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**What we do in the shadows:
Attempting to locate legitimacy in New Zealand's spy
agencies**

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Abstract

According to the purpose of the Intelligence and Security Act 2017, New Zealand's intelligence and security agencies operate to "protect New Zealand as a free, open and democratic society". However, their functions, powers and activities are characterised by behaviour completely contrary to these principles. They possess inherently coercive and intrusive powers and are necessarily opaque in the interests of operational security. They operate from the shadows and are almost entirely unknown to the public whom they seek to protect. Following the 15 March 2019 Terrorist attack on Christchurch masjidain, and the 3 September 2021 attack at LynnMall, New Zealand has seen increased discussion about extending the intelligence agencies' powers. In light of this context, this paper seeks to locate the legitimacy of these intelligence and security agencies. This paper defines legitimacy as a question of publicly accepted authority and power, dependent on public trust and confidence. Adopting the purpose section of the Intelligence and Security Act as a lens, this paper explores how and where these agencies anchor their legitimacy given their difficulties in maintaining this core component of trust. It finds that their legitimacy is dependent on the assurances of their oversight bodies, who provide public trust where these agencies lack it.

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I Introduction

According to the Intelligence and Security Act 2017 (the Act), the overarching purpose of New Zealand’s intelligence and security agencies is to “protect New Zealand as a free, open and democratic society”.¹ Yet, the agencies operate in the shadows. They possess significant, coercive and intrusive powers, and remain almost entirely unknown to the New Zealand public.² This paper explores how these agencies attempt to anchor a sense of legitimacy, despite the darkness they inhabit.

Their legitimacy is not anchored in legality alone. This paper holds that legality is not the sole determiner of legitimacy. As Janet McLean suggests, legitimacy is ultimately an issue of who or what holds effective and publicly accepted authority.³ The law is not distinctive in this regard, and indeed, may not be sufficient. Instead, this paper suggests that a more composite and complex view of legitimacy should be adopted. A view which emphasises democratic support, and the need for public trust and confidence.⁴

If legitimacy is ultimately a question of publicly accepted authority and power, based on trust and confidence, then the agencies face a difficult task⁵ The principle purpose of the Act, and the agencies themselves, is a double-edged sword. The agencies must employ inherently intrusive powers in order to protect New Zealand “as a free, open and democratic society”.⁶ In doing so, they act in secret, and in a way contrary to

¹ Intelligence and Security Act 2017, s 3.

² Te Pā Whakamarumarū | New Zealand Security Intelligence Service *Arotake / The 2019 Terrorist Attacks in Christchurch: A review into NZSIS processes and decision making in the lead up to the 15 March attacks* (June 2019) at 68; William Young and Jacqui Caine *Ko tō tatou kāinga tēnei / Report: Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (November 2020) at 612; and John Edwards, New Zealand Privacy Commissioner “Privacy versus Security; The False Dichotomy and the Myth of Balance” (Speech given at the New Zealand Institute of Intelligence Professionals Annual Conference, Rydges Hotel, Wellington, 15 July 2015).

³ Janet Mclean and others “Legality in times of emergency: assessing NZ’s response to Covid-19” (2021) 51 *Journal of the Royal Society of New Zealand* 197 at 208.

⁴ Janet Mclean and others, above n 3 at 208; and Helen Winkelmann, Chief Justice of New Zealand “What Right Do We Have? Securing Judicial Legitimacy in Changing Times” (The Dame Silvia Cartwright Address, Auckland, 17 October 2019).

⁵ Janet Mclean and others, above n 3 at 208; and Helen Winkelmann, above n 4.

⁶ Intelligence and Security Act 2017, s 3; and Te Pā Whakamarumarū | New Zealand Security Intelligence Service *Arotake*, above n 2, at 68.

the societal values the Act seeks to protect.⁷ Such powers and functions inherently cause issues of trust.⁸

The agencies' deficiency in public trust is further compounded by their lack of transparency. Their operational information, and the methods they use to protect New Zealand's national security are 'necessarily' confidential.⁹ As such, they cannot inform the public of the value they provide, and how they protect them from threats. They cannot write their own narrative, or tell their story. Instead, they are reliant on oversight bodies, such as the Inspector-General of Intelligence and Security to tell it for them.¹⁰

The relationship between the intelligence agencies and the New Zealand public suffers from an information asymmetry. If we regard the relationship between the New Zealand public and our intelligence and security agencies as a social contract, then the public, who surrender rights and liberties in exchange for these agencies' services, cannot be viewed as an informed party.¹¹ And the contract itself is a significant one, given the coercive potential of the agencies' powers. It is difficult to locate and ascertain the intelligence community's legitimacy as a public body when it cannot be seen. Particularly as legitimacy rests so heavily on public trust and confidence, which the intelligence community have difficulties in maintaining.

In the current context, it is more important than ever to assess the legitimacy of New Zealand's intelligence and security agencies, and where they derive it from. In the wake of the 15 March 2019 terrorist attack on Christchurch masjidain, and the 3 September 2021 LynnMall terrorist attack in Auckland, there is increased discussion about extending the powers of New Zealand's intelligence and counter-terrorism agencies.¹² Indeed, the government has brought forward an independent statutory review of the agencies' empowering act, the Intelligence and Security Act 2017, which began on 1 July 2021.¹³ However, if the powers of the agencies were to be extended, the public's general lack of information would remain.

This paper looks to the agencies' legislative purpose and adopts it as a lens and framework through which to examine the agencies current functions and settings, and

⁷ Te Pā Whakamarumarū | New Zealand Security Intelligence Service *Arotake*, above n 2, at 68.

⁸ Michael Cullen and Patsy Reddy *Intelligence and Security in a Free Society: Report of the First Independent Review of Intelligence and Security in New Zealand* (29 February 2016) at 52.

⁹ William Young and Jacqui Caine, above n 2, at 612; and John Edwards, above n 2.

¹⁰ Te Pōhēwha Mātaki | Inspector-General of Intelligence and Security "Publications" <<https://igis.govt.nz/publications/>>; and Intelligence and Security Act, s 158(f).

¹¹ John Edwards, above n 2.

¹² William Young and Jacqui Caine, above n 2, at 613; and Thomas Manch "There are safeguards': Parliament progresses new counter-terrorism laws despite concerns" *Stuff* (Online ed, New Zealand, 21 September 2021).

¹³ New Zealand Government "Intelligence and Security Act review brought forward" (Press release, 24 May 2021).

how these serve their sense of legitimacy. The overarching purpose of the Act is to be achieved through the performance of the agencies' function of "effectively contribut[ing] to the protection of New Zealand's national security".¹⁴ However, oversight, safeguards and limits on this function are also incorporated into the purpose of the Act, and requires that it be performed:¹⁵

- (i) in accordance with New Zealand law and all human rights obligations recognised by New Zealand law; and
- (ii) with integrity and professionalism; and
- (iii) in a manner that facilitates effective democratic oversight; and
- (d) ensuring that the powers of the intelligence and security agencies are subject to institutional oversight and appropriate safeguards.

This paper does not attempt to assess whether this legislative purpose is achieved, or whether the agencies are successfully performing their functions. Such an investigation would require information that security outsiders simply cannot access. Instead, this paper attempts to peer behind the veneer of these agencies, and investigates the current instruments, legislation and policy settings surrounding New Zealand's intelligence agencies and their purpose. It asks how their sense of legitimacy located in and served by it. It finds that, due to the 'shadows' that these agencies inhabit, their legitimacy is dependent on the assurances of their oversight bodies, who provide trust where the agencies lack it.

II Legitimacy through efficacy

The Intelligence and Security Act provides that the agencies must "effectively contribute to the protection of New Zealand's national security".¹⁶ Efficacy, or the effective performance of an agency and its functions, can contribute to the legitimacy of an agency. As noted above, legitimacy is ultimately a question of publicly accepted authority and power.¹⁷ In other terms, does the entity secure the co-operation of the population or is it viewed with indifference with regards to the exercise of its power.¹⁸ Or, as Helen Winkelmann CJ has noted in the context of the judiciary:¹⁹

the kind of legitimacy that exists when the decisions of a court are accepted "without fear of punishment or hope of reward"... This type of legitimacy depends upon public confidence in the judiciary. Acting within the legal rules and jurisdiction is a necessary condition for legitimacy to exist in this broader sense, but on its own, it is not enough.

¹⁴ Section 3(a)(i).

¹⁵ Section 3.

¹⁶ Section 3(a)(i).

¹⁷ Janet Mclean and others, above n 3 at 208; and Helen Winkelmann, above n 4.

¹⁸ Janet Mclean and others, above n 3 at 208.

¹⁹ Helen Winkelmann, above n 4.

Here, the Chief Justice has explicitly noted the link between public confidence in institutions and maintaining the legitimacy of those institutions.²⁰ As this paper argues, public trust and confidence is the key driver and determiner of legitimacy. The importance of public trust in maintaining the authority of governments and their agencies has also been acknowledged abroad. For example, the Organisation for Economic Co-operation and Development (OECD), has stated that:²¹

... [t]rust is essential for social cohesion and well-being as it affects governments' ability to govern and enables them to act without having to resort to coercion ... A decline in trust can lead to lower rates of compliance with rules and regulations...

As these authorities indicate, legitimacy, when understood as a question of public authority, is intrinsically connected to public trust and confidence.²² There are a number of factors relevant to securing public trust and confidence, and therefore maintaining legitimacy. These may vary according to the particular institution, power or context. However, the Auditor-General has indicated that efficacy or performance may be an important factor for many agencies. Indeed, public trust and confidence in an agency and its functions should increase as the agency delivers public value.²³

Firstly, in examining delivery effectiveness, we must look to the function and purpose that New Zealand's intelligence agencies are tasked with performing. The agencies' function and purpose are firmly set out in the Intelligence and Security Act 2017. The Act states that the intelligence and security agencies "will effectively contribute to the protection of New Zealand's national security" and that they should be provided with "adequate and appropriate functions, powers, and duties" in order to achieve this end.²⁴ As their governing legislation suggests, New Zealand's two intelligence and security agencies, the New Zealand Security Intelligence Service (NZSIS) and the Government Communications Security Bureau (GCSB), contribute to New Zealand's 'National Security' through the collection of intelligence.²⁵ 'National security' is defined by the *National Security System Handbook* as:²⁶

²⁰ Helen Winkelmann, above n 4.

²¹ OECD *Government at a glance 2013*, (OECD Publishing, Paris, 2013) at 21, as cited in Tumuaki o te Mana Arotake | Controller and Auditor-General *Public Accountability: A Matter of Trust and Confidence* (September 2019) at 18.

²² OECD, above n 21, at 21, as cited in Tumuaki o te Mana Arotake | Controller and Auditor-General *Public Accountability: A Matter of Trust and Confidence*, above n 21, at 18.

²³ Tumuaki o te Mana Arotake | Controller and Auditor-General *Public Accountability: A Matter of Trust and Confidence*, above n 21, at 17.

²⁴ Sections 3(a)(i) and 3(b).

²⁵ Intelligence and Security Act, ss 7 and 8.

²⁶ Te Tari o Te Pirimia me Komiti Matua | Department of Prime Minister and Cabinet *National Security System Handbook* (August 2016) at 7; and William Young and Jacqui Caine, above n 2, at 87.

the condition which permits the citizens of a state to go about their daily business confidently free from fear and able to make the most of opportunities to advance their way of life. It encompasses the preparedness, protection and preservation of people, and of property and information, both tangible and intangible.

