



OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

Royal Commission consultation with the Inspector-General

The Terms of Reference for the Royal Commission of Inquiry into the Attack on Christchurch Mosques on 15 March 2019 provide for the Royal Commission to consult the Inspector-General (cl 8(1)). In the Royal Commission's Update of 29 May 2019 it noted an initial meeting with the Inspector-General. While some of what we discussed with the Royal Commission is classified or operationally sensitive, we also provided some general information about the role of the Inspector-General in the context of the wider intelligence community. This note reflects the information provided and explains how the office of the Inspector-General fits into the overall intelligence authorisation and oversight framework. It also includes some comparative information about intelligence oversight and review functions in other Five Eyes jurisdictions.

Intelligence and security authorisation and oversight framework

1. In New Zealand, as in other jurisdictions, the framework of oversight for the intelligence and security agencies (the New Zealand Security Intelligence Service (NZSIS) and the Government Communications Security Bureau (GCSB)) has a number of elements and layers:
 - 1.1. The Directors-General of the agencies: the Directors-General may apply for the issue of an intelligence warrant and when doing so must confirm that all the information in the application is correct.¹
 - 1.2. The responsible Minister(s): the Minister responsible for each of the intelligence and security agencies is accountable to Parliament for the general conduct of the agencies. The Minister is also responsible for authorising the exercise of specified intrusive powers, by way of Intelligence warrant.
 - 1.3. The Minister for National Security and Intelligence: a non-statutory portfolio first assigned in 2014, currently held by the Prime Minister; leads the national security sector and sets the overall framework within which the agencies operate.
 - 1.4. The Commissioners of Intelligence Warrants: the Chief Commissioner and up to two other Commissioners have a joint role with the Minister responsible for the intelligence agencies in authorising intelligence warrants for the purpose of collecting information, or

¹ Intelligence and Security Act 2017 (ISA), s 55(1)(d).

to do any other thing directly in relation to, a New Zealand citizen or permanent resident (or class thereof).²

- 1.5. The Intelligence and Security Committee (ISC): the ISC is a statutory committee,³ rather than a committee of Parliament as select committees are, but its members serve on the ISC in their capacity as Members of Parliament. The ISC consists of the Prime Minister, the Leader of the Opposition, and Members of Parliament nominated by each of the Prime Minister and the Leader of the Opposition, after consultation. The ISC's principal responsibility is to examine the policy, administration and expenditure of each intelligence and security agency (NZSIS and GCSB). The ISC is precluded from inquiring into any matter within the Inspector-General's jurisdiction and in practice does not look at operational matters.⁴

Parliamentary Committees in Australia, Canada and the UK – composition and powers.

In Australia the Parliamentary Joint Committee on Intelligence and Security (PJCIS) conducts inquiries into matters referred to it by the Senate or House of Representatives or a Minister. The PJCIS is a statutory committee mandated under the Intelligence Services Act 2001 and is comprised of 11 members: 5 Senators and 6 members of the House of Representatives. The PJCIS reviews and makes extensive recommendations on draft legislation. Historically it has operated in a non-partisan manner and it maintains a working knowledge of the agencies' activities.

In Canada, the National Security and Intelligence Committee of Parliamentarians (NSICOP) is empowered by the National Security and Intelligence Committee of Parliamentarians Act 2017 to review the legal framework for national security and intelligence, activities undertaken by a department in relation to national security or intelligence as well as matters referred to it by a Minister of the Crown. NSICOP is comprised of 11 members, all of whom must be a member of either House of Parliament and cannot be a Minister of the Crown, Minister of State or Parliamentary Secretary. No more than 5 members of NSICOP, who are members of the House of Commons, may be members of a governing party. NSICOP members are security-cleared.

In the UK the Intelligence and Security Committee of Parliament (ISC), is comprised of 9 members drawn from both the House of Commons and the House of Lords. A person cannot become a member of the ISC unless they are nominated by the Prime Minister (in consultation with the Leader of the Opposition) and they are not a Minister. The ISC is mandated by the Justice and Security Act 2013 to examine and oversee the expenditure of the Security Service (MI5), Secret Intelligence Service (MI6) and Government Communications Headquarters (GCHQ), consider any

² ISA, ss 53 and 57.

³ ISA, s 192.

⁴ ISA, s 193(2).



operational matter of these organisations (subject to limitations), and oversee intelligence and security matters as set out in a memorandum of understanding.

- 1.6. Institutions with a mandate across the public sector, such as the Controller and Auditor-General, the Privacy Commissioner and the Office of the Ombudsman.
- 1.7. The Inspector-General of Intelligence and Security.

