

Intelligence and Security in a Free Society: Report of the first Independent Review of Intelligence and Security in New Zealand

Paper Five: Activities of the intelligence agencies – Cover and immunities

Proposal

1. This paper seeks Cabinet policy decisions about cover and immunities for the Government Communications Security Bureau (GCSB) and New Zealand Security Intelligence Service (NZSIS).

Executive summary

2. The report of the first *Independent Review of Intelligence and Security in New Zealand* (the review) makes a number of recommendations regarding how the intelligence and security agencies (the agencies) should operate. The reviewers recommend providing clear provisions relating to cover and immunities in the proposed new Act.
3. To take the reviewers' recommendations forward, we propose including provisions in the Intelligence Services and Oversight Bill (the Bill) enabling the use of cover and providing for an appropriate scope of civil and criminal immunities. These powers and immunities are necessary so that employees¹ and persons assisting the agencies can effectively perform the lawful duties and functions of the agencies.
4. We have tried to strike an appropriate balance between enabling effective security and intelligence functions and the rights of the community to be free from unnecessary or unreasonable intelligence agency activity, by placing appropriate limitations and controls on the use of these powers and immunities. We propose introducing limits on who can use the cover powers and access the immunities through the use of a Ministerial Policy Statement. The proposals should be considered alongside the oversight and accountability arrangements addressed in Cabinet paper three.
5. This paper proposes:
 - 5.1 providing the agencies with the power to establish, maintain and use assumed identity information for the purposes of maintaining the secrecy of the agencies' capabilities and activities and for future use;

¹ "Employees", for the purpose of this paper, should be read to include contractors, secondees and intergees, such as members of the Armed Forces who are seconded or integrated into the agencies.

- 5.2 providing employees with the ability to make misleading or false statements (or omissions) for the purpose of keeping the fact of their employment with the agencies secret;
 - 5.3 providing employees of the agencies and persons and entities assisting the agencies, with corresponding civil and criminal immunities related to assumed identity information;
 - 5.4 providing employees of the agencies with civil and criminal immunity for making misleading or false statements (or omissions) under their real identity;
 - 5.5 providing employees of the agencies and those assisting the agencies, with civil immunity for acts or omissions carried out in good faith and in a reasonable manner in the pursuance, or intended pursuance, of the agencies' duties, functions or powers;
 - 5.6 providing for criminal immunities and exceptions to offences in certain situations. The immunity proposals focus on:
 - 5.6.1 protecting employees and those assisting the agencies for acts to give effect to a warrant;
 - 5.6.2 protecting employees for acts necessary to obtain a warrant; and
 - 5.6.3 protecting employees when they assist Police or the Defence Force to carry out Police or Defence Force functions.
6. The exceptions focus on protecting employees for:
- 6.1 breaches of certain Road User Rules; and
 - 6.2 certain offences related to accepting unsolicited information.

Background

7. The NZSIS and GCSB are intelligence collection agencies focussed on protecting New Zealand's national security, international relations, and international and economic well-being. The agencies provide intelligence information that enables the government to make well-informed decisions about issues pertaining to the protection and well-being of New Zealand, and enable enforcement action where appropriate.
8. The information provided by the agencies to the government is often collected in secret. This secrecy is necessitated by the nature of the hostile activities that threaten New Zealand and New Zealanders, which can include espionage, violent extremism, transnational crime and sabotage. Without protections to keep the agencies' employees, capabilities and activities confidential, people who may harm New Zealand's interests could become aware that the agencies are investigating them. Those people may then change their behaviours and methods of communication to avoid detection. Employees could also become targets for those who wish to access classified information if their involvement with the agencies becomes known. One tool to address these problems is the use of cover arrangements, which is discussed in the following section of this paper.

9. The clandestine nature of hostile activities directed against New Zealand also requires the agencies to collect intelligence in ways that, at times, would normally breach the law. In order to conduct such activities lawfully, the agencies need to be empowered under statute and may need to obtain a warrant in accordance with their governing legislation. Like the NZ Police, there needs to be certainty that when employees (and persons assisting the agencies) are acting under such authorisation, they will not be exposed to civil or criminal proceedings when acting in good faith, in a reasonable manner and in accordance with legislation. Immunities from civil and criminal liability corresponding with the agencies' legislative powers are necessary to safeguard employees when they are carrying out the agencies' powers appropriately.
10. The review acknowledges the need for cover and immunities and has developed recommendations, which centre on:
 - 10.1 Cover – the need to allow for the agencies to obtain, create and use any identity information necessary for the purpose of maintaining the covert nature of their authorised activities and for the purpose of keeping the identity of their employees confidential (recommendations 78 – 83); and
 - 10.2 Immunities – the need for civil immunity for acts carried out in good faith in pursuance, or intended pursuance, of the agencies' duties, functions or powers, and the need for criminal immunities for acts done in good faith and in a reasonable manner to obtain or give effect to a tier one or tier two warrant, for minor offences, and for acts associated with cover (recommendations 82, 84 – 90).
11. Our objective in responding to the review is to enable both agencies to carry out their functions effectively by ensuring that they have necessary cover protections and effective immunities for employees and those assisting the agencies to perform the duties, functions and powers of the agencies. We have focused on ensuring:
 - 11.1 that there is a clear legal basis for establishing, maintaining and using assumed identity information and appropriate policy governing its use; and
 - 11.2 that there is a clear legal basis for employees and persons assisting the agencies to be immune from criminal and civil liability, including an appropriate link between the authorisation framework that permits acts that would otherwise be unlawful, and the immunities that would apply.
12. We recommend that the government accept the reviewers' recommendations in relation to cover and immunities. We note that some of the reviewers' recommendations in this area are cast at a relatively high detail. Accordingly, we propose additional detail to support a comprehensive and effective framework.