The GCSB is primarily responsible for protecting this ‘national security’ through signals intelligence, information assurance, and cyber-security.²⁷ The NZSIS is primarily responsible for ‘human intelligence’.²⁸ As the Royal Commission of Inquiry notes, the NZSIS operates by:²⁹

obtaining human intelligence from people with knowledge of, or access to, information. It also obtains information through a range of other collection methods. These include physical surveillance, open-source research and activities conducted under intelligence warrants, such as the use of tracking devices, telecommunications interception and listening devices.

New Zealand’s Intelligence and Security Agencies have a plain and explicit statutory function and purpose. The pressing issue is whether their efficacy in performing this function can be ascertained and relied upon in building and maintaining trust and confidence.

Secondly, we should look to the efficacy of New Zealand’s intelligence and security agencies in demonstrably performing these functions, and how this is ascertained. Trust in public agencies comes from the performance of a function, rather than the function itself.³⁰ This means that the performance of agencies matters, and when this performance is called into question, so is the issue of public trust and confidence, and subsequently legitimacy.³¹ In short, New Zealand’s Intelligence and Security Agencies must be *seen to be* effective in performing their function of contributing to the protection of New Zealand’s national security, as the wording of the statute suggests.³² One need only look to the government’s lagging KiwiBuild housing project to see the consequences of underperformance.³³ In this case, underperformance can quite easily be measured in terms of output, for example the number of homes

²⁷ Intelligence and Security Act, s 8(1); and Te Tira Tiaki | Government Communications Security Bureau and Te Pā Whakamarumarū | New Zealand Security Intelligence Service *Briefing to the Incoming Minister* (2017) at 25.

²⁸ Intelligence and Security Act, s 7(1).

²⁹ William Young and Jacqui Caine, above n 2, at 469.

³⁰ Helen Winkelmann, above n 4.

³¹ Helen Winkelmann, above n 4.

³² Intelligence and Security Act, s 3(a)(i).

³³ See for example, Thomas Coughlan “KiwiBuild Reaches first target – two years late 15,000 homes behind schedule” *Stuff* (online ed, New Zealand, 1 July 2021); Henry Cooke “KiwiBuild failure is more than a broken promise, it’s a betrayal” *Stuff* (online ed, New Zealand, 12 May 2019); and Ethan Te Ora “KiwiBuild Limbo: First home buyers wait as Wellington apartment faces delays” *Stuff* (Online ed, New Zealand, 8 July 2021).

built.³⁴ The painful wait for housing is also felt acutely by New Zealanders. For the government, this creates an unfortunate combination of insurmountable evidence, and real human stories and impact. This has resulted in continued criticism of KiwiBuild.³⁵ This is in contrast to the government’s Covid-19 response, which, like KiwiBuild can be measured in terms of statistics and data.³⁶ The generally recognised early success of the government response at mitigating the Covid-19 virus in New Zealand (at least to date), earned them increased public trust – and even re-election.³⁷ As the Public Service Commission’s Kiwis Count Survey has noted, trust and confidence in government is at an all time high off the back of the increased visibility that the Covid-19 response has given to usually opaque functions of government.³⁸ For example, the rapid payment of the government’s wage subsidy programme.³⁹

The NZSIS and GCSB have significant and intrusive powers, such as “search and seizure, intercept of private communications, [and] surveillance in a private place”⁴⁰ In theory, such significant powers would provide them with the tools required for delivery effectiveness. But, efficacy, like legitimacy, is not solely defined or measured by legal powers and frameworks. In reality, the performance of New Zealand’s intelligence and security agencies is quite difficult to determine. In contrast to the government’s Covid-19 response and public engagement strategy, the New Zealand intelligence agencies publicly release little in the way of measureable outputs from which to determine efficacy.⁴¹ The agencies operate in the shadows, and as such,

³⁴ See for example, Thomas Coughlan, above n 33.

³⁵ See for example, Thomas Coughlan, above n 33; Henry Cooke, above n 33; and Ethan Te Ora, above n 33.

³⁶ See for example, data regarding current Covid-19 case levels Manatū Hauora | Ministry of Health “COVID-19: Current Cases” (2 October 2021) <<https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-data-and-statistics/covid-19-current-cases>>.

³⁷ Suze Wilson “The reward for good pandemic leadership: Lessons from Jacinda Ardern’s re-election” *Stuff* (Online ed, New Zealand, 23 October 2020); and Ephraim Wilson “Trust in Government and Covid-19” (31 May 2021) Te Mana Mātāpono Matatapu | Privacy Commissioner <<https://www.privacy.org.nz/blog/trust-in-government-and-covid-19/>>; Tess McLure “Even as New Zealand battles Covid, trust in government bucks global trend” *The Guardian* (online ed, Christchurch, 30 August 2021).

³⁸ Te Kawa Mataaho | Public Service Commission “Kiwis Count” (24 September 2021) <<https://www.publicservice.govt.nz/our-work/kiwis-count/>>.

³⁹ Tumuaki te o te Mana Arotake | Controller and Auditor-General “Auditor-General’s overview: Management of the Wage Subsidy Scheme” (2021) <<https://oag.parliament.nz/2021/wage-subsidy/overview.htm>>.

⁴⁰ Te Pā Whakamarumarū | New Zealand Security Intelligence Service *Arotake*, above n 2, at 68.

⁴¹ Sandi Beatie and Geoff Dangerfield *Follow-up Review for the New Zealand Intelligence Community (NZIC) / Te Rōpū Pārongo Tārehu o Aotearoa* (State Services Commission, August 2018) at 17.

the public does not generally have access to figures such as the ‘number of terrorist attacks prevented’, or the ‘current number of persons of interest to New Zealand’s national security’. In fact, if the Agencies are effectively delivering on their mandate, the public of New Zealand may never know the ‘near misses’ that have been thwarted. Efficacy in this context cannot be outwardly measured and critiqued in the same manner as the ‘number of kiwibuild homes constructed’. However, while the intelligence and security agencies may claim that they cannot release such information due to operational security, secrecy is not the sole reason for a lack of public performance measures.⁴² In reality, the issue is not that these performance measures cannot be released, but that they do not exist.⁴³ In their 2020 report, *the Royal Commission of Inquiry into the terrorist attack on the Christchurch masjidain on 15 March 2019* stated that:⁴⁴

The current position is that there is still no performance framework in place to measure the efficiency and effectiveness of New Zealand’s intelligence community or counter-terrorism effort, or their delivery against the National Security and Intelligence Priorities.

It appears that New Zealand’s intelligence and security sector has tried for some time to develop adequate performance measures, but so far have not succeeded.⁴⁵ As Sandi Beatie and Geoff Dangerfield noted in their 2018 ‘follow-up’ *Performance Improvement Framework* review of the intelligence agencies, the “fact that the attribution between the activities undertaken and the outcomes achieved is not direct” presents a significant challenge in assessing performance.⁴⁶ In other words, the actions and functions of the NZSIS and GCSB combine with the activities of other agencies in order to achieve national security outcomes.⁴⁷ They cannot take sole responsibility for results and success. Unfortunately, without access to the necessary operational information that these agencies so assiduously guard, it is difficult to interrogate the issues behind the lack of a performance framework further.

As discussed above, it is apparent that New Zealand’s intelligence and security agencies currently lack effective internal and external performance measures. However, it is important to note that the inability to measure something does not render it non-existent or non-functioning. As Beatie and Dangerfield note, some functions and outputs are just inherently difficult to assess and measure.⁴⁸ But while a lack of adequate tools with which to measure efficacy does not render these agencies ineffective, it does

⁴² William Young and Jacqui Caine, above n 2, at 612.

⁴³ At 438.

⁴⁴ At 438.

⁴⁵ William Young and Jacqui Caine, above n 2, at 438.

⁴⁶ Sandi Beatie and Geoff Dangerfield, above n 41, at 17.

⁴⁷ At 17.

⁴⁸ At 17.

make effectiveness more difficult to determine and comprehend. However, from the perspective of the general public, adequate formal measures and review processes may not have a huge impact on their perception of these agencies and their efficacy. This is due to the fact that many New Zealanders are unlikely to even read these measures, or any formal reporting mechanisms. As the Controller and Auditor-General has noted:⁴⁹

Government, and individual government agencies often publish significant amounts of information that is neither read nor understood by those to whom they are accountable.

An increase in available information does not automatically increase public trust and confidence, or perceptions of legitimacy for this reason. Indeed, the public's attention appears to be most effectively captured by dramatic events involving the intelligence and security agencies. Unfortunately, given their commitment to operational security and secrecy, the agencies do not publicise or promote their successes.⁵⁰ As a result, the public ear tends to heed information about these agencies and their efficacy only in times of controversy. In other words, when something has gone awry, and the performance of the intelligence and security agencies has been called into question.

The March 2019 terrorist attack on Christchurch masjidain is a recent, and extremely significant example of such an event. The terrorist was not detected by any of the public sector agencies responsible for counter-terrorism or national security.⁵¹ This includes the NZSIS and GCSB. Particularly in the wake of such a devastating tragedy, that saw the loss of 51 lives, it is entirely rational to question the efficiency of these agencies, and why this terrorist was not detected. Indeed, questions were asked, by the media, by the agencies themselves, and finally by the Royal Commission of inquiry into the terrorist attack.⁵²

In their report, the Royal Commission of Inquiry noted that in recent years, the NZSIS and GCSB had suffered from a lack of capacity and capability.⁵³ While intelligence agencies have significant powers and capabilities, this is not sufficient to ensure efficacy. These powers require direction, strategies, funding and implementation.⁵⁴ The Royal Commission of Inquiry's report gave the impression of the NZSIS as an aged and weakened agency, rapidly attempting to equip themselves

⁴⁹ Tumuaki o te Mana Arotake | Controller and Auditor-General *Public Accountability: A Matter of Trust and Confidence*, above n 21, at 27.

⁵⁰ William Young and Jacqui Caine, above n 2, at 612.

⁵¹ At 397.

⁵² For media attention see for example Paul Buchanan "March 15, right-wing extremism, and the systemic failures of NZ's intelligence agencies" *The Spinoff* (15 December 2020). See also Te Pā Whakamarumarū | New Zealand Security Intelligence Service *Arotake*, above n 2, at 7-8; and William Young and Jacqui Caine, above n 2, at 592.

⁵³ At 475.

⁵⁴ At 475.

for the modern era.⁵⁵ As of 2013, it was reportedly severely understaffed, particularly with regards to their counter-terrorism effort.⁵⁶ Prior to 2016, the NZSIS apparently only had the capability to undertake “partial monitoring of watch-list targets” with “minimal coverage outside Auckland”.⁵⁷ A general lack of political will and engagement towards the agencies, as a result of a series of public controversies, had led to a lack of funding and support, which then created a self-perpetuating cycle of ineffectiveness, and further loss of trust and confidence.⁵⁸

While from 2016 onwards the NZSIS had “undergone rapid organisational growth and organisational business renewal” as result of new leadership, reforms and funding, this transformation was unfortunately incomplete at the time of the 15 March 2019 terrorist attack.⁵⁹ As noted above, NZSIS and GCSB did not detect the terrorist, and did not have the capabilities to do so.⁶⁰ However, while much of the Royal Commission’s commentary suggest a general limitation on efficacy, they also noted that the failure to detect the Christchurch terrorist did not come as a result of any fault or neglect of any particular agency.⁶¹ As noted in the *Arotake* Review:⁶²

NZSIS’s resourcing priorities and decisions were reasonable, but nonetheless left the organisation with limited capacity to effectively fulfill its diverse intelligence responsibilities.

