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Human Rights Commission
Te Kāhui Tika Tangata

Submission to the Foreign Affairs, Defence and Trade Committee on the New Zealand Intelligence and Security Bill

Contact Persons

Janet Anderson-Bidois
Chief Legal Adviser
New Zealand Human Rights Commission
janetab@hrc.co.nz

John Hancock
Senior Legal Adviser
New Zealand Human Rights Commission
johnh@hrc.co.nz

Submission of the Human Rights Commission to the Foreign Affairs, Defence and Trade Committee on the New Zealand Intelligence and Security Bill

Introduction

1. The Human Rights Commission ('the Commission') welcomes the opportunity to provide this submission to the Foreign Affairs, Defence and Trade Committee on the New Zealand Intelligence and Security Bill ('the Bill').

2. The Commission supports the broad intent of the Bill but recommends changes in relation to the definition of "national security", changes to the warrant authorisation process for "foreign persons" and general amendments to better incorporate human rights principles into the legislative framework. The Commission also supports the development of a statutory Code of Practice to provide further guidance on the application of powers conferred under the legislation and suggests further scrutiny of the passport cancellation provisions and the proposed ability to issue warrants for training and testing purposes. Ensuring sufficient resourcing for the Inspector-General of Security and Intelligence services will also be a key component for ensuring the proposed oversight mechanisms are effective.

3. The Commission is also of the view that the debate around the extent and nature of the powers to be conferred on security intelligence services highlights the need to include a specific right to privacy in the New Zealand Bill of Rights Act 1990.

Background

4. The Bill follows the Report of the First Independent Review of Intelligence and Security in New Zealand, *Intelligence and Security in a Free Society* ('the Review') issued in February 2016. It implements many of the Review's recommendations.

5. The Review itself was an essential and timely response to the policy and legislative challenges arising from the emerging mass surveillance and data interception capabilities of intelligence and security services. The Commission has a close interest in the human rights implications of advanced mass surveillance and interception technologies. The Commission was accordingly an early proponent of the need for a fundamental review of the intelligence and security sector in order to address the emerging human rights and policy challenges.[1]

[1] Human Rights Commission, *Report to the Prime Minister: Government Communications Security Bureau and Related Legislation Amendment Bill; Telecommunications (Interception Capability and*

6. As the Review affirms, human rights and freedoms are of central importance when considering intelligence and security policy, practice and legislation. The legal and operational functions of intelligence and security services can be described as having a two-fold effect on human rights. First, these functions may have a limiting effect on human rights, an obvious example being the impact of surveillance operations on the privacy rights of affected persons. Conversely, these functions also enhance the government's capability in meeting its human rights related duty to protect its people from harm.

7. It is therefore significant that the Reviewers, Sir Michael Cullen and Dame Patsy Reddy, take the position that these human rights considerations are complementary[2], and thus must be balanced, rather than traded off against each other.[3] The Commission supports this approach as being consistent with human rights methodology, and has advanced this point in its submissions on the Review and on related legislation.[4]

Summary of the Commission's position on the Bill

8. In its submission to the Review, the Commission proposed a number of recommendations aimed at advancing a human rights consistent approach. In doing so, the Commission was informed by recent UK reports[5] which emphasise, among other things, the importance of clarity, transparency, limitation of powers and human rights compliance in establishing and maintaining public trust and confidence in the role and functions of intelligence and security services. These recommendations included:

    a. Consolidation of the existing legislation into one piece of legislation in order to improve clarity and accessibility.
    b. Strengthened requirements regarding compliance with human rights law.
    c. Stronger warrant authorisation and oversight provisions for the NZSIS and the GCSB.

Security) Bill, and associated wider issues relating to surveillance and the human rights of people in New Zealand, 9 July 2013, para 49, p 12. See also New Zealand Government, *New Zealand's sixth periodic report under the International Covenant on Civil and Political Rights*, 2015, p 13, paras 83-88

[2] Cullen M, Reddy R, *Intelligence and Security in a Free Society*, Report of the First Independent Review of Intelligence and Security in New Zealand, p 15, para 1.5

[3] Ibid at para 1.7

[4] Human Rights Commission, *Submission on Independent Review of Intelligence and Security Services*, 14 August, para 8, Human Rights Commission *Briefing paper relating to human rights and the targeted review of foreign terrorist fighters* (14 November 2014) at [1.4] [cited in the Review at para 1.8

[5] David Anderson QC, *A Question of Trust, Report of the Investigatory Powers Review,* June 2015. Independent Surveillance Review, *A Democratic License to Operate, Report of the Independent Surveillance Review*, Royal United Services Institute for Defence and Security Studies, July 2015

9. The Bill reflects the above recommendations and, on that basis, the Commission generally supports its approach. However, there are aspects of the Bill which raise issues of concern. Chief among these are the broad framing of the objectives of the intelligence and security agencies, which are not limited to matters of national security and include "contributing to economic well-being", a term which is not clearly defined.