Government response: key principles for cover framework

13. Our proposals accept the recommendations of the review and develop further detail required for effective cover powers and cover-related immunities. A table setting out each of the reviewers' recommendations and the government's corresponding response is attached as an **appendix** to this paper.

14. We note that cover arrangements can involve both establishing, maintaining and using assumed identities and making misrepresentations under a person’s real identity. These two issues should be clearly separated.

The power to establish, maintain and use assumed identity information

15. We propose that the new Act should explicitly provide for both agencies to establish, maintain and use any assumed identity information necessary for the purposes of maintaining the secrecy of the agencies’ capabilities and activities and to develop cover arrangements for enabling potential future operations and capabilities. This should include the ability to create an assumed identity for anyone authorised to undertake an activity for the agencies.
16. This proposal reflects the fact that the agencies need to develop well-established assumed identities over time, often well before an authorised operation has even been contemplated. This “development” is essential for an assumed identity to be effective, especially when agencies are dealing with a sophisticated organisation that will notice if there is no background or history to an assumed identity.
17. Consistent with the reviewers’ recommendations, we propose that “assumed identity information” should extend to anything that can be used to establish identity, including the creation of a business or other entity. We propose the power to establish, maintain and use this information should extend beyond primary identity information (such as birth certificates) and secondary identity information (such as RealMe), to include aspects of an individual or entity background necessary to support an assumed identity (such as evidence of an entity’s commercial activity or of an individual’s domestic arrangements). The following table illustrates the type of assumed identity information required:

| Table One: “Assumed Identity Information” examples | | |
|--|--|--|
| Enabling provisions | Individual | Entity |
| <u>Primary identity information</u> (specific enabling provisions are required) | <ul style="list-style-type: none"> • birth certificate (NZ, Cook Islands, Niue, Tokelau) • NZ citizenship certificate | <ul style="list-style-type: none"> • certificate of incorporation • other registration, such as registration as a charitable entity |
| <u>Secondary identity information</u> (specific enabling provisions are required) | <ul style="list-style-type: none"> • NZ passport • IRD number • RealMe • drivers licence | <ul style="list-style-type: none"> • NZ business number • GST number |
| <u>Supporting identity information</u> (a general provision is sufficient) | <ul style="list-style-type: none"> • bank cards • community services card • loyalty cards • evidence of domestic | <ul style="list-style-type: none"> • company credit cards • branded items • staff identification cards • evidence of |

| | | |
|--|---|----------------------------------|
| | arrangements, including address <ul style="list-style-type: none"> • evidence of employment • credit information | commercial or financial activity |
|--|---|----------------------------------|

18. We propose expressly permitting government entities and issuing authorities to establish and issue assumed identity information when requested by the agencies. All requests should be made to the proper issuing authority. This legislative change may need to be carried out using specific enabling provisions in each of the other entities' governing legislation for primary and secondary identity information. A general provision within the proposed new Act should be created to enable supporting identity information to be established, maintained and used.
19. Some of the supporting identity information, such as branded items or evidence of domestic arrangements, may need to be established by the agencies independently of any other entity. We propose that the new Act should empower the agencies to establish assumed identity information independently of government entities, issuing authorities, or other organisations. This may involve creating supporting identity information without any primary assumed identity having been created, which may provide sufficient cover in some operational situations.
20. The review did not address the situations in which the agencies may need the assistance of non-government entities to establish, maintain, or use assumed identity information. This assistance might include, for example, assisting with the development of background information necessary to support an assumed identity. We propose that the new Act should permit non-government entities to assist with establishing, maintaining or using assumed identity information if requested by the agencies. Provision for assistance from non-government entities, while not mentioned by the reviewers, is necessary and is consistent with Australian legislation.
21. We propose that the agencies' exercise of their powers to establish, maintain and use assumed identity information should be governed by a Ministerial Policy Statement. This is consistent with the approach to Ministerial Policy Statements set out in Cabinet paper two. The Ministerial Policy Statement should address the broader exercise of cover powers as well as outline when employees would require use of an assumed identity, as operationally appropriate.
22. Activity carried out under an assumed identity should not be permitted in situations where a qualification is normally needed to obtain a form of identity information and the employee (or person assisting the agencies) does not have the qualification required. For example, an employee of the agencies who cannot pilot an aircraft would not be authorised to do so even though the employee has acquired a pilot's licence under an assumed identity. This is consistent with Australian legislation.
23. We do not propose to make any recommendation in this paper for the protection of assumed identity information in Court. Part two of the Law Commission's 2015 *Review of the Crown Proceedings Act and National Security Information in Proceedings* addressed this matter. Recommendation 29 of the Law Commission's review recommended that the Evidence Act 2006 be amended to provide for anonymity protections for sources and intelligence officers, which should apply in criminal and civil

proceedings. We can see considerable merit in this protection, which may be better addressed alongside the other national security information recommendations made by the Law Commission. As noted in Cabinet paper four, the Minister of Justice is currently developing a proposed government response to the Law Commission's report; this issue will be addressed in that response.

Keeping employment secret

24. Employees of the agencies may also need the ability to keep the details of their involvement with the agencies confidential. This is required for several reasons. Many employees have vast knowledge of operational matters and have access to classified information, which could cause them to become a target of foreign intelligence services if their identity became known. For those involved in covert/ clandestine operations, their sources may be compromised if their link with the agencies becomes known. A further example is an employee with family link that could result in repercussions if their employment with the agencies becomes known. We agree with the reviewers that broader protection is required.
25. Employees of both agencies may need to state that they work for another entity when filling out official forms or when dealing with other parties. However, making false or misleading statements (or omissions) may amount to a criminal offence, such as the offence of completing documents required at a border in a manner known to be false or misleading under section 342 of the Immigration Act 2009. Misleading or false statements could also result in civil liability, such as in contract documents. The review identifies that legislation should make provision for these types of situations.
26. We agree with the reviewers that it is necessary to allow employees of the agencies to make misleading or false statements (or omissions) under their real identity in order to keep the fact of their employment secret. We therefore propose that the new Act empower employees to misrepresent their employer for the purpose of keeping their employment with the agencies secret.
27. A Ministerial Policy Statement should provide parameters around the exercise of this power. The Ministerial Policy Statement should also develop policy on the statements that should be made about the employee's false employment details. For example, employees of the agencies may state that they work for other government entities. The agencies may need to consult with the other government entities concerned.

