
GCSB AND OVERSIGHT LEGISLATION

Introduction

The core New Zealand Intelligence Community (NZIC) consists of three agencies:

1. The Government Communications Security Bureau (GCSB);
2. The New Zealand Security Intelligence Service (NZSIS); and
3. The National Assessments Bureau (NAB), within the Department of the Prime Minister and Cabinet (DPMC).

The legislative framework for the NZIC is contained in four acts:

1. The Inspector-General of Intelligence and Security (IGIS) Act 1996;
2. The Intelligence and Security Committee (ISC) Act 1996;
3. The GCSB Act 2003; and
4. The NZSIS Act 1969

The NZSIS Act has been subject to some changes over the years, most recently in 2011 prior to the Rugby World Cup, but neither the GCSB Act nor the two oversight acts have been substantially amended since their enactments.

NAB is not subject to any specific legislation, as it does not exercise any particular powers.

It is essential that the GCSB has a clearly formulated and consistent statutory framework to operate within, and the public needs to have confidence that it is operating within the bounds of that legal framework.

Purpose of the Changes

The purposes of the amendments to the GCSB Act are:

- To provide for a clearly formulated and consistent statutory framework.

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- To update the GCSB Act to respond to the changing security environment, particularly in relation to cyber and information security. The increasing level of innovation in the cyber environment, while fuelling economic growth and international trade opportunities, is also giving rise to new security issues. The GCSB Act was enacted 10 years ago when cyber matters were less sophisticated and prominent.
- To respond to the changes in the public law environment since the GCSB Act was passed in 2003.

Why change is needed

Clarity of the statutory framework

The Kitteridge Review explained the difficulties of interpreting the GCSB Act alongside the NZSIS Act when the GCSB was providing assistance to NZSIS. The Compliance Review sums up the situation by saying that the GCSB Act is not (and probably has never been) completely fit for purpose.

The legal environment in which the GCSB Act is interpreted has developed since its enactment. The courts' consideration of law enforcement cases has provided further guidance about how intrusive state powers should be set out by statute, and highlights areas where powers may no longer be effective given changes in technology.

Providing for effective oversight

The lack of clarity means that the public, Parliament (and the Intelligence and Security Committee (ISC)), the Inspector-General of Intelligence and Security (IGIS), the responsible Minister, and the Director of the GCSB (and GCSB staff) face an unacceptable degree of uncertainty as to what the lawful functions of the GCSB constitute. This makes any oversight extremely difficult, relying as it does on extensive and complex analysis of the meaning of the GCSB Act and other related legislation.

The foundation of effective oversight is having a clearly formulated and consistent framework. Without that Parliament, the ISC, the IGIS and the responsible Minister must rely on interpretations, and distilling meaning from other sources as to the intention of the GCSB Act.

Recent events, notably the Dotcom case, have shaken public confidence in the GCSB. Intelligence agencies are subject to the law, and accountable to it. But the nature of their operations means it is difficult to apply the usual accountability mechanisms provided by Parliament and the judiciary. Special oversight measures are needed and these measures need to be robust.

Supporting other agencies

In addition to the three key issues above, the GCSB plays a crucial role in the support of other government agencies, in particular the New Zealand Defence Force and the NZSIS. The GCSB also supports the New Zealand Police in the detection and investigation of serious crime. In most of their

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cases GCSB's help is not needed. But the GCSB's unique capabilities can be an invaluable resource for those agencies to draw upon in some cases, to help them in their lawful work.

In a small jurisdiction like New Zealand we cannot afford to duplicate expensive and sophisticated assets, and there are limited numbers of people that can work with such assets. Consistent with the Better Public Services programme, the capabilities such as those developed or acquired by the GCSB, where appropriate and subject to necessary safeguards, should be available to assist in meeting key Government priorities.

The Changing Security Environment

New Zealand faces a changing security environment, in which threats are increasingly interconnected and national borders are less meaningful. Globalisation means New Zealand is no longer as distant from security threats as it once was. This changed environment means the legislation governing GCSB needs modernisation. In particular, GCSB needs to be able to address the security challenges posed by the increasing importance of cyberspace.

