REGULATORY IMPACT STATEMENT[1]

MODERNISING NZSIS LEGISLATION – HIGH PRIORITY AMENDMENTS

Executive Summary

1. This regulatory impact statement provides an analysis of options to address technological changes and other factors that could affect the currency of the NZSIS seizure and interception warrants framework in the New Zealand Security Intelligence Service Act 1969 (the Act).

2. Aspects of the NZSIS warrant framework, while remaining somewhat workable, have not kept pace with new technologies, law change, or modern requirements for intelligence acquisition.

3. It is proposed that Government should aim to make amendments to the Act during early 2011, in time to support effective security operations for the Rugby World Cup 2011 (RWC2011).

4. The costs associated with the policy proposals are difficult to quantify in that they relate to intrusion into personal privacy. These costs must be weighed against the benefits associated with maintaining national security. Existing protections contained in the NZSIS warrants framework together with oversight arrangements will continue to ensure that impacts on privacy are minimised.

Adequacy Statement

5. Dr Warren Young, Law Commissioner, independently reviewed the regulatory impact analysis prepared by the NZSIS and associated supporting material.

6. Dr Young was satisfied that the information and analysis met all of the quality assurance criteria. He noted that the updating and clarifying issues arising from the current legislation were clearly identified; the policy options for addressing these issues were adequately canvassed; and the need for the preferred policy option was demonstrated. Dr Young noted: "While there are some impacts on privacy, this is clearly justified by the associated benefits. In particular, updating the warrant framework is a recognition of technological changes in the storage of and communication of information,

[1] This unclassified version of the Regulatory Impact Statement was prepared for general publication.

and is essential in order to enable the NZSIS to continue to effectively undertake its statutory functions."

Agency Disclosure Statement

7. This regulatory impact statement has been prepared by the NZSIS.

8. It provides an analysis of options to address technological changes and other factors that have resulted in the need to update the NZSIS seizure and interception warrants framework.

9. Proposals have also been put forward to amend the Act to address a gap in the delegation powers of the Director of Security. These proposed changes are exempt from regulatory impact analysis requirements, as those aspects are limited to internal administrative arrangements of the New Zealand Government.

10. The proposals respond to the impact of technological change and are essential to properly enable the NZSIS to continue to effectively undertake its statutory functions.

Dr Warren Tucker
Director of Security

11 August 2010

Status Quo and Problem Definition

Status quo

11. The Act provides that the Director of Security can apply for warrants to undertake certain activities that impinge on personal privacy rights (including property rights). The warrants framework provides for the interception or seizing of documents, communications and other things that cannot otherwise be lawfully obtained. It also provides for powers necessary to give effect to interception and seizure warrants, such as powers of entry and search.

12. Conditions that must be met before a warrant is issued, include that:

- the interception or seizure must be necessary to detect activities prejudicial to security or to gather foreign intelligence information essential to security
- the value of the information must justify the interception or seizure
- the information is not likely to be obtained by any other means
- the information sought is not privileged[2]

Source of issues

13. The warrant framework, while remaining workable over time, has not kept pace with new technologies and law change. It is therefore necessary to make several clarifying amendments to the Act.

14. Over the past 20 years, there has been considerable development of NZ's framework covering human rights. That framework has both broadened in scope and become more explicit. For example, section 21 of the New Zealand Bill of Rights Act 1990 (NZBORA) guarantees the right of everyone to be secure from unreasonable search or seizure, whether of the person, property, or correspondence, or otherwise. Development in case law concerning s21 means that there is an increasing expectation for any search or seizure by state agencies to be supported by express provisions in legislation, rather than by general provisions.

15. Changes in technology have also had an impact. This means that the current NZSIS warrants framework needs to be more expressly configured to better support the use of electronic tracking and some computer-based techniques used to collect information.

16. The current warrant framework specifically authorises activities that would otherwise have been unlawful at the time the provisions were enacted (e.g. 1977 for interception and seizure and 1999 for entry). The underlying premise of the scheme is that activities that were lawful at the time the Act was developed did not need express authorisation (regardless of the extent of intrusion). Some aspects of the framework

[2] Section 4A(3)(d) of the Act provides that a warrant should not be issued if the communications being sought would be privileged under section 31 to 33 of the Evidence Amendment Act (No 2) 1980 or would be communications of a professional nature between a lawyer and their client.

now need clarification as a result of both statutory and case law development. The related but separate question of what activities are "reasonable" under section 21 of the NZBORA has also been the subject of extensive development. Accordingly, there is now a requirement for the current warrant framework to be made more explicit to ensure consistency with the NZBORA and with other legislation such as the Crimes Act 1969.

