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Re: Independent Review of Intelligence and Security

Introduction

1. The New Zealand Law Society welcomes the opportunity to make a submission on the Independent Review of Intelligence and Security.
2. The call for submissions sought an indication of whether the reviewers or their support team within the Ministry of Justice may contact submitters to discuss their submissions. The Law Society welcomes further involvement in the review. In the first instance please contact the Law Society's Law Reform Manager, Vicky Stanbridge.

Overview

3. Robust intelligence agencies are essential in the national interest. But the agencies function in an open and democratic society. It is important there are sufficient checks that strike the right balance between enabling the agencies to do their work and limiting intrusions on individual rights.
4. In summary, the Law Society's submissions are that:
 - The difficult balance to be struck between protecting national security and protecting individual rights should be supported by a clear and coherent legislative framework, which provides strong protection of individual rights and limits intrusions so far as possible. There is ample justification for a review of all relevant legislation (including the Terrorism Suppression Act, the legislation establishing the Intelligence and Security Committee, and the legislation establishing the Inspector-General of Intelligence and Security), and examining and reporting on whether it strikes the right balance, with a view to replacing it with a single coherent piece of legislation developed from first principles.
 - There are a number of issues with the existing legislation, including in particular that both control and oversight are concentrated in the Executive. The balance of democratic control should be improved by increasing scrutiny by Parliament.

- The importance of the subject matter, and the practical and legal difficulties it has generated in New Zealand recently, is more suitable to an inquiry in the nature of a public inquiry under the Inquiries Act 2013. Alternatively the scope of the current review should be expanded.

The need for a review of all relevant legislation, with a view to replacing it with a single statute

5. The Law Society agrees that there is a need for a review of New Zealand's security legislation.
6. Recent events in New Zealand and overseas have called into question the balance that ought to be struck between national security and human rights, especially the rights to liberty and privacy of New Zealand citizens and foreigners.
7. The issues of when and how the New Zealand agencies responsible for national security ought to cooperate with and supply information to overseas agencies have been problematic.
8. Concerns have been expressed that there is inadequate democratic oversight of the New Zealand agencies. For example there is limited oversight of the operational aspects of agencies responsible for the protection of national security, despite the fundamental democratic principle that agencies have to be responsible to Parliament. By way of comparison, there is far more extensive oversight of security matters in the United States, where Congressional Committees can and do carry out rigorous and thorough reviews.
9. These issues are not unique to New Zealand. Other countries, groups and think tanks are engaged in similar debate. A wealth of material has resulted. Two examples include the independently prepared Issues Paper published by the Council of Europe, *Democratic and effective oversight of national security services*¹ and the US Centre of Strategic and International Studies paper, *Balancing Security and Civil Liberties* (both papers **attached**).²
10. The issues raised by this debate are fundamental. They include, for example:
 - what are the human rights (and rights of bodies whether incorporated or not) that ought to be protected;
 - what are the national and international interests that require protection;
 - what is the range of potential threats to those interests;
 - what powers and resources are required in order to help protect against those potential threats;
 - in what agencies should those powers and resources be reposed;
 - to what extent and how ought those agencies to communicate with other agencies, both domestic and overseas;
 - what reporting is required by those agencies, and to whom, to ensure that there is appropriate knowledge of their operations;

¹ http://www.coe.int/t/dghl/standardsetting/media/Conf-FoE-2015/Commissioner%20for%20Human%20Rights_Democratic%20and%20effective%20oversight%20of%20national%20security%20services.pdf.

² http://www.coe.int/t/dghl/standardsetting/media/Conf-FoE-2015/Commissioner%20for%20Human%20Rights_Democratic%20and%20effective%20oversight%20of%20national%20security%20services.pdf.

- what oversight is required to ensure powers and resources are not misused; and
 - what remedies ought to exist if there has been misuse.
11. These issues have not been sufficiently debated in New Zealand, certainly not in recent times and with regard to current terrorist threats and the swift technological advances that have had such an impact on security and intelligence. Debate has often been limited by time or because of a focus on a particular circumstance, Bill or Act. As a result there are issues with much of the legislation that affects national security and human rights, including the:
- Terrorism Suppression Act 2002;
 - Government Communications Security Bureau Act 2003;
 - New Zealand Security Intelligence Service Act 1969;
 - Inspector-General of Intelligence and Security Act 1996;
 - Intelligence and Security Committee Act 1996; and
 - the provisions enacted as a result of the Countering Terrorist Fighters Legislation Bill 2014.³
12. The Law Society considers that there should be a comprehensive review of all security legislation, with a view to replacing it with a single coherent Act.
13. A single Act would have many advantages, including enabling consistency with fundamental principles, avoiding inconsistency with and gaps between various statutes, and minimising the need for piecemeal amendment of different pieces of legislation.
14. The Law Society considers the review ought to start from first principles and include an assessment of whether the suite of current security legislation strikes the appropriate balance between protecting national security and human rights, and whether it ensures meaningful and effective democratic oversight. It ought to have regard to how the current legislation and oversight mechanisms have functioned.
15. The Law Commission's work on use of national security information in court proceedings should, when finished, be integrated into the review.⁴

