Government Communications Security Bureau and Related Legislation Amendment Bill (2013 No 109-1)

Date of Introduction: 8 May 2013 (released 7 May by Prime Minister)

Portfolio: GCSB

Select Committee: As at 8 May, 1st Reading not held.

Published: 8 May 2013
by John McSorley BA LL.B, Barrister
Legislative Analyst
P: (04) 817-9626 (Ext. 9626)

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Purpose

The aim of the Bill is to amend the Government Communications Security Bureau Act 2003 (the GCSB Act), the Inspector-General of Intelligence and Security Act 1996 (the IGIS Act), and the Intelligence and Security Committee Act 1996 (the ISC Act).

In relation to the GCSB Act, the Bill makes amendments to the objective, function, powers and limitation provisions “to improve clarity about the legal parameters for GCSB [(Government Communications Security Bureau)] activities; and to accommodate changes in the prevailing security environment” (“particularly in relation to cybersecurity and information security”).

In relation to the IGIS Act, the Bill makes amendments “to strengthen the office of the IGIS [(Inspector-General of Intelligence and Security)], increasing the resources of the office to enable a greater range of activities to be carried out, expanding the IGIS’s statutory work programme, and enhancing the corresponding reporting responsibilities”.

In relation to the Intelligence and Security Committee Act 1996, the Bill makes amendments to “improve the ISC’s [(Intelligence and Security Committee)] ability to provide effective oversight and accountability of the intelligence agencies”.

Background

“The March 2013 ‘Review of Compliance at the Government Communications Security Bureau’ by Rebecca Kitteridge highlighted difficulties in interpreting the GCSB Act when the Bureau was providing assistance to other agencies, notably the New Zealand Security Intelligence Service”. “At the same time, New Zealand faces a changing security environment in which threats are increasingly interconnected and national borders are less meaningful. Globalisation means New Zealand is no longer distant from security threats as it once was. This changed environment means the legislation governing GCSB needs updating, to enable it to address the security challenges posed by the increasing importance of cyberspace”.

Main Provisions

Commencement

The Bill provides that it comes into force on the day that is one month after the date on which it receives the Royal assent (Clause 2).

Purpose

The Bill changes three paragraphs of the GCSB Act’s purpose. These, in particular, remove the word “foreign” from the phrase “foreign communications” (Part 1, Clause 4, amending Section 3 of the GCSB Act by substituting paragraphs (c), (d) and (e)).

Objectives

The Bill replaces the current objectives of the GCSB (which emphasise the word “foreign” in such phrases as “foreign intelligence”, “foreign organisations” and “foreign persons”) with a shorter version which is that the “in performing its functions, is to contribute to … the national security of New Zealand … and … the international relations and well-being of New Zealand … and … the economic well-being of New Zealand”. The new objective section is much more general and deletes the word “foreign” totally (Part 1, Clause 6, substituting Section 7 of the Act).

Functions

The present functions of the GCSB are phrased in terms of, for example, the gathering of “foreign intelligence”, the deciphering of “foreign communications”, or providing reports on “foreign intelligence” to the Minister. The GCSB Act also provides that it is a function of the GCSB to, for example, assist any public authority on any information it sends or holds or on “any matter that is relevant … to the functions of the public authority or other entity” or for following: “to pursue its objective, … to protect the safety of any person, … in support of the prevention or detection of serious crime”. The GCSB Act also provides that “the performance of the [GCSB’s] functions is subject to the control of the Minister” (Section 8 of the GCSB Act).

The Bill considerably elaborates the functions of the GCSB and puts them into three separate clauses. The order in which those functions are set out in the Bill “is not to be taken as specifying any order of importance or priority”. The Bill also provides that the performance of the Bureau’s functions, and the relative importance and priority of the functions, if any, are to be determined from time to time by the Director, subject to the control of the Minister (Part 1, Clause 6, inserting New Section 8).

