

EX TRISTRAM, R.H. Comments on the N.Z. Security Intelligence Act.

Material page

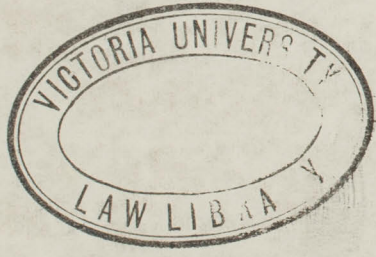
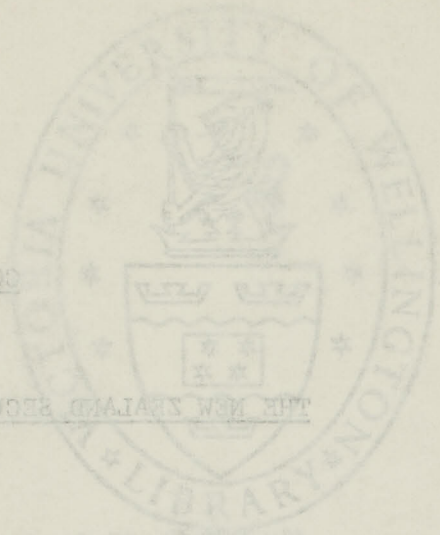


REFERENCE ONLY

LAW LIBRARY

COMMITTEE ON

THE NEW ZEALAND SECURITY INTELLIGENCE SERVICE ACT



MARSHALL, P. R.

366093

Tristram

THE ORIGIN AND OPERATION OF THE SECURITY SERVICE  
The New Zealand Security Service and its origins in an  
amplified Order in Council of the 27th of November, 1958.  
The "Nobody can rule guiltlessly": Saint-Just  
also on that of the British Organisation known as the MI5.

COMMENTS ON

It is a paradox that civil liberties, which grew and  
flourished under the parliamentary system, have been  
endangered in recent decades by executive activities

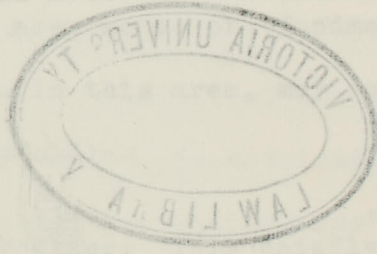
THE NEW ZEALAND SECURITY INTELLIGENCE SERVICE ACT

professedly directed towards the preservation of that  
system. The uncertainty and suspicion aroused by

PAPER FOR LEGAL WRITING REQUIREMENT  
FOR LLB HONOURS AT VICTORIA  
UNIVERSITY OF WELLINGTON.

AUGUST, 1970

ideological differences, the great "loyalty" and "loyalty"  
throughout programmes of varying dimension  
intention of this article to examine, within the framework  
of the New Zealand Security Intelligence Service Act of  
1969, the conflicts, between State and individual interests,  
which are inherent in matters of national security.



R. H. TRISTRAM

TRUST

1. THE ORIGIN AND OPERATIONS OF THE SECURITY SERVICE

The New Zealand Security Service had its genesis in an unpublished Order in Council of the 26th of November, 1958.

Its "Nobody can rule guiltlessly" : Saint-Just procedure and aims on that of the British Organisation known as the MI5.

It is a paradox that civil liberties, which grew and flourished under the parliamentary system, have been endangered in recent decades by executive activities professedly directed towards the preservation of that system. The uncertainty and suspicion aroused by ideological differences between the "Great Powers" has, throughout the world, given rise to "security" and "loyalty" programmes of varying dimension and intensity. It is the intention of this article to examine, within the framework of the New Zealand Security Intelligence Service Act of 1969, the conflicts, between State and individual interests, vetting procedures, with a substantial portion of the efforts which are inherent in matters of national security.

of the Service, and are, moreover, fundamental to any analysis of individual rights in this area, may serve as an illustration.

The procedure is twofold:-

- (1) Negative Vetting: This chiefly, although not exclusively, concerns prospective employees in the Armed Forces and the Police. Immigrants and applicants for naturalization receive similar checks. No approach is made to the person concerned. The employing authority of Government concerned forwards the necessary particulars to the Service, which then makes a check against its

I. THE ORIGIN AND OPERATIONS OF THE SECURITY SERVICE

The New Zealand Security Service had its genesis in an unpublished Order in Council of the 26th of November, 1958. Its organisation was modelled closely both in procedure and aims on that of the British Organisation known as the MI5. The Service performs a number of distinct functions. Primarily it is an agency which collects and collates information; to be used in vetting procedures, in the surveillance of certain organisations, in the briefing of departmental heads and ministers of the Crown, and in pursuing counter-espionage activities. The Service also acts as an advisory body for

(2) Positive Vetting: This procedure is restricted to those who have regular and constant access to "sensitive information". Generally this will involve most Officers of the Armed

For obvious reasons, there is little precise information on how these various functions are performed. However, the vetting procedures, <sup>which occupy such a</sup> ~~with~~ a substantial portion of the efforts of the Service, and are, moreover, fundamental to any analysis of individual rights in this area, may serve as an illustration.

The procedure is twofold:-

(1) Negative Vetting: This chiefly, although not exclusively, concerns prospective employees in the Armed Forces and the Police. Immigrants and applicants for naturalisation receive similar checks. No approach is made to the person concerned. The employing authority or department concerned forwards the necessary particulars to the Service, which then makes a check against its

files. Occasionally access may be had to Police files. If clearance is given the files relating to the person concerned are destroyed. If any doubt arises, whether or not to give security clearance, further inquiries will be made. In such circumstances third persons could be approached. If the doubts cannot be resolved, the difficulty will be made clear to the authority concerned. No evaluation is offered, but the Service will make a recommendation on the <sup>basis</sup> ~~cases~~ of the substantiated material it has assembled, if the authority involved so requests.

(2) Positive Vetting: This procedure is restricted to those who have regular and constant access to "sensitive information". Generally this will involve most Officers of the Armed Forces but only the higher echelons of government departments. However, some departments, such as the Ministry of Foreign Affairs, require 'positive' clearance for nearly all employees. Some employees are subject to <sup>re-</sup>vetting every five years. The material which is the foundation of any report made to the departmental head concerned, is obtained from a standard form, clearly entitled "Security Questionnaire", and is prefaced by the words "You (prospective) employment puts you in touch with information of outstanding importance from the point of view of national security, and it is Government policy that special enquiries must be made about the reliability of those in such employment." This preface reiterates that the material is to be used for security purposes only. Clearly, hence, the person concerned is made fully aware

had to classified information.

of what is involved. Various routine particulars are required,<sup>1</sup> but those which would possibly be remarked on include inquiries regarding countries visited or resided in, and relatives resident in countries outside the Commonwealth. Four references are required, and these, it is stipulated, must be people well acquainted "in private life" with the person completing the form, and capable of vouching as to his or her "character". Of particular interest are the questions pertaining to political affiliations and connections. Predictably the Communist Party and pro-Facist organisations are mentioned. Some indication is given of the organisations which are considered to be "associated or in sympathy with" the Communist movement. It is significant that the form specifically indicates that "membership or association" in these latter organisations "does not necessarily prevent Security clearance."<sup>2</sup>

---

<sup>1</sup>These include marital status, birth and nationality details, residential addresses, employment records and education records, and particulars concerning the father, mother, spouse, brothers and sisters of the person concerned.

<sup>2</sup>The Canadian "Report of the Royal Commission on Security" (June 1969) recommends at p. 35 categorically, that any present membership in an "affiliated" organisation (or anyone who "by his words or actions" shows himself to support such an organisation) should automatically preclude employment in areas where access may be had to classified information.

People named in the questionnaire may themselves be subject to negative vetting. Material gleaned in interviews with references<sup>3</sup> will be evaluated in the context of information obtained from other sources. The prime purpose of inquiries as to character and associations, is to assess the "reliability" and personal qualities of the subject.<sup>3</sup> To this end, no particular factor, beyond that as present membership of the Communist Party, will preclude security clearance. Nor will any allegations unearthed be considered conclusive. If further investigation does not clear up any dubious matter, an interview with the person concerned may follow. Ultimately however, in such circumstances, the matter will be outlined in the report made to the Departmental Head, who must make the final decision on the initial report and any subsequent recommendation.<sup>4</sup>

---

3

<sup>4</sup>Concern has been voiced in some quarters on the attitude taken by the Service to activities of job applicants during their years at University. The attitude of Canadian "Royal Commission" op. cit. (at p. 37) is that "the positions taken by young and enquiring minds should not be held "against" them in later years..... Questionable university associations or activities should not necessarily bar an individual from government employment." It has been indicated to the writer by the Service that this is an adequate summary of the New Zealand attitude to the question.



