

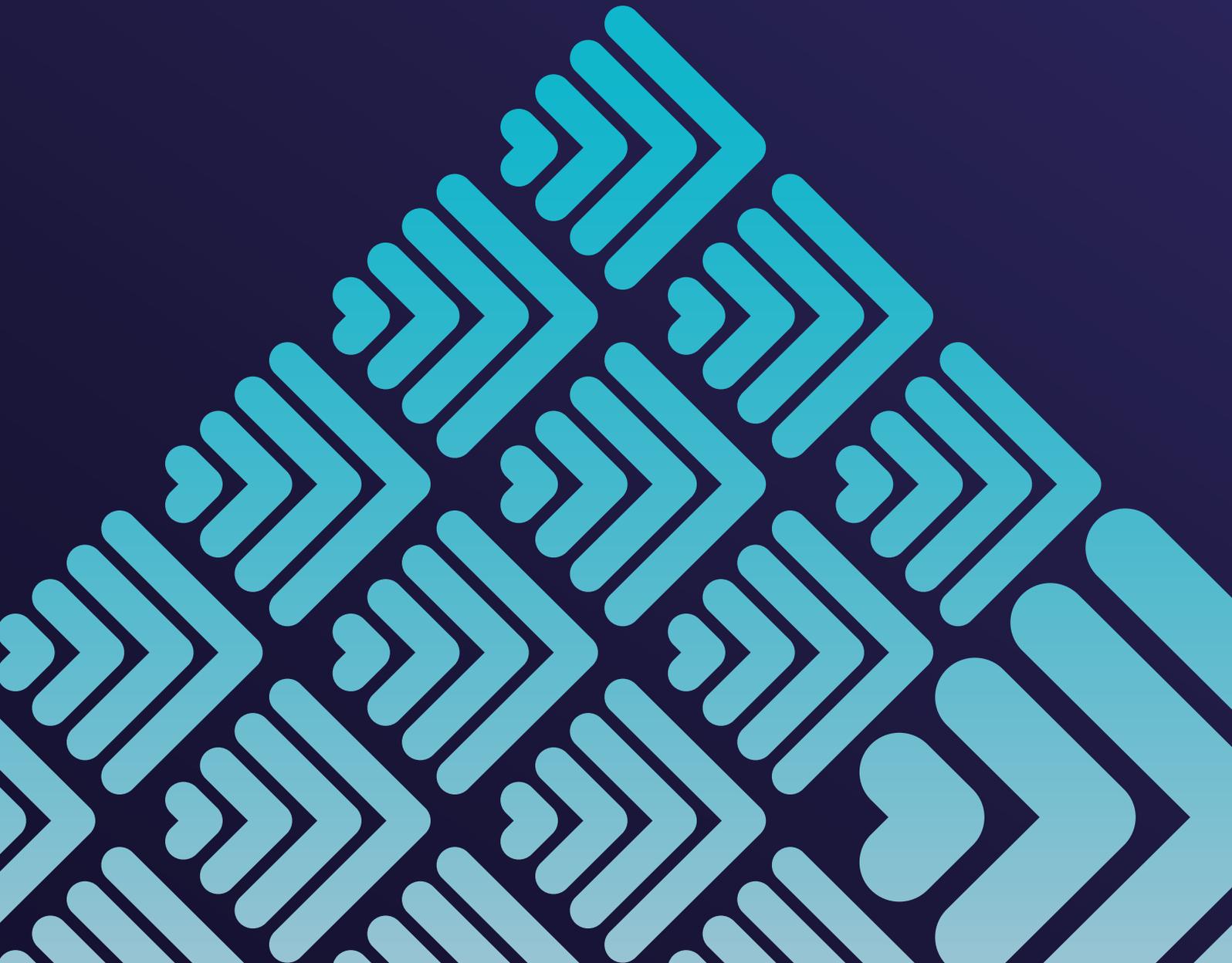


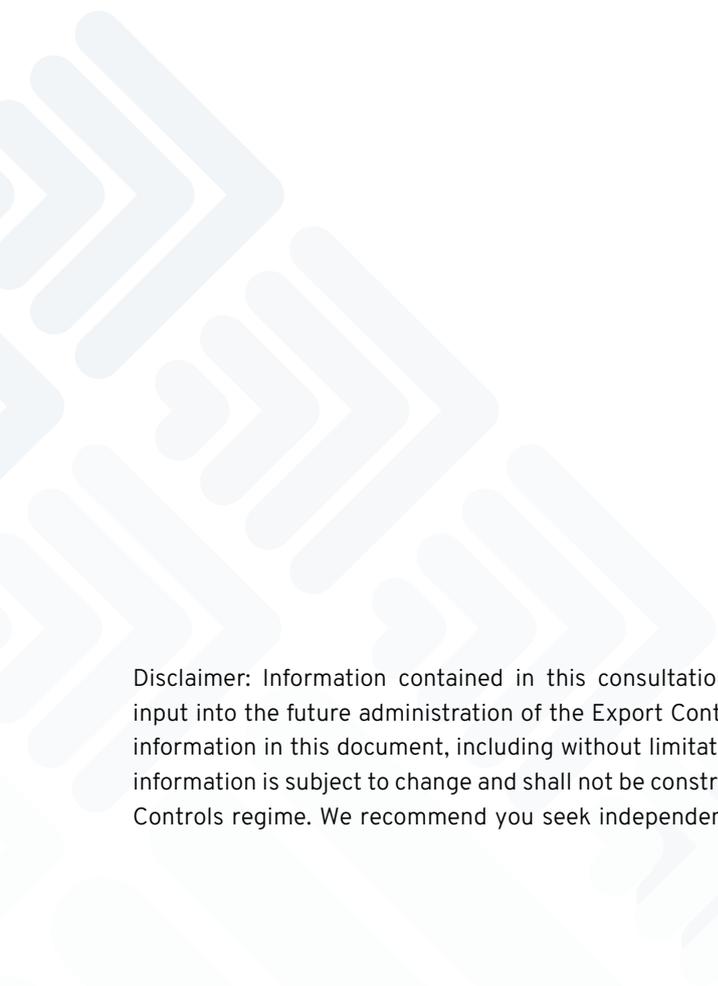
NEW ZEALAND
FOREIGN AFFAIRS & TRADE
MANATŪ AORERE

PUBLIC CONSULTATION DOCUMENT

Proposals to Enhance Export Controls Regime Operations

AUGUST 2022





Disclaimer: Information contained in this consultation document is provided purely for the purposes of seeking public input into the future administration of the Export Controls regime by the Ministry of Foreign Affairs and Trade. As such, the information in this document, including without limitation the views expressed therein, does not constitute legal advice. The information is subject to change and shall not be construed as the final views of the Ministry in its administration of the Export Controls regime. We recommend you seek independent advice on matters specific to your situation, including legal advice.

PUBLIC CONSULTATION DOCUMENT

Proposals to Enhance Export Controls Regime Operations



Have your say

In this document, you will find explanations of Ministry of Foreign Affairs and Trade (Ministry) proposals for a Purpose Statement, revised Criteria for Assessment, and Transparency Approach for the Export Controls regime, and questions to guide your feedback.

This consultation is open until **14 September 2022**.

There are several ways you can have your say on the proposals in this document.



You can respond online at consultation.mfat.govt.nz.



Register at consultation.mfat.govt.nz by **18 August 2022** to take part in one of the online consultation workshops or hui.



In some instances, stakeholders and Treaty partners may be able to arrange an individual meeting with Ministry staff to discuss the proposals and provide feedback. This option is intended for situations in which stakeholders and Treaty partners wish to discuss matters that they are unable to raise in a workshop or hui, for example due to commercial confidentiality or security reasons. Please contact ecrreview@mfat.govt.nz if you think this applies to you.



If you prefer to send a hardcopy of your feedback, please post it by **14 September 2022** to:

Office of the Deputy Chief Executive, Policy
Ministry of Foreign Affairs and Trade
195 Lambton Quay
Private Bag 18 901
Wellington 6160

It is important to note, information obtained by the Ministry as a result of this consultation, including discussions and feedback, is considered “official information” held by the Ministry for the purposes of the Official Information Act 1982 (OIA). As such, the Ministry may release information obtained through consultation in response to an official information request, or in proactively released papers, subject to redactions under the OIA. Where you consider there are legitimate reasons all or part of the information you provide should be withheld, please indicate this in your feedback, along with your supporting rationale. Although this shall not be construed as final, it will be taken into consideration by the Ministry, and we may consult you if necessary in the circumstances.

Foreword from the Secretary of Foreign Affairs and Trade

A vibrant high-value export sector is critical to the wellbeing of Aotearoa New Zealand. This comes with responsibility. Specifically, exporters play a crucial role in supporting Aotearoa New Zealand's commitment to the responsible export of strategic and military end-use goods, for a safer and more secure world by complying with the Export Controls regime administered by the Ministry of Foreign Affairs and Trade.

