



2024-03-21-Scott-OIA

22 April 2024

Scott
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Tēnā koe Scott

Official Information Act request

Thank you for your Official Information Act 1982 (OIA) request of 21 March 2024 to the Government Communications Security Bureau (GCSB) seeking information regarding the Inspector-General of Intelligence and Security (IGIS)'s report *Inquiry into GCSB's hosting of a foreign capability*. Specifically, you asked for:

ONE: I would like to request a copy of JPS – 026 International Agreements and Arrangements

TWO: I would like to request a copy of the 2012 MOU between GCSB and the foreign partner agency referenced throughout the IGIS report

Response

In coming to a decision on your request I have applied the following sections of the OIA:

- Section 6(a), as the making available of the information would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand;
- Section 6(b)(i), as the making available of the information would be likely to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the Government of any other country or any agency of such a Government; and
- Section 18(d), as the information requested is already publicly available.

In relation to the Joint Policy Statement (JPS) on International Agreements and Arrangements, I have attached a copy of this in summary form as provided for under section 16(1)(e) of the OIA, to protect the interests under sections 6(a) and 6(b)(i). Under s18(d), some information is not included in this summary as the information is already publicly available. This is noted in the summary as appropriate.

In relation to the Memorandum of Understanding (MOU), the GCSB worked closely with the IGIS to release as much of the MOU as possible in the public IGIS report. I am confident that the IGIS report balances accountability with the need to protect New Zealand's national security interests. To continue to protect these interests, I am therefore refusing your request for this document under sections 6(a) and 6(b)(i) of the OIA. Insofar as your request relates to parts of the MOU available through the public IGIS report, I am formally refusing these under section 18(d), as the information is already available.

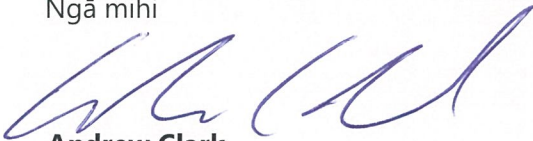
Review

If you would like to discuss this response with us, please feel free to contact information@gcsb.govt.nz.

You have the right to seek an investigation and review by the Ombudsman of this decision. Information about how to make a complaint is available at www.ombudsman.parliament.nz or freephone 0800 802 602.

Please note that the GCSB proactively publishes OIA responses in accordance with the expectations of Te Kawa Mataaho/the Public Service Commission. We intend to publish this response (with your personal information removed) on the GCSB website. Publication of such responses is done on a quarterly basis.

Ngā mihi



Andrew Clark

Te Tumu Whakarae mō Te Tira Tiaki
Director-General, GCSB

The following is summarised information from a GCSB and NZSIS Joint Policy Statement. Where possible, excerpts of the original document have been used. Some details are withheld under section 6(a) of the Official Information Act 1982 as release would prejudice the security or defence of New Zealand or the international relations of the New Zealand government. Some parts of the document are not reproduced as the information is already publicly available.

Summary: JPS 026 – International Agreements and Arrangements

Purpose

1. The purpose of this Joint Policy Statement - JPS-026 - is to set out the processes to be followed by GCSB and NZSIS (**'the agencies'**) when seeking to enter into an Agreement (hereafter **'Treaty'**) or international arrangement (hereafter **'Arrangement'**).
2. This policy provides guidance to help the agencies determine:
 - a. what Arrangements and Treaties are, and distinguish these instruments from other documents that relate to foreign cooperation; and
 - b. which Treaties¹ and Arrangements with overseas public authorities need to be referred to the Intelligence and Security Committee (**the ISC**) for noting, in accordance with the requirements of the Ministerial Policy Statement on Cooperating with Overseas Public Authorities (**the MPS**).
3. This policy also provides guidance on the agencies' roles and responsibilities when entering into Treaties and Arrangements, and the approval process for each (see Annex C).

Alignment with publicly available documents

4. This policy aligns with several publicly available documents:
 - a. The MFAT Treaty Making guide describes Treaties and Arrangements as well as consultation requirements with MFAT.
 - b. The Cabinet Manual requires Cabinet approval for Arrangements that constitute new policy.
 - c. The MPS provides guidance for GCSB and NZSIS in relation to cooperation with overseas public authorities.

¹ Where there has been a Treaty Examination waiver issued.

