



OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

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Dr. Gus Hosein and David Tong
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By email: scarlet@privacyinternational.org

Dear Dr Hosein and Mr Tong

I write in response to your letter of 13 September 2017. I value Privacy International's focus on the role of oversight bodies, as one means by which the lawfulness and propriety of actions of intelligence and security agencies receive scrutiny and review. Alongside the work of other official oversight bodies, civil society organisations such as Privacy International help ensure the transparency of those activities, and also of course serve to 'watch the watchers' which is enormously valuable in an open democracy. As your briefing canvassed, information sharing is a key function of intelligence and security agencies, with the agencies accountable for the extent to which those arrangements comply with international and domestic human rights law.

By way of introduction, I provide a few notes on the role of the Inspector-General of Intelligence and Security, and the current framework, both statutory and organisational, for intelligence and security agencies in New Zealand.

Inspector-General of Intelligence and Security

The office of the Inspector-General of Intelligence and Security (Inspector-General) in New Zealand is independent of the executive. The Inspector-General has oversight of the two intelligence and security agencies, the Government Communications Security Bureau (GCSB) and the New Zealand Security Intelligence Service (NZSIS).

In summary, my office has the functions, duties and powers to:

- ensure the intelligence and security agencies conduct their activities lawfully and with propriety
- ensure that complaints relating to the intelligence and security agencies are independently investigated, and

- advise the New Zealand Government and Intelligence and Security Committee on matters relating to the oversight of the agencies.¹

To fulfil these responsibilities I have jurisdiction to:

- receive complaints
- initiate inquiries into the legality and/or propriety of agency activities
- review the agencies' internal operational systems, and
- review all intelligence warrants.

My office is also able to receive and, where appropriate, investigate protected disclosures (aka whistleblowing) relating to classified information and/or the activities of the intelligence and security agencies.² Information about my role, functions and the work undertaken by my office is available in our Annual Reports³ (with some further details provided below).

New Zealand's intelligence community⁴

The intelligence community comprises two civilian intelligence collection agencies:

- the GCSB⁵ – primarily focuses on foreign signals intelligence (SIGINT)
- the NZSIS⁶ – primarily focuses on domestic human intelligence (HUMINT).

In the New Zealand intelligence community there is also a civilian intelligence analysis and reporting agency, the National Assessments Bureau within the Department of the Prime Minister and Cabinet, and a range of intelligence functions within agencies including Defence, Customs, Immigration and Police. None of these is subject to specialist independent oversight, although they are subject to more general public sector oversight by the Office of the Ombudsmen and the Office of the Privacy Commissioner.

Review of intelligence and security: Intelligence and Security Act 2017

An independent review of intelligence and security in New Zealand, in February 2016, recommended a complete overhaul of the statutes governing the GCSB, NZSIS and their oversight. The recommendations, set out in the Report *Intelligence and Security in a Free Society*,⁷ are now largely implemented by the Intelligence and Security Act 2017 (IS Act), which came into effect on 28 September 2017.

Acting in compliance with human rights law

In keeping with the review's recommendations, the IS Act includes requirements that the GCSB and NZSIS "act in accordance with New Zealand law and all human rights obligations recognised by New

¹ Intelligence and Security Act 2017 (IS Act), ss 156, 158 and 171. All New Zealand legislation is available at www.legislation.govt.nz

² Protected Disclosures Act 2000, ss 12 and 13; IS Act, s 160.

³ Inspector-General of Intelligence and Security Annual Reports are available at www.igis.govt.nz/publications/annual-reports/

⁴ NZIC website is available at www.nzic.govt.nz

⁵ GCSB website is available at www.gcsb.govt.nz

⁶ NZSIS website is available at www.nzsis.govt.nz

⁷ Sir Michael Cullen and Dame Patsy Reddy *Intelligence and Security in a Free Society* February 2016, available via search at www.parliament.nz/

Zealand law”.⁸ Of particular relevance to Privacy International’s enquiry are sections 10 and 12 of the IS Act which require the responsible Minister to be “satisfied” of this compliance, before authorising the agencies to share information with overseas public authorities / foreign parties and undertake foreign cooperation.

Ministerial Policy Statements under the new Act

The IS Act also requires the Minister responsible for the NZSIS and GCSB to issue Ministerial Policy Statements (MPSs), to provide guidance for the agencies on the conduct of lawful activities in 13 areas.⁹ The Office of the Inspector-General was consulted during the development of these MPSs. Of particular relevance to intelligence sharing is the MPS entitled *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities*.¹⁰ I comment further on this specific MPS below.