17. Crown Law supports the contention that there are areas of uncertainty in the Act that would benefit from clarification. Similarly, the Inspector-General of Intelligence and Security (Inspector-General) has recommended the NZSIS consider updating the Act.

Specific issues

18. Six specific matters need to be addressed:

19. First, the current framework does not specifically provide for the use of electronic tracking devices. The needs of NZ law enforcement agencies have previously been catered for in this area, with the development of a tracking warrants regime (sections 200A to 200P of the Summary Proceedings Act 1957) but security and intelligence requirements have not been similarly addressed.

20. Second, the current warrant framework needs to be clarified in the area of computer-based surveillance. Section 253 of the Crimes Act 1961 provides a qualified exemption to the "access without authorisation" offence for the NZSIS (see section 252). The current approach of providing a qualified exemption for some activities but not others, creates uncertainty for the intelligence agencies, as well as for other agencies acting under warrant.

21. Third, the specification of facilities needs to be expressly provided for. This is a necessary update in an age where the use of mobile phones and cyber identities are becoming more common. This matter has specifically been raised as a matter for legislative amendment by the Inspector-General.

22. Fourth there is a need to clarify that those persons exercising NZSIS entry powers will continue to be protected from liability when they are seeking to obtain or facilitate entry. This is likely to involve a minor amendment to the existing entry powers framework to make it clear that the existing NZSIS power to "undertake any act that is reasonable in the circumstances and reasonably required" to achieve the purposes of the warrant also applies to obtaining and facilitating entry. Consideration also needs to be given to linking the protections that apply to the issue and exercise of warrants to NZSIS entry powers. The entry powers were drafted subsequent to the warrant powers and do not contain the same protections. This issue is one that has been specifically raised by the Inspector-General.

23. Fifth, there is a need to protect all persons acting under NZSIS warrants from liability, regardless of the status of the warrant. Currently, protection applies only to

those warrants where the subjects are NZ citizens and residents (domestic warrants). It does not apply to warrants issued in respect of foreign citizens, even though the warrant might be exercised domestically. This is a gap that ought to be remedied by extending protection to the exercise of all NZSIS warrants. To counterbalance this and other measures being proposed, a possible option would be to strengthen the warrants approval process by requiring that all NZSIS warrant applications should be approved by both the Commissioner of Security Warrants (a retired High Court Judge) and the Minister in charge of the NZSIS. At present, dual approval is required only in respect of warrant applications for the surveillance of NZ citizens and residents. The Any proposal to add the independent and quasi-judicial authority of the Commissioner of Security Warrants to the warrants process will considerably strengthen accountability.

24. Sixth, there is an existing requirement to specify, in advance, all those persons assisting the NZSIS under warrant. This is a cumbersome requirement, particularly when numerous external parties might be involved in an assistance capacity. Currently, any change to the persons assisting during the term of the warrant can only be achieved by an amendment to the warrant itself, requiring the warrant to be resubmitted to the Minister in charge of the NZSIS for formal approval. Often, it is not possible to specify at the time of seeking the warrant all of those persons who will be requested to assist during its term (which may be up to 12 months). Law enforcement agencies such as the NZ Police are not required to specify the persons requested to assist under warrant. Amending the requirement would improve the efficiency of the warrants process and would enable the NZSIS to react more quickly to a change in the circumstances of the warrant subject. It is not proposed to remove a requirement to specify persons altogether, but to delegate the task either to the Director of Security or to the person responsible for the warrant (known as the “authorised person”).

Objectives

25. The objectives for the amendments to the warrants framework are to:

- maintain NZSIS operational effectiveness by updating the warrants scheme and to clarify that modern technical methods of surveillance may be used
- maintain protections for those acting under warrant, including those exercising entry powers
- improve operational efficiency by allowing a more flexible process for persons assisting under warrant

Regulatory Impact Analysis

Alternative options

26. Three policy options were assessed:
    - maintaining the status quo (i.e. non-legislative solutions)
    - long-term legislative reform
    - immediate amendment to the Act

Status quo

27. The first option would be to maintain the status quo, by continuing to operate under the existing warrant framework. This option is not appropriate given the need to provide for national security by clarifying the use of effective operational techniques and ensuring the protection of those acting under NZSIS warrants.

