies advise that interference and espionage activities it has observed are persistent, harming New Zealand interests, are undertaken by motivated actors, and target a broad range of individuals and sectors. However, due to often clandestine nature of the activities involved, it is difficult for us to determine the full scope of foreign interference and espionage activities occurring in New Zealand and the scale of the harm this conduct poses.

Based on our examination of domestic and international foreign interference case studies (which drew on publicly available and classified information), engagement with agencies and communities, and our criminal offence review, our key assumptions include:

- foreign interference activity is greater than has been identified or reported on, but it is not widespread or occurring in high volumes
- the potential harm of foreign interference activity, both as a one-off incident or as part of a coordinated and strategic set of behaviours, can be highly damaging to New Zealand and those under its protection
- change to criminal justice legislation is necessary because broader existing interventions and mitigations are insufficient to deal with foreign interference activity on their own
- options for addressing the problem are mainly preventative as significant incidents may not have occurred yet in New Zealand, but there is a sound reason to avoid them from happening at all
- even when behaviours are in scope of the preferred option, effective investigations need to overcome existing practical and operational challenges which will not be addressed by this work, but possibly as part of the wider Countering Foreign Interference Work Programme
- updated criminal justice legislation will help to deter foreign interference activity, but it will also likely result in some dedicated interference actors modifying their conduct to work around any changes brought about by the preferred option. This includes by increasing efforts to hide or otherwise obscure activities, or adjusting them to fall just outside the scope of new legislation, and
- this work does not address the root cause of foreign interference – which may be characterised as inter-state competition and indirect hostility – but rather will only capture individuals and entities that are engaging in activities used to achieve foreign-state objectives. Therefore, interference activities by foreign states will likely continue even though individuals may be held accountable for their actions.

**Responsible Manager(s) (completed by relevant manager)**

Rajesh Chhana  
Deputy Secretary Policy  
Ministry of Justice



2 May 2024

**Quality Assurance (completed by QA panel)**

Reviewing Agency:	Ministry of Justice
Panel Assessment & Comment:	A panel within the Ministry of Justice has reviewed the Regulatory Impact Statement “Criminal justice proposals to counter foreign interference targeting New Zealand”. The panel considers that the information and analysis in that document partially meet the Quality Assurance criteria.

The RIS is complete, clear and generally concise. There was no public consultation about the options in the RIS, given the time constraints, but there was adequate consultation with relevant stakeholders and use of proxies to support the analysis.

The RIS only partially meets the requirement to be convincing because, although it makes a compelling case that change is needed, it is less persuasive in its description and analysis of the specific options. In particular, the panel noted that the potential scope of the bespoke offence of committing an imprisonable offence for the benefit of a foreign power, proposed under the preferred option, does not seem as clearly defined or analysed as the proposed foreign interference offence. The RIS does not clearly establish why the preferred option should be favoured over modification of existing offences and appears to overstate the disadvantages of option 2 compared to the other two options. The panel also noted that the Treaty analysis does not include any evidence about the particular impact of foreign interference on Māori.

## Section 1: Diagnosing the policy problem

### What is the context behind the policy problem and how is the status quo expected to develop?

#### Defining “foreign interference”

1. All countries engage in foreign influence activities to shape perceptions and decision-making in other countries. For example, this includes normal diplomatic activity, transparent lobbying, and other genuine overt efforts to affect policy and practice.
2. In contrast, **foreign interference** is an act by a foreign state, often through a proxy, which is intended to improperly influence, disrupt, or subvert a country’s interests by deceptive, corruptive, or coercive means.<sup>1</sup>
3. Examples of interference activities include:
  - influencing government decision-making by lobbying officials secretly on behalf of another state or by activities of co-opted domestic officials covertly working at the direction of a foreign state
  - compelling individuals, often with ties to a foreign state (eg familial, cultural, business), to act, or not act, in certain ways, and
  - manipulating domestic media or interactions on social media to amplify pro-foreign state perspectives or minimise views or ideas that are critical of that state.

#### Foreign interference has negative implications for New Zealand’s sovereignty

4. The definition of foreign interference above is used by agencies that contribute to New Zealand’s national security and is set out in New Zealand’s 2023-2028 National Security Strategy which is discussed below at para 17. This definition encompasses a wide spectrum of activities – some currently legal, and others illegal under New Zealand law and subject to criminal sanctions.
5. Regardless of its legal status, foreign interference represents a deliberate attempt by another state to undermine New Zealand as an independent sovereign State.
6. Covert influence of officials by direct and indirect means (eg by influencing public debate online) has a flow-on effect on the quality of domestic, economic, and foreign policy, and the calibration of New Zealand law. In the long term, this activity can erode public trust and confidence in the integrity of information, government decisions, and democratic institutions – regardless of whether corrupt influence or interference is real or perceived.
7. New Zealand also is responsible for ensuring the safety and security of all individuals under its protection, including the ability to exercise political and civil rights and freedoms without prejudice. When these are restricted by a foreign state (eg by threats or undue pressure on an individual to not publicly debate an issue that is deemed off-limits by a foreign state) this constitutes a harm to New Zealanders because it diminishes their recognition and expression of protected rights.

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<sup>1</sup> *Secure Together Tō Tātou Korowai Manaaki: New Zealand’s National Security Strategy 2023-2028* (Department of the Prime Minister and Cabinet, National Security Strategy, 2023) at 7.

8. Taking these national and individual-level impacts into account, foreign interference activity has potentially far-reaching negative implications for New Zealand. This includes our security, international relations, economy, democratic institutions and processes, and undermines the safety and security of those under New Zealand's protection.

*Foreign interference has developed over time due to technological advancements and increased inter-state strategic competition*

9. Foreign interference has evolved from traditional methods of 'spy craft', including espionage activity.<sup>2</sup> It includes a wider range of state-sponsored activities that exploit modern trends in technology and information sharing to achieve a strategic outcome.
10. The internet and other emerging technologies have enabled people to connect from anywhere in the world to share, receive, analyse, and utilise vast amounts of information. This has, in turn, changed the way some states undertake activity within the "grey zone" – the space between peace and war that spans cooperation, competition, confrontation, and conflict.
11. As described in a 2021 Ministry of Defence assessment<sup>3</sup>, increasing strategic competition is leading some states to rely on a wide range of grey zone activities to create or exploit uncertainty and shape perceptions in other states. Such activities are designed to maintain a level of plausible deniability, hinder other states' abilities to react, and are not readily addressed by international law.

*A recent survey suggests that some members of the public are concerned about foreign interference targeting New Zealand*

12. There is limited evidence on the extent to which the public considers foreign interference to be a significant threat to New Zealand. However, recent findings indicate this may be front of mind for some people. A 2022 public survey on national security issues found that, of the 1,148 people in New Zealand that were asked how real identified threats were likely to happen within the next 12 months:
  - 50 per cent felt that the threat of another country interfering in New Zealand affairs was a 'somewhat' or 'very real' threat, and
  - 43 per cent felt that the threat of a foreign country or foreign actor coercing New Zealand to act against its interest was a 'somewhat' or 'very real' threat.<sup>4</sup>
13. These results indicate a general awareness and concern about espionage and foreign interference-related activities in New Zealand. This may be associated with periodic media reporting on these topics, which usually features in relation to specific incidents<sup>5</sup>,

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<sup>2</sup> In general, **espionage** refers to clandestine activities undertaken to collect State or private information, materials, or capability to obtain competitive advantage at the expense of New Zealand's security, international relations, and economic prosperity. Assets obtained as part of espionage activities can be later used to support foreign interference activities, for example by making it easier to identify potential New Zealand targets to manipulate or coerce: above n 1, at 22.

<sup>3</sup> *He Moana Pukepuke E Ekengia E Te Waka – A rough Sea can Still be Navigated*. (Ministry of Defence, Defence Assessment, 2021) at 16.

<sup>4</sup> The survey was commissioned by the Department of the Prime Minister and Cabinet to inform the contents of the *2023 National Security Long-term Insights Briefing*. For more information and to access the survey see: [2022 IPSOS National Security Survey Report | Department of the Prime Minister and Cabinet \(DPMC\)](#)

<sup>5</sup> For example, see ['Nazi' soldier trial presents national security complications \(newsroom.co.nz\)](#)

relevant electoral or parliamentary proceedings<sup>6</sup>, or publications by agencies within the national security sector<sup>7</sup>. The incidence of these reports have increased in recent years, which coincide with a rise in news on regional and global competition and tensions.<sup>8</sup>

## **Current regulatory and non-regulatory settings that protect New Zealand from foreign interference**

### *Existing safeguards under the status quo*

14. Existing rules and regulatory settings protect against many forms of foreign interference in New Zealand. These include:
  - rules, transparency measures, and regulatory offences (including for political donations) to support free and fair elections
  - controls that regulate the export of strategic goods that can be used against New Zealand and legislation that helps to manage risks to New Zealand interests that arise from foreign investment in assets of national importance
  - rules and guidance for potential targets of undue foreign influence, including for the conduct of officials and New Zealand researchers. These help to maintain the reliability and effectiveness of the public service, including through whistle-blower protections, and by managing potential conflicts of interest
  - official information legislation which provides the public with access to information, advice and considerations decision-makers rely on when making policy decisions
  - general criminal offences and enforcement mechanisms to detect and deter espionage, corruption, harassment, blackmail, money laundering, and other harmful conduct that could be used to undertake or support foreign interference, and
  - the ability to request a foreign state waive diplomatic or consular immunity for one of its representatives or accredited family members in New Zealand when a serious crime is alleged to have been committed. This helps to ensure that foreign representatives with immunity respect the laws and regulations of New Zealand as is their duty under Vienna Convention on Diplomatic Relations 1961 and the Vienna Convention on Consular Relations 1963, to which New Zealand is a party.
15. Beyond these regulatory systems, processes, and protections, other societal factors work to mitigate and protect against many forms of foreign interference – particularly when involving money or other forms of personal gain to exert influence. This is reflected in international indexes of freedom and transparency where New Zealand consistently ranks as a high trust society with low tolerance for corrupt behaviours.<sup>9</sup> New Zealand’s active media also helps to provide transparency around who policy makers are engaging with and what their interests and motives are.

