



**REPORT TO THE PRIME MINISTER
GOVERNMENT COMMUNICATIONS SECURITY BUREAU AND
RELATED LEGISLATION AMENDMENT BILL; TELECOMMUNICATIONS
(INTERCEPTION CAPABILITY AND SECURITY) BILL, AND ASSOCIATED WIDER
ISSUES RELATING TO SURVEILLANCE AND THE HUMAN RIGHTS OF PEOPLE
IN NEW ZEALAND**

09 JULY 2013

Executive summary

1. This report is provided pursuant to the direct reporting function of the Human Rights Commission - Te Kahui Tika Tangata (the Commission) under section 5(2)(k) of the Human Rights Act 1993 (HRA).
2. This report focuses on the proposed Government Communications Security Bureau and Related Legislation Amendment Bill (GCSB Bill) and the proposed Telecommunications (Interception Capability and Security Bill) (TICS Bill) and how the Commission considers these pieces of legislation may affect human rights. It also addresses wider issues relating to surveillance and the human rights of people in New Zealand.
3. The Commission considers that what is proposed by the GCSB Bill and the TICS Bill is too wide-reaching. It does not provide adequate oversight, and makes inadequate provision for ensuring appropriate transparency and accountability of those who administer the legislation. It does not provide for a legal regime containing sufficient safeguards against abuse of power and to facilitate a proportional approach.
4. The primary recommendation of this report is that a full and independent inquiry into New Zealand's intelligence services be undertaken as soon as possible. This primary recommendation is supported by five further recommendations.

Introduction

5. This report is provided pursuant to section 5 of the HRA, in relation to the proposed GCSB Bill and TICS Bill. Under section 5(2)(k)(i) the Commission can report directly to the Prime Minister on 'any matter affecting human rights, including the desirability of legislative, administrative, or other action to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights', and under section 5(2)(k)(iii)

on 'the implications of any proposed legislation (including subordinate legislation) or proposed policy of the Government that the Commission considers may affect human rights'.

6. This report is provided against the background of the disclosure beginning in June 2013 and which is ongoing through international media of the existence of an extensive external intelligence-gathering programme operated by the United States National Security Agency (NSA). This programme is extraordinary in scope, monitoring vast amounts of electronic communication, including metadata of non-United States persons living outside the United States. The disclosures also highlight the way in which the NSA has worked along with some members of the Five Eyes arrangement (members of which are Australia, Canada, New Zealand, the United Kingdom and the United States) on this mass intelligence-gathering programme.
7. These disclosures have revealed the involvement in mass surveillance of some members of the Five Eyes arrangement. It is clear from these disclosures that the NSA has had access to the personal data of large numbers of individuals around the world, via telecommunications and electronic communications companies. On 27 June 2013, a bi-partisan group of 26 United States senators stated in a letter to the Director of National Intelligence that "the bulk collection and aggregation of Americans' phone records has a significant impact on American's privacy."¹ What is also clear is that the New Zealand public is now concerned that metadata related to people in New Zealand may be being passed onto the GCSB by Five Eyes partners. This is given the suggestion that the sharing of metadata collected by agencies in other member countries between some Five Eyes partners is taking place.
8. The Commission recognises that States have a duty – which is in part a human rights related duty – to protect their citizens from both physical harm and from interference with their civil and political rights. Most law enforcement involves active protection of human rights. Legislation has an important role to play; however, legislation can be unduly intrusive. Careful consideration is required to ensure that resulting legislative measures are consistent with international and domestic human rights obligations.
9. The Commission recognises that some level of surveillance is inevitable and can be justified in contemporary democratic society. However, there is nothing to suggest that surveillance in a democratic society such as New Zealand cannot be subject to human rights principles, and consistent with an approach that protects human rights, by limiting rights in a manner which is proportionate and justified, in accordance with law.

¹ Letter to the Honorable James R. Clapper, Director of National Intelligence, signed by 26 US Senators, 27 June 2013.