Immunities in relation to cover arrangements

28. While immunity arrangements are dealt with generally in the next section, we deal here with the immunities related to cover arrangements. This is one area where the reviewers' recommendations have required further development to ensure they can be implemented effectively.
29. In this area there are a number of issues to consider that are beyond what the review recommended; however, our proposals, which are set out below, are no broader than the reviewers' intention to provide for immunities corresponding with activities relating to cover arrangements.
30. The wording of recommendation 82 limits immunities to situations where cover is used as part of an "authorised operation" or to keep the fact of a person's employment with one of the agencies secret. In respect of the operational use of cover, it is important

that the immunities extend more widely than “authorised operations”. As discussed above, assumed identity information is not only created for a specific operation. It is established, maintained and used as a protective capability that can be called on when required.

31. We propose that immunities from civil and criminal liability should be broadly framed to extend to reasonable acts carried out in good faith and required to establish, maintain or use assumed identity information, for the purposes of maintaining the secrecy of the agencies’ capabilities and activities and to develop cover arrangements for enabling potential future operations and capabilities. Australian legislation establishes an appropriate scope for criminal immunity by covering any act that would not be an offence if an assumed identity were the person’s real identity. We propose adopting a similar boundary.
32. These immunities should extend to the agencies’ employees as well as any other person or entity (government or non-government) that assists the agencies, including employees of issuing authorities for assumed identity information. Employees of issuing authorities may otherwise be subject to an offence under their own governing legislation; for example, it is an offence under section 30 of the Passports Act 1992 for a member of the Department of Internal Affairs to issue a New Zealand travel document without lawful authority or reasonable excuse, knowing that the person to whom it relates is not entitled to be issued it. The immunity provision will expressly provide for immunity from such offences.
33. We also propose that employees who need to misrepresent the identity of their employer should have immunity from civil and criminal liability related to making misleading or false statements (or omissions) for the purpose of keeping their employment with the agencies secret.

Statutory incorporation of cover powers and associated immunities

34. We propose implementing these recommendations in a form that could be considered different to that suggested by the reviewers, in order to achieve the desired outcomes. This may require both a general provision in the new Act and specific provisions in other legislation. Table one (above) illustrates how general and specific provisions could be applied.
35. Specific provisions are already established in the Births, Deaths, Marriages and Relationships Registration Act 1995, the Land Transport Act 1998 and the Electronic Identity Verification Act 2012. Other Acts that may need to be amended include the Passports Act 1992, the Immigration Act 2009 and the Companies Act 1993.
36. Retaining and extending this approach provides certainty to the agencies and to employees of issuing authorities that need to comply with their legislative frameworks in order to satisfy requests for assumed identity information. The specific provision approach also enables protections to be established that prevent the disclosure of assumed identity information for security reasons (for example, as already provided for in section 78 of the Births, Deaths, Marriages and Relationships Registration Act 1995). The Identity Information Confirmation Act 2012 may need to be amended to enable the agencies to request the restriction of searches of applicable databases when a request pertains to assumed identity information.

37. As well as retaining and establishing certain specific provisions, general provisions will also be needed in the proposed new Act to empower the use of primary identities, including allowing for the creation of supporting identity information. Much of this work is detailed and can appropriately be dealt with as the Bill is being drafted.
38. The reviewers recognised that other government entities also need to conduct undercover and covert/ clandestine operations. We accept that some of the existing specific provisions related to assumed identity information also currently apply to the NZ Police. We note that policy changes under the Bill will not affect the cover arrangements already in place for the NZ Police.
39. We note that the NZ Police is currently working on policy proposals relating to assumed identities and that the need for the NZ Police to resolve these issues will likely be made more urgent by the proposed new Bill. We propose that the NZ Police (and any other government entities that may require similar protections) should address reform of their own arrangements. However, we note that there is existing Cabinet policy approval for passports to be issued to employees of the NZ Police and other government entities under an assumed identity (CAB Min (13) 27/5 refers). If a specific provision is added to the Passports Act 1992 to enable the agencies to establish, maintain and use passports issued under an assumed identity, we propose that the provision be extended to other entities in accordance with the existing Cabinet policy approval.

Government response: key principles for immunities framework

40. Some of the agencies' functions involve carrying out activity that would be unlawful if it was not enabled in the agencies' governing legislation. The review notes that immunities are necessary for employees to perform their functions effectively and without fear of prosecution. Accordingly, the reviewers recommend a range of criminal and civil immunities for the agencies. The reviewers consider that persons assisting the agencies should also be covered by immunities to ensure that they are not penalised for complying with requests to assist the agencies.
41. The immunities available to the agencies currently vary in scope. There is a significant gap in the immunities available to NZSIS employees as they currently fall outside the coverage provided by the civil immunity provision in the State Sector Act 1988. There is also no criminal immunity for reasonable acts carried out by NZSIS staff in good faith in order to obtain a warrant, which is an immunity available to GCSB employees under the Government Communications Security Bureau Act 2003. The review recommends that the immunities should be applied consistently to both agencies (recommendation 84).
42. We agree with the reviewers' recommendations regarding civil and criminal immunities but propose further detail, which is required to develop the recommendations into policy. A table setting out recommendations related to immunities is attached as an **appendix** to this paper.
43. We propose that the same immunities and exceptions should apply to the employees of both agencies (although one of the exceptions should only protect NZSIS employees). We propose that the comprehensive immunity provisions should be incorporated into the proposed new Act rather than including immunities as provisions in other legislation. This is in line with the need for consistent immunities for both agencies and the need for a comprehensive immunity regime without legislative gaps.

