

# **Is the NZSIS interested in you? Privacy in the security world**

## **Speaking Notes for Identity Conference**

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Thank you.

It is great to have the opportunity to be a part of this conference and to be a part of Privacy Week.

Privacy is a very important issue, and one that the New Zealand intelligence agencies – your intelligence agencies – take very seriously.

Today you have heard about the connected world and the implications this has on our privacy.

The connected world also has major implications for security and it is important we consider them together.

Today I'm going to focus on four areas:

- I want to talk first about why the NZSIS was established and the work we do;
- I'll talk about who the NZSIS is interested in, and why;
- I'll describe the processes that we have to follow to exercise our powers of interception; and
- I'll set out the safeguards that are in place to ensure these powers are used appropriately.

What I hope to show is that in a liberal democracy like New Zealand, we need both individual privacy and national security. They complement one another, and a balance must be struck between them.

In order to keep our country secure and protect our citizens, we have to be able to intercept private communications in some exceptional and legally authorised circumstances.

But the needs of security agencies are not absolute. Any intrusion into privacy on the grounds of national security must occur only where it is necessary and proportionate, and must be subject to oversight.

I will start by talking about national security, and the role of an intelligence agency like NZSIS in a democracy.

The New Zealand government established the SIS in 1956. At this time, and until the end of the Cold War, the Service had two areas of focus. The first was on countering espionage - that is, covert spying by foreign governments in New Zealand. The other was countering subversion - that is, attempts by foreign entities to covertly undermine the lawful authority of the State. Both were areas of intense activity.

The SIS's effort to understand and to counter subversion was, and still is, largely misunderstood. I think it is important to get into the "head space" of the era. The name "Cold War" was not a misnomer. Western governments of the time, and the intelligence agencies that served them, really did consider themselves to be on a war footing in relation to the communist bloc. From their perspective, the stakes were nothing less than the survival of democratic government as they knew it. It was NZSIS's job to try to understand what was going on and to build an accurate intelligence picture.

To the public, though, NZSIS's activities were often misconstrued as NZSIS spying on anyone who did not agree with the government. The Service's image was also negatively affected by some public controversies over the years, some of which were "a fair cop" and some of which were not. The legacy of the Cold War has been hard to shake off.

Although the New Zealand Security Intelligence Service has changed hugely since the end of the Cold War, the protection of democracy remains a key responsibility. It is even enshrined in the NZSIS Act. The Act sets out the principles that underpin the performance of the Service's functions. I quote:

*In performing its functions ... the Security Intelligence Service -*

- (a) contributes to keeping New Zealand society secure, independent, and free and democratic;*
- (b) contributes to the participation of New Zealand in the maintenance of international security;*
- (c) acts -*
  - (i) in accordance with New Zealand law and all human rights standards recognised by New Zealand law, except to the extent that they are, in relation to national security, modified by an enactment;*
  - (ii) in the discharge of its operational functions, independently and impartially;*
  - (iii) with integrity and professionalism;*
  - (iv) in a manner that facilitates effective democratic oversight.*

In some other jurisdictions, security and intelligence agencies are tools of the political elite, and are not accountable for their activities.

That is not the case in this country. New Zealand has a properly constituted security intelligence agency, which exists to protect our freedoms and our way of life.

And this is why I was attracted to the role of Director of Security. I am not in this job because I have a fascination for spying or because I relish the thought of intruding into people's private affairs. Leading the Security Intelligence Service appealed to me because I feel strongly about the New Zealand way of life. I want to protect that way of life so we can continue to enjoy the things that are so wonderful about New Zealand, including the

integrity of our institutions, the privacy of our citizens, and our democratic rights and freedoms. And that motivation and commitment is shared by every person I have met in the NZSIS.

