Turning the Dial
from ‘Social Licence’ to ‘Democratic Security’

New Zealand’s Intelligence and Security Agencies and the Case for an Informed Citizenry

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Executive Summary

While New Zealand does need intelligence and security agencies that ensure the integrity of our democratic institutions and protect New Zealanders from harms associated with various forms of political violence, the New Zealand Security Intelligence Service and the Government Communications Security Bureau have grown significantly during the War on Terror. Since 2001, both have received appreciable increases in funding and enlarged their respective workforces. Moreover, New Zealand parliamentarians recently granted both agencies an array of greater information-gathering and surveillance powers, helped formalise their working relationships with businesses operating within the financial and telecommunications sectors, and provided stronger secrecy provisions for their work. The growth of New Zealand's intelligence and security agencies must be situated against a background of widespread and heightened public awareness of the harms caused by transnational terrorism. It must also be understood in the context of rapid and far-reaching advances in information and communication technologies. The value of this growth, however, must be assessed against the need to better prepare New Zealand for routine, surprise and novel security challenges.

Over the past twenty years both agencies have maintained strong connections to New Zealand's wider intelligence and security communities. The growth of New Zealand's two intelligence and security agencies continues to take place as the reach of New Zealand's wider intelligence community broadens and deepens through the introduction of new sophisticated surveillance technologies within New Zealand. This growth also occurs as the New Zealand Defence Force continues to perform an increasing number of civilian tasks while the New Zealand Police becomes more militarised. The ongoing evolution of the wider intelligence and security communities is significant because, following the Government's adoption in 2011 of a very broad definition of national security that rendered opaque the distinction between external and domestic security threats, the New Zealand population is now treated as a source, or conduit, of serious danger. The recent growth of the NZSIS and the GCSB amidst this evolution of the wider intelligence and security communities signals important transformations in New Zealand intelligence work. The dynamics informing, and the consequences following from, these transformations are not yet fully understood.

In recent years several scandals involving parliamentarians or public servants, or both, appear to have undermined the public's trust and confidence in New Zealand's intelligence and security agencies. This low public trust and confidence is acknowledged by consultants in their reviews of, and inquiries into, the agencies and is also acknowledged publicly by parliamentarians, senior public servants and political reporters. It has prompted stronger oversight of, and increased transparency from, both agencies, as well as calls for both agencies to be given a social licence to operate. We suggest that a new public unease concerning intelligence work is emerging within New Zealand society despite changes to the governance arrangements that increase the public accountability of the agencies, and despite numerous reviews and inquiries. We suspect the low public trust and confidence in the New Zealand Security Intelligence Service and the Government Communications Security Bureau is intensified by successive scandals, but this new unease will be sustained by deeper concerns over the agencies' organisational leadership, close working relationships with the New Zealand Defence Force and the New Zealand Police, and connections to United States' intelligence and security agencies. By our reckoning, the Government's current approach to the question of trust and confidence in its intelligence and security agencies is limited – and has now reached its limits.

Rather than call for stronger external oversight of, and more transparency from, the intelligence and security agencies, or for further reviews and inquiries into their conduct, we reframe the nature of the current relationship between New Zealand's intelligence and security agencies and the public they serve. We suggest that fostering a society of citizens capable of granting informed consent to be subjected to state surveillance is a necessary pre-condition for the agencies to hold a social licence to operate. We go further by taking seriously the possibility of an informed citizenry becoming actively involved in democratic security practice; that is, security of the people, by the people, for the people. Democratic security is a relatively new concept that requires leaders of New Zealand's intelligence and security agencies to do something more than: enhance the visibility of their high-level policies and public-facing strategies; openly share their interpretations of the law governing their conduct; publicly explain changes in their organisational design; and justify to parliamentarians the allocation of resources against their strategic and operational priorities. It also requires leaders of those agencies to do something more

than engage in additional outreach activities with traditional stakeholders. Indeed, it behooves our intelligence and security agencies, and the leaders of those agencies, to play a pro-active role in co-creating opportunities for dialogue and engagement that enable and value differences of opinion, dissent, criticism and even critique – all of which are, of course, attributes of a vibrant liberal democracy. It requires, too, parliamentarians and other public servants to enable and support the intelligence and security agencies in this endeavor. This vision of democratic security heralds a major shift from a whole-of-government to a whole-of-society approach to intelligence and security matters.

