

22 April 2022

National Office
Ministry of Justice
C/- Jason Lescelius, ISA Review Secretariat
Wellington

ISAReview@dpmc.govt.nz

Tēnā koe

Review of the Intelligence and Security Act 2017

1. Thank you for your letter seeking my views on the ISA and OPC's experience with the ISA.
2. I am pleased to report that our experience has largely been positive, and the two intelligence agencies have constructively engaged with OPC about privacy issues, in statutory consultations and when proactively seeking OPC's advice and input.
3. The enactment of the ISA in 2017 represented a significant reform of the legislation relating to the intelligence and security agencies. While affirming the continuing mandate of the agencies to protect important national security interests, the ISA has substantially improved the legislative framework from a privacy and transparency perspective.
4. Before the ISA, the two agencies were exempt from most of the privacy principles (other than the individuals rights of access and correction and the protections relating to unique identifiers. The ISA narrowed that exemption, and the intelligence agencies are now subject to most of the privacy principles in the Privacy Act as the Privacy Act exemption (section 28 of the Privacy Act) other than principles 2, 3 and 4(b) relating to the collection of personal information.
5. While this has largely regularised the previous gap in oversight from OPC's perspective, I note that the privacy complaints that OPC receives about the intelligence agencies continue to be complaints about a person's access to their own personal information under privacy principle 6. The role of the Inspector-General continues to be a critical one in identifying privacy issues in the operations of the intelligence agencies, with the consultation provisions in the ISA and the Privacy Act enabling discussion between the two oversight Offices.

6. Under the ISA, the oversight role of my Office has expanded with the statutory consultations on direct access agreements. Our input has also been sought on the issue and review of ministerial policy statements that have privacy considerations

7. In response to your particular areas of interest:

a. My perspective on how well the intelligence and security agencies are complying with the privacy principles that apply to them is that the agencies are generally performing well in meeting my Office's expectations in relation to the privacy complaints we investigate, although these have so far been limited to access complaints under principle 6.

b. My view on how the Act balances privacy rights with the intelligence and security functions is that the legislation represents a significant improvement on the previous legislation. The Privacy Commissioner's [submission](#) to the 2015 review opened with a quote from the former United Kingdom Independent Reviewer of Terrorism Legislation, David Anderson QC:

"A successful response to [terrorism and other] threats depends on entrusting public bodies with the powers they need to identify and follow suspects in a borderless online world. But trust requires verification. Each intrusive power must be shown to be necessary, clearly spelled out in law, limited in accordance with human rights standards and subject to demanding and visible safeguards."

The Commissioner's 2015 submission also rejected the notion of a "balance" – rather than trading off privacy, it is vital to focus on the need to accommodate the protection of both security interests and privacy.

I endorse this framing of the objective to ensure that the ISA continues to provide both appropriate and necessary powers to support intelligence functions and the commensurate checks and balances for the privacy and human rights of individuals.

c. My view on the information sharing provisions in the Act is that by providing authority for the intelligence agencies to gain access to government information holdings, these provisions give useful transparency for the public about this activity. The process of operationalising these provisions is also a necessary discipline for both the intelligence agencies and the information holder agencies to ensure that the information sharing is directed and in accordance with agreed protocols. Another benefit is that the provisions specifically invoke oversight and review mechanisms.

d. My view on the respective responsibilities of the Privacy Commissioner and the Inspector-General of Intelligence and Security is that generally this is working well in practice. I very much appreciate the collegial relationship that has developed between our respective offices. The IGIS is the specialist intelligence oversight body taking the lead in major investigations, and with OPC contributing specialist privacy expertise in statutory consultations, access complaint investigations, and through consultation between the IGIS and the Privacy Commissioner on particular matters.

