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COUNTERING FOREIGN TERRORIST FIGHTERS: WARRANTLESS SURVEILLANCE POWERS OF THE NEW ZEALAND SECURITY INTELLIGENCE SERVICE

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Abstract

On 9 December 2014, the New Zealand Security Intelligence Service Amendment Act 2014 amended the New Zealand Security Intelligence Service Act 1969 by removing the requirement for an intelligence or visual surveillance warrant in some situations of emergency or urgency. The warrant process is the primary mechanism for the purpose of ensuring surveillance powers are not exercised arbitrarily or unreasonably. Any departure from this process must be justified, limited and proportionate. After a brief look at the history of the Bill, this paper will then consider the circumstances in which a warrantless authorisation shall be granted and information retained, with reference to the trigger concepts of "terrorist act", "foreign terrorist fighter" and "security". Amendments proposed include limiting the grounds for warrantless surveillance and information retention to countering "foreign terrorist fighters". It will then discuss the consistency of the Bill with the New Zealand's Bill of Rights Act, focussing on the authorisation structure and length. It will put forward an amendment that restructures the power such that authorisation for surveillance in urgency will be provided by the Minister and Commissioner within 12 hours.

Key words: warrantless, surveillance, counterterrorism, New Zealand Security Intelligence Service, Countering Terrorist Fighters Legislation Bill

I Introduction

The traditional divide between domestic and foreign threats has been eroded with global trends in international migration and expanded use of the Internet, rapidly pluralizing and dispersing the menace posed by foreign terrorist fighters and other violent extremists. The most recent manifestation of the foreign terrorist threat is the rise of the Islamic State of Iraq and Levant, who are responsible for widespread use of indiscriminate and extreme violence primarily in Iraq and Syria. More than 25,000 foreign terrorist fighters are associated with ISIL, of which an estimated 3,000 hold western passports. The threat of radicalised foreign fighters causing mass casualties is conducive to anticipatory and preventative counterterrorism measures. An inevitable consequence of this risk dynamic is an intelligence-led approach in which surveillance is conducted on a wide and prescient scale.

New Zealand's Countering Terrorist Fighters Legislation Bill ("the Bill") was introduced to the House under urgency on 25 November 2014. It amended three statutes in order to restrict and disrupt travel, monitor and investigate foreign terrorist fighters. ⁴ The Committee divided the Bill into the Passports Amendment Bill, Customs and Excise Amendment Bill, and New Zealand Security Intelligence Service Amendment Bill pursuant to Supplementary Order Paper 39. ⁵ On 9 December 2014, the amendments became law following a 94-27 party vote in the House. ⁶ The New Zealand Security Intelligence Amendment Act 2014 thereby amended the New Zealand Security Intelligence Service Act 1969 by removing the requirement for an

¹ Office of the Privacy Commissioner of Canada Special Report to Parliament: Checks and Controls: Reinforcing Privacy Protection and Oversight for the Canadian Intelligence Community in an Era of Cyber-Surveillance (28 January 2014) at 2.

² Most recent statement on the number of foreign terrorist fighters associated with ISIL found at UN News Centre "At Debate, UN and Security Council renew pledge to counter foreign terrorist fighters" (29 May 2015) United Nations <www.un.org>. Numbers of western passports from Department of Prime Minister and Cabinet Regulatory Impact Statement: Foreign Terrorist Fighters – Targeted review of relevant legislation (12 November 2014) at 2[2].

³ Clive Walker "Keeping Control of Terrorists without Losing Control of Constitutionalism" (2007) 59 Stan L Rev 1395 at 1396.

⁴ Countering Terrorist Fighters Legislation Bill 2014 (1-2) (select committee report) at 1.

⁵ Amendments other than ss 4ID and 4IE of the New Zealand Security Intelligence Service Act 1969 lie outside the scope of this paper.

⁶ (9 December 2014) 702 NZPD 1207.

intelligence or visual surveillance warrant in some situations of emergency or urgency.⁷

The warrant process is the primary mechanism for the purpose of ensuring surveillance powers are not exercised arbitrarily or unreasonably. Any departure from this process must be justified, limited and proportionate. This paper does not consider whether warrantless surveillance in situations of emergency or urgency is a justifiable extension of powers to the security intelligence service. Rather, it will examine the breadth and duration of the power as enacted in the light of the principle of legality and human rights. In making this analysis, this paper seeks to determine whether the scope of the current power is proportionate to the foreign terrorist fighter threat, and put forward possible amendments that will circumscribe the overzealous enactment.

After a brief look at the history of the Bill, this paper will then consider the circumstances in which a warrantless authorisation shall be granted and information retained, with reference to the trigger concepts of "terrorist act", "foreign terrorist fighter" and "security". It will then discuss the consistency of the Bill with the New Zealand Bill of Rights Act, focusing on the authorisation approval structure and period of validity. A few concluding remarks will close the paper.

II Impetus for the Amendment

Spurred by the rise of ISIL, shortly after the 2014 election Cabinet agreed to a targeted review of capacity, capability and legislation to ensure they are adequate to respond to the evolving threat of foreign terrorist fighters and violent extremism both locally and internationally. The focus of the review was interim measures to be taken

⁷ New Zealand Security Intelligence Service Act 1969 ("NZSIS Act"), s 4ID.

⁸ Privacy Commissioner "Submission to the Foreign Affairs, Defence and Trade Committee on the Countering Terrorist Fighters Legislation Bill" at 3.

⁹ John Key, Prime Minister of New Zealand "Speech to New Zealand Institute of International Affairs" (media release, 5 November 2014); Department of Prime Minister and Cabinet, above n 2, at 1[2].

in advance of the comprehensive review of legislative required to commence before 30 June 2015. ¹⁰ The Bill was the result of the targeted review's recommendations. ¹¹

The review and provisions are in part a reflection of New Zealand's international obligation to comply with United Nations Security Resolution 2178 as enacted under Chapter VII of the Charter of the United Nations. 12 This Resolution expressed grave concern over the "acute and growing threat posed by foreign terrorist fighters". ¹³ The Resolution reaffirmed that all States shall prevent the movement of terrorists by effective border controls; intensify international information sharing and cooperation; and to make efforts to prevent radicalization, recruitment, financial support and operation of foreign fighters. 14 It leaves to states the responsibility of deciding what legislation is necessary to achieve these goals, consistent with international human rights, humanitarian principles, and refugee law. 15 Perhaps surveillance is the necessary foundation for practical implementation of these measures, but it is notable that the Resolution does not expressly encourage the expansion of state surveillance powers. Furthermore, it was stated by a member of the Select Committee on the Bill that New Zealand's law before amendment complied with Resolution 2178.16 As a result, the Resolution does not provide a solid foundation upon which to enact overzealous legislation.¹⁷

In October 2014, New Zealand's domestic threat level was raised from very low to low, indicating that a terrorist attack is possible, but not expected. ¹⁸ Government agencies have identified 30 to 40 people of concern, and another 30 to 40 individuals requiring further investigation in a number of centres around New Zealand. ¹⁹ In April 2015, the Director of Security stated that these individuals are involved in a range of activities, including inciting radicalism, funding or facilitating travel for foreign

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¹⁰ Department of Prime Minister and Cabinet, above n 2, at 1[2].

¹¹ Countering Terrorist Fighters Legislation Bill 2014 (1-2) (select committee report) at 1.

¹² Department of Prime Minister and Cabinet, above n 2, at 1; Countering Terrorist Fighters Legislation Bill 2014 (1-2) (select committee report) at 2.

