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Rt. Hon John Key
Chair
Intelligence and Security Committee
Parliament Buildings
P O Box 18 041
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Dear Committee Members

GOVERNMENT COMMUNICATIONS SECURITY BUREAU AND RELATED LEGISLATION BILL

Legislation Advisory Committee

1. The Legislation Advisory Committee ("LAC") was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It produces and updates guidelines for legislation, known as the Guidelines on the Process and Content of Legislation. These have been adopted by Cabinet.

2. The terms of reference of the LAC include:

   - to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;

   - to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

General comments

3. The Bill aims to update the functions and to clarify and, to some extent, expand the interception and access powers of the GCSB.

4. The LAC considers that the statutory framework governing the activities of the GCSB should include an adequate and appropriate range of safeguards and oversight mechanisms. The statutory framework contained in the Bill includes a number of safeguards; however the overall view of the LAC is that these safeguards could usefully be strengthened and improved, without unduly interfering with the stated functions of the GCSB.

5. The LAC therefore makes a number of suggestions to add to and improve the range of safeguards in the Bill to enhance the protection of citizens from state surveillance, unless clearly justified in the circumstances, that the Committee may wish to consider:

- Introducing appropriate principles underpinning the performance of the GCSB's functions.
- Introducing an agency approval process in relation to the GCSB's function in s 8C to assist other agencies, consistent with the Search and Surveillance Act 2012.
- Amending s 14 to strengthen the limitation on intelligence gathering in relation to New Zealanders.
- Introducing thresholds and safeguards in relation to the sharing of "incidentally obtained intelligence" with domestic agencies under s 25.
- Strengthening the Inspector-General's oversight of the activities of the GCSB.
- Including statutory measures to protect privilege, for consistency with the Search and Surveillance Act 2012.

6. The LAC also invites the Committee to consider:

- A judicial process for the issue of warrants relating to New Zealanders.
- The scope of the GCSB's powers to act without a warrant or other authorisation under s 16.

Section 8 – Functions of Bureau

7. The Bill extends the operations of the GCSB within New Zealand, particularly in relation to information assurance/cyber security (s 8A) and in relation to assisting other domestic agencies (s 8C). The Committee may wish to consider whether it would be desirable to include appropriate principles that underpin the GCSB's revised functions, for example, as has been included in 2011 in s 4AAA of the New Zealand Security Intelligence Service Act 1969.

8. Another consideration is whether there should be an express statement of political neutrality, as per s 4AA of the Security Intelligence Act.

Section 8C – assisting other agencies in the exercise of their functions

9. The LAC's view is that the s 8C function requires suitable criteria as to both the type of agency that may be assisted, and the circumstances in which assistance may be requested by those agencies. Without suitable criteria, there is a risk that the function is overly broad, and that the technological surveillance tools available to the GCSB could be used on behalf of domestic agencies in circumstances that do not warrant such intervention. Statutory criteria might be considered desirable to prioritise use of the GCSB's resources. The LAC suggests an approach that is consistent with the Search and Surveillance Act 2012 in setting appropriate criteria.

10. The LAC notes that section 45 of the Search and Surveillance Act provides criteria in relation to the use of interception devices to intercept private communications, specifying that such surveillance may only be used to obtain evidential material in relation to an offence punishable by a term of imprisonment of 7 years or more or certain offences under the Arms Act 1983. By virtue of s 8C(2), this limit on the powers of the particular agency means that the GCSB's powers to assist that agency through conducting interception on its behalf, are subject to the same limit.

11. Section 50 of the Search and Surveillance Act also limits the agencies that are empowered to utilise interception devices for evidence gathering by way of an approval process under which the Minister of Justice may, after consultation with the Minister of Police, recommend an Order in Council where satisfied that it is appropriate for the agency to use interception devices and that the agency has the necessary technical capability, compliance procedures and expertise in using interception devices.