The Export Controls regime is an essential element in helping Aotearoa New Zealand to fulfil international commitments and obligations, including in relation to counter proliferation, arms control, disarmament, human rights, and international humanitarian law. It is a significant thread in our commitment to restricting the ability of countries or terrorist groups to develop, accumulate, or transfer military, dual-use and military end-use goods and technology which may contribute to human rights violations, internal repression, or international aggression or instability. It is important that the Export Controls regime operates effectively while also not imposing undue compliance costs or restrictions on trade.

An independent review of the Export Controls regime, delivered in July 2021, found that the Ministry of Foreign Affairs and Trade has administered the Export Control system consistent with its underlying intent and legislation. The review report also made a suite of recommendations on improvements to the design and implementation of the system, which the Ministry has committed to implementing.

This consultation document covers proposals to clarify the purpose of the Export Controls regime, revise the criteria used to assess export applications, and enhance transparency of the Export Controls regime's operations.

I encourage participation from exporters, universities and researchers, civil society, and Māori, including iwi and hapū as Treaty partners. Have your say to ensure we take an inclusive approach to improving the clarity and transparency of Aotearoa New Zealand's Export Controls regime. In what is likely to be an increasingly challenging future, it is more important than ever that Aotearoa New Zealand has a fit for purpose Export Controls regime. Your contributions are integral to this significant work.



CHRIS SEED

SECRETARY OF FOREIGN AFFAIRS AND TRADE

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Executive summary

- Aotearoa New Zealand's Export Controls regime controls the export of strategic and certain other military end-use goods and technology from Aotearoa New Zealand, in line with our domestic and international obligations and commitments. Its intent is to ensure we act responsibly when exporting strategic and military end-use goods, and to help protect our security and national interests.
- The Export Controls regime is regulated under the Customs and Excise Act 2018 and managed by the Ministry of Foreign Affairs and Trade (the Ministry).
- Following the Review of the Ministry of Foreign Affairs and Trade's Export Controls Regime¹ in 2021, the Ministry proposes changes to parts of the Export Controls regime's operational policy framework to provide greater clarity and enhance the Export Controls regime's fitness for purpose in a more complex future.
- We invite stakeholder and Treaty partner feedback on the proposals which cover three key components of the operational framework for the Export Controls regime. These are:
 - The adoption of a Purpose Statement to provide clarity on what the Export Controls regime aims to achieve and why
 - Assessment Criteria which form the basis for the assessment of the risks posed by the export of the goods. These Criteria have been substantially rewritten to reduce their number and improve their clarity
 - An explicit Transparency Approach for the Export Controls regime.
- The proposed Purpose Statement reads:

Aotearoa New Zealand is committed to being a responsible exporter of strategic and military end-use goods.

In line with our domestic and international obligations, commitments and policies, the purpose of our Export Controls regime is to control the export of military and dual-use goods and technology from Aotearoa New Zealand, as well as certain other goods to military, police and other end-users, which may contribute to the detriment of our security or national interests or to human rights abuse, or contravene international humanitarian law.
- The proposed consolidated Assessment Criteria are:
 - *Consistency with Aotearoa New Zealand's disarmament, arms control and non-proliferation obligations, commitments and policies*
 - *Consistency with Aotearoa New Zealand's obligations, commitments and policies regarding fundamental principles of international law, international human rights law and international humanitarian law*
 - *Consistency with Aotearoa New Zealand's other international obligations*
 - *Whether the export may compromise Aotearoa New Zealand's national interests including, without limitation: security, international relationships and international reputation*
 - *The impact the export is expected to have on peace, security and stability*
 - *Whether the export may undermine confidence in Aotearoa New Zealand's commitment to being a responsible exporter of strategic and military end-use goods.*

¹ David Smol & Jennie Kerr, A Review of the Ministry of Foreign Affairs and Trade's Export Controls Regime, 2021.

- **The proposed Transparency Approach is directed towards:**
 - *providing confidence that Aotearoa New Zealand is a responsible exporter of strategic and military end-use goods and that these are not being exported to support unacceptable end-use*
 - *providing assurance to Parliament and to New Zealanders that the Ministry is making export permit decisions within its legislated mandate*
 - *enabling exporters and other interested parties to gain a clear understanding about the operation of the Export Controls regime and its relevance to them*
 - *providing confidence that Aotearoa New Zealand is fulfilling its international and domestic obligations and commitments*
 - *providing assurance that the Ministry's operation of the scheme is meeting the wider expectations of government relating to promoting trust and confidence in the public service*
 - *encouraging and supporting international transparency efforts.*

It includes objectives, and principles as well as outlining key components of a transparency implementation plan.



To have your say on all or any of these proposals, please go to consultation.mfat.govt.nz to respond online by **14 September 2022**. Register at consultation.mfat.govt.nz by **18 August 2022** to attend an online consultation workshop or hui at which you can learn more about the Export Controls regime, ask questions and have your say. In limited instances it may be possible to arrange an individual discussion with the Ministry about the proposals. Please contact ecrreview@mfat.govt.nz to discuss this.

If you prefer to send a hardcopy of your feedback, please post it by **14 September 2022** to:

Office of the Deputy Chief Executive, Policy
 Ministry of Foreign Affairs and Trade
 195 Lambton Quay
 Private Bag 18 901
 Wellington 6160

At the end of the consultation period the Ministry will analyse stakeholder feedback. This analysis will be used to consider whether changes are needed to the proposals. It is intended that implementation of the operational policy changes will take place following finalisation of the proposals later in 2022.

1. Introduction

The Export Controls regime

The Export Controls regime for Aotearoa New Zealand operates to ensure we act responsibly when exporting strategic and military end-use goods, and helps protect our security and national interests. It is managed by the Ministry of Foreign Affairs and Trade (the Ministry).

Under the Customs and Excise Act 2018 (the Act), the export of strategic goods (firearms, military goods and technologies, and goods and technologies that can be used in the production, development or delivery of nuclear, chemical or biological weapons) is prohibited unless a permit has been obtained from the Secretary of Foreign Affairs and Trade. A permit is also required for the export of military end-use goods and technology.²

The Export Controls regime is designed to ensure that such trade is consistent with our wider foreign, strategic and security policy. It is an essential element of our non-proliferation, arms control and disarmament policies, and of our commitment to being a responsible exporter.

Aotearoa New Zealand's Export Controls regime is a significant thread in our commitment to restrict the ability of countries or terrorist groups to develop weapons of mass destruction, and to prevent the transfer of conventional weapons for undesirable purposes.

Aotearoa New Zealand is a member of the four international export controls regimes and the Arms Trade Treaty (2013). These form the basis of our own Export Controls regime:

- **Wassenaar Arrangement** which controls conventional weapons and dual-use goods and technologies
- **Missile Technology Control Regime** which controls missile-related goods and technologies
- **The Australia Group** which controls chemical and biological weapons-related materials
- **Nuclear Suppliers Group** which controls nuclear material, equipment and technology
- **The Arms Trade Treaty (2013)** which controls certain conventional weapons and their associated ammunition/munitions.

Every application to export controlled goods is assessed individually against the Criteria for the Assessment of Export Applications. The Secretary of Foreign Affairs and Trade has the authority to grant approval for the export of strategic goods (described in an Order in Council under Section 96 of the Act, and listed in the New Zealand Strategic Goods List), as well as for goods not on the Strategic Goods List but subject to catch-all provisions (identified through a Gazette Notice under Section 97 of the Act). The Assessment Criteria guide the Ministry in assessing applications for permits for both types of goods.

² Sections 96 and 97 of the Customs and Excise Act 2018 provide for the issuing of orders and notices prohibiting the export of specified goods and goods intended for specified purposes. See Appendices 2, 3 and 4.

The 2021 Independent Review of the Export Controls Regime

In 2021, an Independent Review of the Export Controls regime (the Review) examined the Ministry's export controls framework (including related policies, processes, systems, controls and people) to assess and comment on whether it was fit for purpose.

The Review concluded that the Ministry has administered the Export Controls regime consistent with its underlying intent, the legislation and the supporting policy instruments. The reviewers found no instances where the Ministry approved or declined a permit application based on reasoning that was not allowed within the legislative framework. They also observed that risk assessments appeared reasonable. Nevertheless, the reviewers found that design and implementation of the Export Controls regime fell short of contemporary best practice in several respects and, in that sense, was not fit for what is likely to be an increasingly challenging future. The reviewers also observed that the Export Controls regime was under-resourced for the future.³

The reviewers made nine recommendations to enable the Export Controls regime to meet current and emerging challenges and to bring it into line with contemporary best practice.

Specifically, the Review recommended that the Ministry:

- *review and refresh the Criteria for Assessment*
- *invest in more structured and comprehensive systems and processes*
- *strengthen the decision-making framework*
- *strengthen record-keeping and evidencing of critical steps*
- *enhance transparency and public confidence in the Export Controls regime*
- *extend proactive outreach and education*
- *work with New Zealand Customs Service to develop and publish a formal compliance strategy*
- *develop a business case for increased resourcing for the Export Controls regime*
- *ensure the Export Controls regime is fit for the future.*⁴

Under each recommendation, the Review identified priorities for action. You can find the full text of the Review recommendations and priorities at Appendix 1 of this consultation document.

The Ministry's Response to the Review

The Ministry welcomed the findings of the Review and accepted all its recommendations. The Minister of Foreign Affairs requested the Ministry to begin work on the recommendations.