The principles

16. The crystallisation of principles is a matter for public debate and inquiry. Some of the relevant principles or factors are identified below. The submission then identifies some shortcomings of the current legislation when assessed against those principles.
17. The Law Society considers that the principles should reflect the following:
- New Zealand is a constitutional democracy, and as such the actions of the government ought to be authorised by law and in accordance with the rule of law;

³ The Countering Terrorist Fighters Legislation Bill 2013 resulted in a number of Amendment Bills: the Passports Amendment Act 2014, Customs and Excise Amendment Act 2014 and New Zealand Security Intelligence Service Amendment Act 2014.

⁴ <http://www.lawcom.govt.nz/our-projects/protection-classified-and-security-sensitive-information>.

- citizens, legal entities and foreigners within the jurisdiction of New Zealand have fundamental civil and political rights and interests protected by law;
- New Zealand's national security interests need to be protected against internal and external threat;
- the protection of national security interests can help to ensure the protection of the rights of citizens, legal entities and foreigners within the jurisdiction of New Zealand;
- a balance is required to be struck between the protection of rights and the protection of national security – that balance ought to reflect the principle that fundamental rights and interests protected by law ought to be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society;⁵
- a range of intelligence and security agencies are required to help protect against national security threats;
- the agencies may need to liaise with overseas agencies;
- the agencies need sufficient legislation, functions, powers and operational capacity to enable them to meet the objective of protection of national security;
- the legislation governing functions, powers and operations of intelligence and security agencies must reflect the balance that is required to be struck;
- the functions, powers and operations of intelligence and security agencies must be prescribed by law and defined narrowly and with precision,
- the operations of intelligence and security agencies must be subject to ex ante authorisation;
- those the subject of the powers and operations of intelligence and security agencies ought to have the ability to challenge these, to the extent that doing so is not inconsistent with national security interests. Those challenges ought to be before an independent body with judicial powers;
- the functions, powers and operations of intelligence and security agencies must be subject to ongoing, meaningful and effective internal and external oversight;
- the ultimate external oversight must be by Parliament;
- the bodies conducting that oversight must have access to all information and powers required to enable them to properly discharge their function;
- that oversight ought to be conducted in public to the extent that doing so is not inconsistent with national security interests; and
- there ought to be meaningful remedies if the governing legislation is breached.

The current legislation viewed in light of those principles

18. Some of these principles are reflected in the general legislative framework for the Government Communications Security Bureau and New Zealand Secret Intelligence Service. For example:
- both agencies are statutory bodies with defined statutory functions and powers;

⁵ Essentially section 5, New Zealand Bill of Rights Act 1990, expanded to include other interests, for example privacy. See also *R v Oakes* [1986] 1 SCR 103 at [69] to the effect that invasive public powers cannot be justified unless they serve a pressing and substantial social purpose.

- intrusive actions require prior authorisation under intelligence and interception warrants (except in limited defined cases);
- domestic intelligence or interception warrants require the joint approval of the responsible Minister and the Commissioner; and
- the activities of the agencies are subject to oversight by the independent Inspector-General of Intelligence and Security.

19. However, the Law Society considers that the present checks and balances fall short of those that are required. In particular control and oversight are concentrated in the hands of the Executive. There is insufficient Parliamentary oversight.

20. Other issues are apparent. These are identified below (with reference to earlier Law Society submissions (**attached**) where appropriate):

The Government Communications Security Bureau Act 2003

- The Government Communications Security Bureau’s statutory functions are insufficiently precisely defined and overbroad, particularly those conferred in sections 8B and 8C (as set out in the Law Society’s submission of 14 June 2013 at [25] – [31]).⁶
- The GCSB’s activities are guided by “principles” set out in section 8D. These should be restated as legally enforceable duties.
- There is a broad conferral of powers on the Director under section 8E. No equivalent general conferral of powers is contained in the NZSIS Act. At the very least, the conferral should be restricted to those powers “necessary” to perform the GCSB’s functions and not extended to those that may be “desirable” as currently is the case in section 8E.
- The protection against the interception of private communications and the retention of incidentally obtained intelligence in section 14 is insufficient (as set out in the submission of 14 June 2013 at [32] – [43]).
- Consideration should be given to transferring the responsibility for interception warrants from the Minister to the Attorney-General.
- The section 16 power to intercept without warrant or authorisation is overly intrusive and unjustifiable (as set out in the Law Society’s submission of 14 June 2013 at [49]);