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<sup>6</sup> For example, see [SIS and GCSB chiefs brief MPs on potential for foreign interference in NZ politics - NZ Herald](#)

<sup>7</sup> For example, see [Call for greater protection for Chinese New Zealanders | RNZ News](#)

<sup>8</sup> For example, see [Minister warned to protect critical infrastructure amidst increasing risk | RNZ News](#)

<sup>9</sup> Transparency International consistently ranks New Zealand as one of the top three least corrupt countries in its Corruption Perceptions Index [2023 Corruption Perceptions Index: Explore the... - Transparency.org](#), while Freedom House rates New Zealand’s global freedom score at 99 out of 100 across a range of rights and freedoms [New Zealand: Freedom in the World 2024 Country Report | Freedom House](#).



16. The current settings reflect New Zealand’s egalitarian values, the importance of the public’s access to decision makers, and support for fundamental freedoms.

***A significant amount of work is already underway to address foreign interference risks to New Zealand***

17. Published in August 2023, New Zealand’s first *National Security Strategy 2023-2028* (the Strategy) describes the country’s security outlook, and sets out our national security interests alongside three key priorities:
- acting early to prevent national security threats and build New Zealand’s resilience
  - working together to foster collective understanding and approaches, and
  - leading an integrated approach.
18. Identifying foreign interference and espionage as one of twelve national security focus areas,<sup>10</sup> the Strategy centres on a whole-of-society vision of: “A secure and resilient Aotearoa New Zealand – one that is protected as a free, open, and democratic society for future generations.”
19. The Government’s *Countering Foreign Interference Work Programme*<sup>11</sup> is the primary vehicle for addressing foreign interference risks and aligns closely with the 2023 National Security Strategy. Coordinated by the Department of the Prime Minister and Cabinet (DPMC), the cross-agency work programme focuses on foreign-state interference and aims to protect New Zealand’s economy, democratic institutions, and civil and political rights by:
- boosting awareness and resilience to foreign interference, including via the New Zealand Police (Police) developing training for frontline staff to recognise and respond to foreign interference, intelligence and security agencies’ cross-sector engagement on the threat environment and protective/information security advice<sup>12</sup>, and DPMC and the Ministry for Ethnic Communities working to enhance community resilience to attempted interference.
  - increasing transparency of certain activities, which includes:  
S6(a)

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<sup>10</sup> *Secure Together Tō Tātou Korowai Manaaki: New Zealand’s National Security Strategy 2023-2028* (Department of the Prime Minister and Cabinet, National Security Strategy, 2023) at 7.

<sup>11</sup> For details, see [Countering foreign interference | Department of the Prime Minister and Cabinet \(DPMC\)](#)

<sup>12</sup> For guidance, see [Protection against Foreign Interference | Protective Security Requirements](#)

- strengthening regulatory settings, which includes the recent changes to the Overseas Investment Act 2005 to strengthen screening of foreign purchases and investments in sensitive New Zealand businesses and assets.

20. This broad suite of government responses recognises that successfully addressing foreign interference risks to New Zealand requires a combination of regulatory and non-regulatory responses (eg knowledge and awareness building to help identify and call out interference). This is because interference can manifest in a multitude of ways and sectors, thus requiring a range of responses as no single approach may be appropriate in all situations.

*A criminal justice response supports a range of activities to strengthen New Zealand's resilience to foreign interference*

21. The Countering Foreign Interference Work Programme recognises that a key element of a comprehensive response to foreign interference and espionage risks to New Zealand includes civil and criminal justice interventions. This way, consideration of democratic/constitutional principles and implications, the conduct of elections, regulation of political activities, and application of the criminal law are included in the countering foreign interference effort.
22. In November 2021, Cabinet invited the Minister of Justice to undertake a review of New Zealand's existing foreign interference and espionage-related criminal offences, and consider opportunities for promoting transparency of those undertaking political lobbying and other activities in New Zealand on behalf of a foreign principal [ERS-21-MIN-0042 refers]. This work also considered the approaches taken recently in other comparable jurisdictions, including in the United Kingdom and Australia.<sup>13</sup>
23. In March 2023, in response to the findings of our criminal offence review and advice on foreign influence transparency matters, Cabinet invited the Minister of Justice to:
- submit policy proposals for legislative change to address foreign interference, and
  - report back on overseas developments related to transparency regimes for political lobbying and other foreign influence activities, and whether such an approach has sufficient merit for the New Zealand context [ERS-23-MIN-0005 refers].
24. In December 2023, based on our advice, the current Minister of Justice made the decision to:
- continue work to develop criminal justice legislative proposals, which necessitated the development of this Regulatory Impact Statement, and
  - cease work related to foreign influence transparency regimes, but that the Minister would consider the status and timing of potential future transparency-related work later in the parliamentary term, relative to other justice policy priorities.<sup>14</sup>

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<sup>13</sup> For details on changes to the Australian criminal offence regime see [National Security Legislation Amendment \(Espionage and Foreign Interference\) Bill 2018 – Parliament of Australia \(aph.gov.au\)](#). For changes to the United Kingdom's criminal offence regime see [ISN National Security Act 2023 \(publishing.service.gov.uk\)](#).

<sup>14</sup> Consideration of foreign influence could be included in future work related to reviewing regulatory options for political lobbying. This relates to parallel work the Ministry of Justice undertook to support the development of a voluntary code of conduct for "third-party" lobbyists and early scoping of a potential review of policy options for

*Counterfactual*

25. Without well-calibrated criminal justice legislation, it can be difficult to detect, investigate and prosecute foreign interference and espionage activity. Individuals engaged in interference activity can continue their behaviours – even if confronted by agencies, or are being reported by communities – as the activity is often not unlawful.
26. Left unaddressed, such activity is likely to continue and New Zealand may become a more favourable target for interference by a wider range of states. This has negative implications for New Zealand and New Zealanders and increases the likelihood that a significant event will occur.
27. In addition to a degrading effect on public trust and confidence in democratic institutions and processes, interference also impacts New Zealanders' trust in the ability of the State to protect them from these types of unwanted activities.

**What is the policy problem or opportunity?**

28. Foreign interference activity constitutes a threat to New Zealand as an independent sovereign State.
29. Without appropriate criminal justice legislation, New Zealand's ability to successfully detect and address foreign interference and espionage risks is limited – which enables some unwanted activity to persist and results in ongoing, and potentially increasing, negative outcomes for New Zealand.

**The scale of the problem and assumptions**

*The nature of foreign interference activities in New Zealand*

30. Intelligence and security agencies advise that a small number of states are engaging in foreign interference and espionage against New Zealand.
31. Operating overseas and in New Zealand, these states (and their witting or unwitting New Zealand-based proxies) are engaging interference and espionage-related activities that are detrimental to a broad range of New Zealand interests. Some of these activities are intended to directly undermine New Zealand, while others are intended to benefit the foreign state, but harm also occurs to New Zealand or to New Zealanders as a by-product of the activity.
32. Intelligence agencies have observed signs of interference efforts targeting our political, academic, media, and business sectors. In New Zealand, political interference largely takes the form of attempting to deceptively influence policymaking. For example, in 2022 a foreign-state representative secretly worked with New Zealand-based individuals to persuade a New Zealander with political influence to change their position on a subject that is sensitive to that foreign state.
33. Another key target of interference activities in New Zealand are our refugee, migrant, and well-established ethnic and religious communities, which have members that are viewed as dissidents by foreign states.

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regulating lobbying activities. Information on this work can be found on the Ministry of Justice website using the following link: [Political lobbying | New Zealand Ministry of Justice](#).

34. Interference activities include monitoring community members, covertly promoting foreign-state nationalistic sentiment in New Zealand, and preventing expatriate communities from developing or expressing views deemed subversive. Foreign actors may achieve this through social media monitoring, media manipulation, and the use of motivated community contacts. Targeted groups and individuals may be subject to harassment and threatening behaviours, or even coerced or compelled to return to their country of origin.
35. Details on some of the activities above are captured in a recent publication on New Zealand's threat environment.<sup>15</sup>

### *Assumptions*

36. The New Zealand Security Intelligence Service (NZSIS) advises that interference and espionage activities it has observed are persistent, harming New Zealand interests, are undertaken by motivated actors, and target a broad range of individuals and sectors.
37. Due to the often clandestine nature of the activities involved, however, it is difficult for us to determine the full scope foreign interference and espionage activities occurring in New Zealand and the scale of the harm this conduct poses. However, based on findings of our criminal offence review, an examination of domestic and international foreign interference case studies (which relied on publicly available and classified information), and targeted engagement with agencies and communities we have set out our key assumptions below.
38. One assumption is that foreign interference activity is higher than has been identified or reported on – partially because it is difficult to detect, but also because people may not recognise or be familiar with the tactics and techniques being employed by interference actors and are not reporting it. However, we also assume it is not widespread and occurring in high volumes. This is due to the required specific, strategic, and calculated effort involved by foreign states and willing actors in New Zealand to enable it to occur.
39. Another assumption is that the potential harm of foreign interference activity, both as a one-off incident or as part of a coordinated and strategic set of behaviours, can be highly damaging to New Zealand and those under its protection.
40. A third assumption of this work is that changes to criminal justice legislation is necessary because broader existing interventions and mitigations are insufficient for dealing with foreign interference activity on their own.
41. In many ways, options for addressing the problem will be preventative as significant harms may not have occurred yet in New Zealand, but there is a sound reason to avoid them from happening at all. For example, at the most extreme end, this could include loss of key military or national security information, high-level officials acting against New Zealand interest on behalf of a foreign state (which would have immediate effects and cause long-term damage to public trust and confidence), the forced repatriation of

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<sup>15</sup> *New Zealand's Security Threat environment 2023* (New Zealand Security Intelligence Service, Threat Assessment, 2023).

New Zealand residents to their home country<sup>16</sup> or even the assassination of individuals which has been alleged to have occurred in other jurisdictions.<sup>17</sup>

42. Even when behaviours are in scope of the preferred option, effective investigations would need to address challenges **S6(c)**
  
43. These practical challenges will not be addressed by our work, and highlight that it is only one part of a wider Countering Foreign Interference Work Programme. In addition to agencies needing to take steps to adapt investigative approaches under the preferred option, other agencies would need to undertake work to support communities and the public identify interference activity and work to manage expectations about the strengths and limits of the preferred approach.
  
44. Finally, we assume changes to criminal justice legislation will help to deter foreign interference activity. However, we anticipate that it will also cause some dedicated actors to modify their conduct in an effort to get around any legislative changes that result from this work. This includes by increasing efforts to hide or otherwise obscure activities or adjusting to fall just outside the scope of any changes to the criminal offence regime.
  
