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Chairperson
Intelligence and Security Committee
PARLIAMENT BUILDINGS

GOVERNMENT COMMUNICATIONS SECURITY BUREAU AND RELATED LEGISLATION AMENDMENT BILL – INITIAL BRIEFING

1. This briefing provides an overview of the purpose and content of the Government Communications Security Bureau and Related Legislation Amendment Bill (the Bill).

BACKGROUND

2. The Bill is an omnibus bill amending the Government Communications Security Bureau Act 2003 (GCSB Act), the Inspector-General of Intelligence and Security Act 1996 (IGIS Act), and the Intelligence and Security Committee Act 1996 (ISC Act).
3. The purposes of the Bill are to:
 - provide for a clearly formulated and consistent statutory framework to govern the activities of the Government Communications Security Bureau (the Bureau);
 - update the GCSB Act to respond to the changing security environment, particularly in relation to cybersecurity and information security; and
 - enhance the external oversight mechanisms that apply to the intelligence agencies (both the Bureau and NZSIS) by strengthening the office of the Inspector-General of Intelligence and Security (IGIS) and by improving the operation of the Intelligence and Security Committee (ISC).

SUMMARY OF CHANGES TO THE GCSB ACT

4. The amendments to the GCSB Act are not revolutionary. They do not involve a fundamental change the principles underpinning the GCSB Act.

Functions of the Bureau

5. Currently section 8 of the GCSB Act provides for three functions:
 - information assurance and cybersecurity,
 - foreign intelligence, and
 - co-operation and assistance to other entities.

6. These three functions are retained, but the descriptions are clarified to allow for more effective oversight, and updated to respond to the changing operational environment. These changes will complement and amplify the proposals to strengthen oversight with amendments to the IGIS Act and the ISC Act.

Information assurance and cybersecurity – new section 8A (clause 6)

7. Effective information assurance and cybersecurity activity forms a core part of the defence of the modern nation state. The Bureau's information assurance and cybersecurity and co-operation functions are currently compressed into a single paragraph (section 8(1)(e)) which is both complex to negotiate and inadequate to empower the Bureau to carry out the full scope envisaged for those functions.
8. Splitting the two apart will improve transparency and make it easier to articulate clearly what it is that the government intends the Bureau to do, beyond its foreign intelligence role, to support New Zealand's security, international relations and economic prosperity through the provision of expert advice and assistance.
9. The Bureau has a key role to play in the wider cybersecurity domain. It hosts New Zealand's National Cyber Security Centre (NCSC), and Cabinet has indicated its expectation that the Bureau will considerably enhance its cybersecurity capabilities and use its expertise to assist a range of organisations (government, state sector, critical infrastructure providers and key economic contributors) to protect their information, ICT, networks and infrastructure from cyber threats.
10. The function of assisting with information security is clearly indicated in the GCSB Act. But because the information security function must be interpreted with reference to the Bureau's objective, even this function can be read narrowly to apply only within the public sector, potentially excluding critical national infrastructure providers and organisations of national significance.
11. New section 8A will allow the Bureau to co-operate with, and provide advice and assistance to both public and private sector entities on matters relating to the security and integrity of electronic information, communications, and information infrastructures of importance to the government

Foreign intelligence – new section 8B (clause 6)

12. The Bureau's foreign intelligence function is defined in the GCSB Act in a highly prescriptive way which states not only what the overall function is, but exactly what it consists of and how it is to be achieved – to a level of detail that includes deciphering, decoding, translating, examining and analysing communications. This is far from ideal, given the major changes in the ways technology is used to communicate since the GCSB Act was passed 10 years ago.
13. It is more appropriate to describe at a higher level the foreign intelligence function that the Bureau is expected to carry out, complemented by a set of powers and limitations to govern what activities may be conducted in pursuit of the function. This approach provides transparency about the nature and scope of the function, without expressly legislating the skills required in pursuit of these functions and powers.
14. New section 8B therefore focuses on the gathering and sharing of intelligence about the capabilities, intentions or activities of foreign organisations or foreign persons, in accordance with the government's intelligence requirements.

Co-operating with other entities – new section 8C (clause 6)

15. The GCSB Act contemplates this support role, but provides no clear basis for defining the limits of such assistance. It appears to constrain the role by stating (in section 8(2)) that advice and assistance may be provided to other entities in fulfilling their functions, but only on matters that are relevant to the pursuit of the Bureau's own objective or to the safety of any person; or the commission of serious crime.
16. As a result, it is uncertain what basis the Bureau has for its co-operative role, and for sharing its expertise across the intelligence community and the wider public sector. Greater clarity is required about whether, in what circumstances, and to what extent the Bureau is able to provide assistance to others, in accordance with its legal functions and powers.
17. The Bill enables the Bureau to provide assistance to three listed State Service entities (as well as any other departments that may in future be authorised by Order in Council) in respect of any activity that that other entity may lawfully undertake but lacks the capability to do so (see new section 8C(1)).
18. When assisting one of the listed entities, the Bureau will be governed by that other entity's powers and restrictions, and – importantly – will not be able to go beyond the powers that the other entity is lawfully entitled to exercise (see new section 8C(2)). The Bureau will be subject to the oversight and control mechanisms of the entity requesting assistance in carry out the activity in question, but it will still be subject to the oversight of the IGIS in respect of the Bureau's determination that it was able to provide assistance. For example, the Police would need a warrant before they could intercept communications and before they could request assistance from the Bureau in undertaking that activity.