New Zealand has already taken important steps in this direction. Cheryl Gwyn, former Inspector-General of Intelligence and Security, established a reference group comprising individuals from beyond the public service to provide her office with advice on legal, social and security developments in New Zealand and overseas, inform her work programme and offer feedback on her performance. Moreover, the Ministry of Defence has consulted with the public, including academics, during the development of its Defence White Papers 2010 and 2016. More recently, the Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019 established a Muslim Community Reference Group as a means of ensuring opportunities for Muslim communities to engage with the inquiry. The Commission's report calls for an advisory group on counter-terrorism, comprising representatives from communities, civil society, local government and the private sector, to offer advice to the Government on preventing people from engaging in extremism, violent extremism and terrorism. It also calls on the Government to establish a programme to fund independent New Zealand-specific research on the causes of, and measures to prevent, violent extremism and terrorism. While these laudable steps are a good start, we believe more could be done to transform New Zealand's intelligence and security agencies into bulwarks of democratic security practice.

We have prepared the ensuing report specifically for decision-takers responsible for directing and managing New Zealand's intelligence and security agencies. In it, we identify a set of ideas that could help turn the dial *from* the current situation where senior public servants seek a social licence to operate *towards* a future where parliamentarians, senior public servants and university leaders co-create opportunities for democratic security practice to take root and flourish. This will involve fostering an informed citizenry, socially aware, politically literate and capable not only of granting consent to be subjected to surveillance by the state, but also of more active involvement in the policies and practices needed to make all New Zealanders secure and safe. To that end, we suggest that parliamentarians improve the intellectual quality of the current debate on intelligence and security matters within the House of Representatives, be prepared to re-politicise issues that had previously been securitised and tighten the definition of national security. We also suggest that senior public servants gear the intelligence and security agencies to be more pro-active in the release of archived information, produce sanitised intelligence products for the New Zealand public and report to Parliament on their public engagement and capability-building efforts. We think both parliamentarians and public servants should engage directly with subject-matter experts when they commission reviews and inquiries into intelligence and security matters, and we strongly believe there is much merit in establishing a Parliamentary Commissioner for Security. We think academics could collaborate more often on security research, produce tailored reports for policymakers, co-design and co-deliver professional short courses on security, as well as plan and coordinate a nation-wide programme of public lectures on contemporary security challenges facing New Zealand. In identifying these ideas for further consideration, we hope to help light a pathway forward to a much safer and more inclusive New Zealand.

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1. Introduction

In this introductory section we explain why and how we prepared this report, setting forth our primary objective, outlining our key sources of information and describing our analytical method. We articulate the value of academic research into, and independent analysis of, New Zealand's intelligence and security agencies. We also signal the structure of the ensuing report.

Primary Objective

We prepared this report to test conventional thinking and challenge received wisdom on the current relationship between New Zealand's intelligence and security agencies and the public they serve. We did so because we believe this very important relationship warrants reframing in light of the public's low trust and confidence in those agencies, following scandals involving either parliamentarians or public servants, or both. We see conventional thinking clearly manifested in the Annual Reports to the House of Representatives produced by the agencies, which draw attention to actions taken that strengthen public accountability measures, but which simultaneously reveal a sophisticated surveillance apparatus used in increasingly effective and efficient ways. We see received wisdom circulating within the reports of several reviews and inquiries focusing on those agencies written by consultants, some of which made recommendations aimed at improving that trust and confidence through greater transparency of agency activities; yet most of the resulting reports tend to endorse and entrench a view that positions the intelligence and security agencies separately from – and, at times, antagonistically to – New Zealand society.