45. We also understand that this work does not address the root cause of foreign interference – which may be characterised as inter-state competition and indirect hostility. Instead, it will capture individuals and entities that a foreign state uses to achieve its interference objectives. While it may be more likely that individuals can be held accountable for their activities through our work, foreign states that seek to interfere in New Zealand will likely continue their activities, though possibly in a reduced capacity.

**The current criminal law can be improved to support a criminal justice response to foreign interference and espionage activity**

46. As noted at para 22 above, as part of a justice response to the broader countering foreign interference work programme, Cabinet invited the Minister of Justice to undertake a review of New Zealand’s existing foreign interference and espionage-related criminal offences, and consider opportunities for promoting transparency of those undertaking political lobbying and other activities in New Zealand on behalf of a foreign principal.
  
47. The Legislation Design and Advisory Committee’s (LDAC) *Legislative Guidelines* identifies that the purpose of criminal offences is to punish, deter, and publicly denounce conduct that society considers to be blameworthy and harmful. The Guidelines note that criminal offences should only be used if they are necessary to

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<sup>16</sup> For example, see [China's forced returns prompt call for foreign interference committee \(newsroom.co.nz\)](https://www.newsroom.co.nz)

<sup>17</sup> For example, see [Trudeau accuses India's government of involvement in killing of Canadian Sikh leader | CBC News](https://www.cbc.com/news/Canada/india-sikh-leader-killing-1.5488888)

achieve a significant policy objective, particularly the avoidance of harm to society or to particular classes of people.<sup>18</sup>

48. Recognising this purpose, the goal of our work was twofold. First, by examining domestic and international case studies, we identified the extent to which activities being undertaken in the New Zealand were in scope of existing criminal sanctions. Second, it supported assessments on whether additional measures were required to make foreign-sponsored activities more visible and to improve the ability to hold people accountable for undertaking activity considered beyond a tolerable level of harm to New Zealanders or New Zealand interests.

***Findings of the Ministry of Justice's review of criminal offences***

49. In our review of criminal offences, we assessed whether New Zealand's criminal justice system responses were adequate to address foreign interference and espionage activity. The review was comprehensive, centring on the Crimes Act 1961, but also included other relevant offences, for example those relating to:
- **harm/offence-focused legislation**, including the Terrorism Suppression Act 2002, Summary Offences Act 1981, Harassment Act 1997, Secret Commissions Act 1910, Trespass Act 1980, and the Harmful Digital Communications Act 2015.
  - **regulatory offences**, including the Electoral Act 1993, Local Electoral Act 2001, AML/CFT Act 2009, Immigration Act 2009, Customs and Excise Act 2018, and the Overseas Investment Act 2005, and
  - **offences related to the conduct of, and interactions with, officials and other members of government**, including the Intelligence and Security Act 2017, Defence Act 1990, Armed Forces Discipline Act 1971, Policing Act 2008, Public Service Act 2020.

***A range of existing offences criminalise foreign interference and espionage-related activities***

50. We confirmed that existing offences cover a wide range of harmful activity previously observed as being contributors to, or key elements of, foreign interference activity.
51. A range of existing offences criminalise activities that can be undertaken as part of foreign interference efforts. For example, offences related to bribery, corruption, blackmail, harassment, and severe hostile actions against the State such as treason and sabotage.
52. Additionally, several existing offences relate specifically to unlawful access to information and unlawful sharing of information. These include offences for espionage, theft, unlawful access to information systems or locations where information is held, impersonating officials, unauthorised taking, and wrongful communication, retention or copying of classified and official information.
53. New Zealand's current criminal offence regime also accounts for the activities described above if multiple actors are involved or the activities occur overseas. The Crimes Act 1961 applies liability to people who support the commissioning of an offence even if they did not commit it themselves. Conspiring to commit an offence,

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<sup>18</sup> *Legislation Guidelines 2021 Edition* (Legislation Design and Advisory Committee, Guidelines, 2021) at 121.

attempts, and procuring the commissioning of an offence are also all offences under the Act.<sup>19</sup> If an action that forms part of an offence occurs in New Zealand, the offence is considered to have occurred in New Zealand even if the person charged was not in New Zealand at the time of the act.<sup>20</sup>

***Some concerning activities are not captured by existing offences***

54. Our review concluded that existing legislative provisions do not sufficiently cover some activities observed in New Zealand and overseas that could be prejudicial to the State or harm individuals or communities. Some activities related to foreign interference and espionage are currently not covered by the criminal law because:

- the limited nature of party liability allows New Zealand citizens, in some instances, to assist foreign operatives to commit espionage acts in or outside New Zealand, while remaining immune from criminal liability, or
- the individual act or the collection of behaviours is not currently criminalised in New Zealand, for example:
  - covertly or coercively interfering in general public discourse or relationships
  - engaging in some forms of foreign interference working as an agent of a foreign intelligence agency in New Zealand, or
  - undertaking intelligence activity targeting individuals in New Zealand without their knowledge or consent (this likely falls outside the scope of the current espionage offence which centres on providing information or objects to outside of New Zealand that are likely to prejudice New Zealand security or defence).

55. In addition, where some activities were captured by the existing criminal law, other potential non-legislative issues could act as barriers to their use. This included issues related to:

- uncertainty on when and who could commit the espionage offence, which may contribute to the very low number of charges under the offence<sup>21</sup>, and
- penalties for relevant offences did not reflect the significance of the state-sponsored element of activities. We assessed some penalties as being too low relative to the level of intended harm.<sup>22</sup> This has implications for Police's ability to investigate and respond to foreign interference activities, even when individuals or communities are reporting them.

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<sup>19</sup> Sections 310 and 311.

<sup>20</sup> Section 7.

<sup>21</sup> To date, only one individual has been charged under the espionage offence. See [Soldier charged with espionage also accused of being member of far-right groups | RNZ News](#)

<sup>22</sup> For example, the offence intimidation under the Summary Offences Act 1981 carries a maximum term of imprisonment of 3 months. However, this does not factor the scale of the harm if this conduct is carried out by the direction of a foreign state to silence an individual in New Zealand – and their community by extension – for expressing views that are critical of the actions of that foreign state on the internet.

56. A key driver of the limitations we identified related to historic changes to New Zealand's espionage-related offences and the development of new and emerging technologies. This issue is discussed in further detail below.

*Crimes against public order and the evolution of unwelcomed foreign state-sponsored activities targeting New Zealand*

57. Certain acts are criminalised in New Zealand due to the significant damage they can cause to the functioning of a free and democratic society. These public order offences criminalise acts of treason, espionage, and mutiny, which cover some of the most hostile acts a person owing allegiance to the Sovereign in right of New Zealand can commit against the State.
58. These offences have endured on the statute book due to the substantial practical and symbolic harm they capture. Meanwhile, other public order offences have been repealed over the years to better reflect fundamental principles of criminal justice and upholding democratic rights and freedoms.
59. Notable examples include:
- offences for spying and communicating with foreign agents under the now repealed Official Secrets Act 1951, which included evidential presumptions heavily favouring the prosecution and placed the onus on the accused to prove their innocence.
  - sedition offences in the Crimes Act 1961 which, in general, criminalised making or publishing statements that were deemed to undermine public order or the preservation of the State or Government. The offences were repealed on the basis that they were too broad, infringed on freedom of expression and could be potentially abused to stifle or punish political speech.<sup>23</sup>
60. In its 1981 Report, the Committee on Official Information (Danks Committee) – which laid the foundation for repealing the Official Secrets Act 1951 and replacing it with the Official Information Act 1982 – recognised that espionage has very close connections with treason. The Committee even considered espionage to be a modern form of treason which may be undertaken in a manner that is not covered by the existing treason offence, and needed to be address by new criminal sanctions.<sup>24</sup>
61. Through the lens of open government and access to information, the Committee proposed an approach to criminal sanctions that focused on the handling of official information – specifically the intentional release of information to prejudice New Zealand interests or wrongful “leakage” of official information.<sup>25</sup> The current espionage and wrongful communication of official information offences in the Crimes Act and Summary Offences Act largely retain the rationale and approach proposed by the Danks Committee.
62. Where the Danks Committee saw espionage as the evolution of treason against the Sovereign and New Zealand, we view foreign interference activity as further evolved

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<sup>23</sup> For details see - Law Commission *Reforming the Law of Sedition* (NZLC R96, 2007).

<sup>24</sup> Committee on Official Information (Danks Committee) *Towards Open Government - Supplementary Report*. (Danks Committee, Report, 1981) at [5.50].

<sup>25</sup> Above n 26, at [5.49].



forms of statecraft operating outside of the open and public types of state-to-state engagement.

63. In the over 40 years since the Danks Committee report and repeal of other public order-related offences, much as changed both in terms of technology and global interconnectedness. Interference and espionage activities can now occur effectively from within New Zealand and from offshore locations, and foreign states evolve their techniques to exploit shifts in the way people use technology.

*Strengths and weaknesses of the current espionage and wrongful communication offences*

64. While the Danks Committee convened in a time that was largely analogue (eg paper based, limited opportunities for large information transfers), the offences it proposed are largely resilient as they are not prescriptive in terms of the type of information (or object) or how it is communicated (or delivered), other than being “official” information for the purposes of the s78A Crimes Act offence and the s20A Summary Offences Act. This means that the offences can still account for the many ways information is generated and disseminated in the digital world of today and the sheer volume and accessibility of information that exists.
65. However, a key limitation of this offence approach is that it does not account for the ability for foreign states directly from abroad, or by using local proxies, to use this information to undertake activities that are directed *towards* New Zealand and New Zealanders for a strategic purpose.
66. The Danks Committee offences only contemplated official information being leaked or information/objects be provided *outside* of New Zealand. Meanwhile, though the repealed Official Secrets Act spying offence and communicating with foreign agents provision were not without faults, they may have been able to address some types of foreign interference activity targeting New Zealand that is being observed today.

