

# ABC SUBMISSION FOR REVIEW OF 2017 INTELLIGENCE & SECURITY ACT (ISA)

## Introduction

This submission is presented by the Anti-Bases Campaign (ABC), a group which has been interested in the activities of the Security Intelligence Service (SIS) and the Government Communications Security Bureau (GCSB) since the establishment of the Waihopai Spy Base in 1988.

## Parameters of inquiry

Because this review is the result of a specific ISA legal requirement, the scope of the inquiry is limited in a way that does not allow the public to discuss alternatives to the established system and hence severely restricts full debate on the intelligence and security agencies and on possible alternatives. Given the recommendation [No 2] of the Royal Commission report on the Christchurch Mosque massacre, which recommended the creation of a new spy agency, that is a disappointment. Restrictions on scope of inquiry discourages input from those with alternative viewpoints and suggests that only a limited set of outcomes are possible.

## History of Problems

This review specifically investigates the Intelligence and Security Act of 2017. When considering [2.1] whether the Act appropriately balances national, community and individual security with individual privacy and other rights, and [2.2.] whether the Act sufficiently enables and controls target discovery activity by the intelligence and security agencies, the troubling history of SIS and GCSB errors, illegal activities and failures need to be remembered. [Some examples: the Rainbow Warrior affair, the Ahmed Zaoui saga, 86 Kiwis illegally spied on by GCSB, MPs spied on, DotCom raid input, the fixation on Muslim 'terrorists' and the Christchurch Mosque killings.]

On 'balance' the evidence suggests, in terms of the ISA 2017, we should restrict, or even remove, powers given to the two agencies rather than expand their power. There is no evidence that, despite huge increases in annual budgets and large increases in personnel, this country is any more secure. There is no evidence that passing several 'national security' and 'counter-terrorist' laws in the past ten years, consistently expanding the agencies' powers, has led to better security outcomes, while privacy

and democratic freedoms have been reduced. Certainly, the various pieces of legislation have not resulted in better oversight or more public control of the spy agencies.

Generally, governments, in terms of right to privacy, disclosure, data collection and handling, and covert activities, have erred on the side of granting the agencies more powers each time there is another failure or another review. This must not happen following this current ISA Review.

## **2.1 Balance of security and rights**

The ISA (2017) does not sufficiently balance SIS/GCSB powers and privacy/democratic/general human rights. In recent years, citizens are no closer to being able to access their SIS/GCSB files or learn about surveillance of themselves or their families (even historically). On the other hand, governments have: (1) empowered the GCSB to spy on New Zealanders, (2) introduced secret court trials - with some limited protections - where 'national security' is involved; (2) extended warrantless searches; (3) introduced prosecutions for preparing/planning' actions (under the Counter-Terrorism Law); and (4) hugely expanded the amount of data the agencies collect.

## **2.2 Enabling and controlling target discovery activity**

The ISA needs to be amended to rebalance democratic/human rights issues against the ever-expanding powers given to the SIS and GCSB. In particular there needs to be more regulation of warrants [see below], more responsibilities given to the Police – in conjunction with community organisations – and more public oversight. It is arguable that in many cases of domestic target discovery the 'targets' should be informed that they are under surveillance. This is more likely to prevent serious incidents than clandestine surveillance – especially if relevant community organisations are brought in to assist.

The ISA is virtually silent on SIS/GCSB/special forces operations overseas, most unknown to the NZ population. For example, covert activities related to the 'war on terror' have involved NZ personnel directly or indirectly in atrocities. Five Eyes associates wrongly tortured and imprisoned hundreds of Muslim men in Guantanamo

Bay – most were later cleared of terrorist links. NZ’s part in this (associated moral culpability at the very least) and similar actions or ‘renditions’ has not been revealed.

An Inspector-General of Intelligence and Security (IGIS) investigation, which took 4 years because of insufficient cooperation, revealed hundreds of cases where NZ spy agencies used information obtained through torture, and the SIS even sent questions to be given to the victims. Note that the investigation was extremely circumscribed – to 2002-2009 only, and only in Afghanistan. We know from Edward Snowden that NZ spies earned a citation from the NSA for tracking Bangladeshi ‘terrorists’ who were handed over to brutal treatment of their local security organisation. We do not know if other events remain hidden from public disclosure.

Recent IGIS reports have described current problems with handling such incidents, and NZ data ethics experts have also expressed concerns [See, eg, Newsroom, 1 April 2022]. This year Andrew Little told the media there had been two cases where approval had been given to use information extracted by torture. Usage was justified because the information came from a third party not involved in the torture rather than the perpetrators directly. Clearly an area where NZ law does not result in acceptable standards, and legislation is not working.

### **2.3 Improving authorisation**

Problems with warrants have been a constant theme in annual Inspector-General Reports for many years. Warrants for covert operations need much greater scrutiny both before and after they are issued. Issuing Ministers and/or Commissioners may have to make hurried decisions on the basis of information supplied by the ‘prosecutors’, and the IG does not have the resources to properly post-check warrants (or if activities that require warrants are concealed). [Note that in Australia recently more than 15 police officers were convicted of lying under oath or concocting information to get warrants; The Age, 1 Feb, 2022]. Oversight must ensure that NZ ‘secret agents’ are held to higher standards.