10. The Commission also notes that the Reviewers' recommended that intelligence and security agencies ('the agencies') be subject to a Code of Conduct. This recommendation does not appear to be incorporated into the Bill. This is an issue that the Commission has previously advocated for and one which we continue to support.

11. Furthermore, the Commission considers that the challenges brought about by contemporary and future electronic surveillance and data interception technology require consideration of whether the New Zealand Bill of Rights Act 1990 (BORA) should be updated to include a free-standing right to privacy. While the Bill broadens the application of the Privacy Act principles to the functions of the agencies, inclusion of a right to privacy within the BORA would bring New Zealand statutory law into greater substantive alignment with the International Covenant on Civil and Political Rights (ICCPR). It would also strengthen the capability of New Zealand's domestic human rights framework to provide a check against potential future encroachment of surveillance and metadata interception technology on people's lives. While this particular matter falls outside the Committee's remit in respect of the Bill, the Commission urges Committee members to give consideration to this issue when preparing their report.

Part 1 of the Bill

Clause 3 - Purpose

12. Clause 3(c) of the Bill provides that:

> "The purpose of this Act is to protect New Zealand as a free, open, and democratic society by…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;"

13. The Commission welcomes the placement of a human rights provision within the purposive section of the legislation. This should help ensure that human rights considerations will be at the forefront of intelligence and security policy and practice.

14. However, it is important that the agencies do not narrowly interpret the term "all human rights obligations recognised by New Zealand law" in such a way that limits their consideration to domestic statute or common law principles. Instead, an appropriate interpretation of "all human rights obligations recognised by New Zealand law" ought to include all international human rights treaties ratified by the New Zealand Government.

15. The jurisprudence of the New Zealand Courts certainly supports this approach, with the Court of Appeal recently affirming that the Courts can be expected to interpret legislation in a manner consistent with international treaty obligations,[6] and that Parliament is not to be assumed to have intentionally passed legislation contrary to those treaty obligations.[7] In addition, the reference to the ICCPR in the Long Title of BORA indicates a legislative desire to achieve compliance with international rights obligations.[8] This is further reinforced at the international level by Articles 26, 27 and 29 of the Vienna Convention (Law of Treaties)[9], which together provide that treaty obligations are binding on a state party and its territory, and that the internal law of a state party may not be used as a justification for its failure to perform a treaty obligation. It follows that the functions of the agencies should also reflect international human rights jurisprudence, including General Comments by UN Treaty bodies and related or relevant reports and recommendations of UN Special Rapporteurs.

16. **Therefore, in order to ensure that the agencies perform their functions in accordance with New Zealand's international human rights treaty obligations (and to reinforce the importance of doing so) the Commission recommends that cl 3(c)(i) of the Bill is amended as follows —**

'…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, including obligations under international human rights treaties;"

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6 *DP v R* [2015] NZCA 476, [2016] 2 NZLR 306 at [11], citing *New Zealand Airline Pilots Association Inc v Attorney-General* [1997] 2 NZLR 269 (CA) at 289 and *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China* [2001] 3 NZLR 463 (CA) at [16].

7 *DP v R*, above n 6, at [11], citing inter alia *Terranova Homes and Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437 at [227]; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24] and [32]; and *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.

8 Although not referred to in the Long Title of BORA, international conventions other than the ICCPR have been referred to on a number of occasions and can inform the analysis. See for example, *Ministry of Health v Atkinson* [2012] 3 NZLR 456 (CA) at [42].

9 Ratified by New Zealand on 4 August 1971

Clause 4 – interpretation; definition of "foreign person" – discriminatory intelligence warrant regime

17. The definition of "foreign person" under cl 4 of the Bill covers all persons who are not a New Zealand citizen or a permanent resident. Under this definition, children born in New Zealand to non-resident parents will also be considered as a "foreign person" for this purpose, as well as persons who hold time-limited or extended Residence Visas.

