

**Government Communications Security Bureau and Related Legislation
Amendment Bill**

**Submission by the Privacy Commissioner
to the Intelligence and Security Committee**

17 June 2013



Privacy Commissioner
Te Mana Matapono Matatapu

1. Introduction

- 1.1 I agree with some of the aims of this legislation. For instance, I agree that the law governing the Government Communications Security Bureau's (GCSB's) activities would benefit from additional clarity. I also agree that some updating of the law is needed in our complex digital world, so that GCSB can keep pace with new threats to New Zealand, both in the traditional intelligence sphere and in the area of cybersecurity.
- 1.2 However, it is because of the complex, dynamic environment that I believe the topic needs to be considered further and in more detail. In particular, it is not yet clear what type and level of oversight is most appropriate. The effects on individuals are potentially very significant, and it is important to get the legislation right.
- 1.3 I therefore recommend that a body such as the Law Commission should be asked to investigate the most appropriate shape of legislation to govern the intelligence agencies in New Zealand. In particular, I recommend that body should be asked to consider:
- What type and level of oversight would be most appropriate in this environment; and
 - How the legislation should best be crafted to ensure GCSB is accountable for how it protects personal information.

2. The law needs to clarify GCSB's powers to intrude into privacy

- 2.1 GCSB has a crucial role to play in the security of New Zealand. To perform that role GCSB needs to have a range of legal powers. Inevitably, these powers will permit GCSB to intrude – often to a significant extent – into personal communications and other key aspects of personal privacy.
- 2.2 To be acceptable, those powers need to be demonstrably necessary and justified, and must go only as far as is necessary to achieve their legitimate aim. They must also be subject to rigorous independent oversight, to guard against misuse.
- 2.3 One of the aims of this Bill is to clarify the scope of existing legal powers that have been the subject of confusion. I support this aim. In a free and democratic society, it is vital to clearly explain the limits within which the intelligence agencies may act. Without that clarity, there is little chance that the intelligence agencies can be held properly accountable for their actions.
- 2.4 However, it is not yet entirely clear what powers are appropriate, particularly since GCSB has three distinct but occasionally overlapping roles: intelligence-gathering about foreigners; cybersecurity expertise and advice (which will also involve collecting information about New Zealanders' activities); and using its capabilities to assist other key agencies in New Zealand.
- 2.5 This Bill is being put before the House at a time when the activities of intelligence agencies world-wide are under serious scrutiny. For instance, in today's media, there are questions about GCHQ's activities in the United

Kingdom in intercepting communications of G20 delegates. The fallout from the whistleblower's revelations about the activities of the NSA in the United States is continuing, and the questions raised by those revelations will not be answered for some time to come.

2.6 There is therefore good reason to postpone consideration of this Bill at least for a short time, to enable us to develop a clearer perspective on what powers New Zealand intelligence agencies should have to perform their functions.

3. Appropriate oversight is vital – but it is not yet clear what the best model of oversight is

3.1 The Bill aims to enhance oversight of GCSB activities and to some extent, it does so. For instance, it brings more under the warrant system than is currently the case (though it could potentially go further), and it boosts the role of the Inspector General of Intelligence and Security (IGIS). Whether the IGIS can perform the many tasks expected of the office will depend very largely on receiving – and then continuing to receive – an adequate level of resources, as the explanatory note to the Bill recognises. Failure to resource the IGIS properly would result in a failure of the principal oversight mechanism that this Bill creates.

3.2 However, more fundamentally, it is not yet clear that the model reflected in either the current or the proposed legislation is the best oversight model for modern intelligence agencies. There are a number of alternative systems in similar nations overseas, such as Canada or the United Kingdom. These are worth considering in more detail, to see whether they would suit the New Zealand environment, with or without modification.

3.3 I appreciate that the security environment has changed significantly since the current GCSB legislation was written. The threats that New Zealand faces are increasingly sophisticated and international in nature. There is therefore a level of urgency about the matter, to deal with the challenges that GCSB already has to manage.