The international human rights framework

10. It is widely acknowledged that human rights have a significant role to play in the area of communications surveillance.²
11. The Magna Carta of 1215 established the principle that due process of law safeguards against arbitrary interference with an individual's rights. This principle continues to form part of modern day human rights law and New Zealand domestic law. It follows that in order for the rule of law to be upheld, people must know and understand the content of the laws they are subject to.
12. Human rights have their most recent origins in the International Bill of Human Rights which consists of the Universal Declaration of Human Rights ('the Declaration'), the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Social, Economic and Cultural Rights ('ICESCR'). They are said to be indivisible, interdependent and interrelated - improving one right can advance another, and vice versa. Thus respecting freedom of expression, for example, can facilitate the right to freedom of assembly whereas limiting it can have the opposite effect.
13. The International Bill of Rights was essentially the distillation of the principles New Zealand fought World War II for –namely freedom, democracy, justice and human rights. New Zealand has long been a strong voice for democracy, the rule of law and human rights on the international stage. The relevance of democracy, the rule of law and human rights and fundamental freedoms has not dimmed since the aftermath of World War II. Ensuring that New Zealand's intelligence services operate in a manner consistent with respect for human rights and fundamental freedoms is essential to uphold the rights of people in New Zealand.

Communications surveillance and the right to privacy

14. Privacy is the most obvious, but not the only important right, engaged in the context of communication surveillance. The right to privacy is found in both the Declaration³ and the ICCPR⁴ but is not found in the New Zealand Bill of Rights Act 1990 and the Privacy Act 1993 is no substitute for the failure to include the right to privacy in the New Zealand Bill of Rights Act. The failure to include the right to privacy in the New Zealand Bill of Rights weakens the domestic protections of right to privacy.

² See, for example, a 2010 Regulatory Impact Statement on modernising the New Zealand Security Intelligence Service Act 1969 ('NZSIS') to address the technological changes relating to the NZSIS seizure and interception warrants framework, which specifically refers to the important role that human rights play in liberal democracies, noting in particular to the right to privacy, the protection of personal integrity and property rights and maintenance of the rule of law.

³ Article 12, Universal Declaration of Human Rights.

⁴ Article 17, International Covenant on Civil and Political Rights.

15. Privacy is fundamental in a democracy and is essential to human dignity. It reinforces the rights to freedom of expression and assembly. As with many other rights, it can be limited if a restriction is prescribed by law, designed to achieve a legitimate aim and is proportionate to that aim. For the reasons outlined later in this report the Commission is of the view that the proposed legislation is too general for it to be proportionate to its objective.
16. The proposed legislation is also inconsistent with the advice of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.⁵
17. In April this year Frank La Rue, the current UN Special Rapporteur, submitted a report in accordance with a resolution by the Human Rights Council on the implications of States' surveillance of communications on the exercise of the human rights to privacy and freedom of opinion and expression⁶. While conceding that "concerns about national security and criminal activity may justify the exceptional use of communications surveillance technologies"⁷ he went on to say:

*Communications surveillance should be regarded as a highly intrusive act that potentially interferes with the rights to freedom of expression and privacy and threatens the foundations of a democratic society. Legislation must stipulate that State surveillance of communications must only occur under the most exceptional circumstances and exclusively under the supervision of an independent judicial authority. Safeguards must be articulated in law relating to the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them and the kind of remedy provided by the national law.*⁸

18. Various non-binding standards that have been developed by human rights NGOs – often in conjunction with multinational corporations and academics – provide useful guidance on how to advance human rights in the rapidly evolving digital information age. A copy of the principles developed by the Global Network Initiative and the *International Principles on the Application of Human Rights to Communications Surveillance*⁹ are appended to this report, by way of example. The *International Principles on the Application of Human Rights to Communications Surveillance* are particularly relevant given how recently they were developed¹⁰ and the fact that they are designed to specifically address the application of international human rights law in the current

⁵ The United Nations provides for "special procedures" to deal with specific issues or thematic matters. They include designated individuals known as Special Rapporteurs who can receive complaints if they fall within their mandate.

⁶ A/HRC/23/40.

⁷ At [para 3].