¹³ SC Res 2178, S/Res/2178 (2014) preamble at 2.

¹⁴ Preamble at 4.

¹⁵ Kennedy Graham (Green Party) speaking during the Second Reading (9 December 2014) 702 NZPD 1207.

¹⁶ Fletcher Tabuteau (New Zealand First) speaking In Committee (9 December 2014) 702 NZPD 1207.

¹⁷ Kennedy Graham, above n 15.

¹⁸ Prime Minister John Key (Press release, 13 October 2014).

¹⁹ Countering Terrorist Fighters Legislation Bill 2014 (1-2) (select committee report) at 2.

fighters, foreign fighters who have already travelled to the Middle East, and people actively planning attacks in New Zealand.²⁰ For the year ending 30 June 2014, the New Zealand Security Intelligence Service ("NZSIS") advised on the cancellation of passports of some monitored individuals intending to travel to Syria, finding that there is a "real likelihood" the lives of those individuals have been saved, and "had these individuals managed to get to Syria and fight, the NZSIS has prevented the risk of battle-hardened individuals returning and compromising New Zealand's security."²¹

Notwithstanding, the targeted review found that urgent situations may arise and, despite processes to expedite warrant application and issuance, the number of hours required for a warrant to be issued may risk the loss of vital intelligence and failure to cancel an individual's passport before they leave New Zealand. ²² The review, therefore, supported a power of emergency authorisation issued by the Director of Security. ²³ It is worthy of note that the review does not refer to an actual situation in which delay inherent in the warrant process has resulted in adverse effects. When introducing the Bill, Hon Christopher Finlayson spoke to a "hypothetical situation" in which the warrantless powers "could" be required. ²⁴ This suggests that the current warrant system has served the purpose of monitoring and investigating foreign terrorist fighters aptly. To illustrate, the NZSIS's first interim report on the use of authorisations for the period 12 – 31 December 2014 stated that no authorisations had been made. ²⁵

Finally, the review draws parallels with the similar regime for surveillance without a warrant in situations of emergency or urgency in the Search and Surveillance Act 2012 available to law enforcement authorities,²⁶ which narrowly became law after passing 61 votes to 57.²⁷

²⁰ Interview with Rebecca Kitteridge, Director of the New Zealand Security Intelligence Service (Brent Edwards, Insight, Radio New Zealand, 19 April 2015).

²¹ New Zealand Security Intelligence Service *Annual Report: For the year ended 30 June 2014* (G 35, 23 March 2015) at 10.

²² Department of Prime Minister and Cabinet, above n 2, at [18].

²³ At [20] – [21].

²⁴ Christopher Finlayson (National Party) speaking during the First Reading (25 November 2015) 702 NZPD 781.

²⁵ New Zealand Security Intelligence Service Section 4ID Authorisations Interim Report for the period 1 July 2014 to 31 December 2014 (2 March 2015) at 4.

²⁶ Department of Prime Minister and Cabinet, above n 2, at [19].

²⁷ (22 March 2012) 678 NZPD 1245.

The Countering Terrorist Fighters Legislation Bill passed through Parliament under urgency. Two days were allowed for public submission; nearly 600 submissions were received, 23 of which were heard.²⁸ The Bill received support at every stage by the National, ACT and United Future parties (62 seats). The Green Party, New Zealand First and the Maori Party opposed it at every stage (27 seats). Labour (32 seats) initially did not support the amendments, but gave an affirmative vote after the Select Committee process.²⁹

III Statutory Requirements for Legal Authority to Undertake Surveillance

This part will outline the statutory requirements for the issuance of a warrant, then compare these requirements with those for the issuance of an authorisation by the Director. It will then consider the oversight mechanisms for authorisations, and canvas the emergency warrant procedures of other key Commonwealth jurisdictions.

A Pre-Amendment Powers of the New Zealand Security Intelligence Service

The NZSIS was established under the New Zealand Security Intelligence Service Act 1969. Its statutory functions are to "obtain, correlate and evaluate intelligence relevant to security" and "communicate any such intelligence to such persons, and in such manner, as the Director considers to be in the interests of security." 30

Prior to the Bill, there was no avenue through which the NZSIS could legally undertake warrantless surveillance. Interception or seizure of any communication, document or thing not otherwise lawfully obtainable, or the undertaking of electronic tracking, had to be authorised by a warrant jointly issued by the Minister in charge of the New Zealand Security Intelligence Service and the Commissioner

7

²⁸ Kennedy Graham, above n 15.

²⁹ Andrew Little (Labour Party) speaking during the Second Reading (9 December 2014) 702 NZPD 1207

³⁰ NZSIS Act, s 4(1)(a).

of Security Warrants.³¹ The Commissioner of Security Warrants is an individual who has previously held office as a High Court Judge.³² A domestic intelligence warrant would be issued where the Minister and Commissioner were satisfied that: (a) the proposed interception, seizure or electronic tracking is "necessary for the detection of activities prejudicial to security"; and (b) the value of the information sought justified the particular activities; and (c) "the information is not likely to be obtained by any other means"; and (d) any communications sought to be intercepted or seized is not privileged in court proceedings.³³

The Inspector-General of Intelligence and Security operates the oversight scheme for the warrant process. Their role is to review the effectiveness and appropriateness of procedures adopted by intelligence agencies to ensure compliance with the statutory provisions relating to the issue and execution of warrants. Reports are published annually canvassing the year ending 30 June. In 2014, the Inspector-General initiated an own-motion inquiry into actions undertaken by the NZSIS and Prime Minister's Office in 2011. Arising from regular inspection of security warrants, this was the first Inspector-General inquiry into the propriety of particular activities of an intelligence and security agency.

On 25 November 2015, the Inspector-General released her report.³⁷ The report found that the NZSIS had disclosed incomplete, inaccurate and misleading information; failed to provide clarification once these errors had become apparent; made significant errors in handling media information and OIA.³⁸ The report further established that the NZSIS did not have appropriate processes and protocols for the maintenance of political neutrality in its relationship with the Prime Minister's Office; failed to maintain a relationship of trust and confidence with the Leader of the Opposition; and undertook an insufficiently rigorous and careful

³¹ NZSIS Act, s 4A(1).

³² Section 5A(3).

³³ Section 4A(3).

³⁴ Inspector General of Intelligence and Security Act 1996, s 11(d)(i).

³⁵ Section 27(1).

³⁶ Cheryl Gwyn Annual Report for the year ended 30 June 2014 (Office of the Inspector-General of Intelligence and Security, 17 February 2015) at 12.

³⁷ Cheryl Gwyn Report into the release of information by the New Zealand Security Intelligence Service in July and August 2011 (Office of the Inspector-General of Intelligence and Security, 25 November 2014).

³⁸ At [9] – [12].

approach to security intelligence.³⁹ In what seems extremely inopportune timing, the Countering Terrorist Fighters Legislation Bill was introduced to the House the very day this report was released, thereby accompanying proposed extension of intrusive state powers with a weak political foundation and corroded public trust.⁴⁰

B The New Zealand Security Intelligence Service Amendment Act 2014

On 12 December 2014, the New Zealand Security Intelligence Amendment Act came into force.⁴¹ It provided two new powers to the NZSIS: warranted visual surveillance powers to detect, investigate or prevent any actual, potential, or suspected terrorist act or facilitation of a terrorist act; and "authorisations" for warrantless surveillance in situations of emergency or urgency.⁴²

1 Section 4ID: warrants need not be obtained in some situations of emergency or urgency

Under the amended Act, an intelligence warrant or visual surveillance warrant need not be obtained in some situations of emergency or urgency. The Director of the NZSIS may authorise a person to undertake surveillance without a warrant where the power is necessary for the detection, investigation or prevention of any actual, potential or suspected terrorist act or facilitation of a terrorist act, the Director is satisfied that the threshold for issuing a warrant is met, and obtaining a warrant is impracticable in the circumstances and a delay is likely to result in a loss of intelligence. An authorisation allows the interception or seizure of any communication, document or thing, electronic tracking, or visual surveillance. The

³⁹ Cheryl Gwyn, above n 37, at [14] – [21].