Oversight

- The Kitteridge review has shown that we need to strengthen the oversight arrangements for GCSB, to ensure proper boundaries are in place and observed.
- Effective and credible oversight of the intelligence agencies is crucial for assuring the New Zealand public that those agencies' powers are being used in accordance with the law and with respect for New Zealanders' rights to privacy.
- There is an inherent tension between the secrecy required for effective intelligence operations, and legitimate public expectations of government agencies' transparency. The goal is to balance these two opposing considerations in a way that provides both appropriate levels of security and public assurance.

Internal Oversight

- The most immediate oversight of GCSB and NZSIS is the internal management oversight exercised day-to-day by those agencies' leadership teams. Good internal oversight provides a reliable "compass" and a solid compliance culture.
- The Director is already taking steps to build a modern compliance system in GCSB. This doesn't, of course, require legislation. It is also fair to say that NZSIS has put more effort into this area than GCSB in the past but the strengthened oversight proposals will apply to the NZSIS too.
- Two legislative changes will be made that will impact directly on how GCSB manages itself. First, GCSB will be required by statute to ensure it maintains a written record of all warrants and authorisations in a form that is readily available for inspection by the IGIS. This will support a strong internal agency compliance culture.

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- And secondly, we will be removing exemptions for the Bureau from the Privacy Act. Under section 57 of the Privacy Act 1993, the Bureau (and NZSIS) are exempt from all the privacy principles except principles 6 (access to personal information), 7 (correction of personal information) and 12 (unique identifiers). The Law Commission recommended, in its June 2011 review of the Privacy Act, that the Act be amended to make a further four principles applicable to the intelligence agencies:
 - Principle 1 (purpose of collection of personal information)
 - Principle 5 (storage and security of personal information)
 - Principle 8 (accuracy of personal information to be checked before use)
 - Principle 9 (agency not to keep personal information for longer than necessary)

External oversight mechanisms

- Externally, a suite of oversight mechanisms is currently in place.
 - The Responsible Minister decides the direction and priorities of the department, must authorise certain activities and is accountable to the House for ensuring the proper conduct of the department.
 - The Inspector-General of Intelligence and Security (IGIS) is a source of independent external oversight and is responsible for examining issues of legality and propriety, efficacy and efficiency, and human rights and privacy compliance.
 - The Intelligence and Security Committee (ISC) is the parliamentary oversight mechanism; examining issues of efficacy and efficiency, budgetary matters and policy setting.
 - The Commissioner of Security of Warrants advises the Minister responsible for the NZSIS on NZSIS applications for warrants concerning New Zealanders, issues those warrants jointly with the Minister.
 - The Auditor-General, the Privacy Commissioner, and the Office of the Ombudsmen also conduct important oversight functions in respect of the agencies but they are not central.
- The Government intends to modernise the legislation governing the IGIS and the ISC, to provide those bodies with enhanced oversight of the GCSB and NZSIS. This will require amendments to the ISC Act 1996 and the IGIS Act 1996. Several other changes, not requiring legislative change, are also intended.

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Independent Oversight – the IGIS

- The intended changes to strengthen the office of the IGIS fall into three broad categories:
 - Legislative changes to explicitly expand the IGIS’s work programme and enhance reporting responsibilities;
 - Increased resourcing of the office of the IGIS to enable a greater range of activities to be carried out; and
 - Legislative changes to address the required qualification for the appointment to the IGIS and Deputy IGIS role, to broaden the pool of potential candidates, and the appointment process.
- An amendment to the IGIS Act is intended to ensure the IGIS’s statutory work programme retains a focus on warrants and authorisations, but also is extended to include system-wide issues that impact on operational activity.
- The IGIS will be required to certify each year in his or her annual report that the compliance systems of the intelligence agencies are sound.
- The IGIS will be able to initiate inquiries into matters of propriety without requiring concurrence by the Responsible Minister. This will enable the IGIS to undertake independent inquiries.
- The Responsible Minister will be given explicit responsibility to respond to IGIS reports within a reasonable time-frame. The Minister may choose to provide those responses to the ISC.
- The IGIS will be expected to make unclassified versions of his or her reports public, with appropriate precautions also taken in respect of any privacy or security concerns.
- The legislative requirement that the IGIS be a retired High Court Judge will be removed, to broaden the pool of potential candidates. The three year term will remain but any further reappointment will be restricted to allow a maximum of one additional term.
- A deputy IGIS will be appointed and the office better resourced.