We acknowledge the allure of a social licence to operate in this context of low public trust and confidence, and identify several conditions needed for New Zealand's intelligence and security agencies to obtain and retain such licence. Foremost amongst those conditions is a New Zealand public that comprises a citizenry capable of granting informed consent to be subjected to state surveillance. Yet we also take seriously the possibility of the 'informed citizen' – that is, a socially aware and politically literate citizen – actively participating in democratic security practice. In our report, we identify a set of ideas that could, with further consideration and due deliberation, provide a strong basis for building a genuine partnership between parliamentarians, public servants and members of the public that moves beyond the limited, and limiting, whole-of-government approaches to intelligence and security matters towards a more inclusive and robust whole-of-society approach. We note, too, that university leaders and academic specialists have a special role to play here.

We have prepared this report specifically for parliamentarians with the following responsibilities:

- Minister for National Security and Intelligence;
- Minister for the New Zealand Security Intelligence Service;
- Minister for the Government Communications Security Bureau;
- Minister for Implementing the Recommendations of the Royal Commission of Inquiry into the Terrorist Attacks on Christchurch Mosques on 15 March 2019; and
- Members of the Intelligence and Security Committee.

We have also written this report for senior public officials with responsibilities for managing New Zealand's intelligence and security agencies, specifically the:

- Director-General of the New Zealand Security Intelligence Service;
- Director-General of the Government Communications Security Bureau; and the
- Deputy Chief Executive, National Security Group of the Department of the Prime Minister and Cabinet.

We expect our report will be of interest to other parliamentarians and senior public officials with responsibilities for directing and managing New Zealand's wider intelligence and security communities. Independent Crown Entities with integrity mandates covering the intelligence and security agencies – such as the Inspector-General of Intelligence and Security; Auditor-General; Chief Ombudsmen; Chief Human Rights Commissioner; and the Privacy Commissioner – might find our report relevant to their roles too.[1] We hope our report will capture the imagination of the wider New Zealand public, including political reporters and news media organisations, activists, campaigners and members of civil society organisations, as well as researchers, academics and students alike.

Professor Cynthia White (Pro Vice-Chancellor of the College of Humanities and Social Sciences, Massey University) commissioned us to prepare this report and we remain grateful for her continued support of our research. Professor White wanted us to demonstrate the value of independent and applied research to the government agencies involved in the Multi-Agency Research Network (MARN).[2] We sincerely hope that we have done so while keeping a larger audience in mind. We are also grateful to our colleagues at the Centre for Defence and Security Studies and the Politics and International Relations Programme within the School of People, Environment and Planning at Massey University for their constant encouragement and collegial support.

While we originally intended to complete our work by the middle of 2020, factors beyond our control, especially the outbreak of COVID-19 and its rampant escalation into a global pandemic, disrupted our efforts to achieve this. The Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques' report was also delayed by about a year. Sensing an opportunity in that delay, we wanted to draw on, and benefit from, the Royal Commission's findings, hoping that the timing of our report might in some way contribute to the discussions on New Zealand's longer-term response to the horrific events of 15 March 2019. Following on from the hui involving public servants, academics and community groups held in Christchurch in mid-June 2021, it strikes us that we now stand at a propitious moment when we might help turn the dial *from* a social licence to operate sought by senior public servants *towards* a democratic security practice that actively involves an informed citizenry.

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1 We have included a full list of our intended audience as Appendix 1: Distribution List.

2 MARN brings together a range of government agencies that are interested in undertaking collaborative research with each other and various academic units within Massey University.

Information Sources

In preparing this report we drew heavily on information contained in publicly available documents. We examined Annual Reports to the House of Representatives and Briefings to Incoming Ministers. We read public speeches by parliamentarians and senior public servants as well as other public statements made by them. We also consulted handbooks, strategies and other official documents concerned with intelligence and security issues. We considered several reports written by consultants who reviewed various aspects of the intelligence and security agencies. All this information has been produced or commissioned by New Zealand parliamentarians or their officials, much of it for public consumption.[3] We were mindful that these documents are byproducts of organisational objectives and constraints, artefacts of professional cultures as well as conveyers of information. Furthermore, we reflected on the results of surveys measuring New Zealand public opinion conducted by third parties and drew on the results of our own survey specifically designed and conducted for this report.