They Royal Commission noted that despite any potential increase in resourcing, “detection of the individual would have depended on chance” for example, through the individual “deviating from operational security”.⁶³

It is important to note, particularly as they do not announce their successes, that individual public controversies, or unfortunate events do not necessarily render the Agencies generally ineffective. Indeed, though the Royal Commission of Inquiry critiqued the Agencies’ capacity, they have also noted that:⁶⁴

From our inquiries, we are satisfied that agencies have had success in countering and disrupting terrorism and violent extremism in New Zealand. But these stories have not been told publicly.

While this statement regarding their ‘success’ is positive, the public may yet remain uncertain. The public suffers from a general lack of information and engagement

⁵⁵ At 474-476.

⁵⁶ At 474-476.

⁵⁷ At 475.

⁵⁸ At 612-614.

⁵⁹ William Young and Jacqui Caine, above n 2, at 475 and 482.

⁶⁰ At 482.

⁶¹ At 621.

⁶² Te Pā Whakamarumarū | New Zealand Security Intelligence Service *Arotake*, above n 2, at 93.

⁶³ At 609.

⁶⁴ At 420.

regarding the intelligence and security agencies.⁶⁵ What information is publicly released tends to be piecemeal, and often negative. Some positive commentary amongst the Royal Commissions' otherwise quite robust critique of the Agencies and other negative media stories⁶⁶ is unlikely to tip the balance, and create a positive and trustworthy view of intelligence and security capability in New Zealand. Indeed, the lack of information and political engagement with intelligence and security issues could actually undermine rather than build public trust and confidence.⁶⁷ For example, the Director-General of Security has noted that the public appear to believe that the NZSIS's scope and focus is broader, and that they collect more information about New Zealanders than they do in reality.⁶⁸ This could lead to a (perhaps only somewhat) unjustified apprehension of the agencies.

Thus the challenges these agencies face in demonstrating their efficacy could significantly undermine their ability to maintain a stable and valid 'social contract' with the New Zealand public. For the public, the value of this 'social contract' stems from the promise to protect Aotearoa's national security. If the public cannot be assured of the agencies' efficacy in performing this function, then they cannot be assured that the value promised in the social contract will be delivered. In more 'contractual' terms, one might think of this as being similar to a deficiency in consideration. In theory, public trust and confidence in an agency and its abilities should increase as the agency delivers public value.⁶⁹ Unfortunately, New Zealand's intelligence and security agencies struggle to demonstrate this value. As a result, the public are left to trust the agencies' word that this value is being effectively delivered. However, as noted above, the agencies are limited in their to tell their own story due to the shadows they inhabit. Thus, in reality, they must rely on their oversight bodies to tell this story for them. Despite the prominent positioning of the requirement that the Agencies "effectively contribute to the protection of New Zealand's national security"⁷⁰ in the purpose of the Intelligence and Security Act, efficacy cannot be relied upon as a way to locate legitimacy in this context.

⁶⁵ William Young and Jaqui Caine, above n 2, at 612-614.

⁶⁶ See for example the discussion of the Kim Dotcom controversy at 413.

⁶⁷ At 612-614.

⁶⁸ Small, Zane "NZSIS top spy Rebecca Kitteridge tells group of powerful MPS there's 'no doubt' white supremacy is on the rise" (online ed, 23 March 2021).

⁶⁹ Tumuaki o te Mana Arotake | Controller and Auditor-General *Public Accountability: A Matter of Trust and Confidence*, above n 21, at 17.

⁷⁰ Intelligence and Security Act, s 3(a)(i).

III Legitimacy through constraints

The Intelligence and Security Act provides that New Zealand’s intelligence Agencies must achieve their purpose and function of protecting “New Zealand as a free, open and democratic society” by:⁷¹

- (c) ensuring that the functions of the intelligence and security agencies are performed—
- (iv) in accordance with New Zealand law and all human rights obligations recognised by New Zealand law; and
- (v) with integrity and professionalism; and
- (vi) in a manner that facilitates effective democratic oversight;

The Act requires the agencies to carry out their powers and functions in accordance with New Zealand law and human rights obligations, with integrity and professionalism, and in a manner that facilitates effective democratic oversight.⁷² These requirements are also reflected in general duties imposed on the agencies by the Act.⁷³

The overarching purpose of the Act, and the constraints noted above, reflect this inherent tension found in relation to security agencies – a tension between efficacy and safeguards. The Act, and by extension the agencies, pursue a purpose of protecting “New Zealand as a free, open and democratic society”.⁷⁴ As noted above, this principal purpose is in many ways a ‘double-edged sword’. On one hand, it encourages agencies to function effectively in order to protect New Zealand.⁷⁵ On the other hand, the Act also protects New Zealand and its “free, open, and democratic society” from the agencies and their “special and intrusive powers”⁷⁶, by defining and limiting their powers and instituting oversight. These intrusive powers and capabilities could pose a threat to New Zealanders if abused, and used “to pursue illegitimate aims”.⁷⁷ If we consider the relationship between the New Zealand public and the Agencies to be akin to a social contract, its validity would be rather tenuous if it could be easily undermined by the agencies’ powers. Additional instruments and settings are required in order to assure the public that they are not at risk from unjust intrusion.

⁷¹ Section 3.

⁷² Section 3(c).

⁷³ Section 17.

⁷⁴ Section 3.

⁷⁵ Sections 3 and 3(a)(i).

⁷⁶ Te Pā Whakamarumarū | New Zealand Security Intelligence Service Arotake, above n 2, at 68; and Michael Cullen and Patsy Reddy, above n 8, at 52.

⁷⁷ Michael Cullen and Patsy Reddy, above n 8, at 52.

A Functions performed in accordance with New Zealand law and human rights obligations

The Intelligence and Security Act 2017 provides that in performing their functions, the intelligence and security agencies must act “in accordance with New Zealand Law and all human rights obligations recognised by New Zealand law”.⁷⁸ As aforementioned, the legality of the agencies’ actions is not the sole determiner of their legitimacy, nor is their compliance with human rights obligations. A more ‘social’ view of legitimacy, based on trust and confidence, is multi-faceted and reliant on a number of different levers.⁷⁹ However, that is not to say that legality and human rights compliance are not important aspects. Indeed, public agencies would be remiss to overlook the longstanding and generally accepted proposition that the state must act in accordance with the law.⁸⁰ This requirement carries both legal and normative significance.⁸¹ The NZSIS and GCSB’s intelligence and security functions (also known as colloquially as ‘spying’) have inherent implications for human rights and freedoms.⁸² As Sir Michael Cullen and Dame Patsy Reddy have noted:⁸³

These agencies use special and intrusive powers to carry out their mandate. Some of these powers limit fundamental human rights and could be unlawful if not for specific legislative authorization.

The Intelligence and Security Act 2017 empowers the Agencies to lawfully infringe on the rights of New Zealanders where justified.⁸⁴ Indeed, the public appear to be aware of these human rights implications. Many of the public submissions on the New Zealand Intelligence and Security Bill 2016 (the precursor to the Intelligence and Security Act 2017), commented on New Zealand’s human rights obligations.⁸⁵ A public perception of compliance with New Zealand law and human rights obligations would help to quell any concerns regarding the Act’s potentially coercive powers, and therefore further public trust.

⁷⁸ Section 3(c)(i).

⁷⁹ Janet Mclean and others, above n 3 at 208

⁸⁰ Michael J Allen and Brian Thompson *Cases and Materials on Constitutional and Administrative Law* (8th ed, Oxford University Press, Oxford, 2005) at 164; and B V Harris “The ‘third source’ of authority for government action” (1992) 108 LQR 626 at 626.

⁸¹ Michael J Allen and Brian Thompson, above n 80, at 164; and B V Harris, above n 80, at 626.

⁸² Te Kāhui Tika Tangata | New Zealand Human Rights Commission “Submission to the Foreign Affairs, Defence and Trade Select Committee on the New Zealand Intelligence and Security Bill 2016” at 1.

⁸³ Michael Cullen and Patsy Reddy, above n 8, at 52.

⁸⁴ At 52.

⁸⁵ Te Tari o te Pirimia me te Komiti Matua | Department of the Prime Minister and Cabinet *New Zealand Intelligence and Security Bill: Departmental Report to the Foreign Affairs, Defence and Trade Committee from the Department of Prime Minister and Cabinet* (December 2016) at 33.

Firstly, we can look to the absence of legality, and how it can impact on legitimacy. As discussed above, the agencies possess significant and intrusive powers, and there is a recognized need to impose legal controls around their use.⁸⁶ Like the current Intelligence and Security Act 2017, the Agencies' previous empowering legislation provided that they must perform their functions in accordance with New Zealand Law.⁸⁷ However, despite this provision, the agencies (in particular the GCSB) were found to have significant issues with legal compliance.⁸⁸ These issues were exemplified in 2012 with the unlawful surveillance and arrest of Kim Dotcom.⁸⁹ The GCSB was found to have acted unlawfully when it intercepted Kim Dotcom's private communications. Given his status as a permanent resident, the GCSB were prohibited from intercepting his communications, except in very limited circumstances which demonstrably did not apply.⁹⁰

Rebecca Kitteridge, prior to her current term as the Director General of Security, was responsible for conducting the inquiry into the GCSB's conduct and compliance with the law following this incident.⁹¹ Her report, titled *Review of Compliance at the Government Communications Security Bureau*, was published in March 2013.⁹² It found that there were:⁹³

systemic problems with the Government Communications Security Bureau's legal compliance systems, and suggested that at least 88 people might have been subject to unlawful surveillance over the previous decade.

The Kim Dotcom incident, and subsequent findings of systemic compliance issues led to significant public backlash, and the deterioration of political will and support of intelligence and security agencies.⁹⁴ Indeed, in the aftermath of this controversy, New Zealand's intelligence and security agencies more regularly refer to their legal compliance and constraints. They frequently assure audiences of the legality of their

⁸⁶ Cullen, Michael and Reddy, Patsy *Intelligence and Security in a Free Society: Report of the First Independent Review of Intelligence and Security in New Zealand* (29 February 2016) at 52.

⁸⁷ Government Communications Security Bureau Act 2003, s 8D(1)(a); and New Zealand Security and Intelligence Act 1969, s 4AAA(1)(c)(i).

⁸⁸ William Young and Jaqui Caine, above n2, at 413.

⁸⁹ At 413.

⁹⁰ At 413.

⁹¹ Te Tira Tiaki | Government Communications Security Bureau "Review of Compliance" <<https://www.gcsb.govt.nz/our-work/review-of-compliance/>>; and William Young and Jaqui Caine, above n 2, at 413.

⁹² Rebecca Kitteridge *Review of Compliance at the Government Communications Security Bureau* (New Zealand Government, March 2013).

⁹³ William Young and Jaqui Caine, above n 2, at 413.