11. Character investigation is intended to perform a twofold function. It not only seeks to establish personal integrity, but also to reveal any predilections or personal defects, in the subject of the enquiries (or amongst his close family) which could make him susceptible to pressure.<sup>5</sup>

Considerable comment has been aroused by the indication in Parliament that 18000 "investigations" were made in one recent calendar year.<sup>6</sup> Such figures are a distortion as they include revetting and a minimum of four negative vettings (of the referees) for each positive vetting made. Normally the Service will make in the region of 2500 checks under the negative procedure. This will include a large number of checks on applicants for naturalisation and immigration. Positive checks will be made on about 1300 to 1400 people each year.

---

<sup>5</sup>"Canadian "Report" op. cit. (at p.36 ). Special mention is made of homosexuality, which is not considered a bar for a low level of clearance. However clearance "should not normally be granted clearance to higher level." Once again it has been indicated that this indicates general security criteria in New Zealand.

<sup>6</sup> Parliamentary Debates: Vol.362 at p.2125 .

II. A STATUTORY BASIS FOR THE SERVICE

The Draft Bill:

The vociferous criticism to which the Service has been subject since its inception reached its zenith in the "Godfrey" incident and the "Laurenson" affair, both of which involved Universities and raised questions of <sup>improper</sup> employer conduct. It would be a sterile exercise to examine the validity of the specific allegations directed at the Service; of greater importance than the furore aroused on those occasions was the air of sensation and suspicion which had come to surround security activities. The culmination of this public concern was the introduction of a Bill avowedly modelled in most material aspects on the Australian Security Intelligence Organisation Act 1956. The ostensible intention of this Bill was to assuage criticism of the anomalous standing of the Service, a creature neither of statute nor of the common law, but <sup>derived</sup> denied from the prerogative powers of the Crown to defend the realm. Substantially the Bill contained nothing which had not already been encapsulated in the equivalent Australian Act.<sup>7</sup>

---

<sup>7</sup> With the exception of a personation clause, ultimately enacted as S.13.

<sup>9</sup> Parliamentary Debates. Vol 3-2 p. 2145.

Critics could be forgiven for considering this a rather jejune and insubstantial legislative exercise; and predictably it did not placate those concerned with security service activities.<sup>8</sup>

The Act:

"The further Parliament and the administration go to show that they are doing all they can to protect the interests and rights of the citizen, the more we encourage the growth of confidence in the Service."<sup>9</sup> Mr Kirk's words would seem to indicate the consideration which persuaded Government to implement the considerable alterations and extensions found in the final enactment. It is, however, important that any attempt to reconcile the conflicting demands of national security and civil liberties must do <sup>more</sup> most than lull or beguile. Furthermore, an enactment such as this, which gives wide discretionary powers, must be preceded by debate and discussion of sufficient thoroughness to reveal not only substantial reasons for such discretion, but also some assurance that it will be exercised judiciously and responsibly.

---

<sup>8</sup> Notably missing was (a) any mention of ministerial control (see p. post); (b) any indication of methods to be utilised in performance of the Service's functions; (c) any definition of "subversion", at that time undefined either by statute or by the Courts (see p. post); (d) any appeal procedure.

<sup>9</sup> Parliamentary Debates. Vol 362 at p. 2145.

Assurance as to the taintless nature of past conduct cannot be accepted as an adequate safeguard for the future. It is for those who wish to enact measures which countenance a diminution of civil liberties to defend such infringement. If any Government wishes to cloak executive discretion in a mantle of "security" it must justify such unnatural sacrosanctity, and provide adequate protection for individual interests. Such considerations are germane to the comment which follows.

"Security":

Fundamental to the whole Act is the definition of "security" given in section two,<sup>10</sup> the three ingredients of which are espionage, sabotage and subversion. Few could or have *cavilled* at the inclusion of espionage and sabotage as both terms have been defined by reference to other statutes and are susceptible to further elucidation by the Courts.<sup>10</sup> It should however be noted that some difficulties could still arise from the definition of "espionage."<sup>11</sup> Unauthorised disclosures within the Official Secrets Act 1951 could conceivably include numerous acts, from loose talk

---

<sup>10</sup>"Security" means the protection of New Zealand from acts of espionage, sabotage, and subversion, whether or not it is directed from or intended to be committed within New Zealand." The words "acts of" were included on the motion of Dr Findlay, M.P. on the grounds that this would be "clear and valuable warning that the Service is concerned with overt actions" alone.

<sup>11</sup> In the draft Bill "espionage" and "sabotage" were left undefined. In the Act the former is defined as any "offence against the Official Secrets Act 1951 which could benefit the Government of any country other than New Zealand." The latter is defined as "any offence against Section 79 of the Crimes Act 1961."

in a pub, to the peccadilloes of a Vassal. Sweeping provisions such as these are manifestly intended to be reserve powers, to be invoked only in exceptional circumstances. It is not pertinent within this article to question whether such considerable powers are desirable. Arguably however, the Service, to fulfil its functions, is obliged to safeguard against all breaches of the Official Secrets Act 1951 which come within the definition given.<sup>11</sup> Such a responsibility, if judiciously and sensibly exercised, is of the very essence of security activities. At point, however, here and elsewhere, is the lack of external supervision of the Service, which the Act, arguably, does not adequately remedy.

Sabotage, as defined in the Crimes Act 1961, relates only to any Act which prejudices the safety, security or defence of New Zealand, but does not include any Act of industrial sabotage by way of strike or lockout.

"Subversion" was undefined in the draft Bill, and the definition<sup>12</sup> would appear to follow on submissions made to the Statutes Revision Committee. The term "~~subversive~~" is one which has such ill-defined limits, and has been used so indiscriminately, that it is not surprising that concern was expressed at its inclusion in a Bill which purported to delineate and give statutory substance to the operations of a hitherto arcane body. As was indicated in one submission to the Statutory Revision Committee,<sup>13</sup> the adoption of the definition of subversion given in the Concise Oxford Dictionary,<sup>14</sup> would, by its comprehensive coverage, give

---

<sup>11</sup> (See p. 8)

<sup>12</sup> Contained in S.2 of the Act.

<sup>13</sup> That of Mr Christopher Wainwright.

<sup>14</sup> "subversion": to overturn, upset, effect destruction or overthrow of religion, monarchy, the constitution, principles, morality."

the Director sufficient justification for investigations into almost any political activity. In such a situation, in the absence of statutory clarification there would appear to be three options; the Director could either use a subjective test of his own, or he could seek to give <sup>the</sup> colour of objectivity by adopting someone else's, or by divining what would constitute, in majority opinion, subversive behaviour. <sup>Whose?</sup> Whatever course was chosen would be fraught with difficulties. The first option would cause the Service's activities to vary, as it were, with the Chancellor's foot. The last option could conceivably give an unnecessarily wide ambit to security investigations, with a concomittantly stultifying effect on divergent opinion.

However "subversion" was interpreted there would have been little opportunity for supervision, or alteration in attitudes, as the structure of the Act was inimical to any review. The Director was placed in an invidious position; should the activities of the Service inadvertently become public, it could readily be claimed that there had been an abuse of discretion, given the equivocal and ambiguous nature of the term "subversion". Further, to proscribe subversive activities, in such an undefined way, and subject them to surveillance, is to circumscribe rights of privacy, reputation and freedom of expression, without giving the individual opportunity either to regulate his behaviour according to defined standards, or to ascertain and refute any allegations made.

In the Act subversion is defined as "attempting, inciting, counselling, advocating, or encouraging - No mention is made

- (a) The overthrow by force of the Government of New Zealand, or
- (b) The undermining by unlawful means of the authority of the State in New Zealand."

To what extent does this definition obviate the difficulties outlined above?