⁴⁰ Kennedy Graham, above n 15.

⁴¹New Zealand Security Intelligence Service Amendment Act 2014.

⁴² Section 4.

⁴³ NZSIS Act, s 4ID.

⁴⁴ Section 4ID(1).

⁴⁵ Section 4ID(2).

authorisation is valid for a period of 24 hours. 46 Upon expiry, no further application may be made for an authorisation in respect of the same subject matter. 47

Table 1 compares the statutory requirements for issue of a warrant with authorisations granted in situations of urgency or emergency. ⁴⁸ Firstly, warrants and authorisations allow undertaking of the same modes and level of surveillance. ⁴⁹ Secondly, warrants are approved jointly by the Minister in charge of the NZSIS and the Commissioner of Security Warrants upon application by the Director, whereas the Director issues authorisations. ⁵⁰ As a result, surveillance under authorisation is approved internally. Thirdly, intelligence warrants are provided on grounds prejudicial to "security", whereas visual surveillance and authorisations may be made only in respect of a terrorist act or facilitation thereof. ⁵¹ Thus, authorisations are granted on more limited grounds than a warrant. Fourthly, in addition to satisfaction that grounds for a warrant are fulfilled, authorisations additionally require that obtaining a warrant is impracticable and is likely to result in loss of intelligence. ⁵² Finally, warrants may be valid for a period up to 12 months and may be renewed in respect of the same subject matter. ⁵³ Authorisations are valid for a period of 24 hours, and may not be renewed unless a warrant is granted in respect of that subject matter. ⁵⁴

2 Section 4IE: oversight after an authorisation has been issued

Section 4IE contains an oversight scheme operating after an authorisation has been issued. Immediately after an authorisation is given, the Director must advise the Minister, the Inspector-General and, where appropriate, the Commissioner. ⁵⁵ The Minister or the Commissioner may direct the NZSIS to discontinue activity under the authorisation and destroy any information collected without delay. ⁵⁶ If the Minister or Commissioner makes such a direction, the Director must refer the matter to the

11

⁴⁶ NZSIS Act, s 4ID(3).

⁴⁷ Section 4ID(4).

⁴⁸ See Appendix.

⁴⁹ NZSIS Act, ss 4A(1), 4IB(1) and 4ID(2).

⁵⁰ Sections 4A(1) and 4A(4), 4IB(1) and 4IB(5) and s 4ID(1).

⁵¹ Sections 4A(3)(a), 4IB(3)(a) and 4ID(1)(a).

⁵² Section 4ID(1)(c).

⁵³ Sections 4C and 4IC(1)(c).

⁵⁴ Sections 4ID(3) and 4ID(4).

⁵⁵ Section 41E(1).

⁵⁶ Section 41E(2).

Inspector-General for investigation.⁵⁷ It is the responsibility of the Director to ensure that any directions are carried out without delay.⁵⁸

After expiry of an authorisation, if no application has been made for a warrant, the Director must provide a report to the Minister or, where appropriate, the Commissioner, including reasons the authorisation was given, no application for a warrant was made and the nature of the information collected under the authorisation. The Minister or Commissioner must determine whether it was appropriate for that authorisation to have been given, and refer the matter to the Inspector-General for investigation. If an authorisation is followed by a warrant application that is refused, the Director must refer the matter to the Inspector-General for investigation.

If no warrant is issued in relation to the authorisation, the Minister must ensure that any records are destroyed except information that may be prejudicial to security.⁶² The decision to retain records must be referred to the Inspector-General for investigation.⁶³ The breadth of this retention clause raises questions because it allows information to be retained on grounds wider than that for which it was authorised to be collected, and will be considered in more depth in Part III.

Evidently, the Inspector-General operates the integral oversight mechanism for the exercise of authorisation powers. However, debate in the House raised concerns regarding the statutory political neutrality, independence and powers of the Inspector-General to ensure intelligence and security agencies comply with the law, given the advisory role of the office.⁶⁴ The powers and role of the Inspector-General are to be reviewed in the wider intelligence and security community review this year.⁶⁵

⁵⁷ NZSIS Act, s 41E(4).

⁵⁸ Section 4IE(3).

⁵⁹ Sections 41E(5)-(6).

⁶⁰ Section 4IE(7).

⁶¹ Section 41E(8).

⁶² Section 4IE(9).

⁶³ Section 41E(10).

⁶⁴ Phil Goff, (Labour Party) and David Shearer (Labour Party) speaking In Committee (9 December 2014) 702 NZPD 1207.

⁶⁵ Christopher Finlayson (National Party) speaking In Committee (9 December 2014) 702 NZPD 1207. There has been no further information as to the state of the review released to the public as of August 2015.

Sections 4IE(12), 4IE(13) and 4IE(14) impose interim six-monthly and annual reporting requirements to be prepared by the Director to be delivered to the Minister. ⁶⁶ The Bill contains a sunset clause set to expire on 1 April 2017. ⁶⁷

3 Use of information and possible redress for individuals subject to improper surveillance

Information gained or the existence of a warrant may not be disclosed otherwise than in the strict course of official duties or as authorised by the Minister. While the Act does not expressly provide that intelligence may be used as evidence, it is difficult to conceive of any other purpose for the collection of intelligence, and there are Canadian and Australian precedents that assume this is the case. Interesting legal questions also arise as to whether warrantless surveillance is admissible in court if a subsequent warrant is not sought, or denied.

The rights of an individual subjected to improper surveillance are not set out in the enactment. In the security intelligence context, the challenge in gaining access to judicial review or successfully filing a complaint with the Inspector-General, Ombudsman or Privacy Commissioner is that individuals are required to be aware of the surveillance. Comments about security organisations generally note that such awareness is precluded by the clandestine nature of the surveillance programmes and, as a result, individuals may not have a legal avenue for redress. ⁷¹ Where police overstep their powers in the course of criminal investigation, that activity will be tested in court. By contrast, security organisations face the prospect of accountability

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⁶⁶ NZSIS Act, s 41E(12) – (14).

⁶⁷Section 41G.

⁶⁸ Section 12A.

⁶⁹ Roger Douglas *Law, Liberty, and the Pursuit of Terrorism* (The University of Michigan Press, Ann Arbor, 2014) at 71 citing cases: *Parkin v O'Sullivan* [2006] FCA 1413; (2006) 162 FCR 444; *Charkaoui v Canada* (*Citizenship and Immigration*) 2008 SCC 38; [2008] 2 SCR 326.

⁷⁰ Kennedy Graham (Green Party) speaking during the First Reading (25 November 2014) 702 NZPD 781.

