

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

### **Paper Four: Institutional reform of the agencies, appointment of judicial commissioners and general administrative matters**

#### **Proposal**

1. This paper is the fourth in a suite of seven papers. The first three papers were considered at the Committee's April meeting [NSC-16-MIN-0009; CAB-16-MIN-0142 refers]. The four papers that will be considered by the Committee at its May meeting are as follows:
  - 1.1 Paper four: Institutional reform of the agencies, appointment of judicial commissioners and general administrative matters;
  - 1.2 Paper five: Activities of the agencies – cover and immunities;
  - 1.3 Paper six: Activities of the agencies – information sharing and arrangements with foreign partners; and
  - 1.4 Paper seven: Generic legislative issues and consequential amendments.
2. This paper seeks Cabinet policy decisions on new institutional arrangements and other supporting arrangements for the intelligence and security agencies. It follows the release of the Independent Review of Intelligence and Security in New Zealand (the review) on 9 March 2016. It also addresses issues arising from the first three Cabinet papers and which the Committee had directed officials to progress further after its April meeting.

#### **Executive summary**

3. The review makes a number of recommendations and other observations on the institutional arrangements needed to support the proposed new Act. Principal amongst these is the proposal to bring the New Zealand Security Intelligence Service (NZSIS) and the Government Communications Security Bureau (GCSB) fully into the ambit of the State Sector Act 1988. We support this approach but also note that, due to the nature of the intelligence and security agencies, some aspects will need to be considered in more detail.
4. The reviewers' recommended changes and other proposals include:

- 4.1 Establishing the New Zealand Security Intelligence Service (NZSIS) as a public service department under the State Sector Act 1988, with exemptions and exceptions as appropriate;
  - 4.2 The Director of Security and the Director of Government Communications Security Bureau (GCSB) to be appointed or removed for just cause by the State Services Commissioner who should also set the terms and conditions of employment for the Directors and undertake regular performance reviews;
  - 4.3 A new code of conduct to be developed for the New Zealand Security Intelligence Service (NZSIS) based on the principles of the proposed new Act, in consultation with the State Services Commissioner, either as a variation of the State Services Commission's Standards of Integrity and Conduct or bespoke;
  - 4.4 Consideration to be given to including the role and functions of the National Assessments Bureau (NAB) into the proposed new Act;
  - 4.5 A review of the current placement of the Combined Threat Assessments Group (CTAG) within New Zealand Security Intelligence Service (NZSIS) and to consider whether it should be placed within NAB;
  - 4.6 A panel of at least three judicial commissioners be introduced headed by the Chief Commissioner of Intelligence Warrants (to replace the current single Commissioner of Security Warrants) to ensure availability at all times. The reviewers recommended the commissioners be either retired or sitting judges.
5. We recommend that Cabinet agree to include almost all of the recommended changes into the Bill, with some adjustments as outlined further in this paper. We also propose a different approach to considering the future placement of CTAG.
  6. Overall, these changes will significantly modernise the institutional arrangements for the New Zealand Security Intelligence Service (NZSIS) and as required to a lesser extent for the Government Communications Security Bureau (GCSB). We also note that certain aspects may need to be tailored to reflect the particular operating environment of the intelligence and security agencies.
  7. We do not support the appointment of sitting judges as judicial commissioners. Despite the reviewers seeing advantages in this, in our view the appointment of sitting judges could potentially affect, or be seen to affect, their judicial independence noting also that these are not full-time roles. Our preference is to appoint retired judges to these roles.

## **Background**

8. The NZSIS and the GCSB play a crucial role in protecting New Zealand's interests. It will be important to the trust and confidence of New Zealanders that the intelligence and security agencies are seen to be part of the modern public service and subject to the same policies and practices, or amended as appropriate, expected of all other public service departments.
9. The NZSIS grew out of Police Special Branch and existed without a legislative base until the passing of the NZ Security Intelligence Service Act 1969. At the time, it was

considered that the terms and conditions for NZSIS employees needed to be concealed from public scrutiny. This led to the NZSIS being established outside the core public service legislation. The State Sector Act 1988 and the Employment Relations Act 2000 do not apply to the NZSIS. The Director of Security is a statutory officer currently appointed by the Governor-General.

10. The GCSB was originally part of the New Zealand Defence Force but became a non-public service department in 1989. In 2003 the GCSB was established as a department of state but was excluded from some parts of the State Sector Act regime. The Employment Relations Act does apply to the GCSB. The Director of the GCSB is a statutory officer currently appointed by the Governor-General on the recommendation of the Prime Minister.

### **Retention of two separate agencies with specialist capabilities**

11. Both the NZSIS and the GCSB have intelligence and protective security functions. While there is some overlap in their work and the tools available to them, each agency operates within a distinct domain and the focus of the agencies differs.
12. The GCSB derives intelligence from information technology systems and provides advice on the protection of information on such systems and other information assurance services. While the GCSB's intelligence gathering function is currently focussed on foreign intelligence, this is largely for historic reasons shaped by its World War II origins.
13. The NZSIS uses a range of human intelligence and technical methods to collect and analyse information and to provide protective security advice and assistance to other entities. The NZSIS also provides advice and assessments on security related threats. The NZSIS's intelligence collection function connects to "security" more broadly, including foreign intelligence matters as well as domestic security.
14. We propose that the Bill will set out the distinct areas of operation of each of the agencies.

### **Bringing the agencies fully into the Public Service**

15. The reviewers have recommended bringing the NZSIS fully into the normal State sector arrangements that apply to all other public service departments and completing the same for the GCSB. There are aspects of how the intelligence and security agencies work that will require particular consideration, but overall we support the reviewers' recommendations.

#### *The NZSIS*

16. There are no compelling reasons or special characteristics that require the NZSIS to remain a non-public service department or for the Governor-General to appoint the Director of Security. The NZSIS is not unique in being apolitical and it is common for other public service chief executives to undertake statutorily independent functions that bring with them intrusive powers. Similarly, ministerial oversight and responsibilities are already features of the NZSIS framework. In our view, the need to protect NZSIS operations and staff from public scrutiny can be accommodated within a public service department model.

