

Submission to the New Zealand Intelligence and Security Bill

By Dr David Small

A Introduction.

This Bill reads as though it were designed for some reality tv challenge to prepare for scenarios from 24, the Fox TV series that promoted abandoning the rule of law. New Zealand is not a tv show. Far from “reflect(ing) New Zealand’s long-standing commitment to human rights, democracy, accountability and the rule of law”, this Bill represents yet another unjustified erosion of all of those principles.

This Bill radically extends the powers and reach of New Zealand’s intelligence network. It does this in a context where:

- There is no demonstrable reason to do so;
- There is no evidence that New Zealanders want to increase the powers of the intelligence agencies;
- There is no evidence that New Zealanders are feeling anywhere near as worried about national security as the intelligence agencies would like us to be;
- There is no evidence that there are any threats that the current powers of New Zealand’s intelligence agencies are unable to cope with;
- Intelligence agencies have repeatedly acted with cavalier disregard of the freedoms of New Zealanders and the rule of law; and
- No adequate measures of oversight and accountability of these agencies have been put in place.

The list of appalling and/or unlawful actions (that we know about) by New Zealand’s intelligence agencies is long and shameful. It includes:

- The raids against Tuhoe and activist networks;
- The spying on a sitting MP;
- The unfair and unlawful treatment of Ahmed Zaoui;
- The illegal break-in and searches during the Apec Trade Ministers’ Conference;
- The unlawful treatment of Kim Dotcom;
- The mass surveillance of our Pacific neighbours;
- The harrassment of a New Zealander for disapproving of the Fiji Government;
- The delivery of Tampa refugees in New Zealand to Australian authorities;
- The politically biased approach to responding to OIA requests; and
- The distorted media beat-ups over issues such as “Jihadi brides”.

Nothing short of a clean out and total overhaul of the NZSIS and the GCSB will have any chance of eliminating the toxic cultures that permeate these organisations. Only this will give us any hope of them fulfilling their missions of enhancing the freedom and security of the people of New Zealand.

This Bill represents the continuation of a process whereby the NZSIS and the GCSB exceed their lawful powers, are exposed as acting unlawfully (usually by the actions of citizens and not through formal reviews), then are given enhanced powers retrospectively, which they then in turn go beyond. This process of ratcheting up their encroachment on the rights of New Zealanders is facilitated by a process of obtaining legal advice that puts the wishes of intelligence agencies ahead of the rights of New Zealanders. Secret unaccountable agencies like the NZSIS and the GCSB should take the opposite approach. Where there is any degree of uncertainty, these should be required to adopt the interpretation of their powers which is the most conservative and least invasive of people's rights and freedoms.

B. Clauses of Concern in the Bill.

5. Meaning of national security

This is far too broad. For example, "potential threats to New Zealand's status as a free and democratic society from foreign interference" and "potential threats that may cause serious harm to the quality of life of the New Zealand population" could include an extremely wide range of possibilities, many of which should not be used to invoke the extraordinary powers included in this legislation or other legislation that draws on this definition of "national security".

22. Limitation on collecting intelligence within New Zealand.

The provisions within this part of the Bill is so weak as to be absolutely worthless. If New Zealanders really are to have the right "to engage in lawful advocacy, protest or dissent in respect of any matter" much of this Bill needs to be abandoned. It is silent on how those rights are actually upheld.

One way they could be advanced a little would be for this Bill to include a clause that makes it clear that where there is a conflict between this Bill and the New Zealand Bill of Rights Act 1990, NZBORA prevails. Another way would be to include serious sanctions against anybody acting for or on behalf of an intelligence agency who does anything that undermines these basic rights.

Part 3 Covert Activities of Intelligence and Security Agencies

This part of the Bill gives intelligence agencies far too much power to act outside the law and to cover up and escape detection for usurping their lawful powers.

If these provisions had been enacted at the time that the SIS and the Police engaged in serious violations of the rights of New Zealanders during the APEC Trade Ministers meeting, their unlawful activities would never have come to light. They would have been able to tell

so many lies and carry out so many cover-ups and require so many other people and organisations to do the same that their unlawful behaviour would never have been exposed. Recall that there was a total failure of the supposed legitimate avenues of holding these agencies to account at that time. If these agencies are given a free reign to lie and cover their tracks, one of the few (albeit weak) means for the public to hold them to account will be effectively removed.

66 Powers of GCSB under intelligence warrant

66(e) and (f) are far too broad. They do not exclude, for example, acts or threats of acts of violence, blackmail, theft, sabotage, reputational damage, internment, deportation, or destruction of property.

68 Requests for assistance to give effect to intelligence warrant

This is effectively the power to co-opt on the hoof. Given the extraordinary powers and the protection from immunity that such people or organisations would enjoy and could potentially abuse, this is far too loose a provision.

188 Exception from Criminal Liability under section 246 Crimes Act 196 in certain circumstances

This provision makes it far too easy for information to be obtained through unreliable or unethical means or sources and to be used and laundered for the use of others without any checks and balances. The anti-torture provision is so minimal and subjective as to be worthless.

189 Exceptions to the Land Transport (Road User) Rule 2004.

This reads like a licence for SIS agents to engage in car chases. It poses an unnecessary risk to the public and should be removed.

262-263 Amendments to the Privacy Act

These amendments open privacy breaches far too wide. If private information is deemed necessary for an investigation being run by an intelligence agency, it should obtain a court order. This clause allows for too much room for the sorts of loose arrangements that we saw with Westpac Bank handing over the personal information of an individual to the Police without this request being subjected to any legal scrutiny. This practice should be stamped out, not legitimized.

272-274 Amendments to the Search and Surveillance Act 2012

This provision gives is too much discretion to Police to engage in warrantless searches on minimal subjective grounds.

C Conclusion

This Bill is a thoroughly reprehensible attack on the rights and freedoms of New Zealanders. It is based on a politicized and spurious exaggeration of the threats to the security of New Zealanders. If passed, it will further empower New Zealand's disreputable and unaccountable intelligence agencies to bypass the rule of law for which they have so often shown contempt.

I wish to speak to this submission.