⁷¹Martin Scheinin *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* A/HRC/13/37 (28 December 2009) at [38].

only where oversight mechanisms raise an issue, or information morph into criminal proceedings.⁷²

As an illustration of the situation in New Zealand, in the past five years the Inspector-General has recorded only a handful of errors and complaints, none of which resulted in compensation. Three complaints relating to harassment and surveillance have been made, none of which were upheld.⁷³ Corrective action following two errors in 2010 meant that "[n]o apparent harm to anyone had followed". ⁷⁴ Similarly in 2014, information collected from inadvertent surveillance of a third party was deleted and no further action was determined as necessary. ⁷⁵

4 Other Commonwealth jurisdictions

It is important to understand how New Zealand's amendments compare with the legislation of other Commonwealth countries. At the request of the Select Committee, the Department of the Prime Minister and Cabinet released a statement comparing provisions of the Bill with the legal standards in Australia and the United Kingdom.⁷⁶

The legislative foundation in Australia for urgent surveillance is the Australian Security Intelligence Organisation Act 1979 s 29. The statement represented that the Director-General of the ASIO may issue emergency warrants where the Director is satisfied of "reasonable grounds for believing" that the surveillance will substantially assist the collection of intelligence relation to security. On its face, this is correct, but the statement did not mention the integral paragraph 29(1)(a). This provision requires that the Director-General may issue a warrant where "the Director-General

⁷² Craig Forcese and Kent Roach "Bill c51: the Good, the Bad... and the Truly Ugly" (13 February 2015) <thewalrus.ca>.

⁷³ D P Neazor *Inspector-General of Intelligence and Security Annual Report 2011* (Office of the Inspector-General of Intelligence and Security, 11 October 2011) at [8]; D P Neazor *Inspector-General of Intelligence and Security Annual Report 2012* (Office of the Inspector-General of Intelligence and Security, November 2012) at [10.d].

⁷⁴ D P Neazor, *Inspector-General of Intelligence and Security Annual Report 2010* (Office of the Inspector-General of Intelligence and Security, 16 November 2010) at [31].

⁷⁵ Cheryl Gwyn, above n 36, at 21.

⁷⁶ Department of the Prime Minister and Cabinet *Countering Terrorist Fighters Legislation Bill – Comparison with other jurisdictions* (28 November 2014).

⁷⁷ At [5].

has forwarded or made a request to the Minister for the issue of a warrant".⁷⁸ The operation of this paragraph is to dictate that surveillance may only be authorised by the Director-General after a warrant has been applied for. Emergency warrants are valid for a period not exceeding 48 hours.⁷⁹

New Zealand's emergency authorisations are granted in more limited, counterterrorism circumstances than Australian emergency warrants. New Zealand's authorisations also extend for half the period of Australia's emergency warrants. However, Australian emergency warrants may only be issued where a warrant application has already been made to the Minister. This suggests that the Australian security services do not consider the time to collate evidence for a warrant a disproportionate threat to their ability to collect vital information.

The statement then references the Security Service Act 1989 s 3(b) as the legislative foundation for the United Kingdom MI5's power to undertake urgent surveillance.⁸⁰ However, this section of the Act was repealed and superseded in 1994.⁸¹ The current legislative provisions for urgent surveillance conducted by MI5 is the Regulation of Investigatory Powers Act 2000. A warrant will be granted in circumstances of national security, for the detection or prevention of serious crime, and for safeguarding the economic well-being of the United Kingdom.⁸² Warrants for interception of communication and intrusive surveillance in an urgent case will only be issued where the Secretary of State has expressly authorised it issue.⁸³ An urgent interception warrant will last for a period of five working days.⁸⁴

The United Kingdom's emergency powers are granted in considerably wider circumstances and are valid for a significantly longer period than New Zealand's emergency authorisations. However, the United Kingdom's urgency provision requires the Secretary of State (for these purposes, the actor equivalent to New Zealand's Minister and Commissioner) to personally authorise the warrant. This is

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⁷⁸ Australian Security Intelligence Organisation Act 1979 (Aus), s 29(1)(a).

⁷⁹ Section 29(2).

⁸⁰ Department of Prime Minister and Cabinet, above n 76, at [10].

⁸¹ Security Service Act 1989 (UK), s 3(b).

⁸² Regulation of Investigatory Powers Act 2000 (UK), s 5(3).

⁸³ Sections 7(2)(a) (interception of communications); 42(1) and 44(2) (intrusive surveillance).

⁸⁴ Section 9(6)(a).

strictly contrasted with New Zealand's legislation that requires notification of the Minister and Commissioner whom have a power to discontinue the surveillance, but do not positively authorise it until a warrant has been issued.⁸⁵

Though not referred to in the departmental report, the Canadian Security Intelligence Service has no statutory authority to undertake warrantless surveillance. Under s 21(1) of the Canadian Security Intelligence Service Act 1984, if a warrant is required for investigation of a threat to security, applications are made to a Federal Court judge after having obtained the Minister's approval.⁸⁶

IV Warrantless Surveillance: Necessary, Justified and Proportionate?

The Office of the United Nations High Commissioner for Human Rights has stated that:⁸⁷

Terrorism aims at the very destruction of human rights, democracy and the rule of law. It attacks the values that lie at the heart of the Charter of the United Nations and other international instruments: respect for human rights; the rule of law; rules governing armed conflict and the protection of civilians; tolerance among peoples and nations; and the peaceful resolution of conflict.

The flip side is that "measures to combat terrorism may also prejudice the enjoyment of – or may violate – human rights and the rule of law." ⁸⁸ As a result, counterterrorism best practice requires that the exercise of functions and powers be based on the principle of legality and that restrictions on rights shall be proportionate to the benefit obtained. ⁸⁹ For example, a recommendation to New Zealand following its second Universal Periodic Review by the United Nations Human Rights Council

⁸⁶ Canadian Security Intelligence Service Act 1985 (Can), s 21(1).

⁸⁵ NZSIS Act, s 4IE(2).

⁸⁷ Office of the United Nations High Commissioner for Human Rights Fact Sheet No 32: Human Rights, Terrorism and Counter-terrorism (July 2008) at 7.

⁸⁸Martin Scheinin *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* A/HRC/16/51 (22 December 2010) at [8]. ⁸⁹ At [15]-[16].

was to ensure that legislation on surveillance complies with the principle of proportionality, and that its counterterrorism legislation is in full compliance with the ICCPR. 90

A Principle of Legality

Respect for the rule of the law means that the principle of legality cannot be compromised. ⁹¹ This principle is enshrined in Article 15 of the International Covenant on Civil and Political Rights (ICCPR) and is non-derogable, even in times of public emergency. ⁹² It is implicit in this principle that laws contain clear and precise provisions, so as to ensure that the law is not subject to interpretation that would unduly broaden the scope of the proscribed conduct. ⁹³ Following investigation in Chile, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has recently recommended that "in particular, the definitions of terrorist crimes should be confined exclusively to activities that entail or are directly related to the use of deadly or serious violence against civilians". ⁹⁴

Applied to the New Zealand Security Intelligence Service Act 1969, the principle of legality requires that the Acts provisions are formulated in explicit, precise and confined terms such that an individual may be reasonably aware when their behaviour will subject them to warrantless surveillance. The trigger concept of the warrantless surveillance power is that of "terrorist act". 95

1 Definition of "terrorist act"

The definition of "terrorist act" is contained in s 5 of the Terrorism Suppression Act 2002. The term encompasses acts that constitute an offense as defined in a specified

⁹⁰United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review: New Zealand A/HRC/26/3* (7 April 2014) at [218.154]-[218.155].

⁹¹ Kim Lane Scheppele "Global Security law and the Challenge to Constitutionalism after 9/11" (2011) 2 PL 354 at 365.

⁹² International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 15 ("ICCPR").

⁹³ Office of the United Nations High Commissioner for Human Rights, above n 87, at 40.