Responses to Privacy International’s questions

1. Is the government and/or are the intelligence agencies required to inform you about intelligence sharing arrangements they have made with other governments?

There is no legislative provision requiring the GCSB or NZSIS (or any other government body) to proactively inform the Inspector-General about current or new intelligence sharing arrangements with other governments or foreign agencies. It is a matter of public record that New Zealand’s primary intelligence sharing relationships are with New Zealand’s Five Eyes partners of USA, UK, Australia and Canada.

However, the IS Act requires that, where the GCSB or the NZSIS request a government of, or an entity in, another jurisdiction to carry out an activity that would be an unlawful activity if it were carried out by the GCSB or NZSIS, they must obtain an intelligence warrant. As my office reviews all intelligence warrants, any such request and associated intelligence cooperation agreements will be subject to my oversight.¹¹

More generally, in order to carry out the Inspector-General’s functions and duties, I have broad rights of access to all agency information which can, as necessary, include access to NZSIS or GCSB’s intelligence sharing arrangements with other countries and foreign agencies. (These powers are noted below in response to your third question).

2. Does your mandate include independent oversight of the intelligence sharing activities of your government?

Yes, to the extent that my mandate includes independent oversight of the intelligence sharing activities of New Zealand’s two intelligence and security agencies, the GCSB and NZSIS, both of which are government departments.

⁸ IS Act, ss 3(c), 10(3), 12(7), 17(a) and 18(b).

⁹ IS Act, ss 206, 207 and 209.

¹⁰ The MPSs are available at www.nzic.govt.nz/legislation/

¹¹ IS Act, s 49(2).

Key points to note are:

- My office is independent of the agencies themselves and executive government. Key features of this independent status are that my office is funded by an appropriation that sits outside of the intelligence community; the appointments of the Inspector-General and Deputy Inspector-General are made without reference to the agencies; these roles are both independent statutory officers, not employees; I am not subject to direction from the Prime Minister or any Minister in terms of how I carry out my role
- The IS Act provides for total, unmediated access to security information held by the intelligence and security agencies
- I can initiate an inquiry into the lawfulness and propriety of agency activities, where that is in the public interest and without the need for government request or concurrence, and
- The IS Act requires that I report publicly, annually and on specific inquiries. This is an important aspect of my independence and of transparent and effective oversight and public accountability.

My office is small (eight people in total) which requires us to carefully prioritise where we put our resources and our focus in terms of overseeing all of the agencies' activities. That said, I am satisfied that as a team we do manage to achieve sufficiently broad and also in-depth coverage. My work programme and Annual Report are published each year, and also tabled in the House, which allows the public to form its own view of the effectiveness and productivity of this office.

3. Do you have the power to access in full all relevant information about the intelligence sharing activities of your government?

Yes, as noted above, I have broad rights of access to agency information as necessary to carry out all my statutory functions and duties. In addition, in the context of an inquiry the IS Act provides the Inspector-General with powers to:

- require any person to provide any information, document or thing in that person's possession or control, that I consider relevant to an inquiry¹²
- receive in evidence any statement, document, information or matter that may assist me with an inquiry, whether or not that material would be admissible in a court of law¹³
- require disclosure to the Inspector-General of any matter, despite that information, document, thing or evidence being subject to an obligation of secrecy under an enactment or otherwise¹⁴
- summons persons I consider able to give information relevant to an inquiry,¹⁵ and
- enter, at a reasonable time, any premises used by an intelligence and security agency.¹⁶

Any person answering questions, giving evidence or providing information documents or things to the Inspector-General has the same privileges as witnesses have in a court of law.¹⁷

¹² IS Act, s 179.

¹³ IS Act, s 176.

¹⁴ IS Act, s 180.

¹⁵ IS Act, s 178.

¹⁶ IS Act, s 184.

¹⁷ IS Act, s 181.

4. Do you have the power to review decisions to share intelligence and/or undertake independent investigations concerning the intelligence sharing activities of your government?