17. The principal effects of establishing the NZSIS as a public service department are:
- 17.1 The Director of Security will also become the Chief Executive of the NZSIS. The State Services Commissioner will be the Chief Executive's employer in terms of appointment (including an acting chief executive), remuneration, performance and removal for just cause or excuse;
  - 17.2 The Director of Security will in turn be the employer for NZSIS staff who will be recognised as employees under the State Sector Act;
  - 17.3 Ministerial delegations to the Chief Executive will continue as at present;
  - 17.4 The State Services Commissioner will also consult with the Director of Security on the application of the Standards of Integrity and Conduct or a variation thereof as appropriate;
  - 17.5 A more substantive change will be the application of the Employment Relations Act to the NZSIS and this is discussed in more detail below;
  - 17.6 NZSIS will be listed as a Public Service department in Schedule 1 of the State Sector Act;
  - 17.7 NZSIS will be included in measures such as the Government's Capping the Size of Core Government Administration and Giving Priority to Front-line Service Delivery (as will the GCSB).

#### *The GCSB*

18. Most of the State Sector Act already applies to the GCSB, but there are some historical exceptions to be addressed as set out below. In accordance with the reviewers' recommendations, we support the GCSB coming fully within the ambit of the State Sector Act. This will require:
- 18.1 The State Services Commissioner to appoint the Director of the GCSB (also being the Chief Executive), or acting chief executive, along with remuneration, terms and conditions and any removal for just cause or excuse;
  - 18.2 The State Services Commissioner will be responsible for the performance reviews of the Chief Executive (in practice this is already the case);
  - 18.3 The power to negotiate collective agreements will rest with the State Services Commissioner, who in practice delegates this to chief executives.

#### *Employment Relations*

19. Bringing the NZSIS under the State Sector Act will mean the Employment Relations Act will apply to the NZSIS for the first time. This has two main effects:
- 19.1 NZSIS employees will come under the freedom of association and collective bargaining provisions of the Employment Relations Act. The GCSB is already a unionised workforce and there are no compelling reasons why this cannot also be the case for the NZSIS. This will be a new way of working for the NZSIS, though it already has an effective and respected staff association.

Under the State Sector Act the State Services Commissioner is responsible for the negotiation of collective agreements, though this in practice is delegated to chief executives. The same arrangements can apply to the NZSIS.

- 19.2 NZSIS employees will also gain access to the Employment Relations Act personal grievance provisions for the first time.

*A clearer delineation between national security considerations and employment matters*

20. The assessment of a person's suitability to hold a national security clearance is a statutory function of the NZSIS whereby the Director of Security provides a recommendation to the relevant agency chief executive. The chief executive then decides if the employee should be granted a security clearance and on what terms. The process is set out in the Government's Protective Security Requirements (PSR).
21. Where NZSIS and GCSB employees fail to retain a security clearance, as a condition of employment and in terms of the respective personnel security policies, they cannot continue working for either agency in any capacity and their employment is terminated. This may also apply to other agencies for roles requiring high level security clearances as a condition of employment, e. g. the Ministry of Defence, Customs, the Ministry of Foreign Affairs and Trade and the Department of the Prime Minister and Cabinet.
22. The Employment Relations Act allows an employee to pursue a personal grievance for a claim of unjustified dismissal. The GCSB has experienced cases at mediation where the ability to hold a security clearance has been conflated with procedural fairness and decision-making during consequential dismissal processes. Extending the application of the Employment Relations Act to NZSIS will expose this issue further.
23. A person's suitability to hold a security clearance is a national security consideration exercised as a protective security function of the NZSIS and as such can be distinguished from the employment relationship. The Inspector General of Intelligence and Security (IGIS) has authority to inquire into these matters along with the relevant experience and institutional competence to do so. For the NZSIS and GCSB, an IGIS inquiry may also traverse the respective directors' decision on whether to grant a security clearance. In our view, procedural fairness and any other considerations to do with the Director of Security's recommendation on a person's suitability to hold a security clearance should stay under IGIS jurisdiction and that the substance of that recommendation should not be revisited in Employment Relations Act fora.
24. We propose to reinforce this through an amendment to the Employment Relations Act to provide that where a person's suitability to hold a security clearance is raised as part of a personal grievance, the Employment Relations Authority must recognise the jurisdiction and particular competence of the IGIS to inquire into complaints about a security clearance recommendation from the Director of Security.
25. A chief executive's final decision on whether to grant a security clearance (based on the Director of Security's recommendation and in accordance with the PSR's Personnel Security Management Protocol) may include matters that subsequently give rise to a personal grievance. While acknowledging that for the NZSIS and the GCSB the chief executive's decision on the granting of a security clearance will remain open to IGIS scrutiny, we do not wish to second guess the employment relations institutions on whether the consequences of that decision could create a personal grievance.

26. Further, there is no intention to diminish the existing rights for GCSB employees under the Employment Relations Act nor to deny any expectations of NZSIS employees. However, in our view greater clarity is needed on the appropriate fora to consider issues arising from the protective security considerations of a person's suitability to hold a security clearance (based on a recommendation from the Director of Security) and those matters more correctly open to the Employment Relations Act fora.
27. There is still a risk of an employment dispute being pursued both through a complaint to the IGIS (who for example can recommend compensation) and under the Employment Relations Act. We note that the risk of "double-dipping" will be reduced with the broader range of grounds for the IGIS to decide not to inquire into a complaint that we are proposing be included in the new legislation. In particular, these would include discretion to refuse to inquire into a complaint where a complainant may be deemed to have an adequate remedy under the law or other administrative practice. An example of this could be where a person had already lodged a personal grievance claim under the Employment Relations Act. In our view the IGIS and the Employment Relations Authority are more than capable of navigating these jurisdictional weigh-points
28. In responding to these proposals, the Ministry of Business Innovation and Employment (MBIE) recognises that the IGIS currently has the best access and competency to inquire into the Director of Security's recommendation on a person's suitability to hold a national security clearance. However, where a security clearance is raised as part of a personal grievance, MBIE suggest that IGIS provide advice directly to the Employment Relations Authority which can then determine the whole of the personal grievance claim. That way all parties continue to discharge their functions accordingly. How this might work in practice will require further work and if the overall proposals are agreed, officials will continue to develop the supporting policy and practice. Alternatively, MBIE would prefer to see the current employment relations system manage these issues until there was more evidence of the full extent of the problem. MBIE also note that these proposals affect very few employees and are of minor consequence to the wider employment relations system.
29. There is also an argument that the Employment Relations Act remedy of reinstatement for unjustified dismissal should not apply where a person cannot maintain a security clearance and is therefore unable to continue their employment. The nature of employment relationship disputes can be complex and we do not wish to remove a right (and for GCSB employees, an existing right) that could still have a role subject to a person maintaining a security clearance. While on the face it this may appear to be a circular argument - a person cannot practically work, particularly for NZSIS or GCSB, without a suitable security clearance - in our view that is not a justification to explicitly deny a particular remedy to resolve an employment relationship problem. MBIE support this view.
30. Accordingly, we propose a change to the Employment Relations Act to ensure that, to the extent the Director of Security's recommendation on a security clearance is relevant to an employment relationship problem, an IGIS inquiry should inform the Employment Relations for a consideration of the employment relationship matter. This should be introduced through the Bill itself. This matter may need to be considered between meetings of the NSC and for that reason, we seek power to act for the Minister for National Security, the Minister in charge of the NZSIS, the Minister responsible for the GCSB and the Minister for Workplace Relations and Safety and the Attorney-General.

