LEGISLATION DESIGN AND ADVISORY COMMITTEE

7 October 2016

Mark Mitchell MP, Chairperson
Foreign Affairs, Defence and Trade Committee
Parliament Buildings
PO Box 18 041
Wellington 6160

Dear Mr Mitchell,

New Zealand Intelligence and Security Bill

1. The Legislation Design and Advisory Committee (**LDAC**) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. The LDAC provides advice on design, framework, constitutional and public law issues arising out of legislative proposals. It is responsible for the LAC Guidelines (2014 edition), which have been adopted by Cabinet.

2. In particular, the LDAC's terms of reference include these dual roles:
    a. providing advice to departments in the initial stages of developing legislation when legislative proposals are being prepared; and
    b. through its External Subcommittee, scrutinizing and making representations to the appropriate body or person on aspects of bills that raise matters of particular public law concern.

3. The External Subcommittee of the LDAC referred to in paragraph 2b above is comprised of independent advisers, from outside Government, who have been appointed by the Attorney-General. Under LDAC's mandate, that External Subcommittee is empowered to review and make submissions on those bills that were not reviewed by the LDAC prior to their introduction.

4. The New Zealand Intelligence and Security Bill is one that was not reviewed by LDAC prior to introduction. The External Subcommittee has therefore reviewed it, and desires to make the **attached** submission. This submission was principally prepared by the following members of the LDAC External Subcommittee: Professor Geoff McLay, Brigid McArthur, James Wilding, Professor Andrew Geddis, Jonathan Orpin, Simon Mount, and Jeremy Johnson with input from other members of the Subcommittee.

5. Thank you for taking the time to consider the Subcommittee's submission. It wishes to be heard on this submission.

Yours sincerely

Paul Rishworth QC
Chairperson
Legislation Design and Advisory Committee

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1. Introduction

1.1. The Legislation Design and Advisory External Subcommittee (the **Subcommittee**) has been given a mandate by Cabinet to review introduced Bills against the LAC Guidelines on Process and Content of Legislation (2014 edition) (the **Guidelines**). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles. Our focus is not on policy, but rather on legislative design and the consistency of a Bill with fundamental legal and constitutional principles.

1.2. The Subcommittee may only review and make submissions on Bills that did not have the benefit of a substantive LDAC review before introduction. The New Zealand Intelligence and Security Bill is one such Bill.

1.3. This submission focusses on aspects of the New Zealand Intelligence and Security Bill (the **Bill**) that appear to be inconsistent with the Guidelines or could be refined to increase the quality and transparency of the legislation. In particular, this submission focusses on ensuring:

(a) the relationship between the powers in the Bill and the law that would otherwise govern the activities of the intelligence and security agencies is clear;[1] and
(b) freedoms and protections for individuals are adequately provided for.[2]

[1] LAC Guidelines (2014 edition), Chapter 2 "How new legislation relates to the existing law"
[2] LAC Guidelines (2014 edition), Chapter 3 "Basic constitutional principles and values of New Zealand"; Chapter 5 "New Zealand Bill of Rights Act 1990"; Chapter 7 "Privacy and dealing with information about people"; Chapter 16 "Creating a new statutory power".

1.4. We recognise the important competing interests that arise in the case of legislation directed at national security and international and domestic protection. Restrictions on rights and freedoms are sometimes inevitable. However, it is important to ensure that any restrictions are rationally justified and proportional. It is also important to ensure the adequacy of the oversight of powers conferred in this context. Those matters fall within Chapters 3 and 5 of the Guidelines and are important to the transparency and public confidence that the Bill seeks to promote.

1.5. We have endeavoured to make suggestions that will result in an accessible, transparent, and quality piece of legislation that strikes a better balance between protections for individuals and powers necessary for intelligence and security agencies to effectively and practically achieve their purposes.

Part 1 – Preliminary provisions

2. Definition of National Security – clause 5

2.1. The Bill includes the definition of national security proposed in the *First Independent Review of Intelligence and Security in New Zealand*.[3] However, the regulatory impact statement indicates an alternative option is preferred – national security is not defined but operates as an initial threshold, with a list of the types of activities and threats in respect of which the agencies can target New Zealanders.[4] We understand from the Cabinet material that the intention is to consult on the definition proposed in the Review to keep it with the package of other Review recommendations. However, the preferred option which is not included in the Bill may prevail.

