



**ENVIRONMENT AND CONSERVATION ORGANISATIONS OF NZ INC.**

Level 2, 126 Vivian St, Wellington, New Zealand

PO Box 11-057, Wellington

Email: [eco@eco.org.nz](mailto:eco@eco.org.nz)

Website: [www.eco.org.nz](http://www.eco.org.nz)

21 June 2013

Security and Intelligence Committee  
Parliament Buildings  
Wellington

## **Government Communications Security Bureau and Related Legislation Amendment Bill**

### **1.0 Introduction**

The Environment and Conservation Organisations of NZ (ECO) is the national alliance of 58 groups with a concern for the environment. ECO has been involved in issues of environment, conservation and resource management and land-use policy since its formation in 1972.

ECO has policies on due process and an Open Society and to this end, worked for open government, the OIA, and we have sought policies and practices of public agencies and governments to protect the freedoms of civil society and civil rights. We made submissions on a series of security and intelligence law in the past. This submission has been prepared by members of ECO Executive and is in line with ECO Policy.

Finally, we thank you for the opportunity to comment. We wish the time were longer for the preparation of this submission and for the consideration of the issues revealed in the media about the USA's intelligence "net". We are very sorry that the Government only released the Cabinet papers relating to these changes on the last day of submissions, too late to be of much use to submitters.

ECO wishes to be heard in support of this submission. Please contact ECO's Executive officer on 04-385-7545 and [eco@eco.org.nz](mailto:eco@eco.org.nz) for further information.

### **2.0 Observations about the Policy, Integrity and Liberty Issues**

ECO welcomes some aspects of this Bill, particularly the extension of the oversight functions of the Inspector-General and the Security and Intelligence Committee, although these could be more extensive.

ECO opposes the fundamental purpose of the Bill and the changes to the functions, purpose and powers of the GCSB. We especially deplore the policy and legislative response to the finding that

the GCSB has acted illegally, with the distasteful legitimisation of the illegal behaviour rather than any attempt to discourage and prohibit such behaviour. We think this is very wrong.

The extension of the powers and functions of the GCSB to include the provision of services and advice to other agencies and especially to private entities is a particular worry for us, given the broad extent of the scope of this and the narrow focus on economic wellbeing. In so many of the issues that we deal with, we find our long term view of planetary systems maintenance and environmental quality and the protection of natural capital leads us into situations where our sense of preservation of New Zealand's well being is much longer term than many of those we wrangle with in public issues. Our sense of wellbeing and economic wellbeing is broader and inclusive of social, cultural, human and environmental well being, with economic wellbeing founded on these things.

We find our concern for the long term health of the environment and society to be often at odds with much shorter-term thinking which sees immediate economic growth as trumping longer term economic, environmental and social concerns. Thus we imagine that our member groups and we ourselves could become targets of the powers of the GCSB, as could unions and other totally legitimate organisations with concerns about labour policies, environmental consequences or community impacts of activities of government and infrastructure projects and other private entities' activities.

We oppose the inclusion of economic well being as a criterion for the operation of and functions of the GCSB and we particularly oppose the extension of the powers and functions to the private entities. We urge the Committee to remove these provisions.

### **3.0 Clause by Clause Submissions**

#### **3.1 Part 1**

##### **Amendments to Government Communications Security Bureau Act 2003**

Clause 6

Clause 6 replaces the existing sections 7 and 8. In relation to proposed s 7

In the 2003 Act section 7 is

#### **7 Objective of Bureau**

(1) **The objective of the Bureau is to contribute to the national security** [emphasis added] of New Zealand by providing—

(a) foreign intelligence that the Government of New Zealand requires to protect and advance—

(i) the security or defence of New Zealand; or

(ii) the international relations of the Government of New Zealand; or

(iii) New Zealand's international well-being or economic well-being; and

(b) foreign intelligence to meet international obligations and commitments of the Government of New Zealand; and

*(c) advice, assistance, and protection to departments of State and other instruments of the Executive Government of New Zealand in order to—*

*(i) protect and enhance the security of their communications, information systems, and computer systems; or*

*(ii) protect their environments from electronic or other forms of technical surveillance by foreign organisations or foreign persons.*

*(2) For the purposes of subsection (1)(a)(iii), the interests of New Zealand's international well-being or economic well-being are relevant only to the extent that they are affected by the actions or intentions of foreign organisations or foreign persons.*