### *The treatment of other personal grievance issues*

31. A consequence of applying the Employment Relations Act to NZSIS is that personal grievance proceedings involving NZSIS employees may involve classified material, including national security information or other sensitive operational details in evidence. It is important that the employment relations bodies are able to deal with that information in a way that protects national security.
32. We consider that this issue is best addressed as part of the Government's response to the Law Commission's review on the use of national security information in proceedings. The Commission's report, which was tabled in Parliament in December 2015, made related recommendations to deal with similar issues in civil and criminal proceedings and administrative decision-making.
33. The Minister of Justice is developing a proposed Government response to the Law Commission's review for Cabinet's consideration. We recommend that the Minister of Justice is invited to include as part of her consideration of the Commission's recommendations, the approach to national security information proceedings in the employment bodies with the intention that the legislative provisions that have the effect of applying the Employment Relations Act 2000 to the NZSIS do not come into force until processes to protect national security information in those bodies are in place.

### **Centralising Intelligence Assessments**

#### *The roles and functions of the National Assessments Bureau (NAB)*

34. The reviewers made some useful observations on how the intelligence process works, particularly the distinctions between intelligence collection, assessment and policy formation. The reviewers identified the National Assessments Bureau (NAB), a business unit of DPMC as New Zealand's dedicated intelligence assessment centre.
35. The reviewers recommended that the Government should consider including the role and functions of the NAB in the new Act. We support this and we propose to include these roles and functions in the Bill.
36. The current functions of NAB are to assess and prepare reports relating to New Zealand's national security, economic and international interests and to provide these reports to the relevant decision-makers. The NAB is located within the Department of the Prime Minister and Cabinet because its work is based on information drawn from many government departments and agencies. At present, NAB has an independent assessment mandate established by Cabinet but the functions carried out by NAB are not recognised in legislation. Including the functions currently undertaken by NAB in the new Act would recognise the need for a lead intelligence assessment role in New Zealand and as a core element of the New Zealand Intelligence Community.
37. To give effect to this, the functions currently carried out by NAB as described below, would be statutorily conferred on the chief executive of the responsible department of state. The chief executive could then delegate those functions as appropriate. The proposed new Act should outline the following functions for such an entity:
  - 37.1 To lead intelligence assessments within the New Zealand Intelligence Community; and

- 37.2 To provide relevant decision-makers with independent and policy-neutral assessments:
- 37.2.1 related to events and developments, domestic and external, that are of significance to New Zealand's national security, economic interests, international interests and well-being;
  - 37.2.2 prepared from all sources of information available to the New Zealand Government; and
- 37.3 To co-ordinate the setting of national intelligence priorities across the broader intelligence sector.
38. The reviewers have also suggested that to strengthen the role of intelligence assessments, the Government should consider establishing the NAB as a departmental agency for operational autonomy and to strengthen its focus on customer service delivery.
39. The Chief Executive of DPMC as Chair of the Officials Committee for Domestic and External Security Coordination (ODESC) already has a well-established leadership role in security and intelligence. The Chief Executive gives the Prime Minister strategic advice on security and intelligence matters, integrates and aligns the work of agencies to meet Government's security and intelligence priorities, supports the governance and oversight of the intelligence sector and represents New Zealand's security and intelligence interests overseas. The assessment component of national security is operationalised through the Director of Intelligence and Assessments, who leads the NAB.
40. In our view this provides sufficient depth and breadth of capability within the overall national security arrangements and ensures intelligence is correctly located within the overall system architecture. Creating the NAB as a departmental agency, with its own chief executive, would increase fragmentation within the intelligence community and potentially reduce the flexibility required to meet the continually changing context. It would also come with increased cost. Ensuring the enduring nature of the NAB's dedicated intelligence assessment function can be met by having the functions the NAB performs conferred in legislation on the chief executive of the responsible department of state.
41. The reviewers also recommended the Government consider extending the Intelligence and Security Committee's (ISC's) examination and review functions to the NAB. We do not consider it necessary to extend the ISC's examination and review functions to the NAB, as recommended by the reviewers. The time and resources of the ISC are best spent focusing on the activities of the GCSB and NZSIS, as these agencies have intrusive capabilities that require democratic oversight. Moreover, the NAB is subject to the scrutiny of the Government Administrative Committee as part of DPMC annual reporting processes, extending another committees' examination to NAB would create unnecessary overlap and reporting requirements.

*The future positioning of the Combined Threat Assessments Group (CTAG)*

42. The Combined Threat Assessments Group (CTAG) is an inter-agency unit housed in the NZSIS that provides analysis and assessments of terrorist threat levels to New



Zealanders and New Zealand. CTAG also makes recommendations on domestic terrorism threat levels.