Parliamentary Oversight – the ISC

Changes to the way the ISC operates are proposed to improve its ability to provide oversight and accountability of GCSB and NZSIS.

- The Prime Minister will be required to relinquish the ISC chair when the Committee is discussing the performance of an agency for which the PM is the Responsible Minister.

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- The Prime Minister will be permitted to nominate either the Deputy PM or the Attorney-General to act as an alternate chair in circumstances where that alternate is not already a member of the ISC.
- Subject to restrictions on the publication of sensitive information, the ISC will be required to table its reports in the House and make them publicly available via a website.
- The Department of the Prime Minister and Cabinet has been directed to discuss with the ISC members how best the Department could support the Committee's work.

Summary of Legislative Changes to the GCSB Act

Proposals for change

The recommended legislative changes are not revolutionary. They do not involve a fundamental change to the construction of the GCSB Act or the principles underpinning it.

Functions of the GCSB

Currently the GCSB Act provides for three functions:

- Information assurance and cyber security,
- Foreign intelligence,
- Co-operation and assistance to other entities.

The proposal is that that these three functions remain, but that the descriptions are clarified to allow for more effective oversight, and updated to respond to the changing operational environment. These changes will complement and amplify the proposals to strengthen oversight with amendments to the Inspector-General of Intelligence and Security Act and the Intelligence and Security Act.

Information assurance and cyber security

The GCSB's information assurance/cyber security and co-operation functions are currently compressed into a single paragraph of the Act (section 8(1)(e)) which is both complex to negotiate and inadequate to empower the Bureau to carry out the full scope envisaged for those functions. Splitting the two apart will improve transparency and make it easier to articulate clearly what it is that the government intends the GCSB to do, beyond its foreign intelligence role, to support New Zealand's security, international relations and economic prosperity through the provision of expert advice and assistance.

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The Bureau has a key role to play in the wider cyber security domain. It hosts New Zealand's National Cyber Security Centre (NCSC), and Cabinet has indicated its expectation that the Bureau will considerably enhance its cyber security capabilities and use its expertise to assist a range of organisations (government, state sector, critical infrastructure providers and key economic contributors) to protect their information, ICT, networks and infrastructure from cyber threats.

The particular role of assisting with information security is clearly indicated in the GCSB Act as a function of the Bureau. But because the information security function must be interpreted with reference to the Bureau's objective, even this function can be read narrowly to apply only within the public sector, potentially excluding critical national infrastructure providers and organisations of national significance.

Foreign Intelligence

The Bureau's foreign intelligence function is defined in the Act in a highly prescriptive way which states not only what the overall function is, but exactly what it consists of and how it is to be achieved – to a level of detail that includes deciphering, decoding, translating, examining and analysing communications. This is far from ideal, given the major changes in the ways technology is used to communicate since the Act was passed 10 years ago – and in light of future changes which can already be anticipated.

It is more appropriate to describe at a higher level the foreign intelligence function that the Bureau is expected to carry out, complemented by a set of powers and limitations to govern what activities may be conducted in pursuit of the function. This approach will provide transparency about the nature and scope of the function, without expressly legislating the skills required in pursuit of these functions and powers.