The priorities under the recommendations include some that could be addressed through internal operational improvements; others that require detailed operational policy development; and a number that would require legislative reform to implement.

³ David Smol & Jennie Kerr, *A Review of the Ministry of Foreign Affairs and Trade's Export Controls Regime*, 2021, paras 87 – 90.

⁴ David Smol & Jennie Kerr, *A Review of the Ministry of Foreign Affairs and Trade's Export Controls Regime*, 2021, pp 13 – 14.

The Ministry has started to address the recommendations for internal operational improvements. For example, in the Export Controls Team, two new positions have been created and experienced staff recruited. This will help manage the workload and mitigate the risk of knowledge residing in one key specialist.

For those recommendations requiring legislative reform, the time required to advance legislation and the constraints of the legislative programme mean these are longer term goals. We will consider legislative reform, including the possibility for stand-alone legislation covering export controls, following the implementation of those recommendations able to be advanced without legislation.

Remaining recommendations that are externally focused and require detailed operational policy changes are the subject of the current consultation.

Purpose of this Consultation

The purpose of the consultation is to gain feedback from Export Controls regime stakeholders and Treaty partners on key components of the Ministry's proposals to implement those recommendations of the Review that can be achieved without legislative change.

This consultation does not replicate the Review. Instead, it is of a largely technical nature, focused on operational policy aspects of the Review recommendations that can occur independent of legislative reform. If the government seeks legislative reform, that will be subject to a separate consultation process.

We would like feedback on:

- The proposed Export Controls regime Purpose Statement
- The proposed Criteria for the Assessment of Export Applications
- The proposed Transparency Approach for the Export Controls regime.

Detailed specific feedback will help us understand:

- The extent to which stakeholders and Treaty partners see the proposals as:
 - understandable
 - workable
 - adequate to address those recommendations of the Review that can be progressed without legislative reform.
- Any perceived unintended consequences of the proposals
- Ways in which stakeholders and Treaty partners believe the proposals could be improved to make them more understandable, or workable, or to give better effect to the recommendations of the Review.

Listening to, analysing, and where appropriate acting on stakeholder and Treaty partner feedback will help the Ministry to ensure that the best decisions are made to implement applicable Independent Review recommendations and ensure the Export Controls regime is fit for an increasingly complex future.

Structure of this consultation document

The next part of this document considers each of the proposals. First, there is an explanation of the proposal in terms of the findings of the Review, the Ministry's response, and the reasons for the proposed approach. The text on which we are consulting appears in a blue box. For the Criteria for Assessment of Export Applications, we provide an explanation of the intent of the Criteria as a whole, before considering each criterion separately.

The Criteria are technical, therefore to assist understanding of how they would work in practice, guidance is provided under each one. After each proposal, you will find questions for consideration. Consultation questions are at the end of each section, as well as after the guidance on each of the Criterion in section 3. There is an opportunity to comment on the proposals as a whole in Section 5. The document finishes with a conclusion explaining how to get further information, what will happen to the information gathered in the consultation, and intended next steps.

There are four appendices to the document. These provide the full recommendations of the Review; sections 96 and 97 of the Customs and Excise Act 2018; and the Customs Export Prohibition (Strategic Goods) Order 2011 and Gazette notice which underpin the Export Controls regime.



2. Purpose Statement

Explanation

The Review recommended clarification of the legislative purpose of the Export Controls regime. A number of interviewees stated that the lack of a ‘specific and relevant purpose statement’ for the Export Controls regime in the Customs and Excise Act made it difficult to understand the relevant parts of the Act, supporting legislative instruments and policy documents.

Legislative reform is outside the scope of this consultation. This section focuses on Ministry proposals to issue an Export Controls regime purpose statement as an operational policy response to clarify why the Export Controls regime exists and its purpose.

We propose a succinct, high-level statement setting out the ‘what’ (counter proliferation) and the ‘why’ (alignment with our wider foreign, security and strategic policy). This is set out in the box below.

Aotearoa New Zealand is committed to being a responsible exporter of strategic and military end-use goods.

In line with our domestic and international obligations, commitments and policies, the purpose of our Export Controls regime is to control the export of military and dual-use goods and technology from Aotearoa New Zealand, as well as certain other goods to military, police and other end-users, which may contribute to the detriment of our security or national interests or to human rights abuse, or contravene international humanitarian law.

Questions

1. What do you like about the proposed Purpose Statement?
2. What don't you like about the proposed Purpose Statement?
3. Do you foresee any unintended consequences from adoption of the proposed Purpose Statement?
4. If so, what?
5. What, if anything, would you change to make the proposed Purpose Statement more understandable, or workable, or to better describe the overarching reason the Export Controls regime exists?

3. Assessment Criteria

Explanation

The Assessment Criteria set the parameters considered by the Ministry when assessing an application for a permit to export controlled goods. The Criteria reflect the Government's commitment to making responsible decisions around the export of strategic and military end-use goods, and form the basis for the assessment of the risks posed by the export of the goods. They act as an internal guide to ensure decisions are taken using a consistent approach. They also provide exporters with information on what is taken into account when their application for a permit to export controlled goods is considered.

The Review recommended that the Ministry review, refresh and consolidate the Assessment Criteria in order to reduce scope for interpretation, and to add a criterion relating to domestic reputation defined in a way that minimises uncertainty for exporting businesses and the research community.

The Ministry agreed that the current Assessment Criteria would benefit from greater clarity and succinctness. The six proposed Assessment Criteria presented below are designed to allow the Ministry to adequately address the risks associated with the export of strategic and military end-use goods from Aotearoa New Zealand, and demonstrate that Aotearoa New Zealand is a responsible exporter of these goods. The simplified and more coherent approach is also intended to enable exporters and potential exporters to better determine whether their proposed exports are likely to require a permit application, and, if so, whether such an application has a reasonable prospect of being approved.

In applying the Assessment Criteria, account is taken of reliable evidence sourced by the Ministry from its diplomatic posts in other countries, relevant reports from international bodies, intelligence and information from like-minded countries, open sources and other organisations.

Taken together, the six Assessment Criteria cover all matters to be considered in determining whether to approve or decline an application permit. The Assessment Criteria do not form a hierarchy and all applications will be considered against all Criteria. Nevertheless, some are more applicable to some goods, technologies, intended uses and intended export destinations, than others.

The application of the Criteria, in particular, Criteria 4, 5 and 6 is sometimes a best judgment with a number of diverse factors affecting the final determination. Where the outcome is not clear, the assessment and proposed determination will undergo additional scrutiny at senior levels within the Ministry. Ministers may also be consulted before the Secretary of Foreign Affairs and Trade makes a final decision. To assist exporters and potential exporters to navigate the application process, further supporting tools will be developed.

We propose the following Criteria to underpin assessments of permit applications under the Aotearoa New Zealand Export Controls regime:

1. Consistency with Aotearoa New Zealand's disarmament, arms control and non-proliferation obligations, commitments and policies
2. Consistency with Aotearoa New Zealand's obligations, commitments and policies regarding fundamental principles of international law, international human rights law and international humanitarian law
3. Consistency with Aotearoa New Zealand's other international obligations
4. Whether the export may compromise Aotearoa New Zealand's national interests including, without limitation: security, international relationships and international reputation
5. The impact the export is expected to have on peace, security and stability
6. Whether the export may undermine confidence in Aotearoa New Zealand's commitment to being a responsible exporter of strategic and military end-use goods.

The following pages set out each criterion and provide commentary to make clear the scope of issues taken into account under each, highlighting relevant documents (for example, domestic legislation or policies). Where examples are provided of the various factors that may be taken into account in assessing applications for export under each criterion, it is important to note that these are intended to be illustrative and non-exhaustive. The aim is to provide a better understanding of some of the factors that are taken into account in an assessment process, and of the types of issues that may influence whether particular applications are approved or declined.

Criterion 1

Consistency with Aotearoa New Zealand's disarmament, arms control and non-proliferation obligations, commitments and policies.

Guidance on Criterion 1

Under this Criterion, an export will be assessed against both the legal obligations and non-legally binding commitments Aotearoa New Zealand has undertaken in respect of disarmament, arms control and non-proliferation. Relevant policies will also be taken into account to ensure that the export would be consistent with Aotearoa New Zealand's broader approach to these issues.

Legal obligations

Legal obligations relevant for this Criterion include the international disarmament and non-proliferation treaties Aotearoa New Zealand is party to, related domestic legislative or regulatory requirements, and obligations contained in resolutions of the United Nations Security Council (UNSC). They include obligations relating to weapons of mass destruction as well as conventional weapons.

An assessment under this Criterion will consider whether the item for export is prohibited or illegal in Aotearoa New Zealand under domestic legislation such as:

- New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987
- Chemical and Weapons (Prohibition) Act 1996
- Anti-Personnel Mines Prohibition Act 1998
- Cluster Munitions Prohibition Act 2009
- Arms Act 1983.

Assessment will also include whether the export would be consistent with Aotearoa New Zealand's obligations under treaties that Aotearoa New Zealand is a party to but which are not the subject of specific implementing legislation, including the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects (Convention on Certain Conventional Weapons) (1980) and its Protocols, and The Arms Trade Treaty (2014).