***Our work was informed by the lived experiences of New Zealand’s ethnic and faith-based communities***

67. We drew on existing community connections to consult with a small number of representatives of ethnic and faith-based community groups in New Zealand to better understand their lived experiences of foreign interference activities. Overall, these discussions confirmed the documented nature of community-focused foreign interference activities in New Zealand and highlighted the fear that some community members live with daily. Issues raised by community members included:
- foreign-state surveillance of community events and protests
  - receiving intimidating messages by phone or online for participating in pro-democracy movements or expressing concern or disapproval of authoritarian state activities overseas, and
  - manipulation of local community-focused media outlets.
68. Community members also raised concerns about the alleged involvement of some individuals in local and central government politics, or employed in public sector positions, operating covert political agendas on behalf of foreign states. Some reported concerns for their relatives residing in their country of origin, while others were concerned about what could happen to them if they visited their country of origin.

69. A key insight from discussions with community representatives is the compounding impact that the involvement of a foreign state has on activities targeting individuals and communities – for example, intimidation by someone acting on behalf of a foreign state carries more weight than intimidation by an independent actor.
70. Discussions with community members also identified frustrations experienced by some members as they report concerns to Police and no apparent action results. Police have advised that this is because some activities reported on their own likely do not reach the thresholds of criminal offending. In these instances, Police are unable to address them through a law enforcement response. This supported our findings related to limitations in the current criminal offence settings and informed one of our assumptions of this work (discussed above at paras 42, 43, and 55).

**Policy objectives and options reflect a range of foreign interference-related considerations and an assessment of stakeholder interests**

71. To address the identified problem, we developed policy objectives and options based on our engagement with community representatives and review of criminal offences discussed above, an examination of foreign interference case studies from overseas and in New Zealand, and incorporating LDAC’s legislative best-practice guidance.<sup>26</sup>

*General human rights considerations and interests of stakeholders and the public*

72. The New Zealand Bill of Rights Act (NZBORA) 1990 is expressed to “affirm, protect and promote human rights and fundamental freedoms in New Zealand”, and to “affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights”.
73. While foreign states are permitted to try to influence government decisions and the views of New Zealanders, a core basis of this work is that this should be done openly, not impact on New Zealand sovereignty, or cause harm to those under New Zealand’s protection.
74. One objective of foreign interference activity targeting New Zealand is to suppress, control or limit activities of individuals and communities that another state considers to be contrary to its interests. Options must therefore aim to counter this activity, and support and uphold rights and freedoms. This includes, for example, freedoms of expression and association; freedom from discrimination; electoral rights; the manifestation of religion and belief; and the general right to privacy.
75. However, in protecting these rights and freedoms, we consider that options must also avoid impinging on legitimate conduct in a free and open democracy as far as possible. This would undermine the very values interventions are trying to protect from foreign interference. Further, options should not impinge on the public’s right and interest for an open and transparent government. This includes access to information and protections from coercive state powers when it is divulged in the public interest via appropriate channels (eg maintaining strong whistle-blower protections).
76. Therefore, we consider that the State’s interference with these rights should be limited, so that any options that introduce restrictions contribute to the functioning of New Zealand’s democracy by being:

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<sup>26</sup> For the LDAC Guidelines see: [Guidelines | The Legislation Design and Advisory Committee \(ldac.org.nz\)](https://www.ldac.org.nz/Guidelines)

- proportional to the importance of the objective
- clear, targeted, and do not capture legitimate activity
- more appropriate than other options that are less rights-limiting, and
- for the greater good of society.

77. This approach is in line with section 5 of NZBORA, which sets out that rights and freedoms under the Act may only be subject to reasonable limits prescribed by law that are demonstrably justified in a free and democratic society.

*Community considerations and interests*

78. New Zealand's diverse communities can be targets of interference as other states attempt to control or influence their activities. Further, some community members may actively support foreign interference, while others may be unwittingly exploited or pressured into participating in such activities. Due to familial or ethnic ties to foreign states, or by expressing views or beliefs that align with those promoted by foreign states (which is their protected right in New Zealand), individuals may also come under suspicion of being involved in interference activities when this is not accurate.

79. Therefore, a key consideration in developing options was the potential impact on communities. While communities are likely to benefit from work intended to protect them from interference, there is a risk that interventions may also have unintended consequences. For example, this work is likely to highlight the interference activities of certain foreign states. This may be linked to an increase in unfounded fear or mistrust felt by some sections of the population towards certain groups or communities which can have a marginalising effect. Communities may also feel targeted by proposals which could affirm existing distrust of authorities.

80. Unintended consequences may be exacerbated if policy interventions are not well understood in general or because of widespread misinformation. While this may lead to an increase in anti-government narratives and perspectives, it may also put certain communities at heightened risk of prejudicial acts by other New Zealanders due to ethnic or familial ties to named interfering states.

81. These unintended effects could undermine other ongoing government work aimed at supporting social cohesion, which relates to another national security priority – countering terrorism and violent extremism.<sup>27</sup>

82. Based on our discussions with community representatives and assessment of foreign interference activity across a range of sectors, we understand that stakeholders are interested in changes that:

- support their ability to exercise democratic rights and freedoms or are not barriers to lawful conduct by being unduly restrictive, and
- protect them, their families, and wider communities from retaliation and victimisation (both from foreign interference activity or prejudicial acts by other New Zealanders due to real or perceived ties foreign states).

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<sup>27</sup> For example, see the Ministry of Social Development's website: [Development of Te Korowai Whetū Social Cohesion strategic framework - Ministry of Social Development \(msd.govt.nz\)](https://www.msd.govt.nz/development-of-te-korowai-whetū-social-cohesion-strategic-framework)

*Te Tiriti o Waitangi/the Treaty of Waitangi considerations and the interests of Māori*

83. The Waitangi Tribunal's Reports of the Te Paparahi o Te Raki Inquiry concluded that, under Te Tiriti o Waitangi/Treaty of Waitangi, specified rangatira agreed to an arrangement where they would share power and authority with the Crown – each with different roles and spheres of influence. In addition to the Crown exercising control over new settlers, it also acquired the right to protect Māori from 'foreign threats and represent them in international affairs, where necessary'.<sup>28</sup>
84. This has been considered in relation to the Crown's role in negotiating international treaties and is equally relevant in the context of foreign interference.
85. We have not directly engaged with Māori on this work or the proposed options. However, we consider that policy options intended to protect New Zealanders and the conduct of government against foreign interference attempts should equally work to protect Māori, and the processes by which collective consultation and engagement with the Crown occur by iwi and hapū.
86. For example, foreign states may target Māori to covertly influence or shape their views or perspectives in order to mislead individuals about a government initiative that Māori have a particular interest. Given the recognised Te Tiriti/Treaty status of Māori, this may be seen as a more effective way to interfere in the conduct of government compared to similar activities targeting different groups.
87. By accounting for this in the preferred option:
- Māori can more readily participate in society without being unduly influenced or coerced by foreign states (which is same interest as other New Zealanders)
  - the Māori/Crown relationship established under Te Tiriti/the Treaty is safeguarded against interference attempts to undermine it, and
  - the policy option is less likely to disproportionately impact Māori.

**What objectives are sought in relation to the policy problem?**

88. Based on the considerations and interests discussed in the previous section, we have identified two key objectives of this work.
89. The first objective is to safeguard New Zealand sovereignty from foreign interference and espionage activity that:
- presents the highest potential to harm New Zealand's interests and those in New Zealand
  - is most likely to be undertaken in a manner that is intended to avoid detection or being attributable to a foreign state, and
  - is least likely to be deterred through other regulatory or non-regulatory approaches.

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<sup>28</sup> Waitangi Tribunal *Tino Rangatiratanga me te Kāwanatanga - The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, Report, Part 1, Volume 1, 2023) at [4.1] pg 163.

90. The second objective is to protect those in New Zealand from being negatively impacted by foreign interference activity – including both by acts intended to control or harm individuals, or by introducing measures that create barriers to lawful conduct.
91. These objectives support agencies' ability to detect, investigate and hold individuals to account for undertaking foreign interference activity and helps to safeguard individuals and communities that are targets of interference.

## Section 2: Deciding upon an option to address the policy problem

### What criteria will be used to compare options to the status quo?

92. We have used the following criteria to analyse the policy options.

#### *Consistent with current approaches to regulation or other legal settings in New Zealand*

93. This includes being:

- *clear and targeted* – the option should be easily understood by everyone it applies to, and to those responsible for implementing or enforcing it. The option should target clearly defined and specific activities
- *practical and effective* – the option should enable and support successful intervention by responsible authorities, and be adaptable to technological changes and other shifts in practice/behaviours, as far as possible
- *appropriate and proportionate* – the option captures the purpose of the activity and scale of the harms, and is cost effective
- *a deterrent* – the option should contribute to deterring conduct that undermines New Zealand sovereignty or core interests

#### *Consistent with constitutional principles*

94. To align with New Zealand values this includes:

- supporting the exercise of rights and freedoms, including the general right to privacy, and
- minimising limitations on rights.

### What scope will options be considered within?

95. Recognising the existing safeguards in place and the breadth work being undertaken within the wider Countering Foreign Interference Work Programme, Cabinet and Ministerial direction focused our work on one aspect of this broad and complex issue – legislative options to support a criminal justice response to foreign interference.

#### **Policy options focus on foreign-state-sponsored activity**

96. As this work is part of the Countering Foreign Interference Work Programme, it centres on activities associated with foreign states.

97. Overseas non-state entities can also use modern tools and techniques to influence New Zealanders. Some activities can be done for more benign reasons, such as seeking to promote businesses or tailor online content and advertising to align with user preferences. They can also be used for malicious purposes. For example, by extremist groups intending to spread disinformation and distrust of government to undermine social cohesion, or enabling individuals to anonymously stalk and harass others online.

98. Options considered focus on activity of other states, and closely related entities (eg political parties in single-party states), due to the underlying power and control that come with the internationally recognised status. Foreign states can create laws that

direct the conduct and behaviours of its citizens and possess resources to detect and hold those that violate laws to account – most significant of which include punitive actions such as fines, forfeiture of assets, censorship and in severe cases, imprisonment, forced labour, and execution.

99. While New Zealand can create laws that govern the conduct of individuals and entities to address interference activities, we cannot legislate against other states directing such activity in pursuit of their own foreign or domestic policy agendas. Therefore, policy interventions account for the unique role and significance of the foreign state involvement which is not comparable to the actions of individuals alone or even large multi-national non-state entities which must adhere to laws and regulations.

