

## **Intelligence and Security in a Free Society: Report of the first Independent Review of Intelligence and Security Legislation in New Zealand**

### **Paper Three: Oversight and transparency**

#### **Proposal**

1. This paper seeks Cabinet policy decisions on oversight and transparency arrangements for the intelligence and security agencies (the agencies). It follows the release of the *Independent Review of Intelligence and Security* (the review) on 9 March 2016.

#### **Executive summary**

2. The review makes a number of recommended changes to the oversight and transparency arrangements for the agencies. The recommended changes would, if agreed, be incorporated into the proposed Intelligence Services and Oversight Bill (the Bill). Most of the recommendations relate to the Inspector-General of Intelligence and Security (the IGIS) and the Intelligence and Security Committee (the ISC).
3. The reviewers' recommended changes include (but are not limited to):
  - 3.1 enshrining in legislation the independence of the IGIS from the agencies, the responsible Minister(s), and the Prime Minister;
  - 3.2 allowing the ISC to request that the IGIS inquire into any matter relating to the agencies' compliance with the law and into the propriety of particular activities undertaken by the agencies;
  - 3.3 clarifying that the IGIS may review warrants on substantive grounds, as well as procedural grounds;
  - 3.4 removing the current restriction on the IGIS inquiring into operationally sensitive matters unless strictly necessary to perform his or her functions; and
  - 3.5 increasing the membership of the ISC to between five and seven members.
4. We recommend that Cabinet agree to include almost all of the recommended changes in the Bill. These changes would significantly strengthen democratic and independent oversight of the agencies, building public trust and confidence in the agencies and in the wider intelligence community.

5. We recommend that Cabinet reject one of the review's recommendations. This is the proposal to allow non-New Zealand persons to complain to the IGIS and is discussed in the table at paragraph 18.

## Background

6. The Government Communications Security Bureau (GCSB) and the New Zealand Security Intelligence Service (NZSIS) play a crucial role in protecting New Zealand's interests. It is vital that New Zealanders are assured that the agencies have a clear and appropriate legal framework to operate within.
7. The terms of reference for the review, as discussed in more detail in *Paper One: Overview*, include determining whether oversight arrangements provide sufficient safeguards at an operational, judicial and political level to ensure the agencies act lawfully and maintain public confidence. The reviewers make a number of recommendations which they consider will improve upon existing settings and arrangements.
8. The review follows a particularly turbulent period for the agencies. In New Zealand, our agencies' compliance with the law has been questioned and certain activities criticised (including by the IGIS). The agencies are now subject to more political, media, and public scrutiny than ever before. The response to the review is an opportunity for the Government to improve oversight and transparency arrangements, and to build public trust and confidence.

## Comment

9. The reviewers make 18 recommendations relating to oversight and transparency arrangements for the intelligence and security agencies. Of those 18 recommendations, we propose that Cabinet agree to 17 recommendations in whole or in large part.
10. In New Zealand, oversight is provided in the following ways.
  - 10.1 Executive oversight is provided by the Minister Responsible for the GCSB and in Charge of the NZSIS, who is responsible for normal ministerial functions such as Budget matters and setting Four Year Plans, as well as for deciding warrant applications; the Minister for National Security and Intelligence, who is responsible for leading the national security system – including policy settings and the legislative framework; and the Cabinet National Security Committee (NSC), which has oversight of the national intelligence and security sector, and considers policy and legislative proposals relating to the sector;
  - 10.2 Judicial oversight is provided by the Commissioner of Security Warrants (although not strictly acting as a judge) and the courts generally;
  - 10.3 Democratic oversight (beyond that provided by Ministers) is provided by the ISC, which is the Parliamentary oversight committee and considers issues of efficacy and efficiency, budgetary matters and policy settings; the Leader of the Opposition, to whom both agencies are charged with reporting; and Parliament; and