12. The LAC suggests that the Committee may wish to introduce a similar approval process in s 8C(1)(d). For example, a department may be specified for the purposes of s 8C where the Prime Minister or Minister responsible for the GCSB has consulted with the Minister of Justice and the Minister of the Police (and any other relevant Ministers) and is satisfied that it is appropriate for the department to be able to co-operate with and receive advice and assistance from the GCSB. Eligible departments could also be limited to those that employ enforcement officers as part of its functions (the definition of a "law enforcement agency" in the Search and Surveillance Act).

13. If the suggestion made above for the inclusion in the Bill of a provision as to the underpinning principles is adopted by the Committee, an alternative approach to controlling exercise of the s 8C function would be to develop non-legislative guidance for the GCSB that relates back to these principles. From an accountability perspective, it would be desirable for any such guidance to be publicly released.

Section 14 – limiting surveillance of New Zealanders for intelligence gathering purposes

14. The LAC notes that s 14 of the GCSB Act is to be retained, although its effect is now to be focussed on the GCSB's s 8B functions, and does not

affect the exercise of the GCSB's interception functions under s 8A (information assurance/cyber security) or s 8C (assisting other agencies).

15. The other key change to s 14 is the replacement of the term "communication" with the term "private communication." This represents a potential narrowing of the section's application.

New Zealand citizens and residents

16. S 14 is a critical section as it limits the GCSB's power to seek a warrant to intercept the private communications of New Zealand citizens or residents (for the purpose of intelligence gathering under s 8B) whether within or outside New Zealand. The LAC also notes that the scope of s 14 is relevant in setting the boundaries of the GCSB's powers to engage in warrantless activity under s 16(3).

17. Our first comment is that the inter-relationship of s 14(1) with s 15B(1)(b) and with the definition of "foreign person" could be made clearer. Our reading is that s 14 prevents the GCSB from intercepting the private communications of New Zealand citizens or residents for the s 8B intelligence gathering function, either under warrant or under warrantless powers. However, if a New Zealand citizen or resident falls within the definition of either a "foreign organisation" or a "foreign person" (as a citizen or resident acting as an agent or representative of a person who is not a citizen or resident), then the GCSB would need to obtain a warrant under s 15A to intercept the private communications of that person.

18. There is a clear prohibition on the interception of the private communications of New Zealand citizens or residents without a warrant or authorisation under either the s 8A or s 8B functions, by virtue of new s 16(1A), although we note this needs to be read subject to s 16(3) which provides that s 14 overrides to the extent of any inconsistency.

19. The LAC suggests that s 15B and s 16 should more clearly set out the circumstances in which the GCSB may intercept the communications of New Zealand citizens or residents, acting either under or without warrant or access authorisation, respectively.

20. The LAC's second point is to raise a question for the Committee's consideration as to whether the category of people qualifying for s 14's protection should be based on citizenship or residency status. Although the citizen/resident distinction is currently used in the Act, the LAC believes that there are both principled and practical reasons for broadening the s 14 category to include all people lawfully in New Zealand, in light of the broadening of the GCSB's intelligence-gathering functions under s 8A and s 8B. This would provide potential protection from state surveillance that is not explicitly authorised through a warrant process to lawful visitors to New Zealand including tourists, visiting dignitaries, conference delegates and other professional visitors, students, and those with lawful or pending immigration status.

21. The principled reason for such an approach is that human rights law, including the New Zealand Bill of Rights Act 1990, is not based on this kind of citizenship/residency distinction but operates holistically in its application to all. At the practical level, the LAC also wonders whether reliance on this distinction, involving due diligence into immigration status, would be the most workable in practice.

22. The LAC believes a more satisfactory approach would extend s 14 to restrict intelligence gathering in relation to any person lawfully in New Zealand, with s 15B(1)(b) then authorising the GCSB to seek an interception warrant or access authorisation for s 8B purposes where a person who is lawfully in New Zealand comes within the definition of a foreign person (a person who is neither a New Zealand citizen nor a permanent resident) or a foreign organisation. Thus a distinction between citizens/residents and non-citizen/residents would be retained for the purpose of seeking a warrant or authorisation, but non-citizen/residents lawfully in New Zealand would not be subject to warrantless interception under s 16, and any surveillance of those persons would require state authorisation through the warrant process.