43. The reviewers concluded that the Government should review the current placement of CTAG within the NZSIS and consider whether it may more appropriately be situated within the NAB. In making this recommendation the reviewers clearly saw a synergy between the NAB and CTAG that is not being optimised. The reviewers also made several observations on how NAB could usefully broaden its own focus. CTAG has been reviewed several times in the past, though not since 2012.
44. We note the views of the reviewers and we agree that it would be appropriate to reconsider the placement of CTAG at some point. However, rather than a standalone review we propose that the future placement of CTAG should be considered within the wider NZIC operating model and as part of the associated four year implementation plan. This way a more rounded view of CTAG can be gained alongside consideration of the wider NZIC capability. The Security Intelligence Board has oversight of the NZIC four-year plan and developments will be reported through to NSC at appropriate intervals. We consider that this meets the intent of the reviewers' recommendations for CTAG.

#### *National Intelligence and Security Advisor (NISA)*

45. The reviewers also suggested that the government consider establishing a National Intelligence and Security Advisor (NISA) to oversee and co-ordinate the GCSB, NZSIS and the NAB. This was proposed as a way of facilitating budgetary efficiencies and operational matters and to take an overall leadership role across the sector and to act as the principal advisor to government on matters of intelligence and security.
46. We do not support this proposal. As already outlined, in our view there is already sufficient depth and breadth within the overall governance arrangements across the New Zealand Intelligence Community to enable the Government to receive timely national security advice as required, including budgetary advice for the Community. Should the existing governance arrangements need further strengthening, this can occur through the Security Intelligence Board and does not at this stage warrant institutional change.

#### **Judicial Commissioners**

47. The reviewers observed the limitations of currently only having one Commissioner of Security Warrants and noted that he was often called upon at short notice. The reviewers noted that the NZSIS Act allows the Attorney-General to act for the Commissioner if he or she is unavailable, though there is no equivalent in the GCSB Act. The reviewers considered this to be inappropriate given the particular role of the Commissioner.
48. Based on the current Commissioner's workload and the potential for an increase in warrant applications should the wider review recommendations be adopted, the reviewers recommended that a panel of at least three judicial commissioners be established, including and headed by a Chief Commissioner of Intelligence Warrants (in place of the current single Commissioner of Security Warrants).
49. We support the reviewers' recommendation for more than one judicial commissioner and in particular the need to ensure coverage in the absence of the Chief

Commissioner of Intelligence Warrants. We also note that the roles will be part time. We therefore, agree to provide in the Bill for a panel of up to three judicial commissioners, including and headed by a Chief Commissioner of Intelligence Warrants. We propose that initially, a Chief Commissioner and one additional judicial commissioner be appointed. The question of whether to appoint a third judicial commissioner can be considered from time to time by the Attorney-General.

50. The reviewers had a slight preference to appoint sitting judges as judicial commissioners due to, for example, their ability to hear cases involving classified information coming before the courts. However, in our view it is important that judicial commissioners are not seen in any way to undermine the independence of the sitting judiciary. Further, it is arguably harder to fit the sometimes urgent work of a judicial commissioner within the busy and less-flexible hearing schedules of sitting judges (particularly those travelling to circuit courts). I consider that retired judges would bring their significant judicial experience and skills to the role and as noted, the judicial commissioner appointments are not intended to be full-time positions.
51. The Commissioner of Security Warrants is currently appointed by the Governor-General on the recommendation of the Prime Minister following consultation with the Leader of the Opposition for a term of 3 years and may be reappointed from time to time. The current NZSIS Act requires the Commissioner to have previously held office as a Judge of the High Court and this is the standard for similar appointments. We propose that this arrangement continue into the new Act for the new Chief Commissioner of Intelligence Warrants and also for the appointment of further judicial commissioners.
52. The NZSIS Act prescribes the functions of the Commissioner. Given the appointment of a panel of commissioners, we propose that the functions of the commissioners, including the Chief Commissioner of Intelligence Warrants, are prescribed in the new Act similarly to the manner in which they are described in the NZSIS Act at present.

### **Remuneration for the Inspector General of Intelligence and Security**

53. We also propose that as part of the overall implementation arrangements, the setting of remuneration for the Inspector General of Intelligence and Security (IGIS) and for the Deputy Inspector General shift to the Remuneration Authority. Remuneration for the IGIS is currently governed by the Fees and Travelling Allowances Act 1951. This reflects the previous part-time arrangement for the IGIS but is inconsistent with both the current level of activity and what is anticipated in the role enhancements agreed in Cabinet paper 3, Oversight and Transparency. This would also bring the IGIS into line with arrangements for comparable office holders, e. g. section 9 of the Ombudsmen Act 1975 provides for the Remuneration Authority to set salary and allowances. At this stage it is not clear if there are any financial implications.

### **Other amendments in relation to the Inspector-General of Intelligence and Security**

54. We propose two further minor amendments be included in the Bill in relation to the IGIS:
  - 54.1 Grounds for the IGIS to refuse to inquire into a complaint: currently the bases on which the IGIS may refuse to inquire into a complaint are limited to where the subject matter of the complaint is trivial or the complaint is frivolous or vexatious or is not made in good faith. Once inquiries are underway, the IGIS

may also refuse to inquire into the matter further if it appears that further inquiries are unnecessary or the matter is one which should be heard by a court or tribunal. We propose that these grounds should be amended to reflect the approach taken in section 17 of the Ombudsmen Act 1975 which provides a fuller range of reasons not to inquire into a complaint or to further investigate a complaint.

- 54.2 The requirement for one member of the advisory panel to the IGIS to be a lawyer: currently the Inspector-General of Intelligence and Security Act requires that one member of the advisory panel that is established to provide advice to the IGIS should be a lawyer who has held a practising certificate for not less than 7 years. This requirement may unduly restrict the range of people who might be considered and we recommend that it be removed so that decisions can be made on merit alone.