- 10.4 Independent oversight is primarily provided by the IGIS, as well as the Privacy Commissioner, the Office of the Controller and the Auditor-General, the Ombudsmen, and the media.
11. A modern state must have intelligence and security agencies to effectively detect and protect itself from national security threats, and to protect its economic and international interests. Such agencies require significant and often highly intrusive powers in order to achieve these objectives.
  12. The intrusive nature of the agencies' powers and the possible impact of the exercise of these powers on individuals mean that an independent and robust oversight regime is essential. For instance, independent oversight mechanisms (for example, the IGIS's powers to investigate complaints) ensure that individuals have somewhere to turn if they are negatively affected by the agencies' actions.
  13. Effective independent oversight requires more than just one person or one office. There must be robust executive, judicial, democratic, and independent oversight arrangements. Each 'branch of oversight' must complement the others, while respecting the distinct role the other branches have to play.
  14. For instance, in exercising his or her oversight, the IGIS should focus on the conduct of the agencies in making an application for a warrant. Did they provide all relevant material, including material that might not support their application? Were they frank in their assessment of the case? In our view, the IGIS is better placed to review those matters than to review the *decision* of the responsible Minister (and the Commissioner of Security Warrants, where applicable) to grant a warrant. Any deficiencies in, for instance, the candour of the agencies in seeking a warrant should be sheeted home to the agencies themselves.
  15. Given the broader security and foreign affairs considerations that are in play in matters of security, matters where the judiciary have traditionally deferred to the executive, we consider that the IGIS's role is appropriately focussed on the conduct of the agencies in seeking or implementing a warrant, and does not extend to criticising a decision to grant a warrant, and certainly not to invalidating warrants. For the avoidance of doubt, we note that a warrant will stay in force until the Minister or a judicial commissioner decides to revoke it, regardless of the IGIS's findings around the conduct of the agencies.
  16. New Zealand's current arrangements already provide significant oversight but, as always, there is room for improvement. The recommended changes would strengthen different aspects of oversight. For example, changes to the ISC would significantly improve democratic oversight, particularly since the ISC would be able to request that the IGIS investigate agencies' compliance with the law or the propriety of their activities. Similarly, changes to the IGIS would strengthen independent oversight.

## **Recommendations proposed for inclusion in the Bill**

### *Inspector-General of Security and Intelligence*

17. The IGIS plays a critical role in ensuring that the agencies both comply with the law and act properly. In 2013, the IGIS was substantially strengthened through enhanced powers and institutional arrangements. In recent years the office has undertaken a number of significant reviews and inquiries, some of which have

received considerable public and media attention. These inquiries are in addition to the IGIS's regular review of warrants, access authorisations, and internal compliance systems.

18. The recommended changes would further strengthen the IGIS's ability to provide high-quality oversight and scrutiny, and would help to build public confidence in the agencies. As a result the IGIS would be a more independent body, more akin to similar oversight bodies such as the Independent Police Conduct Authority.
19. We recommend that Cabinet agree to include the following recommendations in the Bill.

	<b>Recommendation</b>	<b>Rationale for accepting</b>
1	Replace section 4 of the Inspector-General of Intelligence and Security Act 1996 (the IGIS Act) with a clear statutory statement that the role of the IGIS is to ensure that the agencies act in compliance with their legislative framework, to independently investigate complaints about the agencies, and to advise the government and the ISC on matters relating to the oversight of the agencies.	<p>Section 4 of the IGIS Act currently frames the IGIS's role as assisting the responsible Minister in the oversight and review of the agencies. Although there are many benefits to the IGIS being able to assist the Minister, this section may convey the impression that the IGIS is an instrument of the Minister and not truly independent.</p> <p>The proposed change would emphasise the IGIS's independence, thereby assuring the public that the IGIS is not an 'arm' of the government but rather an independent review body.</p>
2	Fund the IGIS's office through an appropriation separate from that of the agencies.	<p>The IGIS is currently funded via the Ministry of Justice, with funds from the agencies diverted in 2013 to cover the operational costs of the expanded office.</p> <p>The proposed change would be consistent with the independent nature of the IGIS's role.</p>
3	Change the appointment process for the IGIS and Deputy IGIS so that they are appointed by the Governor-General on the recommendation of the House of Representatives.	<p>The IGIS and Deputy IGIS are currently appointed by the Governor-General on the recommendation of the Prime Minister following consultation with the ISC. The review suggests that this does not have the appearance of a sufficient degree of independence from the executive.</p> <p>The proposed change would again emphasise the independent nature of IGIS's role, while making the appointment process consistent with that used for similar oversight bodies,</p>