⁹⁴ At 412-414.

actions, and the robust legal framework in which they must operate.⁹⁵ For example, in a speech at Victoria University of Wellington in 2016, the Director-General of Security cited the equivalent s 3(C)(i) provision requiring legal compliance, and noted that:⁹⁶

This confirms for the avoidance of doubt that the NZSIS must always operate within the law – recognizing that we have special but lawful powers to take actions that would otherwise not be legal...

It is apparent that the Agencies understand that while legality may not be the determiner of legitimacy, its absence can significantly undermine the public trust, confidence and authority of intelligence and security agencies.

Secondly, we can look to the current legislative framework, and assess how it, and its provisions relating to human rights may contribute to the Agencies' legitimacy. The Agencies' current empowering legislation, the Intelligence and Security Act 2017, was introduced in response to Sir Michael Cullen and Dame Patsy Reddy's 2016 review of intelligence and security in New Zealand.⁹⁷ On their recommendation, the Intelligence and Security Act 2017 brought the NZSIS, the GCSB and their oversight bodies under a "single comprehensive piece of legislation".⁹⁸ It also sought to remedy the "significant deficiencies" in the previous intelligence and security legislative framework, which had been highlighted through the controversy surrounding Kim Dotcom's 2012 arrest.⁹⁹ The Intelligence and Security Act 2017 has not provided a perfect remedy to issues in the intelligence and security space. Indeed, according to the NZSIS's 2019 *Arotake* review, the Intelligence and Security Act still suffered from a "lack of clarity" which has meant that "the Agencies and their oversight bodies are at times uncertain about what the law does and does not permit" making it more challenging to ensure compliance¹⁰⁰ However, the Royal Commission of Inquiry into the 15 March 2019 Terrorist attacks noted that the new Act has implemented many of Cullen and Reddy's recommendations for correcting these deficiencies.¹⁰¹ For example,

⁹⁵ Kitteridge, Rebecca, Director-General of Security "Protecting New Zealand as a Free, Open and Democratic Society: The Role of the NZSIS" (Speech given as part of the Victoria University of Wellington Public Office Holders Lecture Series, Victoria University of Wellington, Wellington, 3 June 2016); and Jane Patterson "GCSB speech hijacked by protesters" *Radio New Zealand* (Online ed, 11 September 2015).

⁹⁶ Kitteridge, Rebecca, Director-General of Security "Protecting New Zealand as a Free, Open and Democratic Society: The Role of the NZSIS" above n 95.

⁹⁷ New Zealand Intelligence and Security Bill 2016 (158-1) (explanatory note) at 1.

⁹⁸ At 1.

⁹⁹ Te Kahui Tika Tangata | New Zealand Human Rights Commission *Privacy, Data and Technology: Human Rights Challenges in the Digital Age* (May 2018), at 22.

¹⁰⁰ Michael Cullen and Patsy Reddy, above n 8, at 2.

¹⁰¹ William Young and Jacqui Caine, above n 2, at 564.

the Intelligence and Security Act 2017, introduced the recommended ‘double lock’ approach to issuing ‘Type 1’ Intelligence Warrants, .¹⁰² A Type 1 warrant authorizes:¹⁰³

an intelligence and security agency to carry out an otherwise unlawful activity for the purpose of collecting information about, or to any other thing directly in relation to any person who is a citizen or a permanent resident.

The ‘double lock’ system increases the protection afforded to New Zealand citizens and permanent residents, as it requires Type 1 warrants to be considered and issued jointly “by the responsible minister (or ministers) and a Commissioner of Intelligence Warrants”.¹⁰⁴ Only persons who have held office as a judge of the high court are eligible to be a Commissioner of Intelligence Warrants.¹⁰⁵ In reality, this system is actually ‘triple-locked’ given that the Inspector General of Intelligence and Security’s (‘the Inspector-General’) current practice “is to review every warrant obtained by the agencies”.¹⁰⁶

Te Kāhui Tika Tangata | the New Zealand Human Rights Commission expressed their support for the strengthened warrant provisions.¹⁰⁷ The ‘double-lock’, or rather, ‘triple-lock’ system increased the level of oversight required to authorise the use of intrusive powers. Therefore, the warrant provisions now offer New Zealanders more significant protections from intrusion and is therefore more compliant with New Zealand’s human rights obligations.¹⁰⁸ However, the New Zealand Human Rights Commission also expressed concern at the distinction that the warrant system creates between New Zealand citizens and permanent residents, and other persons in New Zealand.¹⁰⁹ The otherwise unlawful collection of information from non-citizens and permanent residents is authorized under a Type 2 warrant. Unlike Type 1 warrants, which require consideration by the responsible minister and a Commissioner of Intelligence Warrants, Type 2 warrants are considered only by the former.¹¹⁰ As such,

¹⁰² Michael Cullen and Patsy Reddy, above n 8, at 7.

¹⁰³ Intelligence and Security Act, s 51.

¹⁰⁴ Intelligence and Security Act, s 55(2); and William Young and Jacqui Caine, above n 2, at 575.

¹⁰⁵ Intelligence and Security Act, s 113.

¹⁰⁶ Young, William and Caine, Jacqui *Ko tō tatou kāinga tēnei / Report: Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (November 2020) at 575.

¹⁰⁷ Te Kāhui Tika Tangata | New Zealand Human Rights Commission “Submission to the Foreign Affairs, Defence and Trade Select Committee on the New Zealand Intelligence and Security Bill 2016” above n 82 at 1.

¹⁰⁸ At 1.

¹⁰⁹ At 1.

¹¹⁰ Intelligence and Security Act, s 55(3); and William Young and Jacqui Caine, above n 2, at 575.

they are afforded less protection from the Agencies' significant and intrusive powers, which the New Zealand Human Rights Commission has stated is discriminatory.¹¹¹

Despite this concern, the New Zealand Human Rights Commission were generally in support of the New Zealand Intelligence and Security Bill 2016 (the precursor to the Intelligence and Security Act 2017).¹¹² They have since noted that the “strong human rights-based approach adopted in the review [the Cullen-Reddy Review] is reflected in the new legislation”.¹¹³ Indeed, the Intelligence and Security Act 2017 introduced a number of “strengthened requirements regarding human rights compliance”.¹¹⁴ For example, the Intelligence and Security Agencies are now captured by most of the Privacy Act 2020's information privacy principles, and are therefore subject to greater compliance requirements and oversight by the Privacy Commissioner.¹¹⁵ The Intelligence and Security Act has also made express provision for the right to freedom of expression, and has provided “clear assurance that lawful acts of advocacy, protest, or dissent are secure from intelligence activity”.¹¹⁶ Additionally, the oversight capabilities of the Inspector-General of Intelligence and Security were also strengthened, by allowing them to inquire into operationally sensitive matters.¹¹⁷ These additional measures, alongside explicit provision for human rights compliance in the purpose of the Act, is perhaps an indication that the Agencies are attempting to anchor their legitimacy in these concepts.¹¹⁸ This would align with the Act's explicit intention to “to improve transparency and oversight arrangements to give the public greater confidence that the agencies are acting lawfully and appropriately”.¹¹⁹

¹¹¹ Te Kāhui Tika Tangata|New Zealand Human Rights Commission “Submission to the Foreign Affairs, Defence and Trade Select Committee on the New Zealand Intelligence and Security Bill 2016” above n 82, at 1.

¹¹² At 1.

¹¹³ Te Kahui Tika Tangata|New Zealand Human Rights Commission *Privacy, Data and Technology: Human Rights Challenges in the Digital Age*, above n 99, at 22.

¹¹⁴ Te Kāhui Tika Tangata|New Zealand Human Rights Commission “Submission to the Foreign Affairs, Defence and Trade Select Committee on the New Zealand Intelligence and Security Bill 2016” above n 82, at 1.

¹¹⁵ Te Kahui Tika Tangata|New Zealand Human Rights Commission *Privacy, Data and Technology: Human Rights Challenges in the Digital Age* above n 99, at 22.

¹¹⁶ New Zealand Intelligence and Security Bill 2016 (158-1) (Select Committee Report) at 12; and Intelligence and Security Act, s 19.

¹¹⁷ New Zealand Intelligence and Security Bill (explanatory note), above n 97, at 3.

¹¹⁸ Intelligence and Security Act, s 3(c)(i).

¹¹⁹ New Zealand Intelligence and Security Bill (explanatory note), above n 97, at 1.

Finally, we must look to the Agencies’ actual compliance with the Law, and recognized human rights obligations, and whether this can be ascertained. The emphasis in the provision is on compliance in accordance with requirements.¹²⁰

In accordance with New Zealand law and all human rights obligations recognized by New Zealand law...

While the Agencies’ stronger legal framework may encourage compliance with the law and New Zealand’s human rights obligations, it does not determine or guarantee it. From a trust and confidence perspective, it is important that the public perceive the Agencies as being actually compliant with the law. In other terms, the public must believe that the clauses of the social contract are being respected and upheld. Compliance is about behavior, and the legislation cannot provide evidence of this. Despite the apparent improvements in the agencies’ legislative regime, it is still difficult for the public themselves to ascertain compliance or gain any insight into intelligence activity due to a lack of transparency.

Again, the public’s trust and confidence in the agencies is dependent on assurances from their oversight bodies. Assurance from the Inspector-General of Intelligence and Security is particularly important regarding matters of compliance. The Inspector-General publicly issues annual reports pertaining to the Agencies’ compliance with the law and New Zealand’s human rights obligations.¹²¹ However, even the Inspector-General caveats his assurance by noting that his assessment is:¹²²

not a certification that every action of the agencies has been lawful and proper. It is an assessment of the agencies’ approaches to minimising the risk of illegality and impropriety.

In 2018, the NZSIS publicly (and quite vocally) announced that the Inspector-General had found the agency’s systems and processes were legally compliant “for the second year in a row”.¹²³ However, neither of the agencies have since made such an announcement. This is not because they have been found non-compliant, but because the Office of the Inspector-General have recently changed their compliance accreditation approach.¹²⁴ Previously, Inspector-Generals released an “overall conclusion on whether each agency had sound compliance procedures and systems in

¹²⁰ Intelligence and Security Act, s 3(c)(i).

¹²¹ Te Pourewa Mātaki | Inspector-General of Intelligence and Security “Publications”, above n 10; and Intelligence and Security Act, s 158(f).

¹²² See for example Brendan Horsley *Annual Report: For the year 1 July 2019 to 30 June 2020* (Te Pourewa Mātaki | Office of the Inspector-General of Intelligence and Security, 26 January 2021) at 25.

¹²³ Te Pā Whakamarumarū | New Zealand Security Intelligence Service “NZSIS systems & processes found to be legally compliant” (Press release, 6 December 2018).

¹²⁴ See for example Brendan Horsley *Annual Report: For the year 1 July 2019 to 30 June 2020*, above n 122, at 25-27.

place”.¹²⁵ While this approach was simple, and perhaps preferable for the agencies from a posturing perspective, it lacked detail and had “the disadvantage of requiring a blunt choice to be made” when “[t]he law does not require such a choice”.¹²⁶ Under the Inspector-General’s new compliance review approach, each agency is assessed and rated according to “five main headings, rather than stating a single assessment”.¹²⁷

The relevant factors, or “headings” through which the agencies’ compliance with the law is assessed are: Operational policy and procedure, internal compliance programmes, self-reporting and investigation of compliance incidents, training, and responsiveness to oversight.¹²⁸ The agencies are not assessed as being ‘compliant’ or ‘not-compliant’ under each heading, but instead rated according to a “four-level scale”:¹²⁹

Figure 1:

Strong	Systems are mature, well-maintained and effective. Any issues or shortcomings are minor, recognised by the agency and remediation is imminent or under way.
Well-developed	Systems are predominantly well-developed, well-maintained and effective, but some change is needed to make them fully sound. Necessary improvements are in development and/or require further time and resourcing to implement.
Under-developed	Systems require significant change to function effectively. Necessary improvements require substantial planning and resourcing and may require medium to long term programmes of change.
Inadequate	Systems are critically deficient or about to become so.