The definition is clearly related to the crimes of treason<sup>15</sup>

- 
- 15 "S.B. Treason - Everyone owing allegiance to Her Majesty the Queen in sight of New Zealand commits treason who, within or without New Zealand -
- (a) kills or wounds or does grievous bodily harm to Her Majesty the Queen.....; or,
  - (b) any matter was against New Zealand.
  - (c) Assists an enemy at war with New Zealand, or any armed forces against which New Zealand forces are engaged in hostilities.....; or
  - (d) invites or assists any person with force to invade New Zealand; or
  - (e) uses force for the purpose of overthrowing the Government of New Zealand; or
  - (f) conspires with any person to do anything mentioned in this section.

matters which are not crimes? In Baker<sup>17</sup> Mr Justice Cooper held and sedition as outlined in the Crimes Act 1961, which offences that counselling was more restricted than giving information, encompass the major elements of subversion. No mention is made and stated that the preferred definition was that of Stephen in the sections concerned of "counselling" or "advocating", in his "Digest of Criminal Law", wherein counselling was considered However, the former term is implicitly included by virtue of S.66 equivalent to "instigating". Instigation clearly includes an (d) of the Crimes Act which stipulates that everyone a party to element of inflammatory behaviour. Arguably, however, advocacy and guilty of an offence who "incites counsels or procures any person to commit the offence.". Does the inclusion of "advocating" extend the legitimate surveillance activities of the Service to

- 
- <sup>16</sup> I.81 Seditious offences defined: (1) A seditious intention as an intention - (a) to bring into hatred or contempt, or to excite disaffection against .... the Government of New Zealand, or the administration of justice; or
- (b) to invite the public or persons, or any class of persons to procure otherwise than by lawful means the alteration of any matter affecting the Constitution, laws, or Government of New Zealand
- (c) to invite, procure, or encourage violence, lawlessness or disorder
- (d) to incite... commission of any offence... prejudicial to public safety or to the maintenance of public order;
- or
- (e) to excite such hostility or ill-will between different classes of persons as may endanger the public safety.

<sup>16</sup> See p. 122.

<sup>19</sup> S.2. of the Security Intelligence

<sup>17</sup> See related to the original Service Act.

(1909) 28. N.Z. L.R. 536.

<sup>18</sup> P. 10 of seq.



matters which are not <sup>crimes</sup> ~~crime~~? In Baker<sup>17</sup> Mr Justice Cooper held that counselling was more restricted than giving information, and stated that the preferred definition was that of Stephen in his "Digest of Criminal Law", wherein counselling was considered equivalent to "instigating". Instigation clearly includes an element of inflammatory behaviour. Arguably, however, advocacy is more limited than this, and is ambivalent, for it may or may not seek to instigate or incite. The distinction is admittedly fine, and it turns on the level of "abstraction" of the activity concerned. Advocacy is essentially a public activity, as opposed to the clandestine nature of counselling; further it does not involve the element of personal assistance which seems inherent in "counselling". Conceivably, hence, advocacy includes activities which do not necessarily involve a breach of the law. The deleterious effect of including such a term, which is not defined, nor subject to the interpretation of the courts; has been outlined above.<sup>18</sup> Such uncertainty could conceivably inhibit free discussion, for it would be easy to misconstrue the definition of subversion, and countenance (or fear) the surveillance of public discussion and study.

It is interesting to note in this context that it is sufficient to keep to "undermine... the authority of the State."<sup>19</sup> To commit a seditious offence however, one must seek to alter ..... the Constitution, laws or Government.<sup>16</sup> Presumably, to satirise or

---

<sup>16</sup> See p. 12.

<sup>17</sup> (1909) 28. N.Z. L.R. 536.

<sup>18</sup> p. 10 et seq.

<sup>19</sup> S.2. of the Security Intelligence Service Act.

ridicule the New Zealand Government could undermine the authority of the State. Where such activities are carried out by means of underground or proscribed magazines, illegal broadcasts, or performances which are considered scandalous, defamatory or obscene, they could be regarded as subversive. It would seem, hence, one might invite the attentions of the Service not only by undermining the State itself, but endangering something much more nebulous, its "authority". This characteristic, or "aura" of the State stems not only from its statutory powers, but also from the subjective attitudes of every subject. The Service hence has the function of <sup>guarding</sup> ~~accordng~~ the morale and "esprit de corps" of the State, the emanation of its powers.

Arguably it would have been wiser to confine the activities which the Service has a duty to investigate to those which are already illegal. The wider the functions of the Service are, the greater its intrusion on political activity must necessarily be.

To return to the question of whether the definition has obviated the difficulties involved in such an intangible term as subversion.

It is clear <sup>that</sup> a large area of the activities of the Service will concern illegal activities alone. Any redress against unnecessary infringement and any chance that an individual has to defend himself against allegations will be discussed in the section of this article which relates to the appeal procedure.<sup>20</sup>

---

<sup>20</sup> See p. 33 et seq.

The difficulty of review of the general performance of duties under this definition will be dealt with in relation to ministerial control and responsibility.<sup>21</sup> One further problem has arisen in the discussion of "advocacy", that ~~is~~ the difficulties inherent in deciding whether or not a particular activity is lawful. The difficulty has been mitigated by the provision of a definition of "subversion". Nevertheless the changes instituted leave some "penumbral" areas. For example, the law relating to demonstrations is by no means clear. It is certain however that some people involved in such activities do not act within the law. Could it be argued that those who counsel others to take part in civil disobedience are encouraging the "undermining....of the authority of the State."? Given the increasing incidence of arrests in demonstrations it could conceivably be argued that such forms of protest necessarily entail an assault on State authority.

A further example may be found in the industrial field. Strikes and lockouts, as defined in the Industrial Conciliation and Arbitration Act 1954, are, in certain situations, illegal activities. On occasions such industrial disputes have been regarded by large segments of the population as blatant attempts to undermine the State.

---

<sup>21</sup> See p. 18 *et seq.*

Parliamentary Debates, 1954, having countenanced the subjection of the subject to surveillance for activities which it was admitted quite possibly did not involve any breach of the law, the Chairman affirmed that the most valuable of this country's political traditions were "the rule of law and the established rights and liberties of the subject".

Could these difficulties have been avoided? The Statutes Revision Committee specifically rejected any suggestion that "subversion" be replaced by sedition and treason. The Chairman of <sup>the</sup> ~~that~~ Committee indicated that the provisions of the Crimes Act relating to those offences were insufficiently wide to protect the State against "deliberate undermining" and "carefully planned plots."<sup>22</sup>

One possible solution presents itself; that it would have been more advisable to limit the investigatory functions of the Service to treasonous and seditious acts. This course would have two marked advantages. The first is that both terms have been the subject of judicial interpretation, and have been reasonably clearly delineated. The second is that to commit a seditious offence one must have a seditious intent, and no-one shall be deemed to have such where he acted in good faith, intending either "(a) to show that Her Majesty has been misled or mistaken; or (b) to point out errors or defects in the Government or Constitution of New Zealand, or in the administration of justice; or to incite the public, or any person, or any class of persons to attempt to procure by lawful means the alteration of any matter affecting the Constitution, laws or Government of New Zealand; or (a) to point out, with a view to their

---

<sup>22</sup> Parliamentary Debates, Vol. 362, pp. 1793. Having countenanced the subjection of the citizen to surveillance for activities which it was admitted quite possibly did not involve any breach of the law, the Chairman affirmed that the most valuable of this country's political traditions were "the rule of law and the established rights and liberties of the subject"!

removal, matters producing or having a tendency to produce feelings of hostility or ill-will between different classes of persons."<sup>23</sup>

No such safeguard is included in the definition of "subversion" which could preclude any person from being labelled a subversive, and suffering accordingly. All those activities encompassed by S.81 are unlawful. It has been argued above that "subversion" does include activities which are lawful. Do the provisions of S.81, however, include activities which do not seek to undermine "the authority of the State". In other words could the substitution of sedition for subversion widen the area with which the Service could be concerned? Arguably yes, for paragraphs (c) and (e) of subsection one of S.81<sup>24</sup> involve matters which do not necessarily involve the State's authority directly.

In considering the offence of sedition in contrast to "subversion" the safeguard contained in subsection two would be a material improvement only in so much as it provides that there is no seditious intent where a person intends to show in good faith that Her Majesty has been misled or mistaken, or to point out errors or defects in the Government, or Constitution or administration of justice. [ Nevertheless, such activities outlined could, without this saving proviso have been deemed unlawful and seditious.<sup>25</sup> ]

---

<sup>23</sup> S.81 (2) Crimes Act 1961.

<sup>24</sup> Op. cit. p. 16.

<sup>25</sup> These activities could still be unlawful if not seditious, and hence fall within the present definition of subversion, i.e. painting politically inflammatory slogans.

It is notable that sedition and subversion, as defined by statute, make reference to "lawful" and "unlawful" means. An attempt has been made above to indicate the problems which such phrases present. The recurring difficulty in the administration of an Act such as the New Zealand Security Intelligence Service Act is that there is little likelihood that any administrative decision as to what constitutes an unlawful act, will be open to judicial interpretation. The substitution of "seditious offences" for "subversion" would offer only a marginal possibility of clear definition in this area, and could at the same time widen the areas in which the Security Service would be competent to investigate.

It is suggested that the most feasible improvements to the present definition of "subversion" could be wrought by the omission of the word "advocating",<sup>26</sup> and the inclusion of a saving proviso similar to that contained in S.81 (2) (a) and (b) of the Crimes Act 1961.