This approach will also provide greater transparency. The exceptions, however, may require amendments to specific offences that exist in other legislation.

Civil immunity

44. We propose that immunity from civil liability should apply to all acts carried out in good faith, in a reasonable manner, and in pursuance or intended pursuance of the duties, functions or powers of the agencies, which is consistent with section 86 of the State Sector Act 1988. The immunity should protect both employees of the agencies and persons and entities assisting the agencies. Providing civil immunities to the employees of both agencies is consistent with recommendation 89 of the review and with recommendation five of the Law Commission's 2015 *Review of the Crown Proceedings Act and National Security Information in Proceedings*, which recommends that statutory immunity for Crown employees be retained.
45. The question arises of how to best achieve this civil immunity. Cabinet paper four proposes bringing both agencies under the State Sector Act 1988, which includes the civil immunity provision for public sector employees (section 86). However, the State Sector Act 1988 provision does not provide civil immunity for persons assisting the agencies. Furthermore, the State Sector Act does not explicitly address activities that would otherwise be unlawful but for the agencies' authorising regime. To ensure a comprehensive and coherent framework, we propose including civil immunity provisions in the new Act. This approach will provide a provision that is consistent with the State Sector Act 1988 while also providing a clear link to all of the agencies' duties, functions and powers, including:
 - 45.1 extending civil immunity to persons assisting the agencies;
 - 45.2 addressing activities associated with assumed identity information and with keeping the fact of employment a secret (as addressed in the preceding section of this paper); and
 - 45.3 addressing acts necessary to obtain or give effect to a tier one or tier two warrant and acts carried out to assist the NZ Police or the New Zealand Defence Force (which are discussed below).
46. We agree with the reviewers that none of these civil immunities will prevent the Crown being held directly liable for breaches of the New Zealand Bill of Rights Act 1990 by public officials. While an individual public sector employee may be immune from liability, if a person's human rights have been breached, that person may still have a remedy against the Crown for public law compensation. This is consistent with recommendation six of the Law Commission's 2015 *Review of the Crown Proceedings Act and National Security Information in Proceedings*.

Criminal immunity

47. The review recommends that immunity from criminal liability should apply to a number of specific situations:
 - 47.1 acts carried out in good faith and in a reasonable manner that are reasonably believed to be necessary to give effect to a tier one or tier two warrant;

- 47.2 acts carried out in good faith, in a reasonable manner and in accordance with the purposes of the Act to obtain a tier one or tier two warrant;
- 47.3 minor offences or infringements that may need to be committed in the course of an investigation carried out under a tier three Ministerial Policy Statement (such as exceeding a speed limit, which is a breach of the Road User Rules);
- 47.4 acts related to creating or maintaining cover, or to keep the fact of employment by the agencies a secret (these were addressed in the preceding section).

Giving effect to a tier one or tier two warrant

- 48. We propose that the new Act should maintain the status quo of providing the employees of the agencies with criminal immunity for acts carried out in good faith and in a reasonable manner that are reasonably believed to be necessary to give effect to a tier one or tier two warrant. We propose that the immunity should apply if the person acting under the tier one or two warrant believes on reasonable grounds that the preconditions for the exercise of that warrant have been satisfied, which is consistent with the immunity for the NZ Police under section 166 of the Search and Surveillance Act 2012.
- 49. A concern of the agencies, which we propose to address, is uncertainty about liability when a person acts under a warrant that they reasonably believe is valid but later turns out to be invalid. While Cabinet paper three identifies that the IGIS will not have the power to declare a warrant invalid, a court would have such a power. We propose to provide certainty that persons acting under a warrant are immune from civil or criminal liability, even if the warrant under which they are acting is later judged to have not been validly issued. This is consistent with the protection provided by section 27 of the Crimes Act 1961 for the NZ Police and others who execute judicially issued warrants.
- 50. We also propose that criminal immunity should extend to persons assisting the agencies (as it does under current legislation covering the two agencies' authorised activities).

Obtaining a tier one or tier two warrant

- 51. We propose that criminal immunity should extend to acts carried out in good faith, in a reasonable manner and in accordance with the purposes of the Act to obtain a tier one or tier two warrant. At present, only the GCSB is covered by this protection. We agree that that this provision should be extended to employees of the NZSIS. The example given by the review is using a video of extreme violence to support an application for a warrant. Copying objectionable material of this nature to provide to another person may amount to an offence under the Films, Videos and Publications Classification Act 1993. Employees of the agencies should not be put at risk of criminal prosecution in this type of situation.
- 52. In order to engage the immunity, we propose that the new Act should make it clear that the employee must reasonably believe that his or her actions are necessary to obtain a warrant, and that acts must be carried out in good faith, in a reasonable manner, and in accordance with the purposes of the Act. The immunity would not extend to activities that in themselves would require a warrant.

53. This criminal immunity is consistent with the immunity for the NZ Police provided by section 165 of the Search and Surveillance Act 2012.