### **National security and “agent of a foreign power”**

55. The reviewers have proposed a definition that is restricted to protecting as opposed to advancing New Zealand’s interests, including its economic and international security. The specific definition proposed by the reviewers is as follows:

“National security” means the protection against –

- 55.1 Threats or potential threats, to New Zealand’s status as a free and democratic society from:

55.1.1 Unlawful acts, or

55.1.2 Foreign interference;

- 55.2 Imminent threats to the life and safety of New Zealanders overseas;

- 55.3 Threats, or potential threats, that may cause serious harm to the safety or quality of life of the New Zealand population;

- 55.4 Unlawful acts, or acts of foreign interference, that may cause serious damage to New Zealand’s economic security or international relations;

- 55.5 Threats, or potential threats, to the integrity of information or infrastructure of critical importance to New Zealand;

- 55.6 Threats, or potential threats, that may cause serious harm to the safety of a population of another country as a result of unlawful acts by a New Zealander that are ideologically, religiously or politically motivated;

- 55.7 Threats, or potential threats, to international security.

56. In April, Cabinet’s National Security Committee directed officials to consider the definition of “national security” proposed by the reviewers so that the definition could be addressed in second suite of papers [NSC-16-MIN-0007, paragraph 19 refers].

57. The reviewers’ proposed definition would provide greater clarity to the agencies and to the general public about the types of activities the agencies are empowered to act in relation to. It also includes a number of thresholds, such as “serious harm”, “critical

importance” and “serious damage”, which ensures that the agencies’ intrusive powers will only be used in relation to the most serious of threats to New Zealand.

58. Despite these clear advantages, officials have advised that there are a number of issues with the reviewers’ proposed definition - including but not limited to:
- 58.1 A lack of clarity around the scope of the definition (meaning that it would not be clear what types of activities would be covered and what would not); and
  - 58.2 The number of thresholds and tests in the reviewers’ definition would be difficult to apply in practice and would give rise to uncertainty in particular circumstances about whether something fell within the definition; and
  - 58.3 Concerns that an attempt to define national security would interact with other legislation and conceptions of national security across government.
59. Officials have advised that an alternative approach may be possible whereby national security is not defined but operates as an initial threshold, with a list of the types of activities and threats in respect of which the agencies can target New Zealanders. An example of an alternative type of provision of this nature is set out in the **appendix** to this paper.
60. This type of approach would provide greater clarity and transparency as it makes clear in legislation the situations when the agencies can target New Zealanders, rather than through the application of a complex and multi-limbed legal test. It would leave to the Attorney-General (and judicial commissioner) to determine whether a proposed warrant is necessary to protect New Zealand’s national security. The interests of national security are not necessarily static and it is appropriate for the Executive to determine that limb of the test through the warranting process. However as national security is the basis on which the agencies can target New Zealanders, the warrant must also relate to one of the identified activities. Both limbs must be satisfied (e. g. while most acts related to terrorism will constitute a threat to national security, only a much narrower set of activities related to serious crime will meet this test).
61. The list of activities in the example in the **appendix** covers areas which may relate to areas which are the primary responsibility of other agencies (e. g. Police have responsibility for serious crime). However, officials have noted that this is true of almost all the intelligence collection activities of the NZSIS and GCSB. As noted by the reviewers:
- “The agencies’ primary role is to use their specialist capabilities to collect intelligence, including secret intelligence and to make it available to those individuals and agencies whose role it is to act on it.”*
62. The New Zealand Intelligence Community has shifted to a customer-driven model and the agencies are focusing their intelligence collection efforts in support of the National Intelligence Priorities. The agencies’ primary purpose is to collect intelligence to support the work of other agencies – for example, foreign intelligence supports work led by Ministry of Foreign Affairs and Trade in the conduct of New Zealand’s international relations. In the same vein, the agencies intelligence collection would support the criminal investigation and law-enforcement functions of the Police (which is the basis for including certain serious criminal activities in the list of activities above).

63. Officials also note that the approach to national security is also limited in two other significant ways as agreed by National Security Committee in April:
- 63.1 Retaining section 2(2) of the NZSIS Act which restricts the ability of the NZSIS from investigating lawful advocacy, protest and dissent and applying this restriction to GCSB; and
  - 63.2 Retaining section 4(2) of the New Zealand Security Intelligence Service Act, providing that it is not a function of the NZSIS to enforce measures for security and apply this restriction to both agencies (although the GCSB's role in proactively protecting information systems from cyber-attacks would continue).
64. We consider that there is some merit in the approach suggested by officials. However, we think it is desirable for the integral parts of the package recommended by the reviewers to be considered together. Accordingly, we recommend that the Committee agree to the inclusion of the reviewers' proposed definition of "national security" in the new legislation. This is a matter that should be addressed by the Foreign Affairs, Defence and Trade Select Committee, which will consider the Bill.

*Agent of a foreign power*

65. Currently, the GCSB is able to target New Zealanders where those New Zealanders have been designated by the Director as an agent or representative of a foreign person or foreign organisation. Under the reviewers' proposed approach, the agencies would still be able to target New Zealanders for the objectives of contributing to New Zealand's international relations and wellbeing and New Zealand's economic wellbeing where they are designated as an agent of a foreign power, and there is a valid warrant.
66. As the reviewers note, the current scope of agent of a foreign power is potentially very broad, and includes New Zealanders working for international companies. The reviewers proposed the Government review the definition of agent of a foreign power with a view to limiting its potential scope.
67. We propose the following in response to this recommendation to:
- 67.1. Apply the concept of agent of a foreign power to both agencies. The NZSIS is not currently restricted in this respect, and so represents a narrowing of the NZSIS's current ability to target New Zealanders;
  - 67.2. Discontinue the practice of the Director designating a person as an agent of a foreign power. As recommended by the reviewers, a tier one warrant should be required to target a New Zealander (or class of New Zealanders) where that New Zealander is acting for or on behalf of a foreign person or organisation – this ensures New Zealanders are protected by the "triple-lock";
  - 67.3. Allow tier one warrants automatically to designate the following persons or entities as an agent of a foreign power:
    - 67.3.1. any New Zealand person or entity acting for or on behalf of a foreign government; and