The Functions of the Service:

Statutory provision for these is made in section four of the Act.

The draft Bill made no specific reference to ministerial control. As the section now stands, the various provisions are all prefaced by the words "subject to the control of the Minister." This alteration, while still potentially contentious, was intended to answer those critics who had attacked the unleashed and unsupervised discretion of the Director.

In this context, what is meant by the term ministerial control? Implicit in the concept of ministerial control in a democracy is the correlative concept of ministerial responsibility.

---

26 See p.12 ante.

"Once discretionary powers have been conferred, their exercise by departmental officers - and their Ministers - is subject to parliamentary control under the doctrine of ministerial responsibility. The procedures available include direct approaches by the person affected to his Member of Parliament, or to the Minister. These approaches can be satisfied without reference to the House of Representatives; or the Member may choose to raise the matter in the House by one of the procedures available."<sup>27</sup> Under the Security Intelligence Service Act an individual is given an opportunity to appeal where he feels that his career or livelihood has been adversely affected.<sup>28</sup> What however if he wishes to have the matter publicly debated, indicating as it might, gross abuses on the part of the Service? The matter may be raised in the House, but it is dubious whether it could possibly be the subject of full and informed debate. A member may ask a question or request clarification, but whether or not he receives an adequate reply, is, as always, up to the Minister. The crucial difference in the area is, however, the complete secrecy which surrounds the Service. Any inquiries may be deflected on the basis that a reply would be prejudicial to national security.

---

<sup>27</sup> Robson: "The British Commonwealth: The Development of its laws and Constitutions: New Zealand" p.122. Zealand and abroad as are capable

of assisting the...service in the performance of its functions.  
<sup>28</sup> S.17.

Therefore, it is only in exceptionally flagrant cases that a Member will have sufficient evidence to demonstrate the Service has exceeded its authority. The precise limits of the Service's competence, were, prior to the Act, extraordinarily unclear. The discretions enshrined in section four to a considerable extent eviscerates this section's apparent embodiment of the Service's functions. A member who seeks to criticise a particular action is placed, except in the most blatant situations, in the invidious position of attacking an extremely wide discretionary power.

---

<sup>29</sup> S.4. (1).... the functions of the....service shall be -

(a) To obtain, correlate, and evaluate intelligence relevant to security, and to communicate any such intelligence to such persons, and in such manner, as the Director considers to be in the interests of security.

(b) To advise Ministers of the Crown, where the Director is satisfied that it is necessary or desirable to do so, in respect of matters relevant to security, so far as those matters relate to Departments or branches of the State Services of which they are in charge.

(c) To co-operate as far as practicable and necessary with State Services and other public authorities in New Zealand and abroad as are capable of assisting the....service in the performance of its functions.

---

<sup>30</sup> For example, the choice not to reveal sources of information, tactics, as distinct from techniques, present investigations and detailed information regarding particular directions of activity.

<sup>31</sup> Not since some comments made by Mr Fraser in debate in 1948 (Hansard NO. 15, p.242) has any generalised discussion on the Service taken place (with the exception of the debates preceding the Act), except where an indiscretion which has become public, has served as a catalyst.



Given the singular nature of the Service's activities, is ministerial control, (even though its exercise is not subject to Parliamentary control in the usual fashion,) an adequate safeguard both of the individual and the public interest? In New Zealand the Service has traditionally been the responsibility of the Prime Minister. Even if it were not so, the demands on any Minister's time would probably tend to be rationed on the basis of the dimension of the activities contained in each portfolio, and the extent to which the electorate expresses its concern or interest in the various matters under his care. In this context it is to be noted that the Service does not enter the public arena very often. Its expenditure is by the procedures relatively routine. Furthermore, in cases of particular concern, the infringement of a person's rights in an individual instance, it would be unlikely and scarcely impractical to expect the Minister. The very multiplicity of activities which the Service is engaged in, such as sabotage and subversion, prevents effective ministerial control or discretion at the level where supervision exercised. There is no breakdown of expenditure (although this is now listed separately in the Estimates Appropriations Bill). In short, and possibly for good reasons,<sup>30</sup> the Service is not susceptible to Parliamentary control, as it is normally exercised.<sup>31</sup> It is therefore misleading, except in a generalised sense, to speak of the Minister in charge of the Security Service as being "responsible" to Parliament.

---

<sup>30</sup> For example, the obvious need not to reveal sources of information, tactics, as distinct from techniques, ~~present~~ current investigations and detailed information regarding particular directions of activity. It was ~~improbable~~

<sup>31</sup> Not since some comments made by Mr Fraser in debate in 1948 (P. Debates No.15, p.242) has any generalised discussion on the Service taken place (with the exception of the debates preceding the Act), except where an indiscretion which has become public, has served as a catalyst.

Given the singular nature of the Service's activities, is ministerial control, (even though <sup>as</sup> its exercise is not subject to Parliamentary control in the usual fashion.) an adequate safeguard both of the individual and the public interest? In New Zealand the Service has traditionally been the responsibility of the Prime Minister. Even if it were not so, the demands on any Minister's time would probably tend to be rationed on the basis of the dimension of the activities contained in each portfolio, and the extent to which the electorate expresses its concern or interest in the various matters under his care. In this context it is to be noted that the Service does not enter the public arena very often, its expenditure is small,<sup>32</sup> its procedures relatively routine. Furthermore, in one area of particular concern, the infringement of a person's rights in an individual instance, it would be unlikely and possibly impractical to expect reference to the Minister. The very multiplicity of activities covered by the words "espionage, sabotage and subversion" prevents effective ministerial control of discretion at the level where it most matters; the decision to investigate an individual's activities on the ground that they may come within these headings. The practical implications of ministerial control within the context of the Service is that, of its very nature, supervision of only the most general nature will be exercised.<sup>33</sup>

---

<sup>32</sup> \$332,000 for this fiscal year.

<sup>33</sup> An example of this may be seen in 1966. The Prime Minister gave incorrect information to the House on an incident concerning Service's activities on campus. Because of a misunderstanding which arose over a telephone conversation with the Director a retraction had to be made. It was ~~clear~~ obvious from the Parliamentary Reports <sup>that</sup> which the Prime Minister was, on this matter at least, completely uninformed as to Service procedure. (Parliamentary Debates 347. at p. 1498).

Possible difficulties are best illustrated by analysing the various parts of section four.<sup>34</sup> Subsection (1) (a) outlines in skeletal form the Service's function as an information agency. To some extent this provision obfuscates rather than clarifies the position. No indication is given, even in generalised terms, of how the Director may obtain his information. Presumably (although it cannot be taken for granted) the Service will not breach the law.<sup>35</sup> There remains however various means of obtaining information which are not specifically outlawed<sup>36</sup>, or may be utilised if approved by certain authorities. For example, mail may be opened<sup>37</sup>, and telephone wires <sup>interfered with</sup> ~~tapped~~,<sup>38</sup> if a certain procedure is followed, and the approval of the <sup>Department</sup> ~~Postmaster-General~~ is obtained. There is no indication that "agents provocateurs" will not be used. A list of increasingly far-fetched examples could be enumerated, and the argument reduced to absurdity. It is therefore pertinent to remember that fear feeds on suspicion.

---

<sup>34</sup> Op. cit.

<sup>35</sup> Dr Findlay (*Parl. Debates* V.362 at p2114) produced a specimen contract of Service, which was said to indicate the grounds for dismissal of any officer. It includes as a ground "any conviction for a criminal offence." (there is not however any specific mention of any breach of the law.)

<sup>36</sup> For example the much famed electronic devices. The utility of these according to the Director is exaggerated, as their instalment is a difficult and time-consuming procedure. Nor is their efficiency guaranteed.

<sup>37</sup> Post Office Act ~~1954~~ <sup>1954</sup> by the Service.

<sup>38</sup> *Telephone Regulations 1968/234 (R.56)* be construed as encompassing

material, which, while not being evidence of espionage, sabotage or subversion, could provide circumstantial material of use in this field (for example, the personal characteristics of people engaged in suspect political activities, their social contacts and family connections)?

As has already been noted in this article,<sup>39</sup> one of the most compelling reasons for this legislation is to dispel unnecessary fears and secrecy, and thereby facilitate the Service's performance of its functions. A valuable opportunity was lost in this area, to make perfectly clear, considering the emphatically emphasised importance of the activities of the Service, the necessity for flexibility in technique, and provide for their approval in each instance.<sup>40</sup> If a particular technique such as wire-tapping was not necessary,<sup>41</sup> then this should have been made evident. If it (or other methods) were necessary, this should, also, in a democracy, have been made clear. Similar objections could be made to the word "evaluate". Here however the position is elucidated by the words which follow, i.e. ... "information relevant to security".<sup>42</sup> Presumably this

---

<sup>39</sup> p. 7.