5. As the information in these documents is publicly available, it is not reproduced in this summary.

Background

6. The agencies cooperate with overseas public authorities for the performance of their functions. Sometimes cooperation may necessitate the development of a Treaty or Arrangement to ensure the principles and terms of cooperation are clear and agreed by the parties involved. For example, the agencies may consider it necessary to seek such an instrument where the party or form of foreign cooperation is entirely new or where the cooperation relates to a complex matter.
7. For clarity, the agencies are not required to have a Treaty or Arrangement to cooperate with an overseas public authority. However, there are other requirements related to cooperation that the agencies may need to comply with under the JPS- Management of Human Rights in Overseas Cooperation Policy.

Scope

8. This policy applies to Treaties and Arrangements with overseas public authorities entered into by the NZSIS or GCSB; including Treaties and Arrangements that:
 - a. involve other government departments where NZSIS or GCSB is the 'lead agency'²; or
 - b. create specific obligations or roles for the agencies, but where the NZSIS or GCSB is not the 'lead agency'.
9. This policy does not apply to:
 - a. arrangements or records relating to domestic cooperation;
 - b. documents that record cooperation with an overseas public authority, but that do not fall within the definition of an Arrangement or a Treaty;
 - c. agreements with private individuals or corporate entities which are governed by a contract; and
 - d. documentation relating to individual secondments.
10. The agencies are party or subject to a number of Arrangements and Treaties that were entered into before this policy came into effect. This policy does not apply retrospectively to these documents, with the exception that:
 - a. they must be stored within the respective agency register; and

² Is the agency (or agencies) responsible for the negotiation of the Treaty, as well as drafting the accompanying documents (e.g. Cabinet papers, NIA) and attending Select Committee briefings required as part of the Treaty making-process.

- b. any Arrangement entered into since September 2017 must be considered for referral to the ISC in accordance with the MPS criteria.

Documents that ***are not*** within the scope of this policy

- 11. There are a range of documents, that record engagement with an overseas public authority that are not within the scope of this policy as they are not defined as Treaties or Arrangements. Non exhaustive examples include:
 - a. operational planning documents for joint operations or joint intelligence collection;
 - b. Terms of References (ToR), planning documents or joint exercises from Committees or working groups;
 - c. records of liaison meetings (in New Zealand or overseas);
 - d. records relating to visits, events or conferences hosted or attended by the agencies with foreign partners;
 - e. records relating to the provision of intelligence to or from foreign partners, including human rights risk assessments; and
 - f. records relating to training or workshops delivered or attended by the agencies with foreign partners.
- 12. These documents outline day-to-day or working level details of foreign cooperation and do not need to be stored in the agencies registers or considered for referral to the ISC.

Policy

- 13. This policy sets out the terms and processes to be followed by the agencies for entering into Treaties and Arrangements (see a summary of the process in Annex A).
- 14. Overseas public authorities may use different terms when referring to these instruments. As such, a conversation around the purpose of any proposed Treaty or Arrangement and the intention (i.e. binding or non-binding) should be initiated and recorded by the agencies at the onset of discussions about formal written commitments with any foreign partner(s).
- 15. Treaties and Arrangements must have an assigned Tier 2 business owner (or delegate)³ and a subject matter expert (SME) responsible for negotiation, management and the relationship or form of cooperation established by the instrument.
- 16. Where there is uncertainty about the status of a document, consider the purpose, format and terminology used and confirm with the Tier 2 business owner or delegate. Where still unsure, seek advice from a member of the respective agency Legal team to determine

whether the document is an Arrangement or Treaty and therefore needs to be approved in accordance with this policy, stored in the agencies register and considered for referral.

17. As Treaties and Arrangements have distinct procedural, legal and constitutional requirements,⁴ a partnership model between the relevant teams should be adopted as outlined below.
18. Where the intent is to enter into a Treaty (which will require Cabinet mandate), consultation must occur between the relevant teams before any indication of (in principle) support is provided. When necessary, noting or endorsement should also be obtained from the Directors-General, Senior Leadership Team and/or the Minister.

Treaties

19. Where GCSB and/or NZSIS are acting as the lead agency/ies in the negotiation⁵ of a Treaty, they will consult MFAT at an early stage. This is to ensure the process, timetable and consultation for the particular Treaty is clear before commencing.
20. The agencies may be consulted on Treaties that are negotiated by other New Zealand Government departments.