In the Bill, the objective is significantly altered, so that national security is no longer the overall objective of the Bureau, it is just one, and the restriction in subsection 2 is removed:

*"7 Objective of Bureau*

*The objective of the Bureau, in performing its functions, is to contribute to—*

*"(a) the national security of New Zealand; and*

*"(b) the international relations and well-being of New Zealand; and*

*"(c) the economic well-being of New Zealand."*

**A. We urge the Committee to reinstate national security as the overall objective of the GCSB, to remove the proposed section 7(c) (above) which makes economic well being a basis for spying and other activities, and to restore subsection 2 of section 7.**

The economic wellbeing objective in 7(c) makes people and organisations of certain kinds, including those who are members of organisations such as Greenpeace, AVAAZ, the Antarctic and Southern Ocean Coalition, with global membership, who disagree with some forms of economic activity, open to the activities of the GCSB. This is contrary to a free and open society. It is not reasonable that some people's or company's pursuit of economic activity should be the basis for action by the GCSB. Private pursuit of economic activity will often be to the detriment of other aspects of well being and/or to long term ecosystem, environmental or social health and hence longer term resilience of the economy,

**B. We urge the Committee to reinstate section 7(2). In the parent Act it is**

*(2) For the purposes of subsection (1)(a)(iii), the interests of New Zealand's international well-being or economic well-being are relevant only to the extent that they are affected by the actions or intentions of foreign organisations or foreign persons*

**C. Section 8 Amendments:**

In the original Act, the Bureau has the following functions:

*"8(1)(a) to gather foreign intelligence, in accordance with the foreign intelligence requirements of the Government of New Zealand, by"— (i), (ii) and (iii).*

This conditioning in 8(1)(a) to foreign intelligence requirements of the functions of the GSCB is dropped in the Amendment Bill – so that now the GSCB has the role of undertaking domestic activities for domestic purposes, not for foreign intelligence purposes. We disagree with this language and policy intent and urge that the original be reinstated.

## C1. New Section 8B

**We propose the following changes to this proposed amendment to new Section 8B:**

### **“8B Intelligence gathering and analysis**

“(1) This function of the Bureau is—

“(a) to gather and analyse intelligence (including from information infrastructures) ~~in accordance with the Government’s requirements~~ about the capabilities, intentions, and activities of foreign persons and foreign organisations **only to the extent necessary to protect New Zealand from threats to its external security** or to our well being; and

“(b) to gather and analyse intelligence about **external** information infrastructures; and

“(c) to communicate any intelligence gathered and any analysis of the intelligence to—

“(i) the Minister; and

“(ii) any **New Zealand public** ~~person or~~ office holder (whether in New Zealand or overseas) authorised by the Minister to receive the intelligence.

“(2) For the purpose of performing its function subsection (1)(a) and (b), the Bureau may co-operate with, and provide advice and assistance to, any **New Zealand** public authority (whether in New Zealand or overseas). ~~and any other entity authorised by the Minister for the purposes of this subsection.~~

The effect of these changes would be to ensure that only public agencies can receive intelligence and that these must be New Zealand public agencies. We consider this is necessary for NZ intelligence etc to be used for New Zealand purposes only. In the light of the dubious intelligence and military practices of the USA, and no doubt others, we do not consider that sharing of such information with foreign agencies is safe for New Zealanders or New Zealand.

## C2. Proposed section 8C

**The language proposed in the Bill is:**

*“8C Co-operation with other entities to facilitate their functions*

*“(1) 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:*

*“(a) the New Zealand Police; and*

*“(b) the New Zealand Defence Force; and*

*“(c) the New Zealand Security Intelligence Service; and*

*“(d) any department (within the meaning of the Public Finance Act 1989) specified for the purposes of this section by the Governor-General by Order in Council made on the recommendation of the Minister.*

*“(2) To avoid doubt, the Bureau may perform its function under subsection (1)—*

*“(a) to the extent that the advice and assistance is provided for the purpose of activities that the entities may lawfully undertake; and*

*“(b) subject to any limitations, restrictions, and protections under which those entities perform their functions and exercise their powers; and*

*“(c) 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.*

**ECO agrees that the GCSB should be able to advise agencies on the security of their own information but we do not agree that it should be able to assist in the spying and intelligence gathering of other agencies on New Zealanders.** The reason for this is that the practices will generate informal and formal fudging of the purpose of these activities and we will find that New Zealand descends into a surveillance state. We have seen how such things happen with the GCSB’s own illegal activities and the extraordinary governmental response of legitimising this illegal behaviour, rather than demanding, and in the case of the Minister, accepting, accountability for this illegality.