Role of the Inspector-General of Intelligence and Security

2. The Office of the Inspector-General of Intelligence and Security is the principal external oversight body for the intelligence and security agencies (defined as the NZSIS and the GCSB).⁵
3. The Inspector-General and Deputy Inspector-General are appointed by the Governor-General on the recommendation of the House of Representatives, following consultation by the Prime Minister with the ISC.⁶
4. As independent statutory officers, the Inspector-General and Deputy Inspector-General are independent from and not subject to direction by the Directors-General of the agencies, the responsible Minister, the Minister for National Security and Intelligence, or any other Minister, or the ISC.
5. The role of the Inspector-General under the ISA is to ensure that the intelligence and security agencies conduct their activities lawfully and with propriety, independently investigate complaints and advise the ISC on matters relating to oversight.⁷ The Inspector-General's role is limited to oversight of the intelligence and security agencies. It does not include, eg the National Assessments Bureau (NAB) or the intelligence functions of the New Zealand Police, the New Zealand Defence Force, New Zealand Customs and Immigration New Zealand. The ISC's role is similarly limited to the NZSIS and the GCSB.

⁵ ISA, s 4.

⁶ ISA, ss 157 & 164.

⁷ ISA, s 156.

Oversight responsibility in comparable jurisdictions

In Australia the Inspector-General of Intelligence and Security currently has oversight of six agencies, referred to as the “Australian Intelligence Community”. They are the Australian Security Intelligence Organisation (ASIO), Australian Secret Intelligence Service (ASIS), Australian Signals Directorate (ASD), Australian Geospatial-Intelligence Organisation (AGO), Defence Intelligence Organisation (DIO) and Office of National Assessments (ONA). As a result of the 2017 Independent Intelligence Review, the IGIS will shortly also assume oversight responsibility for the intelligence functions of the Australian Federal Police, the Department of Immigration and Border Protection, the Australian Transaction Reports and Analysis Centre and the Australian Criminal Intelligence Commission.

In Canada, the National Security and Intelligence Review Agency Bill (Bill C-59) will, when enacted, result in the Canadian Security Intelligence Service (CSIS), Communications Security Establishment (CSE) as well as a number of other departments and agencies involved in national security or intelligence, being subject to independent oversight by a single body, the National Security and Intelligence Review Agency.

In the UK the Investigatory Powers Commissioner’s Office (IPCO) has oversight jurisdiction in respect of any public agency that exercises intrusive investigatory powers. This approach to “functions” is so broad that, as well as covering MI5, MI6, GCHQ and the Police, it includes other public authorities with investigatory powers, down to overseeing city councils in their use of visual surveillance cameras. As well as having an “oversight” role, IPCO also has an authorising function: Judicial Commissioners are responsible for approving, modifying or renewing warrants. IPCO has no power to initiate an own-motion inquiry or jurisdiction to receive complaints from the public. Complaints are received and heard by the Investigatory Powers Tribunal.

In the USA, each intelligence and security agency, including the Central Intelligence Agency (CIA), Federal Bureau of Intelligence (FBI) and the National Security Agency (NSA), has its own Inspector General. US Inspectors General report to the head of the agency they oversee. There is an overarching Intelligence Community Inspector General (IC IG) (established under the 2010 Intelligence Authorization Act). The IC IG is located within the Office of the Director of National Intelligence and has a mandate across the Intelligence Community.

A table comparing the functions of oversight bodies from the Five Eyes jurisdictions is included at the end of this note.

Monitoring security legislation

The United Kingdom has an Independent Reviewer of Terrorism Legislation whose role is to inform the public and political debate on anti-terrorism law in the UK. The Reviewer reports annually or on specific issues as required.

In Australia there is an Independent National Security Legislation Monitor who independently reviews the operation, effectiveness and implications of national security and counter-terrorism laws; and considers whether the laws contain appropriate protections for individual rights, remain proportionate to terrorism or national security threats, and remain necessary.

In New Zealand the ISA requires periodic review of the Act. The first review is to occur five years after the Act commenced (s 235 ISA), which will be late 2022. The ISA requires the Prime Minister to determine the terms of reference for the review, and to appoint two reviewers (s 236 ISA). The agencies and the Inspector-General may provide information to the review (s 237 ISA). There is no dedicated legislative monitoring and review body.