In the Inspector-General’s most recent Annual Report, which was for the period of 1 July 2019 to 30 June 2020, the NZSIS was rated as “well-developed” for all indicia.¹³⁰ The GCSB was rated as “well-developed” for all indicia save its ‘internal compliance programmes’ for which it received an “under-developed” rating.¹³¹ This low rating was primarily due to significant under-staffing in the GCSB’s compliance team.¹³²

A simple compliance ‘tick’ approach is a more useful communications tool from the agencies’ perspective. As noted above, under such an approach they can describe

¹²⁵ At 25.

¹²⁶ At 25.

¹²⁷ At 25.

¹²⁸ At 25 - 26.

¹²⁹ For figure 1 see Brendan Horsley *Annual Report: For the year 1 July 2019 to 30 June 2020* n 112, at 27.

¹³⁰ At 27-32.

¹³¹ At 28.

¹³² At 28.

and promote themselves to the public as being ‘compliant’. However, the Inspector-General’s new multi-factor rating approach, provides a more accurate account of the agencies, which may promote the public’s trust in the Office of the Inspector-General as an oversight body. Given the agencies’ lack of transparency and inability to demonstrate compliance directly, reliable oversight mechanisms are hugely important for promoting trust and confidence and anchoring legitimacy.

B Functions performed with integrity and professionalism

Section 3(c)(iii) of the Intelligence and Security Act 2017 provides that the functions of the agencies must be “*performed with integrity and professionalism*”.¹³³ This provision is distinct from other potentially legitimising aspects of the Act’s purpose section, in its inherent emphasis on values, as opposed to rigid ‘rules’.¹³⁴ Integrity and professionalism speak to ethics and principles of conduct.¹³⁵ This provision reflects the need for intelligence and security agencies to source some aspect of their legitimacy from these ‘softer’ qualities. This is logical, given the connection many public sector actors, such as the Public Services Commission, have acknowledged between integrity and the trustworthiness of agencies.¹³⁶ Indeed, the Public Service Commission appears to view integrity as synonymous with public trust and confidence, or at the very least as a quality that is key to growing and enhancing it.¹³⁷

The presence of legal standards can strengthen and the protections surrounding the agencies and their coercive potential, but these measures are somewhat redundant if the culture of the agencies is one that does not respect them. As the Director-General of Security has noted, “systems and procedures are only as good as the staff who follow them”.¹³⁸ From the perspective of a social contract between the agencies and the public, integrity and professionalism are important for ensuring that the intentions of the parties are real, and that the terms of the agreement are respected. Unfortunately, due to the more amorphous and subjective nature of integrity and professionalism, any articulation or recognition of what they look like in practice may prove elusive, particularly in the context of security and intelligence. The existence of these qualities, and how agencies can demonstrate their legitimacy through them is more difficult to determine than, for example, compliance with the law. While it is challenging as an outsider to examine

¹³³ Intelligence and Security Act, s 3(c)(ii).

¹³⁴ Intelligence and Security Act, s 3(c)(ii).

¹³⁵ *Professionalism and Ethics in the Public Service: Issues and Practices in Selected Regions* UN Doc ST/ESA/PAD/SER.E/5 (2000) at 1.

¹³⁶ Te Komihana o Ngā Tari Kawanatanga | State Services Commission *Understanding the code of conduct – Guidance for State Servants* (April 2020) at 4-5.

¹³⁷ At 4-5.

¹³⁸ Kitteridge, Rebecca, Director-General of Security “Protecting New Zealand as a Free, Open and Democratic Society: The Role of the NZSIS”, above n 95.

how these qualities play out in an operational sense, we can attempt to gain a sense of their shape and presence (or lack thereof) at a higher level.

Firstly, we can look to the current settings and standards that the intelligence and security agencies and the wider state sector have in place regarding behaviour and conduct. Te Kawa Mataaho | The Public Service Commission sets expectations regarding the conduct of the wider public service, including the NZSIS and GCSB, through the “Standards of Integrity and Conduct” (‘the Code’).¹³⁹ These standards aim to help maintain the “trust and confidence of New Zealanders” by encouraging conduct which demonstrates trustworthiness and professionalism.¹⁴⁰ As such, the Code explicitly acknowledges legitimacy through trust and confidence.

The Code’s ethical requirements fall under four different values, all of which are “indicative of integrity”, which “is the inclusive and all-embracing description” of the values and standards contained in the Code.¹⁴¹ Professionalism, like integrity, is not explicitly defined by the code, but the Public Service Commission has issued guidance indicating that it possesses a similar ‘all inclusive’ quality, and also encompasses many of the Code’s standards.¹⁴² According to the Code’s four aforementioned values, members of the public sector must demonstrate that they are:¹⁴³

Fair, Impartial, Responsible and Trustworthy.

It is ‘living’ all four values and ‘walking the talk’ that defines integrity. The individual ethical requirements or ‘standards’ which fall under the above values provide more specific direction regarding behaviour and conduct. For example, in acting fairly, the public service must “be professional and responsive” and “work to make government services accessible and effective”.¹⁴⁴ In acting responsibly, the public service must, amongst other things, “act lawfully and objectively” and “treat information with care and use it only for proper purposes”.¹⁴⁵ Interestingly, a number of these standards

¹³⁹ See Te Komihana o Ngā Tari Kawanatanga | State Services Commission *Standards of Integrity and Conduct* (June 2007). Note that the Code was issued prior to the State Services Commission becoming the “Public Service Commission” in 2020; and Public Service Act 2020, s 17(2)(a) and sch 1, cl 8.

¹⁴⁰ Te Kawa Mataaho | Public Service Commission “Integrity and Conduct” (8 June 2021) <<https://www.publicservice.govt.nz/our-work/integrityandconduct/>>

¹⁴¹ Te Komihana o Ngā Tari Kawanatanga | State Services Commission *Understanding the code of conduct – Guidance for State Servants*, above n 136, at 5; and Te Komihana o Ngā Tari Kawanatanga | State Services Commission *Standards of Integrity and Conduct*, (June 2007), above 139.

¹⁴² Te Komihana o Ngā Tari Kawanatanga | State Services Commission *Understanding the code of conduct – Guidance for State Servants*, above n 136, at 32-33.

¹⁴³ Te Komihana o Ngā Tari Kawanatanga | State Services Commission *Standards of Integrity and Conduct* (June 2007), above 139.

¹⁴⁴ Above 139.

¹⁴⁵ Above 139.

appear reflective of the requirements contained in the purpose section of the Intelligence and Security Act 2017. For example, the need to “act lawfully” links directly to the s 3(c)(i) requirement on intelligence agencies to perform their functions “in accordance with New Zealand law”.¹⁴⁶ This similarity is in some ways unsurprising, given that both the purpose section of the Intelligence and Security Act 2017 and the Standards of Integrity and Conduct are concerned with legitimacy.¹⁴⁷

As noted above, the Public Sector Code and its ethical requirements apply to New Zealand’s intelligence and security agencies; the NZSIS and the GCSB.¹⁴⁸ However, the NZSIS also has its own code of conduct which can be examined.¹⁴⁹ While a code of conduct specific to the GCSB may potentially exist, this author could not locate it. Given the two agencies’ similar functions and settings, the NZSIS code of conduct can be viewed as sufficient for obtaining some insight into the agencies’ own settings and expectations regarding integrity and professionalism. Like the Public Sector Standards of Integrity and Professionalism, the NZSIS code acknowledges the importance of a public reputation to trust in the institution.¹⁵⁰

The NZSIS is judged by the way we collectively represent ourselves; therefore it is necessary for everyone to maintain a high standard of personal and professional conduct at all times...The reputation of the NZSIS is critical to its success therefore behaviour or actions which have the potential to bring the agency into disrepute will be managed in accordance with this Code and the ICSS Disciplinary Policy and Procedures applying to both NZSIS and GCSB.

In noting the importance of the NZSIS’ reputation to their success, they implicitly recognise the importance of integrity, and therefore public trust and confidence in maintaining legitimacy.

The NZSIS Code of Conduct reflects many of the same principles and values found in the Public Sector Standards of Integrity and Conduct. For example, the principles of professionalism, fairness and impartiality, and of course, honesty and integrity.¹⁵¹ However, the NZSIS’ principles and standards are much more

¹⁴⁶ Intelligence and Security Act, s 3(c)(i).

¹⁴⁷ Te Komihana o Ngā Tari Kawanatanga | State Services Commission *Standards of Integrity and Conduct* (June 2007), above 139.

¹⁴⁸ Te Komihana o Ngā Tari Kawanatanga | State Services Commission *Standards of Integrity and Conduct* (June 2007), above 129; and Public Service Act, s 17(2)(a) and sch 1, cl 8.

¹⁴⁹ Te Pā Whakamarumarū | New Zealand Security Intelligence Service *NZSIS Code of Conduct* (September 2017).

¹⁵⁰ At 2.

¹⁵¹ See generally; Te Pā Whakamarumarū | New Zealand Security Intelligence Service *NZSIS Code of Conduct*, above n 149.

comprehensive than the Public Sector code. Take, for example, the NZSIS standards relating to professionalism:¹⁵²

- Exercise sound discretion and judgement when carrying out your duties.
- Obey lawful and reasonable instructions.
- Comply with organisational policy and procedures.
- Comply with all security requirements as required of you in the PSR and organisation policy.
- Act professionally.
- Maintain a professional image according to the nature of your duties and the position held.
- Avoid conduct which may, or does, lead to your reporting for work in an impaired state, including the use of alcohol or non-prescription drugs.
- Conduct all work place communications in good faith.
- Refrain from unauthorised public comment on, or criticism of, NZSIS policies or work, during and after ceasing employment with the NZSIS.

The increased number of standards and their detail in comparison to the Public Sector’s Code of Conduct can be explained by the latter’s more general nature. The Public Sector Standards of Integrity and Conduct apply to the broader public sector, and as such lack some specificity.¹⁵³ The Public Service Commission has noted that the “code of conduct is not, on its own, sufficient to ensure that everyone meets these standards”.¹⁵⁴ Individual Public Sector organisations, such as the NZSIS and the GCSB, must have in place their own “policies and procedures that put the standards into practice”.¹⁵⁵

Despite the extent and prescriptiveness of the NZSIS standards of conduct, the requirements remain opaque, much like the agencies themselves. The NZSIS’ standards, unsurprisingly, possess an intelligence and security ‘slant’. That is, they align with their policies, requirements and operational practices.¹⁵⁶ This includes provision for specific principles relating to “security culture” and “confidentiality”.¹⁵⁷ As a consequence, a reasonable ordinary person’s view of integrity and appropriate conduct

¹⁵² At 5.

¹⁵³ Te Komihana o Ngā Tari Kawanatanga | State Services Commission *Understanding the code of conduct – Guidance for State Servants* (April 2020) at 3-5.