2.2. The Subcommittee considers national security should be defined in the legislation. It is fundamental to the accessibility, clarity, and legitimacy of the legislation that this key concept is clearly defined at the outset of the Bill. The Subcommittee suggests that in defining national security, an element of discretion could be left to the Attorney-General to mitigate some of DPMC's concerns about the workability of the proposed definition. Further, we suggest the concern around the definition interacting with other legislation can be addressed by expressly carving out the definition as limited to this Bill.[5]

2.3. In terms of process, the Subcommittee notes it is not clear from the material that clause 5 is not the preferred approach and an alternative option is simultaneously being considered. This

[3] Hon Sir Michael Cullen KNZM, Dame Patsy Reddy DNZM *Intelligence and Security in a Free Society: Report of the First Independent Review of Intelligence and Security in New Zealand* (29 February 2016).

[4] Regulatory Impact Statement: New Zealand Intelligence and Security Bill (5 April 2016) at [86]-[91].

[5] The Guidelines relevantly provide: "Any conflict or interactions between new and existing legislation should be explicitly addressed in the new legislation … the new legislation should make clear which provision shall prevail or how it is intended that the two provisions should operate together." LAC Guidelines (2014 edition) at 2.2.

should have been clear from the outset. We suggest the Committee should be aware of this ambiguity when it considers submissions from the public.

2.4. Finally, if the Committee retains the definition as proposed in clause 5, we suggest it should be integrated better with other provisions in the Bill. As it stands, clause 5(d) duplicates concepts of "economic security" and "international relations" which are covered in clause 11(b) and (c). Under clause 55 (Issue of Type 1 intelligence warrant), the distinction between clauses 11(b) and (c) from 11(a) materially impacts the circumstances in which a Type 1 warrant can be granted. Currently under clause 5, the concepts in 11(b) and (c) are included in the definition of national security, which creates ambiguity around the distinction between the concepts in clause 55.

2.5. We also note that the terms "international relations and well-being of New Zealand" and "the economic well-being of New Zealand" in clause 3 are broad and would benefit from a tighter definition.

3. Meaning of sensitive information – clause 6

3.1. Clause 6 defines sensitive information as information of a certain kind that would be likely to prejudice the interests set out in subclause (1). Subclause (2) sets out the kinds of information that can be sensitive information, including information that might lead to the identification of, or provide details of, sources of information available to an intelligence and security agency, or other assistance or operational methods available to an intelligence and security agency.[6]

3.2. The definition of sensitive information determines what information can be provided to the Intelligence and Security Committee (clause 163) and disclosure restrictions on information provided to that Committee (clause 164). It is therefore important to ensure the definition of sensitive information does not unreasonably limit how individuals may deal with information and their rights to seek and receive information and to justice under the New Zealand Bill of Rights Act 1990 (**NZBORA**).[7] The Subcommittee suggests subclause (2)(a) would benefit from more specificity to prevent an overly broad interpretation.

Part 2 – Intelligence and Security Agencies

4. Objectives of intelligence and security agencies – clause 11

4.1. Clause 11 sets out the objectives of the intelligence and security agencies. The Subcommittee considers the reference to "principal objectives" in the provision is not transparent and creates

[6] Clause 6(2)(a).
[7] New Zealand Bill of Rights Act 1990, ss 14 and 27. See also

ambiguity. This wording seems to imply there are other, secondary or non-principal objectives of the intelligence and security agencies that are not set out in legislation.

4.2. Transparency and creating public confidence are two key drivers of this legislation. The Explanatory Note to the Bill provides that the Review "emphasises the need to improve transparency and oversight arrangements to give the public greater confidence that the [intelligence and security] agencies are acting lawfully and appropriately. … a variety of provisions are included to increase transparency around the intelligence and security agencies' activities."[8]

4.3. We suggest if there are other relevant, secondary objectives of the agencies, that these are either set out in legislation in a separate clause, or the legislation should provide a transparent framework for how secondary objectives are established, where they are published, and any relevant thresholds to apply to the objectives. This will help to achieve the objective of transparent and confidence building legislation. Alternatively, if clause 11 is intended to be a list of exhaustive objectives, we suggest removing the word "principal".

5. Principles underpinning performance of functions – clause 12

5.1. Clause 12 sets out the principles intelligence and security agencies must act in accordance with when carrying out their functions. It is unclear to the Subcommittee what the intention of subclause (2) is, which provides that the principles in subclause (1) do not impose particular duties or powers on an intelligence and security agency, or the Director-General or employees of those agencies. We submit the limitation in subsection (2) should be amended in so far as it purports that subclause (1) does not impose particular duties on intelligence and security agencies, their Director-Generals, or employees. In our view the statute would be strengthened without that limitation.

5.2. Subclause (2) appears to strip subclause (1) of any legislative character and renders it exhortatory. We are particularly concerned about the impact this has in relation to the obligation to observe New Zealand law and human rights obligations in subclause 12(1)(a). If the intention of subclause (2) is to provide immunity to the named agencies and persons, this should be expressly addressed and linked to other immunity provisions provided throughout the Bill.