- 67.3.2. any New Zealand person or entity acting for or on behalf of a designated terrorist organisation (including both persons and organisations designated by United Nations Security Council Resolution and organisations designated under the Terrorism Suppression Act 2007);
- 67.4. Require a specific tier one warrant to target any New Zealander (including a class of New Zealanders) as person acting for or on behalf of a foreign person or organisation in all other cases (including persons who may work for international organisations or international companies). This means the Attorney-General and judicial commissioner would need to be satisfied that it is necessary and proportionate to target that specific New Zealander (or class of New Zealanders);
68. The above proposals represent a significant enhancement in the level of oversight of the agent of a foreign power process. The process would also now apply to the NZSIS. Accordingly, we do not consider it necessary to limit the definitions of foreign person and foreign organisation as sensitive cases for both agencies would now be considered by the Attorney-General and judicial commissioner. We propose to retain the existing definitions of foreign person and foreign organisation in the New Zealand Security Intelligence Service Act and Government Communications Security Bureau Act. In particular, the New Zealand Security Intelligence Service Act definition in respect of unincorporated bodies is preferable to the Government Communications Security Bureau Act definition, and the Government Communications Security Bureau Act approach to international organisations should be retained.
69. To address some of the operational concerns identified by the agencies and the reviewers, we propose the following:
- 69.1. An agent of a foreign power is a person or entity who is “acting, or purporting to act, for or on behalf of” a foreign person or organisation, rather than needing to prove a formal relationship of agency. This would capture individuals who may have claimed to join a terrorist organisation.
- 69.2. To address cases where information may be incomplete or fragmented, a person or entity may be designated an agent of a foreign power where the agencies have a reasonable suspicion that a person or entity is an agent of a foreign power. The current legislation does not provide a formal test and this creates difficulties.

### **Membership of the Intelligence and Security Committee**

70. At its April meeting, the Committee:
- 71.1 Noted that the Intelligence and Security Committee (ISC) currently comprises five members as specified under the Intelligence and Security Committee Act 1996; and
- 71.2 Directed officials to report back to the Cabinet National Security Committee in May 2016 with advice on the future membership of the ISC [NSC-16-MIN-0009, paragraph 22].

71. Officials have advised that the reviewers' recommendation for the legislation to provide for the Committee to have a minimum of five and maximum of seven members provides for the greatest degree of flexibility. The appropriate membership can then be determined by the Prime Minister after consultation with the Leader of the Opposition, as the reviewers have suggested. We agree with this advice and recommend that the Committee agree to this also.

### **Ministerial Policy Statements**

72. Following Cabinet decisions regarding Ministerial Policy Statements generally in the first round of papers, several agencies have highlighted the need to be consulted on particular aspects of their development and implementation. We would expect normal portfolio consultation to occur in line with the obligations of Ministers and Departments contained in the Cabinet Manual where the development or implementation of a Ministerial Policy Statement was relevant to other portfolios.

### **Consultation**

73. The following agencies have been consulted on Cabinet papers four to seven of this suite of papers: the NZSIS; the GCSB; NZ Police; NZDF; the Ministries of Foreign Affairs and Trade; Defence; Justice; Primary Industries; Business, Innovation, and Employment; the State Services Commission; the Treasury; the NZ Customs Service; the Department of Internal Affairs; and the Crown Law Office.
74. In addition:
- 74.1 The Ministry of Transport and the Inland Revenue Department were consulted on Cabinet paper five;
  - 74.2 The Inland Revenue Department, the Ministry of Education, the Ministry of Transport, and the Office of the Privacy Commissioner were consulted on Cabinet paper six;

### **Financial implications**

75. The proposals in this paper may have financial implications:
- 75.1 Remuneration for the directors of the NZSIS and GCSB is currently set by the Remuneration Authority. There may be funding implications from moving this to the State Services Commissioner as different frameworks are used for each. The SSC is working with the Remuneration Authority to smooth the transition to the State Services Commissioner acting as the employer of the chief executives of the NZSIS and GCSB. Any financial implications arising from the will be considered as part of the implementation work programme.
  - 75.2 Also, any changes made to the roles and functions of the two directors may affect the total package for either role. This has yet to be determined but in either case will be a cost to the agencies.
  - 75.3 Providing for a panel of three judicial commissioners (and the initial appointment of one judicial commissioner to support the Chief Commissioner) will also have financial implications though it is noted that these are part-time roles.

75.4 The proposal to shift the setting of remuneration for the IGIS and the Deputy IGIS to the Remuneration Authority may have financial implications. However, at this stage it is not clear if that is the case.

76. As was noted in Cabinet paper one of this suite of papers, any fiscal implications of the proposals will be covered from within the agencies' baselines [NSC-16-MIN-0007, paragraph 27]. This is also the case with respect to any fiscal implications arising from papers four to seven.

### Legislative implications and publicity

77. We note that the legislative implications and publicity in respect of the proposals in all of the papers in this suite of papers were addressed in Cabinet paper one [NSC-16-MIN-0007, paragraphs 28-33].

78. We propose to refer the Bill to the Foreign Affairs, Defence and Trade Select Committee after its first reading. We note that that Committee considered the Countering Terrorist Fighters Legislation Bill in 2014 and therefore has recent experience dealing with the issues arising from legislation of this nature.

### Regulatory Impact Analysis

79. The Regulatory Impact Analysis (RIA) requirements apply to the proposals in Cabinet papers one to seven of this suite of papers and a Regulatory Impact Statement (RIS) has been prepared. The RIS is attached.

80. The Department of the Prime Minister and Cabinet's internal RIS quality assurance panel has reviewed the RIS and associated material. The Panel considers that the information and analysis summarised in the RIS *partially meets* the quality assurance criteria.

81. As traversed in the Agency Disclosure Statement, the options considered respond to recommendations made by reviewers. The reviewers conducted a thorough and wide-ranging inquiry, involving extensive consultation, and developed a deep understanding of the how the intelligence community operates. Officials' approach to the reviewers' report was to accept recommendations except where good reason not to exists. This was partly due to the special nature of security and intelligence issues, but also due to robustness of the inquiry and the reviewers' intention that their recommendations work as a package. The panel also commented on insufficient quantification of impact. The nature of the agencies' work and the need to keep operational matters confidential has made this difficult to address.