¹⁵⁴ At 3.

¹⁵⁵ At 3.

¹⁵⁶ See, for example, Te Pā Whakamarumarū | New Zealand Security Intelligence Service *NZSIS Code of Conduct*, above n 149, at 5.

¹⁵⁷ At 8-9.

may not align with that of the intelligence and security agencies.¹⁵⁸ Indeed, the agencies' approach to certain matters may shock the ordinary person. This was exemplified through the NZSIS's failure to pass evidence of the notorious sex offender Josef Fritzl's crimes to the Police in the 1990s.¹⁵⁹ A former NZSIS agent, who had gathered evidence of Fritzl's crimes against his daughter, complained to the Inspector-General of Intelligence and Security in 2020.¹⁶⁰ During his time with the NZSIS, he had not been told why evidence was being collected on Fritzl. In his complaint, he sought disclosure of these reasons, as well as an explanation regarding the agencies' failure to report the information to the police.¹⁶¹ In response to his complaint, the former agent received a letter from the Director-General of the NZSIS, threatening to refer his conduct to the Police.¹⁶²

The content and wording of the Director-general's letter provides significant insight into the NZSIS's expectations and requirements of their staff:

As you will recall the obligation to protect classified information gained in the course of duties for the New Zealand Government is lifelong ... We take any failure to comply with undertakings to protect classified information very seriously. This includes consideration of referral to New Zealand Police for investigation of any criminal wrongdoing.

Indeed, the agencies' value of confidentiality and security is hugely apparent from the Director-General's letter. They place so much weight on secrecy that these conduct requirements follow individuals beyond their employment with the NZSIS. Additionally, this incident, and the Director-General's response, highlights the fact that, as the Inspector-General noted in his response to the compliant; "[w]hat is reasonable for an intelligence agency in such circumstances is not necessarily what is reasonable for an ordinary person".¹⁶³ Through this incident, we can perceive the standards and principles akin to those reflected in the current NZSIS code of conduct, such as commitment and loyalty "to the mission" influencing decision-making.¹⁶⁴ On the one hand, the public can be assured of the agencies' commitment to "the mission" and the security of New Zealand. But, on the other, they may be concerned at the seemingly

¹⁵⁸ Brendan Horsley *Report into a compliant against the NZSIS: Public report* (Te Pourewa Mātaki | Office of the Inspector-General of Intelligence and Security, 30 November 2020) at 3.

¹⁵⁹ Guyon Espiner "Security Intelligence Service Failed to report 'New Zealand's Fritzl' Ronald Van Der Plaat" *Newshub* (8 December 2020).

¹⁶⁰ Above 159.

¹⁶¹ Above 159.

¹⁶² Above 159.

¹⁶³ Brendan Horsley *Annual Report: For the year 1 July 2019 to 30 June 2020*, above n 112, at 3.

¹⁶⁴ Te Pā Whakamarumarū | New Zealand Security Intelligence Service *NZSIS Code of Conduct*, above n 149, at 4.

disparate version of integrity and professionalism the agencies hold, which may require them to sacrifice the well-being of individuals in the interests of “the mission”.

Unfortunately, even the standards relating to more general or ‘mundane’ principles such as professionalism provide little insight as to the actual shape and implementation of practices and policies relating to integrity and professionalism. For example, the code of conduct notes that members of the NZSIS are required to “maintain a professional image according to the nature of your duties and the position held”.¹⁶⁵ Without the requisite information about the nature of these duties and details of the position, which are generally not released due to security concerns, it is impossible to discern what such compliance would look like in practice. However, the ‘generic’ and ‘high level’ quality of integrity and conduct standards is not unique to the NZSIS. Many of the Public Sector Standards of Integrity and Conduct, for example the requirement to “strive to make a difference to the well-being of New Zealand and all its people”, are similarly normative and aspirational.¹⁶⁶ Such standards fail to adequately reflect the real practices, policies and procedures put in place to promote integrity.

The *second* issue to consider with regards to integrity and professionalism, is how these standards of conduct seek to promote public trust and confidence, and therefore legitimacy, if they cannot generally provide insight into real practices. The answer is that they provide evidence of intention. As discussed above, both the Public Sector and NZSIS codes of conduct face certain limitations, however, their mere existence is encouraging from a trust and confidence perspective. While the GCSB has been covered by the Public Sector Standards of Integrity and Conduct for some time, the Standards did not apply to the NZSIS until 2017.¹⁶⁷ This is because the NZSIS, which initially arose out of a special branch of the New Zealand police, was not part of the Public Sector until the passage of the Intelligence and Security Act 2017.¹⁶⁸ Therefore, the Standards of Integrity and Conduct did not apply.¹⁶⁹ As discussed above,

¹⁶⁵ At 5.

¹⁶⁶ Te Komihana o Ngā Tari Kawanatanga | State Services Commission *Standards of Integrity and Conduct* (June 2007).

¹⁶⁷ Michael Cullen and Patsy Reddy, above n 8, at 56; and Te Tira Tiaki | Government Communications Security Bureau and Te Pā Whakamarumarū | New Zealand Security Intelligence Service *Briefing to the Incoming Minister* (2017) at 38.

¹⁶⁸ Cullen, Michael and Reddy, Patsy *Intelligence and Security in a Free Society: Report of the First Independent Review of Intelligence and Security in New Zealand* (29 February 2016) at 56; and Te Tira Tiaki | Government Communications Security Bureau and Te Pā Whakamarumarū | New Zealand Security Intelligence Service *Briefing to the Incoming Minister*, above n 27, at 38.

¹⁶⁹ Michael Cullen and Patsy Reddy, above n 8, at 56; and Te Tira Tiaki | Government Communications Security Bureau and Te Pā Whakamarumarū | New Zealand Security Intelligence Service *Briefing to the Incoming Minister*, above n 27, at 38.

the Public Sector Standards now apply to the NZSIS, and the agency has also adopted their own more specific, tailored standards.

The introduction of the NZSIS to the Public service, and the adoption of their own unique code of conduct was on the recommendation of Cullen and Reddy in their 2016 independent review of the agencies, who noted that the agency could benefit from the “shared values” of the wider Public Sector:¹⁷⁰

The purpose behind the State Sector Act is to promote and uphold public sector departments that operate in the collective interests of government while remaining politically neutral and maintaining appropriate standards of integrity and conduct. Bringing the NZSIS into the public sector proper would support the move toward greater transparency. It should bring about positive changes to the NZSIS’s secret culture and help build shared values with the wider public management system.

The aspiration for entirely “shared” values is a somewhat forlorn hope, given the double-edged sword that tends to work against transparency. Even if the agencies were able to step away from the shadows, public information about their intrusive activities this could actually undermine public trust and confidence.

Despite these limitations, the adoption of both codes of conduct indicates an intention to create a culture of integrity and professionalism. This is supported by the inclusion of the principles of “integrity and professionalism” in the purpose of the Intelligence and Security Act 2017, and the imposition of a general duty upon the intelligence agencies when performing their functions to act “with integrity and professionalism”.¹⁷¹ While the standards of conduct and the provisions in the Act do not reveal the exact practices or procedures in place to ensure integrity, they indicate that the agencies place normative weight on these values. Indeed, while the NZSIS standards of conduct do not provide insight into operational procedures or mechanisms, they appear to be relatively stringent. For example, NZSIS staff must “proactively report any security concerns relating to [themselves] or [their] colleagues” and “proactively manage [their] security clearance through the regular reporting of any change in circumstances”.¹⁷² Some of these conduct requirements also extend beyond the period of a persons’ employment with the NZSIS, as individuals are to “refrain from unauthorised public comments on, or criticism of, NZSIS policies or work, during and after ceasing employment with the NZSIS”.¹⁷³ These examples again suggest that the agencies take their statutory requirement to act with integrity and professionalism rather seriously, and understand its significance in relation to trust and legitimacy.

¹⁷⁰ Michael Cullen and Patsy Reddy, above n 8, at 57.

¹⁷¹ Intelligence and Security Act, s 17.

¹⁷² Te Pā Whakamarumarū | New Zealand Security Intelligence Service *NZSIS Code of Conduct*, above n 149, at 8.

¹⁷³ At 5.

As noted above, while it does appear that these standards are concerned with creating an appropriate culture and genuinely promoting integrity, the agencies also place a significant focus on their reputation. The intelligence and security agencies understand, just as the Public Service Commission does, that a public image of integrity and professionalism is good for public trust and confidence.¹⁷⁴ This is quite apparent from the NZSIS’s aforementioned mandate against criticising the agency or its work, even after ceasing employment.¹⁷⁵ However, an intention to create a culture and image of integrity and professionalism does not necessarily translate into trust and confidence. The public cannot see actual evidence of behaviour demonstrating integrity, given that the intelligence agencies operate in the shadows. As a result, members of the public must be able to perceive the agencies’ intention to create such a culture. However, members of the public are unlikely to read the Public Sector or NZSIS standards of conduct, and they cannot guess the intentions of the intelligence and security agencies.¹⁷⁶ It is difficult to discern how else the public could ascertain this intention. As it stands, the agencies are once again reliant on their oversight bodies to assure the public of their trustworthiness and legitimacy on their behalf. However, in this case, having to rely on the Inspector-General of Intelligence and Security, or another oversight body as a narrator may not be a bad thing.¹⁷⁷ As discussed above, the agencies’ approach to integrity and conduct is different from that of the ordinary person. If the public did gain insight into the actual behaviour and conduct of the NZSIS and GCSB, it is not unlikely that they would be unnerved by what they saw.

C Functions performed in a manner that facilitates democratic oversight

The Intelligence and Security Act 2017 provides that the Agencies must perform their functions “in a manner that facilitates effective democratic oversight”.¹⁷⁸ The oversight requirements, including the requirement that the Agencies’ powers be subject to “institutional oversight and appropriate safeguards” are their most effective legitimising factors.¹⁷⁹ While the elements discussed above, such as integrity and compliance with the law are important in constructing legitimacy, they cannot be relied

¹⁷⁴ Te Pā Whakamarumarū | New Zealand Security Intelligence Service *NZSIS Code of Conduct*, above n 149, at 1; Te Komihana o Ngā Tari Kawanatanga | State Services Commission *Standards of Integrity and Conduct* (June 2007); and Te Kawa Mataaho | Public Service Commission “Integrity and Conduct”, above n 140.

¹⁷⁵ Te Pā Whakamarumarū | New Zealand Security Intelligence Service *NZSIS Code of Conduct*, above n 149, at 5.

¹⁷⁶ Tumuaki o te Mana Arotake | Controller and Auditor-General *Public Accountability: A Matter of Trust and Confidence*, above n 21, at 3.

¹⁷⁷ Te Pourewa Mātaki | Office of the Inspector-General of Intelligence and Security “about” <<https://igis.govt.nz/about/>>.

¹⁷⁸ Intelligence and Security Act, s 3(c)(iii).