<sup>40</sup> The Canadian Royal Commission Report (op. cit.) states at p. 102 that methods of interception are often the only effective means of safeguarding the State. On the question of telephone conversations and evesdropping the Report recommends ministerial control, (as opposed to the mooted judicial control). Evesdropping should only be used in exceptional circumstances, to be approved by the Director in each instance. The opening of mail should have ministerial approval in each instance.

<sup>41</sup> The Prime Minister (Parl Debates V. 362 at p 2109) has categorically denied that wire-tapping is utilised by the Service.

<sup>42</sup> Quaere: whether the word "relevant" be construed as encompassing material, which, while not being evidence of espionage, sabotage or subversion, could provide circumstantial material of use in this field (for example, the personal characteristics of people engaged in suspect political activities, their social contacts and family connections)?

indicates that information which did not further the statutory aims of the adequate supervision, or statutory elaboration, there is no indication Service will be discarded. The criteria to be utilised are those that material may not be provided on New Zealand citizens which outlined in the definition of security given in section two. would prevent the granting of visas (for example) by some countries.

Such How are the words "to communicate such intelligence to such persons and in such manner, as the Director considers to be in the interests of security to be construed? No limitation is placed on whom the Service may communicate security material, although S.4 (1) (b) and (c) indicate the people and organisation that the Service has a primary delegation to advise and co-operate with. There appears, however, to be some discrepancy between S.4 (1) (a) and S.4 (1) (c). Must the latter be considered an elaboration of the former, or is S.4 (1) (a) to be read as subject to S.4 (1) (c)? It is understood that the wide power of communication given the Service is required in order that the Service may disclose the nature of their inquiries to people whose co-operation they wish to enlist in pursuing their investigations further. Nevertheless the object behind the design of this section is palpably obvious. The intention is to preserve the autonomy of the Service, and to allow it considerable flexibility. Section Four, theless, as the section stands the Director would seem to have an unfettered discretion <sup>concerning persons to whom</sup> as to whom he may communicate security matters to (unless the Minister has specifically ordered otherwise).<sup>43</sup>

<sup>44</sup> The Director has indicated to the committee that in fact there is no communication with allies concerning New Zealand citizens; purely for opaque terminology. What is meant by "public authorities in New Zealand and abroad....."? On its face the phrase is no more than an obvious recognition of necessary co-operation, <sup>between State departments and</sup> with our allies overseas. It gives tacit approval for reciprocal assistance. However without

<sup>43</sup> Semble: What guarantee (beyond that of the personal integrity of the members of the Service) is there against anonymous communication of Service material to employers, to trade unions officials or other influential people?

adequate supervision, or statutory elaboration, there is no indication that material may not be provided on New Zealand citizens which would prevent the granting of visas (for example) by some countries. Such communication could be a serious impediment to the free movement of the citizen, against which he has no redress, either under this Act, or quite probably under that of any other nation.

A critic of the Act could be forgiven if he suspected that the motivation behind the generalities of the section was akin to that outlined in Machiavelli's instructions to Raffaello Girolami:-

"Occasionally words must serve to veil facts. But this must happen in such a way that no-one become aware of it; or if it should be noticed, excuses must be at hand immediately."

Nevertheless the object behind the phrasing of this section is palpably obvious. The intention is to preserve the autonomy of the Service, and to allow it considerable flexibility. Section four, construed as an entity, would seem to indicate an intention to leave only crucial policy decisions to the Minister, and give the Director

---

44 The Director has indicated to the <sup>writer</sup> ~~center~~ that in fact there is no communication with allies (concerning New Zealand citizens) purely for purposes of establishing whether or not that ally should grant a visa. <sup>Other</sup> ~~The~~ hypothetical examples given in the body of the article could possibly have been the subject of similar assurances. The purpose of the analysis however is to indicate the width of discretion and to underline the absence of genuine ministerial control.

theories of Parliamentary Democracy. The singularity of the Service's

unhindered control over the details. The rationale behind such a policy is indicated in two English statements on the subject. The first is from Sir Findlater Stewart's Report of 1945. "But from the very nature of the work, need for direction except on the very broadest line can never arise above the level of Director-General. That appointment is one of great responsibility... having got the right man there is no alternative to giving him the widest discretion in the means he uses and the direction in which he applies them - always provided he does not step outside the law." The second is contained in a directive given in 1952 by the then Home Secretary Sir David Maxwell Fyfe to the Director-General of the English equivalent of the Security Service: "It is essential that the Security Service be kept absolutely free from political bias or influence, and nothing should be done that might lend any colour to any suggestion that it is concerned with the interests of any particular segment of the community or with any other matter than the Defence of the Realm as a whole."

The attitude is made clear in these two statements. The Security Service must have some independence in order that it be evident it is not the "Secret Police" arm of a particular Government or faction. The Director has in his public pronouncements, gone to considerable pains to make this impartiality clear, even to the extent of indicating that the Prime Minister might not necessarily have access to all files in the Service's records.<sup>45</sup>

Patently such an attitude is not in accord with commonly accepted theories of Parliamentary democracy. The singularity of the Service's

---

<sup>45</sup> New Zealand Weekly News. June 16th 1969.

duties cannot exempt the Service from control, however, indirect, by elected representatives of the people. In some way a balance must be reached amongst the conflicting demands of independence, secrecy and responsibility. If the Director can in his own discretion withhold some matters from the Minister (even if the grounds are that the request is improper), then the ultimate answerability of the executive in this area is endangered, and the considerable powers of clandestine surveillance are ~~put~~ placed beyond Parliamentary control. It would appear that any interpretation of section four which would allow this result is fallacious for it would promote not flexibility but licence.

How then can abuse of the Service be avoided? To provide for fulsome annual reports, is obviously not the answer. Submissions were made to the Statutes Revision Committee recommending that a select committee (to include the Leader of the Opposition) ought to be responsible for ensuring that the Service performed its functions adequately, and did not trespass beyond its competence jurisdiction. The Leader of the Opposition during debates on the Bill,<sup>46</sup> suggested that a person should be appointed who could, in complete confidence, ascertain from the Director an outline of the work of the Service (that is, its methods of obtaining information and the criteria by which the relative importance or gravity of circumstances which engage the Service are assessed.) If a certain matter is one which would not justify the use of marginally accepted methods of collecting

---

46. *Parliamentary Debates: Vol 362. at p. 2145.*



safeguard would seem to be in the selection of officers of a high information, the person designated could advise the Director to seek the written authority of the Minister. These suggestions are open to three objections. First, it does not solve the problem of a ministerial attempt to use the Service for partisan ends. Second, it could render the responsibility vested in the Director nugatory. Third, the procedure, besides being cumbersome, could endanger the reliance allies place on the Service as a body not subject to "Security leaks", because of its relatively close and autonomous nature.

The first objection could be met by making provision for the Director to report to Parliament directly, in grave and exceptional circumstances. The House could discuss the propriety of any ministerial request in secret session. The second objection is not so easily met. The conflict between the granting of a wide discretion, and the control of its exercise could be more readily reconciled if any action under the Statute was reviewable by the Courts. Except in exceptional circumstances however, any such exercise will remain unknown to the public, and there will therefore be no question of any judicial review.<sup>47</sup> The most practicable

---

<sup>47</sup> Circumstances could arise in which Security Service activities patently exceeded any requirements of "security", e.g. a request for information on which to establish a person's reliability, where the ~~mention~~ of the position concerned was not one in which national security could conceivably be involved. Possibly such an exercise of discretion could be subject to review by the courts. As to abuse of discretion see Associated Provincial Picture Houses Ltd v Wensbury Corporation (1948) I.K.B. 223 at 229.

safeguard would seem to be in the selection of officers of a high calibre, the development of procedures in accord with democratic traditions, and the establishment of a recognised convention of reference of new departures in practice and policy to the Minister. Conversely the Minister, if he is alive to the issues involved in the exercise of the Service's functions, will subject the Service to regular scrutiny. The third objection would seem a little specious and perhaps even presumptuous, for presumably any body or person appointed would perform their functions discreetly, and with due regard to the secrecy of the material involved.

The question of "quis custodiet custodias?" remains. The best approximation to a pragmatic solution is that mooted by Mr Kirk.<sup>48</sup> The only other means of resolving the dilemma, would appear to be an emphasis on the quality of procedure and personnel as outlined in the preceding paragraph.