18. These definitions have particular implications for the issuing of urgent Type 1 and Type 2 intelligence warrants under clauses 69 and 70 of the Bill. Under clause 69, both the Attorney-General and a Commissioner of Intelligence Warrants (CIW), a judicial officer, are empowered to issue a Type 1 intelligence warrant. Clause 51 of the Bill provides that a Type 1 intelligence warrant authorises an intelligence and security agency to carry out what would otherwise be an unlawful activity for an authorised purpose in respect of New Zealand citizen or permanent resident.

19. Under clause 70 of the Bill, the Attorney-General alone may issue a Type 2 intelligence warrant. Type 2 intelligence warrants empower the agencies on the same terms as a Type 1 intelligence warrant, but apply in respect of persons who are not New Zealand citizens or permanent residents; in other words, persons who are defined as "foreign" under cl 4 of the Bill.

20. The distinction is obvious. Judicial oversight or involvement in the issue of an urgent intelligence warrant is only available where the subject person is a citizen or permanent resident. For all other urgent intelligence warrants in respect of a "foreign person" (Type 2 warrants), there is no judicial oversight or involvement during the issuing process, with the issuing function resting solely with the Attorney-General, a member of Cabinet and an officer of the executive branch of the government.

21. Put simply, this provides that New Zealand citizens and permanent residents benefit from judicial oversight should an intelligence warrant be sought against them, whereas foreign persons do not. This distinction is significant, not trivial, as both Type 1 and Type 2 intelligence warrants authorise the agencies to undertake activities that otherwise could potentially constitute an unlawful intrusion or infringement of the subject person's human rights.

22. This constitutes a prima facie breach of the right to freedom from discrimination under s 19 of the BORA in respect of ethnic or national origins, which includes nationality or citizenship under s 21(1)(g) of the Human Rights Act 1993. BORA applies equally to all persons within the territory of New Zealand regardless of their national origin.

23. The Bill's approach directly reflects the recommendations of the Review, which recommended this procedural distinction in respect of the issue of Tier 1 (now Type 1) and Tier 2 (now Type 2) warrants. In coming to this decision, the Reviewers did not appear to consider in any detail the fact that the distinction is, on its face, discriminatory. The prerogative for treating New Zealanders differently in this respect is essentially treated by the Reviewers as a matter that is self-evident and they do not explore or express a policy rationale for such a distinction.[10]

24. If follows that the justification for the distinction is also not enunciated in the Bill's Explanatory Note, nor is it assessed by the Attorney-General in his report on the Bill under s 7 of BORA. Furthermore, neither the Departmental Disclosure Statement prepared by DPMC[11] nor the Bill's Regulatory Impact Statement (RIS) traverse any policy rationale for the distinction.

25. The distinction between the treatment of New Zealand citizens/permanent residents and all other persons in the Bill's warrant regime also appears to be at odds with international human rights best practice guidelines, which recommend non-executive oversight of intelligence collection measures as a matter of course. For example, the 2010 Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, included the following practice guideline:

> *Intelligence collection measures that impose significant limitations on human rights are subject to a multilevel process of authorization that includes approval within intelligence services,* ***by the political executive and by an institution that is independent of the intelligence services and the executive.***[12]

[10] Cullen M, Reddy R, *Intelligence and Security in a Free Society*, Report of the First Independent Review of Intelligence and Security in New Zealand, see 6.32-6.37
[11] http://disclosure.legislation.govt.nz/bill/government/2016/158
[12] Scheinin M, *Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/14/46, 17 May 2010, bid p 32

26. **In order to rectify the Bill's discriminatory effect on persons who are not a New Zealand citizen or permanent resident, the Commission recommends that the Committee consider extending the role of the CIW to provide authorisation for the issue of Type 2 urgent intelligence warrants under cl 70 of the Bill.**

Definition of 'national security' and the objectives of the agencies

27. Clause 5 of the Bill establishes a statutory definition of "national security". This follows the recommendation of the Reviewers. Clause 5 uses exactly the same terminology as that recommended by the Reviewers and defines "national security" as meaning 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 New Zealand population:
> (d) unlawful acts, or acts of foreign interference, that may cause serious damage to New Zealand's economic security or international relations:
> (e) threats, or potential threats, to the 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 a population of another country as a result of unlawful acts by a New Zealander that are ideologically, religiously, or politically motivated:
> (g) threats, or potential threats, to international security

28. In coming to this position, the Reviewers noted that some jurisdictions, such as the UK have decided not to define national security, in order to provide flexibility in an evolving environment. However, the Reviewers considered it preferable to include a definition within legislation in order to provide a distinction between activities by agencies directed towards national security objectives and their "other objectives" when collecting information about New Zealanders.[13] The Reviewers also considered that the definition should be narrower in scope to the current "all hazards" policy definition and, while broad