23. However, if an extension of this kind was considered to unduly interfere with the GCSB's operations in relation to foreign intelligence (for example by requiring a prohibitively large number of warrants) it may be possible to refine the protected category so that, at a minimum, those people with a long or medium-term right to remain in New Zealand such as students, lawful migrants and refugees, are included in the scope of s 14.

Private communications

24. A key feature of s 14 as amended by the Bill is the adoption of the term "private communication". This term derives from the Crimes Act 1961 definition in section 216A, for the prohibition on using interception devices in s 216B, and is also used in the Search and Surveillance Act 2012. A Law Commission report[1] has noted the difficulties with continuing to use this definition in light of technological developments and increasing technological convergence in telecommunications. The Government has not yet responded to the Law Commission's assessment as the Ministry of Justice is currently considering the Commission's broad multi-part review of privacy law. Nevertheless, the LAC believes it would be desirable for the Committee to assess the adequacy of the "private communication" definition as used in the Bill, given its centrality to the privacy protection mechanism in s 14. The key question is whether the definition provides the expected degree of privacy protection.

25. One issue is that, although the term "communication" is broadly defined to include both human and machine produced information, the term "private communication" implies that only communications between human participants ("parties"), which one party wishes to be confined to the parties,

[1] Law Commission *Invasion of Privacy: Penalties and Remedies* (NZLC R113, 2010) at ch 3, Appendix A. The Law Commission recommended revision of the definition of "private communication" in the Crimes Act 1961 to adopt a "reasonable expectation of privacy" test (R10).

and in circumstances where there is not a likelihood of interception by an outsider, come within its scope. However, interception powers extend to communications data such as commands to computers that can be intercepted through various surreptitious techniques including Wi-fi data collection, keystroke logging, cookies, spyware or deep packet inspection. To take one example, while a person's data inputs to a device that are not communicated to another person would likely fall within the definition of a "communication", it is less clear whether they would come within the scope of a "private communication".

26. Another issue is the circular nature of the "private communication" definition; any likelihood of interception may cancel out the desire of the parties to keep their communication private. The definition developed at a time when the fact inquiry was reasonably straightforward. A communication made in a public place attracted less protection than a communication made in confidential circumstances. The expansion of technological communications devices has made the assessment more complex as to the circumstances in which parties can expect that their communications are not susceptible to interception. The concern is that as technological development enhances interception capability, privacy protection is potentially diluted.

27. Given these issues, it would be desirable for the Committee to consider the workability of the term "private communication" in this context. The LAC suggests that the definition of "private communication" be revised to better reflect the level of communications, information and data privacy that New Zealanders may reasonably expect.

Section 15B – dual warrant authorisation process

28. The Committee may wish to consider whether the framework would be strengthened by the use of judicial warrants in circumstances where warrants are sought in relation to New Zealanders, rather than through the joint authorisation system proposed in the Bill. The judicial authorisation of warrants is a fundamental cornerstone of New Zealand's constitutional arrangements that ensures robust and independent oversight of the activities of law enforcement agencies, as well as the trust and confidence of the public. However, particular security arrangements would be needed to ensure additional levels of security and confidentiality in this context. The LAC notes however that the joint authorisation system proposed in the Bill is consistent with the New Zealand Security Intelligence Service Act 1969.

29. The LAC also notes that the s 15B joint authorisation process only applies to warrants or authorisations to intercept the "private communications" of New Zealand citizens or residents. If the dual warrant authorisation process is to be retained, the LAC believes that it should apply to warrants or authorisations to intercept the "communications" of New Zealanders. This is consistent with the warrant requirement in s 15A(1)(a).

Section 16 – Interception not authorised by a warrant

30. Another key mechanism in the Act is the setting of requirements for when interception warrants and access authorisations must be obtained. S 16 authorises the GCSB to engage in warrantless surveillance in certain defined circumstances.