	<b>Recommendation</b>	<b>Rationale for accepting</b>
		such as the Judicial Conduct Commissioner, the Auditor-General, and members of the Independent Police Conduct Authority.
4	<p>Increase the initial term of appointment for the IGIS from three to five years.</p> <p>There would be no change to the reappointment sections, which specify that the IGIS may be reappointed once for a further three years.</p>	<p>The current term is fairly short given the complex and technical nature of the agencies' work. A five year initial term would give the IGIS time to build his or her knowledge and expertise in the area, and to develop sustained relationships with the agencies and wider intelligence community. It would also make the term of initial appointment more consistent with other oversight positions, such as the Parliamentary Commissioner for the Environment (5 years), the Auditor-General (up to seven years), the Ombudsmen (five years), and the Privacy Commissioner (up to five years).</p>
5	<p>Require the IGIS to submit his or her draft work programme to the responsible Minister, for comment.</p>	<p>The legislation currently requires the IGIS to submit his or her work programme to the responsible Minister, for approval. In practice, the Minister does not approve the work programme; instead, he or she is informed and given the opportunity to make suggestions. This is an appropriate approach given the IGIS's independent oversight role, particularly in light of his or her ability to initiate own motion enquiries.</p> <p>The proposed change would accurately reflect what already occurs. It would ensure that the agencies and the responsible Minister are aware of the IGIS's work programme while expressly prohibiting them from directing it.</p>
6	<p>Expressly permit the IGIS to make the final work programme publicly available.</p>	<p>This would build public understanding of the work of the IGIS, as well as creating greater transparency in terms of the agencies' activities. It would also build confidence in the independence of the IGIS and in the important role the IGIS has to play in</p>

	<b>Recommendation</b>	<b>Rationale for accepting</b>
		terms of providing oversight.
7	Allow the IGIS to inquire into any matter relating to the agencies' compliance with the law, including human rights law, and into the propriety of particular activities of the agencies at the request of the ISC.	<p>The IGIS can already initiate inquiries at his or her own motion, or at the request of the Prime Minister or the responsible Minister.</p> <p>Allowing ISC to request that the IGIS inquire into certain matters would allow representatives from other political parties to have input into what the IGIS enquires into, further strengthening democratic oversight.</p>
8	Where the IGIS undertakes an inquiry at the request of the ISC, he or she should report back to the Committee on any findings. The responsible Minister's response to the findings should also be made available to the ISC.	Allowing the IGIS to report back to the ISC further builds transparency and democratic oversight, while making the responsible Minister's response available means that the ISC is aware of the government's position.
9	Where the inquiry is initiated at the IGIS's own motion or at the request of the responsible Minister or the Prime Minister, the IGIS should be allowed to present his or her findings to the ISC, with the agreement of the responsible Minister or the Prime Minister. The current provision allowing the Minister to provide his or her response to the ISC should remain.	Allowing the IGIS to report back to the ISC on own motion inquiries and inquiries undertaken at the request of the government (with its permission) builds transparency and therefore democratic and independent oversight.
10	The legislation should clarify that the IGIS's review of warrants is not merely in relation to procedural matters but is a comprehensive look behind the face of the warrant. This includes reviewing the agencies' case for a warrant and how the warrant was implemented.	<p>The IGIS currently reviews all warrants and undertakes a comprehensive end-to-end review of a few of these. This is one of the main ways in which the IGIS provides independent oversight. The proposed change would clarify that role and emphasise that the current approach represents an appropriate level of scrutiny.</p> <p>Under this approach, the IGIS could consider the propriety of the application. For example, did the agency fully disclose all relevant information to the Attorney-General (and judicial commissioner, if</p>