Arrangements

21. Since Arrangements establish commitments for the agencies and may involve close scrutiny, they must have a nominated Tier 2 business owner (or delegate) who is responsible for the overall negotiation and management of the Arrangement. These involve ensuring the tasks below are followed through:
 - a. confirming the status of the document with the assistance of the relevant teams;
 - b. ensuring that the relevant teams are aware of the Arrangement and that consultation with them has occurred (as required);
 - c. arranging consultation with MFAT (as required);
 - d. making an early assessment as to whether the Arrangement may meet the threshold for referral to the ISC (in consultation with the Chief Financial Officer (CFO) and relevant teams (as required));
 - e. ensuring the CFO is advised if there are financial implications, or any doubts on the criteria related to significant expenditure of funds;

⁴ MFAT, International Treaty Making guidance, 2020

⁵ New Zealand must first obtain a negotiating mandate. Following which, New Zealand officials will participate in international negotiations resulting in the text of the agreement being finalised

- f. advising the Directors-General and Directors of the relevant teams that there may be an Arrangement which meets the threshold for referral to the ISC, however a final determination is needed;
 - g. identifying and allocating appropriate resources to negotiate and draft the Arrangement;
 - h. ensuring the signed Arrangement is stored in the agency register; and
 - i. coordinating amendments or modifications to a pre-existing Arrangement (this may be signed by the original signatory or as set out in the Arrangement).
22. The Arrangements must be drafted using careful wording to ensure it is clear that they are not legally binding.
23. The Minister is the recommended approval authority for Arrangements that involve new policy. The determination to elevate approval of an Arrangement to the Minister is made by the Directors- General. All Arrangements must otherwise be approved and signed by a Director-General or a person delegated by them to enter into the commitment.
24. As Arrangements often outline the terms and details of cooperation, over time they may require modification or revision. The documents typically include a review period with this in mind. Where modifications or revisions to the Arrangement are required, the agencies should capture these in an Addendum which must be stored with the original.

Consultation with MFAT

25. Consultation must be carried out by the Agencies in accordance with the publicly available documents referred to in paragraph 4 of this summary.

Record-keeping

26. Each agency is responsible for establishing and maintaining a register that will store approved Treaties and Arrangements.
27. The business owner of the Treaty or Arrangement is responsible for ensuring the documents are stored in the respective register. The relevant teams must be engaged at this stage to store the documents, apply appropriate Access Control Groups and restrictions to the records (as required).

Referral to the ISC

28. The MPS requires that some Treaties (where there has been a Treaty examination waiver issued) and Arrangements⁶ with overseas public authorities must be referred to the ISC for noting if they meet the criteria set in the Table below. A flowchart for determining referral to the ISC is in Annex B.
29. This requirement applies to Treaties and Arrangements with an overseas public authority entered into by the NZSIS or GCSB since September 2017; including Treaties and Arrangements that:
- involve other government departments where NZSIS or GCSB is the 'lead agency'; or
 - create specific obligations or roles for the agencies, but where the NZSIS or GCSB is not the 'lead agency'.

The MPS Referral criteria

Referral criteria Arrangement and Treaties⁷	Description
<i>Is likely to have significant implications for New Zealand's foreign policy or international relations</i>	<p>To make this determination the agencies need to consider how the Arrangement is going to affect New Zealand's foreign policy priorities⁸ and its relationship with other countries (including the overseas public authority) and whether the Arrangement significantly impacts those priorities and/or other countries.</p> <p>Where necessary, the relevant teams should be consulted to make this determination. Where after internal consideration the agencies are uncertain, consultation should occur with MFAT and then the Minister.</p>
<i>Results in a significant change to the agencies' priorities or intelligence focus</i>	<p>The intelligence priorities are set by the Government, primarily through the National Security Intelligence Priorities (NSIPs).</p> <p>The NSIPs' organisation framework and the prioritisation exercises undertaken by GCSB and NZSIS determine where the agencies focus their resources in order to meet these priorities.</p> <p>Where an instrument results in a significant change to the agencies' priorities or intelligence focus then it should be referred. The significant change is to the agencies' intelligence focus, prioritisation and/or resourcing and not changes to the NSIPs, which are led by DPMC and set by Cabinet.</p>

⁶ Newly entered Treaties and Arrangements, including significant Treaties and Arrangements entered into with an existing partner; or a significant modification to an existing Treaty or Arrangement (i.e. amendments that alter the substantive terms of the Arrangement).