Section four concludes with a subsection which is apparently designed to emphasise that the Security Service does not have police functions. It states: "It shall not be a function of the Security Intelligence Service to enforce measures for security." Should there be any need for example to execute a search warrant, under the Official Secrets Act, the Police will be used to perform this task.

The Director and Officers of the Service:

In submissions made to the Statutes Revision Committee some criticism was directed at the method, outlined in sections five and six of the Act, of appointing the Director and officers of the Service. The contractual basis was considered inadvisable, for it was possible that some officers could see renewal of the term of employment as being dependent on their zeal and <sup>success</sup> services in uncovering subversives. As no indication was given in a schedule to the Bill of what kind of terms were included in the contract of service, commentators sought to cover any eventuality. The almost inviolate nature of the present Director's position, and that of some of his officers, it was submitted,

---

<sup>48</sup> Op. cit. p.28.

was contrary to constitutional practice. No dismissal procedures were articulated, nor was there any indication that the contracts stipulated minimum standards of behaviour or adherence to prescribed procedure. This criticism went unheeded. It could have been avoided by providing in a schedule to the Act, specimen copies of the contracts of employment of officers and employees, in sufficient detail to indicate the grounds for dismissal, termination of contract, and any disciplinary action.<sup>49</sup> In the absence of any schedule, section eight of the Act provides a useful check, as it stipulates that the Chairman of the State Services Commission must concur in any terms or conditions determined by the Director. It is notable that by

---

<sup>49</sup> Dr Findlay's citing of a specimen contract has already been noted *at p. 23* ante. The following further grounds for dismissal were also enumerated (1) Any breach of Security requirements (2) any serious or wilful breach concerning State property (3) negligence in duties (4) becomes inefficient or incompetent as a result of his own wrongful conduct (5) liquor or drugs in excess (6) becomes bankrupt or makes any assignment or arrangement for the benefit of his creditors (7) guilty of scandalous or improper conduct (8) guilty of any act or omission likely to prejudice..... interests of the Crown or the Security Service, except an act ordered by or on behalf of the Director, in the case of an act performed as so ordered.

(4) The person appointed as Director of Security immediately before the commencement of this Act shall be deemed to have been appointed under the section, and shall hold office on the same terms and conditions as are specified in the agreement under which he was so employed unless and until he agrees to accept other conditions."

The statutory position of the present Director is singular. The virtue of subsection one of section eight neither the Director, nor the officers nor the employees of the Service enjoy any of the considerable protection and security of position afforded by a public servant by the appeal procedure established in the State Services Act 1962.

It is difficult to envisage, in spite of the contrary submissions delineated above, that the Service could be other than contractual. An appropriately worded contract, revealed in a schedule, could obviate the fears of the critics. Flexible dismissal procedures are obviously necessary in security work. However the Legislature has sought, in the case of former public servants, to provide for some continuity and security of employment, and in this area at least has removed any suspicion that renewal will be used as a goad.<sup>50</sup> Further, it is implicit in the terms of the Director's appointment that the Legislature has envisaged this position as being terminable only in exceptional and clearly defined situations.<sup>51</sup>

---

<sup>50</sup> S.10 of the Act.

<sup>51</sup> S.5 "Director of Security....(2) The Director of Security shall be appointed by the Governor-General, and (subject to subsection (4) of this section) shall hold office on such terms and conditions as the Governor-General determines....

(4) The person employed as Director of Security immediately before the commencement of this Act shall be deemed to have been appointed under the section, and shall hold office on the same terms and conditions as are specified in the agreement under which he was so employed unless and until he agrees to accept other conditions."

The statutory position of the present Director is singular. The security of tenure which he enjoys is considerable, for he may only be removed by Act of Parliament, or under the terms of a contract which is not appended to the Act, and has never received legislative approval.<sup>52</sup> Even a Judge of the Supreme Court may be removed by an address by the House of Representatives. This independence and special status is not accidental and accords with the theory outlined earlier in this article.<sup>53</sup>

Considerable comment was made in the House on the necessity for the officers of the Service to be of a high calibre. Reference has already been made in this article to this factor as a means of ensuring a judicious and liberal interpretation of the Service's duties.<sup>54</sup> It is surprising that no opportunity was taken in debate in the House to clarify this matter. There is some cogency in the suggestion that men or women trained in the so-called "liberal studies" could ensure that the evaluation functions of the Service were exercised in an equitable manner.<sup>55</sup>

---

<sup>52</sup> Dr Findlay (*Parl. Debates, V362 at p 2114*) has indicated that the terms are similar to those outlined in footnote 49.

<sup>53</sup> See p. 27 The Canadian "Royal Commission" Report also argued that independence was needed, i.e. "This individual must rest on some security of tenure .... and upon clear and public terms of reference which include provision for the disclosure of information at his discretion." (my emphasis.)

<sup>54</sup> p. 30. a court of law; (2) decisions in these matters, ultimately the responsibility of the State and cannot be surrendered to the courts.

(4) Permanent Heads remain responsible for security in their departments.

<sup>55</sup> It has been intimated to the writer that a considerable <sup>proportion</sup> ~~proportion~~ of the officers of the Service do have degrees, in various disciplines, including political science. *Public Interest*: pub. Hutchinson.

Security Appeals:

Sections fourteen to twenty-four which make provision for an appeal procedure, were included after representations were made to the Statutes Revision Committee. A number of countries have instituted such appeal procedures, none of which are as far reaching in their jurisdictional provisions.

In the United Kingdom, where a civil servant has been the subject of an adverse security report,<sup>56</sup> the Minister must decide whether or not there is a prima facie "case". If it is decided that the allegations have substance, the persons concerned should be provided with some details. Mr Atlee stated in 1948 that the civil report "should not merely be informed that he is suspected, but should be given, as far as possible, chapter and verse saying "You are a member of this organisation. You did this or that, can you explain it?" He ought to have the case put before him perfectly clearly."<sup>57</sup> Sources of information were not to be

---

<sup>56</sup> Judicial review was rejected on four grounds: (1) the need to avoid disclosure of continuing investigations; (2) the criteria on which Security findings are made (relating to reliability), do not necessarily relate to matters which can be tested by rules of evidence used in a court of law; (3) decisions in these matters, ultimately the responsibility of the State and cannot be surrendered to the courts. (4) Permanent Heads remain responsible for security in their departments, and cannot be bound by outside decision.

<sup>57</sup> See Williams "Not in the Public Interest": pub. Hutchinson.

revealed however. Fourteen days are allowed for reply. If the Minister does not then vary his ruling, a further 7 days must be allowed for communication of whether or not an appeal will be made to the Advisory Body.<sup>58</sup> This body is comprised of 3 retired civil servants, (none of whom, as yet, have had any legal training). Originally representation was not allowed, and even now remains limited to the preliminary hearing. The civil servant may adduce witnesses, but he has no power of 'sub-peona', nor may he hear the security authority's witnesses (and is thereby effectively deprived of any right of cross-examination or refutation). The Minister may take such action as he deems fit on the resulting report.

<sup>58</sup> This preliminary procedure is similar to what precedes, in some instances, a difficult or doubtful security clearance in New Zealand. On occasions the individual concerned will be interviewed, and Departmental Heads will be told, and factually, of the difficulties involved, in any ensuing recommendation.

to those of the United Kingdom and the United States, is the right of appeal given to people outside the Public Service, and not merely to the employees of independent contractors employed in high "security-risk" projects. By virtue of section 17 of the Act, the Commissioner

<sup>59</sup> Vol. 58, Y.L.R. p. 31. "Loyalty among Government Employees", Emerson and Helfeld.

<sup>60</sup> Public Law 733.

<sup>61</sup> To whom the provisions of the Act in the United Kingdom was extended to cover in March 1957. It is notable that there is no statutory provision whatever relating to these matters in that country.

In the United States (as opposed to both the United Kingdom and New Zealand) every person entering civilian employment may be the subject of a security investigation. A prima facie case is presented, by the security authorities, to a "loyalty board" of three or more <sup>persons</sup> ~~representatives~~. If the decision is adverse, the subject is served with a written notice setting forth the charges "as specifically and completely as, in the discretion of the agency, security considerations permit."<sup>59</sup> The individual is given the right to reply in writing to the charges and is also entitled to an administrative hearing before the "loyalty board" at which he may appear personally, and <sup>be</sup> accompanied by counsel or representatives of his own choosing and present ~~.....~~ evidence on his own behalf. "Sensitive agencies" are exempted from this particular procedure, but have ~~analogous~~ provisions. In 1950 the provisions relating to the "Loyalty Programme" were combined with those relating specifically to security matters.<sup>60</sup>

The most notable feature of the New Zealand system, in comparison to those of the United Kingdom and the United States, is the right of appeal given to people outside the Public Service, and not merely to the employees of independent contractors employed in high "security-risk" projects. By virtue of section 17 of the Act, the Commissioner

<sup>59</sup> Vol. 58, Y.L.R. p. 31. "Loyalty among Government Employees", Emerson and Helfeld.