### **Engagement shaped the scope of feasible options**

100. As foreign interference activity is often undertaken in secret and can target almost any sector or individual, insights from a diverse range of government agencies was required to support the work. We achieved this by establishing a cross-agency working group to inform the development of options. This incorporated perspectives from the intelligence, enforcement and defence sectors, but also foreign affairs, ethnic communities, media regulation and academia.
101. The working group included representatives from: DPMC (National Security Group), Police, NZSIS, Government Communications Security Bureau (GCSB), Ministry of Foreign Affairs and Trade (MFAT), Ministry of Defence, New Zealand Defence Force (NZDF), Ministry of Education, Ministry for Culture and Heritage, and the Ministry for Ethnic Communities. The Department of Internal Affairs, Crown Law Office and the Serious Fraud Office were also engaged on an ad hoc basis.
102. Engagement with members of impacted communities also helped to shape what individual-level interests and impacts were considered as part of option development. It will also help inform future public communications on the work to ensure it is undertaken in a manner that respects communities' safety and wellbeing.
103. In recognition of the national security issues involved and a pressing need to address legislative gaps, we received Ministerial direction to engage in targeted consultation on the work and policy options. This meant only engaging with government entities S6(a) and members of communities that agencies confirmed as being foreign interference targets.
104. To account for this, we sought feedback on options from entities within government that hold key constitutional or independent roles and/or relevant sector specific insights. This included engagement with the Office of the Ombudsman, the Privacy Commission, and Universities New Zealand. We also recognise that, as preferred policy option will likely require legislative change to implement, public feedback will also be sought during the select committee stage of the future bill's progression through the House of Representatives.

### **Options consider experiences and approaches of comparable overseas jurisdictions**

105. Other countries have identified similar limitations or gaps in their offence regimes related to foreign interference. In developing options, we considered recent legislative changes or ongoing work being undertaken by a range of jurisdictions. We focused on developments in Australia, the United Kingdom (UK) and Canada, S6(a)

Details on recent work in these jurisdictions are set out below.

### **Australia**

106. Australia's National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 broadened existing offences related to foreign interference, increased some penalties, and added new offences. This included preparatory conduct and knowingly or recklessly supporting, or being funded by, a foreign intelligence agency.
107. As outlined in the revised explanatory memorandum of the Act<sup>29</sup>, foreign interference offences criminalise conduct undertaken on behalf of a 'foreign principal' that is covert, deceptive, threatening or menacing to influence political or governmental processes or the public's ability to exercise democratic or political rights. To ensure these offences are effective, the legislation increased the range of proceedings that can be held in secret, which enables prosecution of those who commit an offence.
108. At that time, Australia also put in place a regulatory regime to increase transparency of activities being undertaken on behalf of a 'foreign principle' by enacting the Foreign Influence Transparency Scheme Act 2018.<sup>30</sup> Among other things, the scheme was intended to complement criminal offences by providing an alternative mechanism for holding individual accountable via regulatory non-compliance for undertaking foreign influence activities.

### **United Kingdom**

109. In July 2023, the UK enacted the National Security Act which introduced new criminal offences to address foreign interference and espionage risks, new powers for law enforcement agencies, and a Foreign Influence Registration scheme.<sup>31</sup>
110. The range of new offences are broad, including espionage offences, foreign interference offences, and offences for sabotage, obtaining a material benefit from a foreign intelligence service, preparatory conduct, and unauthorised entry to a 'prohibited place'. The foreign interference offences criminalised engaging in designated 'prohibited conduct' to achieve an 'interference effect'.
111. The offences have many similarities with the Australian equivalent, but included a requirement to have been knowingly or, reasonably ought to have been known, to be undertaken on behalf of a 'foreign power'. In addition to these changes, the National Security Act also specified that protected 'information' in scope of offences also included information about tactics, techniques, and procedures.

### **Canada**

112. While no new legislation has been introduced to date, the Canadian government is actively undertaking work to develop new criminal offences to address foreign interference risks and potential for a new foreign influence transparency registry.

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<sup>29</sup> See [ParlInfo - National Security Legislation Amendment \(Espionage and Foreign Interference\) Bill 2018 \(aph.gov.au\)](https://aph.gov.au/ParlInfo/nr/nr4429)

<sup>30</sup> See [Federal Register of Legislation - Foreign Influence Transparency Scheme Act 2018](https://www.federalregister.gov/?title=Foreign+Influence+Transparency+Scheme+Act+2018)

<sup>31</sup> For an overview of UK legislative changes, see [National Security Act Factsheet – Home Office in the media \(blog.gov.uk\)](https://www.blog.gov.uk/2023/07/20/national-security-act-factsheet-home-office-in-the-media/)



113. Canadian officials have recently undertaken public consultation on both the potential merits of a foreign influence registry<sup>32</sup> and potential options for new foreign interference-related offences<sup>33</sup>, including a new general foreign interference offence, and specific offences related to intimidation or inducement of individuals, or interference in democratic processes. Other issues tested by officials included whether to raise penalties for existing offences, modernising its sabotage offence and whether to undertake work related to the security of information in court proceedings.

### Some options were ruled out

114. We ruled out certain options after considering approaches taken in overseas jurisdictions. This was to account for recent changes to existing New Zealand legal frameworks, or due to the option's inconsistency with principles underpinning New Zealand legal and regulatory settings. This included:

- Making changes to court proceedings related to the use of confidential or classified information. This recognised that the Security Information in Proceedings Act 2022, which provides an overarching framework to manage security information in proceedings, had recently come into force in November 2023. The framework sets the process for how security information, including that obtained by the intelligence and security agencies, can be used and protected in court and administrative decisions.
- Making changes to the Sentencing Act 2002 to account for impacts to national security as an aggravating factor during sentencing. The efficacy of this approach did not meet a threshold for consideration because it was unclear when and how such evidence would be included as part of proceedings for general offences. We also assessed that the scale of identified harms associated with foreign interference would be better accounted for in penalty levels for new or updated offences which form part of the options we analysed.
- Implementing a foreign influence transparency regime to provide transparency of foreign state-sponsored activities directed at New Zealand, similar to those being put in place by comparable jurisdictions. We considered this option, but advised our Minister against it – which informed his December 2023 decision discussed at para 24 above.

This option provides a means of holding individuals accountable via penalties for regulatory non-compliance (eg not registering in general or registering specific influence activities). However, we did not recommend this option because its general purpose is to provide transparency of legitimate influence activities, and not address interference and espionage activity that represent the highest potential to harm to New Zealand interests and to individuals in New Zealand. Other factors considered included:

- the relatively high initial and ongoing costs in maintaining and enforcing a regulatory regime<sup>34</sup>

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<sup>32</sup> See [What We Heard Report: Consulting Canadians on the merits of a Foreign Influence Transparency Registry \(publicsafety.gc.ca\)](https://publicsafety.gc.ca)

<sup>33</sup> See [Addressing foreign interference \(justice.gc.ca\)](https://justice.gc.ca)

<sup>34</sup> As an example, in its submission to the parliamentary committee reviewing the Foreign Influence Transparency Scheme Act 2018, the Australian Attorney-General's Department reported it receives A\$2.2M per year and

- identified impacts on freedom of expression for those seeking to undertake influence activities
- the absence of a complementing domestic lobby register in New Zealand (which would help lower the likelihood that a lone foreign influence register could be easily circumvented by using a local proxy), and
- limited evidence of their efficacy without well-calibrated definitions and scoping and appropriate enforcement mechanisms.<sup>35</sup>

## What options are being considered?

115. Three options have been identified:

- Option 1 – Status quo
- Option 2 – Modify existing offences to address identified gaps and limitations in the criminal offence regime
- Option 3 – Amend existing offences and create new bespoke offences to address identified gaps and limitations in the criminal offence regime

### Option 1 – Status quo

116. No change to existing settings. Responses to foreign interference activity directed at New Zealand are addressed through existing regulatory and non-regulatory settings and initiatives within the Government's Countering Foreign Interference Work Programme which are discussed at paras 19.

117. Under this option existing limitations and gaps in the criminal law will remain, along with the current difficulties in investigating and prosecuting foreign interference and espionage activity. Individuals engaged in interference activity are able to continue their behaviours – even if confronted by agencies, or are being reported by communities – as the activity is often not unlawful.

### Option 2 – Modify existing criminal offences

118. This option addresses limitations and gaps identified in our criminal offence review by adapting existing criminal offences to account for contemporary issues and foreign-state conduct. No new offences are proposed under this option.

119. This includes, for example, making changes to the current offences within the Crimes Act 1961 such as the espionage offence and other foreign interference-related offences (eg blackmail, sabotage, bribery) or offences in other legislation (eg Electoral Act 1993) to account for the foreign state-sponsored element as an aggravating factor.

120. This would be achieved by including new penalty thresholds to reflect higher levels of harm and culpability of the criminal conduct (eg similar to penalty settings for the espionage offence of up to 14 years imprisonment), or by introducing lower *mens rea* thresholds. For example, the espionage offence only covers intent to prejudice New

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employs 13 staff to administer the Scheme (including maintaining the register, education and outreach activities, information sharing across agencies and support for enforcement activities).

<sup>35</sup> For details on the operation and recommended improvements to the Australian foreign influence scheme see, Parliamentary Joint Committee on Intelligence and Security *Review of the Foreign Influence Transparency Scheme Act 2018* (parliamentary committee report, March 2024).

Zealand's interests. The offence would be amended to recognise that knowingly or recklessly prejudicing New Zealand's interests via activities currently criminalised under the espionage offence has the same detrimental outcome as intentional conduct.

121. This option would also support an enforcement response to conduct that can prejudice the security or defence of New Zealand by:
- extending party liability related to assisting espionage activities to address identified gaps, and
  - increasing accountability for unauthorised disclosure of official and classified information by updating official and classified information offences to account for changes to core official information legislation; making it explicit that sharing military tactics, techniques, and procedures is an offence; and ensuring that individuals with access to security or defence information hold it in-confidence.
122. The development of bullet two above was influenced by input received by the Office of the Ombudsman – which has a unique role and experience related to the use of “official information” and the interpretation of its definition under the Official Information Act 1982.

