OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

25 November 2016

Further submission on the New Zealand Intelligence and Security Bill

To the Foreign Affairs, Defence and Trade Committee

On 10 November 2016 I appeared before the Committee, with the Deputy Inspector-General of Intelligence and Security, to speak on my submission on the New Zealand Intelligence and Security Bill 2016.

In response to questions from the Committee we agreed to provide some possible drafting of amendments to the Bill in accordance with our submission. In particular, we agreed to suggest amendments to provisions on:

- the definition of national security;
- warranting;
- political neutrality; and
- Ministerial Policy Statements.

We hope the following suggestions are of some help to the Committee and officials.

1. Definition of national security

I supported submissions from others that the Bill should retain a definition of "national security", on the basis that a concept so fundamental to the scheme of the Bill should not be left undefined. The meaning of "national security" is critical to interpretation of the purpose of the Bill (clause 3); the objectives of the intelligence and security agencies (clause 11); and the requirements for issuing intelligence warrants and permissions to access restricted information (clauses 55, 56 and 113).

Contribution to national security is a threshold for the exercise of the highly intrusive powers of the agencies. While the definition must recognise a broad and evolving range of threats, it must also set boundaries. In my view the definition in clause 5, based on the recommendation of the Independent Review, appropriately focuses on protection from threats. This is consistent with the approach taken in Canadian and Australian security legislation (eg the Canadian Security Intelligence Service Act 1985, section 2; the Australian Security Intelligence Organisation Act 1979, section 4).

For the same reason, it is also appropriate to include a threshold for the other permissible purposes of the agencies: I suggest that that can be done by referring to "national" well-being and national economic interests in clause 3.

I suggest clause 5 could be retained with some modifications, as follows. Explanations for suggested amendments are in italics.

5 Meaning of national security

In this Act, national security means the protection against—

(a) threats, or potential threats, to New Zealand's status as a free and democratic society from unlawful acts or foreign interference:

(b) imminent threats to the life and safety of New Zealanders overseas:

(c) threats, or potential threats, that may cause serious harm to the safety ~~or quality of life~~ of the people of New Zealand ~~population~~:

(d) unlawful acts, or acts of foreign interference, that may cause serious damage to New Zealand's national economic ~~security~~ well-being or international relations:

(e) threats, or potential threats, to the security ~~integrity~~ of information or infrastructure of critical importance to New Zealand:

(f) threats, or potential threats, that may cause serious harm to the safety of the people ~~a population~~ of another country as a result of unlawful acts by a New Zealand~~er~~ person that are ideologically, religiously, or politically motivated:

(g) threats, or potential threats, to international security .

"Quality of life" is uncertain in scope and the intent is captured by the sum of subclauses (a)-(e) and (g).

A threat to a population is a threat to mass survival not simply a threat to public safety, ie possible harm to anyone within the population.

Economic "well-being" is used in cls 3 and 11. The economic interests at issue must be national interests.

'Integrity' seems too narrow: eg a threat to take control of critical infrastructure, without damaging it, could be a national security issue.

"New Zealander" is undefined, but New Zealand person is defined in cl 4.

If clause 5 is amended, related amendments are required to clauses 3 and 11, given the connections between the provisions.

Suggested changes to clauses 3 and 11 follow.

3 Purpose

The purpose of this Act is to protect New Zealand as a free, open, and democratic society by—

(a) establishing intelligence and security agencies that will effectively contribute to—

(i) ~~the protection of~~ New Zealand's national security; and

(ii) the international relations and national well-being of New Zealand; and

(iii) the economic national well-being of New Zealand; and

(b) giving the intelligence and security agencies adequate and appropriate functions, powers, and duties; and

(c) ensuring that the functions of the intelligence and security agencies are performed—

(i) in accordance with New Zealand law and all human rights obligations recognised by New Zealand law; and

(ii) with integrity and professionalism; and

(iii) in a manner that facilitates effective democratic oversight; and

(d) ensuring that the powers of the intelligence and security agencies are subject to institutional oversight and appropriate safeguards.

Clause 5 reference to protection means it is unnecessary here.

As with 'international security' in cl 5, contribution to well-being should be expressly linked to the national interest.

As in cl 5, the economic interests at issue must be national interests.

Note: "economic well-being" is used in Australian, Canadian and UK legislation so there may be benefit in retaining that term rather than "economic security", so that any statutory interpretation of it in those jurisdictions has relevance for NZ.