Powers of the Bureau

19. The GCSB Act currently confers three powers of interception on the Bureau:
 - warrantless interception in situations not involving the physical connection of an interception device to a network; and not involving the installation of an interception device in any place in order to intercept communications in that place (sections 15 and 16);
 - interception of communications by an interception device under an interception warrant granted by the Responsible Minister (section 17);
 - access to a computer system under a computer access authorisation granted by the Responsible Minister (section 19).
20. These powers continue to provide the basic tools that the Bureau needs to perform its foreign intelligence and information assurance and cybersecurity functions. The Bill amends the GCSB Act to make it clear that the powers can be used for both the foreign intelligence function and the information security and assurance function, subject to appropriate controls and limitations (see new section 13 / clause 11).
21. The language used to capture the powers, in light of changes in the legal environment, and the way in which communications are now carried and routed around the world is outdated and would benefit from being refreshed. In addition, the warrant (section 17) and access authorisation provisions (section 19) are repetitive in terms of the procedural and substantive requirements to be met in applying for and granting a warrant or authorisation. New section 15A (clause 14) replaces sections 17 and 19, by combining both powers in a single section with common and consistent requirements.

Controls and limitations on the powers of the Bureau

Interceptions not to target New Zealanders for intelligence gathering purposes

22. The basic premise underpinning the operations of the Bureau is that it does not conduct foreign intelligence activities against New Zealanders. This premise pre-dated the GCSB Act. Given its importance and significance it was incorporated in the GCSB Act (section 14). The repeal of this basic premise was not contemplated by the Government at any time.
23. However, the way this basic premise was incorporated into the GCSB Act is less than ideal, and meant that it applied to not only the foreign intelligence function of the GCSB, but also to its other two functions – namely information assurance and cooperation and assistance to other agencies. This has created a growing number of difficulties, and is restricting GCSB's ability to effectively carry out its other two functions.
24. New section 14 (clause 12) preserves this basic premise and clarifies that it only applies to the Bureau's foreign intelligence function, and not to its information assurance and cooperation and assistance functions. This means that situations like those in the Kim Dotcom case would continue to be prohibited. It also means that if an organisation requests the Bureau's assistance with computer security to determine whether a cyber-intrusion has occurred, it is able to assist without risking legal complications around section 14.

Involvement of the Commissioner of Security Warrants

25. The clarification of section 14 means that the Bureau will be able to intercept the communications of New Zealanders in the following situations:
 - When the Bureau is carrying out its information and cyber security function,
 - When the Bureau discovers a New Zealander acting as an agent of a foreign power under its foreign intelligence function (which is one of the existing exceptions to the basic premise in section 14).
 - When the Bureau is providing assistance to the entities named in new section 8C to carry out their lawful activities.
26. In cases where the Bureau will be intercepting communications of New Zealanders when undertaking its core functions of information assurance and cybersecurity and foreign intelligence, as an added safeguard and oversight mechanism, all such interceptions will require the warrant to be jointly issued by the Responsible Minister and the Commissioner. This is very similar to the role of the Commissioner in respect of domestic warrants sought by the NZSIS and is an important safeguard in respect of New Zealanders' privacy.
27. The Commissioner however will not play a role when the GCSB is assisting another entity to perform that other entity's functions. That is because, before any assistance can be given, that other entity will first need to have the lawful authority to undertake the activity for which assistance has been sought. Such authority could take the form of a warrant issued by the courts, or an existing statutory authority granted by Parliament, or some other source of legal power to carry out the activity. In such cases, the Bureau will be governed by the restrictions and limitations that apply to that other entity. For example, in the case assisting Police execute a surveillance device warrant, the

authorisation and oversight comes from the court and the Search and Surveillance Act contains all the controls on how the information collected is to be managed.

Register of warrants and authorisations

28. To enable the IGIS to have access to the best possible information, the Bill requires the Bureau to maintain a written record to all warrants and authorisations in a form readily available for inspection by the IGIS (see new section 19 / clause 18).