28. Non-legislative solutions are not available to resolve the warrant issues.

Deferral

29. The second option would be to address these warrant issues on a long-term timeframe, possibly in conjunction with a fundamental review of NZ security legislation. A fundamental review of the Act is being proposed during the next two to three years. There are a wide range of policy problems impacting on the NZSIS resulting from its outdated legislation, and which extend beyond those matters associated with the warrants framework. However the updating and clarification of the warrants framework and its protections require urgent attention.

Immediate amendment

30. The third option would be to develop a NZSIS Amendment Bill to address high priority amendments:
    - providing an express framework for the use of electronic tracking and location devices
    - clarifying the approach to qualified exemptions for computer offences
    - expressly providing for the specification of facilities
    - addressing protections from liability for those persons acting under warrants
    - amending the requirement to specify those persons assisting under warrant
    - fixing gaps in the delegation powers of the Director of Security

31. Implementing these changes immediately would support NZSIS operational effectiveness in the lead up to the RWC2011.

Preferred option

32. It is proposed that Government should aim to complete the high priority warrant amendments to the Act during early 2011.

33. It is also proposed that a parallel policy review should be undertaken, aiming to achieve new security legislation by the end of 2012. The proposal for a fundamental review is the subject of separate proposals to Cabinet.

Costs and benefits

34. The proposed measures clarify the use of surveillance techniques that intrude on personal privacy. These surveillance activities will continue to be subject to warrant and the existing built-in legislative protections that apply to warrants.

35. There are minimal direct financial costs associated with implementing the proposals. Direct financial benefits could arise by confirming the use of electronic surveillance options. However, the net benefit of the proposals will be achieved through maintaining operational effectiveness (i.e. maintaining national security) rather than any monetary savings or efficiency gains that might accrue.

36. Accordingly, the following cost-benefit analysis is based on an evaluation of the costs associated with impacts on personal privacy weighed against the benefits that arise from continuing to use effective surveillance methods and consequent improvements to national security.

Costs

Human rights values

37. Human rights are central values of liberal democracies. These values include the right to privacy (including the protection of information and local privacy), the protection of personal integrity, the protection of property rights, and maintenance of the rule of law (including protection from unauthorised search). Reasonable expectations of privacy extend to reasonable and proportionate use of the activities covered by the policy proposals, namely; electronic tracking; interference with computers; interference with property, and the interception of private communications.

38. As noted earlier, the Act warrants framework was intended to cover only those activities that would otherwise have been unlawful to carry out. This approach of "general permissibility" for very intrusive activities is outdated, and does not take into account developments in the law, for example under the NZBORA. Legislating specifically for serious intrusions into personal privacy has the effect of stating publicly what types of practices may be undertaken, for what purpose and under what constraints. It also ensures that warrants for such activities attract the direct attention of the formal oversight authorities.

Electronic tracking

39. Electronic tracking does impact on personal privacy. By providing expressly for electronic tracking within the warrant framework, as well as formally confirming that the NZSIS can continue to undertake electronic tracking surveillance, will result in a

strengthening of the decision-making and oversight arrangements that apply to the use of this technique.

40. As noted above, express electronic tracking powers have already been addressed in the law enforcement domain, with a tracking surveillance warrants framework being provided in respect of the NZ Customs Service and the NZ Police (section 200A-200P of the Summary Proceedings Act 1957).

Computer interference

41. Clarifying the approach to the qualified exemptions to computer offences in the Crimes Act 1961 will provide certainty around the extent of the intelligence agencies' powers in relation to access and interference with computers. Access to, modification of, or interference with computers does impact on privacy. However, this proposal aligns the Crimes Act 1961 provisions with existing powers in the NZSIS Act. The interception warrant framework already allows a person to do any act that is reasonable in the circumstances and reasonably required to achieve the purposes for which the warrant was issued. While computer interference does impact on property rights, any interference would usually be minor. The warrant tests of necessity and value of information would continue to apply and would be weighed up against any operational proposal involving interference with a computer system.