⁸ At [para 81].

⁹ Accessible at www.necessaryandproportionate.net/

¹⁰ The current version was only finalised on 7 June 2013.

digital environment and the burgeoning increase in communications surveillance technology and techniques.

Compliance with the New Zealand Bill of Rights Act 1990 (NZBoRA)

19. The vet by the Ministry of Justice identified a number of inconsistencies with the NZBoRA in both pieces of legislation. In relation to the GCSB Bill these were the rights to freedom of expression, non-discrimination and unreasonable search and seizure found in subsections 14, 19(1) and 21.¹¹ In the case of the TICS Bill, the rights of concern in relation to the proposed legislation were the right to freedom of expression, the right to be free from unreasonable search and seizure and the right to natural justice (subsections 14, 21, and 27(1)). The analysis concluded that all could be justified. The Commission does not agree with this conclusion.
20. The test for justification under s.5 of the NZBoRA was set out by the Supreme Court in *R v Hansen*.¹² Any limit on a right must:
- (i) serve a sufficiently important objective to justify curtailing the right;
 - (ii) the limiting measure must be rationally connected to its purpose;
 - (iii) impair the right or freedom no more than is reasonably necessary to achieve its purpose;
 - (iv) be in due proportion to the importance of the objective.
21. The Commission recognises that the objective of the legislation is sufficiently important to justify some curtailment of the rights identified. It also accepts that what is proposed is rationally connected to what it is designed to achieve.
22. Because the rights involved are fundamental to the functioning of a democratic society, the State's power to intrude on these freedoms must inevitably be subject to some constraints. As the legislation is overly broad and enables mass surveillance, in our view, the limitation impairs the rights to privacy and freedom of expression in particular, more than is reasonably necessary. Further in the absence of any compelling argument for the level of intrusion that is contemplated, it cannot be said that what is proposed is proportionate to the objective of the legislation. As Tech Liberty NZ put it in their submission on the GCSB Bill:

The creation of a mass surveillance state with government agencies that collect data about us, and analyse it is a major in changing the nature of our society. People act differently when they are being watched and there is a chilling effect on freedom of expression. The government has failed to show that these losses are

¹¹<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/government-communications-security-bureau-and-related-legislation-amendment-bill>

¹² [2007] 3 NZLR 1.

*proportional to any perceived benefit we will get from giving up our privacy in this way.*¹³

Government Communications Security Bureau and Related Legislation Amendment Bill (GCSB Bill)

23. The stated purpose of the GCSB Bill is to clarify the legal framework that governs the activities of the GCSB and to update it in response to the changing security environment – particularly in relation to cybersecurity and information security. The Bill would also enhance the external oversight mechanisms that apply to the intelligence agencies by strengthening the office of the Inspector-General of Intelligence and Security and improving Parliament’s Intelligence and Security Committee.¹⁴
24. In the Commission’s view, the relatively innocuous description in the explanatory note does not reflect the full extent of what the GCSB Bill will allow – namely, permit foreign intelligence agencies to access data about private citizens in New Zealand. This is achieved principally through the amendments to section 8 of the principal Act which describe the functions of the GCSB. Clause 6 replaces the present subsections 7 and 8 with new subsection 7 to 8D. While the new provisions may seem to substantially reflect the present s.8, they introduce some significant changes. For example, section 8C changes the relationship between the Bureau and other public authorities or entities by removing the present restriction in section 9(2) which limits the Bureau’s cooperation to:
- a) pursuing the Bureau’s objectives (as found in section 7 which will also be repealed);
 - b) protecting the safety of any person;
 - c) supporting the prevention or detection of serious crime:
25. The section is replaced by one which would allow the Bureau to carry out a wide range of activities that it might not otherwise be authorised to do, in cooperation with the agencies listed in section 8C(1) – namely, the Police, the Defence Force, the SIS and any public sector department specified for this purpose by Order in Council: section 8C(2)(c). Section 8D also allows the Director “all the powers that are necessary or desirable to perform the functions of the Bureau”. Together, these provisions could allow the GCSB a free hand in carrying out virtually any activity it chose under the aegis of any of the authorities listed. Further, as the Law Society points out, this means that the protections and anonymity afforded to the GCSB also apply to the agency in question.