[13] Cullen M, Reddy R, *Intelligence and Security in a Free Society*, Report of the First Independent Review of Intelligence and Security in New Zealand, para 5.80

enough to cover wide-ranging, evolving threats, should be focused on the *protection* of New Zealand interests only, as distinct from advancing them or promoting them.[14]

29. The distinction between the agencies "national security objectives" and their "other objectives" is reflected across cl 5 and cl 11 of the Bill. Clause 11 sets out the overall objectives of the agencies. Clause 11(a) refers the role of IS agencies in protecting national security, as defined under clause 5. Clauses 11(b) and (c), by contrast, refer to the role of the agencies in "contributing" to "international relations and wellbeing of NZ" and "economic well-being and NZ" as other, separate, objectives. This indicates that the clauses 11(b) and (c) are not necessarily "national security" related and act to confirm a role for the agencies beyond that of protecting and maintaining national security.

30. This raises an important policy question regarding the scope of the functions of the intelligence and securities agencies. In the Commission's view, the primary role and objective of the agencies is to maintain and protect national security. We are particularly concerned that clause 11(c) gives the agencies a more nebulous, free-form role in "contributing" to economic well-being, entirely unconnected from its role in protecting New Zealand's national security, which under clause 5(d) includes protecting economic security. Clause 11(c) could be interpreted by the agencies as providing them with licence to direct their functions towards monitoring the activities of groups or individuals who pose no national security risk but who hold legitimate views about economic, environmental or social policy that may be contrary or in opposition to the government's economic policy objectives.

31. **The Commission therefore recommends that clause 11 of the Bill be amended to provide that the protection of national security is the primary objective of the intelligence and security agencies.**

Development of a Code of Practice

32. In its submission to the Independent Review of Security and Intelligence Services the Commission recommended the development of a statutory Code of Practice that would apply across the security and intelligence sector. This echoed the recommendations of the ISR Panel and David Anderson QC in the United Kingdom.

[14] Ibid paras 5.81-5.83

33. Both the ISR Panel and Anderson reinforced "the articulation of enduring principles" as a key component of any intelligence and security regime. The ISR Panel recommended the development of statutory Codes of Practice, written in plain accessible language, that include details of the technical implementation and application of governing legislation.[15]

34. The Commission endorses this approach. Although the current Bill goes some way towards addressing the disparate and inadequate nature of existing legislation and policy, providing additional simple and clear guidance and rules about the practical application of the powers would promote adherence and encourage public confidence.

35. In addition, a statutory Code of Practice that applies across the intelligence and security sector has the potential to provide a stronger protective mechanism against intrusive practices or "jurisdiction creep" than a policy-level compliance framework. It would also provide a vehicle for requiring specific human rights training for any individual who will exercise powers and functions conferred on them under the legislation. This would support powers being exercised in a manner consistent with clause 3(c)(i) of the Bill, as contemplated.

36. The Cullen/Reddy report recommended the NZSIS should be required to prepare a Code of Conduct based on the principles of a proposed single Act.[16] This recommendation appeared to focus more on the importance of tailoring the State Services Commission Code of Integrity Conduct so it applies more directly to the unique nature of some aspects of the NZSIS's human intelligence work. Although the Commission supports such an approach, we believe that a Code of Practice that provides practical guidance on the operational aspects of the legislation is also essential, for the reasons outlined above.

37. **The Commission recommends that the Bill be amended to require the specific development of a statutory Code of Practice to provide further guidance about the practical exercise of powers and functions conferred under the proposed legislation.**

Adequate funding for the Inspector-General

38. The Inspector-General has a key oversight role under existing legislation and under the current Bill. It is essential that this office be adequately resourced and funded in order to

[15] *A Democratic License to Operate*, Recommendation 2
[16] Supra, note 13, Recommendation 5 and para 4.24,4.25

allow the Inspector-General to undertake his or her functions effectively, efficiently and in a timely manner.

39. The Commission urges the Committee to take steps to ensure that appropriate and adequate funding and resources are made available for this purpose and that these are provided on an ongoing and enduring basis.