The New Zealand Security Intelligence Service Act 1969

- The Security Intelligence Service’s activities are guided by “principles” set out in section 4AAA. Comprehensive principles should be developed further and should be enforceable.
- Consideration should be given to transferring the responsibility for intelligence warrants from the Minister to the Attorney-General.
- The protection in section 2(2) of lawful protest should be repositioned and separately headed, for example “*Right to lawful protest affirmed*”.

⁶ Government Communications Security Bureau and Related Legislation Amendment Bill, submission 14.6.13 available at http://www.lawsociety.org.nz/_data/assets/pdf_file/0007/68389/Government-Communications-Security-Bureau-and-Related-Legislation-Amendment-Bill-140613.pdf (copy **attached**).

- Section 2(2) prohibits the “surveillance of any person” engaged in lawful protest but nowhere does the Act define the term “surveillance”.
- The Minister and Commissioner of Security Warrants may issue intelligence warrants under section 4A of the Act. They must each be “*satisfied on evidence ... that the conditions specified in subsection (3) apply to the proposed warrant*”. However, their (value) judgments are protected from challenge in the courts. Section 4A(6)(b) declares that the issue of a warrant “*shall not be subject to judicial review under Part I of the Judicature Amendment Act 1972 or otherwise*”. This privative clause is inappropriate.
- By virtue of section 4IG, sections 41A – 41F are repealed as from 1 April 2017. These provisions authorise the issue of visual surveillance warrants, or the giving of authority to undertake visual surveillance and to intercept and seize communications, without either a visual surveillance warrant or an intelligence warrant. If those powers are no longer necessary, why are they not repealed now?

The Inspector-General for Intelligence and Security Act 1996

- There is some uncertainty about the extent of the exceptions in subsections 11(3) and (4). For example, may the Inspector-General for Intelligence and Security review the Minister’s decision to issue a particular warrant?
- The relationship between sections 20, 23 and 26(3) should be reviewed. At present, the Minister may prevent the IGIS from accessing security documents relevant to an inquiry by virtue of his power in section 26(3).

The Intelligence and Security Committee Act 1996

- The Intelligence and Security Committee is prevented from undertaking any substantive scrutiny of the agencies by the limitation in section 6(2). The Law Society considers this is an anomaly and should be removed or amended (as set out in its submission of 14 June 2013 at [62] to [65]).

The Countering Terrorist Fighters Legislation Bill 2014

- The Law Society acknowledges that whether it is necessary to renew the legislative amendments enacted as a result of the Countering Foreign Terrorist Fighters Bill 2014⁷ will to a large extent depend on international events. If the relevant provisions of UNSCR 2178 remain in force then New Zealand will continue to be obliged to comply and arguably some elements of the legislation will therefore remain relevant. However, this should be submitted to careful analysis. There should not be a roll-over of the provisions in their entirety without careful reconsideration.
- The Law Society reiterates the concerns expressed in its submission of 27 November 2014 (at [8] to [18])⁸ as to the passport provisions introduced by the Countering Foreign Terrorist Fighters Bill, namely that:
 - denial or cancellation of a passport breaches the right to exit New Zealand contained in section 18(3) of the New Zealand Bill of Rights Act 1990;

⁷ See footnote 3.

⁸ Countering Terrorist Fighters Legislation Bill 2014, submission 27.11.14 available at http://www.lawsociety.org.nz/_data/assets/pdf_file/0006/85056/Countering-Terrorist-Fighters-Legislation-Bill-27-11-14.pdf (copy **attached**)

- the proposed threshold for an extended passport denial term is less stringent than for the initial 12 month term;
- a person whose passport is denied or cancelled has a limited ability to object;
- the extended denial or cancellation term of 3 years is not a good fit with the interim nature of the legislation;
- amended drafting creates a potentially lower threshold by which a judge is required to extend a passport denial term by a further 12 months; and
- there are concerns regarding inadequate availability of judicial review.