	Recommendation	Rationale for accepting
		<p>applicable)? Did it accurately represent the intelligence case?</p> <p>It would also allow the IGIS to review the execution of the warrant. For example, were the warrant's conditions adhered to? What intelligence was collected under the warrant? How was that intelligence used?</p> <p>To avoid any doubt, we propose to clarify that the IGIS's review of warrants does not extend to invalidating a warrant issued by the Attorney-General (and a judicial commissioner, where applicable). This would intrude upon the independence of those decision-making roles and could serve to undermine the comity between the various 'branches of oversight'.</p> <p>Equally, we propose that the Bill make it clear that, should the IGIS's review of the warrant find that, for example, the relevant agency had not provided full information to the Attorney-General (and judicial commissioner, where applicable) that would not in any way invalidate the warrant, the intelligence collected pursuant to it, or action taken by the agencies or any other body in reliance upon that warrant or that intelligence.</p>
11	Remove the current restriction on the IGIS inquiring into operationally sensitive matters unless strictly necessary to perform his or her functions.	<p>The wide ambit of complaints and queries to the IGIS means that he or she will often need to inquire into operationally sensitive matters. In practice neither agency currently seeks to limit the IGIS's inquiries, but the legislation should not require the IGIS to justify his or her inquiries in this way.</p> <p>This proposal would make New Zealand consistent with the approach taken by comparable jurisdictions (for example, Australia).</p>
12	Update all legislative references permitting the IGIS to access	The IGIS Act enables the IGIS to access information where he or she is

	<b>Recommendation</b>	<b>Rationale for accepting</b>
	information for the purpose of undertaking inquiries, to reflect all functions and duties of the role.	conducting an inquiry. However, undertaking inquiries is only one aspect of the IGIS's role; for instance, he or she also audits and reviews the agencies' activities. Although the IGIS currently receives the full cooperation of the agencies in terms of access to information, the legislation should accurately reflect all of the IGIS's functions and duties.
13	The IGIS should be removed as a member of the IGIS Advisory Panel.	The Advisory Panel provides advice to the IGIS, as well as acting as a 'check' on the IGIS. Panel members may report directly to the Prime Minister on any matter relevant to intelligence and security, if they consider it necessary to alert the Prime Minister. This could include a matter relating to the IGIS's performance. We consider that the IGIS should therefore not be a member of the Panel, as this might put him or her in a position of conflict and could compromise the independence of the Panel.

#### *Intelligence and Security Committee*

20. The ISC is the Parliamentary oversight committee for the intelligence and security agencies, and examines issues of efficacy and efficiency, budgetary matters and policy settings. It is established under the Intelligence and Security Committee Act 1996 as a statutory committee of Parliament.
21. ISC is one of the main ways in which democratic oversight of the agencies is achieved. The ISC has a fairly limited public profile, although its work has attracted more attention over the past few years. The recommended changes will increase the capability of ISC, as it will be able to request that the IGIS - with his or her significant experience and skills - investigate compliance or the propriety of certain actions undertaken by the agencies.
22. We recommend that Cabinet agree to include the following recommendations in the Bill.

	<b>Recommendation</b>	<b>Rationale for accepting</b>
14	Increase the membership of ISC to allow for between five and seven members. The appropriate number should be determined by the Prime Minister after consultation with	ISC currently has five members: the Prime Minister, the Leader of the Opposition, two MPs nominated by the Prime Minister, and one MP nominated by the Leader of the