Jurisdiction

6. The Inspector-General has jurisdiction to:
 - 6.1. **receive complaints** from the public, current and former staff members of the intelligence and security agencies.⁸ Complainants must show that they have been or may be “adversely affected” by any act, omission, practice, policy or procedure of the GCSB or NZSIS. Complaints must be independently investigated.⁹ The IGIS is also the nominated authority for the purpose of receiving protected disclosures (“whistleblowing”) from employees of an intelligence and security agency or of other public sector organisations that hold or have access to classified information or information relating to the activities of an intelligence and security agency;¹⁰
 - 6.2. **initiate inquiries** on the Inspector-General’s own initiative or at the request of the Prime Minister (propriety only) or the Minister responsible, or the ISC, into the legality and/or propriety of the actions of the intelligence and security agencies.¹¹ “Propriety” is not defined in the legislation but is clearly intended to have a broader reach than pure legality;¹²
 - 6.3. the Inspector-General is obliged to **report publicly** on all of her inquiries, including inquiries into complaints (subject to security constraints and excepting reports concerning

⁸ ISA, ss 158(1)(e) and 171.

⁹ ISA, ss 156(2)(a)(ii) and 171.

¹⁰ Protected Disclosures Act 2000, s 12.

¹¹ ISA, s 158.

¹² See eg Inspector-General of Intelligence and Security Report into the release of information by the New Zealand Security Intelligence Service in July and August 2011, pp 70 & 71, www.igis.govt.nz/publications/investigation-reports/.



employment matters and security clearance issues).¹³ Inquiry reports must be provided to the responsible Minister and the Chief Executive of the agency concerned and the Prime Minister or ISC, where the inquiry was requested by that person or body;¹⁴

- 6.4. **review the agencies' internal systems** with a view to certifying annually whether their compliance systems are "sound".¹⁵ We examine a sample of each agency's compliance systems and controls and apply a materiality threshold;
 - 6.5. **review intelligence warrants.**¹⁶ The OIGIS reviews all of the NZSIS and GCSB intelligence warrants. Some of those warrants are selected for deeper analysis. This involves a comprehensive check of the process and path by which the application for the warrant or authorisation was formulated (ie what was the intelligence case and whether other requirements, such as comprehensive disclosure to the decision-maker, were met), to the application signed by the Minister (and Commissioner of Intelligence Warrants where required), review and cancellation/non-renewal or renewal of the warrant, what intelligence was collected under it, what use was made of that intelligence, what arrangements were in place for retention and storage, and destruction of the information collected. We make recommendations to improve systems and procedures and sometimes identify a failure to meet the requirements of the legislation.
7. The Inspector-General's role is *ex post facto*; she does not have any responsibility for directing or approving operations or warrants. The Inspector-General may make a finding that a warrant, or activity conducted under a warrant, is "irregular" and make recommendations to the Minister (and Commissioner of Intelligence Warrants where relevant) but that does not invalidate the warrant or the activity.¹⁷

¹³ ISA, s 188.

¹⁴ ISA, s 185(3).

¹⁵ ISA, s 222 (2)(c).

¹⁶ ISA, s 158(1)(i).

¹⁷ ISA, s 163.



Efficiency/effectiveness mandate

The New Zealand Inspector-General has no “efficiency” or general “effectiveness” mandate when overseeing the activities of the intelligence and security agencies and has no intelligence research, collection or analysis capability that might support such a mandate.

In the USA, the Inspectors General for each of the intelligence and security agencies, and the IC IG, have a statutory mandate to provide leadership, coordination, and recommendations on policy to promote economy, efficiency and effectiveness in the administration of programmes and activities within the responsibility of the agency they oversee. The IGs also have an auditing type function to prevent and detect fraud and abuse in programmes and activities that come within the responsibility of the agency they oversee (Inspector General Act 1978, Intelligence Authorization Act 2010).

In Canada, one of the functions of SIRC is to review annually at least one aspect of CSIS’ performance in taking measures to reduce threats to the security of Canada and to assess the effectiveness of CSIS (the HUMINT agency) in achieving this objective. There is currently no comparable provision relating to oversight of CSE, the SIGINT agency.

Rights of access; investigative and remedial powers

8. The Inspector-General’s powers are coupled with a right of access to all security records held by the agencies and a right of access to all of the agencies’ premises, ICT systems and staff.¹⁸ The *quid pro quo* for that privileged access is that the Inspector-General and her staff are subject to the same constraints on receiving, holding and using classified information as are intelligence and security agency staff. We must all be security cleared to the highest level. We work in a SCIF (secure compartmented information facility) and follow the same security measures as agency employees.
9. In the case of inquiries, the Inspector-General has strong investigative powers akin to those of a Commission of Inquiry, including the power to compel persons to answer questions and produce documents and to take sworn evidence.¹⁹ The Inspector-General’s proceedings, reports and findings are challengeable only for lack of jurisdiction.²⁰
10. The Inspector-General has recommendatory powers only, including the recommendation of remedies that involve the payment of compensation.²¹ In addition to the persuasive effect of the Inspector-General’s findings with the agencies themselves and the Minister, the ISA also specifically provides that, where the Inspector-General has made recommendations, she can

¹⁸ ISA, s 217. We interpret this as a right of direct access to agency databases and information systems.