⁹⁴ Ben Emmerson *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* A/HRC/25/59/Add.2 (11 March 2014) at [93]. ⁹⁵NZSIS Act, s 4ID(1)(a).

terrorism convention; ⁹⁶ or acts that are carried out "for the purpose of advancing an ideological, political, or religious cause" that intend to induce terror in a civilian population or unduly compel a government or international organisation to do or abstain from doing any act. ⁹⁷ Acts of the latter type also require a harm element, such that the act must be intended to cause: ⁹⁸

- Death or serious bodily injury; or
- "serious risk to health or safety of a population"; or
- serious interference or disruption to an infrastructure facility, "if likely to endanger human life"; or
- "destruction of, or serious damage to property of great value or importance, major economic loss, or major environmental damage" if likely to result in the aforementioned outcomes; or
- "introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country".

Section 25(1) of the Act lengthily extends the definition into the inchoate period by legislating that a terrorist act is carried out where planning or preparations to carry out the act, whether it is carried out or not; a credible threat to carry out the act; an attempt to carry out the act; or the actual carrying out of the act. ⁹⁹ A terrorist act is facilitated if there is knowledge that a terrorist act is being facilitated, but this does not require that the facilitator knows specifically that any act is foreseen or planned, or that the act is ultimately carried out. ¹⁰⁰ The definition contains an avoidance of doubt safeguard stating that "the fact that a person engaged in any protest, advocacy, or dissent, or engaged in any strike, lockout or other industrial action" alone is not sufficient basis for inferring the requisite purpose or intention. ¹⁰¹

The definition has been criticised by the New Zealand Human Rights Commission as "open to interpretation" with the potential to be "applied very broadly by law

⁹⁹ Section 25(1).

⁹⁶ Terrorism Suppression Act, sch 3: unlawful seizure of aircraft, civil aviation, international crimes, taking of hostages, maritime navigation, fixed platforms, bombings, nuclear material and nuclear terrorism.

⁹⁷ Terrorism Suppression Act, s 5(2).

⁹⁸ Section 5(3).

¹⁰⁰ Section 25(2).

¹⁰¹ Section 5(5).

enforcement and intelligence officials.¹⁰² For example, New Zealand's only charges under the Terrorism Suppression Act were dropped after the Solicitor-General concluded that "the legislation is unnecessarily complex, incoherent and as a result almost impossible to apply" to the circumstances of the case.¹⁰³

In general, this ambiguity is found in other jurisdictions: the Canadian, New Zealand and Australian definitions of terrorism are based to a considerable extent on the United Kingdom's definition. However, despite widespread ambiguity, the United Nations Human Rights Council has emphasised the undesirability of such legislation, stating that "an imprecise definition of a crime can lead to the criminalisation of innocent conduct and to the broadening of proscribed conduct in judicial interpretation". As a result, individuals may be subject to the special powers the state has reserved for counterterrorism. How the state has reserved for counterterrorism.

2 "Terrorist act" versus "foreign fighter"

The breadth of the definition poses particular problems in the context of warrantless surveillance. The originating sources of the threat for which the legislation was enacted are the foreign terrorist fighter, violent extremism and radicalisation. However, the Bill did not define these terms, or use them in the substantive enactments. Hon Christopher Finlayson, Minister in Charge of the New Zealand Security Intelligence Service, stated that the Government considered the terms did not need a specific definition because definition of "terrorist act" in Section 5 of the Terrorism Suppression Act is adequate: 108

[w]e are targeting people by behaviour or intended behaviour, not by a label. The bill targets people who want to carry out a terrorist act... People who want to go and fight

¹⁰⁵United Nations Human Rights Council Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism A/HRC/28/28 (19 December 2014) at [21].

¹⁰² Human Rights Commission *Operation Eight: a human rights analysis* (December 2013) at [79].

¹⁰³ David Collins QC Decision of the Solicitor-General in Relation to the Prosecution of People under the Terrorism Suppression Act 2002 ("Operation 8") (Crown Law, 8 November 2007) at [8].

¹⁰⁴ Douglas, above n 69, at 51–53.

¹⁰⁶ Kent Roach "Defining Terrorism: The Need for a Restrained Definition" in Craig Forcese and Nicole LaViolette (eds) *The Ottawa Principles of Human Rights and Counter-Terrorism* (Irwin Law, Toronto, 2008) 97 at 98; Office of the United Nations High Commissioner for Human Rights, above n 87, at 40.

¹⁰⁷ Countering Terrorist Fighters Legislation Bill 2014 (1-2) (select committee report) at 1.

¹⁰⁸ Christopher Finlayson (National Party) speaking during the Second Reading (9 December 2014) 702 NZPD 1207.

for the Islamic State or Iraq and the Levant are just the latest manifestations of the terrorist acts already envisaged by, and defined in, the Terrorism Suppression Act.

However, the definition of "terrorist act" is overly broad for the purpose of countering foreign terrorist fighters. To understand this mismatch, we must first understand what a foreign terrorist fighter is. Resolution 2178 provides the definition as: ¹⁰⁹

individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict."

One of the defining elements of a foreign terrorist fighter is that an individual leaves his or her country of origin. 110 The current definition of "terrorist act" and trigger concept for warrantless surveillance, however, contains no distinction between suspected acts committed by the foreign terrorist fighter, and domestic threats. Domestic actors, while undeniably a threat to national security, are thereby implicated under legislation that is enacted to address a distinguishable threat.

Some may argue the domestic threat of terrorism is an even greater impetus for warrantless surveillance than foreign terrorist fighters, as this threat has potential to cause harm at home. However, New Zealand's threat level remains at low: the threat of a terrorist attack is assessed at possible, but not expected. An unexpected threat does not justify unprecedented expansion of an intrusive State power that has the potential to apply very broadly. 111 The Law Society stated in reference to the Bill that where legislation "which has such a potential to profoundly impact on human rights" is being considered, "public input and debate is essential". 112 Therefore, if warrantless surveillance is to justifiably extend to the domestic sphere, it is imperative that debate and public consultation consider the full breadth of its implications.

¹⁰⁹ SC Res 2178, above n 13, preamble at 2 (emphasis added).

¹¹⁰See Geneva Academy of International Humanitarian Law and Human Rights "Foreign Fighters Under International Law" (October 2014) at 5; Orla Hennessy "The Phenomenon of Foreign Fighters in Europe" (July 2012) International Centre for Counter-Terrorism at 2.

¹¹¹ Kennedy Graham, above n 15.

¹¹² New Zealand Law Society "Law Society urges reduction of terrorist fighter bill powers" (27 November 2014) https://www.lawsociety.org.nz.

For now, introduction of a definition of "foreign fighter" and subsequent limitation of the power to these terms are imperative. For instance, legislators should return to Supplementary Order Paper (SOP) Number 42 introduced by Kennedy Graham of the Green party that failed to pass in the House following a 48 – 73 vote. This SOP proposed the insertion of a threefold purpose statement into each of the amending bills to provide clarity and interpretive instruction for the extent to which the new powers can be exercised. In respect of the New Zealand Security Intelligence Service, the SOP sought to introduce a section 41AA:

4IAA Purpose

- (1) The purpose of sections 4IA to 4IG is to ensure that New Zealand
 - a. meets its obligations under UN Security Council resolution 2178 of 24 September 2014 to combat threats to international peace and security caused by terrorist acts including those perpetrated by foreign terrorist fighters; and
 - ensures that such action by New Zealand remains consistent with its obligations under international human rights law, international refugee law, and international humanitarian law; and
 - c. ensures that such action by New Zealand is not associated with any religion, nationality, or civilization.
- (2) Sections 4IA to 4IG apply to any person suspected of being a foreign terrorist fighter as defined in subsection (3), and to no other person.
- (3) Foreign terrorist fighter means a person who travels to a State other than their State of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.