¹⁷⁹ Intelligence and Security Act, ss 3(c)(iii) and 3(d).

upon alone because their existence is difficult to discern with certainty. Due to the secret and opaque nature of the security and intelligence agencies, the public cannot assure themselves that the NZSIS and GCSB are acting in a way that is “reasonable, necessary and proportionate”.¹⁸⁰ The public are reliant on democratic and external oversight to assure them that the Agencies are acting consistently with the purposes and functions provided to them through the Act.¹⁸¹

Oversight, particularly democratic oversight, serves the overarching purpose of the Intelligence and Security Act. That is, to “protect New Zealand as a free, open, and democratic society”.¹⁸² While the Agencies pursue this goal through the protection of New Zealand’s national security, the Act’s oversight mechanisms contribute by protecting the public from the Agencies and their significant powers. However, oversight cannot function atop a resistant or closed subject. The Agencies must facilitate democratic oversight in order for it to be effective.

Firstly, we can look to ‘direct democratic accountability’, and why “democratic oversight” has been adopted in lieu of it. ‘Direct democratic accountability’ is a mechanism frequently relied upon by the New Zealand Government and Public sector and is an incredibly important factor in maintaining public trust, confidence and acceptance of their legitimacy.¹⁸³ The Controller and Auditor-General of New Zealand has described accountability as being:¹⁸⁴

about the relationship between the State and its citizens, and the extent to which the State is answerable for its actions. The concept of accountability refers to the legal and reporting framework, organisational structure, strategy, procedures, and actions to help ensure that any organisations that use public money and make decisions that affect people's lives can be held responsible for their actions.

In a representative democracy like New Zealand where the public have entrusted power in others, there must be mechanisms for representatives to be held accountable to the public for breaches of this trust.¹⁸⁵ As Jamie Gaskarth notes, “organisations that are closed to external scrutiny are more open to abuse”.¹⁸⁶ The government cannot expect the public to place trust in it and its agencies if there is no consequence for failing them.

¹⁸⁰ Cullen and Reddy, above n 8, at 3.

¹⁸¹ At 3.

¹⁸² Intelligence and Security Act, s 3.

¹⁸³ Tumuaki o te Mana Arotake | Controller and Auditor-General *Public Accountability: A Matter of Trust and Confidence*, above n 21, at 5-6.

¹⁸⁴ Tumuaki o te Mana Arotake | Controller and Auditor-General *Public Sector Accountability through raising concerns* (4 March 2016), at 9.

¹⁸⁵ Tumuaki o te Mana Arotake | Controller and Auditor-General *Public Accountability: A Matter of Trust and Confidence*, above n 21, at 9.

¹⁸⁶ Jamie Gaskarth *Secrets and Spies: UK Intelligence Accountability after Iraq and Snowden* (Brookings Inst. Press, 2020) at 28.

Direct democratic accountability requires direct interaction with the New Zealand Public.¹⁸⁷ This is in contrast to “democratic oversight” which refers to formal oversight bodies or mechanisms, such as the Intelligence and Security Committee, as opposed to the collective public.¹⁸⁸ The New Zealand Government’s COVID-19 briefings are an excellent example of direct democratic accountability in action. As Dr Dean Knight has noted, for the duration of New Zealand’s 2020 ‘Level 4’ lockdown (and beyond), the government rendered account directly to the public through “[d]aily media briefings” which “saw the government interrogated deeply about all aspects of the pandemic and response”.¹⁸⁹ Such an approach is reliant on significant levels of transparency.

The GCSB and NZSIS have increasingly made efforts to engage with the public and improve their transparency. There are numerous examples of this. For example, public speeches about intelligence and security where this was previously rare, and features in magazines and periodicals such as the *Public Sector* journal.¹⁹⁰ The Director-General of Security, Rebecca Kitteridge, even appeared in a One News feature titled “Do you have what it takes to spy for New Zealand? SIS looking for new recruits” promoting the NZSIS.¹⁹¹

A particular incident in 2015, and the GCSB’s surrounding comments, provide insight into the intent of these intelligence agencies, and their purposeful shift in transparency and information sharing. In September 2015, the then acting Director-General of the GCSB Una Jagose had been poised to give a speech at the Office of the Privacy Commissioner’s Technology Forum at the National Library until “two anti-GCSB protestors unfurled a banner in front of the podium and refused to move”.¹⁹² The event was then cancelled. Radio New Zealand noted that “Ms Jagose said the agency had heeded public calls for greater transparency”¹⁹³ and that in her speech, had it gone ahead, she would have spoken about:¹⁹⁴

¹⁸⁷ Tumuaki o te Mana Arotake | Controller and Auditor-General *Public Accountability: A Matter of Trust and Confidence*, above n 21, at 5.

¹⁸⁸ Pāremata Aotearoa | New Zealand Parliament “Intelligence and Security Committee” <<https://www.parliament.nz/en/pb/sc/scl/intelligence-and-security-committee/>>.

¹⁸⁹ Dean R Knight “New Zealand: Rendering Account During the COVID-19 Pandemic” (19 April 2021) *Verfassungsblog: On matters constitutional* <<https://verfassungsblog.de/new-zealand-rendering-account-during-the-covid-19-pandemic/>>.

¹⁹⁰ Rose Northcott “A Job beyond the ordinary; a conversation with rebecca kitteridge” (2018) 41 *Public sector journal* 11, at 11-12.

¹⁹¹ One News “Do you have what it takes to spy for New Zealand? SIS looking for new recruits” (2018) <https://www.youtube.com/watch?v=yUAUQHJ_-EE>.

¹⁹² Jane Patterson “GCSB speech hijacked by protesters”.

¹⁹³ Jane Patterson, above n 185.

¹⁹⁴ Above n 185.

more than we've ever talked about before in public about our cyber security programme, called the Cortex programme - how we look at the privacy interests related to that programme, how it works, how it's controlled, what it is ... stuff that we've never said before

However, transparency does not equal accountability. The intelligence and security agencies remain limited in their ability to render account to the New Zealand public, and provide transparency when it matters. For example, the government's response to the recent 3 September 2021 terrorist attack in LynnMall, is in stark contrast to their recent practice of transparency and accountability through regular COVID-19 briefings. When providing a press conference on the attack, the Prime Minister Jacinda Ardern expressed obvious frustration at being unable to immediately provide render an account of the incident, noting:¹⁹⁵

I had prepared a timeline of everything we knew of this individual and his interactions with the agencies and the law. I have been advised that because of suppression orders I cannot share that with you today.

Of course, this example is complicated by the court's suppression orders. This was the primary obstacle to the Prime Minister immediately releasing the information.¹⁹⁶ However, the incident is still illustrative of the complicated and restricted nature of the national security context. In comparison to the New Zealand's COVID-19 response, state actors are find it much more difficult to render account due to operational security concerns.

Though the NZSIS and GCSB have attempted to increase their transparency in recent years, "the necessarily secret nature of its capabilities and activities prevents the sort of transparency that would usually apply to a public sector organisation".¹⁹⁷ This means that New Zealand's intelligence and security agencies are very limited in their ability to be *directly* accountable to the public, and cannot increase public trust and confidence effectively in this way. Fortunately, as the Intelligence and Security Act reflects, accountability comes in many forms.¹⁹⁸ Direct accountability is not the sole option for public agencies.

Secondly, we should consider how the intelligence and security agencies facilitate "effective democratic oversight" when they generally struggle to render account.¹⁹⁹ New Zealand's intelligence and security agencies are accountable through

¹⁹⁵ Jacinda Ardern and Andrew Coster "Jacinda Ardern, Andrew Coster Speak after terrorist attack at Auckland mall" (Press conference, 3 September 2021).

¹⁹⁶ Above n 195.

¹⁹⁷ Rebecca Kitteridge *Review of Compliance at the Government Communications Security Bureau* (March 2013) at 20.

¹⁹⁸ Jamie Gaskarth, above n 180, at 20-22.

¹⁹⁹ Intelligence and Security Act, s 3(c)(iii).

external oversight.²⁰⁰ External bodies detached from the NZSIS and GCSB, oversee and scrutinise these agencies and their activities to ensure that they act in compliance with the law and New Zealand’s democratic values.²⁰¹ Though these agencies cannot truly represent the entire ‘demos’, a number of them can be seen as representative of the New Zealand public. In particular, the Intelligence and Security Committee (“the Committee”) and the Inspector General of Intelligence and Security, which are sufficiently connected to the public to be considered “democratic”.²⁰²

The Intelligence and Security Committee is a Parliamentary Committee, whose “members must be drawn from parties in government and those in opposition”.²⁰³ The Committee’s direct connection to Parliament makes it an inherently democratic oversight body. Additionally, the Committee also provides a forum for direct democratic accountability. While many of the Committee’s hearings are ‘closed’, it also holds ‘open’ sessions which are accessible to members of the public including through livestreaming of the hearing.²⁰⁴ The Committee’s annual review of the intelligence and security agencies provides a rare platform for New Zealanders to gain insight directly from the actors themselves.²⁰⁵ The Agencies provide annual reports to the Committee, as required under the Intelligence and Security Act 2017, and appear to attend hearings as required.²⁰⁶ However, beyond this, there is very little information about how the Agencies themselves facilitate the Intelligence and Security Committee’s democratic oversight.

As noted above, the Inspector-General of Intelligence and Security, though best characterised as an ‘independent’ oversight role, also possesses some ‘democratic’ credentials. The majority of these credentials are earned through the Inspector-General’s connections to the Intelligence and Security Committee and Parliament. For example,

²⁰⁰ Te Rōpū Pārongo Tārehu o Aotearoa | New Zealand Intelligence Community “Oversight” <<https://www.nzic.govt.nz/oversight/>> ; and Jamie Gaskarth, above n 180, at 21.

²⁰¹ Te Rōpū Pārongo Tārehu o Aotearoa | New Zealand Intelligence Community “Oversight” <<https://www.nzic.govt.nz/oversight/>>, above n 200.

²⁰² Pāremata Aotearoa | New Zealand Parliament “Intelligence and Security Committee” <<https://www.parliament.nz/en/pb/sc/scl/intelligence-and-security-committee/>>; and Te Pā Whakamarumaru | New Zealand Security Intelligence Service *Arotake*, n 2, at 72.

²⁰³ William Young and Jacqui Caine, above n 2, at 556.

²⁰⁴ William Young and Jacqui Caine, above n 2, at 414; and Zane Small “NZSIS top spy Rebecca Kitteridge tells group of powerful MPS there’s ‘no doubt’ white supremacy is on the rise” (online ed, 23 March 2021).

²⁰⁵ Zane Small, above n 204.

²⁰⁶ Intelligence and Security Act, s 193(b); and Zane Small “NZSIS top spy Rebecca Kitteridge tells group of powerful MPS there’s ‘no doubt’ white supremacy is on the rise” (online ed, 23 March 2021).

the Committee can request the Inspector-General of Intelligence and Security to conduct and inquiry into:²⁰⁷

- (i) any matter relating to an intelligence and security agency’s compliance with New Zealand law, including human rights law;
- (ii) the propriety of particular activities of an intelligence and security agency.

Therefore, the Inspector-General may be subject to ‘democratic’ direction, albeit representative democratic direction. A matter that the Inspector-General may be required to inquire into is the appropriate issue of authorisations, or ‘warrants’ for the collection of information.²⁰⁸ The Act requires the Agencies to maintain a register and record of all warrants or authorisations issued, in order to facilitate oversight by the Inspector-General and other relevant actors.²⁰⁹ However, this mechanism to facilitate oversight is a requirement of the Act. While the Agencies must comply with these mechanisms, one could argue that it is not they themselves that are facilitating the ‘democratic oversight’.

