

NINTH ASEAN-AUSTRALIA-NEW ZEALAND DIALOGUE

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Kuala Lumpur

NATIONAL SECURITY, POLITICAL STABILITY AND CIVIL LIBERTY: ACHIEVING EQUILIBIRUM AND BALANCE

Introduction

This is a timely subject for New Zealand as earlier this year a substantive review took place entitled Intelligence and Security in a Free Society which resulted in a significant overhaul of previous legislation designed to better adapt the agencies' ability to operate in a much more complex threat environment, while achieving a better balance between safeguarding both national security and civil liberties.

Why this overhaul was necessary

To secure public confidence New Zealand has taken the approach that security agencies need to be able to demonstrate their value to New Zealanders rather than being kept in the shadows. Legislative change was required to include appropriate external and independent checks and balances. Because of the nature of their work security agencies cannot always be entirely open about their activities. The public therefore needs to be able to count on oversight and accountability mechanisms to ensure the agencies act lawfully and reasonably.

Another important driver of the legislation was the need to ensure it provides for changes in the nature of threats and advances in technology. A lack of clarity in the previous legislation – there were four separate Acts of Parliament - meant that the security agencies and their oversight bodies were at times uncertain about what the law did and did not permit which made compliance difficult. There was a need to set out clearly what the agencies could do, in what circumstances and subject to what protections for individuals.

There were also inconsistencies between the two agencies in terms of their functions, powers and authorisation regimes, which created barriers to their working together. To establish the best possible foundation for well-informed decision-making governments need to receive intelligence that is comprehensive and robustly tested.

A significant issue is the growing complexity and sophistication of security threats and the methods of communication used by those posing those threats. In today's globalised world threats transcend geographical boundaries. In the modern technological and online environment, even internal threats to security can sometimes be discovered or investigated using high-end electronic intelligence capabilities. In the light of these developments intelligence and security agencies need to work together and pool their expertise.

Security agencies' activities by their very nature are intrusive. They are not ordinarily subject to public scrutiny or review by the courts. This makes it essential that all of their activities are externally authorised and open to oversight to ensure they are reasonable, necessary and proportionate.

The review mentioned above determined that while intelligence can play an important role in supporting government decision-making, not all of it is useful. It is only of value if focused on the issues most important to the country and turned into a product that decision-makers can use. It is therefore essential that intelligence collection aligns with government priorities and is independently assessed to ensure that as far as possible the end product meets the needs of its users.

New legislation

The review's recommendation for a single comprehensive Act of Parliament was agreed by the Government. This Act includes a new authorisation regime requiring some level of authorisation for all intelligence and security activities that entail gathering information about individuals or organisations, proportionate to the level of intrusion involved. Having a single Act makes the law easier to understand and access.

It ensures appropriate checks and balances on agency activities while removing unnecessary barriers to effective inter-agency cooperation. This improves the agencies' ability to comply with the law and allow oversight bodies to monitor that compliance more effectively.

The Act provides for a panel of judicial commissioners, compared with just one previously, made up of retired and/or sitting judges; expands the size of the Parliamentary Intelligence and Security Committee, and expands its powers by allowing that Committee to enquire into any matter about the intelligence and security agencies compliance with the law including human rights law and the propriety of their activities. It also enables oversight to occur before, during and after any activity. It also expands the oversight roles of the Inspector-General of Intelligence and Security.

That individual, who is the main external check on the agencies, is responsible for reviewing issues of legality and propriety, which includes the agencies' compliance with human rights and privacy obligations. To ensure the independence of the Inspector-General he or she is appointed by the Governor-General on Parliament's recommendation and is funded through an appropriation separate from the agencies.

The prime purpose of the new legislation is to protect New Zealand as a free, open and democratic society. This reflects the agencies role in assisting the government to fulfil its obligation to ensure that its citizens can go about their lawful business safely and without undue interference with their human rights.

The legislation sets out the objectives of the two agencies as contributing to:

- the protection of our national security, including its economic security, and the maintenance of international security

- New Zealand's international relations and well-being, and
- New Zealand's economic well-being.

Agency common functions include collecting intelligence, protective security, and assisting other government agencies.