***Option 2 supports an enforcement response to foreign interference activity and could be tailored to avoid some risks related to over-criminalisation***

123. By only amending existing offences, this approach helps to ensure that changes more readily align with current approaches to criminal law in New Zealand, while also accounting for the higher level of harm associated with the involvement of a foreign state. This supports the first objective of safeguarding New Zealand sovereignty by providing greater nuance in charging options to better enable law enforcement agencies rely on existing offences to address criminal conduct.
124. It also enables changes to target specific types of criminal conduct that is most often associated with foreign interference activity. This helps to avoid risks related to over criminalisation and unintended capture and supports the second objective of ensuring the impact on individual rights and freedoms is reduced.
125. While these changes will mean more activities will be in scope of updated offences, we anticipate that the total number of prosecutions will remain low. This is due to the assumed relatively low overall number of foreign interference and espionage incidents occurring. Another factor in low prosecutions includes existing implementation challenges related to complexities in investigations in this area and relying on sensitive government information in court proceedings.

***Tailoring existing offences may have unintended consequences and would not be able to account for future changes in foreign interference techniques and activities***

126. Existing offences were created for specific purposes during a specific point in time. Modifying these purposes may also have potential unintended consequences, including risks of potential unintended capture.
127. We considered this particularly in the context of the current espionage offence which covers any information or object that is delivered outside of New Zealand – including both public and government information. Lowering the threshold of criminality to activities done that recklessly prejudice New Zealand's security or defence opens the offence to a far wider range of activities beyond intentional acts to harm New Zealand –

especially when considering the ease in which information can now be shared around the world through the internet.

128. For example, if an individual sends an overseas business partner an email containing information on software they developed which has both civilian and military applications, this could potentially fall under a 'reckless espionage' offence as the information holds the potential to prejudice New Zealand's security or defence and the sender was being reckless to this harm.
129. This risk could be partially addressed by introducing defences into the espionage offence, but this would introduce new levels of complexity. Difficult decisions will need to be made on what types of activities, across a range of sectors and situations, would be deemed appropriate to carve out from the offence.
130. The targeted nature of this approach would also mean that it would be difficult to account for future changes in the way foreign interference activity is conducted. If foreign states employ different techniques than the ones that are covered by updated offences, further law change would be required to update relevant offences to recognise the higher harms of that conduct.

#### ***New Zealand Bill of Rights Act 1990 implications of modifying existing offences***

131. One of the objectives of foreign interference activity is to suppress or control actions that a foreign state views as contrary to its interests. Amending existing offences is intended to counter this by recognising the significance associated with foreign-state involvement. This, in turn, supports people's ability to exercise of rights and freedoms by deterring foreign interference activities and a better means of holding individuals to account.
132. This option retains the status quo of Police's power and responsibilities, such as the thresholds for making use of the Search and Surveillance Act 2012, and application of the Privacy Act 2020's principles to law enforcement's collection and use of information. It engages these legislative thresholds, but does not amend existing settings.
133. However, some new penalty thresholds for existing offences may have indirect privacy implications as Police could rely on more intrusive powers to investigate relevant offences when it was unable to do so previously. For example, Police cannot use surveillance powers to investigate the current criminal harassment offence, but it may be able to if there is a higher penalty threshold for foreign state-sponsored criminal harassment.

#### **Option 3 – Amend existing offences and create new bespoke offences** (the preferred option)

134. This option addresses limitations and gaps identified in the Ministry's criminal offence review by:
  - modifying existing criminal offences to account for gaps in the scope and settings of current offences, and
  - creating new bespoke offences to address limitations in the criminal law related to identified foreign interference activities that present the greatest risk to New Zealand interests.

135. This option includes changes to existing provisions support an enforcement response to conduct that can prejudice the security or defence of New Zealand identified in Option 2 at para 121. Specifically, by amending existing provisions related to espionage and wrongful communication of “official” and “classified” information offences.
136. This option differs from Option 2, in that existing offences and provisions are not retrofitted to account for a broader range of conduct that feature as part of foreign interference activities. Instead, this option proposes to introduce two new bespoke offences in the Crimes Act tailored to foreign interference. These include:
- A ‘foreign interference’ offence to criminalise intended or reckless harm to critical New Zealand interests. This specifies foreign interference in law for the first time and is defined as comprising three essential elements:
    - To distinguish this conduct from legitimate influence, it must include activities that are *deceptive, covert, corruptive, or coercive* in nature, and
    - The conduct is directed at *compromising core New Zealand interests*. This includes national security, defence, international relations, economic well-being, government administration, and democratic processes. Interests also include the safety and security of individuals and their families, and their ability to exercise civil, political, or democratic rights, and
    - Activities are knowingly, or ought to have been known to be, *undertaken for, on behalf of, or in collaboration with a “foreign power”*.
  - An offence of committing an imprisonable offence with intent that, or being reckless as to whether, a foreign power receives a specified benefit from the committing of the base offence. The offence will provide an ‘uplift’ in penalty (discussed in the next section) to an existing imprisonable offence, recognising the additional harm involved in the intent, or reckless conduct, to benefit a foreign power. As an example, this new offence could be applied to:
    - section 21 of the Summary Offences Act 1981 – Intimidation – which carries a maximum penalty of 3 months’ imprisonment. This offence would better reflect the serious coercive nature of this behaviour if it is undertaken to benefit a foreign state, for example, by silencing New Zealand community members who are viewed as being dissidents by that state.

#### *Penalties for new offences under Option 3*

137. The penalties proposed for the new ‘foreign interference’ offence is a maximum term of imprisonment of 14 years for conduct that is intended to cause harm, and a maximum term of imprisonment of 10 years for conduct that is reckless to harm.
138. The penalties proposed for the offence of committing an imprisonable offence is a maximum term of imprisonment of 10 years for conduct that is intended benefit a foreign power, and a maximum term of imprisonment of 7 years for reckless benefit to a foreign power.
139. These tiered penalties reflect the significance of conduct that is intended to undermine New Zealand sovereignty, or may likely result in significant harm to New Zealand interests. They provide a more graduated approach for crimes against public order, which include the espionage offence (maximum term of imprisonment of 14 years), the wrongful communication, retention or copying of classified information (maximum term

of imprisonment of 5 years), and the wrongful communication, retention or copying of official information offence (maximum term of imprisonment of 3 years).

***This option provides mechanisms to support an enforcement response to foreign interference while also supporting the exercise of rights and freedoms***

140. This option provides a 'bright line' for what specific conduct related to foreign interference constitutes a criminal act and account for the higher degree of harm when criminal conduct is undertaken to benefit a foreign state. The 'foreign interference' offence is also flexible because it does not define specific acts making it able to account for future methods in which interference activity will occur.
141. To commit one of the new offences, all three elements must occur for the foreign interference offence or an imprisonable act must have taken place. These are important safeguards to help ensure lawful conduct is not captured.
142. As an example, business conducted in private (eg use of encrypted communication apps or holding confidential meetings) and/or activities that involve cooperation or collaboration with foreign state entities (including state media, state-owned enterprises, and state universities) will not trigger either offence. On their own, these are acceptable activities in an open and free democracy and the purpose of the activity is not to harm designated interests captured by the foreign interference offence.
143. By focusing on criminal acts and incorporating a bright line and multi-element approach, both objectives can be achieved. New Zealand sovereignty is protected by providing a means to hold individuals accountable for serious interference-related activity and the exercise of individual rights and freedoms is supported.
144. Similar to Option 2, based on the assumed relatively low incidents involved, the anticipated complexity of investigations, and challenges in relying on sensitive government information in proceedings, we expect that the total number of investigations and prosecutions will be low. For a comparison, comparable offences put in place in Australia in 2018 have resulted in only two charges under their new offences – one case still before the courts and the other resulting in conviction<sup>36,37</sup>.

***Foreign interference-type offences have a heightened risk of potential unintended capture which requires the inclusion of additional safeguards***

145. Our examination of comparable offences in Australia and the UK identified that foreign interference-type offences have a particular risk related to potential unintended capture. This risk exists due to the necessarily broad scope of activities captured by these types of offences.
146. There is a possibility that some legitimate activities, at the margins, could satisfy all three elements of the foreign interference offence and expose a person to criminal liability. Overseas, this risk has been identified in the media sector<sup>38</sup>, but it may equally apply to other sectors which involve a high degree of interactions with foreign-state-linked entities (eg international business or academic research).

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<sup>36</sup> See <https://www.bbc.com/news/world-australia-65284522>

<sup>37</sup> See [First sentence for foreign interference handed down | Australian Federal Police \(afp.gov.au\)](#)

<sup>38</sup> For example see: Sarah Kendall *Foreign Interference Law & Press Freedom* (University of Queensland Australia, Reform Briefing, January 2022).

147. While the three-element approach helps to mitigate this risk, a level of ambiguity that is not generally appropriate within the criminal law will remain. This has the potential to create uncertainties for both the public and law enforcement agencies on when and how some activities will result in criminal liability.
148. To address this, the new offences include the additional safeguard of requiring the Attorney-General to consent to proceedings, similar to the existing espionage offence. This helps to protect individuals from unjust punishment by providing an extra layer of oversight which takes into account whether it is in the public interest to prosecute. The approach is also in line with the Solicitor-General's Prosecution Guidelines as the offences involve matters of security and foreign relations.<sup>39</sup>
149. Discussions with representatives from the academic sector indicate that individuals who are potential targets of foreign interference activity may welcome this type of offence. This is because it is intended to protect them from harmful conduct rather than acting as a barrier to their work. However, it was also advised that future work during the legislative and implementation process is needed to help ensure that potentially impacted sectors are provided with clear information on the scope, purpose, and intent of the offences. This was seen as a way to address concerns of related to unintended capture and reduce the potential chilling effect this could have on research collaborations and international exchanges.
150. Some of this information will be provided as part of the government's communications on the preferred option, **S9(2)(f)(iv)**

### ***New Zealand Bill of Rights Act 1990 implications of introducing new offences***

151. This option has similar benefits and impacts related to the exercise of rights and freedoms as Option 2.
152. Bespoke offences provide detail on what type of conduct specifically constitutes as criminal foreign interference, and provides a means to hold individuals accountable who undertake such activities. This provides clarity for the public and foreign states on what activities are not permitted, which helps to protect against identified forms of interference that are intended to limit or reduce the exercise of rights and freedoms.
153. In protecting these rights and freedoms, the new offences engage one right under the Bill of Rights, section 21 freedom from unreasonable search and seizure, and the general right to privacy. The proposals will enable Police to access existing search and surveillance powers for activities that, on the face of it, constitute lower-level offending or the general exercise of rights and freedoms, if there are reasonable grounds to suspect that elements of the new offences are satisfied (eg activities are undertaken on behalf of a foreign power or intended to benefit a foreign power).