Facilities

42. The proposal to expressly provide for the specification of facilities is a technical change. It updates the current legislation by allowing greater flexibility in specifying subjects, including where they are known by their cyber identity. Existing protections continue to apply requiring the destruction of any information that is not relevant to the security investigation (e.g. section 4F *Duty to minimise impact of interception warrants on third parties* and section 4G *Destruction of irrelevant records obtained by interception*).

Protection

43. Amending existing NZSIS entry powers to confirm protection to staff obtaining or facilitating entry would not result in a significant additional impact on privacy. The proposal simply clarifies the extent of existing protections for those carrying out the seizure and interception of information already provided for by the current warrant framework.

44. The proposal to protect all persons acting under NZSIS warrants from liability has no material impact on privacy or on any associated costs.

Assistance

45. The proposal to allow for greater flexibility in the naming of people assisting with warrants is an administrative change that has no material impact on privacy or on any associated costs.

Benefits

National security requirements

46. An objective of the proposed measures is to maintain the effectiveness of NZSIS surveillance methods.

47. The scope of what constitutes "NZ's security" continues to evolve. In 1969 when the Act was introduced, the Act defined security in a way that reflected cold war era concerns, addressing threats such as espionage and subversion. However, the concept of national security has changed during the intervening 40 years and includes more contemporary threats from terrorism, economic well-being and international well-being (these matters were incorporated by 1996 and 1999 Amendments to the Act).

48. National security, privacy and other fundamental civil liberties are complementary, rather than conflicting, values. *"To a very significant extent, 'national security' means just this – freedom from interference; freedom from terrorist attack, freedom from deliberately incited racial violence, freedom from espionage which itself threatens basic freedoms such as privacy, freedom from the kind of genuinely subversive activity which is aimed – not just in theory but in fact – at destabilising or overthrowing the very democratic system upon which the exercise of civil liberties depends."* [3]

49. The Law Commission adopted a similar approach, seeking to strike a balance between human rights and law enforcement values in providing search powers for law enforcement agencies. They considered that *"while there is a balance to be struck, there is a good deal of complementarity between the two sets of values, particularly in a strong democratic state such as New Zealand. Search powers that encroach too far on human rights values are unlikely to gain legislative or community support. Similarly, investigative powers that are too tightly controlled and that prevent law enforcement officers from doing their job effectively will bring human rights norms into disrepute."* [4]

50. This complementary relationship between national security and fundamental human rights underpins the approaches that other developed Western democracies take to configuring their own security intelligence functions. For example, the Canadian Charter of Rights and Freedoms enshrines the right to life, liberty and security; underpinning Canadian national security policy where "*a clear and effective approach to security is not just the foundation of our prosperity – it is the best assurance that future generations will continue to enjoy the very qualities that make this country a place of hope in a troubled world."* [5]

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[3] Security and Intelligence Services – Needs and Safeguards. Rt Hon Sir Geoffrey Palmer.
[4] Chapter 2, paragraph 2.7. Search and Surveillance Powers. Report 97. New Zealand Law Commission. June 2007
[5] Chapter 1. Securing an Open Society: Canada's National Security Policy. April 2004. Government of Canada.

51. Likewise, the European Convention on Human Rights influences how European countries (including the United Kingdom) configure their state surveillance powers to protect fundamental human rights. The Convention identifies a fundamental right to privacy as well as recognising there may be interference with this right where there is a need to uphold national security or economic well-being (Article 8).

52. A balance must be struck between allowing for effective national security measures and privacy values. Implementing state surveillance powers can undermine privacy even though the same powers are intended to uphold the security values that support privacy and other basic human rights. NZ's security legislation maintains this balance in several ways; by configuring robust oversight of the NZSIS (through the Inspector-General of Intelligence and Security Act 1996 and the Intelligence and Security Committee Act 1996); by placing clear limits on NZSIS functions, and by providing for warrants to be approved before exercising intrusive surveillance powers (seizing information or intercepting communications). The Privacy Commissioner and the Chief Ombudsman also play an important oversight role.

Warrant tests unchanged

53. Importantly, the proposals do not seek to alter the thresholds associated with the issue of warrants. The existing tests would be fully retained and would also be applied (see section 4A(3) of the Act). In accordance with this framework:

- any interception, seizure, or electronic tracking must be necessary
- the value of the information must justify the interception, electronic tracking or seizure
- the information must be unlikely to be obtained by any other means
- the information sought must not be privileged[6]

54. The tests of necessity and value, in particular, require the Commissioner of Security Warrants and the Minister in charge of the NZSIS to address the balance struck between privacy and security values in any warrant application.