**As such, we submit that the original text should stand and this subsection should be deleted.**

#### **Clause 9 Appointment of the Director.**

ECO agrees that this appointment process should be revised, and we welcome the State Services Commissioner involvement. In keeping with the principle of bipartisan foreign affairs and as a safeguard, ECO suggests that the appointment of the Director be on the joint recommendation of the Prime Minister and the Leader of the Opposition. This would moderate the power of the PM, remove the potential for a politically biased appointment, and given the sensitivity of the position and that that Director has sensitive powers, we think such a joint process is necessary and essential.

**Thus we suggest the following amendment:**

##### **“9 Appointment of Director**

*“(1) The Director of the Bureau is appointed by the Governor-General, on the recommendation of the Prime Minister **and the leader of the Opposition**, for a term not exceeding 5 years, and may from time to time be reappointed.”*

**We suggest the consequential amendment in 9c as follows:**

##### **“9C Removal from office**

*“(1) The Governor-General may at any time for just cause, on the **joint** recommendation of the Prime Minister **and the Leader of the Opposition**, remove the Director from office.*

New section 9D

This proposes:

##### **“9D Review of performance of Director**

*“(1) The Minister may direct the State Services Commissioner or another person to review, either generally or in respect of any particular matter, the performance of the Director.*

*“(2) The person conducting a review under subsection (1) must report to the Minister on the manner and extent to which the Director is fulfilling all of the requirements imposed on the Director, whether under this Act or otherwise.*

*“(3) No review under this section may consider any security operations undertaken, or proposed to be undertaken.”*

**We consider that the power of review must extend to security operations, as such, we recommend that the proposed 9D, subsection 3 be deleted.** Our rationale for this is that otherwise, an illegal operation such as that conducted in the raid on Mr Kim.Com could not be investigated. We do not agree that any agency, least of all one involved in secret activities, should be unable to be reviewed by competent and independent authorities.

#### **Clause 12 - Section 14**

The language of the Act is:

##### ***14 Interceptions not to target domestic communications***

*Neither the Director, nor an employee of the Bureau, nor a person acting on behalf of the Bureau 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.*

The Bill proposes (clause 12) instead:

##### ***“14 Interceptions not to target New Zealand citizens or permanent residents for intelligence-gathering purposes***

*“(1) In performing the Bureau’s function in section 8B, the Director, any employee of the Bureau, and any person acting on behalf of the Bureau must not authorise or do anything for the purpose of intercepting the private communications of a person who is a New Zealand citizen or a permanent resident of New Zealand, unless (and to the extent that) the person comes within the definition of foreign person or foreign organisation in section 4.*

*“(2) Any incidentally obtained intelligence obtained by the Bureau in the performance of its function in section 8B—*

*“(a) is not obtained in breach of section 8B; but*

*“(b) must not be retained or disclosed except in accordance with sections 23 and 25.”*

**ECO welcomes the exclusion in section 14, but notes that the new proposed section 14 allows the GCSB to spy on New Zealanders for Police, SIS, and other purposes. This starts to feel like a surveillance state. One has to ask whether the cure is worse than the disease. We submit that the harms from which we are being protected, may well be much less than the undermining effect on free speech and liberty and other freedoms that the provisions of this Bill provide. This is especially worrying when we have already a government with scant regard for human rights or due process.**

**Clause 14 in relation to section 15 of the Act causes ECO considerable disquiet, particularly when the purpose goes beyond the security considerations to the vague notion of well being. The proposed language is:**

**14 New sections 15A and 15B and cross-heading inserted**

After section 15, insert:

*“Authorisations to intercept communications or access information infrastructures*

*“15A Authorisation to intercept communications or access information infrastructures*

*“(1) For the purpose of performing the Bureau’s functions under section 8A or 8B, the Director may apply in writing to the Minister for the issue of—*

*“(a) an interception warrant authorising the use of interception devices to intercept communications not otherwise lawfully obtainable by the Bureau of the following kinds:*

*“(i) communications made or received by 1 or more persons or classes of persons specified in the authorisation or made or received in 1 or more places or classes of places specified in the authorisation:*