Under the new legislation the security agencies are in general only able to obtain a warrant to target New Zealand citizens, permanent residents and organisations for the purpose of protecting national security. The broader objectives of contributing to our economic and international well-being apply only in relation to foreign persons and organisations (which could include a New Zealander acting on behalf of a foreign entity such as a government or terrorist organisation).

The new authorisation framework adopts a three-tiered approach. The highest level is a warrant approved by the Attorney-General and a judicial commissioner. It is required for any activities that would otherwise be unlawful.

In such an event both the Attorney-General and a judicial commissioner would need to be satisfied that the statutory criteria for issuing an authorisation are met. The Attorney-General also would take into account broader national interest considerations and has discretion to decline to issue a warrant even if the criteria are met. The judicial commissioner considers the legality of the application for a warrant including its consistency with human rights laws.

A specific review warrant is required if the agencies wish to analyse incidentally obtained intelligence for the purpose of an operation or investigation targeting a New Zealander. This prevents incidental interception being used as a way around the authorisation requirements.

The second tier is for a warrant issued by the Attorney-General to carry out any activities that would otherwise be unlawful, but are not for the purpose of targeting New Zealand citizens, permanent residents or organisations. The third is a policy statement issued by the Minister responsible for the agencies after being referred to the Inspector-General for comment. Each of the third tier warrants need to set out what information or activity it applies to, the purposes for which the information can be collected or activity carried out, the methods that can be used and any protections that need to be put into place.

Before issuing a tier one or tier two authorisation, the Attorney-General and judicial commissioner need to be satisfied:

- a. that the proposed activity is necessary either for the proper performance of the agency's functions, or to test, maintain or develop capabilities or train employees for performing the agency's functions;
- b. the proposed activity is proportionate to the purposes for which the authorisation is sought;
- c. the outcome sought cannot reasonably be achieved by less intrusive means;

- d. there are satisfactory arrangements in place to ensure that nothing will be done in reliance on the authorisation beyond what is reasonable and necessary for the proper performance of a function of the agencies; and
- e. satisfactory arrangements are in place to ensure that the information is only obtained, retained, used and disclosed in accordance with the legislation.

The Attorney-General is required to refer applications for tier one and two authorisations to the Minister of Foreign Affairs for comment if the proposed activity is likely to have implications for our foreign policy or international relations.

The agencies are required to keep a register of all authorisations which is to be made available to the Inspector-General, the Minister responsible for the agencies, the Attorney-General and the judicial commissioners. Their annual reports are to include reporting on the outcome of all tier one and tier two authorisations.

In the event of an emergency the agencies are permitted to begin an activity that would normally require an authorisation with approval from the Attorney-General where there is an imminent threat to the life or safety of any person or the delay associated with obtaining an authorisation is likely to seriously prejudice national security. But strict obligations are imposed to ensure that those responsible for oversight are advised without delay and that they can direct that an activity is to cease without delay if they are unconvinced of the need for it.

The new legislation also brings the two security agencies further into the core public service increasing accountability and transparency. They now act as regular government departments and are treated as such. Previously our Security Intelligence Service was left out of legislation other government departments must follow such as the State Sector Act and the Employment Relations Act.

The legislation requires any cooperation with and provision of intelligence to foreign jurisdictions to be consistent with legislative provisions and agencies' obligations. The new Act precludes the agencies from using foreign parties to collect information they are legally unable themselves to obtain.

The new Act enables the security agencies to access information held by other government departments via their electronic databases. But this access is subject to a joint protocol between the Minister responsible for the agency and the Minister responsible for the department whose database holds such information and must be in consultation with the Privacy Commissioner. The Inspector-General must monitor compliance with this protocol.

Potential for Cooperation

The findings of the review that led to legislative change and the provisions I have outlined in this legislation are on the public record and can therefore be shared. Any cooperation that took place would have to be in accordance with our legislation. There is of course also potential for cooperation in terms of capacity building for countering

threats of terrorism. Indeed such collaboration is already taking place, for instance, through the South-east Asia Regional Centre for Counter-Terrorism, and support for Singapore's Information Fusion Centre and through collaboration in Proliferation Security Initiative activities.

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