### 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:

1. **note** that the Independent Review of Intelligence and Security in New Zealand recommends a number of changes to the institutional and other support arrangements for the work of the New Zealand Security Intelligence Service (NZSIS) and the Government Communications Security Bureau (GCSB);



### *New institutional arrangements*

2. **note** that the NZSIS and the GCSB both have intelligence and protective security functions but that each agency operates within distinct domains and the focus of each agency is different;
3. **agree** that the Bill set out the distinct areas of operation for the NZSIS and the GCSB;
4. **agree** that the NZSIS become a public service department under the State Sector Act 1988;
5. **note** that the State Services Commissioner will consult with the Director of Security on the application of the *Standards of Integrity and Conduct* or a variation thereof as appropriate;
6. **note** that as a Public Service department the NZSIS will be subject to government policies such as *Capping the Size of Core Government Administration and Giving Priority to Front-line Service Delivery*;
7. **agree** that the GCSB come fully under the State Sector Act 1988;

### *Employment relations*

8. **note** that as a public service department under the State Sector Act 1988, the Employment Relations Act 2000 will also apply to the NZSIS;
9. **note** that the Employment Relations Act already applies to the GCSB;
10. **note** that the application of the Employment Relations Act to the New Zealand Security Intelligence Service (NZSIS) means that:
  - 10.1 NZSIS staff will come under the freedom of association and collective bargaining provisions of the Employment Relations Act;
  - 10.2 NZSIS staff will have access to the Employment Relations Act personal grievance provisions;
11. **note** that continued employment in the NZSIS and the GCSB depends on an employee retaining an appropriate national security clearance otherwise their employment will be terminated;
12. **note** that the above will also be the case for certain roles in other agencies where the holding of an appropriate level security clearance is a condition of employment;
13. **note** that the Inspector General of Intelligence and Security (IGIS) exercises wide powers to inquire into a complaint against a recommendation from the Director of Security on the suitability of a person to hold a national security clearance;
14. **note** that the IGIS's powers of inquiry also encompass the decision of the respective NZSIS and the GCSB directors to grant a security clearance to their own agency staff;
15. **agree** that the assessment of a person's suitability to hold a security clearance is a national security matter exercised as a protective security function of the NZSIS and as such can be distinguished from the employment relationship;

16. **agree** that matters arising from the Director of Security's recommendation on a person's suitability to hold a security clearance should stay remain within the remit of the IGIS;
17. **note** that a chief executive's decision as to whether to grant a person a security clearance and associated employment consequences may be considered by the Employment Relations fora;
18. **agree** that as far as the Director of Security's recommendation is relevant to an employment relationship problem, the IGIS's inquiry should inform the Employment Relations Act fora;
19. **agree** to amend the Employment Relations Act to give effect to paragraphs 16 to 18 above;
20. **note** that the risk of "double dipping" between the two jurisdiction will be reduced through the recommended amendment to the Employment Relations Act and the proposal to amend the IGIS's discretion to refuse to inquire into a complaint (see paragraph 33 below);
21. **note** that the Minister of Justice is developing a proposed Government response to the Law Commission's use of national security information in proceedings;
22. **invite** the Minister of Justice to include as part of her consideration of the Commission's recommendations, the approach to national security information proceedings in the employment bodies with the intention that the legislative provisions that have the effect of applying the Employment Relations Act 2000 to the New Zealand Security Intelligence Service (NZSIS) do not come into force until processes to protect national security information in those bodies are in place;
23. **authorise** the Minister for National Security and Intelligence, the Minister in Charge of the New Zealand Security Intelligence Service (NZSIS), the Minister Responsible for the Government Communications Security Bureau (GCSB) and the Minister for Workplace Relations and Safety to make decisions consistent with the overall policy proposals in relation to the proposed amendment to the Employment Relations Act;

#### *Centralising intelligence assessments*

24. **agree** that the role and functions currently carried out by the National Assessments Bureau (NAB) be including in the Bill and conferred on the chief executive of the responsible department;
25. **agree** that the Bill contain the following functions for the such an entity:
  - 25.1. to lead intelligence assessment within the New Zealand Intelligence Community;
  - 25.2. to provide relevant decision-makers with independent and policy-neutral assessments
    - 25.2.1. related to events and developments that are of significance to New Zealand's national security, economic interests and international relations;

25.2.2. prepared from all sources of information available to the New Zealand Government; and

25.3. to co-ordinate the setting of national intelligence priorities across the broader intelligence sector;

26. **reject** the reviewers' recommendation for the Intelligence and Security Committee's examination and review functions to be extended to the NAB;

27. **agree** that the future placement of the Combined Threat Assessments Group (CTAG) should be considered within the wider NZIC operating model and as part of the associated four year implementation plan;

#### *Judicial Commissioners*

28. **agree** that the Bill provide for a panel of up to three judicial commissioners to be established and headed by a Chief Commissioner of Intelligence Warrants;

29. **agree** that the panel of judicial commissioners should be appointed by the Governor-General on the recommendation of the Prime Minister following consultation with the Leader of the Opposition for terms of 3 years with provision for possible reappointment;

30. **agree** that the functions of the Chief Commissioner of Intelligence Warrants and judicial commissioners are prescribed in the new Act;

31. **agree** that judicial commissioners be retired High Court judges;

32. **agree** to the initial appointment of one judicial commissioner to support the Chief Commissioner;

#### *Remuneration of the Inspector-General of Intelligence and Security*

33. **agree** that the remuneration of the Inspector General of Intelligence and Security (IGIS) and for the Deputy Inspector General shift to the Remuneration Authority;

#### *Other amendments in relation to the Inspector-General of Intelligence and Security*

34. **agree** that the grounds on which the IGIS may refuse to inquire into or to further investigate a complaint be amended to reflect the grounds open to the Ombudsmen in section 17 of the Ombudsmen Act 1975;

35. **agree** that the requirement in section 15C for one of the members of the advisory panel to the IGIS to be a lawyer who has held a practising certificate for not less than 7 years be removed;

#### *National Security and "agent of a foreign power"*

36. **note** that the reviewers have proposed that "national security" should be defined to mean:

36.1. threats or potential threats, to New Zealand's status as a free and democratic society from:

36.1.1. unlawful acts, or

- 36.1.2. foreign interference;
  - 36.2. imminent threats to the life and safety of New Zealanders overseas;
  - 36.3. threats, or potential threats, that may cause serious harm to the safety or quality of life of the New Zealand population;
  - 36.4. unlawful acts, or acts of foreign interference, that may cause serious damage to New Zealand's economic security or international relations;
  - 36.5. threats, or potential threats, to the integrity of information or infrastructure of critical importance to New Zealand;
  - 36.6. threats, or potential threats, that may cause serious harm to the safety of a population of another country as a result of unlawful acts by a New Zealander that are ideologically, religiously or politically motivated;
  - 36.7. threats, or potential threats, to international security;
37. **note** that in April Cabinet directed officials to consider the definition of "national security" proposed by the reviewers so that the definition could be addressed in this second suite of papers [NSC-16-MIN-0007, paragraph 19];
38. **note** that officials have advised there are a number of issues with the reviewers' proposed definition - including but not limited to:
- 38.1. concerns that an attempt to define national security would interact with other legislation and conceptions of national security across government
  - 38.2. a lack of clarity around the scope of the definition (meaning that it would not be clear what types of activities would be covered and what would not); and
  - 38.3. the number of thresholds and tests in the reviewers' definition would be difficult to apply in practice.
39. **note** that officials have suggested an alternative approach whereby "national security" is not defined, but rather operates as an initial threshold, with a list of the activities and threats in respect of which the agencies can target New Zealanders;
40. **agree** to the inclusion of the reviewers' proposed definition of "national security" in the Bill;
41. **note** the agencies would still be able to target New Zealanders for the objectives of contributing to New Zealand's international relations and wellbeing and New Zealand's economic wellbeing, where those New Zealanders are designated as agents of a foreign power;
42. **note** this process currently only applies to Government Communications Security Bureau (GCSB) as the New Zealand Security Intelligence Service (NZSIS) is not restricted in its ability to apply for a warrant to target a New Zealander;
43. **agree** to apply this restriction to both agencies, with the necessary modifications;

44. **agree** that an agent of a foreign power is a person or entity who is “acting, or purporting to act, for or on behalf of” a foreign person or organisation;
45. **agree** that to address cases where information may be incomplete or fragmented, a person or entity may be designated an agent of a foreign power where the agencies have a reasonable suspicion that a person or entity is an agent of a foreign power;
46. **agree** that A tier one warrant should be required to target a New Zealander (or class of New Zealanders) where that New Zealander is acting for or on behalf of a foreign person or organisation;
47. **agree** that in the course of executing a tier two warrant against a foreign power where New Zealanders are identified, the agencies will need to apply for a tier one warrant (including a review warrant) in respect of those New Zealanders;
48. **agree** that where the Attorney-General and Judicial Commissioner consider it necessary and proportionate in the context of a particular warrant application, the agencies should be able to apply for a Tier one warrant to target a foreign person or organisation which automatically designates the following classes of New Zealanders as persons acting for or on behalf of a foreign person or organisation:
  - 48.1. any New Zealand person or entity acting for or on behalf of a foreign government;
  - 48.2. any New Zealand person or entity acting for or on behalf of a designated terrorist organisation (including both persons and organisations designated by United Nations Security Council Resolution and organisations designated under the Terrorism Suppression Act 2007);
49. **agree** that in all other cases, a separate tier one warrant will be required to target any New Zealander as person acting for or on behalf of a foreign person or organisation;
50. **note** this is a significant enhancement in the level of oversight for ‘agent of a foreign power’ which as a matter of practice is currently approved by the Director of the Government Communications Security Bureau (GCSB);
51. **agree** to consolidate the existing definitions of foreign person and foreign organisation in the NZSIS Act and GCSB Act.
52. **agree** the definition should adopt the NZSIS Act definition in respect of unincorporated bodies and the GCSB Act approach in respect of international organisations;

*Intelligence and Security Committee (ISC)*

53. **note** that at its April meeting the Committee:
  - 53.1. noted that the ISC currently comprises five members as specified under the Intelligence and Security Committee act 1996; and
  - 53.2. directed officials to report back to the Committee in May 2016 with advice on the future membership of the ISC;

54. **agree** that the membership of ISC should be a minimum of five members and a maximum of seven, with the appropriate number being determined by the Prime Minister after consultation with the Leader of the Opposition;

*Ministerial Policy Statements*

55. **note** that normal portfolio consultation will occur where the development or implementation of a Ministerial Policy Statement was relevant to other portfolios;

*Financial implications*

56. **note** that the proposals in this paper may have financial implications;
57. **note** any fiscal implications of the proposals in papers four to seven will be covered from within the agencies' baselines;

*Legislative implications*

58. **note** that the legislative implications of this suite of papers were addressed in Cabinet paper one [NSC-16-MIN-0007, paragraphs 28-33];
59. **note** that the Bill will be referred to the Foreign Affairs, Defence and Trade Select Committee.

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

### OFFICIALS' ALTERNATIVE PROPOSAL TO DEFINING "NATIONAL SECURITY"

In the case of tier one warrants, (in addition to the other five criteria discussed in Cabinet paper two) the agency applying must also satisfy the Attorney-General and judicial commissioner that:

1. The proposed activity is necessary to contribute to the protection of national security (national security not being formally defined and therefore adaptive and responsive to a dynamic security environment, but determined by Attorney-General and Judicial Commissioner); and
2. The proposed activity is necessary for the collection of intelligence relating to one or more of the following activities in New Zealand or overseas:
  - 2.1 terrorism or violent extremism;
  - 2.2 espionage or other foreign intelligence activity;
  - 2.3 sabotage;
  - 2.4 proliferation of chemical, nuclear, radiological, or biological weapons;
  - 2.5 activities which may be relevant to serious crime and involve:
    - 2.5.1 the movement of money, goods or people;
    - 2.5.2 the use or transfer of intellectual property;
    - 2.5.3 the improper use of an information infrastructure;
    - 2.5.4 damage to New Zealand's international relations or economic security;
  - 2.6 threats to, or interference with, information (including communications) or information infrastructure of importance to the Government of New Zealand;
  - 2.7 threats to international security;
  - 2.8 threats to New Zealand government operations in New Zealand or abroad;
  - 2.9 threats to New Zealand's sovereignty, including its territorial or border integrity and system of government; and
  - 2.10 threats to the life or safety of New Zealanders.