Strengthening oversight tools and mechanisms

8. The terms of reference for the review indicate that the reviewers will take into account that the review should enhance trust and confidence in the intelligence and security agencies. Oversight plays an important role in assuring the public and I raise two matters for the reviewers' consideration that contribute to public trust and confidence.
9. The first is in the area of strengthening the oversight machinery. In 2014, the previous Privacy Commissioner established an oversight group of the Inspector-General, the Chief Ombudsman, and the Auditor-General to meet to co-ordinate and share insights about issues relating to oversight of the intelligence agencies. The Directors-General of the intelligence agencies occasionally join this meeting to update the oversight group on areas of development and improvement, and current issues.
10. This is a useful and practical response to the challenges of oversight in the intelligence and security context. However, it does not have any statutory backing, or specific resourcing allocation.
11. In 2015, the Privacy Commissioner raised the option of creating an Oversight Board of the relevant agencies. In my view this is an idea that warrants consideration in the current review, given the integral role of the oversight agencies in providing trust and assurance for the public and in monitoring the activities of the intelligence agencies within our respective jurisdictions.
12. The second option for consideration is the potential for strengthening the oversight tools within the ISA. For example, the Ministerial Policy Statement provision in the ISA has been a useful development and connects ministerial oversight and expectations with certain types of intelligence activities.
13. Another potentially very useful mechanism would be the addition of a set of principles within the ISA, to help guide intelligence agency decision-making about the appropriate use of intrusive powers depending on the particular circumstances.
14. For example, in the 2017 joint review of the Search and Surveillance Act (chapter 3), the Ministry of Justice and the Law Commission has recommended including a principles section in the SSA with a set of 7 potential principles that should be taken into account when State agencies are exercising powers of intrusion. I believe this is a promising potential development to guide the use of intrusive powers, and a similar set of principles would be well worth considering for the ISA.
15. As background context for this suggestion, the Privacy Commissioner's 2015 submission noted that surveillance is not well regulated by privacy and other law, outside of the Search and Surveillance Act 2012 (that applies to the law enforcement agencies). Under the ISA, Part 4 intelligence warrants enable the intelligence agencies to gain authorisation for activities that are otherwise unlawful under the criminal law. However, there is an inevitable lag between the rapid technological advances that enable privacy intrusions and the law's ability to regulate those intrusions.

16. The regulation of intrusive technologies by the intelligence agencies depends on the extent of any applicable constraints (such as the NZ Bill of Rights Act), and statements of expectation such as the Ministerial Policy Statements. In my respectful view, the ISA review is an opportunity to consider additional guidance measures that facilitate the oversight functions, as well as ongoing public trust and confidence in the necessary functions of the intelligence agencies and the appropriate use of intrusive powers. This also aligns with the consideration in the review's terms of reference that the law provides clear and understandable parameters of operation.

Information sharing

17. The review's terms of reference include how the Act may best enable the intelligence agencies to appropriately and effectively cooperate and share information with New Zealand government agencies and other partners
18. In relation to personal information, the Privacy Act is relevant to this discussion, as well as the ISA, in providing a decision-making framework to enable public sector agencies to respond to evident risk.
19. A useful and recent example in a very different context has been the demonstrable way that the Privacy Act has responded to the public health risk affecting the community with the sudden emergence of Covid-19. The Privacy Act enables appropriate government responses through the in-built decision-making mechanisms that provide discretion to share personal information on a risk-based approach.
20. This is also the case in relation to matters of national security, with the ISA's amendments to the privacy principles to provide broad scope for the intelligence agencies to use personal information (IPP10(2)) and for any agency to share personal information with an intelligence agency that is necessary for it to carry out any of its functions (IPP11(1)(g)).
21. One of the issues I am aware of is the ongoing need to build maturity and experience within government agencies to foster improved confidence with applying discretion where this is clearly justified on the strong public interest grounds that are embedded in the privacy principles.

Conclusion

22. I trust that my initial comments are of assistance to the review. Please let me know if we can provide further information, discussion or input as the review progresses.
23. I am also available if you have questions about the privacy considerations arising from the review of the ISA, including information sharing and ensuring that the intelligence agencies have the best options in place for access to the information they need to execute their important functions, with appropriate oversight and review.
24. I note that the review is considering whether the ISA adequately provides for the collection of intelligence and the processing, analysis, retention and destruction of collected

information and data. Please let us know if we can assist with information about the role of the Privacy Act in relation to these aspects of the review (privacy principles 8-10).

25. I would welcome the opportunity to provide further input to the review on any particular options that are being considered that may have privacy impacts for individuals and we are available to assist if there are issues identified with the information sharing provisions or any other relevant aspects of the legislation.

Nāku iti noa, nā

A handwritten signature in blue ink, appearing to be 'Liz McPherson', written in a cursive style.

Liz McPherson

Deputy Privacy Commissioner and Acting Privacy Commissioner