5.3. The Subcommittee notes the Guidelines provide that "[l]egislation or provisions in legislation that have no legal effect and that are not intended to be enforced are a waste of Parliament's time, a needless expenditure of public funds, and bring the law into disrepute."[9] We suggest

[8] New Zealand Intelligence and Security Bill, Explanatory Note.
[9] LAC Guidelines (2014 edition) at p.4.

the Committee should be mindful of provisions which are not truly legislative in nature (i.e. they cannot be enforced, there is no sanction, or they do not have any consequences).

5.4. The Subcommittee also queries why the principle to act independently and impartially in subclause (1)(b) is limited to operational functions. It seems to imply there is no duty to act impartially and independently in the course of the intelligence and security agencies' other functions.

5.5. The Subcommittee suggests clause 12 may be more appropriate as a general set of principles that apply across the entire Bill. This would add to the safeguards and protections in the Bill and ensure decision-makers, operational functions, and all other activities under the legislation are exercised consistently with one set of over-arching principles.

6. Public authority not defined – clauses 13 – 15

6.1. Clauses 13 – 15 provide it is a function of intelligence and security agencies to collect and analyse intelligence, provide protective security services, advice and assistance, and provide information assurance and cybersecurity activities. Intelligence and security agencies may carry out these functions to assist named persons or groups of persons, including "public authorities".

6.2. The Bill currently does not define "public authority". The Subcommittee suggests it would increase the transparency of the legislation and the powers of the intelligence and security agencies to assist and advise under these clauses if "public authority" was defined.

7. Cooperation with other entities to facilitate their functions – clause 16

7.1. Clause 16 provides it is a function of intelligence and security agencies to cooperate with each other, the New Zealand Police, and the New Zealand Defence Force. The agencies may also provide advice and assistance to those entities for the purpose of facilitating the performance or exercise of those entities' functions, duties or powers. The clause as drafted, and similar clauses throughout the Bill, raise our key concern that the Bill needs to make the relationship between current law, in this case the Search and Surveillance Act 2012, and the new powers in the Bill clear.

7.2. The effect of this provision is it allows intelligence and security agencies to exercise the powers of the Police or Defence Force in the course of assisting one of those entities, or to use their own power or capabilities that the Police or Defence Force may not have for the purposes of those agencies.

7.3. The Subcommittee recommends the intelligence and security agencies' ability to provide this kind of support, and in effect the extension of their powers to include those of the Police and

Defence Force when providing assistance, should be more transparent and upfront in the legislation.

7.4. The Subcommittee also suggests the relationship between intelligence and security agencies and warrants issued to Police under the Search and Surveillance Act should be clarified. It is not clear from clause 16 whether an intelligence and security agency can act pursuant to a Police warrant obtained under the Search and Surveillance Act. We suggest if intelligence and security agencies will be able to act pursuant to a Police warrant, this should be transparent in the Police application for a warrant. For example, relevant legislation should include a requirement to include the intention to seek assistance from an intelligence and security agency in the particulars of a warrant application. This will ensure judges issuing warrants are fully informed of who will be acting under the warrant.

7.5. The Subcommittee also suggests the impact of providing assistance to Police should be integrated with disclosure provisions under the Criminal Disclosure Act 2008 and the Policing Act 2008. Those Acts respectively require Police to disclose personal information for purposes relating to international policing[10] and relevant information to the defence in criminal proceedings.[11] However, presumably information obtained by the Police as a result of assistance or advice from an intelligence and security agency could not be disclosed. This limitation should be clear on the face of the legislation.

8. Cooperation with other entities to respond to imminent threat – clause 17

8.1. We note a similar point that we have made above in relation to clause 16. If the intention of this provision is to allow the intelligence and security agencies the ability to provide assistance over and above what is usually available to them under their regular powers, then the relationship to the provisions that would normally apply should be addressed.

9. Activities of intelligence and security agencies must be politically neutral – clause 21

9.1. Clause 21 provides "[t]he Director-General of an intelligence and security agency must take all reasonable steps to ensure that the agency does not take any action for the purpose of furthering or harming the interests of any political party."

9.2. We note the term "political party" appears to be carried over from section 8D of the Government Communications Security Bureau Act 2003 and section 4AA of the New Zealand Security Intelligence Service Act 1969.

[10] Policing Act 2008, ss 95A – 95F.
[11] Criminal Disclosure Act 2008.

9.3. The Subcommittee suggests this terminology should be updated to capture a modern concept of "politics". Referring to "political party" is an odd way of expressing political neutrality and seems to narrow its scope. For example, it is possible for a person or group of people to be political and hold political interests and views without being aligned with any particular political party. They may denounce politics altogether, view themselves as apolitical, or as expressly non-political. We consider it is important that the agencies' neutrality extends to those persons and groups too.