⁷ Where the Treaty has been issued with a Treaty Examination waiver.

⁸ According to MFAT 2019, there are six strategic foreign policy priorities for New Zealand: 1. Safeguarding NZ's interest in the Pacific, 2. Shaping an Indo-Pacific regional order that reflects NZ interests, 3. Maximising NZ Trade value and resilience, 4. Investing in global rules and institutions that deliver for NZ, 5. Tackling increasing risks to NZ's security; and 6. Playing a credible role in global climate change action.

	<p>For example, an Arrangement to cooperate, in an on-going or significant way, on an intelligence matter that was not previously prioritised or resourced by the agencies would be considered a significant change. Where necessary, relevant Tier 2 Managers (or delegate) should be consulted to make this determination.</p>
<p><i>Will involve significant expenditure of funds</i></p>	<p>Arrangements that involve 'significant expenditure of funds' would need to be assessed on a case-by-case basis in consultation with the CFO.</p> <p>Factors that may be relevant to the assessment include (but are not limited) to:</p> <ul style="list-style-type: none"> • the purpose of the Arrangement • the actual or anticipated costs (on an annual as opposed to the whole of life basis) • the level of discretion in respect of any such costs (e.g. whether the agencies can determine on a case-by-case basis which projects to contribute to).
<p><i>Is seen to be inconsistent with Government objectives or priorities</i></p>	<p>This referral requirement is intended to capture Arrangements that could create significant reputational or political risk for the agency or New Zealand. For example, an Arrangement:</p> <ul style="list-style-type: none"> • to cooperate with an overseas public authority that has been subject of criticism for carrying out serious human rights breaches; and/or • that would undermine public confidence in the agencies because it goes beyond what would ordinarily be expected of intelligence and security agencies. <p>Where necessary, the relevant teams should be consulted to make this determination.</p>

30. The Directors of relevant teams and the Directors-General of the relevant agency must be advised in advance of any Arrangement that may meet any of these criteria and consulted to make the final determination about whether a referral is needed.
31. If there is any doubt about whether an Arrangement or a Treaty (where there has been a Treaty examination waiver issued) meets the referral requirements, the agencies will refer the matter to the Minister who may make a decision or may confer with the Chair of the ISC and seek a determination. The relevant team will prepare documentation for the Minister Responsible for the agencies.

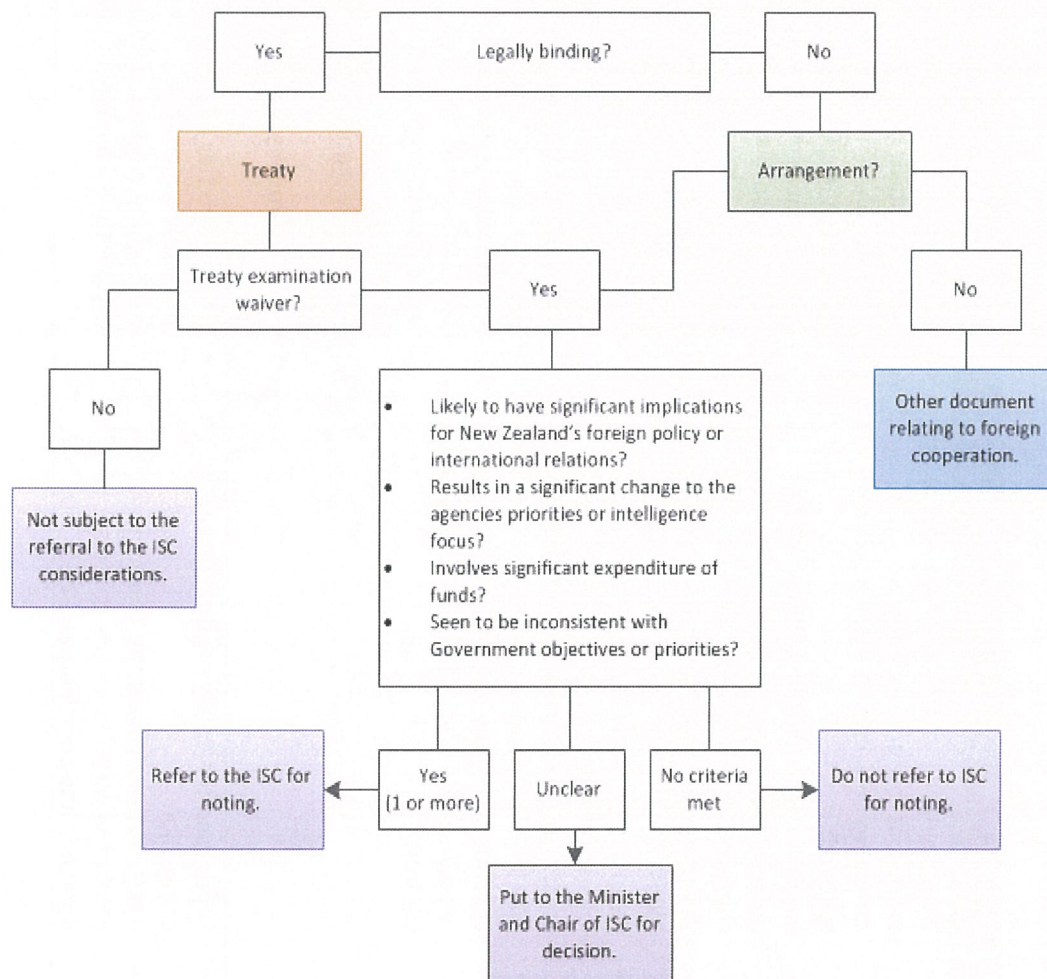
Annex A – Key steps in establishing Treaties and Arrangements