The NZSIS is not the tool of the politicians on either side of the House. In fact, its governing legislation contains several provisions that explicitly require me, as Director, to behave in a way that is politically neutral and that prevents any government from directing its investigations. Again, I quote:

- (1) *The Director must take all reasonable steps to ensure that –*
  - (a) *the activities of the Security Intelligence Service are limited to those that are relevant to the discharge of its functions;*
  - (b) *the Security Intelligence Service is kept free from any influence or consideration that is not relevant to its functions;*
  - (c) *the Security Intelligence Service does not take any action for the purpose of furthering or harming the interests of any political party.*
- (2) *The Minister may not direct the Security Intelligence Service to institute the surveillance of any person or entity or any class of person or entity within New Zealand.*
- (3) *The Director must consult regularly with the Leader of the Opposition for the purpose of keeping him or her informed about matters relating to security.*

So there is a legal framework, which sets out very explicitly the principles and values that underpin and imbue our work.

Within this framework, the NZSIS conducts its work to achieve the following goals:

- to reduce vulnerabilities in New Zealand, in terms of people, systems and places;
- to reduce harm, by identifying and communicating information about threats; and
- to collect and provide the government with foreign intelligence relevant to security.

Our work is about providing protective security advice right across government, including vetting public servants for their suitability to hold security clearances.

Our work helps to protect New Zealand and New Zealanders from espionage from foreign states – and while I will not comment further about this aspect of our work, one would be naïve to think that New Zealand was somehow exempt from the world’s second-oldest profession.

New Zealand has obligations to support international security by countering the proliferation of weapons of mass destruction. New Zealand has smart, innovative companies and research institutions doing research and development in areas that sometimes have dual uses. The NZSIS works closely with other agencies to prevent that research or technology from being misused.

The Service is still required to protect our system of parliamentary democracy from subversive activity – although thankfully, with the end of Cold War, that is not such an issue for us right now.

But as our work on countering subversion has diminished, another area has increased – that is, our role in protecting New Zealanders from acts of violent extremism here and overseas.

It is rather startling to think that when I was interviewed for the Director of Security role eighteen months ago, ISIL did not feature in my interview presentation. It is a big preoccupation for me now.

ISIL recruits to its extremist cause through the use of slick propaganda, distributed via social media around the world. Its recruits may be young, vulnerable, or disaffected. They are excited by the extreme nature of what they see, and are drawn to something that they think has meaning. The internet overcomes geographic distance and enables communication between these susceptible people and those encouraging them, radicalising them and directing them. The internet, and especially social media, means it is very easy for these individuals to connect up with others who share and strengthen their world view.

The threat to our security posed by foreign terrorist fighters is real, and it continues to develop rapidly. I know that my sister agencies overseas are dismayed at the prospect of radicalised and battle-hardened foreign fighters returning to their countries of origin – in some cases in their hundreds. Regardless of how the current situation in the Middle East is resolved, the issue of returning foreign fighters is going to challenge security services around the world for many years to come.

Domestic extremists are also a real concern. ISIL explicitly urges individuals to conduct attacks using any weapon they have – a knife, a car – without talking to anybody about their plans. Attacks of this kind are extremely difficult to stop.

We have seen the consequences of ISIL's communications strategy and tactics being experienced in Paris, Belgium, Ottawa, Melbourne and Sydney, where lives have been taken or threatened.

I don't want to overstate the situation in New Zealand. As I have said before, there is a very small number of people in New Zealand, inspired by ISIL, who are talking about, advocating or planning to commit violent acts here or elsewhere. And it is the job of the Security Intelligence Service to understand what is going on so that those violent acts can be prevented.

Across all the areas of work I have just outlined, our job is to understand the domestic and international threatscape and to communicate the intelligence picture to those who need to know it. That involves obtaining, sifting and assessing strands of intelligence.

NZSIS has around 230 staff. The size of the task that Parliament has set us would be impossible for such a small agency to do by itself.

