



MFAT's proposed changes to export controls

Submission

Electronic submission to exportcontrols@mfat.govt.nz

Context

Universities New Zealand,¹ KiwiNet,² Science New Zealand³ and the Independent Research Association⁴ (IRANZ) thank the Ministry of Foreign Affairs and Trade (MFAT) for the opportunity to provide feedback on the proposed changes to export controls ('the proposal') outlined in further detail [here](#). In summary, it is a proposal to "widen catch-all controls over the export of goods and technologies which are not listed in the New Zealand Strategic Goods List and which are destined directly or indirectly for a military, paramilitary or police end-user".

This submission reflects the views of the Vice-Chancellors and the Deputy Vice-Chancellors of Research of all eight universities, Kiwinet, Science New Zealand and IRANZ collectively referred to as 'we'.

For further information, please contact Bronwen Kelly, Deputy Chief Executive of Universities New Zealand—Te Pōkai Tara, bronwen.kelly@universitiesnz.ac.nz

Executive summary

While we acknowledge the sentiment of the proposed regulatory changes, the proposal in its current form is unworkable. The lack of clear guidance as to what is and is not in scope of the policy creates potential for Government to be overly cautious in determining which technologies are encompassed—with a potentially 'chilling' impact on valuable research and knowledge sharing. The lack of guidance may also mean that research organisations⁵ and/or their researchers may simply decide that only the most extreme technologies fall within scope—with the effect that the policy fails in its objectives. Furthermore, research organisations simply cannot predict what all technologies will be used for in the future and therefore cannot be held accountable for failing to do so. Nor can research organisations identify all the military or other affiliations of offshore entities or individuals. MFAT is in a much better position to do this and need to take greater responsibility and accountability for assessing technology risk and vetting offshore collaborators/partners/purchasers.

We support the rationale for the proposed regulatory changes to export controls that apply to high-risk countries—to ensure national security and to prevent the misuse of technology. We suggest that

¹ Representing all 8 universities (www.universitiesnz.ac.nz)

² Representing Plant & Food Research, Callaghan Innovation, AgResearch, Otago Innovation, Landcare Research, Lincoln University, University of Canterbury, Viclink, WaikatoLink, AUT Enterprises Ltd, Cawthron Institute, Environmental Science & Research, NIWA, Scion, GNS Science Malaghan Institute and the Health Innovation Hub (<https://kiwinet.org.nz/>)

³ Representing all 7 Crown Research Institutes (<http://www.sciencenewzealand.org/>)

⁴ Representing multiple research organisations as listed here: <https://www.iranz.org.nz/members.html>

⁵ Throughout this submission, the term 'research organisations' includes, but is not limited to, universities and crown research institutions.

Government significantly rework this policy in collaboration with the research sector to ensure that MFAT's intention is accurately reflected while also preventing unintended consequences.

We recommend that MFAT establishes a working group with representatives from MBIE and the research sector to refine the proposal before the regulations come into effect. These refinements must include:

- 1) greater clarification and specification of what is in scope and what is not
- 2) the exemption of fundamental research
- 3) the acknowledgement that value chains are complicated
- 4) amendments to accommodate the reality of intellectual property ownership by overseas parties.

Once the regulations come into effect, we recommend that:

- 1) research organisations should have 12 months to build their relevant expertise, systems and processes before the new regulations are enforced
- 2) MFAT creates a non-commercially sensitive list of technologies (those that receive a permit and those that do not qualify), which is continuously updated and is accessed only by registered NZ research organisations
- 3) MFAT designs a toolkit or framework and educational material to assist research organisation staff to make accurate judgements on whether to seek a permit
- 4) MFAT provides interactive advice where risk assessment is nuanced
- 5) MFAT offers a service to research organisations to vet potential overseas collaborators / partners.

Clarifications and specifications required

Our view is that the proposed policy is broader than it needs to be—several aspects need further specification and clarification to address potential unintended consequences.

Required specifications include:

- the technologies MFAT considers are for “operations and activities of a military or police nature”. Does this include technology that has a more general application but could also be for military use (eg, robotics, nanomaterials for electronic devices)? It would be helpful to have a list of the technologies that are in and out of scope.
- characteristics or features of technology that are considered ‘risky’ and would not be permitted. This applies across a broad range of research subject areas, including materials research, software, psychology etc, given the large number of potential applications.
- the timing of risk assessment should also be specified. Fundamental research evolves towards application so, in the early stage of research, potential applications can be very broad and usually unpredictable. The revised policy should specify when the risk should be formally evaluated for the purposes of applying for a permit.

Further clarifications include:

- the government agency with responsibility for which aspects of overseas technology transfer (eg, MBIE, TEC). We recommend that a single agency (and therefore ‘one source of truth’) should be the only point of contact for research organisations on this matter, to prevent confusion and miscommunication.
- the definition of technology ‘transfer’ or ‘export’ (ie, does this include emails, results and data, lab books, filing of patents, cloud-based drop-boxes, downloads of open source software from websites etc?). While ‘transfer’ is described in the Strategic Goods List, does that definition apply to this new proposed regulation?