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<sup>39</sup> Crown Law Office *Solicitor-General's Prosecution Guidelines* (Crown Law Office, Guidelines, 1 July 2013) at [11.1] pg13.

How do the options compare to the status quo?

Criteria		Option		
		Option 1 Status quo	Option 2 Modify existing criminal offences	Option 3 Amend existing criminal offences and create new bespoke offences (the preferred option)
Consistent with current approaches to regulation or other legal settings in New Zealand	Clear and targeted	0 Wider guidance produced as part of the existing Countering Foreign Interference Work Programme will provide information on what is considered by agencies as inappropriate behaviour in New Zealand, but many activities can continue as they are not unlawful.	+ Increased clarity on when modified existing offences are being committed – increasing their utility. - Rescoping key offences, including the espionage offence, is likely to have unintended consequences related to overcriminalisation of legitimate conduct. This supports enforcement activities, but has costs to the public.	+ Increased clarity on when amended existing offences are being committed – increasing their utility. ++ Specifying what activity constitutes criminal 'foreign interference' provides clarity for the public, enforcement agencies, and foreign states on what is, and is not, appropriate behaviour in New Zealand. - - Some ambiguity in the offence is unavoidable but can be accounted for.
	Practical and effective	0 Increased awareness of foreign interference can help people feel supported and call out this type of activity, but this option does not support successful criminal justice interventions by responsible authorities.	+ Enables enforcement agencies to utilise existing offences to address criminal harm, including when it is undertaken on behalf of a foreign state or to benefit a foreign state. + Somewhat future-proofed, but further updates to existing offences likely needed at a further date as foreign interference activities adapt and change over time.	+ Enables enforcement agencies to utilise existing and new offences to address criminal harm, including when it is undertaken on behalf of a foreign state or to benefit a foreign state. ++ The option can account for changes in how foreign interference activity occurs.
	Appropriate and proportionate	0 No direct costs. Existing work in the government work programme will highlight the purpose and negative impact of foreign interference activity, but this option does not provide a means to appropriately respond to the scale of the harms.	+ Targeted approach that can be tailored to specific activities to support enforcement responses to interference. 0 Difficult to determine full scale of interference activities which impacts on whether new offences are appropriate, but the approach is assumed to address potentially highly harmful activities in New Zealand. - - Upfront costs to amend legislation, likely ongoing costs for future amendments.	+ Targeted approach that centres on core elements of foreign interference activity, including acts that are already criminalised in New Zealand, and those intended to, or are reckless as to harm to specified interests. 0 Difficult to determine full scale of interference activities which impacts on whether new offences are appropriate, but the approach is assumed to address potentially highly harmful activities in New Zealand. - Upfront costs to amend legislation.
	deterrence	0 Existing limitations and gaps in criminal justice legislation will remain which increases the likelihood that foreign interference activity will continue and potentially increase over time.	0 Some increase in likelihood of criminal sanction by addressing existing gaps and accounting for foreign-state sponsored activity supports deterrence, but may not have strong deterrent effect as interference activity can be modified to work around specific changes (interference activity likely to adjust to get around changes).	+ Increased likelihood of criminal sanction by addressing existing gaps and accounting for foreign-state sponsored activity supports deterrence. Bespoke offences may make it more difficult for foreign interference actors to work around these changes.
Consistent with constitutional principles	Exercise of rights and freedoms are supported	0 Coercive interference activity likely to continue which has ongoing negative implications for individual expression of rights and freedoms.	+ Updated criminal sanctions can help to deter some interference activity and supports enforcement activity to hold individuals to account for engaging in foreign interference – supporting individuals' ability to exercise rights and freedoms. - Indirect impact on general right to privacy as Police could rely on more intrusive powers to investigate modified offences that account for the aggravating foreign state element when it was unable to do so previously. This would impact an assumed low number of people who would be investigated for the offence.	+ Updated criminal sanctions can help to deter some interference activity and supports enforcement activity to hold individuals to account for engaging in foreign interference – supporting individuals' ability to exercise rights and freedoms. - Indirect impact on general right to privacy as Police could rely on intrusive powers to investigate new offences for acts that, on the face of it, appear to be general exercise of rights or freedoms or low-level criminal offending. This would impact an assumed low number of people who would be investigated for the offence.
	Minimising limitations on rights	0 No change to limits on rights and freedoms.	+ Targeted changes to offences limit the scope of who will be captured by offences and protects against unintended capture. - Changes to key offences likely results in over criminalisation, and accounting for this would be complex and challenging.	+ Three-limb offence approach and capturing already criminalised conduct protects against criminalising legitimate conduct in a free and open democracy. - - Some marginal legitimate activities will be in scope of the offence but are coupled with identified measures to reduce risk of unjust punishment.
<b>Overall assessment</b>		<b>0</b>	<b>0</b>	<b>+</b>

**Key for qualitative judgements:**  
 ++ much better than doing nothing  
 + better than doing nothing  
 0 about the same as doing nothing  
 - worse than doing nothing  
 - - much worse than doing nothing



**What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?**

- 154. Our preferred option is Option 3 - Amend existing criminal offences and create new bespoke offences.
- 155. As noted previously, criminal offences are intended to punish, deter, and publicly denounce conduct that society considers to be blameworthy and harmful. They should only be used if necessary to achieve a significant policy objective, particularly the avoidance of harm to society or to particular classes of people.
- 156. By tailoring new offences towards specific hallmarks of foreign interference activity, this option is better aligned with legislative best-practice guidelines and supports a criminal justice response to foreign interference and espionage activity. This works towards both objectives of this work – safeguarding New Zealand sovereignty against foreign interference and espionage activity and supporting the exercise of individual rights and freedoms – by increasing the likelihood that potential interference actors will be deterred from undertaking activities or by holding them accountable for their now criminal acts through successful prosecutions.
- 157. This approach retains many of the positive benefits of Option 2, but avoids risks related to modifying existing offences to cover issues and contexts they were not designed to address. It is also the more future-proofed option by being more readily able to account for new techniques and tools that can be used to undertake foreign interference activity – which also means lower cost and effort related to future legislative change to ensure criminal offences remain fit for purpose with respect to foreign interference.
- 158. We recognise that this option has a degree of ambiguity and may expose certain individuals and sectors to potential criminal liability under the new foreign interference offence. However, we consider this risk is sufficiently mitigated by:
  - incorporating a three-element approach which requires all three parts of the offence to be satisfied before a person can be subject to criminal liability
  - the offence has the added safeguard of requiring the Attorney-General's consent to criminal proceedings, and
  - further non-legislative work [S9\(2\)\(f\)\(iv\)](#)

**What are the marginal costs and benefits of the option?**

- 159. We have analysed marginal costs and benefits for the preferred option: Option 3 – Amend existing offences and create new bespoke offences.

Affected groups	Comment	Impact	Evidence Certainty
<b>Additional costs of the preferred option compared to taking no action</b>			
People engaging in criminal foreign interference activity	<b>Ongoing</b> – Those convicted of a new or updated offence are liable to a prison sentence.	<b>High</b> – defendants may require legal fees for court proceedings for committing the offence, with potential for imprisonment.	<b>High certainty</b> – Will be incurred per arrest for committing an offence.

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<p>People engaging in lawful activities that are on behalf of, or in collaboration with, a foreign power.</p>	<p><b>Ongoing</b> – there will be flow-on impacts to individuals coming into contact with foreign-state entities, including due diligence activities to ensure they are not engaging in criminal conduct.</p>	<p><b>Low</b> – depending on the conduct, there may be a need for greater due diligence activity if the conduct has the potential to prejudice specified interests in new offences.</p>	<p><b>High certainty</b> – activities are necessary to ensure the individual/entity does not commit an offence.</p>
<p>New Zealand Police</p>	<p><b>One-off</b> – Initial cost of implementing change including training on detecting criminalised activity and techniques for engaging impacted individuals and communities. <b>Ongoing</b> – Cost of investigation and enforcement of offences.</p>	<p><b>Low</b> – Having offence may encourage higher reporting of incidents by impacted communities and investigations would be resource intensive, but these are expected to be rare (and this may drop off if interference activity is deterred).</p>	<p><b>Medium certainty</b> – members of the community are already reporting interference activity and it is possible that Police would investigate suspected offending under amended and new offences.</p>
<p>NZDF Joint Military Police Unit</p>	<p><b>One-off</b> – Initial cost of implementing change including training on detecting criminalised activity conducted by service members <b>Ongoing</b> – Cost of investigation and enforcement of offences.</p>	<p><b>Low</b> – while Military personnel may be targets of interference and espionage, the number of incidents is expected to be low.</p>	<p><b>Low certainty</b> – Limited evidence is available to confidently forecast expected numbers of investigations.</p>
<p>NZSIS/GCSB</p>	<p><b>Ongoing</b> – flow-on impacts from updated criminal offence regime includes increased reporting of interference activity by the public and agencies, which may result in a related increase in workload for the agencies.</p>	<p><b>Medium</b> – Under their legislation, protecting national security related to espionage or other foreign intelligence activity is a key part of the agencies role – increased leads would result in a need to dedicate intelligence resource.</p>	<p><b>Low certainty</b> – Limited evidence is available to confidently forecast impacts on agency intelligence activity.</p>
<p>Crown Prosecutors/ Armed Forces Defence Counsel Panel</p>	<p><b>Ongoing</b> – Cost of prosecution for breach of offences (mainly for Crown Prosecutors, though NZDF has a pool of barristers that can act as prosecutors in the Court Martial) or assigned defence counsel in Court Martial.</p>	<p><b>Low</b> – number of breaches expected to be low.</p>	<p><b>Medium certainty</b> – some domestic and international evidence is available to forecast expected numbers of prosecutions.</p>
<p>Ministry of Justice</p>	<p><b>Ongoing</b> – Cost of legal aid.</p>	<p><b>Low</b> – number of breaches expected to be low which reduces the cost of legal aid.</p>	<p><b>Medium certainty</b> – some domestic and international evidence is available to forecast expected need for legal aid for court cases.</p>