Acts associated with a Ministerial Policy Statement

54. The review recommends that minor offences or infringements that may need to be committed in the course of an investigation carried out under a Ministerial Policy Statement should be covered by criminal immunity.
55. Activities carried out under a Ministerial Policy Statement are, by definition, activities that are lawful. Legislative provisions relating to these activities should exist to anticipate particular situations where a minor offence may need to be carried out and where it would be unreasonable to expect the agencies to have applied in advance for a tier one or tier two warrant.
56. An example is a breach of the Road User Rules by NZSIS employees who are undertaking covert/ clandestine visual surveillance activities. These rule breaches may include traffic offending such as speed, traffic signal, stopping and parking offences (which can occasionally be an operational necessity when undertaking visual surveillance).
57. We propose that an exception (rather than an immunity) to specific Road User Rules is sufficient. This exception should be similar to that for the NZ Police under the Land Transport (Road User) Rule 2004. It should apply to the NZSIS only and should account for the clandestine/covert nature of NZSIS surveillance. The exception should not extend to reckless or dangerous driving that endangers other drivers on the road, and it should require NZSIS employees to take all reasonable steps to avoid injury or damage or interference with any other person.
58. Another example of offending that may require protection relates to the handling of information provided by third parties to the agencies. This information is important as it can provide the initial lead that begins an intelligence investigation. For example, it may provide domestic or foreign intelligence as well as information relating to cybersecurity and information assurance. In some circumstances, however, the source or provenance of the information will not be accurately ascertainable and receiving the information could amount to an offence (such as the offence of receiving under section 246 of the Crimes Act 1961). This has become particularly relevant for the agencies after the Supreme Court held in *Dixon v R* that data was capable of being stolen property. This means, for example, that when third parties conducting unlawful activities online choose to share information with the agencies, accepting that data could amount to an offence (such as receiving stolen property).
59. We propose an exception to offences related to accepting unsolicited information from third parties (such as the offence of receiving stolen property). The exceptions should be limited by the agencies' obligation to comply with all human rights standards recognised by New Zealand law. This obligation prevents the agencies from receiving information from third parties when the information is reasonably believed to have been obtained through torture or any other serious abuse of human rights. This will require the agencies to take reasonable steps to ascertain whether the information was obtained through a serious breach of human rights. The agencies' civil immunity should also apply when unsolicited information is received.

60. The exception to offences relating to accepting unsolicited information will not cover situations where the agencies have prospectively sought information that has the potential to be obtained by unlawful means, which will require a tier one or tier two warrant. The IGIS has the power to review whether or not it might have been feasible to have obtained warrants prospectively, as outlined in Cabinet paper three on oversight. As a further safeguard, we propose a restriction on the subsequent use of unsolicited information that has been obtained by unlawful means. Such information should not be passed onto other entities that do not have a similar exception (such as the NZ Police). This should not prevent the information being used to develop intelligence reports to be disseminated to other government entities.

Immunities when assisting other New Zealand government entities

61. Cabinet paper one accepts the reviewers' recommendation that the agencies should have a specific co-operation and assistance function ("the assistance function") in addition to the co-operation that occurs under their other two functions (intelligence collection and protective security). The assistance function would allow for co-operation in three ways:

| Table Two: Assistance and co-operation under the agencies' assistance function | | | | |
|---|--|--|--|--|
| | Entity being assisted | When agencies can assist | What power do the agencies act under while assisting | Source of immunity/exceptions |
| 1. | Agencies assist each other. | Agencies can assist each other to carry out joint functions in accordance with their proposed new joint legislation. | Powers provided to the agencies by the proposed new Act (the agencies' governing legislation). This may require a warrant for tier one or tier two activity. | The proposed new Act governing the agencies (and any other legislation that might be amended during drafting in order to provide legislative provision for the immunities or exceptions). |
| 2. | Agencies assist the NZ Police or New Zealand Defence Force (NZDF). | Agencies can assist the NZ Police or NZDF to carry out any NZ Police or NZDF function. | NZ Police or NZDF powers, which may originate from legislation, common law, prerogative, customary international law, or international agreements. | Immunities that attach to Police or NZDF powers, which may source from legislation, common law, prerogative, customary international law or international agreements. Civil immunity will source from the agencies' legislation |

| | | | | |
|----|---|---|--|---|
| | | | | <p>since that civil immunity applies to acts carried out in pursuance, or intended pursuance of the duties, functions and powers of the agencies.</p> <p>We note that not all of the NZ Police and NZDF immunities can extend to the agencies, as detailed in the section below.</p> <p>Therefore, we propose that the agencies should have an additional immunity that attaches to their specific assistance function in order to provide immunity when there are such gaps.</p> |
| 3. | Agencies assist any other government entity (whether in New Zealand or overseas). | Agencies can assist where it is necessary to respond to an imminent threat to the life or security of a New Zealander overseas, or any person in New Zealand or on the high seas. | Powers provided to the agencies by the proposed new Act (the agencies' governing legislation). This may require a warrant for tier one or tier two activity. | The proposed new Act governing the agencies (and any other legislation that might be amended during drafting in order to provide legislative provision for the immunities or exceptions). |

62. As table two demonstrates, when the agencies are assisting Police or NZDF to carry out a NZ Police or NZDF power, there is a question as to what criminal immunity the agencies might have. This was a concern expressed by the reviewers. The review recommended that when the agencies assist the NZ Police or NZDF, the agencies should act within the scope of the powers of the NZ Police or NZDF and should not have a broader criminal immunity than the immunity associated with those powers.
63. Where a particular NZ Police or NZDF power has a corresponding immunity that cannot extend to the agencies, the agencies cannot effectively assist without the risk that their employees could face criminal liability. This may have the effect of hindering assistance by the agencies to the NZ Police or the NZDF.

64. Therefore, we propose an additional immunity from criminal liability for employees of the agencies who are carrying out the agencies' assistance function. This immunity should require acts to be carried out in good faith, in a reasonable manner, and the employee must reasonably believe that their action is necessary to give effect to the agencies' assistance function for the purpose of assisting Police or NZDF.
65. The agencies should be limited to acting within the scope of the powers of the NZ Police or the NZDF. The agencies should only be immune from acts carried out within that scope. This is consistent with the Law Commission's 2007 *Review of the Search and Surveillance Powers*, which stated that "the courts will always assume that a statute that authorises people to do particular acts is intended to immunise them from criminal or civil liability for acts done within the limits of that statutory authority." We note that it should not be possible to expand the powers of Police or the NZDF by cooperating with the NZSIS or GCSB.
66. The purpose of linking this immunity to the assistance function is to clarify that the employees of the agencies will have a criminal immunity for acts carried out in good faith and in a reasonable manner when assistance is provided under Police or NZDF powers. Oversight arrangements for the NZ Police, the NZDF and the agencies, such as those provided by the Independent Police Conduct Authority and the IGIS, will help to ensure that any assistance that is provided under the specific assistance function remains within the bounds of the NZ Police or NZDF powers.
67. If any further issues relating to the agencies' assistance to Police or the NZDF emerge, then these can be addressed through NSC-16-Min-0008 recommendation 53, which authorised the responsible Ministers to make any necessary policy decisions relating to the warranting regime that may emerge through the drafting process.