2 Ibid., p. 2.
Function in relation to information assurance and cybersecurity

The Bill first sets out the function of the Bureau in relation to information assurance and cybersecurity. This function is to:

- to co-operate with, and provide advice and assistance to, any public authority whether in New Zealand or overseas, or to any other entity authorised by the Minister, on any matters relating to the protection, security, and integrity of:
  - communications, including those that are processed, stored, or communicated in or through information infrastructures (i.e. “including electromagnetic emissions, communications systems, and networks, information technology systems and networks, and any communication carried on, contained in, or relating to those emissions, systems, or networks”); and
  - information infrastructures of importance to the Government of New Zealand; and
- to do everything that is necessary or desirable to protect the security and integrity of those communications and information infrastructures, including identifying and responding to threats or potential threats to those communications and information infrastructures; and to report to the Minister; and any person or office holder (whether in New Zealand or overseas) authorised by the Minister to receive the report following on anything done under this provision and any intelligence gathered as result (Part 1, Clause 6, inserting New Section 8A; Clause 5, amending Section 4 of the Act by inserting a new definition, that of “information infrastructure”).

Intelligence gathering and analysis

The Bill sets out the function of the Bureau in relation to gathering and analysing intelligence about the capabilities, intentions, and activities of foreign persons and foreign organisations, and in relation to gathering and analysing intelligence about information infrastructures (Part 1, Clause 6, inserting New Section 8B).

Co-operation with other entities to facilitate their functions

The Bill sets out the function of the Bureau in relation to co-operation with certain other entities to facilitate the performance. This function of the Bureau is to co-operate with, and provide advice and assistance to, the following for the purpose of facilitating the performance of their functions:

- the New Zealand Police;
- the New Zealand Defence Force;
- the New Zealand Security Intelligence Service; and
- any department (within the meaning of the Public Finance Act 1989) specified for the purposes of the provision by the Governor-General by Order in Council made on the recommendation of the Minister.

The Bill also provides “to avoid doubt”, that the GCSB “may perform this function … to the extent that the advice and assistance is provided for the purpose of activities that the entities may lawfully undertake … and … subject to any limitations, restrictions, and protections under which those entities perform their functions and exercise their powers … and … even though the advice and assistance might involve the exercise of powers by, or the sharing of the capabilities of, the Bureau that the Bureau is not, or could not be, authorised to exercise or share in the performance of its other functions (Part 1, Clause 6, inserting New Section 8C).
Director has full powers to perform GCSB’s functions

The Bill gives the Director all the powers that are necessary or desirable for the purpose of performing the functions of the Bureau, but this is subject to the GCSB Act, any other enactment, and the general law (Part 1, Clause 6, inserting New Section 8D).

Director and employees of GCSB

The Bill deals with a number of other matters relating to GCSB staff including:

- the appointment of the Director, the appointment process, remuneration and conditions of appointment, removal from office, and review of the Director’s performance (Part 1, Clause 7, substituting Section 9 by New Sections 9-9D);

- making it an offence for current or past employees of the Bureau to unlawfully disclose information gained in connection with the Bureau with the maximum penalties increased from two years’ to three years’ imprisonment and from a $2,000 to a $5,000 fine (Part 1, Clause 8, amending Section 11);

New Zealand citizens or permanent residents not to be targeted for intelligence-gathering

The Act presently provides that neither the director, nor an employee of the GCSB, nor a person acting on behalf of the GCSB may authorise or take any action for the purpose of intercepting the communications of a person (not being a foreign organisation or a foreign person) who is a New Zealand citizen or a permanent resident (Section 14 of the Act).

The Bill reproduces the present provision but adds the following “… unless and to the extent that the person comes within the definition of foreign person or foreign organisation in Section 4 [of the Act]”. The Bill also provides that any incidentally obtained intelligence is not obtained in breach of new Clause 8B, but must not be retained or disclosed except in accordance with Section 23 (headed: “Destruction of irrelevant records obtained by interception”) of the Act and New Section 25 (see immediately below) (Part 1, Clause 12, substituting Section 14 of the Act).

When incidentally obtained intelligence may be retained and communicated to others

The Bill provides that the director may retain incidentally obtained intelligence that comes into the possession of the GCSB for one or more of the purposes following and communicate that intelligence to the persons specified below.

The purposes are:

- preventing or detecting serious crime in New Zealand or any other country;

- preventing or responding to threats to human life in New Zealand or any other country.