¹³ Tech Liberty NZ, *Submission to the Intelligence and Security Committee concerning the Government Communications Security Bureau and Related Legislation Amendment Bill*, 21 June 2013.

¹⁴ Explanatory note, *Government Communications Security Bureau and Related Legislation Amendment Bill: General Policy* at 2.

26. In the United States similar powers have allowed the National Surveillance Agency (NSA) to undermine legislation that is the equivalent of the GCSB Act even though the legislation was established precisely to prevent this type of situation.¹⁵ The Commission understands that the GCSB has closer links with the NSA and others in the Five Eyes arrangement than the SIS. Allowing the roles of the GCSB and the SIS to merge therefore has the potential to permit a virtually unchecked exchange of information about New Zealand citizens.
27. The Commission further notes that while the proposed new section 14 purports to prevent interceptions targeting domestic communications, this is limited to not authorising the interception of “private communications” of New Zealand citizens for the purposes of section 8B. It follows that the other functions in section 8 are not affected by the prohibition.
28. The definition of “private communication” found in the principal Act exempts “communication occurring in circumstances in which any party ought reasonably to expect that the communication may be intercepted by any other person not having the express or implied consent of any party to do so”. The Commission agrees with the Chair of the Legislation Advisory Committee, that the definition is unacceptably vague, capable of a variety of interpretations and has the potential to undermine reasonable expectations of privacy.
29. Much of the concern that surrounds the GCSB may be alleviated if the public has confidence that there was satisfactory oversight of how the powers it creates were being exercised. The Bill proposes that this role would be filled by the Inspector-General of Intelligence and Security. In the Commission’s view this places too much power in the hands of a single authority. The oversight function would be strengthened – and possibly more acceptable – if an independent mechanism with cross-party political oversight were introduced.
30. The Commission notes that in considering the proposed legislation, it considered its view as to whether the inclusion of a sunset clause, causing the legislation to expire or be reviewed after a certain period of time, would address its concerns. However, the Commission believes, given the matters covered in the proposed legislation are of such high importance and go to the heart of human rights, that this would not adequately address its concerns. Instead, the Commission recommends a full and independent inquiry, as elaborated on later in this report.

¹⁵ Donohue, L “NSA surveillance may be legal - but it’s unconstitutional” www.washingtonpost.com/opinions. The author notes that the intelligence community in the United States has a history of overreaching in the name of national security and while the Foreign Intelligence Surveillance Act 1978 limited the sweeping collection of intelligence and created rigorous oversight, subsequent amendments had allowed it run more invasive programme than those that gave rise to the Act itself.

Telecommunications (Interception Capability and Security) Bill (TICS Bill)

31. The TICS Bill imposes obligations on telecommunications network operators to assist the government “on network security matters where they raise a risk to New Zealand’s security or economic wellbeing”.¹⁶ In return the government will provide information (where appropriate) about network security risks and increase network operators’ knowledge in this area.¹⁷ The TICS Bill will require network operators to understand their obligations for interception capability and make it easier for them to comply with their obligations. The interception network will be underpinned by a compliance and enforcement framework.
32. As with the GCSB Bill, much of what is suggested is unclear and capable of a variety of interpretations. For example, “national security” is not defined. There is also a wide Ministerial discretion under which apparently any government department can require a service operator to provide the same interception capability as a network operator.
33. Of further concern, however, is the fact that where procedural matters involving “classified security information”¹⁸ relating to administration or enforcement of the Act are involved, at the request of the Attorney-General, a court can receive or hear matters in the absence of the defendant or the defendant’s lawyers. While provision is made for the appointment of special advocates, conducting proceedings in the absence of the defendant raises issues about the breach of the right to natural justice in section 27(1) NZBoRA. Despite the opinion of the Attorney-General to the contrary (as a court can appoint a special advocate),¹⁹ the Commission considers that the limitation is unjustified and a disproportionate response to the need to protect classified security information in this context, particularly since it is relatively unclear as to who will be appointed as a Special Advocate - or if one will be appointed at all.²⁰

Surveillance and human rights – maintaining public trust in New Zealand

34. The Commission notes that the proposed legislation was introduced before the international media’s ongoing exposure of the extent of the mass surveillance activities of some of the States which are members of the Five Eyes arrangement.