We have chosen on this occasion not to use any classified information that is available in the public domain and, in some cases, featured in New Zealand newspapers following its unauthorised disclosure overseas by, for instance, Chelsea (formerly known as Bradley) Manning or Edward Snowden.[4] Our intention here is to facilitate greater engagement between the intelligence and security agencies and the public without an expectation on those agencies to comment on their own classified material. We have also chosen not to request material under the Official Information Act 1982.[5] Nor did we request interviews with the Directors-General of the agencies in part because previous requests for interviews were not granted and in part because we do not seek here to create more primary-source material demonstrating New Zealand's intelligence and security efforts. Rather, we aim only to independently examine the relevant material that already exists in the public domain.

Having collected as much relevant primary-source material as practicable, we used that material to discern and then analyse recent transformations in New Zealand intelligence work. By analysis, we mean here a process by which we break down the phenomenon of New Zealand intelligence work into its constitutive parts (or aspects) to better understand the relationship

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3 A comprehensive list of these documents is contained in Appendix 2: Bibliography.

4 For analyses of unauthorised disclosures, see *The WikiLeaks Files: The World According to US Empire* (Verso, London and New York, 2015); see also Z Bauman, D Bigo, P Esteves, E Guild, V Jabri, D Lyon and RBJ Walker (2014) "After Snowden: Rethinking the Impact of Surveillance" (2014) 8(2) *International Political Sociology* 121; SM Hughes and P Garnett "Researching the Emergent Technologies of State Control: The court-martial of Chelsea Manning" in M de Goede, E Bosma and P Pallister-Wilkins (eds) *Secrecy and Methods in Security Research: A Guide to Qualitative Fieldwork* (Routledge, London and New York, 2020), 213; D Lyon "Big Data Surveillance: Snowden, everyday practices and digital futures" in T Basaran, D Bigo, EP Guittet and RBJ Walker (eds) *International Political Sociology: Transversal Line*s (Routledge, London and New York, 2017); and D Rogers "Snowden and GCSB: Illuminating neoliberal governmentality? in A Colarik, J Jang-Jaccard and A Mathrani (eds) *Cyber Security and Policy: A Substantive Dialogue* (Massey University Press, Auckland, 2017).

5 Classification of official information does not, in itself, preclude its release under the Official Information Act because the grounds upon which information may be classified differ from the reasons that information can be withheld. For an account describing the widespread loss of faith in New Zealand's official information request system and the rise of communication managers within the public service, see D Fisher "OIA a bizarre arms race" *The New Zealand Herald* (online ed, Auckland, 23 October 2014). See also C Gwyn *A review of the New Zealand Security Classification System* (Office of the Inspector-General of Intelligence and Security, Wellington, August 2018).

among those parts (or aspects) to one another as well as to the phenomenon of New Zealand intelligence work as a whole. By our reckoning, the key aspects worthy of immediate analysis are: (i) the various services delivered by the two intelligence and security agencies to their consumers, especially those belonging to the wider intelligence and security communities; (ii) the operational capabilities and the financial and human resources required to deliver those services; (iii) the agencies' relationships with businesses within the financial and telecommunications sectors as well as their partnerships with foreign intelligence agencies; and (iv) the arrangements governing the operation and development of the two agencies.

We also scrutinised the empirical record for any evidence of actions taken to restore public trust and confidence in New Zealand's intelligence and security agencies. Firstly, we closely examined the accountability documents produced by public servants, who suggest the release of their Annual Reports with more detailed content is evidence of increased transparency. Secondly, we closely examined reports produced by consultants tasked with undertaking various reviews and inquiries into some of the major challenges facing the intelligence and security agencies. Some of these consultants acknowledge the low public trust and confidence in the agencies, suggesting the release of their reports to the public is also an act of transparency that could help restore public faith.

Our report builds upon a range of secondary sources, particularly research on New Zealand's search for security published mostly by New Zealand-based academics. We have identified here, too, a growing corpus of literature embracing critical approaches to security studies (mostly produced by academics based overseas) because it represents the vanguard of research that is independent from the major institutions welding discernible power in intelligence and security matters. Since our conclusions are framed by two key concepts – social licence to operate and democratic security practice – we briefly surveyed the relevant academic literature as well.[6] We hope this material is valued by parliamentarians and public servants who wish to deepen and broaden their understanding of intelligence work and national security, and the continuities and departures between the two.