Immunities and human rights law

68. To maintain public confidence, we propose retaining the provision in the agencies' existing governing legislation that provides that the agencies must act in accordance with New Zealand law, including all human rights standards recognised by New Zealand law, when performing their functions. This will ensure that the immunities cannot be used to circumvent human rights law, and is consistent with the review's recommendations that the agencies act in accordance with human rights law and obligations.

Recommendations

The Minister for National Security and Intelligence and the Minister Responsible for the GCSB and in Charge of the NZSIS recommend that the National Security Committee:

Cover

1. **agree** that cover arrangements, which involve both the establishment, maintenance and use of assumed identities and making misrepresentations under a person's real identity, are necessary to protect the secrecy of the agencies' employees, capabilities and lawful activities;

Assumed identities

2. **note** recommendation 78 of the review that the legislation should explicitly provide for the agencies to obtain, create and use any identity information necessary for the purpose of maintaining the secret nature of their authorised activities. This should include the ability to create cover for anyone authorised to undertake activity for the agencies;
3. **agree** to empower the agencies to establish, maintain and use assumed identity information for the following purposes:
 - 3.1 maintaining the secrecy of the agencies' capabilities and activities; and
 - 3.2 developing cover arrangements to enable potential future operations and capabilities;
4. **agree** that the framework should empower an authorised person to:
 - 4.1 request other government entities to assist with establishing, maintaining and using an assumed identity;
 - 4.2 permit a non-government entity or individual to assist with establishing, maintaining and using an assumed identity if requested;
5. **agree** to permit the agencies to establish, maintain and use assumed identity information independently of other entities where necessary;
6. **note** recommendation 79 of the review that "identity information" should include anything that could be used to establish identity, such as credit cards and shell companies, in addition to traditional forms of identification, such as passports and driver licences;
7. **agree** that "assumed identity information" should be anything that may be needed to establish, maintain and use an assumed identity;

Misrepresentation of employer

8. **note** recommendation 80 of the review that the agencies should also have the ability to obtain, create and use identification information necessary to keep the identity of their employees confidential;
9. **agree** to permit employees of the agencies to make misleading or false statements (or omissions) under their real identity for the purpose of keeping the fact of their employment with the agencies secret;

Ministerial Policy Statements

10. **note** recommendation 81 of the review that the use of these powers should be covered by a tier three authorisation (Ministerial Policy Statement), to ensure they are exercised only where necessary and proportionate;
11. **note** that a Ministerial Policy Statement should address the exercise of the agencies' power to establish, maintain and use assumed identity information, including limitations and restrictions;

12. **note** that a Ministerial Policy Statement should provide parameters on the use of false or misleading statements (or omissions) by employees under their real identity;

Cover-related immunities

13. **note** recommendation 82 of the review that there should be corresponding immunities from civil and criminal liability for reasonable acts done in good faith to create or maintain cover as part of an authorised operation, or to keep the fact of a person's employment with the NZSIS or GCSB secret;
14. **agree** that criminal and civil immunity should apply to acts required to establish, maintain and use assumed identity information, for the purpose of maintaining the secrecy of the agencies' capabilities and activities and to develop cover arrangements for enabling potential future operations and capabilities;
15. **agree** that this immunity should:
 - 15.1 protect GCSB and NZSIS employees; and
 - 15.2 protect individuals and entities (both government and non-government) assisting the agencies, including the employees of issuing authorities;
16. **agree** that criminal and civil immunity should apply to the establishment, maintenance and use of an assumed identity as if the assumed identity and any supporting identity information, pertained to the person's real identity;
17. **agree** that criminal and civil immunity should apply to misleading or false statements (or omissions) that are carried out under an employee's real identity to keep the fact of their employment secret;

Incorporation of cover powers and cover-related immunities in legislation

18. **note** recommendation 83 of the review that powers and immunities relating to assumed identity information should be incorporated through general provisions in the legislation governing the agencies, rather than by inserting specific exemptions in other legislation;
19. **note** that we consider that there may be a need for both a general provision for assumed identity information in the new Act as well as specific provisions in certain other legislation:
 - 19.1 specific provisions may need to be included in other legislation governing core assumed identity information, such as the Immigration Act 2009, the Companies Act 1993 and the Passports Act 1992, to provide certainty to the agencies and to issuing authorities;
 - 19.2 general provisions in the proposed new Act should address the use of primary identities and the establishment of supporting information;
20. **agree** that work should be undertaken with the Parliamentary Counsel Office to determine the appropriate approach to establishing general provisions relating to assumed identity information and, where necessary, specific provisions in other legislation to achieve the desired policy outcomes;

21. **note** that Police (and other government entities if necessary) should address reform of their own arrangements, if necessary;
22. **agree** that if any new specific legislative provision is made in drafting to amend the Passports Act 1992 in order to enable passports to be issued under an assumed identity, this provision should extend to Police and other government entities in accordance with existing Cabinet policy approval;

General immunities

23. **note** that immunities from civil and criminal liability are necessary to safeguard employees and those assisting the agencies, when performing the agencies' functions that involve carrying out an activity that would be unlawful if it was not enabled under the agencies' legislation;
24. **agree** with recommendation 84 of the review that the same immunities should apply to both agencies, in line with the recommendations that the agencies share functions and an authorisation regime;
25. **agree** with recommendation 85 of the review that immunities should also apply to anyone required to assist the agencies, such as telecommunications companies, or to human sources or agents acting at the agencies' request or direction;