Non-legally binding commitments

Aotearoa New Zealand has signed up to a number of non-legally binding commitments in the field of disarmament, arms control and non-proliferation which will be taken into account in the assessment of any proposed export. These include the guidelines and best practices adopted at Meetings of States Parties to The Arms Trade Treaty (2013) and as a member of the four international export controls regimes (The Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement).

Commitments also include those made in political declarations and national or joint statements, which may have implications for the assessment of the proposed export item, its end user and/or potential end-use. For example, the Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas (when adopted) will become a non-legally binding commitment.

Relevant policy

Assessments will also consider whether the proposed export is consistent with Aotearoa New Zealand's broader policies on disarmament, arms control and non-proliferation. For example, the position taken by the government on autonomous weapons systems will be taken into account as a relevant policy.

Relevant policies can be found on the disarmament section of the Ministry website:

mfat.govt.nz/peace-rights-and-security/disarmament/

Questions on Criterion 1

1. Does Criterion 1 accurately, clearly and adequately reflect a key area for consideration in the Ministry's assessment of applications for export permits?
2. Please tell us why you think this?
3. What, if anything, would you change to improve the accuracy, clarity and adequacy of Criterion 1?
4. Do you foresee any unintended consequences from adoption of Criterion 1?
5. If so, what?
6. Is the Guidance on Criterion 1 accurate, clear and useful to assist exporters and the public to understand the application of this Criterion?
7. What, if anything, is particularly helpful about the Guidance on Criterion 1?
8. What, if anything, would you change to improve the accuracy, clarity and usefulness of the Guidance on Criterion 1?

Criterion 2

Consistency with Aotearoa New Zealand's obligations, commitments and policies regarding fundamental principles of international law, international human rights law and international humanitarian law.

Guidance on Criterion 2

Under Criterion 2, an export and its intended use is assessed against Aotearoa New Zealand's obligations and commitments regarding fundamental principles of international law, international human rights law and international humanitarian law. Relevant policies will also be taken into account to confirm an export or intended use is consistent with Aotearoa New Zealand's policy positions to these issues.

Legal obligations

Legal obligations relevant to Criterion 2 include a wide range of international legal instruments that Aotearoa New Zealand is party to, principles of customary international law; related domestic legislative or regulatory requirements; and obligations contained in resolutions of the UNSC. They include obligations covered by the broad framework of international law, as well as international human rights law and international humanitarian law (which establishes rules around the conduct of war to limit the effects of armed conflict).

Assessment under Criterion 2 can include the country or public authority's stability, and where relevant, the success of any previous mitigation efforts applied by Aotearoa New Zealand or close international partners when cooperating with the country or authority.

An assessment under Criterion 2 will consider whether a proposed export would, or would be likely to, be used in the commission of breaches of Aotearoa New Zealand's primary obligations under general international law. It will also consider whether it is lawful or appropriate to provide support to the end user (regardless of what the proposed export is). This criterion will also assess secondary obligations which place Aotearoa New Zealand at risk of being complicit in other states' internationally wrongful acts or breaches of international law. This assessment can include the state or end user's stability and human rights record.

Difference between primary and secondary legal obligations

Aotearoa New Zealand, like all states, has primary legal obligations which derive from signing up to treaties or through customary international law (general practice accepted as law). These obligations apply directly to Aotearoa New Zealand. They can range in nature from requiring action, to prohibiting conduct or recognising rights. Primary legal obligations are vital to ensuring consistency with international law, as all states, not just Aotearoa New Zealand, are expected to comply with and fulfil their international legal obligations in good faith.

Secondary legal obligations are intended to reinforce primary legal obligations by ensuring that states do not aid or assist another state to breach its primary international legal obligations. In the context of export controls, the concern as it is sometimes expressed is whether a state, by permitting an export, could be in breach of its international obligations because the ultimate recipient of that export may engage in unlawful acts. The allegation is sometimes put that a state is “complicit” in that unlawful act. Complicity is a very serious allegation. In order to be complicit, a state must have:

- Done something (e.g. issued a permit) which materially facilitated the unlawful act by the other state; and
- Done so with the intention to materially facilitate that act, or knowledge to a virtual certainty that issuing the permit would materially facilitate the unlawful act.

Examples of primary and secondary legal obligations in the export controls space

Primary legal obligations:

- Aotearoa New Zealand has primary legal obligations under UNSC resolutions not to export goods in breach of sanctions, or deal with particular entities or states in certain ways. Contravening these sanctions would be a breach of Aotearoa New Zealand’s primary obligations under international law.
- The prohibition on genocide is what is known as a peremptory norm of international law, and so is binding on all states whether or not they are parties to the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) (1948). This status means that states must:
 - cooperate to bring to an end through lawful means any serious breach of the prohibition; and
 - not recognise as lawful a situation created by a serious breach, nor render aid or assistance in maintaining that situation.

This prohibition places a primary legal obligation on Aotearoa New Zealand to act as outlined, even if Aotearoa New Zealand is not the state engaging the prohibition.

Secondary legal obligations:

- The International Covenant on Civil and Political Rights (ICCPR) (1966) provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Aotearoa New Zealand would likely be complicit and in breach of its secondary legal obligations by issuing a permit for an export where:
 - This would materially facilitate the unlawful act by the other state; and
 - There was an intention to materially facilitate a foreign state breaching its obligations under the ICCPR.

- Aotearoa New Zealand has a range of international obligations in respect of gender equality and women's empowerment, and in respect of the prohibition of sexual and gender-based violence in armed conflict⁵. Aotearoa New Zealand would likely be in breach of its secondary legal obligations by issuing a permit for an export where:
 - This would materially facilitate an unlawful act by the other state; and
 - There was an intention to materially facilitate a foreign state breaching its obligations in these areas.

Instruments of international law

Relevant instruments of international law in relation to this criterion include, but are not limited to, the following:

General international law

- Customary international law
- United Nations Charter (1945) (including basis for United Nations Security Council Resolutions)
- International Law Commission, Draft Articles on State Responsibility (2001).

International human rights law

- International Covenant on Civil and Political Rights (ICCPR) (1966)
- International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)
- Convention on the Rights of the Child (CRC) (1989)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984)
- Convention on the Rights of Persons with Disabilities (CRPD) (2006)
- Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) (1948)
- Optional protocols to the above treaties that have been adopted by Aotearoa New Zealand.

International humanitarian law

- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) (1949)
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) (1949)
- Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (1949)

⁵This includes United Nations Security Council, Resolution 1325 Women and peace and security (2000) – the landmark resolution which recognises the disproportionate and unique impact of armed conflict on women and girls.

- Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (1949)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977)
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (2005)
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction (1972)
- The Convention on Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (1980)
- Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)
- Protocol for the Protection of Cultural Property in the Event of Armed Conflict (Hague Protocol for the Protection of Cultural Property) (1954)
- Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague (1999)
- Convention on Cluster Munitions (2008)
- Rome Statute of the International Criminal Court (1998)
- International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989).

Non-legally binding commitments

Aotearoa New Zealand has signed up to a number of non-legally binding commitments in the field of international human rights. These include:

- Universal Declaration of Human Rights (1948)
- United Nations Declaration on the Rights of Indigenous Peoples (2007)
- Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (2008).

Policy considerations

Assessments under Criterion 2 will consider whether the proposed export is consistent with Aotearoa New Zealand's broader policies and commitment to promoting and protecting human rights.

Aotearoa New Zealand has a long-standing and strong opposition to the use of torture, cruel, inhuman or degrading treatment or punishment (including the death penalty) in all cases and under all circumstances, including in response to threats to national security. The prohibition of torture is non-derogable – it can never be violated by states under any circumstances. The position of the government is that the death penalty is the ultimate form of cruel, inhuman and degrading treatment.

The New Zealand International Human Rights Action Plan 2019-2023: Advocacy Priorities sets out our international human rights engagement priorities. An assessment under Criterion 2 will consider whether a proposed export would be consistent with Aotearoa New Zealand's commitment to these human rights priorities.

The United Nations' Guiding Principles on Business and Human Rights recognise that businesses have a responsibility to respect human rights and should work with states to ensure they comply with international human rights principles in the course of their business activities. An assessment under Criterion 2 will consider whether a proposed export would be consistent with Aotearoa New Zealand's commitment to ensuring businesses and other private sector actors promote and respect human rights.

Relevant policy documents, include but are not limited to, the following:

- New Zealand International Human Rights Action Plan 2019 – 2023⁶
- United Nations Guiding Principles on Business and Human Rights.⁷

Questions on Criterion 2

1. **Does Criterion 2 accurately, clearly and adequately reflect a key area for consideration in the Ministry's assessment of applications for export permits?**
2. **Please tell us why you think this?**
3. **What, if anything, would you change to improve the accuracy, clarity and adequacy of Criterion 2?**
4. **Do you foresee any unintended consequences from adoption of Criterion 2?**
5. **If so, what?**
6. **Is the Guidance on Criterion 2 accurate, clear and useful to assist exporters and the public to understand the application of this Criterion?**
7. **What, if anything, is particularly helpful about the Guidance to Criterion 2?**
8. **What, if anything, would you change to improve the accuracy, clarity and usefulness of the Guidance on Criterion 2?**

Criterion 3

Consistency with Aotearoa New Zealand's other international obligations.