40. **The Commission highlights the need to ensure that the Inspector-General's role and office is resourced and funded to a sufficient level to allow him or her to properly discharge the oversight functions outlined in the Bill. This resourcing must be appropriately protected from any interference or reduction that could affect the ability of the office to provide the level of oversight and assurance the public requires.**

Passport Act decisions

41. The Commission notes that the Bill includes proposed changes to the Passport Act. 1992. The changes include a requirement for the Minister of Internal Affairs to notify the Chief Commissioner of Intelligence Warrants of any decision to cancel, or refuse to issue, a New Zealand travel document. After receipt of all relevant documents the Chief Commissioner must review the Minister's decision and prepare a report if he or she considers the decision is not supported by the documentation. If this is the case, the report must recommend the Minister reconsider his or her decision and state the reasons for that recommendation. The Minister must then undertake such reconsideration. In any case where the Minister reviews his or her decision, the person affected by that decision must be notified of the Chief Commissioner's recommendation and the outcome of the recommendation.

42. The Commission notes that passport cancellations have significant implications for individuals and their freedom of movement and can be a particular "touchstone" for disaffected citizens, including those who may pose a security threat. It is important that associated processes be robust, transparent and open to independent review.

43. In its engagement with individuals and groups who have been affected by the current temporary provisions of the Passport Act, the Commission has noted that the reasons for, and process around, cancellation decisions do not seem to be well known or understood. Concern has also been expressed to the Commission about the degree of input and involvement of individuals in respect of whom such decisions are made. Whether or not this is actually the case, it would seem that a requirement to seek the

views of the person affected by the cancellation decision would be a sensible addition to the current review regime. This would ensure that those who have had their travel documentation revoked can have their views taken into account when the relevant decisions are reviewed.

44. **The Commission recommends that the Bill be amended to require the Chief Commissioner of Intelligence Warrants to seek, and take into account, the views of the person affected by the Minister's decision to cancel a passport, unless to do so would in itself pose a security risk**.

Intelligence warrants for training and testing purposes

45. The Commission notes that the additional criteria for the issue of intelligence warrants set out in clause 57(a) include the ability to issue warrants for the purpose of testing, maintaining or developing capability, or training employees. These purposes are subject to further restrictions and requirements around proportionality, the use and retention of information that is obtained, and consideration of the level of intrusion the activity would entail (clauses 57 (b) – (e)). However, the Commission has serious reservations about the need to permit intelligence services to carry out training or testing of this nature. There appears to be very little information publicly available about why such powers would be required. It is therefore difficult to determine whether the ability to issue warrants for these purposes can be substantively justified.

46. **The Commission recommends that the Committee pay particular attention to clauses 57(a)(ii) and (iii) and consider whether these provisions are necessary. If the conclusion is that the provisions are required, then the proposed limits and safeguards should be closely scrutinised to ensure that they are sufficient given the highly intrusive nature of this proposed power**.

SUMMARY OF RECOMMENDATIONS

The Commission generally supports the approach of the Bill. However, there are some aspects which raise issues of concern.

1 In order to ensure that the agencies perform their functions in accordance with New Zealand's international human rights treaty obligations (and to reinforce the importance of doing so) the Commission recommends that cl 3(c)(i) of the Bill is amended as follows — *"…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, including obligations under international human rights treaties;"*

2 In order to rectify the Bill's discriminatory effect on persons who are not New Zealand citizens or permanent residents, the Commission recommends that the Committee consider extending the role of the Commissioner of Intelligence Warrants to provide authorisation for the issue of Type 2 urgent intelligence warrants under cl 70 of the Bill.

3 The Commission recommends that clause 11 of the Bill be amended to provide that the protection of national security is the primary objective of the intelligence and security agencies.

4 The Commission recommends that the Bill be amended to require the specific development of a statutory Code of Practice to provide further guidance about the practical exercise of powers and functions conferred under the proposed legislation.

5 The Commission highlights the need to ensure that the Inspector-General's role and office is resourced and funded to a sufficient level to allow him or her to properly discharge the oversight functions outlined in the Bill. This resourcing must be appropriately protected from any interference or reduction that could affect the ability of the office to provide the level of oversight and assurance the public requires.

6 The Commission recommends that the Bill be amended to require the Chief Commissioner of Intelligence Warrants to seek, and take into account, the views of the person affected by the Minister's decision to cancel a passport, unless to do so would in itself pose a security risk.

7 The Commission recommends that the Committee pay particular attention to clauses 57(a)(ii) and (iii) and consider whether these provisions are necessary. If the conclusion is that the provisions are required, then the proposed limits and safeguards should be closely scrutinised to ensure that they are sufficient given the highly intrusive nature of this proposed power.

8 The Commission is also of the view that the debate around the extent and nature of the powers to be conferred on security intelligence services highlights the need to include a specific right to privacy in the New Zealand Bill of Rights Act 1990.