31. What is unclear to the LAC is the extent to which the criteria in s 16 provide a substantive limitation on warrantless activities. For example, access to an information infrastructure is permitted, provided that access is limited to 1 or more communications links between computers or to remote terminals. It would be desirable for the Committee to assess the scope of activity permitted by this condition.

Section 25 – Retaining and sharing "incidentally obtained intelligence"

32. The LAC notes that the Bill does not provide oversight of the information sharing power in s 25 other than the Inspector-General's annual review of compliance procedures as to information management and legal compliance. The Committee may wish to consider including additional safeguards such as a seriousness threshold before information is shared with domestic agencies. Only the first purpose in s 25(2)(a) contains a seriousness threshold, in referring to "serious crime" (an offence punishable by 2 or more years' imprisonment).

33. The LAC considers that the lower the threshold for sharing information, the greater the need for additional safeguards. The Committee may wish to consider whether any particular safeguards from Part 9A of the Privacy Act 1993 should apply to information sharing between the GCSB and other agencies. The Committee may also wish to consider whether there should be any particular safeguards in relation to the sharing of intelligence about New Zealanders with overseas agencies.

34. The LAC also suggests that the definition of "incidentally obtained intelligence" should clearly indicate whether it is limited to intelligence gathered under the s 8B function, or whether it extends to intelligence gathered under the s 8A function. Any intelligence gathered under the s 8C function should be excluded, as retention and the sharing of s 8C intelligence should be handled by the relevant domestic agency on whose behalf the GCSB is acting.

Own-motion investigations by the Inspector-General

35. The LAC notes that the own motion powers of the Inspector-General to investigate whether the actions of the security agencies may have adversely affected New Zealanders requires the concurrence of the Minister (proposed s 11(1)(c) of the Inspector-General of Intelligence and Security Act 1996). The Committee may wish to consider whether the concurrence of the Minister is a necessary pre-requisite to all such own motion investigations, as there are other mechanisms to properly protect sensitive information that may arise in any such inquiry (for example, s 26(3) – ministerial certificate

limiting disclosure by or to the Inspector-General; s 27(4) - Prime Minister may suppress aspects of the Inspector-General's Annual Report; s 28 – Inspector-General's obligation of secrecy). However if ministerial concurrence is to be retained as a requirement, the Committee may wish to consider whether the requirement can be narrowed in any respect.

Inspector-General's review of compliance

36. The LAC suggests that the level of oversight provided by the Inspector-General could be improved if the Inspector-General's function to review compliance in relation to the issue and execution of warrants and authorisations (s 11(d)(i) of the Inspector-General of Intelligence and Security Act, as amended by the Bill), is broadened to reviewing compliance with the law generally, not just the GCSB Act. This would ensure that compliance with broader obligations, such as under the New Zealand Bill of Rights Act 1990, is monitored.

Privilege

37. The GCSB will be subject to statutory provisions relating to the protection of privilege (e.g. legal, medical and religious privileges, and privileges protecting journalistic sources and informers) under the Search and Surveillance Act 2012 (section 140) in circumstances where they carry out interception on behalf of the Police or another agency (s 8C). (See also s 4A(3) of the NZSIS Act).

38. However where interception or access extends to the communications and information of New Zealanders in relation to the GCSB's other functions (intelligence gathering (s 8B) and assisting agencies in relation to cyber security (s 8A)) the extent to which privileged material is protected will depend on the common law. The Law Commission has noted that it is undesirable to have two sets of privilege rules.[2] For legislative consistency and ease of operation, the Committee may wish to consider including in the Bill privilege measures such as those contained in section 140 of the Search and Surveillance Act.

[2] Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) ch 12.

Conclusion

39. Thank you for considering the LAC's submission. The LAC wishes to be heard on this submission. I can be contacted via my personal assistant, Catriona Boyes, tel 9144836, cboyes@lawcom.govt.nz.

Yours sincerely

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Chair
Legislation Advisory Committee