

Submission to the “Countering Terrorist Fighters Legislation Bill”

By Dr David Small, 27 November 2014.

1. Introduction:

I am a lawyer and a Senior Lecturer at the University of Canterbury. One of my areas of research is the balance between national security and civil liberties. In 2011 I was Fulbright Senior Scholar at Georgetown University Law Center studying alternative approaches to anti-terrorism for low-risk countries. I have made submissions on virtually every piece of legislation impacting intelligence, security and surveillance since the 1996 NZSIS Amendment Act.

I was the first to lodge an official complaint against the NZSIS through the office of the Inspector-General of Intelligence and Security. That complaint was not upheld by the Inspector-General but was subsequently judged by the Court of Appeal to have involved unlawful acts by the SIS. The Court of Appeal ruled at the time that the SIS had no lawful authority to enter private property in order to place a recording device and that an SIS interception warrant did not bestow an implied authority to enter private property.

In response to this ruling, an amendment to the SIS Act was passed and applied retrospectively to authorize the SIS to enter private property for the purposes of effecting the surveillance authorized by an interception warrant. There was widespread public opposition to this move, including a people’s inquiry in Christchurch chaired by University of Canterbury Chancellor, Dame Phyllis Gudhart.

The current Bill proposes to empower the SIS to enter private property even where no interception warrant exists.

This is a significant increase in the invasive powers of the SIS. In a New Zealand context, considerations such as this are as close as we come to constitutional debates. The Bill is yet another move to tilt the balance between protecting national security and upholding individual and civil rights in favour of a narrowly conceived model of advancing national security.

The measures in this Bill are very similar to ones being introduced in the UK. But the British Government which by any measure is a far higher risk than New Zealand of terrorist attack is not planning to introduce its legislation until January 2015.

I see no justification for the haste with which this Bill is being introduced in New Zealand. And I strongly object to the attempt to close off public input into this proposed legislative change by allowing so little time for submissions.

I cannot think of a more staggering denial of the public's right to consultation than the decision to allow just 48 hours for public submissions on a matter of this importance.

2. There is no evidence of an increased threat to New Zealand:

The explanatory note to this Bill claims that the New Zealand's domestic threat level "was recently increased by officials from VERY LOW to LOW (a terrorist attack is possible but not likely)". This alleged increase in risk was announced with no substantiating evidence or outline of criteria by which such ratings are arrived at. Moreover, the claim that the threat level has increased is belied by the fact that eight years ago, the NZSIS described the threat level in almost exactly the same terms as those that are being presented now as an increase in the risk facing New Zealand.

I identified these in my 2011 paper¹, a copy of which I also provided to the inexplicably abandoned Public Safety and Security Project of the New Zealand Law Commission.

I refer you to the 2006 NZSIS report that said the Service “continues to believe that the risk of a terrorist attack on New Zealand or New Zealand interests is low (‘terrorist attack is assessed as possible, but is not expected’)”². This came a year after the New Zealand Ambassador for Counter-Terrorism, Dell Higgle commented that ‘the threat of a direct attack against New Zealand remains low’³. Subsequent to these assessments, officials or politicians have redefined the threat levels during those times as “very low”, the purpose of which could only be to create the impression of a worsening threat level faced by New Zealand.

Those responsible for this deception are fear-mongering. They have provided no evidence that the degree or the kind of threats that genuinely face the country have worsened. They have shown no example of where existing law has been inadequate in dealing with any actual threats. There is no evidence that any terrorist act that has been carried out would have been prevented if this legislation were in place.

The Bill proposes a significant increase in the invasive powers of the most secret and unaccountable arms of the state. The case for extending their powers simply has not been made. The power to engage in surveillance activities without a warrant amounts to the removal of one of the very

¹ David Small (2011) The uneasy relationship between national security and personal freedom: New Zealand and the ‘War on Terror’ *International Journal of Law in Context*, Volume 7, number 4, p.471

² NZSIS (New Zealand Security Intelligence Service) (2006) Report to the House of Representatives for the year ended 30 June 2006. Wellington: NZSIS. Available at: www.nzsis.govt.nz/reports/ar06/nzsis-ar06.pdf.

³ Higgle, D. (2005) ‘Whole of Government Approach and New Zealand’s Contribution to Combating International Terrorism’, 15 August 2005. Available at: www.mfat.govt.nz/Foreign-Relations/1-Global-Issues/

few limitation and safeguards that remain with respect to the powers of the SIS.

Furthermore, the Bill does not limit the removal of these powers to operations against terrorist fighters as the name of the Bill implies. If this Bill is required to counter a specific category threat, that being a “terrorist fighter”, it should at the very least define what it means by a “terrorist fighter” and restrict its application to such people.

Too many unanswered questions remain about intelligence agencies’ treatment of New Zealanders overseas.

The recent killing by American drone of a New Zealander and an Australian who had been living in New Zealand raised serious questions about the role of New Zealand intelligence agencies in providing information to foreign intelligence agencies and, in effect, giving other countries the green light to kill New Zealanders overseas without trial. The government has failed to respond to public calls for greater accountability over what information it shares with foreign intelligence agencies, what obligations it has to New Zealanders overseas, and what judicial processes are most appropriate to follow in circumstances such as those that gave rise to the drone killings.

This legislation moves further down that track before these fundamental questions have been addressed. They also edge New Zealand closer to the UK model of cancelling citizenship for citizens living overseas, and the attendant often fatal consequences of these sorts of moves.

The Intelligence Agencies, their political oversight and their public accountability.

New Zealanders are increasingly losing confidence in the integrity of their intelligence and security agencies and in the politicians who are supposed to hold them to account.

The list occasions when these agencies have been found to have acted outside the law is alarmingly long and is being added to with disturbing regularity.

Questions about oversight and accountability are also mounting, with no serious effort to address them. These include fundamental errors made by the office of the Inspector-General of Intelligence and Security, including but not limited to the example of my own complaint. They also include the revelations that the SIS was spying on a sitting Member of Parliament, unknown to the Committee to which they were supposed to be accountable.

And most recently there was the example of the SIS being used to advance the political interests of the governing party at the expense of its political opposition.

These issues have occurred at a time when the powers and resources of New Zealand's intelligence and security agencies have been steadily increasing.

There needs to be a major public inquiry into this part of the state before there is any further extension of powers or resources.

The changes being proposed in this Bill and the way the Bill is bypassing public consultation make it a serious assault on the rights and freedoms that New Zealanders have long cherished.

I wish to speak to this submission