	<b>Recommendation</b>	<b>Rationale for accepting</b>
	the Leader of the Opposition.	<p>Opposition.</p> <p>Increasing the maximum size of the ISC may increase its representativeness, by allowing for greater diversity in political perspectives (although this depends on how many members are appointed, as well who is appointed). It would allow the Committee the opportunity to more closely reflect the multi-party nature of New Zealand's Parliament.</p>
15	<p>Members of the ISC should be nominated by the Prime Minister after consultation with the Leader of the Opposition, and should be endorsed by the House of Representatives.</p> <p>The Committee should elect its own chairperson.</p>	<p>The Intelligence and Security Committee Act 1996 requires ISC to consist of the Prime Minister, the Leader of the Opposition, two members of the House of Representatives nominated by the Prime Minister following consultation with each party in government, and one member of the House of Representatives nominated by the Leader of the Opposition with the agreement of the Prime Minister and following consultation with the leader of each party that is not in government or in a coalition with the government.</p> <p>The proposed change would give the Prime Minister (who could choose not to sit on the ISC) oversight of its membership, while ensuring that the Leader of the Opposition retains his or her influence. Increasing the maximum size of ISC allows for the opportunity for more of the smaller political parties to be represented on ISC.</p> <p>At the moment, the House of Representatives must endorse members nominated to sit on ISC. This would remain unchanged, and is crucial to maintaining democratic oversight of the agencies.</p> <p>Currently the chairperson must be either the Prime Minister or a member of the ISC appointed by the Prime Minister to sit as the chairperson. Allowing the Committee to elect its own chairperson strengthens democratic oversight.</p>

	<b>Recommendation</b>	<b>Rationale for accepting</b>
16	The legislation should enable the ISC to request that the IGIS inquire into any matter relating to the agencies' compliance with the law (including human rights law), and into the propriety of particular activities of the agencies. This would include operationally sensitive matters.	As discussed above, this change would allow the ISC to harness the IGIS's resources by requesting that IGIS inquire into compliance or the propriety of activities, strengthening its effectiveness as a mechanism for democratic oversight and enhancing the IGIS's role as a provider of independent oversight.
17	The government should in general refer proposed legislation relating to intelligence and security matters to an appropriate select committee (ie, not to the ISC). It should consider referring more sensitive matters to the ISC in parallel.	<p>One of the current functions of ISC is to consider any Bill referred to it that relates to the agencies (subject to some restrictions). We do not consider that this is an appropriate use of the ISC's time. Even if Cabinet agrees to increase the number of members, ISC will still have significantly fewer members than select committees. In addition, ISC members are by convention senior MPs, meaning their availability is often very limited.</p> <p>The proposed change would ensure that the ISC is free to consider more sensitive matters (rather than routine legislation). If classified material needs to be considered in relation to proposed legislation, it could be placed before the ISC for it to consider before reporting its conclusions to the relevant select committee.</p>

### **Recommendation not proposed for inclusion in the Bill**

23. For the reasons discussed below, we recommend that Cabinet reject the following recommendation.

	<b>Recommendation</b>	<b>Rationale for rejecting</b>
18	<p>The category of persons who complain to the IGIS should be extended beyond New Zealand persons, to any complaint by a non-New Zealand person.</p> <p>The IGIS should have the discretion as to whether to inquire into any such complaint and, if any inquiry is conducted, whether to respond to the</p>	We recommend that Cabinet reject this recommendation. We do not consider that investigating the complaints of non-New Zealanders is a reasonable use of the IGIS's time and resources. We would prefer instead for the IGIS to be focussed on investigating the complaints of New Zealanders. Under this recommendation, the IGIS would have

	Recommendation	Rationale for rejecting
	complaint. This decision would not be subject to judicial review.	<p>the discretion to decide whether to inquire into the complaints of non-New Zealanders. Although this proposal could allow the IGIS to dismiss frivolous or vexatious complaints, it would put him or her in an unenviable position of potentially having to reject a complaint from a foreign government, company, or organisation.</p> <p>In addition, the government of the day could not direct how the IGIS should respond to such a request given the independence of the IGIS's role, despite the possible negative consequences of such a decision from a foreign relations perspective.</p> <p>Any extension of the right to complain to the IGIS might create a de facto appeal right in immigration contexts. That is, notwithstanding section 42 of the Immigration Act 2009, it might encourage a court to grant interim relief if the person concerned had a complaint lodged with the IGIS. That complaint might turn on the nature of any classified information provided to the Minister of Immigration. This could slow down deportations made on the grounds of security.</p>

## Recommendations

The Minister for National Security and Intelligence and the Minister Responsible for the GCSB and in Charge of the NZSIS recommends that the National Security Committee:

1. **note** that the *Independent Review of Intelligence and Security* recommends a number of changes to the oversight and transparency arrangements for the intelligence and security agencies (the agencies);
2. **note** that most of the recommended changes, if accepted, will be included in the proposed Intelligence Services and Oversight Bill (the Bill);

### *Inspector-General of Intelligence and Security (IGIS)*

3. **agree** to replace section 4 of the Inspector-General of Intelligence and Security Act 1996 with a clear statutory statement that IGIS's role is to ensure that the agencies act in compliance with their legislative framework, to independently investigate complaints about the agencies, and to advise the government and the

Intelligence and Security Committee (the ISC) on matters relating to the oversight of the agencies;

4. **agree** that the IGIS's office should be funded through an appropriation separate to that of the agencies;
5. **agree** that the IGIS and Deputy IGIS should be appointed by the Governor-General on recommendation of the House of Representatives;
6. **agree** to increase the first term of appointment for the IGIS from three to five years;
7. **agree** to maintain the current limit on reappointments for the IGIS so that the IGIS may only be reappointed once for a further three years;
8. **agree** to require the IGIS to submit his or her draft work programme to the Minister(s) responsible for the agencies, for comment;
9. **agree** to expressly permit the IGIS to make the final work programme publicly available;
10. **agree** that the IGIS should be allowed to inquire into any matter relating to the agencies' compliance with the law, including human rights law, and into the propriety of particular activities of the agencies, at the request of the ISC;
11. **agree** that when the IGIS undertakes an inquiry at the request of the ISC, he or she must report back to the ISC on any findings;
12. **agree** that when the IGIS undertakes an inquiry at the request of the ISC, the responsible Minister's response to the findings should be made available to the ISC;
13. **agree** that where an inquiry is initiated at the IGIS's own motion or at the request of the responsible Minister or the Prime Minister, the IGIS should be allowed to present his or her findings to the ISC, with the agreement of the responsible Minister or the Prime Minister;
14. **agree** to allow the responsible Minister to provide his or her response to the ISC following an inquiry initiated at the IGIS's own motion or at the request of the responsible Minister or the Prime Minister;
15. **reject** the recommendation to extend the category of persons who can complain to the IGIS to non-New Zealand persons;
16. **agree** that the IGIS's review of warrants extends beyond procedural matters to a comprehensive look behind the face of the warrant, and includes reviewing the agencies' case for a warrant and how the warrant was implemented;
17. **agree** that, for the avoidance of doubt, the IGIS's review of warrants does not extend to invalidating a warrant issued by the Attorney-General (and a judicial commissioner, where applicable);
18. **agree** that, should the IGIS's review of the warrant find that full information was not provided by the agencies to the Attorney-General (or judicial commissioner, where applicable), that finding does not in any way invalidate the warrant, any

intelligence collected pursuant to it, or any action taken by the agencies or any other body in reliance upon that warrant or that intelligence;

19. **agree** to remove the current restriction on the IGIS inquiring into operationally sensitive matters unless strictly necessary to perform his or her functions;
20. **agree** to replace all legislative references permitting the IGIS to access information solely for the purpose of undertaking inquiries, to reflect all functions and duties of the role;
21. **agree** that the IGIS should not be a member of the IGIS Advisory Panel;

*Intelligence and Security Committee (ISC)*

22. **agree** to increase the membership of ISC to between five and seven members, with the appropriate number determined by the Prime Minister after consultation with the Leader of the Opposition;
23. **agree** that members of the ISC should be nominated by the Prime Minister after consultation with the Leader of the Opposition, and endorsed by the House of Representatives;
24. **agree** that the ISC should elect its own chairperson;
25. **allow** the ISC to request that the IGIS inquire into any matter relating to the agencies' compliance with the law (including human rights law) and into the propriety of particular activities of the agencies, including operationally sensitive matters; and
26. **agree** that the government should, in general, refer proposed legislation relating to intelligence and security to an appropriate select committee rather than the ISC, and should consider referring more sensitive matters in parallel to the ISC.

Rt Hon John Key  
**Minister for National Security and Intelligence**

Hon Christopher Finlayson  
**Minister Responsible for the GCSB**  
**Minister in Charge of the NZSIS**