*“(ii) communications that are sent from, or are being sent to, an overseas country:*

*“(b) an access authorisation authorising the accessing of 1 or more specified information infrastructures or classes of information infrastructures that the Bureau cannot otherwise lawfully access.*

**ECO submits that this section be dropped entirely, since, in effect, it sweeps away all the safeguards for citizens and residents. It means that any civil society group or company or other organisation or person with any communications beyond New Zealand can be targeted for surveillance. We reject this as far too sweeping, and indeed as dangerous to the liberty of New Zealanders and our communities. It would capture potentially, many legitimate activities, and it puts almost everyone at risk of interception, should the PM wish to do so. We do not like this and do not accept it particularly as it could be used by the Minister in charge for political purposes. We might be able to tolerate, reluctantly this if it were restricted to for the purposes of 8A, but not for 8B.**

**Clause 20 in respect of s21, Immunity from liability**

ECO opposes the wide release from accountability that this section provides. “Good faith” on the part of secret agencies is very difficult to disprove – this provision essentially puts the agency and agents beyond any public accountability and we oppose it. **ECO recommends clause 20 is deleted from the Bill.**

**Clause 22 Section 23 amended (Destruction of irrelevant records obtained by interception)**

The section 23(2) \$1000 penalty for failing to destroy records is too low, particularly when weighted by the already low probability of the retention of such documents being detected

and prosecuted. We suggest that the penalty should be at least \$200,000, and as in section 11(2) of the 2003 Act should also carry a penalty of a prison term. We oppose the repeal of S11(2) from the 2003 Act.

Clause 22(3) and (4) The amendments contemplated by this clause widen the scope of the exceptions, so allowing more records to be retained, thus reducing the privacy of citizens and others whose data or communications are intercepted or acquired. As such, we object to this and ask that the exceptions be restricted to the equivalent scope that was in the 2003 Act.

#### **Clause 24 Section 25 replaced (Prevention or detection of serious crime)**

Replace section 25 with:

**“25 When incidentally obtained intelligence may be retained and communicated to other persons.**

This set of amendments constitutes a significant further extension of the provision of information to the various named agencies. The term “threats or potential threats” provides wide latitude. What is a potential threat? This could allow a great deal of imaginative theorising which may be completely unwarranted.

It is of particular concern that the proposal would allow the provision of the information to *“(d) any other person that the Director thinks fit to receive the information.”*

**We submit that this section 25 (d) should be deleted.**

#### ***25 New sections 25A and 25B and cross-heading inserted***

*After section 25, insert:*

*Part 1 cl 25*

*“Protection and disclosure of personal information*

***“25A Formulation of policy on personal information***

**In general ECO supports the requirement for policies on personal information but it is hard to give unqualified support without knowing what the policy contains.**

**We support the proposed principles relating to personal information in the proposed section 25B.**

## **Part 2**

### **Amendments to Inspector-General of Intelligence and Security Act 1996**

ECO supports the strengthening of the provisions of the Inspector-General of IS Act, the appointment of a deputy Inspector-General and most of the changes proposed in this section, particularly the ability of the I-G to initiate investigations.

It is critical that the office is adequately funded to ensure effective over-sight of the GCSB and SIS. The current arrangements do not provide public confidence in the oversight that is essential to an open democratic society.

#### Clause 29

As with the changes we suggest above, we submit that the recommendation of the appointment of the Inspector-General be a bipartisan matter, so we consider that the Leader of the Opposition also should be involved in the recommendation of appointment of the Deputy or the removal of the deputy as per Section 5(2)

CI 33 This purports to amend section 15(3) but we cannot find such.

#### 35 New section 25A inserted (Publication of Inspector-General's reports under section 25)

After section 25, insert:

**"25A Publication of Inspector-General's reports under section 25**

ECO supports the publication of the Inspector-General Reports, and urges that this provision be given substance.

#### Part 3

##### Amendments to Intelligence and Security Committee Act 1996

ECO supports the strengthening of this Committee as proposed in several of these proposed amendments to the ISC Act 1996.

**We submit that the Committee elect its own chairperson and that the chairperson should not be the Prime Minister as Minister in charge of Security and Intelligence. Amendments to this end should be made to the Bill and the Act.**

Yours sincerely

Cath Wallace  
Co-Chairperson