Such a review could arise in a number of ways. For example, it can occur in relation to my investigation of a specific complaint received by the Inspector-General, or with regard to regular review of all intelligence warrants. Intelligence sharing activities may be considered as part of an own-motion inquiry.¹⁸

Inquiry into possible New Zealand engagement with Central Intelligence Agency detention and interrogation 2001-2009

As I mentioned in my interim reply of 18 September 2017, I am currently conducting a (publicly announced) inquiry into whether the New Zealand intelligence and security agencies had knowledge of or involvement in the CIA detention and interrogation programme of 2001- 2009, as set out in the US Senate Intelligence Committee report of December 2014. I expect my inquiry will result in the clarification of past events; it will also include an assessment of whether relevant standards, in policy, procedure and practice, are currently in place.

A significant part of my inquiry is focused on what safeguards the agencies had at that time, and have now, to avoid the possibility of being implicated in unlawful activity by their foreign counterparts (for example, through agency activities that might amount to complicity in acts of torture). This necessarily involves looking at the agencies' past and present intelligence sharing arrangements, policies and practices, alongside New Zealand's obligations under international and domestic human rights law.

Ministerial Policy Statement on co-operation with overseas public authorities

The IS Act¹⁹ requires that, in conducting any inquiry or review, I must take into account any relevant Ministerial Policy Statement (MPS) and the extent to which the agency has had regard to that statement.

The MPS entitled *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities*, has as its primary purpose the provision of "guidance on determining which overseas public authorities GCSB and NZSIS should engage with, and how that engagement should be regulated, including guidance on the types of activities that are appropriate to undertake with those parties".²⁰ The MPS also "addresses issues associated with the operational use of intelligence gained from a foreign partner".²¹

Parts of the MPS address the use of information by intelligence and security agencies when the information is known or suspected to have been obtained by human rights abuses, such as torture. I

¹⁸ IS Act, s 158.

¹⁹ IS Act, s 158(2).

²⁰ Ministerial Policy Statement *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities*, at [8].

²¹ Ministerial Policy Statement *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities*, at [8].

acknowledge that some aspects of the law on complicity in this context have not yet fully crystallised, but I have made the New Zealand agencies aware of my view that these parts of the MPS require further consideration and careful development. Other jurisdictions are also considering this issue - see, for example, the recently redrafted Canadian *Ministerial Directions on Avoiding Complicity in Mistreatment by Foreign Entities*. The MPS itself contemplates a review within a relatively short time.²²

5. Do you cooperate with any other oversight bodies, domestic or foreign, to oversee the intelligence sharing activities of your government?

Yes, I greatly value the collegial relationships, and discussions on issues (to the extent that our respective laws allow), that my office has with oversight bodies around the world, including bodies in the other Five Eyes countries, and in certain European states with whom I have established relationships.

Broader and deeper international cooperation between intelligence and security agencies represents a growing challenge to accountability. I view this increasing accountability deficit as perhaps the most significant oversight challenge in the field of national security today.

At a domestic level, I may consult with any of the Auditor-General, an Ombudsman, the Privacy Commissioner, Human Rights Commissioner and the Independent Police Conduct Authority, about matters relating to my statutory functions. In doing so I may disclose any information that I consider necessary for the purpose of the consultation, despite the general restriction on the Inspector-General and staff disclosing any security records or other official information about the activities of an intelligence and security agency.²³

As to international oversight cooperation, to date, national investigations have built on each other, rather than being coordinated across jurisdictions. For example, my work on the 'Inquiry into possible New Zealand engagement with Central Intelligence Agency detention and interrogation 2001-2009' has been assisted by inquiry reports published by oversight bodies in other jurisdictions.

At a recent meeting of the newly established Five Eyes Intelligence Oversight and Review Council, the potential to carry out joint oversight projects was canvassed. I am actively pursuing possibilities for carrying out parallel investigations with foreign oversight bodies to examine specified operational activities or, possibly, both or all "ends" of a particular intelligence agency activity carried out across national borders. Any such investigations or joint projects should result in public reports.

²² Ministerial Policy Statement *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities*, at [67].

²³ IS Act, s 161.

I hope my responses have addressed all the matters raised by your enquiries. Please do not hesitate to contact my office again with further queries or for any points of clarification. I am also happy to meet in person with the Aotearoa New Zealand Human Rights Lawyers' Association, if that would assist.

Yours sincerely

A handwritten signature in black ink, appearing to read 'C. Gwyn' with a stylized flourish at the end.

Cheryl Gwyn

Inspector-General of Intelligence and Security