9.4. We therefore suggest clause 21 is amended to read (words to be inserted underlined): "The Director-General of an intelligence and security agency must take all reasonable steps to ensure that the agency <u>is politically neutral and in particular</u> does not take any action for the purpose of furthering or harming the interests of any political party<u>, candidate, or cause</u>".

10. Limitation on collecting intelligence within New Zealand - clause 22

10.1. Clause 22 protects the rights of individuals engaged in lawful advocacy, protest, or dissent in respect of any matter. We suggest the Committee should consider whether it might be better to use the term "freedom of expression" instead of referring specifically to "lawful advocacy, protest, or dissent" as it is broader and perhaps generally better understood.

Part 3 – Covert activities of intelligence and security agencies

11. Purpose of subpart – clause 24

11.1. Clause 24 provides that the purpose of subpart 1 (assumed identities) is to enable an employee of an intelligence and security agency to acquire, use, and maintain an assumed identity for the purposes of facilitating the ability of that intelligence and security agency to carry out its activities while maintaining the secrecy of those activities, and/or to protect the identity of the employee.

11.2. That purpose provision does not include a threshold requiring that assumed identity activities are necessary, which is the threshold in clause 26(2). Such an important threshold ought to be in the purpose provision, so as to inform all subsequent clauses. Its placement at the level of the purpose would better reflect that the power to acquire an assumed identity is significant and intrusive. The Guidelines provide that legislation should not create a power that is wider than is necessary to achieve the policy objective and the purpose of the legislation.[12] This provision is an example of a number of clauses throughout the Bill which could be improved by strengthening the relationship with the purpose of the subpart or the Act more generally.

[12] LAC Guidelines (2014 edition) at 16.3.

11.3. A similar purpose provision is set out in subpart 2, clause 35 in relation to corporate identities. We suggest the threshold of necessity is also included there.

12. Definition of employee – clause 25

12.1. Clause 25 sets out the definitions relating to subpart 1. "Employee" is defined as:

> (a) any person who is, or will be, an employee of an intelligence and security agency; and
> (b) any person who is approved by the Director-General of an intelligence and security to undertake activities for that agency [emphasis added]

12.2. The justification for extension to those who "will be" employees of intelligence agencies is unclear. The definition of employee results in an intrusive power to use assumed identities and immunity against certain criminal and civil liabilities. Absent clear justification, they ought to be available only to actual employees, who presumably have undergone rigorous employee checks and training and are subject to corresponding oversight.

12.3. This reflects Chapter 16 of the Guidelines which emphasises the importance of identifying who holds statutory powers and ensuring that the person holds the appropriate level of authority, expertise, and accountability.[13] It is not clear how those "will be" employees meet that standard.

12.4. If the intention is circumscribed, for example to allow the authorisation process under clause 26(2) to begin while an employment candidate receives final security clearance, this should be made express. Additionally, a provision could be included providing that the Director-General must revoke the authorisation if a person who will be an employee for whatever reason does not become an employee within a certain period.

13. Assistance to acquire, use, and maintain assumed identity – clauses 29

13.1. Clauses 28 and 29 enable an agency to be asked to provide assistance with an assumed identity and to provide that assistance. "Agency" is broadly defined in this subpart to include private sector agencies as well as Ministers, government agencies, and statutory officers.[14]

13.2. Clause 29 requires that agencies must be satisfied of a number of criteria before approving a request for assistance from an intelligence and security agency – that the request is appropriate having regard to the purposes of the subpart and every ministerial policy statement to the extent it is known to the agency. This is onerous and likely beyond the capacity of some private sector agencies.

[13] LAC Guidelines (2014 edition) at 16.2.
[14] Clause 25.

13.3. If that requirement remains then it ought to be coupled with an obligation to assist the agency, for example by requiring requests under clause 28 to provide relevant ministerial policy statements and other material for agencies to consider when granting requests in clause 29, and access to independent legal advice. The latter is important given the obligations that flow from an agency agreeing to assist with an assumed identity.

14. Cancelling evidence of assumed identities – clause 30

14.1. Clause 30 enables the Director-General to direct the cancellation of evidence of an assumed agency. This does not accord with the rights and record keeping obligations of private agencies or governmental obligations under various legislation. Examples include the Official Information Act 1982, Privacy Act 1993, Public Records Act 2005, Local Government Official Information and Meetings Act 1987 and tax legislation. The issue of destruction of evidence relevant to proceedings does not appear to have been grappled with.

14.2. We do not consider that the immunity in clause 33 addresses this, because that responds to a different issue. Immunity does not respond to the important reasons underlying the above-mentioned legislation as to why it is important that records be kept.