Guidance on Criterion 3

Under this Criterion, an export will be assessed against a wide range of other international obligations applying to Aotearoa New Zealand (not including those covered in Criteria 1 and 2). These obligations engage a range of specific and thematic considerations which may be relevant to particular or specialised exports. Relevant policies will also be taken into account to ensure that the export would be consistent with Aotearoa New Zealand's broader approach to these issues.

Legal obligations

Legal obligations relevant to Criterion 3 include a number of international legal instruments that Aotearoa New Zealand is party to, and related domestic legislative or regulatory requirements.

⁶ Ministry of Foreign Affairs and Trade New Zealand International Human Rights Action Plan 2019-2023: Advocacy Priorities, (2019).

⁷ United Nations Human Rights Council United Nations' Guiding Principles on Business and Human Rights, 1 January 2012.

As with Criterion 2, assessments under this Criterion require consideration of both primary and secondary international legal obligations. Aotearoa New Zealand has a wide range of primary legal obligations arising from relevant conventions covering:

- Terrorism and transnational organised crime
- Environmental law
- Law of the sea
- Maritime law
- Space
- Antarctica
- International trade.

Of particular note is the large number of legal obligations arising in respect of hazardous substances and waste. Exports of these products are highly regulated.

In addition to the above, the United Nations Charter outlines a wide-ranging prohibition against the use of force, requiring that all states refrain from both the threat of and use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

Secondary legal obligations may also be invoked where a proposed export would place Aotearoa New Zealand at risk of being complicit in other states' internationally wrongful acts or breaches of international law (see broader guidance in the Guidance on Criterion 2).

Instruments of international law

Relevant instruments of international law in relation to this Criterion include, but are not limited to, the following:

Use of Force

- United Nations Charter (1945).

Terrorism and transnational organised crime

- United Nations Security Council resolutions imposing sanctions
- United Nations Convention against Transnational and Organized Crime (2000)
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973)
- International Convention against the Taking of Hostages (1979)
- International Convention for the Suppression of the Financing of Terrorism (1999)
- International Convention for the Suppression of Terrorist Bombings (1997)
- Convention on the Physical Protection of Nuclear Material (1979)
- Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)
- International Convention on the Suppression of Acts of Nuclear Terrorism (The Nuclear Terrorism Convention) (2005)
- Convention for the Suppression of Unlawful Seizure of Aircraft (1970)
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988).

Environmental law

- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989)
- Cartagena Protocol on Biosafety (2000)
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973)
- Convention on the Law of the Non-Navigational Uses of International Watercourses (1973)
- Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (1997)
- Convention on Biological Diversity (1992)
- United Nations Framework Convention on Climate Change (1992)
- International Convention for the Regulation of Whaling (1946)
- Kyoto Protocol to the United Nations Framework Convention on Climate Change (1992)
- Minamata Convention on Mercury (2013)
- Montreal Protocol on Substances that Deplete the Ozone Layer (and protocols) (1987)
- Paris Agreement (2015)
- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998)
- Stockholm Convention on Persistent Organic Pollutants (2001)
- Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (Waigani Convention) (1995)
- Ramsar Convention on Wetlands of International Importance, especially as Waterfowl Habitat (1971)
- United Nations Convention to Combat Desertification (1994).

Law of the sea

- United Nations Convention on the Law of the Sea (UNCLOS) (1982)
- United Nations Fish Stocks Agreement (1995)
- Agreement relating to the implementation of Part XI of the the United Nations Convention on the Law of the Sea of 10 December 1982 (1994).

Maritime law

- International Convention for the Prevention of Pollution from Ships (MARPOL) (1973)
- Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter (London Convention) (1972)
- International Convention for the Safety of Life at Sea (SOLAS) (1965)
- International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (1978)
- Maritime Labour Convention (2006).

Space

- Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty) (1967)
- Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (Rescue Agreement) (1968)
- Convention on International Liability for Damage Caused by Space Objects (Liability Convention) (1972)
- Convention on Registration of Objects Launched into Outer Space (Registration Convention) (1974).

Antarctica

- Antarctic Treaty (1959)
- Protocol on Environmental Protection to the Antarctic Treaty (1991)
- Convention for the Conservation of Antarctic Marine Living Resources (1982)
- Agreed Measures for the Conservation of Antarctic Fauna and Flora (1964)
- Convention for the Conservation of Antarctic Seals (1972).

International trade

- General Agreement on Tariffs and Trade (GATT) (1947)
- General Agreement on Trade in Services (GATS) (1995)
- Trade Related Aspects of Intellectual Property Rights Agreement (1994)
- Agreement on Government Procurement (1979)
- Information Technology Agreement (1996)
- Individual free trade agreements to which Aotearoa New Zealand is a party.

Non-legally binding commitments and relevant policy

Aotearoa New Zealand has signed up to a number of non-legally binding political or regional commitments in these areas. These include commitments made in political declarations and national or joint statements, which may have implications for the assessment of the proposed export item, its end user and potential end-use. More information about particular areas can be found on relevant sections of the Ministry's website: www.mfat.govt.nz.

Questions on Criterion 3

1. Does Criterion 3 accurately, clearly and adequately reflect a key area for consideration in the Ministry's assessment of applications for export permits?
2. Please tell us why you think this?
3. What, if anything, would you change to improve the accuracy, clarity and adequacy of Criterion 3?
4. Do you foresee any unintended consequences from adoption of Criterion 3?
5. If so, what?
6. Is the Guidance on Criterion 3 accurate, clear and useful to assist exporters and the public to understand the application of this Criterion?
7. What, if anything, is particularly helpful about the Guidance on Criterion 3?
8. What, if anything, would you change to improve the accuracy, clarity and usefulness of the Guidance on Criterion 3?

Criterion 4

Whether the export may compromise Aotearoa New Zealand's national interests including, without limitation: security, international relationships, and international reputation.

Guidance on Criterion 4

Under Criterion 4, consideration will be given to the impact an export may have on Aotearoa New Zealand's security and national interests.

This will include consideration of whether an export may directly or indirectly challenge the security of Aotearoa New Zealand, for example, by contributing to capabilities that might be used against us, or to the conduct of transnational organised crime that targets or affects us. Consideration will also be given to whether the proposed export is consistent with Aotearoa New Zealand's broader national interests, including in preserving and strengthening the international rules-based order. For example, where relevant, an assessment may consider whether a proposed export contributes to Aotearoa New Zealand's interest in supporting maritime security and the freedom of navigation under the law of the sea.

The extent to which the proposed export may affect, directly or indirectly, Aotearoa New Zealand's international relationships, is a further consideration under Criterion 4. This might include, for example whether the decision to approve or deny an export might prejudice our relationship with a third country. Such an assessment could include consideration of whether permitting an export would be consistent with decisions made by like-minded partners (for example, partners that are also members of the multilateral export controls regimes), or whether it would undercut decisions made by them to deny similar exports. Sanctions applied by other countries may be a relevant factor taken into account as part of the assessment process.

Consideration of whether a proposed export may compromise Aotearoa New Zealand's international reputation also comes within Criterion 4. This reputation affects Aotearoa New Zealand's ability to maintain international relationships, and to pursue and achieve national interests in multilateral settings. Protecting it is important. Even if a proposed export

does not breach international law or directly contribute to a gross violation of human rights, it may be that a denial is still appropriate to avoid a negative impact on Aotearoa New Zealand's international reputation. Any such assessment will include consideration of Aotearoa New Zealand's interest in making consistent, rules-based decisions that do not unnecessarily hinder trade and that are understandable for exporters and their offshore consumers.

Questions on Criterion 4

1. Does Criterion 4 accurately, clearly and adequately reflect a key area for consideration in the Ministry's assessment of applications for export permits?
2. Please tell us why you think this?
3. What, if anything, would you change to improve the accuracy, clarity and adequacy of Criterion 4?
4. Do you foresee any unintended consequences from adoption of Criterion 4?
5. If so, what?
6. Is the Guidance on Criterion 4 accurate, clear and useful to assist exporters and the public to understand the application of this Criterion?
7. What, if anything, is particularly helpful about the Guidance on Criterion 4?
8. What, if anything, would you change to improve the accuracy, clarity and usefulness of the Guidance on Criterion 4?

Criterion 5

The impact the export is expected to have on peace, security and stability.

Guidance on Criterion 5

While assessment under Criterion 4 will focus on the impact an export may have on the security or national interests of Aotearoa New Zealand, Criterion 5 will consider its potential impact on peace, security and stability elsewhere, including in relation to our security interests. In some circumstances, that impact may have been the subject of existing scrutiny or assessment. For example, in some situations the UNSC may have already mandated an arms and equipment embargo on relevant exports to a particular destination or end-user. (Such mandates would also be considered under Criterion 2 if relevant to the export in question.)