11 Objectives of intelligence and security agencies

The ~~principal~~ objectives of the intelligence and security agencies are to contribute to—

(a) ~~the protection of~~ New Zealand's national security; and

(b) the international relations and national well-being of New Zealand; and

(c) the economic national well-being of New Zealand.

"Principal" implies additional (unspecified) objectives.

As above.

2. Warranting provisions

In my submission I raised a number of issues with Part 4 of the Bill. When I appeared at the Committee I agreed to provide some drafting suggestions to address two of those points:

- that the Bill should have more specific tests for necessity and proportionality in the issuing of warrants, equivalent to those in the current NZSIS and GCSB legislation (primary submission, paragraphs 7-13); and
- that the term "purpose" is used with different meanings in cl 57 and the wording should be revised to avoid confusion (paragraph 14).

Suggested amendments to address these points follow. These include the deletion of provisions for the issue of warrants for testing and training purposes. As discussed during my appearance, the loss of precision in the tests for proportionality may be due in part to the inclusion of these purposes.

Because neither testing nor training are intended to produce intelligence, a proportionality test specific to intelligence collection cannot apply. Instead, testing/training should be addressed by a stand-alone warranting provision, so as to reflect the different character of those activities while also safeguarding privacy.

For the sake of completeness I also suggest amendments to address two other points from my submission that relate to the same clauses:

- that the Bill should require an agency applying for a warrant to identify all practicable and reasonable steps to minimise the likelihood of collecting privileged information (paragraph 28); and
- that the Bill should require an agency applying for a warrant to identify all reasonable and practicable steps to minimise impacts on third parties, and a duty on warranting authorities to consider conditions for that purpose (paragraph 31).

57 Additional criteria for issue of intelligence warrant

The additional criteria for the issue of an intelligence warrant referred to in **sections 55(2)** and **56(2)(b)** are that—

(a) the carrying out of the otherwise unlawful activity is necessary ~~for one of the following purposes:~~

~~(i)~~ to perform any function of the intelligence and security agency; ~~or~~

~~(ii) to test, maintain, or develop the capabilities of the intelligence and security agency; or~~ 30

~~(iii) to train employees to perform any function of the intelligence and security agency;~~ and

(b) the ~~proposed activity is proportionate to the purpose for which it is to be carried out~~ value of the information sought under the proposed warrant justifies the particular activity or activities for which authorisation is sought; and

(c) the ~~purpose of the~~ information sought under the proposed warrant cannot reasonably be acquired [or achieved] by a less intrusive means; and

(d) there are satisfactory arrangements in place to ensure that nothing will be done in reliance on the warrant beyond what is necessary and reasonable for the proper performance of a function of the intelligence and security agency; and

(e) there are satisfactory arrangements in place, including any conditions or restrictions applied in accordance with section 60, to ensure that—

(i) any information collected in reliance on the warrant will be retained, used, and disclosed only in accordance with this Act or any other enactment; and

(ii) the risk of intercepting privileged communications is minimised as far as reasonable and practicable; and

(iii) the risk that the warrant may affect third parties is minimised as far as reasonable and practicable.

3. Political neutrality

I supported the submission of the Legislation Design and Advisory Committee that clause 21 should provide a broader expression of the political neutrality that is required of the intelligence and security agencies. I acknowledged, however – as did the Committee, on appearance – that the Committee's suggested reference to an agency avoiding action to further or harm the interests of any political "cause" was problematic.

I suggest the matter might be addressed by drawing a connection between clauses 21 and an amended clause 22, as follows. The suggested amendment to clause 22 is in accordance with my primary submission (paragraph 49).

21 Activities of intelligence and security agencies must be politically neutral

(1) The Director-General of an intelligence and security agency must take all reasonable steps to ensure that the agency is politically neutral and in particular that:

(a) the agency does not take any action for the purpose of furthering or harming the interests of any New Zealand political party or candidate; and

(b) the agency does not take any action inconsistent with section 22.

22 ~~Limitation on collecting intelligence within New Zealand~~ Act not concerned with lawful advocacy, protest or dissent

(1) Nothing in this Act limits the right of persons to engage in or contribute to lawful advocacy, protest, or dissent in respect of any matter.