14.3. We accept it appears to be the policy of the Bill to cancel evidence in this way, however, we draw the Committee's attention to the fact there is no threshold for cancellation of evidence. If there is ever justification, then a high threshold would be required. It is an example of why it may be useful for the threshold of necessity to feature in the purpose provision.

14.4. While there will often be justification for limiting access to material evidencing an assumed identity, its cancellation is unjustified in a free and democratic society. If it is to occur, safeguards are appropriate.

15. Restrictions on access to information about process for obtaining assistance, etc – clause 32

15.1. Clause 32 prevents access to information relating to a request for assistance or direction given pursuant to a request for assistance where it would compromise the secrecy of the assumed identity.

15.2. The Subcommittee is concerned about how this restriction interacts with agencies' ability to seek legal advice in relation to providing requested assistance to an intelligence and security agency. Legal professional privilege is important and should generally be respected in legislation.[15] The essence of the solicitor-client relationship is the ability for a client to impart information in a free and frank way with an assurance of absolute confidence. If a client is

[15] For example, The Guidelines relevantly provide that legal professional privilege should be respected in relation to search powers. LAC Guidelines (2014 edition) at 18.1.

unable to do this because of statutory obligations not to disclose certain information, it has the potential to significantly impact a client. The Subcommittee suggests legal professional privilege should not be interfered with or unduly restricted by provisions restricting disclosure of information.

15.3. Further, it seems particularly important for an agency to disclose relevant information to its legal advisers where the agency is subject to a specific statutory obligation and decision-making threshold in clause 29. Allowing legal advice to be obtained in relation to these matters will help ensure agencies have discharged their obligations and make good decisions under clause 29. The legislation should make it clear that this provision does not affect the ability to seek legal advice.

15.4. A limited express provision might also be made in respect of certain other categories of advisors for whom privilege might apply under the Evidence Act 2006.

15.5. This point is also applicable to subpart 2, clause 42 in relation to maintaining assumed corporate identities.

16. Immunity of authorised persons – clause 34

16.1. Clause 34(2)(a) relevantly provides that an authorised person (being an employee of an intelligence and security agency authorised to acquire an assumed identity) is not civilly or criminally liable where the person acts in good faith with reasonable care, nor is the person liable for breach of contract where the breach is a necessary consequence of using or maintaining an assumed identity.

16.2. The Subcommittee understands the rational for providing a limited immunity to authorised persons. However:

(a) civil immunity for the authorised person and (by implication sometimes) the agency would mean innocent persons may suffer loss, despite statutory and common law concepts that impose liability, for example in contract, tort and equity.[16] Discretionary compensation is inadequate;

(b) the criminal immunity is too broad. A more tailored immunity provision is appropriate.

16.3. The same submission is applicable to subpart 2, clause 45 in relation to maintaining assumed corporate identities.

[16] LAC Guidelines (2014 edition) at 2.4-2.5: "New legislation should as far as practicable be consistent with fundamental common law principles. … New legislation can alter, work in parallel with, or entirely override the common law. However the new legislation must clearly identify whether or not it is doing so. If the legislation is not intended to affect the common law, then this should also be explicitly set out in the new legislation."

17. The Inspector-General should oversee Part 3 assumed identity functions

17.1. As it stands, authorisations to acquire assumed identities and activities pursuant to those authorisations are not expressly subject to the regular oversight of the Inspector-General of Intelligence and Security.[17] The Subcommittee considers the significance of these provisions requires the regular, say annual, independent safeguard of oversight by the Inspector-General.

17.2. The Guidelines relevantly provide that new statutory powers should include appropriate safeguards, having regard to the full range of people who are affected.[18] Further they provide "[w]hat is considered to be an adequate level of protection will increase as the interference with the rights of individuals increases."[19] Generally, decisions that affect a person's rights or interests should be reviewable in some way.[20]

17.3. In light of the potential interference with individual rights and the extent of powers under Part 3, it seems appropriate to include a regular independent review by the Inspector-General to ensure rights are protected and powers are exercised in accordance with law.

Part 4 - Authorisations

18. Effect of ethnic or national origins - warrants

18.1. The authorisation regime provided in Part 4 of the Bill is based on a distinction between New Zealand citizens and permanent residents on the one hand, and people who are not New Zealand citizens or permanent residents on the other. Specifically, the Bill provides that a Type 1 warrant applies to New Zealand citizens and permanent residents[21] and Type 2 warrants apply to people who are not New Zealand citizens or permanent residents.[22]

18.2. The effect of this distinction is that Type 1 warrants are subject to the further safeguard of being authorised by a Commissioner of Intelligence Warrants in addition to the Attorney-General. Further, a higher threshold must exist before a Type 1 warrant can be issued for objectives relating to international relations and the economic well-being of New Zealand[23]. There are no similar thresholds for these matters under Type 2 warrants.[24]

[17] See clause 121. Compare clauses 16 and 17.
[18] LAC Guidelines (2014 edition) at 16.6.
[19] Ibid.
[20] Ibid.
[21] Clause 51.
[22] Clause 52.
[23] Clause 55(2)(b).
[24] Clause 56.