Value of Academic Research

We acknowledge that public service organisations, including New Zealand's intelligence and security agencies, maintain the capability to undertake research on intelligence and security matters, but we also recognise that any such research is informed and, to some degree, circumscribed by those organisations' respective lawful purposes. We acknowledge, too, that public service organisations employ university graduates, some of whom have advanced research degrees, but recognise that those graduates are less well placed to apply recent scholarship to their respective organisations' work when compared to academics who, based in universities, are routinely involved in the production of new knowledge on intelligence and security issues.[7] For fairly obvious professional reasons, we think it unlikely that most

[6] A bibliography is contained in Appendix 2: Bibliography.

[7] For more on the longer-term risks associated with contracting academic research on security and intelligence issues within New Zealand, see D Rogers "New Zealand Security Intellectuals: Critics or Courtesans?" in W Hoverd, N Nelson and C Bradley (eds) *New Zealand National Security: Challenges, Trends and Issues* (Massey University Press, Auckland, 2017) 308.

researchers within government agencies would willingly produce work that intentionally reflects poorly on their employers.

Our report is free from any such bureaucratic or executive influence. In preparing it we relied on, and continue to cherish, Section 267 of the Education and Training Act 2020, which states that academic freedom means, among other things, "the freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions" and "the freedom of academic staff and students to engage in research."[8] We embrace, too, the Education and Training Act's requirement that New Zealand universities "accept a role as critic and conscience of society."[9] Academic freedom is vital to pure research that aims to advance collective understanding through the production of new knowledge.[10] In this respect, our intellectual independence means that we do not necessarily reproduce the ways in which New Zealand's intelligence and security agencies see the world, describe themselves or justify their activities.[11] Indeed, we think those views, descriptions and justifications become worthwhile objects of enquiry.[12]

Academic freedom is valuable, too, for applied research, which speaks to communities of practice that lie beyond academia. In this case, it means that our analysis, conclusions and ideas for further consideration are offered here without fear or expectation of favour. Put simply, we speak a truth to bureaucratic and executive power in New Zealand. This intellectual independence is valuable to parliamentarians and public servants because its fruits enable an appraisal of New Zealand intelligence work, the surveillance apparatus underpinning that work, and the professional cultures and daily work practices of those employed within the intelligence and security agencies. That kind of appraisal creates an opportunity to engage with academics who have *bone fide* credentials as subject-matter experts in the field of security studies and who have their expertise recognised as such by other experts. It also opens space to discuss those appraisals, and to deliberate on their significance, with concerned community groups and other members of society. In other words, the intellectual independence inherent in academic research provides the Government opportunities to bring discussion of intelligence and security matters into the heart of the democratic process, where we think it belongs.

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8 Section 267(4)(a) and (b).

9 Section 268(2)(d)(1)(E).

10 For a robust defence of the intellectual independence of universities, see S Fish *Versions of Academic Freedom: From Professionalism to Revolution* (University of Chicago Press, Chicago and London, 2014); S Fish *Save the World on your Own Time* (Oxford University Press, Oxford, 2008); and S Fish *Professional Correctness: Literary Studies and Political Change* (Harvard University Press, Cambridge, Massachusetts, 1995).

11 See MJ Shapiro *The Politics of Representation: Writing Practices in Biography, Photography and Foreign Policy Analysis* (University of Wisconsin Press, Madison, WI, 1988); and H Ben Jaffel, A Hoffmann, O Kearns and S Larsson "Collective Discussion: Towards Critical Approaches to Intelligence as a Social Phenomenon" (2020) 14(3) *International Political Sociology* 323.