¹⁶ Telecommunications (Interception Capability and Security) Bill: Explanatory note.

¹⁷ Regulatory Impact Statement: *Telecommunications Industry – new framework for network security* at [para 41]. The Commission notes that this was one of two RISs prepared for the TICS Bill, both were late in being released, one was heavily redacted and neither had a human rights analysis - despite the recognition in the 2010 Regulatory Impact Statement on modernising the New Zealand Security Intelligence Service Act 1969 of the central role that human rights play in such regimes.

¹⁸ Clause 96(1).

¹⁹ <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/telecommunications-interception-capability-and-security-bill>

²⁰ The Court has a discretion to appoint a Special Advocate under cl.97(3)(c) cf. s.265 Immigration Act 2009 which makes an appointment mandatory.

35. People in New Zealand are relatively trusting of the Government conducting intelligence activities in a proper manner. However, as is the case with other democratic States, the reaction of the New Zealand public should they find that those activities are not being conducted in a proper manner can be expected to be very strong. It is therefore in the interests of New Zealand's intelligence services to have the appropriate transparency and accountability mechanisms in place so that poor or inappropriate conduct does not occur.
36. There is recognition of the important role of this public trust and concern in two relevant cabinet papers. The Prime Minister's redacted Cabinet Paper entitled *Review of Government Communications Security Bureau Act 2003: Paper 2* "rising public interest in the roles and activities of the intelligence agencies..."²¹ This cabinet paper dates prior to the disclosures about surveillance programmes in the international media, beginning in early June 2013.
37. The Prime Minister's redacted Cabinet Paper entitled *New Zealand Intelligence Community – External Oversight Mechanisms* notes: "The Government understands public concerns that have arisen in recent months and believes that legislative and procedural change is needed to maintain public trust in the system."²² Cabinet Minutes show that paper was considered by Cabinet on 26 March 2013. Again the paper refers to public concern and the need to maintain public trust.
38. Public concern has risen dramatically since the disclosures in June and July 2013, which are ongoing, and public trust has been further eroded. This is at the international level and at the domestic level in New Zealand. In New Zealand, additional concerns have arisen out of the tracking of a journalist within the Parliament buildings in the context of trying to ascertain who she had met (while not involving the intelligence community).
39. The New Zealand public will not – and should not have to – accept that the sacrifices New Zealanders have made for freedom, democracy, the rule of law and human rights – such as freedom of speech – are now to be protected by a standard as low as 'if you have done nothing wrong you have nothing to fear'. Such a low standard would be acceptable if the 'nothing wrong' threshold meant one was not planning to or taking up arms against a lawfully elected Government or planning or executing terrorist activities endangering the lives of people in New Zealand or elsewhere. However, the proposals reach well beyond that in ways that the Law Society and Internet New Zealand have explained well in their submissions to the Intelligence and Security Committee. The Commission endorses these submissions. The reports from the Committee hearing suggest that the Legislation Advisory Committee has also taken a similar approach to the Law Society in its submission.

²¹ At para 12.

²² At para 2.

40. The Commission also draws attention to the 1976 the 'Church Report' which published the findings of the *United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*. In particular, the following paragraph is of direct relevance to the current proposed legislation and is worth bearing in mind:

"What can properly be concealed from the scrutiny of the American people, from various segments of the executive branch or from a duly constituted oversight body of their elected representatives? Assassination plots? The overthrow of an elected democratic government? Drug testing on unwitting American citizens? Obtaining millions of private cables? Massive domestic spying by the CIA and the military? The illegal opening of mail? Attempts by an agency of the government to blackmail a civil rights leader? These have occurred and each has been withheld from scrutiny by the public and the Congress by the label "secret intelligence." In the Committee's view, these illegal, improper or unwise acts are not valid national secrets and most certainly should not be kept from the scrutiny of a duly-constituted congressional oversight body."