18.3. Section 19 of NZBORA provides that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993. [25] National origin is a prohibited ground in section 21 of the Human Rights Act. We note the Ministry of Justice's advice on the Bill's consistency with NZBORA does not deal with this issue.

18.4. We suggest the Committee should be satisfied that the distinction on grounds of national origin in the Bill is a justified limitation under NZBORA and no greater than is necessary to achieve the policy objective.[26] The Committee may wish to do this by seeking advice on the matter from the Ministry of Justice or Crown Law.

18.5. The distinction between New Zealanders and non-New Zealanders of course had much wider consequences under the previous legislation. Now the distinction has much more narrow effects, we wonder if the distinction could be removed for those on long-term work or study visas, and who arguably might be deserving of the same protections as New Zealanders.

18.6. From a design perspective, the Subcommittee also notes the distinction creates a significantly more complex authorisation regime. It is important to ensure that the complexity of legislation reflects the policy objective. If the distinction is not justifiable at the policy level, it renders the authorisation regime unnecessarily complex.

19. Authorisation required to carry out unlawful activity – clause 49(2)

19.1. Clause 49(2) provides that an intelligence and security agency may lawfully carry out an authorised activity despite anything to the contrary in any other Act. The Subcommittee understands this provision is not intended to override NZBORA, and suggests this should be expressly addressed.

19.2. The Guidelines relevantly provide that legislation should be consistent with NZBORA and should be express where legislation intends to override fundamental rights. While we assume the intention here is not to override NZBORA, we consider the nature of the Bill and the impact on individuals means the Bill would benefit from expressly addressing how NZBORA applies. This will increase the transparency and legitimacy of the law in the eyes of individuals whom it affects and has the potential to affect.

19.3. The Subcommittee suggests that the express application of NZBORA could be appropriately included in the decision-making criteria for authorising warrants under clauses 55 and 56.

[25] The Guidelines provide that rights in NZBORA should not be limited, or should be subject only to such reasonable limits as can be justified in a free and democratic society. Further, the Guidelines provide that legislation should not discriminate on one of the prohibited grounds set out in section 21 of the Human Rights Act 1993. LAC Guidelines (2014 edition) at 5.1 and 6.1.
[26] LAC Guidelines (2014 edition) at 6.2.

20. Additional criteria for issue of intelligence warrant – cl 57

20.1. Clause 57 sets out the additional criteria the Attorney-General and the Commissioner of Intelligence Warrants, in the case of Type 1 warrants, or the Attorney-General, in the case of Type 2 warrants, must consider before issuing a warrant under clauses 55 or 56. Subclause (a) provides that the carrying out of the lawful activity must be necessary for one of the purposes set out, including to test, maintain, or develop capabilities, or to train employees.

20.2. The Subcommittee does not consider it is appropriate to allow warrants to be issued for the primary purpose of testing or training intelligence and security agencies. The Subcommittee acknowledges the need to ensure intelligence and security agencies and their employees have appropriate opportunities to test capabilities and train employees. However, some of the powers available under warrants are significant and intrusive and should not be available solely for training and testing purposes.

20.3. We suggest that authorised activities should only be undertaken for training and testing purposes where it is proportionate to the activity undertaken. For example, it would not be proportionate to allow an intelligence and security agency to enter and search an individual's home and seize property purely for training and testing purposes. More intrusive activities could be undertaken for training and testing purposes incidentally where the authorised activity is necessary to perform any function of the intelligence and security agency (clause 57(1)(a)(i)).

21. Authorised activities (human intelligence activity) – cl 63(1)(g)

21.1. Clause 63 sets out the list of activities intelligence warrants may authorise. Subclause (1)(g) provides that any human intelligence activity can be authorised and undertaken for the purpose of collecting intelligence, except where that activity involves the use or threat of violence against a person or perverts, or attempts to pervert, the course of justice.

21.2. The Subcommittee queries the scope of human intelligence activities and notes the provision currently reads as if no other limits except those expressed are placed on human intelligence activities. Appropriate safeguards are fundamental to ensuring powers are framed and exercised lawfully and in accordance with the purpose and policy objectives of the legislation. The Guidelines relevantly provide "it is good practice to explicitly identify the specific protections that apply so as to avoid uncertainty."[27]

21.3. The Subcommittee suggests this clause should expressly state the other safeguards (limits) that apply to human intelligence activity. In particular, we suggest human intelligence activities should not extend to offences under Part 6 of the Crimes Act (Crimes affecting the administration of law and justice).

