



14 February 2011

To: The Intelligence and Security Committee

Submission on the Security and Intelligence Service (Amendment) Bill

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We wish to appear before the Committee to speak to our submission. We urge the Committee to end the unnecessary level of secrecy that has so far shrouded this Bill, and to open the submissions process to the public. Holding closed submissions is unwarranted as the Bill, being a public document itself, reveals nothing regarding the operational business of the SIS. Rather, the Bill merely contains the rights, powers, and basic procedural requirements of the SIS.

The decision to hear the submissions process entirely in closed session contrasts with the recent initiative of the Security Intelligence Service to act in a more open and transparent manner.

The Security Intelligence Service

The SIS has a history of spying on the actions of citizens whose political views differed from those of the government of the day, despite never being involved in illegal activities. The SIS also has a history of spying on those participating in and involved with legal civil organisations such as unions. The politicised decisions of the SIS have come to light in the recent releases of files to Green Party MP's, Keith Locke, Catherine Delahunty, and Sue Bradford. The inherently political nature of the SIS was further emphasised in the case of Ahmed Zaoui.

The SIS is an innately secret and unaccountable body. For example, section 81 of the Privacy Act 1993 specifically precludes the Director of the Human Rights Tribunal from reviewing a decision of the Privacy Commission and Inspector-General of the SIS on an alleged breach of the Privacy Act. This limitation is a concern, as it prevents the Tribunal from undertaking its judicial oversight function over what many consider a breach to their fundamental human rights.

The Bill

In light of our concerns about the SIS:

We oppose this Bill as we are concerned about the wide ranging nature of the Bill's proposed powers. The Bill introduces laws increasing the abilities and methods of surveillance. It detracts further from SIS agent's liability and accountability for their actions, where the current Act and the Crimes Act already protect the SIS from liability.

We further oppose this Bill as it has not been vetted for New Zealand Bill of Rights Act 1990 (NZBoRA) compliance due to its urgent and secret nature. Section 21 of the NZBoRA prevents the state from unreasonably searching and seizing the person, property, correspondence or otherwise of any person. It is a well-established convention that to interfere with someone's privacy in this way requires strong foundation in law, with agents relying on specific rather than generalised enabling powers.

The Bill does nothing to mitigate the pre-existing concerns regarding the powers and abilities of the SIS. Those in Parliament debate about the balance between fundamental human rights and freedoms and the need for the SIS to have surveillance powers to protect our society. The balancing comes in the form of the checks and balances placed on these powers and the SIS itself. Instead of finding this balance, the Bill introduces broad concepts, such as that of 'facilities' to cover all electronic technology. The current Act, although not using this language, allows the SIS to get warrants to spy on 'communication, document, or thing'. These terms themselves are too broad; the introduction of the term 'facilities' only makes this more problematic for New Zealanders most fundamental and basic civil liberties.

Specific concerns with the Bill include:

- Clause 17: The amendment to section 251 of the Crimes Act.
 - Section 251 criminalises the selling, making, distributing, or possessing of software for committing crime.
 - The amendment in the Bill allows authorisation of any of these actions by the SIS.
 - The need for the SIS to be authorised to 'possess' software for committing crime appears logical, for example, if a copy has been retrieved off a computer or electronic device.
 - However, it is unclear why the SIS needs the ability to sell, and/or make, and/or distribute software for committing crime. The amendment is nonsensical; the level of intention it imputes "for committing crime" is in direct contrast to the mandate of the SIS – to protect our society. The SIS should not be able to profit from selling software to commit crime, nor should such software be distributed.
 - While all such actions would require prior authorisation, the limitations on the accountability of the service, and the level of secrecy accorded to their actions, creates what is essentially an unreviewable, unaccountable, otherwise criminal act.
- Clause 13: the Bill proposes to allow the Director of Security to delegate any of his powers, to any specified employee or specified class of employees of the SIS. Particularly of concern is the Director's ability to delegate any function or power involved in executing a warrant.
 - The Director's powers are not of a nature which should be delegated to such a vast amount of people, particularly if the Director's powers are expanded as proposed by this Bill.

- While the Director cannot delegate the powers or functions involved in applying for a warrant, the potential for abuse of citizen's rights stems from the execution of the warrant, not the initial existence of the warrant itself.
- Although the Director retains ultimate responsibility for the actions of his or her delegates, the expansive ability to delegate serves to further compound the issues regarding the extensive scope of the search and surveillance powers.

Our firm has had the benefit of reading the submissions on the Bill of the New Zealand Council of Trade Union. We wholeheartedly agree with all submissions of the CTU.

Conclusion

There is debate to be had in New Zealand about the nature and extent of the role of the SIS. The Bill proposes a significant expansion of the powers of the SIS. It also seeks to expand the amount of people who are able to make decisions about the exercise of these powers. These proposals are of concern to us, as expressed in this submission.

This Bill has the potential to provide the backdrop for such debate. However, with such urgency and secrecy accorded to it, the legislative process is lacking in the public debate which normally ensues when controversial legislation is being passed. This is of concern, given the constitutional implications of the bill and the lack of existing safeguards.

We urge the Committee to hear the concerns of the public in open session.