The requirements in subs (1) and the definition in subs (3) are taken verbatim from Resolution 2178.¹¹⁶ Subsection (1) provides interpretive instruction to the NZSIS and the judiciary that encourages a restrictive view of the powers available. Subsections (2) and (3) serve to streamline the Security Intelligence Service's powers to be

¹¹⁴ Kennedy Graham (Green Party) speaking In Committee (9 December 2014) 702 NZPD 1207.

¹¹³ (9 December 2014) 702 NZPD 1207.

¹¹⁵ Supplementary Order Paper 2014 (42) Countering Terrorist Fighters Legislation Bill (1-2) at 2.

¹¹⁶ SC Res 2178, above n 13, at 2 and 1 respectively.

proportionate with the threat for which they were enacted. In the House, the proposed amendment was supported by the Labour Party as a "reasonable" effort to invoke "greater clarity and greater certainty" into definitions in the Bill. ¹¹⁷ Precision of legislative drafting is integral to adhering to the principle of legality, and this SOP provides a good vehicle through which New Zealand can improve its provision.

3 Information retention after "expiry of an authorisation... if no warrant has been issued"

A provision that attracted surprisingly little debate in the House was the data retention clause under s 4IE(9), given that the implications of its drafting potentially undermine several safeguards surrounding the exercise of warrantless surveillance authorisations. This section states that if no warrant is issued in relation to the authorisation, the Minister must ensure that any records resulting from activities undertaken pursuant to that authorisation are destroyed. However, records may be retained where they are relevant to the detection of activities prejudicial to security, or to the gathering of foreign intelligence essential to security. The decision to retain records must be referred to the Inspector-General for investigation. This retention clause provides a route through which the requirements for an authorisation may be systematically undermined.

The provision must be broken down to understand the full extent of what it allows. The phrase "after the expiry of an authorisation" is vague as to the circumstances which amount to an expiry. An authorisation is valid for a period not exceeding 24 hours and it logically follows that an authorisation will expire at the end of this time. However, it is not clear whether the provision applies to authorisations that are discontinued by the Minister or Commissioner. The point of discontinuance could arguably be interpreted as the point of expiry. This interpretation would be consistent with the power given to the Minister or Commissioner under s 4IE(2)(b) to direct the destruction of "any or all of the information collected" because the paragraph provides

¹¹⁷ Phil Goff (Labour Party) speaking In Committee (9 December 2014) 702 NZPD 1207.

¹¹⁸ NZSIS Act, s 4IE(9).

¹¹⁹ Section 41E(10).

a discretion to the Minister or Commissioner to direct the retention of information even where the authorisation has been discontinued. If this interpretation is correct, information may be retained even where an oversight authority has terminated the surveillance.

The information retention provision further does not distinguish between circumstances in which an authorisation was not followed by a warrant application and those in which a warrant application was denied. If circumstances in which no warrant was applied for provide a valid foundation for the operation of the provision, information may be retained about an individual who turned out to be of no ongoing interest to the NZSIS. If the retention provision can be invoked where a warrant has been denied, this would allow for retention of information where the standard for a warrant has not been met in the minds of the Minister and Commissioner.

Finally, the provision does not limit the ability to retain information gathered during authorisations deemed appropriate by oversight authorities. The Minister and Commissioner must determine whether an authorisation not followed by a warrant application was appropriate to be given and refer the matter to the Inspector-General. Furthermore, the Inspector-General has a role of investigation where a warrant application is refused. This lack of specificity leaves open the possibility that information may be retained where oversight authorities have determined that the authorisation should not have been given.

4 Retention on grounds of "security"

A second issue with the retention clause is the breadth of the grounds upon which information may be retained.

The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression expressed concern over vague and unspecified notions of national security that have become an acceptable justification for surveillance: 122

¹²⁰ NZSIS Act, s 4IE(7).

¹²¹ Section 4IE(8).

¹²² Frank La Rue Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression A/HRC/23/40 (17 April 2013) at [60].

the use of an amorphous concept of national security to justify invasive limitations on the enjoyment of human rights is of serious concern. The concept is broadly defined and is thus vulnerable to manipulation by the State as a means of justifying actions that target vulnerable grounds such as human rights defenders, journalists or activists.

As an illustration, the United Nations Human Rights Committee seventh periodic report of the United Kingdom stated that access to communications data should be "limited to the extent strictly necessary for the prosecution of the most serious crimes". 123

Therefore, the second issue with the information retention provision is the breadth of the clause, as it applies to information about activities that may be prejudicial to "security". Security is defined in section 2 of the NZSIS Act as: 124

- (a) the protection of New Zealand from acts of espionage, sabotage, and subversion, whether or not they are directed from or intended to be committed within New Zealand:
- (b) the identification of foreign capabilities, intentions, or activities within or relating to New Zealand that impact on New Zealand's international well-being or economic well-being:
- (c) the protection of New Zealand from activities within or relating to New Zealand that
 - (i) are influenced by any foreign organisation or any foreign person; and
 - (ii) are clandestine or deceptive, or threaten the safety of any person; and
 - (iii) impact adversely on New Zealand's international well-being or economic well-being:
- (d) the prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act.

It is clear that terrorism itself is only a subset of the breadth of the concept of security. In its submission on the Bill, the Law Society pointed to the fact that neither the

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¹²³ United Nations Human Rights Committee *Concluding observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland* CCPR/C/GBR/CO/7 (2014) at [24(d)]. ¹²⁴ Definition of "security" in s 2 of the NZSIS Act.

commission of an offence, nor a risk to life or safety feature in a provision regarding national security. 125

The generous scope of the retention clause is especially peculiar given that, following select committee recommendation, subs 4ID(1) was amended to provide that authorisations for warrantless surveillance must only be granted for counterterrorism activities. The purpose of this amendment was to reduce the scope power, which originally stood on grounds of security, and bring the provision within the counterterrorism intent of the Bill. ¹²⁶ Further, the statutory mechanism to ensure deletion of information provides for a fine of up to \$10,000 for knowing failure to delete records resulting from activities taken pursuant to an authorisation. This amount was increased from \$1,000 following select committee recommendation in order to reflect the seriousness of the offence. ¹²⁷ Similarly, the Law Society supported this increase stating that a firmer safeguard would strengthen the obligation to put in place "appropriate policies and procedures to ensure the Bill is complied with". ¹²⁸

Both of these increased safeguards are systematically undermined by the information retention clause. The clause circumvents the counterterrorism intent of the power by allowing any information collected to be retained on grounds of national security. It then undermines the safeguard against failure to delete records by legalising the retention of information that was never authorised to be collected.

Australian legislation has no provision tailored specifically to Director-authorised warrants, but its general information retention clause provides that information not relevant to security must be destroyed. ¹²⁹ United Kingdom legislation requires that information is destroyed as soon as there are no longer any grounds for retaining it as necessary for any of the "authorised purposes" under a warrant, information necessary for carrying out the functions of the Secretary of State or Interception of

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¹²⁵ New Zealand Law Society "Submission to the Foreign Affairs, Defence and Trade Committee on the Countering Terrorist Fighters Legislation Bill 2014" at [28].

¹²⁶ Countering Terrorist Fighters Legislation Bill 2014 (1-2) (select committee report) at 5.