Ironically, but unsurprisingly, it is difficult to discern from the agencies themselves exactly how they facilitate oversight beyond these required mechanisms. However, while it is difficult to perceive the actions and behaviour of the Agencies, it is apparent that they value the oversight bodies and mechanisms they are subject to. As the then Acting Director of the GCSB Una Jagose noted in a speech to the Privacy and Technology forum:²¹⁰

So, that tension I mentioned: it is managed here, in this system of control and oversight. We cannot be entirely transparent to the public about what we do. But we must be – and we are - utterly open with the oversight bodies. Their reports on us are what should reassure the public that what goes on is lawful and done with New Zealand’s interests at heart. This oversight is very important and we welcome it. It is necessary to build a credible and resilient security and intelligence service for New Zealand. It is the platform for a strong public mandate that I intend to continue building in my time as Acting Director.

Thus, while we cannot entirely peel back the veneer of these Agencies, it is apparent from their public assurances that they *attempt* to facilitate democratic oversight. However, it appears that much of the legitimacy arising from this arrangement is anchored in the oversight bodies, as opposed to the Agencies themselves.

²⁰⁷ Intelligence and Security Act, s 193(1)(e).

²⁰⁸ Intelligence and Security Act, s 158.

²⁰⁹ Michael Cullen and Patsy Reddy, above n 8, at 109; New Zealand Intelligence and Security Bill (explanatory note), above n 97, at 13; and Intelligence and Security Act, s 83.

²¹⁰ Una Jagose, Acting Director of the Government Communications Security Bureau “Speech to the Privacy and Technology Forum” (2015).

IV Legitimacy through external oversight and safeguards

One of the key purposes of the Intelligence and Security Act is to “ensure that the powers of the intelligence and security agencies are subject to institutional oversight and appropriate safeguards”.²¹¹ As noted above, given the agencies’ coercive and intrusive powers, it is important that they are subject to oversight and safeguards in order to prevent the improper use of this power.²¹² And, from a legitimacy perspective, oversight is crucial. The intelligence and security agencies struggle to maintain and retain public trust and confidence themselves, due to their opacity. They cannot tell their own story due to the fact that they live in the shadows. Therefore they need someone else to do this on their behalf. New Zealand’s intelligence and security agencies have at least 7 public bodies and actors who can provide this narrative, including, as aforementioned, the Privacy Commissioner, the Commissioner of Intelligence Warrants, and the Intelligence and Security Committee.²¹³ However, this discussion will primarily focus on the Inspector-General of Intelligence and Security. Of all the Agencies’ oversight bodies, they are the most potent.²¹⁴ As such, they lend the agencies the most legitimacy.

The potency of the Inspector-General’s role as an oversight body is encapsulated in its new te reo Māori name “Te Pourewa Mātaki – the watchtower within the Pā”.²¹⁵ The current Inspector-General, Brendan Horsley, noted that this name acknowledges that:²¹⁶

we are within the somewhat exclusive intelligence community but we stand independently, we look over it and we look outward for the benefit of all.

Horsley’s description aptly encapsulates the role of the Inspector-General, as well as the reality of the ‘exclusive’ form of oversight the position provides. That is, oversight that is provided by an elite few, who are privy to the operational secrets of the intelligence and security agencies. The Inspector-General is an officer independent of the government, who provides extensive oversight of the agencies in a number of ways, including:²¹⁷

- ensuring that security and intelligence agencies carry out their activities lawfully and properly

²¹¹ Intelligence and Security Act, s 3(d).

²¹² Michael Cullen and Patsy Reddy, above n 8, at 52.

²¹³ William Young and Jacqui Caine, above n 2, at 440 and 566.

²¹⁴ At 440.

²¹⁵ Brendan Horsley *Annual Report: For the year 1 July 2019 to 30 June 2020*, above n 122, at 2.

²¹⁶ At 2.

²¹⁷ Te Pourewa Mātaki |Office of the Inspector-General of Intelligence and Security “IGIS” <<https://igis.govt.nz>>.

- independently investigating complaints about the intelligence and security agencies
- providing advice about oversight of the intelligence and security agencies to the New Zealand Government and the Intelligence and Security Committee of Parliament.

The Inspector-General achieves these oversight functions in a variety of ways, including through the review of warrants issued under the Act.²¹⁸ The Inspector-General's consideration is not required for the issue of warrants, which, as aforementioned, are overseen by the Commissioner of Intelligence Warrants and the responsible Minister.²¹⁹ However, it has become the general practice of inspector-general to do so for every warrant issued.²²⁰ This speaks to the weight that the Inspector-General places on these oversight matters.

The Inspector-General also possesses broad inquiry powers, including the ability to inquire into any matter relating to the intelligence and security agency's compliance with the law, or into the particular activities of an intelligence agency.²²¹ They can conduct such inquiries on the request on the responsible Minister, the Intelligence and Security Committee, or on their own initiative.²²² As a result, the Inspector-General is not constrained by the will and direction of the Minister or the Committee. They have the ability to inquire where and when they believe it is necessary. This inquisitorial ability has been further strengthened by the Intelligence and Security Act 2017, which has removed the previous restriction on inquiries into operationally sensitive matters.²²³ This new access is particularly significant given the Inspector-General's relationship to the Parliamentary Intelligence and Security Committee, which is unable to consider matters "relating directly to the activities" of an agency, or inquire into operationally sensitive matters.²²⁴ As noted above, the Intelligence and Security Committee can direct the Inspector-General to inquire into the activities of the agencies as well as their compliance.²²⁵ This relationship could mitigate the Committee's own shortcomings regarding oversight.

The Inspector-General also provides the public with insight into the agencies' propriety and compliance with the law through their aforementioned annual reporting

²¹⁸ William Young and Jacqui Caine, above n 2, at 575.

²¹⁹ At 575.

²²⁰ At 568.

²²¹ Intelligence and Security Act, ss 158(1)(a)-(d).

²²² Intelligence and Security Act, ss 158(1)(a)-(d).

²²³ New Zealand Intelligence and Security Bill (explanatory note), above n 97, at 3.

²²⁴ William Young and Jacqui Caine, above n 2, at 566-567; and Intelligence and Security Act, s 193(1)(f).

²²⁵ Intelligence and Security Act, ss 158(1)(a)-(d).

mechanisms.²²⁶ This enables a degree of more direct democratic oversight and accountability through information. Indeed, this reporting mechanism is so effective and thorough that it provides insight into the Agencies' own facilitation of the Inspector-General's oversight.

As discussed above, given the Agencies' lack of transparency, it is difficult to discern how they facilitate democratic oversight. Fortunately, we are not forced to rely simply on blind trust, or the assurances of the agencies themselves. As part of their annual assessment of compliance, the Inspector-General considers and reports on the Agencies' "responsiveness to oversight".²²⁷ In other words, their engagement with the Office of the Inspector-General, and their facilitation of their oversight functions. This assessment includes consideration of factors such as "open, constructive and timely engagement with the Office of the IGIS" and "commitment of resources to deal with the requirements of IGIS inquiries and reviews".²²⁸

In the Inspector-General's most recent Annual Report, the Agencies were assessed as having "well-developed" compliance systems regarding responsiveness to oversight.²²⁹ The Report noted that the Agencies were "generally cooperative" and efficient in their interactions with the Office of the Inspector-General, but that at "this Office at times finds the agencies overly defensive."²³⁰ This perhaps indicates an imperfect relationship, but does not suggest that the Agencies are impeding the Inspector-General's oversight functions. The public can be assured through these reports that the relationship between the Agencies and their oversight bodies is functioning. Indeed, if it were not, the Inspector-General would the power to issue the agencies with recommendations to correct these shortcomings.²³¹ However, as the Royal Commission of Inquiry has noted:²³²

The Inspector-General of Intelligence and Security's views are not presumptively authoritative, and the agencies are not obliged to act in accordance with findings and recommendations. The agencies are, however, acutely aware of their limited social licence and take adverse reports (which might detract from that social licence) very seriously.

This speaks to the significance of oversight in the intelligence and security space, and the agencies' awareness of this fact. Given the intrusive and coercive powers that the

²²⁶ Te Pourewa Mātaki Te Pourewa Mātaki | Inspector-General of Intelligence and Security "Publications" <<https://igis.govt.nz/publications/>>; and Intelligence and Security Act, s 158(f).

²²⁷ Brendan Horsley *Annual Report: For the year 1 July 2019 to 30 June 2020*, above n 122, at 26.

²²⁸ At 26.

²²⁹ At 31- 32.

²³⁰ At 3.

²³¹ See for example Brendan Horsley *Annual Report: For the year 1 July 2019 to 30 June 2020*, above n 122, at 11.

²³² William Young and Jacqui Caine, above n 2, at 583.

agencies possess, it is crucial that they are subject to robust oversight in order to maintain public trust and confidence.²³³

V Conclusion

New Zealand’s intelligence and security agencies exist in the shadows of society and government. They possess intrusive and coercive powers and are almost wholly unknown to the people whom they are supposed to protect.²³⁴ They are, in many ways, the antithesis of their statutory purpose of protecting “New Zealand as a free, open and democratic society” as they must constantly act in a way contrary to these principles.²³⁵ In many ways, these agencies are a liability to the public, but this risk is often described as necessary by the New Zealand Government. However, this view is not necessarily shared by the rest of New Zealand, and there “remains a much greater degree of public scepticism about the need for intelligence and security agencies, and suspicion of their activities”.²³⁶ As discussed above, it is therefore important, particularly in the current context, to locate the legitimacy of these agencies.

Legitimacy in the security and intelligence context can, in theory, be located in the purpose of the Intelligence and Security Act. The statute’s purpose captures many of the qualities and settings that would build public trust and confidence in intelligence agencies, such as compliance with the law, and integrity. However, legitimacy can only be successfully sourced from these qualities and settings if their existence can be discerned by the New Zealand public. It does not matter whether these qualities or settings are in place, but rather whether the public knows them to be in play. This paper has found that due to the agencies’ inherent secrecy, and lack of transparency, the Act’s potentially legitimising qualities cannot be directly ascertained by the New Zealand Public. On examination, each of the Act’s purpose provisions require assurance from external oversight mechanisms to verify the existence of required settings and qualities for legitimacy.

It is apparent that the oversight provided by entities such as the Inspector-General of Intelligence is instrumental in maintaining the legitimacy of New Zealand’s intelligence agencies. As the Cullen-Reddy review noted, independent external oversight is:²³⁷

essential to ensure that by working to secure populations against internal and external threats and advance the interests of the nation as a whole, intelligence and

²³³ Te Pā Whakamarumarū | New Zealand Security Intelligence Service *Arotake*, above n 2, at 73.

²³⁴ Michael Cullen and Patsy Reddy, above n 8, at 3.

²³⁵ Intelligence and Security Act, s 3.

²³⁶ Michael Cullen and Patsy Reddy, above n 8, at 14.

²³⁷ At 52.

security agencies do not undermine democracy or the rights of individuals in the process.

However, as discussed above, oversight does more than prevent the improper use of the agencies' coercive powers. They lend the agencies the benefit of their public reputation, trust and confidence. The agencies effectively borrow legitimacy from these oversight bodies in lieu of their own. To return to the metaphor of a social contract, if the New Zealand intelligence agencies are a contracting party that the public cannot be entirely assured of, then perhaps these oversight bodies act as an acceptable guarantor and provide assurance and legitimacy where it is lacking.

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