¹⁹ ISA, ss 178 and 179.

²⁰ ISA, s 190.

²¹ ISA, s 185(2).



report further to the Minister on whether those recommendations have been met.²² The requirement to publish reports allows for public comment and pressure and the possibility of indirect enforcement by court proceedings based on an Inquiry report.

Funding and staffing

11. The Inspector-General's office currently comprises the Inspector-General, Deputy Inspector-General, five Investigating Officers (4.6 FTEs), an IT Manager/Security Advisor and an Executive Assistant/Office Manager.
12. The current operating costs of the office are approximately \$1.5m per annum in total, including staff costs and the cost of operating secure systems and premises.

Advisory panel

13. The Inspector-General is supported by a two member statutory advisory panel.²³ The panel members have appropriate security clearances to enable them to have access to, and discuss with me, the classified material held by the NZSIS and the GCSB that my office must consider in order to carry out our review, inquiry and audit functions.



Cheryl Gwyn
Inspector-General of Intelligence and Security

²² ISA, s 186.

²³ ISA, ss 167 - 170. The current members of the panel are Angela Foulkes (Chair) and Lyn Provost.



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Appendix: Comparison of oversight body functions in comparable jurisdictions

	Inspector-General of Intelligence and Security (NZ)	Inspector-General of Intelligence and Security (AU)	Security Intelligence Review Committee (CAN) ²⁴	Office of the Communications Security Establishment Commissioner (CAN)	Office of the Investigatory Powers Commissioner (UK)	Inspector General of the Intelligence Community (USA)
HUMINT agency oversight	✓	✓	✓	x	✓	✓
SIGINT agency oversight	✓	✓	x	✓	✓	✓
Oversight of intelligence functions in other agencies	x	✓	x	x	✓	✓
Inquiry into compliance with law	✓	✓	✓	✓	✓	✓
Inquiry into propriety of activities	✓	✓	x	x	x	x

²⁴ As discussed above, there is legislation currently before the Canadian Senate which, if enacted, would create a new oversight body, the National Security and Intelligence Review Agency (NSIRA). It is proposed that NSIRA would replace the Security Intelligence Review Committee and the Office of the Communications Security Establishment Commissioner. NSIRA would also be mandated to review all national security and intelligence activities across Government, including the Royal Canadian Mounted Police.

	Inspector-General of Intelligence and Security (NZ)	Inspector-General of Intelligence and Security (AU)	Security Intelligence Review Committee (CAN) ²⁵	Office of the Communications Security Establishment Commissioner (CAN)	Office of the Investigatory Powers Commissioner (UK)	Inspector General of the Intelligence Community (USA)
Investigate complaints from the public	✓	✓	✓	✓	✗ ²⁶	✓
Review effectiveness of agencies generally	✗ ²⁷	✗ ²⁸	✓ ²⁹	✗	✗	✓
Review efficiency of agency functions	✗	✗	✗	✗	✗	✓
Inspect places of detention	✗	✓	✗	✗	✗	✓ ³⁰
Review regulations under which the agencies operate	✗	✗	✓	✗	✗	✗
Inquire into reports adverse to citizens or permanent residents of the country	✗	✓ ³¹	✗	✗	✗	✗

²⁵ As discussed above, there is legislation currently before the Canadian Senate which, if enacted, would create a new oversight body, the National Security and Intelligence Review Agency (NSIRA). It is proposed that NSIRA would replace the Security Intelligence Review Committee and the Office of the Communications Security Establishment Commissioner. NSIRA would also be mandated to review all national security and intelligence activities across Government, including the Royal Canadian Mounted Police.

²⁶ Complaints from the public are received and investigated by the Investigatory Powers Tribunal.

²⁷ The IGIS' "effectiveness" jurisdiction is limited to reviewing the effectiveness and appropriateness of the agencies' procedures and compliance systems.

²⁸ The IGIS' "effectiveness" jurisdiction is limited to reviewing the effectiveness and appropriateness of the agencies' procedures relating to the legality and propriety of their activities.

²⁹ Each year, SIRC must review at least one aspect of CSIS' performance in terms of the measures taken to reduce threats to the security of Canada. Additionally, SIRC is mandated to compile and analyse statistics on operational activities of CSIS as well as the performance of CSIS under arrangements it enters into.

³⁰ Has a general power to inspect programs and activities within the responsibility and authority of the head of the agency overseen.

³¹ This power relates to reports furnished by ASIO to a Commonwealth department which may result in adverse action being taken against an Australian citizen or permanent resident.