Civil immunity

26. **agree** with recommendation 89 of the review that employees of the agencies and any person acting at the request or direction of the agencies (persons assisting), should be protected from civil liability for acts or omissions carried out in good faith in pursuance, or intended pursuance, of the agencies' duties, functions or powers. This is the same protection as is provided to public sector employees under the State Sector Act 1988;
27. **agree** that an equivalent provision to the civil immunity provision in the State Sector Act 1988 will be required in the proposed new Act in order to extend immunity to employees of the agencies and persons assisting the agencies and to provide a clear link to the agencies' duties, functions and powers, as well as the new authorising environment;
28. **agree** that civil immunities should extend to all activities carried out by employees of the agencies and persons assisting the agencies, where those activities are consistent with the duties, functions and powers of the agencies, are reasonable and are carried out in good faith;
29. **note** that none of the civil immunities will prevent the Crown from being held directly liable for breaches of the New Zealand Bill of Rights Act 1990 by public officials;

Criminal immunity

30. **note** recommendation 86 of the review that the legislation should provide that no person should be subject to criminal liability for acts carried out in good faith and in a reasonable manner that are necessary to give effect to a tier one or tier two authorisation;

31. **agree** that there should be an immunity from criminal liability for employees of the agencies and persons assisting for acts carried out in good faith and in a reasonable manner that are reasonably believed to be necessary to give effect to a tier one or tier two warrant. This immunity should apply if the person acting under the warrant believes on reasonable grounds that the preconditions for the exercise of that warrant have been satisfied;
32. **agree** that criminal immunity for acts done to give effect to a tier one or tier two warrant should apply even if the tier one or tier two warrant is later judged to have not been validly issued;
33. **agree** with recommendation 87 of the review that employees of the agencies should also have an immunity from criminal liability for acts carried out in good faith, in a reasonable manner and in accordance with the purposes of the Act to obtain a tier one or tier two authorisation;
34. **agree** that for an employee to have criminal immunity for an act carried out in good faith and in a reasonable manner in order to obtain a tier one or tier two warrant, the employee must reasonably believe that his or her actions are necessary to obtain a tier one or tier two warrant. The immunity should not extend to activities that in themselves would require a warrant;

Exceptions from criminal liability

35. **note** recommendation 88 of the review that immunities for employees of the agencies should also extend to any relevant minor offences or infringements that may need to be committed in the course of investigations carried out under a tier three authorisation, such as breaches of road user rules;
36. **agree** that NZSIS employees involved in visual surveillance activity should have an exception to the Road User Rules, consistent with the exception for Police, providing those employees take all reasonable steps to prevent injury or damage or interference with any other person;
37. **agree** that employees of the agencies should have an exception to offences related to accepting unsolicited information unless the employee reasonably believed that the information was obtained by torture or another serious abuse of human rights, which will require taking reasonable steps to ensure that the information had not been collected using such practices;
38. **agree** that unsolicited information obtained by unlawful means should not be able to be passed on to other agencies that do not have an exception or lawful authorisation to receive such information. This should not restrict the ability of the agencies to share intelligence reporting based on information that was, or may have been, unlawfully obtained;

Immunity when assisting

39. **note** recommendation 90 of the review that where the GCSB or NZSIS is assisting another government agency to perform its functions, any immunities that apply to that other government agency being assisted should also apply to the GCSB and/or NZSIS;

40. **note** that the reviewers state that when assisting another government agency, GCSB and NZSIS employees should act within the scope of the powers of that other government agency being assisted and should not have a broader criminal immunity;
41. **agree** that the employees of the agencies should have immunity from criminal liability for acts carried out in good faith and in a reasonable manner that the employee reasonably believes are necessary to give effect to the agencies' assistance function for the purpose of assisting the New Zealand Police or the New Zealand Defence Force;
42. **note** that if any further issues relating to the GCSB or NZSIS's assistance to other government agencies emerge, then these can be addressed through NSC-16-Min-0008 recommendation 53, which authorised the responsible Ministers to make any necessary policy decisions relating to the warranting regime that may emerge through the drafting process; and

Immunities and human rights law

43. **note** that none of these immunities will allow employees of the agencies or persons assisting the agencies to avoid complying with New Zealand human rights law.

Authorised for lodgement

Rt Hon John Key
Minister for National Security and Intelligence

Hon Christopher Finlayson
Minister Responsible for the GCSB
Minister in Charge of the NZSIS

Appendix to Cabinet paper five

| Reviewers' cover-related recommendations | | |
|--|--|--|
| Review recommendation | | Comment |
| R.78 | The legislation should explicitly provide for the agencies to obtain, create and use any identification information necessary for the purpose of maintaining the secret nature of their authorised activities. This should include the ability to create cover for anyone authorised to undertake activity for the agencies. | <p>We agree and propose:</p> <ul style="list-style-type: none"> a. changing the terminology to “establish, maintain and use assumed identity information”; b. widening the purpose to include maintaining the secrecy of the agencies' capabilities and activities and to develop cover arrangements for enabling potential future operations and capabilities; c. being explicit that “anyone authorised to undertake activity for the agencies” includes individuals and entities (both government and non-government); d. explicitly permitting individuals, government and non-government entities and issuing authorities to establish assumed identity information; and e. permitting the agencies to establish assumed identity information independently of other entities and issuing authorities. |
| R.79 | “Identity information” should include anything that could be used to establish identity – such as credit cards and shell companies in addition to traditional forms of identification (such as passports and driver licences). | <p>We agree and propose:</p> <ul style="list-style-type: none"> a. using the term “assumed identity information”; and b. broadening the scope beyond identity documents to include supporting background information, such as bank cards, community services cards and evidence of a company's commercial activity. |
| R.80 | The agencies should also have the ability to obtain, create and use identification information necessary to keep the identity of their employees | We agree, in general. It is also important to distinguish the issue of using assumed identity information from situations where employees |