¹²⁷ At 5.

¹²⁸New Zealand Law Society, above n 125, at [29].

¹²⁹ Section 31 Australian Security Intelligence Organization Act (Aus) requires information not relevant to performance of functions to be destroyed, one function of which is "to obtain, correlate and evaluate intelligence relevant to security" per s 17(1)(a).

Communications Commissioner or Tribunal, and where it is necessary for criminal prosecution. Canada's legislation allows the retention of information respecting activities that "may on reasonable grounds be suspected of constituting threats to the security of Canada". Evidently, these three jurisdictions allow for the retention of information on grounds that reflect those for which a warrant is granted and, in the case of the United Kingdom, for the practical operation of oversight and judicial mechanisms.

To address the loophole in s 4IE(9), it is imperative that the information retention clause is restricted to information regarding the activities of foreign terrorist fighters only where an authorisation has been followed by a warrant or approved as reasonable by the Inspector-General. Thereby, the clause will facilitate the retention of records that were collected on a solid legal foundation.

B Citizens as Subjects of Rights and Justified Limits

Resolution 2178 impleaded States to adhere to their international human rights obligations, stating that failure to comply with these obligations is one of the factors that contributes to increased radicalization and fosters a sense of impunity. Failure to restrict counterterrorism laws pose the risk that they will offend the principle of proportionality that governs the permissibility of restriction on human rights and fundamental freedoms. As a result, the United Nations Human Rights Committee has stated that "measures should be taken to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity." 134

The key right protected under New Zealand's domestic law that is implicated in warrantless surveillance powers is that in section 21 of the New Zealand Bill of Rights Act 1990 ("NZBORA"): "[e]veryone has the right to be secure against

¹³³ Martin Scheinin, above n 88, at [26]; Office of the United Nations High Commissioner for Human Rights, above n 87, at 24.

¹³⁰ Regulation of Investigatory Powers Act (UK), s 15(3)-(4).

¹³¹ Canadian Security Intelligence Service Act (Can), s 21(1).

¹³² SC Res 2178, above n 13, preamble at 2.

¹³⁴ United Nations Human Rights Committee, above n 123, at [24(a)].

unreasonable search or seizure, whether of the person, property, correspondence or otherwise." ¹³⁵

Commentary to the draft article of the White Paper on the Bill of Rights noted that the phrase "whether of the person, property, or correspondence or otherwise" was to ensure that the right applied "not only to acts of physical trespass but to any circumstances where statute intrusion on an individual's privacy is in this way unjustified". The commentary explicitly noted that the protection should extend to "electronic interception of private conversations, and other forms of surveillance". ¹³⁶

Article 17 of the International Covenant on Civil and Political Rights, to which New Zealand is a party, states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence". The Human Rights Committee in its General Comment on the article, indicated that it applies to searches and "surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations." The New Zealand Supreme Court in *R v Hamed* adopted this interpretation. The New Zealand Supreme Court in *R v Hamed* adopted this interpretation.

The Ministry of Justice provided legal advice to the Attorney-General for consistency of the Bill with the NZBORA. The report drew significantly on jurisprudence regarding warrantless surveillance powers available to the police under the Search and Surveillance Act and acknowledged safeguards that are not exclusively judicial, but include parliamentary and executive oversight. It concluded that the limitations "have the important objective of protecting national security, public order, safety and the rights of others" and are "rationally connected with this objective, proportional, and minimally impairing of rights." ¹⁴⁰

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¹³⁵ New Zealand Bill of Rights Act 1990, s 21.

¹³⁶ Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984-1985] I AJHR A6 at [10.152]; Law Commission *Search and Surveillance Powers* NZLC R 79 at [2.15].

¹³⁷ ICCPR, above n 92, art 17.

¹³⁸ United Nations Human Rights Committee *CCPR General Comment No 16*: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection and Honour of Reputation (8 April 1988) at [8].

¹³⁹R v Hamed [2011] NZSC 101 at [18] per Elias CJ.

¹⁴⁰ Ministry of Justice Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Countering Terrorist Fighters Legislation Bill (Office of Legal Counsel, 12 November 2014) at [4].

The Law Society criticised the Ministry's advice in regard to the passport denial provisions as focussing on justifying a restriction that is already permissible at law without considering the appropriateness of the length of the passport denial term, which was the issue on this point, and was not addressed or justified in the Ministry's advice. A similar argument can be made on the Ministry's analysis of warrantless surveillance powers. The advice laboured to justify the concept of warrantless powers in urgency as a legitimate exception to unreasonable search and seizure. However, the concept of warrantless surveillance in exceptional circumstances, at least for law enforcement officials, is well established. The circumstances in which an authorisation may be given, oversight mechanisms, and length were not considered or justified by the advice.

An example of how this analysis should have been undertaken is the Law Commission's report on warrantless surveillance powers for the police. The Commission established that warrantless surveillance powers in exceptional circumstances were available at law for law enforcement authorities. However, "the exceptional nature of such powers makes it essential to codify their existence and scope". The report, therefore, considered three issues of statutory drafting: the offence for which surveillance without warrant ought to be available; the approval process that should precede or follow its use; and the maximum period over which surveillance without warrant should be conducted. These issues will be considered here in relation to warrantless surveillance powers for the NZSIS.

The first issue is of the circumstances in which an authorisation can be given. Reminiscent of the principle of legality argument in the preceding section, there exists a mismatch between the threat that the Bill sought to address, and the breadth of the powers that have been enacted. Warrantless surveillance powers applicable to both domestic intentioned and foreign intentioned actors are disproportionate to the objective of countering foreign terrorist fighters. Where the power is exercised to

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¹⁴¹ New Zealand Law Society, above n 125, at [9].

¹⁴² Law Commission, above n 136, at [2.67].

¹⁴³At [5.5].

¹⁴⁴ At [11.108].

authorise surveillance in circumstances other than that of a suspected foreign terrorist fighter, an individual's right to privacy and protection from unreasonable search and seizure will be unjustifiably implicated.

The next issue is the extent to which an approval process should be provided. On this issue, legislative review should consider the inconsistencies between New Zealand and other Commonwealth nations as a concern that New Zealand has expanded its powers to an unjustifiable extent. Currently, New Zealand's statute allows the Director-General to make an authorisation and then immediately inform the Minister, Commissioner and Inspector-General who may discontinue the surveillance. ¹⁴⁵ In comparison, Canada adheres to the strict judicial warrant procedure. ¹⁴⁶ Australia's precedent requires a warrant application to be made before surveillance can be internally authorised. ¹⁴⁷ The United Kingdom requires urgent authorisation to be made by the Secretary of State, who is the actor that approves warrants in the ordinary course of affairs. ¹⁴⁸ Each of these jurisdictions requires the warrant process to have progressed further before an emergency warrant can be granted, if at all.

The final issue is the maximum period for which the emergency use of surveillance should be permitted. The present authorisation extends for 24 hours. ¹⁴⁹ Canada allows for no emergency authorisation. ¹⁵⁰ Australia's legislation provides for 48 hours, but recall that a warrant application must already have been made, therefore, the period for which the emergency warrant stands is dependent only on the Minister's consideration and issuance of a warrant. ¹⁵¹ The United Kingdom allows for five working days, but this provision is tailored to an emergency situation in which the Secretary of State is not physically available to sign the warrant, but will still personally authorise the surveillance activity. ¹⁵²

¹⁴⁵ NZSIS Act, s 4IE(2).

¹⁴⁶ Canadian Security Intelligence Service Act (Can), s 21(1).