[27] LAC Guidelines (2014 edition) at 16.6.

22. Powers of New Zealand Security Intelligence Service acting under intelligence warrant – clause 65(1)(a)(iii)

22.1. Clause 65 sets out the powers the New Zealand Security Intelligence Service can exercise to give effect to an intelligence warrant. Subclause (1)(a)(iiI) provides the Security Intelligence Service or its employee can enter any place, vehicle, or other thing where a person identified in the intelligence warrant is, or is likely to be, at any time. The Subcommittee wonders whether this power is intended to include places that the person identified in the intelligence warrant has been. As it currently stands, the power seems to only allow entry in present or future circumstances, but does not capture places the person has been in the past. In the interests of clarity, we suggest this should be clearly provided in the provision, if it is the intended use of the power.

23. Privileged communications – clause 67

23.1. Clause 67 provides that certain kinds of privileged communications cannot be obtained pursuant to warranted or authorised activity. Subclause (2) defines privileged communications as communications protected by legal professional privilege or privileged in proceedings under sections 54, 56, 58, or 59 of the Evidence Act 2006. The Subcommittee notes that this does not include privilege for settlement negotiations or mediation.[28]

23.2. It is not clear to the Subcommittee why privilege relating to settlement negotiations and mediation is not protected from collection under authorised activities and warrants. The Guidelines relevantly provide that search powers should respect privileges such as legal professional privilege.[29] We suggest this provision should be amended to protect settlement and negotiation privilege.

23.3. The Subcommittee also notes that clause 67 does not include parliamentary privilege (including communications with members of Parliament) or journalists' assurances of confidence to sources. The Committee may wish to consider whether it is appropriate to protect this kind of information from being obtained through warranted and authorised activities.

[28] Evidence Act 2006, s 57.
[29] LAC Guidelines (2014 edition) at 18.1.

Part 6 – Oversight of intelligence and security agencies

24. Purpose of part – clause 119

24.1. Clause 119 provides the purpose of Part 6 is to provide for the independent oversight of intelligence and security agencies to ensure that those agencies are operating lawfully and effectively. Subclause (2)(a) sets out the functions of the Inspector-General to achieve this purpose.

24.2. The Subcommittee suggests that subclause (2)(a) could be made clearer. The functions of the Inspector-General are sufficiently set out in clause 121. Referring to the Inspector-General's functions in clause 119(2) is repetitive and creates ambiguity around the functions.

24.3. We suggest subclause (2)(a) should be replaced to read: "To achieve this purpose, the office of the Inspector-General of Intelligence and Security is continued, with the Inspector-General having functions, duties, and powers set out in this Part."

25. Functions of Inspector-General – clause 121

25.1. Clause 121 sets out the functions of the Inspector-General. These functions include the power to conduct procedural reviews under subclause (1)(f)(i) and, under subclause (1)(h), reviews relating to an the issue of an authorisation and the carrying out of activities under an authorisation.

25.2. The Subcommittee understands the intention of paragraph (h) is to provide a substantive review of warrants and authorised activities (as recommended in the Review). However, we suggest the provision would benefit from making that clear on the face of the provision. For example, the provision should expressly provide the functions of the Inspector-General are to "conduct a substantive review …".

26. Reviews relating to authorisation – clause 126

26.1. Clause 126(1)(c) provides that where the Inspector-General finds an irregularity in relation to issuing an authorisation or carrying out any activity under an authorisation, the finding does not require the intelligence collected under the authorisation to be destroyed.

26.2. The Subcommittee is concerned about how intelligence collected under an irregular authorisation or activity can be used, particularly in terms of whether it may be used as evidence in a prosecution or as information that can be shared under information sharing provisions of the Bill.

26.3. The Subcommittee accepts that destroying the information may not be appropriate, however, the legislation should be clear about the status of that intelligence and in what circumstances it can be used as evidence or shared with other agencies. The Guidelines relevantly provide: "The Government should respect privacy interests and ensure that the collection of information about people is done in a transparent manner, where the type and amount of information collected and what is done with that information is clearly explained."[30] We suggest this will help the transparency and confidence building this Bill aims to achieve.