The persons are:

- any employee of the New Zealand Police;

- any member of the New Zealand Defence Force;

- the Director of Security under the New Zealand Security Intelligence Service Act 1969;

- any other person that the Director thinks fit to receive the information (Part 1, Clause 24, substituting Section 25 of the Act. The current Section 25 is headed “Protection or detection of serious crime”).
Interception warrants

The Bill provides for the Director, for the purpose of performing the Bureau’s functions under New Section 8A or 8B (described above), to apply to the Minister for an interception warrant to intercept communications or an access authorisation to access information infrastructures and sets out the matters that the Minister must be satisfied about before issuing a warrant or an authorisation. The Bill also requires the Commissioner of Security Warrants (appointed under the New Zealand Security Intelligence Service Act 1969) to be involved if anything that may be done under a warrant or an authorisation issued under this provision is for the purpose of intercepting the private communications of a New Zealand citizen or permanent resident of New Zealand under those new sections to the extent that intercepting the person’s private communications under that section is not precluded by New Section 14 (described above). The Bill also provides that in the case of interceptions without an interception warrant or an access authorisation the interception of private communications of New Zealand citizens or permanent residents is not authorised (Part 1, Clause 14, inserting New Sections 15A and 15B into the Act; Clause 15, amending Section 16).

Personal information

The Bill deals with the protection and disclosure of personal information and requires the Director, in consultation with the Inspector-General of Intelligence and Security and the Privacy Commissioner, to formulate a policy on the protection and disclosure of personal information that complies with certain principles which are set out and which relate to collecting, using, storing, and retaining personal information (Part 1, Clause 25, inserting New Sections 25A and 25B into the Act).

Inspector-General of Intelligence and Security Act 1996

The Bill makes amendments to the IGIS Act including:

- providing for the appointment of a Deputy Director with all the powers and functions of the Inspector-General, subject to the control and direction of the Inspector-General, and having all the powers and functions of the Inspector-General if there is a vacancy in the office of Inspector-General or if the Inspector-General is absent from duty for any reason (Part 2, Clause 29, substituting Section 5 of the IGIS Act);

- providing for the Inspector-General’s term of office, adding a reference to the Deputy Inspector-General, provide a maximum term of appointment of 3 years for each, provide that each can be reappointed, but in the case of the Inspector-General only once (Part 2, Clause 30, amending Section 6 of the IGIS Act);

- in relation to the functions of the Inspector-General:
  - permitting the Inspector-General to inquire into the propriety of particular activities of an intelligence and security agency without needing the agreement of the Minister;
  - requiring the Inspector-General to review, at intervals of not more than 12 months, the effectiveness and appropriateness of procedures adopted by each intelligence and security agency to ensure compliance with its governing legislation in relation to the issue and execution of warrants and authorisations and the effectiveness and appropriateness of compliance systems concerning operational activity, including supporting policies and practices of each intelligence and security agency relating to certain matters, including risk management and legal compliance generally;
  - requiring the Inspector-General to conduct unscheduled audits of such procedures and compliance systems (Part 2, Clause 31, amending Section 11 of the IGIS Act and repealing Section 11(2) of the IGIS Act which currently placed limitations on the ability of the Inspector-General to do anything of his or her own motion in relation to a complaint about any activity of an intelligence and security agency).
In relation to what the Inspector-General must do on completing an inquiry, the Bill requires the Minister to provide his or her response to the report to the Inspector-General and the chief executive of the intelligence and security agency concerned and permits the Minister to provide his or her response to the Intelligence and Security Committee. These amendments do not apply to the extent that a report relates to employment matters or security clearance issues (Part 2, Clause 34 amending Section 25).

Intelligence and Security Committee Act 1996

The Bill specifies that one of the Committee’s functions is to report to the House of Representatives on the activities of the Committee (Part 3, Clause 38, amending Section 6 of the ISC Act). The Bill also provides that:

- the Prime Minister is not to chair a meeting of the Committee while it is discussing, in the course of a financial review of an intelligence and security agency, any matter relating to the performance of the intelligence and security agency if the Prime Minister is the responsible Minister of the agency;

- the chairperson of the Committee may appoint either the Deputy Prime Minister or the Attorney-General (if not already a member of the Committee) to act as chairperson in the absence of the chairperson (Part 1, Clause 39, inserting New Section 7A into the ISC Act).