3.4 However, it is because of those significant changes to the security environment, and the dynamic nature of that environment, that it is worth investing in some additional consideration to ensure that we have the soundest model possible.

3.5 On a more technical note, the Bill is also not specific about what the oversight mechanism is for GCSB's activities under the function listed in 8C – providing capability support to other agencies. There are express references to provisions governing the scope of what can be done under 8A and 8B, but the Bill is silent about 8C. The oversight mechanism is presumably the IGIS, but some further clarity on the point would be useful.

4. The Bill's proposals to enhance privacy protection are a start, but some questions are still unclear

4.1 Under the Privacy Act, the Privacy Commissioner can only consider whether GCSB has properly responded to requests for access to, and correction of,

personal information. Matters such as collection, use and disclosure of personal information by GCSB are not covered by the Privacy Act.

- 4.2 The Privacy Commissioner therefore has no direct mandate to consider whether GCSB is acting within the law under any of its three listed functions (intelligence gathering; collection and use of information to support its cybersecurity advice function; and providing capability to assist other agencies). It is important to note that that will not change under this Bill.
- 4.3 An example of personal information that can raise serious concerns is so-called 'metadata', for instance in the form of telecommunications traffic information. Metadata is not necessarily innocuous. It can provide a detailed map of a person's life – such as tracking their location, contacts and interests. This is why it is valuable in the intelligence arena. But it is also why effective oversight is required to ensure that it is collected and used appropriately, not as the tool of mass surveillance that it has the capacity to be, if unchecked.
- 4.4 The Bill somewhat improves the current controls over GCSB's collection and use of personal information. It requires GCSB to develop an internal policy in consultation with the Privacy Commissioner, for the activities covered by that code to be regularly audited, and for the results of the audit to be reported to the Privacy Commissioner. This at least provides the Privacy Commissioner with a window into the activities of GCSB that does not currently exist, and it signals a strong intention that GCSB will behave appropriately and be accountable for its activities.
- 4.5 However, it is unclear what consequences if any would result if the Privacy Commissioner were to become concerned about any activity. The Commissioner would still have no formal mandate to do anything about matters such as collection and use, and so it is not clear whether the Privacy Commissioner could report any concerns and if so, to whom.
- 4.6 Instead, the Bill currently appears to anticipate that the IGIS will be the sole enforcement authority. The role of the Privacy Commissioner would probably be to inform the IGIS of any concerns, so the IGIS in turn could consider the issue and report if required. If this is the intention, I note in passing that the legislation could set this out more clearly.
- 4.7 While working through the IGIS will often be the most appropriate approach to take, a backstop measure would be useful to ensure that the Privacy Commissioner could directly air serious privacy concerns (for example if the IGIS were too busy to deal with the matter). To do this, the Bill could mirror the provisions of section 81 of the Privacy Act, which gives the Privacy Commissioner the ability to report directly to the Prime Minister and for the Prime Minister then to be able to table the report before the House.
- 4.8 An alternative approach, to which consideration could be given, is that a breach of the internal policy could be deemed to be an interference with privacy, and the Privacy Commissioner's investigation powers would be triggered. This would better recognise the position of individuals who are adversely affected by breaches of the internal policy. The effect of this option

would also more closely reflect the original Law Commission recommendation to make the intelligence agencies subject to the Privacy Act in a greater range of circumstances.

- 4.9 It is useful that the Privacy Commissioner would be consulted in the development of the internal policy on handling personal information, and that that policy would have to be regularly reviewed. However, the Bill does not specify the frequency of reviews, and the nature of the review and the nature of audits also appear to be at the Director's discretion. For example, it is worth considering whether the Privacy Commissioner, the IGIS or both could formally trigger a review of the internal policy if there appear to be concerns with how it is operating or how it is interpreted.

5. Conclusion

- 5.1 I recommend that further time should be spent to determine the best shape for this legislation and that a body such as the Law Commission should be invited to consider the matter in more detail.
- 5.2 In particular, I recommend that further consideration should be given to different oversight models, and to the most appropriate method of making GCSB accountable for how it handles personal information.