How the review should be conducted

21. The current review is being conducted under the review provisions of the Intelligence and Security Committee Act 1996. These provisions:
- (a) Provide for a review of the intelligence and security agencies, the legislation governing them and their oversight legislation (section 21).
 - (b) Require the first review to be commenced prior to 30 June 2015 (section 21). That is the first review of the periodic review regime which requires ongoing reviews every 5 to 7 years. The result of the current review will therefore endure for the next 5 to 7 years.
 - (c) Require the review to be conducted by 2 persons appointed by the Attorney-General with appropriate security clearance (section 22).
 - (d) Require the Attorney-General, after consultation with the Intelligence and Security Committee, to specify (a) the terms of reference for the review; (b) any matters that he considers that the reviewers should take into account in determining how to conduct the review; and (c) the date by which the review is to be concluded.
22. The terms for a review may include any matter relevant to the functions, effectiveness and efficiency of the intelligence and security agencies and their contribution to national security.
23. The purpose of the current review, as set out in the terms of reference, is to determine:
- Q1 Whether the legislative frameworks of the intelligence and security agencies (GCSB and NZSIS) are well placed to protect New Zealand's current and future national security, while protecting individual rights.
 - Q2 Whether the current oversight arrangements provide sufficient safeguards at an operational, judicial and political level to ensure the GCSB and NZSIS act lawfully and maintain public confidence.
- In addition the review is to have particular regard to other matters, including:
- Q3 Whether the legislative provisions arising from the Countering Foreign Terrorist Fighters legislation, which expire on 31 March 2017, should be extended or modified.
 - Q4 Whether the definition of "private communication" in the legislation governing the GCSB is satisfactory.
24. The terms of reference of the current review are too limited. The information provided to submitters is also limited to a brief description of the legislation governing the activities of the agencies, and

oversight mechanisms. It will not sufficiently foster informed public participation. The current review falls short of what is required.

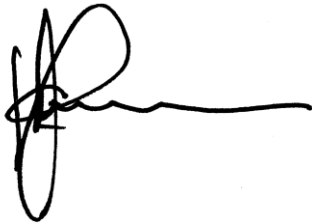
25. The Law Society considers that:
- (a) The terms of reference ought to be widened, to the extent possible, to enable a more thorough review, as recommended below.
 - (b) The review ought to gain a comprehensive understanding of how the intelligence and security agencies operate, including the way they function and liaise with each other and overseas agencies; their compliance with their governing legislation; and to what extent those responsible for their oversight seek or are provided with all relevant information and how they respond to that information.
 - (c) The review panel ought to be supplemented by an advisor whose core expertise is in human rights, and who is independent of, and will be seen to be independent of, government. That would help foster public engagement and ensure a more nuanced understanding of the human rights at stake.
 - (d) The procedure to be followed ought to be informed by submissions. Interested parties, including the Law Society, are likely to have relevant views as to what evidence and material may best inform the review.
 - (e) A proper discussion paper would better ensure public participation and informed debate.
26. The importance of the subject matter, and the practical and legal difficulties it has generated in New Zealand recently, is more suitable to an inquiry in the nature of a public inquiry under the Inquiries Act 2013.
27. This review and subsequent periodic reviews under the Intelligence and Security Committee Act 1996 should be reconstituted as public inquiries under the Inquiries Act 2013. (It is appreciated that legislative change would be required.) Such an inquiry would:
- better reflect the constitutional and democratic importance attaching to the security and human rights issues at stake;
 - have the powers, protections and machinery provided for under the Inquiries Act 2013, including powers of compulsion and protection of witnesses;
 - better ensure that the public is aware of and has input into the review, and allow for a fuller understanding by the reviewers and public of the issues at stake;
 - help to restore public trust and confidence in the activities of the agencies;
 - help to ensure a review that is robust, sustained and informed, and is perceived as such; and
 - better enable the development of relevant principles and more coherent and preferably unified legislation.

Conclusion

28. There is a need for a thorough review of the legislation, functions, powers and operations of New Zealand's intelligence and security agencies.

29. That would help to ensure that an appropriate balance is struck between rights and national security interests and help to develop greater public confidence in those agencies.
30. The review ought to start from first principles. It would be preferable for it to be conducted under the Inquiries Act 2013. Alternatively, the scope of the current review needs to be expanded to cover the issues outlined above.
31. The goal ought to be twofold. First, the development of a single, coherent and precisely drawn piece of intelligence and security legislation. The current suite of legislation is fragmented and problematic in part.
32. Secondly, an appropriate balance between rights and national security interests needs to be re-struck. At present control and oversight is concentrated in the hands of the Executive. There is insufficient Parliamentary oversight.

Yours sincerely

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a long, horizontal, slightly wavy line extending to the right.

Chris Moore
President