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BILLS DIGEST

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New Zealand Security Intelligence Service Amendment Bill 2010

Date of Introduction:	06 December 2010
Portfolio:	NZ Security Intelligence Service
Select Committee:	As at 08 December, 1st Reading not held.
Published: 08 December 2010 by John McSoriley BA LL.B, Barrister, Legislative Analyst P: (04) 817-9626 (Ext. 9626) F: (04) 817-1250 Public enquiries: Parliamentary Information Service: (04 817-9647)	Caution: This Digest was prepared to assist consideration of the Bill by members of Parliament. It has no official status. Although every effort has been made to ensure accuracy, it should not be taken as a complete or authoritative guide to the Bill. Other sources should be consulted to determine the subsequent official status of the Bill.

Purpose

The aim of this Bill is amend the law relating to the New Zealand Secret Intelligence Service (the NZSIS) by updating and clarifying the New Zealand Security Intelligence Service Act 1969 (the Act) to

address technology changes and to ensure consistency with other legislation and, in particular, to update the interception warrant system¹.

Background

According to its explanatory note, the Bill addresses specific issues.

- “The principal Act does not expressly provide for the NZSIS to undertake tracking of subjects by electronic means. The Bill will clarify that the warrant framework does cover the use of electronic tracking devices”;
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- “The principal Act needs to be updated to provide a clear framework for facilities to be the subject of surveillance (such as telephone numbers or IP addresses). The Bill will confirm that facilities can be specified as the subject of warrant applications. This is a necessary update in an age where the use of mobile phones and cyber identities is common”;
- “Authorities provided to the NZSIS also require clarification in the area of computer-based surveillance. Section 253 of the Crimes Act 1961 already provides a qualified exemption to the “access without authorisation” offence for the NZSIS. The current approach of providing a qualified exemption for some activities relating to computers, but not others, creates uncertainty for the intelligence agencies, as well as for other agencies acting under warrant”.
- “The principal Act does not adequately protect from liability those persons exercising NZSIS entry powers when they are seeking to obtain or facilitate entry. The principal Act also fails to provide consistent protection to all persons acting under NZSIS warrants from liability, regardless of the foreign or domestic status of the warrant. The Bill will clarify protections in the Act for persons acting in accordance with a warrant”;
- “There is an existing requirement to specify, in advance, all those persons assisting the NZSIS under warrant. The Bill amends this requirement, which will improve efficiency and enable the NZSIS to respond more quickly to changes in circumstances”².

Regulatory impact statement

The New Zealand Security Intelligence Service produced a regulatory impact statement on 16 August 2010 to help inform the main policy decisions taken by the Government relating to the contents of this Bill. A copy of this regulatory impact statement can be found at:

<http://www.nzsis.govt.nz/publications/>

<http://www.treasury.govt.nz/publications/informationreleases/ris>

¹ New Zealand Security Intelligence Service Amendment Bill, 2010 No 259-1, Explanatory note, General policy statement, p. 1.

² Ibid, pp. 1 and 2.

Main Provisions

Meaning of “Facility”

Amongst several new definitions, the Bill provides a definition of the term “facility” which means:

- an electronic address, phone number, account, electronic identifier or similar identifier, or device that enables: communications to take place between individuals; or communications to be sent to or from an identified individual; or documents to be processed, stored, or accessed; and
- includes, without limitation, any of the following: a unique device identifier; a user account identifier; an Internet Protocol address; an email address; an Internet storage account (*Part 1, Clause 5, definition of “facility”*).

Issuing of interception warrants

Section 4A(1) of the Act provides power for the Minister and the Commissioner of Security Warrants may jointly issue a domestic interception warrant, authorising a person to intercept or seize any communication, document, or thing not otherwise lawfully obtainable by the person, if the Minister and the Commissioner are both satisfied on evidence on oath given by the applicant for the warrant that the conditions specified in Section 4A(3) apply to the proposed warrant.

Section 4A(2) provides that it is the Minister alone who may issue a foreign interception warrant. Such a warrant authorises a person to intercept or seize any communication, document, or thing not otherwise lawfully obtainable by the person, if the Minister is satisfied on evidence on oath given by the applicant for the warrant that:

- the conditions specified in Section 4A(3) apply to the proposed warrant; and
- there are reasonable grounds for believing that no New Zealand citizen or permanent resident is to be identified by the proposed warrant as a person whose communications may be intercepted and that any place to be specified in the proposed warrant is occupied by a foreign organisation or a foreign person.

The conditions set out in Section 4A(3) are that:

- the interception or seizure to be authorised by the proposed warrant is necessary for the detection of activities prejudicial to security or for the purpose of gathering foreign intelligence information essential to security;
- the value of the information sought to be obtained under the proposed warrant justifies the particular interception or seizure; and
- the information is not likely to be obtained by any other means; and
- any communication sought to be intercepted or seized under the proposed warrant is not privileged in proceedings in a court of law under Sections 31 to 33 of the Evidence Amendment Act (No 2) 1980 or any rule of law that confers privilege on communications of a professional nature between a lawyer and his or her client (*Part 1, Clause 6, amending Section 4A of the Act*).

Acting under and effecting warrants

Section 4D concerns the persons who may act under warrants. The existing section requires warrants to specify the persons who are requested to assist the person authorised by the warrant. A change in who is assisting requires the consent of the Minister.

Section 4E is amended to provide that a warrant (including a removal warrant) may be given effect to by the Director of Security (or the acting Director or a delegate) (without the involvement of the Minister) who may also request assistance in executing the warrant. The Bill also extends the powers of entry and powers to execute the warrants to:

- gaining entry to any place where the facility identified in the warrant is likely to be at any time; or
- it is necessary to enter in order to assess that facility (*Part 1, Clause 8, substituting Sections 4D and 4E; Clause 13, inserting New Sections 5AA and 5AAB into the Act (delegations by the Director of Security).*)

Interception warrants renamed intelligence warrants

The Bill amends the Act and the Inspector-General of Intelligence and Security Act 1996 to rename interception warrants intelligence warrants (*Part 1, Clause 15 and the Schedule*).

Amendments to Crimes Act 1961

The Bill removes the specific exemptions (*under Sections 253 and 254 of the Crimes Act 1961*) for the New Zealand Security Intelligence Service and the Government Communications Security Bureau from prosecution for the offences of:

- making, selling, or distributing or possessing software for committing crime (*Section 251 of the Crimes Act 1961*);
- accessing computer system without authorisation (*Section 252 of the Crimes Act 1961*)

The Bill provides in place a definition of “authorisation” which is a defence in relation to both offences. Authorisation is defined by the Bill as including “an authorisation conferred on a person by or under an enactment or rule of law, or by an order of a court or judicial process” (*Part 2, Clauses 16-19, amending Sections 248, and repealing Sections 252(3), 253 and 254 of the Crimes Act 1961*).

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