Matters of urgent enforcement should be handled by the Police and not warrantless agency searches. The IGIS needs more resources to follow up matters related to warrants. It should be noted for the purposes of this ISA review that the IGIS and the agencies disagree about when warrants are needed – e.g., for GCSB access to data

held by overseas partners, amongst other things. 'Initial inquiries' are hugely problematic.

## **2.4 Appropriate protections and oversight**

Another huge problem is data collection by or for Five Eyes partners. The warrant problem is mentioned above. But whistle-blowers such as Edward Snowden have revealed that sister agencies routinely collect/store/access each other's data. This is almost impossible to trace. (In recent years, the spy agencies of the US, UK, Australia and Canada have all built new repositories for data storage with capacities that are almost unimaginable.)

Five Eyes mass collection of data leads to other problems (which specifically relate to the ISA). Huge amounts of data are 'unintentionally' collected and no spy agency will discard data that might – one day – offer clues to a security problem. This is another argument for the ISA giving more responsibilities to the NZ Police who have much more transparency and much more likelihood of making sensible decisions about people in their community. [See 'Recommendations' at the end of this submission.]

One solution is for all data to be destroyed after five years if no further matters have emerged. However, unless the IGIS and his staff are given much more resources, this can never be checked, given the multiplicity of means to conceal information in massive computer storage systems. Note that the IGIS has stated that the GCSB policy on data holding is "not fit for purpose" [IGIS Annual Report 2021] and the IGIS and the agencies themselves have alluded to recent multiple expansions of data collection. "The amount and type of information relevant to our work has increased exponentially in recent years" according to an SIS spokesperson [Newsroom, 1 April, 2022].

Other issues need consideration in terms of data handling: (1) The history of data security/access to privileged information for public servants, both 'public' and covert is not encouraging; (2) The SIS and GCSB are periodically reported to suffer from low morale, high staff turnover, and lack of experienced staff to evaluate data – not a recipe for secure retention of privileged information; (3) In Australia the situation has got so bad that the Criminal Intelligence Commission has stopped reporting breaches of data

handling conduct and agencies like the Australian Security Intelligence Organisation have downgraded their reporting of breaches [Melbourne Age, 30 Dec 2021].

## 2.5 Agency cooperation and sharing with other organisations

### 1. Other NZ organisations

Recently a historic case was revealed where a covert officer discovered severe family abuse but his agency would not report it to the Police and current authorities backed this decision. This is a clear case where co-operation is needed and where agency directors have too much power to make decisions. The fact is that police have far more experience in handling community and family matters than spies do. The Police also have much more experience in handling individuals and groups who are anti-social and/or habituated to violence and are trained to respond to shooting events like the Christchurch Mosque tragedy. There needs to be much more responsibility in the ISA given to the Police and a lot fewer powers given to secret agencies.

### 2. Overseas organisations.

Ministers and the SIS/GCSB themselves frequently allude to the advantages this country gets from its membership of Five Eyes. But to the public there are many glaring negatives. [See also 2.2 above]

- (a) False information resulted in the persecution of Ahmed Zaoui and possibly others
- (b) NZ agencies have repeatedly used information extracted overseas by torture
- (c) GCSB Director Hampton has acknowledged that Five Eyes priorities were a reason NZ spies missed the Chch Mosque killer's threat.
- (d) NZ has been involved in locating 'targets' overseas who have been attacked by special forces or executed in extra-judicial drone strikes – including at least one NZ citizen in Yemen. Significant 'collateral' damage frequently means the death of adjacent civilians.

The 'ethical' issues are not addressed sufficiently, or are too vaguely defined, in the ISA and other legislation. The IGIS does not have sufficient resources to investigate, and with no real powers, it is easy for the agencies to stall or even withhold information. [We note the time and resources needed for the official govt 'Hit and Run' inquiry into Defence Force operations in Afghanistan – including the

concealing of relevant information by senior NZDF officials.] This is the kind of wider policy inquiry that would be exactly suited to investigation by a Parliamentary Select Committee with effective powers!

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## Recommendations for amendments to the ISA

Problems with the ISA and related security agency matters have been previously described. ABC would like to make three recommendations which would go some way to reducing problems with the SIS and GCSB and the current regulations/legislation:

1. The Intelligence and Security Committee, with appropriate clearances, **be given far greater powers to monitor and investigate SIS and GCSB activities** [including operational matters]. They should have investigative staff to assist them.

The US Senate Intelligence Committee offers a clear example of how elected officials can be given clearances to fully investigate all matters pertaining to security agencies.

2. The Inspector-General of Intelligence and Security be given (a) **more staff and resources** and (b) **some powers to enforce discovery** if the agencies are reluctant or tardy in responding to an investigation.
3. The NZ Police should have a **far bigger role in domestic security issues**, which are far more likely than international terrorist events.

The fact is that Police have far more experience in working with community and whanau. The Police also have much more experience in investigating and handling dangerous individuals and groups than closeted public servants and are trained to respond rapidly to instances of extreme behaviour.

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