And in fact we do not do our work alone. We work closely with international partners. Here I am not just referring to our longstanding relationships with Australia, Canada, the United

Kingdom and the United States. We work with many different security agencies from around the world to further our shared goals and interests. At the moment, because of the geopolitical situation in the Middle East, a great deal of that interaction concerns ISIL and foreign fighters. We are hugely grateful for the intelligence that we receive from other countries, which helps us to develop the best possible picture of the situation in Syria and Iraq, and its implications for New Zealand and New Zealanders.

We are also helped in our work by other New Zealand state agencies which have complementary capabilities or complementary functions.

So, for example, we sometimes get help from GCSB. Parliament has authorised GCSB to help agencies like the Service, where their assistance is needed to support certain authorised activities that we undertake. GCSB's technological capabilities – capabilities that we don't have and which would make no sense for us to duplicate – can be invaluable in helping us to obtain the intelligence we need in specific cases. The Police, too, have a key, complementary role in preventing the crime that is terrorism, and we work very closely with them.

Even with the help that we get, NZSIS has to prioritise. We have to make hard choices about what to focus on, and where to deploy our resources. We receive lots of leads, and have a number of investigations going concurrently. We have to focus on those that present the greatest threat, particularly where we are planning to deploy our interception capability under warrant.

Making a decision to intercept a New Zealand citizen's personal communications is only permissible under a Domestic Security Warrant, which often involves months of work and is not something we apply for lightly.

To obtain a Warrant, the intelligence officers have to build and present a meticulously documented application, generally with attachments that are several inches thick, showing that the Warrant meets the criteria set out in our legislation, and is necessary and proportionate. The Warrant application is reviewed by a senior manager and is scrutinised by the legal team. Then, as Director, I review it thoroughly. The Commissioner of Security Warrants then reviews it thoroughly. And then we take it to the Minister in Charge of the NZSIS. He asks questions and may require conditions to be added before it is signed off. Every Warrant must specify a period not exceeding 12 months for which the Warrant is valid. It can be renewed, but we must make the case again.

The reason that I am explaining this process is to make the point that the Service is very constrained and targeted in exercising its interception powers – and rightly so. We do not have the legal authority, the capacity or the capability to act any other way.

But despite that, many people worry about state surveillance.

The National Security Communications team within the Department of the Prime Minister and Cabinet commissioned polling late last year about our intelligence agencies. The results were very interesting, and in some areas quite surprising.

The biggest surprise for me was that 29% of respondents thought that intelligence agencies might be interested in their personal communications.

So apparently nearly a third of New Zealanders believe that their behaviour may be of interest to the intelligence agencies.

If that were true, it would mean that NZSIS would be targeting 1.3 million people. And of course that bears no resemblance to the actual situation.

The reality is that NZSIS had 51 domestic security warrants in force during the last reporting year (to June 2014) – as disclosed in our Annual Report. The number of people actually of interest to us represents a minuscule percentage of the population.

We do not live in a surveillance state where everything you do online is recorded - at least not by the government!

So – please enjoy the freedom that the internet gives you. You are free to click on whatever you want on your device, and you won't pop up on our system. Typically, we get our leads through our interaction with the public and through information provided to us by other agencies. Where information suggests that a person may be a threat to New Zealand's domestic security, we will try to find out more about that person, and either determine that the person is not of interest, or build an intelligence case that may lead to a Warrant application.

Our focus is on the small number of individuals who are actively interested in violent extremism, or causing some other harm to New Zealand's security as defined in our legislation.

In that small number of cases, Parliament has given the Security Intelligence Service the power to intrude on the privacy of New Zealand citizens concerned. By lawfully intruding on the privacy of a few, we make the majority safer.

During my time in the Service, I have found that staff carefully consider their work. NZSIS officers think about the proper scope of any investigations, the legal position, operational risk, and whether any particular activity is necessary and proportionate. Sometimes these issues are matters of judgement, but they are fully discussed and worked through internally, with reference to both the legal position and internal policies.