Policy on personal information

29. The Bill will create new obligations for the Bureau in respect of the handling of personal information, based on the principles under the Privacy Act. Under section 57 of the Privacy Act 1993, the Bureau (and NZSIS) are exempt from all privacy principles except principles 6 (access to personal information), 7 (correction of personal information) and 12 (unique identifiers). The Law Commission recommended, in its June 2011 review of the Privacy Act, that the Act be amended to make a further four principles applicable to the intelligence agencies:

- principle 1 (purpose of collection of personal information)
- principle 5 (storage and security of personal information)
- principle 8 (accuracy of personal information to be checked before use)
- principle 9 (agency not to keep personal information for longer than necessary)

30. Due to the unique requirements of national security and the nature of intelligence gathering it was considered best to require the Bureau to, in consultation with the IGIS and Privacy Commissioner to formulate a policy that recognises those principles, with any modifications if necessary. Compliance will be regularly audited, with results communicated to the Privacy Commissioner. The policy will also be reviewed on a regular basis and updated as required.

Other amendment

31. The Bill makes other amendments to update the GCSB Act, including the following:

- the State Service Commissioner's support for the appointment process, as currently set out in the Cabinet Manual, is codified in new sections 9A – 9D (clause 7).
- in situations of urgency where the responsible Minister is not readily available, the Attorney General, the Minister of Foreign Affairs or the Minister of Defence will be empowered to issue warrants or authorisations (see new section 19A / clause 18).
- the maximum penalty for disclosure of information is increased (from 2 years to 3 years and \$2000 to \$5000) to align with it with similar penalties in the Crimes Act 1961 (see clause 8).
- the provision relating to immunity from civil and criminal liability is updated in line with other statutory provisions (in particular the Search and Surveillance Act) and specific reference is made the protection from liability provision in the State Sector Act 1988 (see new section 21 / clause 20).

OVERSIGHT ARRANGEMENTS

32. Effective and credible oversight of the intelligence agencies is crucial for assuring the New Zealand public that those agencies' powers are being used in accordance with the law and with respect for New Zealanders' rights to privacy.
33. There is an inherent tension between the secrecy required for effective intelligence operations, and legitimate public expectations of government agencies' transparency. The goal is to balance these two opposing considerations in a way that provides both appropriate levels of security and public assurance. In addition to the new role for the Commissioner of Security Warrants, the Bill modernises the legislation governing the IGIS and the ISC to enhance the oversight provided.

Summary of amendments to the IGIS Act

34. In summary the changes to strengthen the office of the IGIS are:

- to extend the IGIS's statutory work programme of the IGIS to include system-wide issues that impact on operational activity while retaining a focus on warrants and authorisations;
- the IGIS will be required to certify each year in his or her annual report that the compliance systems of the intelligence agencies are sound;
- the IGIS will be able to initiate inquiries into matters of propriety without requiring concurrence by the Responsible Minister (thereby enabling the IGIS to undertake independent inquiries);
- the Responsible Minister will be given explicit responsibility to respond to IGIS reports within a reasonable time-frame (and the Minister may choose to provide those responses to the ISC);
- the IGIS will be expected to make unclassified versions of his or her reports public, with appropriate precautions also taken in respect of any privacy concerns;
- the legislative requirement that the IGIS be a retired High Court Judge will be removed, to broaden the pool of potential candidates. The three year term will remain but any further reappointment will be restricted to allow a maximum of one additional term;
- a deputy IGIS will be appointed, on the same basis as the IGIS.

35. These legislative changes will be supported by increased resourcing of the office of the IGIS to enable the greater range of activities to be carried.

Summary of amendments to the ISC Act

36. Changes to the way the ISC operates are proposed to improve its ability to provide oversight of the Bureau and NZSIS:

- the Prime Minister will be required to relinquish the ISC chair (to one of his or her existing nominees on that Committee) when the Committee is discussing the performance of an agency (in the course of conducting a financial review) for which the Prime Minister is the Responsible Minister;
- as a separate measure, the Prime Minister will be permitted to nominate either the Deputy Prime Minister or the Attorney-General to act as an alternate chair of the

Committee, at times and for periods of his or her choosing, even when that alternate is not already a member of the ISC;

- Subject to restrictions on the publication of sensitive information, the ISC will be required to table its reports in the House and make them publicly available via a website;

37. In addition to these legislative changes the Department of the Prime Minister and Cabinet has been directed to discuss with ISC members how best the Department could support the Committee's work.

CONCLUSION

38. It is essential that the Bureau has a clearly formulated and consistent statutory framework to operate within. The public needs to have confidence that it is operating within the bounds of that framework through effective external oversight mechanisms. The amendments contained in this Bill put the Bureau on a sound footing to fulfil the role the Government expects it to perform in the interests of New Zealand, and strengthens the external oversight mechanisms.

39. These legislative amendments are in turn supported by the implementation by the Bureau of the Compliance Review recommendations, coupled with additional resources the Government will be providing to the office of the IGIS.

Rajesh Chhana
Intelligence Coordination Group
Department of Prime Minister and Cabinet