55. The Act also has requirements to minimise impacts on third parties (see section 4F *Duty to minimise impact of interception warrants on third parties*).

The benefit of countering national security risks

56. It is difficult to generalise the benefit of maintaining effective surveillance methods across the diverse range of NZ's security interests. Some of the more acute security threats faced by NZ are associated with potentially catastrophic events that have a low probability of occurring, though the benefit of effectively mitigating a threat is enormous. For example, countering threats posed by terrorism during major international events being hosted by NZ is illustrative.

[6] Privileged information is identified by section 4A(3)(d) of the Act (see footnote 1).

57. The impact on NZ if a terrorist attack were successfully carried out, whilst unlikely, would be significant and long-lasting. As well as any direct loss of life or injury, there would likely be ongoing impacts on NZ's tourism industry, on domestic society and on NZ's international reputation.

58. The policy proposals, by maintaining the effectiveness of NZSIS surveillance capabilities, would reduce these risks by confirming that effective surveillance coverage will continue to be deployed against individuals identified as potential threats.

Net benefit-cost of proposals

59. The policy proposals do have the potential to impact on aspects of personal privacy. The most notable impacts would arise from confirming the use of electronic tracking, computer interference and minor property interference. These privacy intrusions are balanced against clear benefits that accrue to NZ's security by allowing the NZSIS to continue to use effective contemporary investigation methods. The proposed arrangements would be expressly brought into the construct of the existing warrants scheme, which already contains important protections before a security warrant is issued, such as the necessity for particular information. The exercise of these powers would also remain coupled with effective oversight of NZSIS functions.

60. Summary of costs and benefits:

<table>
<tr><th>Proposal</th><th>Cost</th><th>Benefit</th></tr>
<tr><td>Electronic tracking</td><td>Privacy intrusion</td><td rowspan="2">Maintains effective surveillance methods, enhancing national security</td></tr>
<tr><td>Qualified exemption from computer interference offence</td><td>Minor additional impact on privacy and minor impact on property rights</td></tr>
<tr><td>Facilities</td><td rowspan="4">Nil</td><td rowspan="2">Maintains agility in time-constrained circumstances to implement surveillance, enhancing national security</td></tr>
<tr><td>Flexibility in naming people assisting under warrant</td></tr>
<tr><td>Protect staff members exercising entry powers</td><td rowspan="2">Clarifies existing protections for staff and for persons assisting the NZSIS</td></tr>
<tr><td>Protect persons acting under foreign warrants</td></tr>
</table>

Consultation

61. The proposals for high priority amendment to the Act were developed in consultation with the Department of the Prime Minister and Cabinet, State Services Commission, Treasury, Ministry of Foreign Affairs and Trade, Police, and Ministry of Justice.

62. Because of the operational sensitivity of the proposals, public consultation on the proposals was not undertaken. To address the public interest in the area of privacy, and to ensure the proposals are calibrated against appropriate oversight arrangements, the Office of the Privacy Commissioner, the Office of the Ombudsmen, the Commissioner of Security Warrants, and the Inspector-General were also consulted.

63. Agencies' feedback was supportive. The Office of the Privacy Commissioner suggested there should be further strengthening of the Act to apply formal principles of proportionality, necessity and reasonableness to all security intelligence investigations and to protect the privacy of third parties. These suggestions would be most effectively addressed in a longer-term fundamental review of the Act.

64. It is envisaged that the Intelligence and Security Committee of Parliament would undertake public consultation on these proposals to assist their consideration of a NZSIS Amendment Bill.

Conclusions and Recommendations

65. The recommended option is to immediately pursue the proposed amendments; targeting the updating of the warrants scheme during early 2011 in order to support security preparations for RWC2011.

Implementation

66. Provided the proposed amendments to the Act receive assent during early 2011, it is envisaged that the amendments would become immediately effective. Minimal preparation time would be required to effectively implement the amended arrangements.

67. Existing oversight arrangements will cover the proposed amendments, which will ensure that impacts on privacy are minimised and ensure that the use of contemporary techniques remain consistent with national security requirements.

Monitoring, Evaluation and Review

68. The NZSIS would monitor the effectiveness of the amendments and would advise the Minister about any issues arising. A longer-term fundamental review of the Act is proposed during the next two to three years, which would provide an opportunity for addressing any issues.