Governance and oversight of New Zealand's intelligence services

41. The Prime Minister's redacted paper entitled *New Zealand Intelligence Community – External Oversight Mechanisms* notes:

*"Effective, credible external oversight of intelligence agencies is crucial for public assurance that the intrusive powers of such agencies are being used in accordance with the law and that the citizens' right to privacy is being respected. There is an inherent tension between the secrecy required for the protection of methods and sources used and information held by these agencies, and the legitimate public expectation of transparency of government agencies. The goal is to balance these opposing considerations, in a way that provides public assurance that appropriate scrutiny and supervision will take place, whilst still ensuring confidentiality in respect of matters of national security and the sensitive inner workings of intelligence agencies."*²³

42. The Commission agrees with that comment, but notes that the tension is not just between secrecy and transparency. It is also between two sets of human rights New Zealand has entered into international obligations to protect (some of which are reflected in the NZBoRA and the HRA). The tension is between the human right to security of person (in simple terms to feel safe – this is a human right that police, defence forces and other law enforcement are directed to) and the human rights to free speech, assembly, association and privacy, which are at the heart of what it means to a citizen of a democratic state. It is crucial that Parliament – as the voice of the people – is certain that the balance is struck in the appropriate way and that adequate

²³ At para 3.

accountability mechanisms are in place to ensure such a balance is maintained. The Commission does not believe the proposed legislation provides the public with assurance that appropriate scrutiny and supervision will occur.

43. By way of contrast to the lack of oversight by the legislature in New Zealand in these matters, the level of oversight provided in the United States is salient. In the United States there are two legislative Select Committees with oversight, one in the Senate and one in the Congress. The President chairs neither. In New Zealand the Committee with oversight is not even a Select Committee and it is chaired by the Prime Minister, who for all intents and purposes is in the same position as the President in the United States.
44. People in New Zealand are entitled to assurance that the necessary transparency and oversight of the New Zealand intelligence services is in place. They are also entitled to have assurance that the intelligence services, through a rigorous legal regime with appropriate executive, legislature and judicial checks and balances, conducts itself within the law and discharges their functions with due respect for the human rights of all people affected by their activities.
45. People in New Zealand are also entitled to know if mass surveillance of data, such as metadata, relating to them, is being collected through surveillance by New Zealand's intelligence services or its international partner agencies, and if so, for what purpose or use. In particular, any inquiry into the security services must assure New Zealanders if and how metadata collected by foreign intelligence agencies on New Zealanders activities in New Zealand (using metadata collected in New Zealand or outside New Zealand) is shared by those foreign intelligence services with the New Zealand intelligence services. If the other Five Eyes partners share all such metadata with the GCSB, whether it asks for it or not, then New Zealanders are effectively being subjected to mass surveillance and the GCSB is getting information about New Zealanders that it could not itself gain lawfully without appropriate justification or oversight.

Process – the use of urgency for this proposed legislation

46. The Commission shares the New Zealand Law Society's concern about the urgency with which the Bill is being passed through the legislative process. Twenty years ago, Burrows and Joseph warned about the "unseemly haste" of governments determined to get legislation passed.²⁴ The situation has not improved. As public lawyer Mai Chen states,

Given that New Zealand's unicameral Parliament can already enact legislation faster than most Westminster democracies, is urgency being taken unnecessarily and

²⁴ Burrows J.F & Joseph P.A., *Parliamentary Law Making* [1990] NZLJ 306.

*excessively, to the detriment of quality lawmaking, without proper public input through the Select Committee process, such that reform is needed?*²⁵

47. Chen says that since 2008, the current Government has passed over 70 Bills through at least one legislative stage under urgency and while it was arguably appropriate or justified for some of the Bills, for others it was not.²⁶
48. While the Commission recognises that there was an opportunity for submitting through the Select Committee process, the details of how to do so and when this was to occur were not readily available and the time for making submissions on such important (and technical) pieces of legislation was unreasonably truncated. This effectively excluded many from participating in the legislative process, curtailing the full operation of democratic parliamentary processes to which people in New Zealand should be able to maintain a reasonable expectation of occurring to the fullest extent possible.