Not all situations of conflict, insecurity or instability are the subject of UNSC resolutions, however. As a result, the assessment under Criterion 5 has an important role to play in ensuring that the impact of any controlled export on peace, security and stability is taken into account.

Whether the government has a policy against exporting controlled items to the destination in question, or has expressed concern about the actions of a destination state or end-user that are relevant to the export in question will be considered under Criterion 5. The government's decision in 2022 to sanction Russia, and its position on the provision of assistance to Ukraine, are examples of policies relevant to the application of this Criterion.

For states not subject to a specific government policy, assessment under Criterion 5 will still include a range of factors. For example, whether the export destination or end-user is involved in an inter- or intra-state conflict, is known or suspected to sponsor terrorism, or has threatened the security of another state or group of states will be relevant considerations.

In addition, the assessment may consider whether the proposed export would help support a state's ability to defend itself in accordance with the United Nations Charter, or to legitimately ensure its security (for example, by strengthening its ability to monitor and patrol its maritime environment or to communicate securely). Consideration may also be given to whether the export may introduce, contribute to, or exacerbate a destabilising imbalance in the capabilities of two potential adversaries, or address an existing imbalance.

Questions on Criterion 5

1. Does Criterion 5 accurately, clearly and adequately reflect a key area for consideration in the Ministry's assessment of applications for export permits?
2. Please tell us why you think this?
3. What, if anything, would you change to improve the accuracy, clarity and adequacy of Criterion 5?
4. Do you foresee any unintended consequences from adoption of Criterion 5?
5. If so, what?
6. Is the Guidance on Criterion 5 accurate, clear and useful to assist exporters and the public to understand the application of this Criterion?
7. What, if anything, is particularly helpful about the Guidance on Criterion 5?
8. What, if anything, would you change to improve the accuracy, clarity and usefulness of the Guidance on Criterion 5?

Criterion 6

Whether the export may undermine confidence in Aotearoa New Zealand's commitment to being a responsible exporter of strategic and military end-use goods.

Guidance on Criterion 6

An assessment will take into account the risk of harm, if any, from an export. This includes risks of harm that fall short of the threshold applicable under other Criteria. Criteria 2 and 3, for example, cover international obligations and commitments to avoid a range of harms, some of which have a very high threshold for non-compliance. For some exports, however, even though the potential harm (or the degree of certainty about whether a harm may eventuate) does not meet the relevant thresholds under Criteria 2 and 3, assessors may determine that a decision to approve the export would nevertheless undermine confidence in Aotearoa New Zealand's commitment to being a responsible exporter. The determination would be discretionary but would require more than a purely theoretical link between the potential harm and the export.

Under Criterion 6 the question of whether there is reputational risk by association – in other words, reputational risk resulting not from the export itself but from other behaviours of the end user – will also be considered. This is particularly relevant to questions of human rights abuses and repression (behaviours relating to peace, stability and security would be considered under Criterion 5). Under Criterion 6, a determination may be made to decline an export which, for example, in the Secretary of Foreign Affairs and Trade's view, would be to a disreputable end-user even where the specific export itself may not be problematic. In conducting this assessment, consideration will be given to any parent organisation or

other associated organisations of the end-user and, where relevant, to the state itself. The assessment would include consideration of whether the concerning behaviour consists of isolated incidents or is systemic; whether procedures are in place or being put in place to prevent occurrences and to undertake investigation and enforcement of alleged abuses or repression; and whether the behaviour appears to be “endorsed” by the state (for example, through legislation or through a demonstrated lack of will to address it).

If the degree of reputational risk by association is determined to be low, it is unlikely to lead to a permit denial in the absence of other factors of concern. Where reputational risk is assessed as medium, there may be occasions where it is offset by positive factors under other criteria such as Criterion 5. As an illustration, an export to a maritime entity associated with an armed force that presents reputational risk and is also be part of a repressive regime, may be offset by the contribution of the export to the ability of that entity to counter transnational organised crime including piracy, drugs and people smuggling. In circumstances where these positive factors outweigh the reputational risk, the export permit would be likely to be approved.

Questions on Criterion 6

1. Does Criterion 6 accurately, clearly and adequately reflect a key area for consideration in the Ministry’s assessment of applications for export permits?
2. Please tell us why you think this?
3. What, if anything, would you change to improve the accuracy, clarity and adequacy of Criterion 6?
4. Do you foresee any unintended consequences from adoption of Criterion 6?
5. If so, what?
6. Is the Guidance on Criterion 6 accurate, clear and useful to assist exporters and the public to understand the application of this Criterion?
7. What, if anything, is particularly helpful about the Guidance on Criterion 6?
8. What, if anything, would you change to improve the accuracy, clarity and usefulness of the Guidance on Criterion 6?

Summary of Assessment Criteria

Taken together, the six Assessment Criteria cover all matters to be considered in determining whether to approve or decline an application for a permit.

Questions

1. Taken together, do the revised Criteria accurately, clearly and adequately reflect all areas for consideration in the Ministry's assessment of applications for export permits?
2. Please tell us why you think this?
3. Taken together, is the Guidance on the revised Criteria accurate, clear and useful to assist exporters and the public to understand the application of the Criteria as a whole?
4. Please tell us why you think this?
5. Do you foresee any unintended consequences from replacing the current Export Controls Assessment Criteria with the revised Criteria?
6. If so, what?
7. What, if anything, would you change to improve the accuracy, clarity and adequacy of the Criteria as a whole?
8. What, if anything, would you change to improve the accuracy, clarity and usefulness of the Guidance on Criteria as a whole?

4. Approach to transparency

Explanation

To give greater certainty to exporters, other stakeholders and the New Zealand public, we propose making the operation of the Export Controls regime more transparent.

Transparency is generally accepted as relating to commonly-shared knowledge and information. For strategic goods, transparent reporting by countries at a ‘whole of country’ level helps to make clear the movement of such goods around the world. It is a key mechanism in helping to highlight destabilising accumulations of weapons that can undermine international and regional security and stability and have devastating consequences for human suffering.

The Review recommended the Ministry take a number of steps to enhance transparency and public confidence in the Export Controls regime, including:

- publishing more guidance on how the Ministry takes account of information on end-use
- undertaking enhanced annual reporting, covering activity level, any emerging issues and the approach to risk and decision-making, whilst respecting commercial and diplomatic sensitivities
- commissioning and publishing periodic independent reviews to provide assurance to Parliament and the public that the Ministry is making decisions consistent with its legislated mandate and government’s stated appetite for risk
- extending outreach and education to enhance awareness and comprehension of the Export Controls regime (particularly by impacted exporting businesses and researchers).

In response to these recommendations the Ministry has developed a proposed Transparency Approach, comprising:

- Objectives (which will directly align with the final Purpose Statement)
- Principles (directly aligned with current legislative requirements and Open Government Partnership commitments)
- Key components of a transparency implementation plan.

Transparency approach

Transparency Objectives

Our transparency effort is directed towards helping to achieve the following objectives:

- Providing confidence that Aotearoa New Zealand is a responsible exporter of strategic and military end-use goods and that these are not being exported to support unacceptable end use
- Providing assurance to Parliament and to New Zealanders that the Ministry is making export permit decisions within its legislated mandate
- Enabling exporters and other interested parties to gain a clear understanding about the operation of the regime and its relevance to them
- Providing confidence that Aotearoa New Zealand is fulfilling its international and domestic obligations and commitments
- Providing assurance that the Ministry's operation of the scheme is meeting the wider expectations of government relating to promoting trust and confidence in the public service
- Encouraging and supporting international transparency efforts.

Transparency Principles

The proposed principles for achieving greater transparency of the Export Controls regime are:

- **Accountability** – the actions and policies taken by the Ministry in operating the Export Controls regime are known, and can be judged
- **Accessibility** – data and information about the operation of the Export Controls regime is available to New Zealanders unless grounds for refusal or limitations exist
- **Protection** – Personal, confidential and classified data and information are protected
- **Certainty** – interested parties have reasonable certainty about how the Export Controls regime operates and how it is likely to impact on them
- **Participation** – New Zealanders have the opportunity to contribute to public policy processes relating to the regime and to engage with the Ministry as the Export Controls regime operator.

Key components of a Transparency Implementation Plan

The key components of a transparency implementation plan the Ministry will develop and implement across the short, medium and longer term are:

- A statement of the government's objectives for the Export Controls regime
- Targeted guidance material to help exporters and brokers navigate the Export Controls regime, particularly with regard to decision-making
- Statistical summaries of the Export Controls regime's activities (proactive release)
- Other information about the operation of the Export Controls regime, potentially including through annual reporting (proactive release)
- A programme of engagement with external stakeholders
- Ensuring the Export Controls regime's operations are included in a regular programme of internal audit
- Commissioning and publishing periodic independent reviews of the Export Controls regime
- Ensuring that information management systems support collection of full records of export controls decisions and provide access to quality statistical and other information.

Questions

1. Do you agree or disagree with the Transparency Objectives?
2. Please explain why.
3. Do you agree or disagree with the Transparency Principles?
4. Please explain why.
5. Are there any key components of the Transparency Implementation Plan you disagree with?
6. Are there any additional components you recommend are added?
7. Do you foresee any unintended consequences from adopting the proposed Transparency Approach?
8. If so, what?
9. What, if anything, would you change to make the proposed Transparency Approach for the Export Controls regime more understandable or workable, or to give better alignment to Open Government commitments?