Co-operating with Other Entities

The Act contemplates this support role, but provides no clear basis for defining the limits of such assistance. It appears to constrain the role by stating (in section 8(2)) that advice and assistance may be provided to other entities in fulfilling their functions, but only on matters that are relevant to the pursuit of the Bureau's own objective (or to the safety of any person; or the commission of serious crime).

As a result, it is uncertain what basis the Bureau has for its co-operative role, and for sharing its expertise across the intelligence community and the wider public sector.

Greater clarity is required about whether, in what circumstances, and to what extent the Bureau may provide assistance to others in accordance with its legal functions and powers. The proposal is to enable the Bureau to provide assistance to the full extent of its capability, without going beyond powers that the other agency is otherwise lawfully entitled to exercise (but may be lacking the capability). For example, the Police would need an interception warrant before they could intercept communications and before they could request assistance from the Bureau in undertaking that activity.

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Summary of changes to GCSB functions

Based on the approach above, section 8 of the Act (“Functions of Bureau”) will be amended to craft a description of the GCSB’s three core functions around the following elements:

Information assurance/cyber security – Co-operating with, and providing advice and assistance to both public and private sector entities on matters relating to the security and integrity of electronic information, communications, and information infrastructures of importance to the government

Foreign intelligence – Gathering and sharing communications intelligence about the capabilities, intentions or activities of foreign organisations or foreign persons, in accordance with the government’s intelligence requirements

Co-operating with other entities – Co-operating with, and providing advice and assistance to approved entities (notably security and law enforcement agencies) in the performance of their lawful duties; and co-operating with approved entities to facilitate the Bureau’s performance of its own functions

Powers controls and limitations

The GCSB Act confers three powers of interception on the GCSB:

- Warrantless interception in situations not involving the physical connection of an interception device to a network; and not involving the installation of an interception device in any place in order to intercept communications in that place (sections 15 and 16)
- Interception of communications by an interception device under an interception warrant granted by the Responsible Minister (section 17)
- Access to a computer system under a computer access authorisation granted by the Responsible Minister (section 19)

This construct continues to provide the basic tools that the Bureau needs to perform its functions, though the language used to capture the powers, in light of changes in the legal environment, and the way in which communications are now carried and routed around the world is in some respects outdated and would benefit from being refreshed.

At present, section 13 of the Act dictates that the Bureau’s powers are only available for the purpose of obtaining foreign intelligence. While much of the Bureau’s work (including in the cyber security domain) can ultimately be linked to a foreign intelligence objective, the Act was conceived at a time when the nature, extent and potential impact of the cyber threat was dramatically different from the threat posed now.

The GCSB Act will be amended to make it clear that the powers can be used for both the foreign intelligence function and the information security and assurance function, subject to appropriate controls and limitations.

Controls and limitations

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The basic premise underpinning the operations of the GCSB is that it does not conduct foreign intelligence activities against New Zealanders. This premise predated the GCSB Act. Given its importance and significance it was incorporated in the GCSB Act (section 14). The repeal of this basic premise was not contemplated by Ministers at any time

However, the way this basic premise was incorporated into the GCSB Act is less than ideal, and meant that it applied to not only the foreign intelligence function of the GCSB but also its other two functions – namely information assurance and cooperation and assistance to other agencies. This has created a growing number of difficulties, and is restricting GCSB's ability to effectively carry out its other two functions.

New wording will be proposed to preserve this basic premise and clarify that it only applies to GCSB's foreign intelligence function, and not to its information assurance and cooperation and assistance functions. This means that situations like those in the Kim Dotcom case would continue to be prohibited. It also means that if an organization requests GCSB's assistance with computer security to determine whether a cyber intrusion has occurred, it is able to assist without risking legal complications around section 14.

To enable the IGIS to have access to the best possible information, it is proposed that the Act be amended to require the GCSB to maintain a written record to all warrants and authorisations in a form readily available for inspection.

Other amendments

Amendment to the Appointment Framework for the Director of GCSB

The legislation will codify the State Service Commissioner's support for the appointment process, as currently set out in the Cabinet Manual.

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