<i>Treaties</i>	<i>Arrangements</i>
<p>Clarify the proposed status of the document and participants.</p> <p>Consult with MFAT at an early stage to ensure process, timetable and consultation is clear.</p>	<p>Clarify the proposed status of the document and participants.</p> <p>Consult with MFAT at an early stage.</p>
<p>Draft the Cabinet paper to obtain mandate from Cabinet to negotiate.</p>	<p>Negotiate the draft of the Arrangement text.</p>
<p>Draft the proposed Treaty text and consult with relevant parties.</p>	<p>Make an early assessment whether the Arrangement is likely to meet the threshold for referral to the ISC and advise the Directors-General and Director of SGP.</p> <p>If there is any doubt on the referral criteria, it will need to be referred to the Chair of the ISC (through the Minister) after signature for decision.</p>
<p>Draft the Cabinet paper, RIA, and where required the NIA, to approve the Treaty text and authorise signature.</p>	<p>Consult with MFAT on final draft of the Arrangement (unless exception applies).</p>
<p>Obtain approval from relevant managers and the Director in relation to the content of the documents.</p>	<p>Obtain the Director General or their delegate's signature to enter into the Arrangement.</p>
<p>Liaise with the Legal Advisor for International Treaties at MFAT to get papers reviewed.</p>	<p>If one or all of the assessment criteria is met, refer the Arrangement to the ISC for noting.</p>
<p>Proposed Treaty and Cabinet papers submitted to Cabinet for approval and authorisation to sign the Treaty.</p>	<p>Revise or modify the Arrangement (when needed) with the assistance of Legal teams, and capture these in an Addendum.</p>
<p>Treaty signed.</p>	
<p>If required, implement legislation to align domestic law with the obligations of the Treaty, and formal ratification.</p>	
<p>If the Treaty was subject to a Treaty examination waiver issued, and any of the referral criteria are met, refer it to the ISC for noting.</p> <p>If there is any doubt on the referral criteria, it will need to be referred to the Chair of the ISC (through the Minister) after signature for decision.</p>	
<p>Revise or modify the above documents (when needed).</p>	

Annex B – Flowchart determining referral to the ISC

This referral applies to Treaties and Arrangements with overseas public authorities entered into by NZSIS or GCSB since September 2017, including Treaties and Arrangements that:

- i. involve other Government departments where NZSIS or GCSB **is** the 'lead agency'; or
- ii. create specific obligations or roles for the agencies, but where NZSIS or GCSB is **not** the 'lead agency'