- the definition of ‘inappropriate activities’ (p 5) as it relates to militia and police
- the definition of “tangible technology which includes written and electronic information” (p 8, ie, what does ‘tangible’ exclude?)

The unintended consequences of such a broad policy are that MFAT will be inundated with requests for permits and the compliance costs for NZ research organisations will soar. It could also result in lost opportunities if research organisations and overseas collaborators/partners⁶ are simply deterred by an overly cumbersome and over bureaucratized permit process.

Responsibility and accountability rests too heavily on research organisations

The proposed regulatory changes place the responsibility for applying for permits on research organisations. We are concerned that the policy does not provide enough guidance to help research organisations assess whether they should apply. We recommend that MFAT provides a toolkit and educational material to help research organisations’ staff make these judgments. We also recommend that MFAT establishes an advisory group⁷ to provide interactive guidance when risk assessment is nuanced. The revised policy should also consider that these judgements will often be made jointly with overseas collaborators/partners.

Moreover, we recommend that—if this policy, or a variation thereof, comes into effect—MFAT creates a non-commercially sensitive list of technologies that receive a permit and those that do not qualify. This list should be continuously updated by MFAT as it makes decisions on permit applications. This list should also identify overseas collaborators and partners who have either been vetted by MFAT or are party to an approved permit. This will enable research organisations to determine, to some extent at least, the likelihood of successfully obtaining a permit.

Finally, we are also very concerned about the degree to which research organisations will be held accountable for vetting potential overseas collaborators/partners. While the draft policy makes it clear that a permit is required if the overseas collaborators /partners are military, paramilitary or police, it may not be always be obvious if overseas organisations are affiliated to militia or police or if this is the ‘end source’ of the technology.

Research organisations in New Zealand may develop the technology, but thereafter we have little control over where and how the technology is shared—particularly if there has been a commercial transaction around the transfer of IP. We therefore recommend that MFAT provides a service to vet prospective overseas collaborators /partners, as MFAT is privy to more of the sensitive relevant information that the research sector currently has capacity to do or indeed is mandated to assess.

The nature of research and its value chain should be considered

Research activities range from fundamental to highly applied. Fundamental research is carried out to advance knowledge, without predetermining its application or having an application in mind.

Applied research is undertaken to acquire new knowledge but is directed mainly towards a specific practical aim or objective. We therefore recommend that the proposed regulations exclude all fundamental research. Approximately 56% of the research undertaken by New Zealand universities is fundamental in nature, so excluding it from the proposed new regulations would provide a more

⁶ For the purposes of this submission, “overseas collaborators/partners” includes tertiary education and research organisations, government agencies, private businesses etc.

⁷ For example, the Australian government offers advisory services for those who are unable to self-assess or who are uncertain <https://www.defence.gov.au/ExportControls/ICT.asp#Howdolapply>

targeted and relevant approach.⁸ The revised regulations could also exclude applied research when results would typically be published for an international audience (eg, international conference abstracts, journals and periodicals). This would serve to focus specifically on the very technologies we think MFAT is intending to target, reducing the number of unnecessary permit applications.

The revised proposal should also reflect that, even in the applied research and technology space, the application of new technology is not always known when it is developed.

As noted above—but except for open-source software—the pathway to direct end-users is somewhat easy to identify, as they are usually well understood at the concept stage of technology development. However, research organisations have little or no control over the pathways to indirect end-users. The revised version of the proposal needs to acknowledge that value chains are complicated, and the reality is that at the time of export, the full extent to which technology might be used and by whom is often not known.

We are concerned that under the proposed regulations, the onus of responsibility rests with research organisations, yet they have little control over the entire value chain.

Intellectual property must be addressed

In many instances, overseas collaborators/partners of NZ research organisations will own the results of the research for which they have paid. These collaborators/partners will therefore also own the intellectual property (IP), meaning the collaborators/partners, not the NZ research organisation, controls who uses the IP and to whom they license or sell it. The revised version of the proposal should reflect this.

6-month transition timeframe is too short

The timeframe of 6 months between the announcement and the enforcement of the new rules is insufficient for the research organisations to build the expertise required. We recommend at least 12 months.

Further collaborative development is required

We understand that this proposal for regulatory change is intended to protect New Zealand's interests and reputation, and to minimise potential consequences for exporters by following international best practice. We also understand that this proposal is not intended to be punitive. However, we also recognise the need to ensure that new regulations allow for efficient and effective implementation. So, we want to continue to work with MFAT to further refine the proposal through participating a representative working party.

We understand that reaching a point where national interests and the autonomy of university research endeavours are suitably balanced may take time; it has reportedly taken approximately five years' collaboration between the Australian government and Australian universities to achieve this. We could learn much from their experience and recent review.⁹

⁸ 36% is applied research and the remaining 8% is classified as experimental (“systematic work, drawing on knowledge gained from research and practical experience, that is directed at producing new materials, products, and devices; installing new processes, systems, and services; or improving substantially those already produced or installed”) <https://www.stats.govt.nz/information-releases/research-and-development-survey-2018>.

⁹ https://www.defence.gov.au/Publications/Reviews/tradecontrols/Docs/DTC_Act_Review_Final_Report.pdf