| | | |
|------|--|---|
| | confidential. | <p>(using their real identity) need to make misleading statements about their employment:</p> <ul style="list-style-type: none"> a. employees should be able to access assumed identities for the purposes of maintaining the secrecy of the agencies' capabilities and activities and to develop cover arrangements for enabling potential future operations and capabilities; b. employees should be able to make misleading or false statements (or omissions) under their real identity, for the purpose of keeping their employment with the agencies secret. |
| R.81 | The use of these powers should be covered by a tier three authorisation (Ministerial Policy Statement) to ensure they are exercised only where necessary and proportionate. | <p>We agree and propose:</p> <ul style="list-style-type: none"> a. using a Ministerial Policy Statement to specify when the agencies may establish, maintain and use assumed identity information and its associated immunity. The Ministerial Policy Statement should describe the limitations and restrictions on establishing, maintaining and using an assumed identity, which should only be permitted when it is operationally appropriate; and b. a Ministerial Policy Statement should be developed to provide parameters on the use of false or misleading statements (or omissions) by employees under their real identity. |
| R.82 | There should be corresponding immunities from civil and criminal liability for reasonable acts done in good faith to create or maintain cover as part of an authorised operation or to keep the fact of a person's employment with the NZSIS or GCSB secret. | <p>We agree and propose:</p> <ul style="list-style-type: none"> a. describing the immunity more widely so that the immunities apply for the establishment, maintenance and use of assumed identity information for the purposes of maintaining the secrecy of the agencies' capabilities and activities and to develop cover arrangements for enabling |

| | | |
|------|--|---|
| | | <p>potential future operations and capabilities;</p> <p>b. these immunities should extend to the agencies' employees and any other person or entity (government or non-government) who assists the agencies, including employees of issuing authorities;</p> <p>c. there should be immunity for employees of the agencies that make false or misleading statements (or omissions) under their real identity for the purpose of keeping the fact of their employment with the agencies secret.</p> |
| R.83 | These powers and immunities should be incorporated through general provisions in the legislation governing the agencies, rather than by inserting specific exceptions in other legislation as is currently the case. | We consider that there may be a need for both a general provision in the proposed new Act as well as specific provisions in certain other legislation. |

| Reviewers' recommendations related to immunities | | | | |
|---|---|--|-------------------------------|--|
| Review recommendation | What is covered? | For whom | Immunity from | Legal test and additional government proposals to immunity |
| R.82 | Act to create or maintain cover as part of an authorised operation. | Employees; persons assisting; entities and persons issuing assumed identity information. | Civil and criminal liability. | <p>Reasonable act carried out in good faith; in order to maintain cover; as part of an authorised operation.</p> <p>We propose the test be "for the purposes of maintaining the secrecy of the agencies' capabilities and activities and to develop cover arrangements for enabling potential future operations and capabilities" rather than "as part of an authorised operation".</p> <p>We also propose limiting this immunity to those</p> |

| | | | | |
|------|--|-------------------------------|---|--|
| | | | | empowered to use it as discussed in the preceding section. |
| R.82 | Act to keep the fact of a person's employment with the NZSIS or GCSB secret. | Employees. | Civil and criminal liability. | Reasonable act carried out in good faith; in order to keep employment secret. |
| R.86 | Act necessary to give effect to a tier one or tier two warrant. | Employees; persons assisting. | Criminal liability (also covered by civil immunity under R.89). | <p>Act carried out in good faith; in a reasonable manner; and the person must reasonably believe that the action is necessary to give effect to a tier one or tier two warrant.</p> <p>We propose that the immunity apply if the person exercising the warrant believes on reasonable grounds that the preconditions for the exercise of the warrant have been satisfied, including when there is a reasonable belief that the warrant is valid. This is consistent with the immunity for Police under section 166 of the Search and Surveillance Act 2012 and the protection under section 27 of the Crimes Act 1961.</p> |
| R.87 | Act to obtain a tier one or tier two warrant. | Employees. | Criminal liability (also covered by civil immunity under R.89). | <p>Act carried out in good faith, in a reasonable manner; in accordance with the purposes of the Act to obtain a tier one or tier two warrant. This is consistent with the immunity for Police under section 165 of the Search and Surveillance Act 2012.</p> <p>We propose that the immunity should require the employee to reasonably believe that his or her actions are necessary to</p> |

| | | | | |
|-------|--|-------------------------------|---|--|
| | | | | obtain the warrant. The immunity should not extend to activities that in themselves would require a warrant. |
| R.88 | Minor offences or infringements that need to be committed in the course of an investigation carried out under a tier three Ministerial Policy Statement. | Employees. | Criminal liability. | <p>Act carried out in good faith; in a reasonable manner; and must be reasonably required to carry out the activity governed by the Ministerial Policy Statement.</p> <p>We propose exceptions to these offences rather than immunities. This should be limited to an exception for certain breaches of the Road User Rules by the NZSIS and an exception to offences related to either agency obtaining information from third parties.</p> |
| R.89 | Act or omission in pursuance, or intended pursuance, of the agencies' duties, functions or powers. | Employees; persons assisting. | Civil liability. | Act or omission carried out in good faith; in a reasonable manner; and in pursuance or intended pursuance of the duties, functions or powers of the agencies. This follows the immunity found in section 86 of the State Sector Act. |
| R. 90 | Acts carried out to assist another entity under the agencies' assistance function. | Employees | Criminal liability (also covered by civil immunity under R.89). | <p>Immunities that apply to the entity being assisted should apply.</p> <p>We propose immunity from criminal liability should apply for acts carried out in good faith; in a reasonable manner; that the person reasonably believes are necessary to give effect to the agencies' assistance function for the purpose of assisting Police or the Defence Force.</p> |