<sup>60</sup> Public Law 733.

<sup>61</sup> To whom the provisions of the system in the United Kingdom was extended to cover in March 1957. It is notable that there is no statutory provision whatever relating to these matters in that country.



has a duty to "inquire into complaints made in accordance with this Act by any person ordinarily resident in New Zealand that his career or livelihood is or has been adversely effected by an act or omission of the New Zealand Security Intelligence Service."<sup>62</sup>

The New Zealand equivalent of the procedures relating to civil servants above is contained in section 38 of the State Services Act 1962, which provides as follows:

...." (1) If the Commission is of the opinion that any officer should be transferred in the interests of national security, it shall furnish the officer with a statement in writing setting the reasons for its opinion as they may be properly disclosed having regard to the interests of national security."

The officer shall then have fourteen days in which to decide whether or not he will agree to transfer. If he does not, he must either resign or request the Security Review Authority to investigate the matter.<sup>7</sup>

---

<sup>62</sup>For obvious reasons no protection was given to any rights of individual privacy. The comments on techniques (p. 23. ante) are relevant here. Because of the difficulties of definition, any impugning of reputation was not included as grounds for complaint.

This means that some people, (such as housewives) could be deprived of any remedy, unless there was an action in defamation.

<sup>63</sup>No provision is made in section 38 regarding the procedure to be followed if the appeal, is allowed, although by inference from the detailed provisions relating to transfer on confirmation of any security report, it is probable that no further action would be taken. Under the equivalent section, the Public Service Act (S.7 of the 1951 Amendment), the ultimate decision resided in the Commission.

Subsection three of section thirty-eight provides that in arriving at its conclusions "the Security Review Authority shall hear in private evidence tendered by the Commission and any other witnesses, and shall give the officer concerned an opportunity to be heard, and may permit him to be represented by counsel or any other person and have other persons to testify as to his record, reliability and character, and may receive such other ~~evi~~ evidence as it think fit, whether admissible in a court of law or not. The Security Review Authority shall regulate its procedure in such manner as it thinks fit."

Officers of the Public Service in New Zealand have, hence, similar rights of review in such matters as do those in the United Kingdom. Notably however no provision is made for those who have been refused employment on security grounds. The position would be similar in the United States and the United Kingdom, as both systems outlined above apply only to those already in employment. The most pertinent provision in all three systems, is that some minimal indication of the substance of any allegations must be given to the person concerned. However, it is alleged in the United Kingdom that little or no effort is made to do this, and any protection afforded a civil servant is ~~initiated~~ <sup>64</sup> by this denial of information.

---

<sup>64</sup> Street "Freedom, the Individual and the Law", pub. Penguin, Chap. 8.

<sup>68</sup> Probably however any denial would lead to an appeal under the State Services Act 1962, and the grounds for refusal would have to be revealed and justified.

<sup>69</sup> p. 25 ante.

While if there is a right of appeal under section 38, the machinery set up under the Security Intelligence Service Act cannot be used.<sup>65</sup> Section seventeen is intended to give ~~at~~ some redress, however rudimentary, where present procedures are inadequate. The appeal provisions are palpably wider than any existing under any other common law jurisdiction, but they do not obviate all the criticisms made against the procedures available elsewhere; nor do they give any substantial promise of redress in a number of areas where civil liberties are most vulnerable.

<sup>70</sup> By virtue of the State Services Act various appeal boards, and the equivalents for other public authorities, give adequate protection to individual rights and interests?

Theoretically any person who has applied for a position in the State Services, may, appeal (if he suspects he has been denied the post on security grounds) under section seventeen.<sup>66</sup>

---

<sup>65</sup> S.19 (2): "If in the course of his inquiries it appears to the Commissioner (a) That there is an adequate remedy or right of appeal under section 38 of the State Services Act 1962, or otherwise.... he shall refuse to inquire into the matter further.

<sup>66</sup> p. ante.

Practically however such a person will have difficulty in substantiating his claims; mere conjecture that security reasons have adversely affected him may not be regarded as sufficiently substantial grounds for an inquiry.<sup>67</sup> Those both within and outside the Public Service who are subjected to positive vetting will know they are undergoing a security check, and will hence be in a better position should they wish to appeal. However, any subsequent denial of promotion could be attributed to other causes.<sup>68</sup> The difficulties inherent in this area are even more vividly apparent where a citizen is unaware of any investigation of his associations or activities. Arguably, as the Service is to co-operate (by virtue of section four),<sup>68</sup> with State Services and public authorities only, such inquiries could in no way jeopardise the career or livelihood of a citizen. However other "rights" are involved here. The citizen, indirectly, is having his freedom of association, and his individual privacy, circumscribed. Such investigations are an extension of executive power which the individual cannot be expected to endure unless he has some opportunity to defend himself against any allegations.

---

<sup>67</sup> By virtue of section 19 the Commissioner may refuse to inquire into any complaint if it is trivial, frivolous, vexatious or not made in good faith.

<sup>68</sup> Probably however any denial would lead to an appeal under the State Services Act 1962, and the grounds for refusal would have to be revealed and justified.

<sup>69</sup> p. 25 ante.

While it is reassuring that whatever material is procured will normally only be communicated in situations where there is an avenue of redress,<sup>70</sup> concern may still be aroused by the potential damage which an agency such as the Service, with its wide discretion and possession of sensitive material, could wreak. No person should be placed in such a vulnerable position without some opportunity, if this is at all possible, to defend himself.<sup>71</sup>

---

novelty of the appeal procedure itself can serve to hide this essential weakness. Obviously, not all persons on whom an

<sup>70</sup> By virtue of the State Services Act's various appeal boards, the and the equivalents for other public authorities.

material to "State Services and other public authorities", only

<sup>71</sup> "We cannot approve any use of official powers or position to prejudice, injure or condemn a person in liberty, property or good name, which does not inform him of the source and substance of the charge and give a timely and open-minded hearing as to its truth": Mr Justice Jackson. "The Task of maintaining civil liberties" Am Bar Assoc. Journal XXXIX.

The whole apparatus of appeal is invalidated to a considerable extent by the absence of notification. The most glaring omission in the Act is the lack of any provision, of (even the most rudimentary) nature, for any power to indicate, either to an unsuccessful applicant for a position in the State Services, or to any individual on whom a security report has been completed, that certain of their activities have rendered them "security risks". No reiteration of the novelty of the appeal procedure itself can serve to hide this essential weakness. Obviously, not all persons on whom an adverse security report has been made can be notified. While the powers of communication<sup>72</sup> are exercised only to convey security material to "State Services and other public authorities", only those people whose rights were being affected in any material way

---

<sup>72</sup> For it is by communication that interests beyond that of privacy, are endangered, e.g. reputation, livelihood.

<sup>74</sup> See p. ante.

by such communication should, prima facie, be entitled to notification. Arguably for example, any person who has been denied employment by a State department or public authority on security grounds, should be notified, not because an individual has any right to be employed by the State, but because he should not be impugned without redress. If one is charged with a crime, there is a right of fair trial. A person who has been labelled as lazy may demonstrate his diligence in another job. A "security risk" however may be adversely affected and never be aware of it, or in a position to rid himself of such an impediment. Equally if naturalisation is denied on security grounds, it would seem equitable to allow the person concerned some indication of the factors involved.<sup>73</sup> It is no defence, where individual rights are concerned, to allege that the numbers involved are infinitesimal. Nor can immunity from challenge be given to any governmental agency whose discretion is as wide, unregulated and crucial as that of the Security Intelligence Service.<sup>74</sup>

---

<sup>73</sup> Under section 19 (c) the Commissioner may refuse to inquire into a complaint on the grounds that the complainant is not a New Zealand citizen. Hopefully this would not be used in naturalisation cases. In any event the power is a narrowing of the ambit S.17 (d), because any "person ordinarily resident in New Zealand is therein empowered to make a complaint. (No provision is made for appealing against denials of entry, on the grounds that information obtained from foreign authorities could not be revealed, and it would be difficult to obtain any other substantiating material - Parliamentary Debates. Vol 362.)