Annex C – Roles and responsibilities

Agencies Responsibility	Treaties	Arrangements
Tier 2 Business Owners or delegate	<ul style="list-style-type: none"> • Responsible (in principle) for the relationship or form of foreign cooperation • Arranging consultation with MFAT (as required) • Identifying and allocating resources to negotiate and draft the Treaty, in consultation with relevant teams • Assisting the relevant team to prepare Ministerial and Cabinet papers • Assessing (in consultation with the CFO and relevant team as required) whether the Treaty (with an examination waiver issued) may require referral to the ISC • Ensuring the Treaty is stored in the agency register, with the appropriate ACGs and controls 	<p>Responsible for the overall negotiation and management of the Arrangement, which involves ensuring the following tasks are followed through:</p> <ul style="list-style-type: none"> • confirming the status of the document to business units • ensuring that relevant teams are aware of the Arrangement • arranging consultation with MFAT (as required) • making an early assessment as to whether the Arrangement may meet the threshold for referral to the ISC • ensuring the Chief Financial Officer (CFO) is advised or consulted on any significant financial implications • advising the Directors-General and Directors of relevant teams that there may be an Arrangement that meets the threshold for referral to the ISC, however a final determination is needed • identifying and allocating appropriate resources to negotiate and draft the Arrangement (in consultation with relevant teams) • ensuring the signed Arrangement is stored in the agency register • revising or modifying the Arrangement when needed
Support team	<ul style="list-style-type: none"> • Supporting the Treaty negotiation and its completion • If NZSIS and GCSB are the 'lead agency', contacting MFAT to ensure process, timetable and consultation is clear 	<ul style="list-style-type: none"> • Assisting the Tier 2 business owner or delegate on consultation with MFAT • Assisting the business owner or delegate to determine whether the Arrangement needs to be referred to the ISC

	<ul style="list-style-type: none"> • Drafting Ministerial and Cabinet papers, RIA and NIA (when required) with the assistance of Tier2 business owners and Legal teams • Assisting the business owner or delegate to determine whether the Treaty (with an examination waiver) needs to be referred to the ISC • Determining whether other Treaties create roles or obligations for the agencies and potentially brief the Directors-General and the Minister • Briefing the Directors-General and the Minister Responsible for the agencies on Treaties entered into by, or relevant to, the agencies 	<ul style="list-style-type: none"> • Where any of the criteria are met, drafting documentation to support referral to the ISC • Where referral is unclear, drafting documentation to refer the matter to the Chair of the ISC (through the Minister) for decision • Briefing the Directors-General and the Minister Responsible for the agencies on Arrangements entered into by, or relevant to, GCSB or NZSIS
Directors-General or delegate	Approve the Treaty (in principle)	Approve and sign the Arrangement to enter into a commitment or make a determination to elevate the approval to the Minister
Legal teams	<p>Providing legal advice and assistance to:</p> <ul style="list-style-type: none"> • business owners or delegate and relevant team on the Treaty negotiation, Treaty text, and Cabinet papers. • the relevant team on briefings and documentation for Directors-General, the Minister, and the ISC as necessary <p>Administering and maintaining the Treaty and Arrangement register (only GCSB Legal team)</p> <p>Ensuring this policy is updated as required (only GCSB Legal team)</p>	<p>Providing legal advice and assistance to:</p> <ul style="list-style-type: none"> • business owner or delegate on the negotiation and drafting of the Arrangement • business owners or delegate in determining whether documents related to foreign cooperation are Arrangements • business owner and relevant team to determine whether an Arrangement meets the referral criteria • the relevant team on briefings and documentation for the Director-General, the Minister and the ISC <p>Administering and maintaining the Treaty and Arrangement register (only GCSB Legal team)</p>

		Ensuring this policy is updated as required (only GCSB Legal team)
Chief Financial Officer	Providing advice on referral criteria that relate to financial implications	Providing advice on referral criteria that relate to financial implications
NZSIS Support team	<ul style="list-style-type: none"> • Administering and maintaining the Treaty and Arrangement register • Providing advice on compliance requirements related to Treaties • Ensuring this policy is updated as required 	<ul style="list-style-type: none"> • Administering and maintaining the Treaty and Arrangements register • Providing advice on compliance requirements related to Arrangements • Ensuring this policy is updated as required
GCSB Support team	<ul style="list-style-type: none"> • Providing advice on compliance requirements related to Treaties 	<ul style="list-style-type: none"> • Providing advice on compliance requirements related to Arrangements.