5. Overarching Feedback

Questions

1. To what extent do you see the proposed Purpose Statement, Criteria for Assessment and Transparency Approach, taken as a whole, provide clear, effective and workable ways to contribute to the fitness of the Export Controls regime for a more complex future?
2. Do you foresee any unintended consequences from adoption of the proposed Purpose Statement, Criteria for Assessment and Transparency Approach, taken as a whole?
3. If so, what?
4. What, if anything, would you change to make the proposed Purpose Statement, Criteria for Assessment and Transparency Approach, taken as a whole, more understandable, workable, or effective?
5. Do you have any additional feedback or comments?

6. Conclusion

Your feedback on these proposals is important to our work to enhance Aotearoa New Zealand's Export Controls regime operations.

The consultation is open until **14 September 2022**.

There are several ways you can have your say on the proposals in this document. You can respond online at consultation.mfat.govt.nz. To take part in one of the online consultation workshops or hui register at consultation.mfat.govt.nz by **19 August 2022**. In some instances, stakeholders and Treaty partners may be able to arrange an individual meeting with Ministry staff to discuss the proposals and provide feedback please contact ecrreview@mfat.govt.nz to discuss this.

Following the consultation period, the Ministry will analyse feedback. This analysis will be used to consider whether changes to the proposals are needed. It is intended that implementation of the operational policy changes will take place following finalisation of the proposals later in 2022. We plan to release a summary of the consultation feedback at this point.

A summary of consultation feedback will be posted on the Ministry's website www.mfat.govt.nz

If the Ministry receives feedback that is outside of the consultation scope, it will be noted for consideration in future policy processes as relevant.

If you would like to receive a copy of the summary of consultation feedback please provide your email address to ecrreview@mfat.govt.nz



Appendix 1 – Recommendations of the Independent Review of the Export Controls regime¹

We recommend that:

1. MFAT review and refresh the Criteria for Assessment

Priorities would include:

- Reducing the scope for interpretation to the extent practicable
- Reducing the number of Criteria, via consolidation, to simplify their application
- Adding a criterion relating to domestic reputation defined in a way that minimises uncertainty for exporting businesses and the research community
- Introducing periodic review of the Criteria, every three to five years.

2. MFAT invest in more structured and comprehensive systems and processes

Priorities would include:

- Refreshing and updating the Standard Operating Procedure on a regular basis
- Developing a gateway template or checklist for assessing and recording whether a permit can be progressed as a standard export permit
- Requiring that decisions on non-standard applications can only be undertaken by the Senior Counter-Proliferation Advisor or above.

3. MFAT strengthen the decision-making framework

Priorities would include:

- Documenting risk appetite to ensure alignment with Ministers, inform public understanding and reduce uncertainty for exporting businesses and the research community
- Considering the role of Ministers in decision-making in any review of the legislation.

4. MFAT strengthen record-keeping and evidencing of critical steps

Priorities would include:

- Undertaking regular audit or assurance that Export Control decisions are being appropriately documented and recorded
- Referencing the relevant legal tests being applied as part of decision-making, particularly when providing advice to Ministers.

5. MFAT enhance transparency and public confidence in the Export Controls regime

Priorities would include:

- Publishing more guidance on how MFAT takes account of information on end-use
- Enhanced annual reporting, covering activity levels, any emerging issues and the approach to risk and decision-making, while respecting commercial and diplomatic sensitivities
- Commissioning and publishing periodic independent reviews to provide assurance to Parliament and the public that MFAT is making decisions consistent with its legislated mandate and government's stated appetite for risk.

¹ David Smol & Jennie Kerr, A Review of the Ministry of Foreign Affairs and Trade's Export Controls Regime, 2021, pages 13 -14

6. MFAT extend proactive outreach and education

Priorities would include:

- Ensuring (as far as practicable) that all potentially impacted exporting businesses and researchers are aware of and understand the regime
- Providing MFAT with early warning of emerging issues (such as new sensitive technologies).

7. MFAT work with NZ Customs Service to develop and publish a formal compliance strategy

Priorities would include:

- Education and out-reach (particularly around the expanded Catch-alls) to minimise the risk of inadvertent non-compliance
- Selective investment in monitoring and intelligence to increase the likelihood of detecting any non-compliance.

8. MFAT develop a business case for increased resourcing for the Export Controls regime

Priorities would include:

- More depth, professional development and succession planning in the Export Controls team
- More consistent interaction with MFAT's risk and assurance functions
- Sufficient training on the structure of the Export Controls regime for MFAT staff in divisions and posts that are likely to be asked to input to decision-making.

9. MFAT ensure the Export Controls regime is fit for the future

Priorities would include:

- Pursuing legislative reform (preferably through new stand-alone legislation) to:
 - Clarify the legislated purpose of Export Controls
 - Make the regime easier to understand, predict and comply with for exporting businesses and the research community
 - Better-capture intangible means of export, modernise enforcement provisions and enable timely response to emerging challenges in the threat environment
- Supporting the establishment of an all-of-government centre for expertise (required by multiple agencies) to assess the uses of and risks associated with sensitive and emerging technologies.

Appendix 2 – Customs and Excise Act 2018 sections 96 and 97

Section 96. Prohibition on other imports or exports by Order in Council

1. The Governor-General may, by Order in Council, on the recommendation of the Minister, prohibit the importation or exportation of—
 - a. any specified goods; or
 - b. any specified class of goods.
2. A prohibition under this section may—
 - a. be general or be limited to—
 - i. the importation of goods—
 - A. from a specified place:
 - B. by or from a specified person or class of persons:
 - ii. the exportation of goods—
 - A. to a specified place:
 - B. by or to a specified person or class of persons:
 - b. be subject to conditions.
3. A conditional prohibition may allow the importation or exportation of goods under the terms of a licence, permit, or consent granted by—
 - a. the chief executive; or
 - b. any other person named in the order.
4. A licence, permit, or consent under subsection (3) may be granted before or after the importation or exportation of the goods.
5. The Minister must not make a recommendation for the purposes of subsection (1) unless he or she considers that the proposed prohibition is necessary in the public interest.
6. The Secretary must maintain an up-to-date list of all goods and classes of goods whose exportation is prohibited under this section because they have or may have a strategic use.
7. The Secretary must make the list maintained under subsection (6) available by—
 - a. notifying the chief executive of it; and
 - b. publishing it on an Internet site maintained by, or on behalf of, the Secretary.
8. To avoid doubt, any failure to publish a list under subsection (7) does not invalidate the prohibition of the exportation of any goods or classes of goods mentioned in the list.
9. An Order in Council that prohibits the exportation of goods extends and applies to the shipment of the goods for use as stores by a craft, except as otherwise specified in the order.

10. An order under this section—
 - a. is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements); and
 - b. must be confirmed by an Act (see subpart 3 of Part 5 of the Legislation Act 2019).

11. In this section,—

goods includes documents that are not otherwise goods

Secretary means the Secretary of Foreign Affairs and Trade

strategic use, in relation to goods, means use for 1 or more of the purposes listed in section 97(2)(a) to (f).

12. Documents that are not otherwise goods and whose importation or exportation is prohibited under this section—
 - a. are goods for the purposes of the rest of this Act (apart from section 97) as it applies in relation to, as the case may be,—
 - i. imported goods or the importation of goods (including (without limitation) for the purposes of the definition of prohibited imports in section 5(1)); or
 - ii. exported goods or the exportation of goods (including (without limitation) for the purposes of the definition of prohibited exports in section 5(1)); but
 - b. are not goods for the purposes of section 12 of the Goods and Services Tax Act 1985.

Section 97. Prohibition on exports by notice: nuclear, biological, and chemical weapons, etc

1. The Secretary may, by notice after consultation with the Minister, prohibit the exportation of goods described by any use to which they may be put, if the Secretary considers that the prohibition is necessary in the public interest.

2. A notice under subsection (1) must describe goods by reference only to uses that relate (directly or indirectly) to 1 or more of the following purposes:
 - a. the development, production, or deployment of nuclear explosive devices and their means of delivery:
 - b. the development, production, or deployment of biological weapons and their means of delivery:
 - c. the development, production, or deployment of chemical weapons and their means of delivery:
 - d. military use or applications:
 - e. the development, production, or deployment of military goods or other goods that have a civilian use but that are intended for military use or that may have military applications:
 - f. terrorist acts.

3. A prohibition in a notice under subsection (1) may—
 - a. be general or be limited to the exportation of goods—
 - i. to a specified place:
 - ii. by or to a specified person or class of persons:
 - b. be subject to conditions.