Recommendations

49. Given the concerns and issues outlined above, the Commission recommends that a full and independent inquiry into New Zealand's intelligence services is undertaken as soon as possible. The terms of reference of such an inquiry should be agreed on a cross-political party basis.
50. Whilst such an investigation has never taken place in New Zealand, there is precedent for an inquiry of this nature in the United States. As noted above, the 'Church Report' published the findings of the *United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*. The Church Report found that there was an ongoing need for an intelligence system, but that the balance had not been struck in the appropriate manner in many instances where intelligence services had interfered with human rights. The Commission further notes that in Australia, regular reviews of the intelligence services occur.
51. The Commission notes that the *Review of Compliance at the Government Communications Security Bureau*, 'the Kitteridge Report' of March 2013 echoes the conclusions of the Church Report in so far as there being an ongoing need for intelligence services in New Zealand. The Commission believes that an independent inquiry into New Zealand's intelligence services will also likely to find that intelligence services are necessary to protect the human rights of people in New Zealand. What we cannot be certain of without an inquiry of this nature is that the correct balance is being struck between protecting national security and the personal security of New Zealanders and protecting the other human rights of people in New Zealand, and what

²⁵ Chen, M (6 May 2011) *New Zealand Parliament's love affair with fast lawmaking and urgency*. NZ Lawyer 12.

²⁶ Chen, M, 2011.

diversions from the correct path may have been taken or could be taken without adequate safeguards and oversight in place.

52. The Commission envisages that such an inquiry would ensure that there is full and coherent consideration of the role and functions of New Zealand's intelligence services, including their governance and oversight mechanisms. Such an inquiry could usefully give full and measured consideration to the tensions between the human rights discussed in this report, and the balance to be struck between them and legitimate national security concerns.
53. Given that the proposed legislation raises fundamental issues about the intersection between national security (including cybersecurity) and human rights, people in New Zealand should be given confidence by Parliament that this legislation will lead to a system of national intelligence services based on a legal regime which includes sufficient safeguards to protect against arbitrary decision-making and abuse of power. The Commission believes there is much to be said in the points made by Internet New Zealand that cyber security issues are not necessarily best dealt with inside the GCSB, but that if this continues, very strict segregation of the work and the devices used to store the information is necessary.
54. People in New Zealand should be able to trust that the integrity of the system allows for respect and protection of fundamental human rights such as the right to privacy and the right to freedom of expression, and only intrudes on these rights where it is justified, proportionate and legitimate to do so under law. The Commission's view is that the legislation as it is proposed does not provide these safeguards. However, a full independent inquiry would enable these issues to be addressed in a timely manner, appropriate to our current day context of increased surveillance and growth in the global nature of electronic communications, issues which affect all of us in New Zealand.
55. Furthermore, in addition to a full independent inquiry, the Commission recommends:
 - a) That stronger accountability and oversight mechanisms are necessary. This includes Parliamentary oversight of New Zealand's intelligence services, through the establishment of an independent oversight mechanism, preferably a Parliamentary Select Committee with cross-political party membership (in addition to the role filled by the Inspector-General of Intelligence and Security under the proposed legislation);
 - b) That the submissions of the New Zealand Law Society and the Legislation Advisory Committee regarding the drafting of the proposed legislation are taken into account and the proposed legislation amended accordingly;
 - c) That the submissions of Internet New Zealand are taken into account, in particular the Commission endorses the recommendations set out there in regarding human rights; and

- d) That the Government commit to providing human rights training to all members of the New Zealand intelligence services. The Commission would be happy to provide this training. Alternatively, the Commission recommends that oversight and development of such training is undertaken by the Director General of Defence Legal Services, New Zealand Defence Force, in conjunction with the Police Commissioner.