Intelligence and Security Committee

Submission on the Government Communications Security Bureau and Related Legislation Amendment Bill

This submission is in my individual capacity. I wish to appear in person before the Committee.

Support for Purpose of the Bill

The stated purpose of the Bill is to provide a clear statutory framework governing the activities of the Government Communications Security Bureau (GCSB) and enhance oversight. This is welcome given the findings of the Kitteridge Report and the intrusive nature of the agency's operations.

As the Bill is being put through in an accelerated timeframe under urgency, there is a danger that there will be insufficient consideration and debate of the balance between national security, international relations, and economic well-being on the one hand and, on the other, New Zealanders' values, privacy, and proportionality of response.

Creation of a Surveillance State

The combination of Sections 15A and 25 lays the foundation for ubiquitous surveillance in New Zealand, almost entirely in the hands of Ministers. In some cases, as detailed in Section 16, this does not even require a warrant or any oversight whatsoever. Under the guise of its Section 8A and 8B functions as well as the purposes laid out in Section 25(2), the GCSB will be able to collect, store and analyse all communications 'just in case' it is necessary as opposed to a response to an actual need.

Section 15A(1)(a) allows the GCSB to apply for an interception warrant to the Minister "authorising the use of interception devices to intercept communications **not otherwise lawfully obtainable**" (emphasis added). A similar provision is contained in Section 15A(1)(b). Section 15A(5) overrides all checks and balances in the Act. Further, Section 25 provides GCSB with wide discretion in the retention, use and communication of incidental information collected.

Together, these Sections provide the GCSB with the ability to undertake ubiquitous surveillance.

There are no barriers for the data collected to be shared with the National Security Agency (NSA) and others in the Five Eyes arrangement. Not only does the Bill create a Surveillance State, it provides for New Zealanders to be subject to ubiquitous surveillance in real-time by foreign states.

- *The words "not otherwise lawfully obtainable" in Sections 15A(1)(a) and 15A(1)(b) as well as the entirety of Section 15A(5) should be deleted.*

GCSB Spying on New Zealanders

I do not support the inclusion of Section 8C of the Bill and related provisions that provides for the GCSB to provide assistance to the agencies listed in Section 8C(1).

The stated rationale is that "In a small jurisdiction like New Zealand, it is essential that specialised capabilities developed or acquired by agencies like GCSB should be available to meet key government priorities, where appropriate and subject to necessary safeguards." Further, as the Regulatory Impact Statement states, "Other agencies will not have to duplicate technical capabilities and expertise already held by the Crown, and make effective and efficient use of the GCSB's capabilities."

No analysis has been provided of the costs vs. benefits (both tangible and intangible) of alternative options, in particular of an agency such as the New Zealand Security Intelligence Service (SIS) developing the capabilities it needs itself, or that the National Cyber Security Centre (NCSC) cannot be strengthened or re-purposed to achieve this goal.

Extending this logic and the Better Public Services programme, in the name of efficiency, expertise concentration, systems, sources, and resource rationalisation, the SIS and GCSB should be merged into a single agency. The logic that drives the Government to keep these two agencies separate is the very reason that the specialised capabilities of the GCSB should not be used to further the work of the SIS and other agencies listed in Section 8C(1). The unrestrained flow of GCSB's data to the NSA, as detailed below, is another consideration.

In addition, GCSB's limited resources and focus should be on functions that no other agency provides, i.e. Section 8A and 8B. Section 8(3) allows the GCSB Director, subject to only the Minister's control, to be able to prioritise Section 8C functions over the others. This concern is not hypothetical as evidenced by the NSA's increased focus on domestic surveillance in the United States of America.

- *Section 8C and related provisions authorising GCSB spying on New Zealanders should be deleted from the Bill.*

Information flow to the NSA

What sets the GCSB apart from the SIS is its close ties with NSA and others in the Five Eyes arrangement.

Data collected by the GCSB will flow without any check or oversight to the NSA, including that collected by spying on New Zealanders under Section 8C as well as that resulting from an interception warrant/access authorisation under Section 15B and from New Zealand information infrastructure (including the content of the communications themselves) without a warrant under Section 16. How that data is subsequently stored and used by the NSA, as well as for what purpose, is beyond New Zealand's sovereign control or even knowledge.

In addition, data collected by the GCSB under secret warrants and based solely on Ministerial discretion will flow to the NSA due to the Telecommunications (Interception Capability and Security) Bill going through the legislative process in parallel. The data is from lawful interception, duty to assist requests, and network security reviews.

- *A specific provision should be introduced in the Bill prohibiting the GCSB from providing data about New Zealanders and New Zealand information infrastructure, whether collected directly or incidentally, from being given to any and every foreign organisation.*

Strengthen oversight arrangements

GCSB needs to be able to operate in secrecy and outside normal public scrutiny processes. Experience shows that effective oversight is even more important in such situations as otherwise misuse of powers and convenient interpretations of the law are inevitable. The proposed oversight arrangements are clearly inadequate against this standard.

Cross-party political oversight of the GCSB can provide a measure of additional oversight. For example, the Intelligence and Security Committee should be able to independently initiate an enquiry and satisfy itself that incidental information in relation to third parties collected, retained and communicated by the GCSB is in accordance with Section 25.

- *The Intelligence and Security Committee Act 1996 be amended so as to provide the Committee with the powers to undertake the same functions that the Inspector-General of Intelligence and Security has under Section 11 of the Inspector-General of Intelligence and Security Act 1996.*

Mandatory informing the Minister on urgent issue of a warrant/authorisation

Section 19A provides for the people specified in Section 19A(2) to issue an urgent warrant or authorisation if the Minister is unavailable. To provide for continued oversight of the Minister and prevent the Minister from disclaiming knowledge of the urgent warrant/authorisation, the Minister should be mandatorily informed of the urgent warrant or authorisation issue.

- *A provision be included in the Bill that it is mandatory for the person issuing an urgent warrant or authorisation under Section 19A to inform the Minister as soon as the Minister is available after the issue of such warrant or authorisation.*

List of agencies that can be assisted

Section 8C(1)(d) provides for the GCSB to assist any department (within the meaning of the Public Finance Act 1989) by an Order in Council. This is a very low threshold and does not allow for any debate or consideration by Parliament. Yet the intrusive and secretive nature of the GCSB's activities requires careful public consideration of appropriateness and proportionality before the list of departments it is able to assist is extended.

For example, if the GCSB is used to assist Inland Revenue in tackling tax avoidance or the Ministry of Social Development in benefit fraud, this should be the subject of Parliamentary consideration and the legislative process rather than a Cabinet decision.

- *The list of agencies that the GCSB is allowed to assist should be able to be expanded only by amending the Act rather than an Order in Council.*

Ensure whistleblowing process is working

The amended Section 11 increases penalties for unauthorised disclosures by GCSB staff. Given the secretive nature of the organisation, it is vital that public interest disclosure provisions work effectively. Section 12 of the Protected Disclosures Act 2000 provides for special rules that apply to the GCSB in relation to the internal procedures that it must have in place.

- *Include a provision in the Bill that requires the GCSB Director to certify to the Inspector-General of Intelligence and Security annually that all applicable requirements of the Protected Disclosures Act 2000 have been fully complied with and that all staff are adequately informed of internal procedures in relation to protected disclosures. Such information should be reported to the House of Representatives in accordance with Section 12(3).*

Thank you for the opportunity to put forward my views.

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