Of course it is still possible for staff to make errors, or for an oversight body to take a different view from us about what is lawful or proper. In those cases it is important to clearly address the issue, learn any lessons from it, and perhaps change our approach. But what I see is a real commitment within the NZSIS to lawfulness.

Yet still some in the media and the public worry about us. So why is that?

As I mentioned before, there are some legacy issues that date from the Cold War. And I think it is natural for the public to be sceptical or suspicious when we do everything behind closed doors, because we all know that sunlight is the best disinfectant.

I often think that if the public could see the people of the NZSIS doing their work, they would be delighted to see what hard-working, terrific people our intelligence officers are. I would love the Service to have a television show like Border Patrol.

Unfortunately, that is not possible. We have to keep our operational work secret, for very good reasons.

We need to protect our methods and our sources. Any disclosures about the techniques we use may compromise them and make them unusable.

Individuals who supply information may put their own safety at risk. They put their trust in us, and it is our duty to protect them.

But where it is possible to talk about our work, as I am today, I think we should. With others in the New Zealand Intelligence Community, I am working on being more open and transparent.

And as for sunlight and disinfectant – that is provided, on behalf of the public, by our oversight bodies: the Inspector-General of Intelligence and Security, the Intelligence and Security Committee, the Privacy Commissioner, the Office of the Ombudsmen and the Auditor-General.

The Inspector-General of Intelligence and Security reviews every warrant after it is issued. In addition, the Inspector-General and her staff are free to come into our workplace, access our databases and document management systems, and look at anything and everything that we do.

The Office of the Inspector-General has been greatly strengthened over the last couple of years. The Office has gone from one part-time retired Judge and a part-time secretary, to a full-time Inspector-General with a number of permanent full-time staff. That means that sunlight is beaming in across the intelligence agencies right now. The work of the Inspector-General and her staff complements the work that is being undertaken within the NZSIS to strengthen our systems and processes. A Performance Improvement Framework report was published last year, which showed that the NZSIS needed to strengthen a range of areas. I am committed to leading that work, which ultimately supports greater organisational effectiveness and compliance.

In other jurisdictions, a consequence of strengthening oversight and increasing the focus on processes and systems has been an increase in issues being identified for improvement. That can on occasion be painful for the organisation involved – as was the case for the NZSIS when the Inspector-General published her report last year on our handling of OIA requests in 2011. But that is not a bad thing. In fact, it is a sign of a healthy system working properly. It is a normal consequence of putting real effort into effective systems, compliance and oversight. It is proof of greater transparency and accountability, and ultimately leads to improved public trust.

I think that the public are reassured by our level of oversight. I saw last Friday in the Herald that 62.6% of people have confidence that the intelligence agencies work within the law, or have greater confidence now that they act properly.

And while some people continue to challenge the Service's reason for being or our need for secrecy, most understand that every country needs an agency like ours, and support us.

My staff say that when they engage with members of the public, they almost always get a positive response.

The polling that the National Security Communications Team commissioned last year – when the intelligence agencies were under heavy scrutiny – supports our impression of public support. That polling showed that 76% of New Zealanders think that having the NZSIS is good, or very good, for New Zealand. 71% also think it is good, or very good, for New Zealand to be part of the Five Eyes.

In closing, I will repeat what I started out with: that privacy and security are complementary and must be balanced.

We all value personal privacy, but not at any cost. I think most people want a secure country. I think they accept that NZSIS needs the lawful authority to intercept private communications in order to protect the fundamental freedoms and values that make New Zealand the kind of country in which we want to live.

But they don't want their security agencies listening to every household, even in the interests of perfect national security. They want intrusive powers exercised only where it is necessary and proportionate.

That is the balance that must be struck. Exactly where the balance lies may shift from time to time, depending on the level of threat being experienced and the will of the people, as expressed through the democratic process.

And we, in the security agencies, will abide by the expression of that will. Because protecting and supporting democracy is our job.

Thank you.