(2) The exercise of the right in subsection (1) does not, of itself, justify an intelligence and security agency ~~collecting intelligence on~~ taking any action in relation to any person who is in New Zealand or any class of persons who are in New Zealand.

4. Ministerial Policy Statements

I noted in my submission that the Bill provides for only two mandatory Ministerial Policy Statements (MPSs), when Cabinet paper 2 proposed eight MPS topics (paragraphs 38-39). I suggested the Bill should require those MPSs: as reflected in the *Review*, these capture a significant range of intelligence and security activities that can, and in practice do, have a significant impact upon members of the public. The MPS mechanism provides ministerial control, clarity to the agencies and transparency to the public.

I also noted that the requirements for agency compliance with MPSs seem unusually low (paragraph 40) and here propose that compliance be made mandatory: if the Minister has set a policy, there is no reason for the agency not to comply and to allow discretion would undermine the point of the MPS mechanism. I also suggested there should be an express function for the IGIS to review the activity of an agency under an MPS (paragraph 41) and that there should be a requirement to provide the Intelligence and Security Committee and the IGIS with a copy of any MPS issued (paragraph 42).

Suggested amendments for these purposes follow. They include possible changes to clause 12. For completeness the suggested amendments to this clause also address my submission that it should impose on the agencies a general duty to keep records (paragraph 44); and my agreement with the Legislation Design and Advisory Committee that subclause 12(2) should be deleted. Subclause 12(3) should also apply all of these principles to co-operative activities, rather than only those in subclause 12(1)(a).

12 Principles underpinning performance of functions

(1) When performing its functions, an intelligence and security agency must act—

(a) in accordance with New Zealand law and all human rights obligations recognised by New Zealand law; and

(b) consistently with any ministerial policy statement issued under this Act; and

(~~b~~c) in the performance of its operational functions, independently and impartially; and

(~~c~~d) with integrity and professionalism; and

(~~d~~e) in a manner that facilitates effective democratic oversight, including by maintaining comprehensive records of its actions and decisions.

~~(2) Subsection (1) does not impose particular duties on, or give particular powers to,—~~

~~(a) an intelligence and security agency; or~~

~~(b) the Director-General of an intelligence and security agency; or~~

~~(c) an employee of an intelligence and security agency.~~

(3) ~~Despite subsection (2)(b), t~~The Director-General of an intelligence and security agency must take all reasonable steps to ensure that any co-operation with foreign jurisdictions and international organisations in the performance of any function is consistent with subsection (1~~)(a).~~

26 Assumed identity may be acquired, used, and maintained

Delete subclause (4), replaced by new subclause 12(1)(b) above.

121 Functions of Inspector-General

Add, eg after subclause (h):

(x) to conduct a review in relation to the carrying out of an activity or activities by an intelligence and security agency under a ministerial policy statement;

166 Issue of ministerial policy statements relating to co-operating, etc, with overseas public authorities

Delete subclause (2), replaced by new subclause 167(2) below.

167 Issue of additional ministerial policy statements

(1) The Minister responsible for an intelligence and security agency must ~~may, if the Minister considers it necessary or desirable,~~ issue ~~1 or more~~ ministerial policy statements that provide guidance to the intelligence and security agency in relation to:

(a) surveillance in a public place;

(b) obtaining and using publicly available information;

(c) requests to telecommunications providers for communications data;

(d) provision of cyber security and information assurance services by consent;

(e) requests for information from other any agency of the Crown and the private sector;

(f) lawful human intelligence collection; and

(g) any other matter that the Minister considers necessary.

(2) The Minister must provide to the Intelligence and Security Committee and to the Inspector-General of Intelligence and Security a copy of any ministerial policy statement issued under this Act.

5. Streamlined access to telecommunications and financial information

I have discussed this question with officials and understand that they may have proposals for the Committee's consideration. I would be happy to comment on any proposal, but by way of general comment:

- I accept that limited information, for example the existence of a customer account and identity or address information for a customer, can be a significant investigative tool and that there should be a straightforward and properly regulated mechanism for that access, under which the Minister/Commissioner and responsible Director-General still ensure necessity and proportionality, but at a more general level than under warrant.
- However, that streamlined mechanism should not extend into individual call or transaction information - as that can be highly intrusive and disclose, for

example, detailed personal and professional activities and even physical location. Warrants are required for that degree of intrusion and can practicably be obtained in such cases.

Thank you for your consideration.

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