<sup>74</sup> See p. ante.

complaint to the Commissioner, should be furnished with some indication of the nature of the report made in any security report. Section 20(1) prevents the appeal procedure being used as a means of establishing facts currently admitted by the Commission made available to the complainant. It could encourage sources of information or inquiries relating to other persons that are still continuing, and should hence remain within the jurisdiction of the Commissioner. However, if it is possible to provide reasons under 5.38 of the State Services Act) Notification may not always be practicable, even within the situations delineated above. Given, however, that adverse reports are not numerous and that a portion of these could unquestionably be categorised as unsuitable for notification, it would not be too burdensome, should doubt remain in any particular instance in the "open" categories, for reference to be made to the Minister. Only within the most stringently drawn limits can the requirements of natural justice be ignored:

The manner in which the proceedings of the Commission are to be run is outlined in section twenty. While these provisions have the virtue of flexibility, and allow the complainant to be represented, to call witnesses, and to refuse cross-examination, the citizen is still denied rights which are considered fundamental in a criminal trial. It is paradoxical that non-criminal activities, may, by virtue of a security service report, jeopardise a subject's career and livelihood, yet he is deprived of the safe-guards which are guaranteed those accused of the most felonious acts.<sup>75</sup> Even if notification remains confined to persons transferred for security reasons within the Public Service, it would seem only just that those who have made a

---

<sup>75</sup> For example cross-examination. In some instances (for example in relation to "character defects") the evidence may be that of family or neighbours. Why should ~~not~~ such people <sup>not</sup> be cross-examined? Harry Street comments in "Freedom, Individual and the Law." (op. cit.) "Why should a person charged with treason be allowed to confront his accusers and yet a person about to be dismissed because he is likely to commit treason, be denied those minimum judicial rights?"



complaint to the Commissioner, should be furnished with some indication of the nature of allegations made in any security report: Section nineteen will prevent the appeal procedure being used as a means of satisfying idle curiosity.<sup>76</sup>

Admittedly any elaboration made available to the complainant could endanger sources of information or inquiries relating to other persons that are still continuing, and should hence remain within the discretion of the Commissioner. However, if it is possible to provide reasons (under S.38 of the State Services Act) for the transferral of a public servant, it should be possible once the Commissioner has agreed to review a case, to give some details to a complainant.<sup>76a</sup>

A valuable power, which is relevant to the preceding comment, is contained in subsection six of section twenty, i.e. .... the Commissioner may summon before him and examine on oath any person, and may administer an oath". By such means the Commissioner could examine the "sources" of information without endangering their continued usefulness, or anonymity. Verification could be obtained judicious questioning of the complainant, or <sup>any</sup> other person who might provide relevant evidence.

---

<sup>76</sup> *see*  
*Op. cit. p.67.*

<sup>76a</sup> The Canadian "Royal Commission" Report, op. cit. suggests that such details should include, if possible of factors which have entered the recommendation, e.g. membership of associations, residence of relations and character defects. The report asserts that it should be relatively simple to indicate relevant factors without disclosing sources.

Section fourteen stipulates that the person to be appointed as Commissioner of Security Appeals "shall be a barrister or solicitor of the Supreme Court of not less than seven years' practice, whether or not he holds or has held any judicial office."<sup>77</sup> This is a considerable improvement<sup>77</sup> on the practice established in the United Kingdom, for there is a greater likelihood that a protection akin to that afforded to the accused in a court of law will be instituted by such a person,<sup>77</sup> This could be considered justifi-

Section nineteen outlines the Commissioner's discretionary power to refuse to inquire into any complaint. Presumably "trivial" complaints are those where no really deleterious effects on a complainant's livelihood or career are indicated. ~~in the complaint.~~ It is difficult to understand why a complaint may be rebuffed merely because it is "vexatious". Obviously a great number of complaints will appear "vexatious"; such assaults on administrative decisions are often so regarded. Any complaint of substance would seem to warrant some investigation whether or not it is, or is intended to be, vexatious."<sup>78</sup>

Section twenty-one contains a valuable provision for the reference of any evidence of breach or misconduct on the part of any employee or Officer to the Director. An additional safeguard could have been

---

<sup>77</sup> Given the relative flexibility of procedure under section ~~twenty~~.

<sup>78</sup> Section 19 (1) (b) could be construed in contradistinction to S.19 (1) (a), and be read as intending to exclude anything which is merely vexatious. Nevertheless, the objection stands, that investigation should follow if the complaint has any substance.

provided to the effect that any ultra vires Act, or dubious procedure which as a means of arousing public concern, for these, and any reference is uncovered, must also be forwarded to the Director and to the Minister.

Once the Commissioner has completed his investigation he must forward his "findings regarding the complainant", (together with the relevant documents and materials) to the Minister.<sup>79</sup> Section twenty-two stipulates that the Minister retains an absolute discretion whether or not to take any action. This could be considered justifiable on the grounds that the ultimate responsibility for national security resides in the Government. The matter cannot be brought into public debate, by way of publication or broadcasting unless either the Minister has given his written consent, or it arises in debate in the House of Representatives.<sup>80</sup> Presumably it was considered that this was the point at which, however, nugatory it may render the appeal procedure, concession must be made to the requirements of national security and reliance placed in the Minister's judicious exercise of his discretion. It is possible that in blatant cases of denial or justice, the Commissioner himself might resign as a means of protest. It is unlikely that a question in the House would elicit any reply in cases where the Minister had refused to act; nevertheless, incessant questions might be useful

<sup>79</sup>S.21. Section 20 (a) provide that "no proceeding, report, or finding of the Commissioner shall be challenged, reviewed, quashed or called in question in any court."

<sup>80</sup>S.23: Surely if a person is cleared he should be free to publish at least this fact ~~where?~~

as a means of arousing public concern, for these, and any reference made to appeal proceedings in the House, are not subject to the strictures ~~strictness contained in section twenty-three~~, on publication and broadcasting, contained in section twenty three.

Clearly the appeal procedure, ~~for~~ as this appraisal has attempted to indicate, is faulty and unsatisfactory. Nevertheless a considerable effort has been made to provide some redress in a manner which does not compromise security procedures. The caution may however have been excessive. It is wise in examining legislation such as this to remember that it is for Parliament to justify the invasion of civil liberties which the existence of a Security Service implies, and not for the citizen to search for redress against the inexorable infringement of his freedom.

III. Princes that will but hear, or give access,  
To such officious spies, can n'er be safe,  
They take in poison with an open ear,  
And, free from danger, becomes slaves to fear." -

Ben Jonson

XX  
New Zealand has been fortunate that its comparative political calm and minor strategic and military importance has produced few manifestations of a preoccupation with security and secrecy. Nevertheless a flavour of paranoia taints the arguments of both protagonists and opponents of a state security system. It is well to remember therefore that tolerance of divergence and the temperance of rational men provide the most effective protection against the seditious and insidious efforts of the reactionary and revolutionary

alike. It is essential to encourage within society the fearless expression of personal opinion, with the minimum of restriction. By removing the Security Service from limbo, giving it statutory foundation, subjecting it to scrutiny and providing some opportunity for redress against the infringement of individual interests, the Legislature has demonstrated, in cautious fashion, a desire to promote such a sane climate. It is beholden upon the citizen to show a complementary vigilance, and thereby ensure his unhindered exercise of freedom of association and expression. No man's freedoms will remain inviolate, least of all when they are neglected.

-----oOo-----

like. It is essential to encourage within society the fearless  
 expression of personal opinion, with the minimum of restriction.  
 By removing the Security Service from limbo, giving it statutory  
 foundation, subjecting it to scrutiny and providing some opportunity  
 for redress against the infringement of individual interests, the  
 Legislature has demonstrated, in cautious fashion, a desire to promote  
 such a climate. It is beholden upon the citizen to show a  
 complementary vigilance, and thereby ensure his unhindered exercise  
 of freedom of association and expression. No man's freedoms will  
 remain inviolate, least of all when they are neglected.

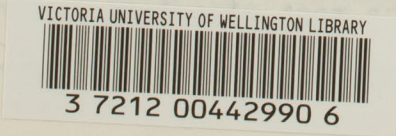
of civil liberties which the existence of a Security Service implies,  
 and not for the citizen to search for redress against the inevitable  
 infringement of his freedom.

-----000-----

To each citizen arises, on his side,  
 the duty to ensure that the Security Service is not used as an open ear,  
 and, thus free danger, becomes always to fear.

Ben Jonson

New Zealand has been fortunate that its comparative political  
 calm and minor strategic and military importance has produced the  
 realisation of a preoccupation with security and secrecy.  
 Nevertheless a favour of paranoia lingers in the arguments of both  
 protagonists and opponents of a state security system. It is well  
 to remember therefore that the balance of interests and the importance  
 of national security provide the basis for the solution and institution of  
 such a system.



TRISTRAM, R.H. Comments on the N.Z. Security Intelligence Act.