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Courts (including the Court Martial of New Zealand <sup>40</sup> )	<b>Ongoing</b> – Cost of proceedings for breach of offences.	<b>Low</b> – As above, we expect low volume of trials.	<b>Medium certainty</b> – some domestic and international evidence is available to forecast expected numbers of court cases.
Department of Corrections	<b>Ongoing</b> – Costs for any offenders convicted for a breach offence whose sentences are managed by Corrections.	<b>Low</b> – As above, we expect low volumes of convictions.	<b>Medium certainty</b> – some domestic and international evidence is available to forecast expected numbers of court cases.
Ministry of Foreign Affairs	<b>One-off</b> – Initial cost of familiarising officials with updated offence regime and preparation to respond to foreign states’ reactions to the New Zealand law change. <b>Ongoing</b> – engage with Diplomatic and Consular Corp on foreign interference issues, and manage diplomatic relations in the event of criminal proceedings against foreign nationals.	<b>Low</b> – initial impact may be medium, but overall low once scope and intent of the preferred option is communicated to foreign states, ongoing impacts will be low due to low number of incidents.	<b>Low certainty</b> – Uncertainty on how foreign states will respond to these changes makes it difficult to forecast expected costs.
Ministry for Ethnic Communities	<b>One-off</b> – Initial cost of familiarising officials with updated offence regime and preparation to respond to community queries and reporting of interference. <b>Ongoing</b> – Cost of communicating with communities on foreign interference issues and connecting groups with relevant agencies to address specific concerns.	<b>Low</b> – initial impact may be medium, but overall once scope and intent of the preferred option is communicated to communities, ongoing impacts will be low due to expected low number of incidents.	<b>Low certainty</b> – Limited evidence on how many communities are impacted by foreign interference activity, and whether the changes will encourage reporting - this makes it difficult to forecast expected costs.
Universities New Zealand or the Ministry of Education	<b>One-off</b> – Initial cost of familiarising officials and academics or researchers with updated offence regime and preparation to respond to queries and reporting of interference. <b>Ongoing</b> – Cost of any further communications with academics or researchers on foreign interference issues and	<b>Low</b> – initial impact may be medium, but overall once scope and intent of the preferred option is communicated to academics and researchers, ongoing impacts will be low due to expected low number of incidents.	<b>Low certainty</b> – Limited evidence on how many New Zealand academics and researchers are impacted by foreign interference activity, and whether the changes will encourage reporting - this makes it difficult to forecast expected costs.

<sup>40</sup> For details on the New Zealand Military Justice system see, [Discipline-Report 2021-2022.pdf \(nzdf.mil.nz\)](https://nzdf.mil.nz/discipline-report-2021-2022.pdf)

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	connecting individuals with relevant agencies to address specific concerns.		
Independent Police Conduct Authority	<b>Ongoing</b> – Cost of reviewing complaints regarding Police investigations.	<b>Low</b> – We expect numbers of complaints to be low, due to the equivalent low number of investigations.	<b>Medium certainty</b> – Some evidence of IPCA complaint investigation is available through IPCA Annual Reports which is used to forecast costs.
Inspector-General of Intelligence and Security	<b>Ongoing</b> – Cost of reviewing complaints regarding NZSIS/GCSB activities related to foreign interference and espionage, or reviews or inquiries related to agencies acting lawfully and properly.	<b>Low</b> – We expect low to no complaints to the IGIS for NZSIS/GCSB and reviews or inquiries related to espionage or interference-related activities (eg intelligence collection) to occur infrequently.	<b>Medium certainty</b> – Some evidence of IGIS complaint investigations and reviews is available through IGIS Annual Reports which is used to forecast costs.
<b>Total monetised costs</b>	<b>Ongoing</b> – A broad range of monetised costs.	<b>Low</b>	<b>Medium certainty</b>
<b>Non-monetised costs</b>	<b>Ongoing</b>	<b>Low</b>	<b>Medium certainty</b>
<b>Additional benefits of the preferred option compared to taking no action</b>			
Individuals undertaking lawful activities on behalf of, or in collaboration with, a foreign state	<b>Ongoing</b> – new offences may help individuals conduct their business with confidence as they are protected from criminal interference activity.	<b>Low</b> – the majority of interactions individuals have with foreign states will be open, transparent and mutually beneficial, and only a small number of interactions will benefit from protections against covert, corruptive, or coercive interference activity.	<b>Low certainty</b> – limited engagement on this topic indicates this benefit is likely, but without more evidence it is difficult to forecast.
General public (most commonly ethnic or religious communities targeted by foreign interference activity)	<b>Ongoing</b> – new offences may help individuals to recognise and feel more confident in reporting criminal interference activity. This also helps deter potential local co-optees from undertaking interference-related conduct.	<b>Low</b> – as the expected volume of foreign interference is low the overall impact will be low, however, for individual targets and impacted communities the impact will be high.	<b>Low certainty</b> – limited engagement with members of the public, specifically with ethnic and religious community members, on this topic indicates this benefit is likely, but without more evidence it is difficult to forecast.
New Zealand government agencies	<b>Ongoing</b> – the new offences can assist agencies by enabling cross-agency cooperation and access to a broader suite of tools to respond to foreign interference activity.	<b>High</b> – Some agencies have advised that the proposed offences will strengthen their ability to respond to foreign interference activity.	<b>Medium certainty</b> – engagement with some agencies, including Police and MFAT, indicate new offences will support their work.

Foreign states	<b>Ongoing</b> – a clear line that constitutes appropriate and inappropriate conduct in New Zealand can help states maintain or positively shift behaviours.	<b>Low</b> – Intelligence agencies advise that only a small number of foreign states engage in foreign interference against New Zealand. Therefore, the overall number of states that would shift behaviours would low.	<b>Medium certainty</b> – the NZSIS advises it has observed this in relation to foreign-state activities in New Zealand and abroad.
<b>Total monetised benefits</b>	N/A	N/A	N/A
<b>Non-monetised benefits</b>	<b>Ongoing</b>	<b>Medium</b>	<b>Medium certainty</b>

160. As indicated in the analysis above, the main costs of Option 3 relate individuals and agencies in the criminal justice pipeline. This includes those convicted of new or updated offences as well as the agencies involved in criminal investigations, court proceedings, and imprisonment those convicted of an offence.
161. Flow-on costs include initial and ongoing costs for agencies that contribute to foreign interference identification (ie intelligence and security agencies), work closely with targets or sectors that are known targets of interference (eg ethnic and religious communities and academia), or support New Zealand’s international relations (MFAT).
162. While the number of successful criminal prosecutions is anticipated to be low, our analysis identifies that, in the context of foreign interference, bespoke criminal sanctions have other benefits both within and beyond the justice sector. This includes:
- helping the public and targeted communities and sectors to recognise and report foreign interference activity or deter potential local co-optees from undertaking harmful or risky interference-related conduct
  - assisting agencies by enabling cross-agency cooperation and access to a broader suite of tools, for example by enabling Police access to powers to investigate interference activity and providing MFAT with the basis to engage foreign diplomatic missions on concerning issues and leverage tools such as requests for waiving immunity, voluntary withdrawal, or expulsion of individuals, and
  - compelling foreign states to positively shift behaviours in response to legal changes, related public statements and other changes. The NZSIS has observed this in relation to some foreign-state activities in New Zealand and abroad.

## Section 3: Delivering an option

### How will the new arrangements be implemented?

163. The proposed changes to existing offences and new offences require new legislation to implement. This will come into effect when the legislation comes into force, which is expected in mid-2025.

#### Initial implementation of the updated criminal offence regime

164. Police (and the NZDF Joint Military Police Unit likely to a lesser degree) will undertake the bulk of the implementation for updated offences. Police will make any necessary additions or amendments to operational policy and guidelines (such as for monitoring

compliance and charging of the offence), and IT systems (such as reporting codes). These aim to ensure consistency of use.

165. The Ministry of Justice will be the agency responsible for administering the legislation containing the policy. The Ministry of Justice, which provides operational support for the judiciary, will implement the required people capability, system, and process changes to ensure that the courts are prepared.

### **Enforcement of amended and new criminal offences**

166. Police (and the NZDF Joint Military Police Unit) will be responsible for monitoring and charging for criminal offending. This includes investigating and gathering evidence where a breach of the law occurs.
167. These functions will be governed by the statutory criteria and any specific operational enforcement guidance. They will also be subject to existing internal processes (as with any other law enforcements powers), such as:
- in appropriate circumstances, approval from higher ranks within Police and/or consultation with relevant legal counsel (eg Police or Military), and
  - completion of community impact assessments (as relevant).
168. Prosecutors will follow the existing guidelines in deciding whether to proceed with a charge for updated existing offences or new offences. The judiciary (including the Court Martial of New Zealand) is responsible for sentencing on conviction.
169. For civilian defendants, the Ministry of Justice administers legal aid. For military defendants whose case is to be heard by the Court Martial, the Registrar of the Court Martial administers legal aid. For any person convicted and sentenced, the Department of Corrections will be responsible for managing any persons sentenced to imprisonment, home detention, or community-based sentences.

### **How will the new arrangements be monitored, evaluated, and reviewed?**

170. Existing mechanisms will be able to review the utility and efficacy of the updated criminal offence regime once in place and can shape operational procedures. In particular:
- the Independent Police Conduct Authority investigates complaints about any Police practice, policy, or procedure, which will include enforcement of updated offences. The Independent Police Conduct Authority reports on its investigations, and can make recommendations on Police processes to better ensure they are exercised in a manner consistent with human rights standards.
  - the courts have the power to judicially review legal challenges concerning the enforcement of criminal offences. If the court determines that any enforcement actions were exercised unlawfully, they can make a declaration of the applicant's legal rights.
171. For any criminal proceedings, the Ministry of Justice maintains records, which will include prosecutions and convictions for amended and new offences.
172. The legislation will also be subject to the Ministry of Justice's ongoing regulatory stewardship functions, as the agency responsible for administering the legislation. These responsibilities will be informed by:

- government data on and feedback from Police operations
- any Independent Police Conduct Authority reports or judicial judgements
- academic studies of these powers, national security issues, and
- any media reports regarding public stakeholders (including communities affected by foreign interference and changes in stakeholders' or other states' behaviour in response to updated offences).

173. However, it will likely be difficult to statistically measure whether the legislation is achieving the purpose of deterring foreign interference activity. While we have data on crime rates, many different factors that drive interference activity can change at the same time. This creates uncertainty in determining whether differences in rates of interference are directly attributable to specific amendments. Especially with the risk that interference activity will adapt in response to these legislative changes, as discussed at paragraph 44.