12 For examples found in the Australian security context see: M McKinley "The Co-option of the University and the Privileging of Annihilation" (2004) 18(2) *International Relations* 115; and D Sullivan "Professionalism and Australia's Security Intellectuals: Knowledge, Power, Responsibility" (1998) 33 *Australian Journal of Political Science* 421. For an account of the challenges of coopting anthropological researchers into the US military in Afghanistan, see RJ Gonzalez "Beyond the Human Terrain System: A Brief Critical History (and a look ahead)" (2018) 15(12): *Contemporary Social Science* 227, as well as RJ Gonzalez "Anthropology and the covert: Methodological notes on researching military and intelligence programmes" (2012) 28(2) *Anthropology Today* 21.

Nonetheless, we appreciate that independent and applied research into the thorny issues of intelligence and security invariably encounters sensitivities and constraints. Information on intelligence and security operations is routinely restricted, if not classified, and access to individuals employed by the intelligence and security agencies is usually tightly controlled. This impairs appreciation of changes in intelligence work, the surveillance apparatus, and professional culture and practices within the intelligence and security agencies, limiting understanding of the external pressures facing these organisations. For academic researchers, intelligence work – especially secret intelligence work with a strong transnational dimension – still takes place in a largely inaccessible 'black box.'[13]

Our report is not immune to these sensitivities and constraints. Yet, as social scientists, we were methodical in our information gathering and robust in our analysis of that information. We are confident that the conclusions presented in our report could be replicated by other researchers with the same access to information that we enjoyed.

While we happily highlight the value of independent and applied research to New Zealand parliamentarians and senior public servants, we are mindful that not everyone will appreciate our views. Our report, which aims to test conventional thinking and challenge received wisdom on the current relationship between New Zealand's intelligence and security agencies and the public they serve, may prove unsettling for some individuals and groups who remain professionally invested in preserving status-quo arrangements. We think it is, however, in the public interest for all New Zealanders to have an opportunity to become better informed on, and more engaged in debates over, intelligence and security issues. We believe New Zealand-based academics are well placed to contribute to that aspiration by promoting community learning and enhancing social awareness and political literacy among New Zealanders; indeed, short-circuiting some of the tension surrounding the intelligence and security agencies' need for secrecy and those frequently calling for greater transparency lies at the heart of our report.

Report's Structure

We have organised our report into six sections, which are supported by four appendices. The first section is this introduction, which, as mentioned, states our primary objective in preparing this report, outlines our key sources of information and describes our analytical method. It articulates the value of academic research into, and independent analysis of, New Zealand's intelligence and security agencies.

In Section 2 of our report we define the problem under consideration as we see it. We point to the very broad definition of national security adopted by the Government in 2011, relay the current purposes, functions and powers of New Zealand's intelligence and security agencies, and demonstrate that intelligence work is no longer bound by the pursuit of national security. Since the dynamics informing, and consequences following from, recent transformations in

[13] See M de Goede, E Bosma and P Pallister-Wilkins (eds) *Secrecy and Methods in Security Research: A Guide to Qualitative Fieldwork* (Routledge, London and New York, 2020), especially A Starianakis "Searching for the Smoking Gun? Methodology and modes of critique in the arms trade," 231; See also D Bigo "Shared Secrecy in a digital age and a transnational world" (2019) 34(3) *Intelligence and National Security* 379; and W Walters *State Secrecy and Security: Refiguring the Covert Imaginary* (Routledge, New York, 2021).

New Zealand intelligence work are not well understood, we identify four key aspects that warrant immediate analysis: service delivery; organisational capabilities and resourcing; relationships and partnerships; and governance arrangements. We convey the main reasons why New Zealand's intelligence and security agencies need the veil of official secrecy before we mention various scandals which, embroiling those agencies in recent years, appear to have diminished the public's trust and confidence in their work. We appreciate that secrecy is double-edged as it is used to shield intelligence work while hampering the ability of senior public servants to demonstrate the value of that work. We submit this constitutes a complex and urgent problem for New Zealand parliamentarians and their public servants.

In Section 3 we trace major transformations that have occurred within New Zealand's intelligence and security agencies since the beginning of the War on Terror, focusing on major changes to service delivery and organisational design as well as to existing governance arrangements. Situating those agencies within the wider intelligence and security communities, we also reveal the large extent to which these changes have strengthened those agencies' relationships not only with other government departments, but also with commercial enterprises operating within New Zealand's economy. Key international partnerships remain as important as ever.