4. A conditional prohibition may allow the exportation of goods under the terms of a licence, permit, or consent granted by—
 - a. the chief executive; or
 - b. any other person named in the notice.
5. A licence, permit, or consent under subsection (4) may be granted before or after the exportation of the goods.
6. A prohibition in a notice under subsection (1) applies to any goods only if the Secretary has determined that the goods are covered by the prohibition.
7. If the Secretary makes a determination under subsection (6) in respect of any goods, the Secretary must notify the chief executive and each relevant exporter as soon as practicable.
8. If a person (the exporter) is aware, or should reasonably be aware, that any goods that the exporter wishes to export are intended for, or may be put to, any of the uses set out in a notice under subsection (1),—
 - a. the exporter must inform the Secretary; and
 - b. the Secretary must, as soon as practicable,—
 - i. decide whether to make a determination under subsection (6) in respect of the goods; and
 - ii. either—
 - A. make a determination and notify the chief executive and the exporter in accordance with subsection (7); or
 - B. notify the exporter that the Secretary is not going to make a determination; and
 - c. the exportation of the goods is prohibited until the exporter receives the Secretary's notification under paragraph (b)(ii).
9. A notice under subsection (1) is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

10. In this section,—

biological weapon has the meaning given to that term in section 2 of the New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987

chemical weapons has the meaning given to that term in Article II of the Schedule of the Chemical Weapons (Prohibition) Act 1996

goods includes documents that are not otherwise goods

military includes any armed force, paramilitary force, Police force, or militia

nuclear explosive device has the meaning given to that term in section 2 of the New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987

Secretary means the Secretary of Foreign Affairs and Trade

terrorist act has the meaning given to that term in section 5 of the Terrorism Suppression Act 2002.

11. Documents that are not otherwise goods and whose exportation is prohibited under this section—
 - a. are goods for the purposes of the rest of this Act as it applies in relation to exported goods or the exportation of goods (including (without limitation) for the purposes of the definition of prohibited exports in section 5(1)); but
 - b. are not goods for the purposes of section 12 of the Goods and Services Tax Act 1985.



Appendix 3 – Customs Export Prohibition (Strategic Goods) Order 2021

1. Title

This order is the Customs Export Prohibition (Strategic Goods) Order 2021.

2. Commencement

This order comes into force on 1 October 2021.

3. Transitional, savings, and related provisions

The transitional, savings, and related provisions (if any) set out in Schedule 1 have effect according to their terms.

4. Exportation of certain strategic goods prohibited

1. The exportation of the goods specified in Schedule 2 is prohibited.
2. However, a person may export those goods if the person—
 - a. has the consent of the Secretary of Foreign Affairs and Trade; and
 - b. does so in accordance with the terms of that consent.

Schedule 1

Transitional, savings, and related provisions.

Part 1

Provisions relating to this order as made.

There are no transitional, savings, or related provisions relating to this order as made.

Schedule 2

Goods prohibited from exportation.

Nuclear weapon-related goods

1. Equipment (including associated software and technologies) that may have application in the development, production, or use of nuclear weapons or their means of delivery.
2. Dual-use goods (including associated software and technologies) that may have application in the development, production, or use of nuclear weapons or their means of delivery.
3. Any document used for the purpose of transferring (including by electronic means) the software or technology described in item 1 or 2 to a person or place outside New Zealand.

Chemical weapon-related goods

4. Precursor chemicals that may have application in the development or production of chemical weapons, except where those chemicals are subject to prohibitions and consents applying by virtue of section 10 of the Chemical Weapons (Prohibition) Act 1996.
5. Biopolymers and biocatalysts that may have application in the development, production, or use of chemical weapons or their means of delivery.
6. Equipment (including associated software and technologies) that may have application in the development, production, or use of chemical weapons or their means of delivery.
7. Dual-use goods (including associated software and technologies) that may have application in the development, production, or use of chemical weapons or their means of delivery.
8. Any document used for the purpose of transferring (including by electronic means) any software or technology described in item 6 or 7 to a person or place outside New Zealand.

Biological agent-related goods

9. Biological agents.
10. Equipment (including associated software and technologies) that may have application in the development, production, or use of biological agents or their means of delivery.
11. Dual-use goods (including associated software and technologies) that may have application in the development, production, or use of biological agents or their means of delivery.
12. Any document used for the purpose of transferring (including by electronic means) any software or technology described in item 10 or 11 to a person or place outside New Zealand.

Conventional weapons and military weapon-related goods

13. Conventional weapons (including associated software and technologies) that are intended for military use or may have military applications.
14. Military equipment (including associated software and technologies).
15. Dual-use goods (including associated software and technologies) that are intended for military use or may have military applications or may have application in the development, production, or use of military goods.
16. Any document used for the purpose of transferring (including by electronic means) any software or technology described in item 13, 14, or 15 to a person or place outside New Zealand.

Explanatory note

This note is not part of the order, but is intended to indicate its general effect.

This order is made under the Customs and Excise Act 2018 and prohibits the export of certain strategic goods. The prohibited goods are those listed in Schedule 2 and include specified military goods, specified dual-use goods, items that may be destined for use in biological agents or chemical weapons, and related documents.

The Secretary of Foreign Affairs and Trade maintains the New Zealand Strategic Goods List, which lists the items, software, and technologies for the prohibited goods. The New Zealand Strategic Goods List is available on the Ministry of Foreign Affairs and Trade Internet site (www.mfat.govt.nz).

This order comes into force on 1 October 2021 and continues the prohibition in clause 5 and the Schedule of the Customs Export Prohibition Order 2017, which expires at the close of 30 September 2021.

This order is a confirmable instrument under section 47B of the Legislation Act 2012.

It will be revoked at the close of 31 December 2022, unless earlier confirmed by an Act of Parliament. That stated time is the applicable deadline under section 47C(1)(b) of that Act. If the order is confirmed, it will remain in force until revoked or amended.

**Michael Webster,
Clerk of the Executive Council.**

Issued under the authority of the Legislation Act 2012.
Date of notification in Gazette: 19 August 2021.
This order is administered by the New Zealand Customs Service

Appendix 4 – Gazette notice

Export controls

Pursuant to Section 97 of the Customs and Excise Act 2018

1. The exportation of the goods or electronic publications specified in paragraph (2) is prohibited, except where an exemption applies as set out in paragraph (3), or with the consent of, and subject to any conditions as are imposed by the Secretary of Foreign Affairs and Trade.
2. The goods and electronic publications referred to in paragraph (1) are goods or electronic publications that may be determined by the Secretary of Foreign Affairs and Trade to be goods or electronic publications that are or may be intended for use relating, directly, or indirectly, to any or all of the following:
 - a. the development, production, or deployment of nuclear explosive devices and their means of delivery;
 - b. the development, production, or deployment of biological weapons and their means of delivery;
 - c. the development, production, or deployment of chemical weapons and their means of delivery;
 - d. a military use or application;
 - e. the development, production, or deployment of military goods or other goods that have a civilian use but that are intended for military use or that may have military applications; or
 - f. terrorist acts.
3. Goods or electronic publications, in relation to paragraph (2)(d) and (e), are exempt from the export prohibition if the goods or electronic publications are:
 - a. Consigned for use in Australia, Canada, Iceland, Japan, Norway, South Korea, Switzerland, the United Kingdom of Great Britain and Northern Ireland, the United States of America or a member state of the European Union;
 - b. animals, food and beverage, or medical, health and sanitary products;
 - c. parts or components or replacement items for a primary system supplied prior to, or under a pre-existing contract to, the promulgation of the Gazette Notice, and not intended for the testing, development, production or maintenance of weapons;
 - d. parts or components or replacement items for a primary system supplied after the promulgation of the Gazette Notice, and not exempt under (c), and not intended for the testing, development, production or maintenance of weapons;
 - e. exported as part of an official development assistance programme funded by the New Zealand Government;
 - f. exports for which contracts existed prior to the promulgation of the Gazette Notice;
 - g. exports for which renewal of contract negotiations or pre-existing contract negotiations have yet to be completed and those negotiations are concluded within six months of the promulgation of the Gazette Notice and the related exports are completed within one year of the promulgation of the Gazette Notice;
 - h. exports of research for which contract/agreement negotiations or renewal of contracts/ agreements are under discussion and such negotiations are concluded within 12 months of the promulgation of the Gazette Notice and those exports are completed within five years of the promulgation of the Gazette Notice; and
 - i. fundamental or basic research.

4. A primary system supplied after the promulgation of the Gazette Notice, and not exempt under 3(g), may be subject to a condition imposed by the Secretary of Foreign Affairs and Trade in accordance with paragraph 1, that the subsequent supply of parts or components or replacement items are exempted under paragraph 3(d) for as long as the situation at the time of approval stands. Any significant change in circumstances may need to be considered and the exemption for those parts or components or replacement items withdrawn.
5. Military use or applications, in relation to paragraph (2)(d) and (e), is defined as: “goods or electronic publications incorporated into weapons, or used in the production, maintenance or testing of weapons, or to materially enable or support operations and activities of a military or internal security nature”.
6. Fundamental or basic research means “experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts, not primarily directed towards a specific practical aim or objective”.
7. A terrorist act is as defined under section 5 of the Terrorism Suppression Act 2002.

Dated this 7th day of September 2020.

CHRIS SEED, Secretary, Ministry of Foreign Affairs and Trade.



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Te Kāwanatanga o Aotearoa
New Zealand Government

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MINISTRY OF FOREIGN AFFAIRS AND TRADE
MANATŪ AORERE