¹⁴⁷ Australian Security Intelligence Organisation Act (Aus), s 29(1)(a).

¹⁴⁸ Regulation of Investigatory Powers Act (UK), ss 7(2)(a), 42(1) and 44(2).

¹⁴⁹ NZSIS Act 4ID(3).

¹⁵⁰ Canadian Security Intelligence Service Act (Can), s 21(1).

¹⁵¹ Australian Security Intelligence Organisation Act (Aus), ss 29(1)(a) and 29(2).

¹⁵² Regulation of Investigatory Powers Act (UK), ss 9(6), 7(2)(a), 42(1) and 44(2).

There is a mismatch between New Zealand's legislation and both its overseas counterparts and its obligations to protect the human rights of its citizens. To amend these issues, New Zealand's Privacy Commissioner would strengthen the obligation to notify the Minister and Commissioner to require the application for a warrant to be made within 12 hours. Under this approach, the surveillance would be positively authorised by the Minister and Commissioner, rather than being subject to discontinuance. ¹⁵³ This recommendation is still considerably weaker than our Commonwealth counterparts, but bolsters the support for a more restrictive view of surveillance in urgent situations.

An alternative, and preferable, amendment would be to have the Minister and or Commissioner give the authorisation, pending a 12-hour window in which a warrant application must be made. If the Director is able to assess whether the warrant threshold is met and subsequently notify the Minister and Commissioner, there does not seem to be any reason not to require the Director to immediately notify the Minister and Commissioner of the relevant evidence and have these authorities issue an authorisation, similar to the United Kingdom requirement. The statement by the Law Commission in regard to police warrantless surveillance powers that "if there is time to obtain internal approval then there ought to be sufficient time to obtain a telewarrant" supports this conclusion. ¹⁵⁴ This formulation would mean that an external oversight authority gives the authorisation itself.

V Conclusion

The latest and most recent manifestation of the terrorist threat is that of the foreign terrorist fighter. As a result of combined international pressure and increase of the domestic threat level at home, and in order to increase domestic capacity to respond to these threats, New Zealand has enacted emergency powers for the NZSIS. The Bill introduced the ability to conduct warrantless surveillance for 24 hours where there is an actual, potential or suspected terrorist act or facilitation of a terrorist act. The Bill was rushed through Parliament under urgency, resulting in significant short-cuts in

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¹⁵³ Privacy Commissioner, above n 8, at 3.

¹⁵⁴ Law Commission, above n 136, at [11.112].

terms of public and external consultation. As a result, the Bill presents several shortcomings.

The Office of Prime Minister and Cabinet provided incomplete information to the Select Committee that did not emphasise the stark differences between the provisions of Australia, the United Kingdom and New Zealand in the context of emergency surveillance. Whereas privacy rights are upheld by the warrant procedure, New Zealand has taken a significant step further than our Commonwealth partners in eroding this right.

The use of the term "terrorist act" offends the principle of legality. The definition itself is vague, with the potential to be applied very broadly. Its breadth does not distinguish between domestic threats and foreign terrorist fighters, thereby extending the power of warrantless surveillance over actors that did not and do not present a threat large enough to justify intrusive state powers. The enactment also contains an information retention clause that creates a significant loophole in the legislation.

The Ministry of Justice's advice on consistency of the Bill with NZBORA provided did not acknowledge the true complexities of the power. While in the context of police powers warranted searches have been found to be reasonable by the Courts, discussion of the shape and scope of the newly enacted powers and their impact on unreasonable search and seizure remained unaddressed and unjustified.

However, in accordance with s 21 of the Intelligence and Security Committee Act 1996, a review of the intelligence and security agencies, the legislation governing them, and their oversight legislation must have been commenced before 30 June 2015. ¹⁵⁵ In the security intelligence context, in which outside debate is precluded by redactions and withheld information, the review will provide a vital forum for deeper analysis of the issues that have been raised in this paper and others, including recourse for individuals subject to surveillance, guidance to the courts, the efficacy of the Inspector-General as an oversight mechanism and, most importantly, the necessity of warrantless surveillance powers at all in the security intelligence context.

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¹⁵⁵ Intelligence and Security Committee Act 1996, s 21(1).

Appendix VI

	Intelligence Warrant	Visual Surveillance Warrant:	Warrantless authorisations
	Pre-existing warrant procedure.	Enacted by NZSISA Act 2014.	Enacted by NZSISA Act 2014.
Power	Intercept or seize any	Visual surveillance. 157	Powers as authorised under an
Authorised	communication, document or thing		intelligence warrant or visual
	not otherwise lawfully obtainable		surveillance warrant. 158
	by the person, or undertake		
	electronic tracking. 156		
Authorising	Minister and the Commissioner	Minister and Commissioner	Director (or person for the time
actor	jointly 159 on application from	jointly 161 on application from	being acting as the Director). 163
	Director or acting Director. 160	Director or acting Director. 162	
Activity sought	Necessary for the detection of	Necessary for the detection,	Necessary for the detection,
to be detected	activities prejudicial to security. 164	investigation, or prevention or	investigation or prevention of any
		any actual, potential or	actual, potential, or suspected
		suspected terrorist act or	terrorist act or facilitation of a
		facilitation of a terrorist act. 165	terrorist act. 166
	Section 4A(3) ¹⁶⁷	Section 4IB(3) ¹⁶⁸	Section 4ID(1) ¹⁶⁹
Grounds for	(d) The value of the information	(b) The value of the information	(b) In the case of an intelligence
authorisation	sought justifies the particular	sought justifies surveillance.	warrant, the conditions in

¹⁵⁶ NZSIS Act, s 4A(1).

¹⁵⁷ Section 4IB(1).

¹⁵⁸ Section 4ID(2)

¹⁵⁹ Section 4A(1).

¹⁶⁰ Section 4A(4).

¹⁶¹ Section 4IB(1).

¹⁶² Section 4IB(5).

¹⁶³Section 4ID(1).

¹⁶⁴ Section 4A(3)(a).
165 Section 4IB(3)(a).
166 Section 4ID(1)(a).
167 Section 4A(3).

¹⁶⁸ Section 4IB(3). 169 Section 4ID(1).

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or warrant	surveillance; and	(c) The information is not likely	4A(3)(b) to (d) apply; or in
	(e) The information is not likely to	to be obtained by any other	the case of a visual
	be obtained by other means;	means; and	surveillance warrant, the
	and	(d) Recording of activities	conditions in 41B(3)(b) to (d)
	(f) Communication sought is not	sought is not privileged	apply.
	privileged under the Evidence	under the Evidence Act	(c) That obtaining a warrant is in
	Act 2006 or any rule of law.	2006 or any rule of law.	time is impracticable in the
			circumstances and delay is
			likely to result in loss of
			intelligence.
Re-application	Section 4C ¹⁷⁰	The same provisions as apply in	An authorisation is valid for a
	(1): Valid for a period not	s 4C apply to visual surveillance	period not exceeding 24 hours. 172
	exceeding 12 months.	warrants. 171	On expiry of an authorisation, no
	(2) The expiry of an intelligence		further application may be made in
	warrant does not prevent a		respect of the same subject
	subsequent application for warrant		matter. 173
	in respect of the same subject		
	matter.		

Table 1. Legislative requirements for intelligence warrants, visual surveillance warrants, and surveillance in situations of emergency or urgency.

¹⁷⁰ NZSIS Act, s 4C.
171 Section 4IC(1)(c).
172 Section 4ID(3).
173 Section 4ID(4).

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