New Zealand Law Society
Te Kāhui Ture o Aotearoa

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Ministry of Justice
**Wellington**

By email: ISAReview@dpmc.govt.nz

**Re: Review of the Intelligence and Security Act 2017**

## 1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the review of the Intelligence and Security Act 2017 (**Act**).

1.2 The Law Society's feedback relates to the provisions relating to authorisation by the Minister and the Commissioner of Security Warrants (Part 4 of the Act), and to independent oversight of the activities of intelligence and security agencies respectively (Part 6 of the Act).

## 2 Authorisations (Part 4)

2.1 We propose that the review consider whether the provisions for external prior authorisation in Part 4 should extend to all significant activities of the agencies, rather than only those activities that would otherwise be unlawful, as currently provided in sections 46(a) and 48.

2.2 We note that, as reported by the then Acting Inspector-General of Intelligence and Security in her inquiry into certain agencies' activities in Afghanistan:[1]

(a) The agencies undertook significant functions in that country; and

(b) The responsible agency personnel themselves decided whether to seek wider government consideration of significant activities posing issues of legality. For example, they decided against raising both the possibility of civilian casualties, and an allegation that a detainee had been tortured.

2.3 The nature of intelligence and security agencies' activities is that:

(a) Such activities – whether or not themselves legal – may have grave consequences for the New Zealand government's compliance with national and international law;

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[1] *Report of Inquiry into the role of the GCSB and the NZSIS in relation to certain specific events in Afghanistan* (June 2020), pages v and 51.

(b) They may also include activities that are legal but raise cross-government policy issues (such as those in Afghanistan but also, for instance, in the form of lawful but intrusive collection and analysis of information); but

(c) Much of that activity is not publicly known and is not (unlike, for instance, the operational activities of the New Zealand Police) readily subject to binding judicial scrutiny.

2.4 As evidenced by the Afghanistan inquiry, the Inspector-General can, as noted below, provide *ex post* scrutiny of such activity. What that inquiry also indicated, however, is that significant issues of legality went unaddressed in practice.[2] The inquiry report also noted that the Government Communications Security Bureau took the position in that inquiry that some matters of concern to the Inspector-General were "beyond its remit".[3]

2.5 Expanded ministerial authorisation would therefore serve three purposes:

(a) Issues of this kind would be robustly identified and addressed;

(b) Decisions such as those described by the Inspector-General would be made by the responsible Minister who is an elected and politically accountable office-holder, rather than by agency personnel; and

(c) Ministerial accountability would more likely result in robust legal advice and wider government consideration where necessary.

## 3 Oversight of intelligence and security agencies (Part 6)

3.1 We consider Part 6 should be retained in future versions of the Act for the following reasons:

(a) Part 6 provides a clear legislative framework for the oversight functions of the Inspector-General of Intelligence and Security (**Inspector-General**) and the Intelligence and Security Committee (**IS Committee**).

(b) These provisions give assurance to the public that the significant powers of the intelligence and security agencies are being scrutinised, and that there is an avenue of redress and protection for complainants.

(c) Part 6 also recognises the difficulties in publishing information regarding the work of the Inspector-General, and sets out processes to improve transparency by requiring the Inspector-General to:

(i) prepare and publish an annual work programme;[4]

(ii) conduct inquiries into, for example, intelligence and security agencies' compliance with New Zealand law, including human rights law;[5] and

(iii) publicly report on the conclusions and recommendations relating to each inquiry.[6]

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2 Above n 1, for example at page 20, paragraph [83] (lack of support to deployed staff).

3 Above n 1, page 12 (footnote 32).

4 Intelligence and Security Act 2017, section 159.

5 Intelligence and Security Act, section 158.

6 Intelligence and Security Act, section 185.

3.2 The Law Society also supports retaining the IS Committee as a statutory committee (rather than a Parliamentary committee established under the Standing Orders of the House of Representatives).

3.3 The IS Committee is somewhat unusual as it is a statutory committee comprised of members of Parliament. Although the proceedings of the IS Committee are protected by parliamentary privilege,[7] its functions, powers and procedures are determined by the Act (rather than the Standing Orders). We consider it is appropriate to continue the IS Committee as a statutory committee given its specialist oversight role and the sensitive nature of the information supplied to the IS Committee.

3.4 We also consider it is appropriate to continue to provide for both oversight mechanisms (i.e., the Inspector-General and the IS Committee), and their relationship to each other, in a single statute to promote transparency, accessibility and certainty.

3.5 We would be happy to discuss this feedback further, and provide additional input if the reviewers identify any particular concerns regarding the Act. Please feel free to contact me via the Law Society's Law Reform & Advocacy Advisor, Nilu Ariyaratne (Nilu.Ariyaratne@lawsociety.org.nz).

Nāku noa, nā

Frazer Barton
**Vice-President**

[7] Intelligence and Security Act, section 199.