27. Complaints that may be made to Inspector-General – clause 134

27.1. Clause 134(1) provides that a New Zealand person may complain that he or she has, or may have, been adversely affected by an act, omission, practice, policy, or procedure of an intelligence and security agency. New Zealand person is defined as any person being a New Zealand citizen, a person ordinarily resident in New Zealand, an unincorporated body whose membership comprises at least 50% New Zealand citizens, or a body corporate that is incorporated in New Zealand.[31]

27.2. The Subcommittee agrees that New Zealand persons should have a right to complain to the Inspector-General. However, the transparency of the regimes might be enhanced by providing that the Inspector-General should have discretion to consider complaints by non-New Zealand persons, as there is clearly potential for mistakes to made in the way services deal with them, as there is with New Zealand. As noted above, the Guidelines provide that decisions and powers which affect individual rights should be open to review.

27.3. We note the concerns in the regulatory impact statement for rejecting this recommendation in the Review.[32] These include concerns about the Inspector-General's limited time and resources, the risk of creating a de-facto appeal right in immigration contexts, and the risk of requiring the Inspector-General to make decisions with foreign policy implications. We suggest the Committee might consider whether those risks might be mitigated by carving out how immigration issues are dealt with and by providing a framework around the Inspector-General's discretion, for example by requiring him/her to have regard to whether considering a complaint is in New Zealand's interests.

28. Disclosure of information may be required despite obligation of secrecy – clause 143

28.1. Clause 143(1) provides that a person must give evidence, answer questions, or provide information or documents to the Inspector-General despite any statutory obligation of secrecy or non-disclosure. The Subcommittee considers this provision should extend beyond statutory obligations and include common law and contractual obligations of secrecy or confidence.

[30] LAC Guidelines (2014 edition) at 7.
[31] Clause 4.
[32] Regulatory Impact Statement at [143].

28.2. The Subcommittee draws the Committee's attention to the Guidelines which provide that appeal or review processes should be subject to appropriate and proportionate safeguards.[33] The Subcommittee suggests that extending disclosure requirements in this clause to include common law and contractual obligations of secrecy or confidence will ensure all relevant material is disclosed to support a robust inquiry process.

29. Proceedings not to be questioned or reviewed – clause 152

29.1. Clause 152 provides that no proceeding, report, or finding of the Inspector-General may be challenged, reviewed, quashed, or called in question in any court except on the grounds of lack of jurisdiction. The Subcommittee draws the Committee's attention to this clause as an ouster (or privative) clause which removes the right to seek judicial review.

29.2. Relevantly, the Guidelines provide that legislation should not restrict the right to apply for judicial review.[34] The right to judicial review is affirmed by section 27(2) of NZBORA, and exists independently of any statutory appeal right. The Guidelines go on to note clauses which remove the right to judicial review are problematic because they "interfere with the courts' constitutional role as interpreters of the law, and as such the courts will interpret such clauses strictly and may not give them their intended effect."[35]

29.3. The Subcommittee suggests that a strong and independent review process is required to ensure activities under this Bill are carried out in accordance with the law. This is particularly important given the nature of this legislation and its ability to impact individuals. Ideally this means judicial review should be available. However, we suggest at the very least, the Committee should be satisfied that the Inspector-General's review process is sufficiently robust, independent, and subject to appropriate safeguards to justify ousting judicial review.

Part 7 – Miscellaneous provisions

30. Ministerial policy statements – clauses 165 - 167

30.1. Clauses 165 - 167 provide the circumstances in which a Minister responsible for an intelligence and security agency must issue one or more policy statements that provide guidance in relation to matters set out. As currently drafted, the provisions are clear as to what parts of the Bill policy statements can relate to, however, there is no provision that links policy statements to the overarching purpose of the Act.

[33] LAC Guidelines (2014 edition) at 25.11.
[34] LAC Guidelines (2014 edition) at 25.1.
[35] Ibid.

30.2. The Subcommittee suggests that all Ministerial policy statements should be required to relate to the purpose of the Act. We note that in principle it should be taken for granted that every statutory power will be exercised in accordance with the purposes of the Act. However, we consider in the case of this Bill it is necessary to ensure the provisions are clearly and transparently tied to the purposes and principles of the Act. The Subcommittee considers this is particularly important because a number of decisions throughout the Bill require decision-makers to have regard to relevant Ministerial policy statements.

30.3. By way of example, we draw the Committee's attention to section 45(1) of the Resource Management Act 1991 which provides: "The purpose of national policy statements is to state objectives and policies for matters of national significance that are relevant to achieving the purposes of this Act." [emphasis added] We suggest a similar provision could be inserted in the Bill as a new clause coming before current clause 165.

31. Conclusion

31.1. Thank you for taking the time to consider the Subcommittee's submission. The Subcommittee may make a supplementary submission next week if it considers there are further matters to comment on. We wish to be heard on this submission.

Yours sincerely

Geoff McLay
Chairperson
Legislation Design and Advisory External Subcommittee