In our fourth section, we examine several reports resulting from various reviews and inquiries into the intelligence and security agencies that were commissioned by either public servants or parliamentarians. We note the similarities among the professional backgrounds of the reports' authors and explain how these consultants were appointed and under what authority. We outline the relevant terms of reference and describe each report's substantive findings as well as any recommended changes to improve service delivery performance and organisational design or to strengthen governance arrangements. While most of the reports momentarily pierce the veil of secrecy and offer a limited degree of transparency into these agencies' conduct, only a few of the consultants recommended actions to restore public trust and confidence in New Zealand's intelligence and security agencies.

Drawing on our findings in the preceding sections, we suggest in Section 5 that the current approach taken by the New Zealand Government to address the question of public trust and confidence is limited, and has reached those limits. This is because New Zealand intelligence work now generates an unease among the wider public that runs counter to those agencies' objectives, despite stronger external oversight of, and increased transparency from, those agencies, and despite several reviews and inquiries into their conduct. We believe the low public trust and confidence in the New Zealand Security Intelligence Service and the Government Communications Security Bureau is intensified by successive scandals, but suspect this new unease around intelligence work will be sustained by deeper concerns over the quality of organisational leadership, the close working relationship with the New Zealand Defence Force and the New Zealand Police, and the strong connection to United States intelligence and security agencies. Section 5 then introduces two key concepts – social licence to operate and democratic security practice – that frame our conclusions. We identify several conditions required for New Zealand's intelligence and security agencies not only to acquire and maintain a social licence to operate, but also to become bulwarks of democratic security

practice. We point to encouraging signs of initial progress, then signal the distance that remains to be travelled, as well as the direction of that required travel, before New Zealand society will comprise a citizenry capable of granting informed consent to be subject to surveillance by the state.

The final section of our report offers a set of ideas for further consideration by parliamentarians, senior public servants and university leaders. By helping turn the dial – *from* the current situation where the Directors-General of the intelligence and security agencies seek a social licence to operate *towards* a future where parliamentarians, public servants and university leaders co-create opportunities that foster an informed citizenry capable not only of granting consent to be surveilled by the state, but also of directly participating in the practices of democratic security – we hope to help light a pathway forward to a much safer and more inclusive New Zealand.

2. *Statement of the Problem*

In this section we share our understanding of the problem at hand. We begin by pointing to the very broad definition of national security adopted by the Government in 2011 before we explain that the current purposes, functions and powers of New Zealand's intelligence and security agencies expand the remit of New Zealand intelligence work beyond the search for national security. We convey the main reasons why New Zealand's intelligence and security agencies need a veil of official secrecy before we outline various scandals which, embroiling parliamentarians or public servants, or both, appear to have diminished the public's trust and confidence in the agencies in recent years. We note that secrecy is double-edged, shielding intelligence work while hampering those senior public servants demonstrating the value of that work. We think this constitutes a complex and urgent problem for New Zealand parliamentarians and their public servants. Noting that the dynamics informing, and the consequences following from, the recent transformations in New Zealand intelligence work are not well understood, we identify service delivery, organisational capabilities and resources, relationships and partnerships, and governance arrangements as four key aspects of that work which warrant immediate analysis.

National Security and Intelligence

The New Zealand Security Intelligence Service (NZSIS) and the Government Communications Security Bureau (GCSB) are the only agencies currently designated as intelligence and security agencies under Section 7 of the Intelligence and Security Act 2017.[14] Founded in 1956 as the New Zealand Security Service, the NZSIS operated for thirteen years under an Order-in-Council. Parliament passed the New Zealand Security Intelligence Service Act in 1969, altering the organisation's name and giving it a legislative base. The NZSIS specialises in human intelligence and delivers protective services, most notably recommendations on the fitness of individual public servants to hold the security clearances required to access, store or use classified information.[15] The GCSB was formally established in 1977 as a civilian agency within the Defence establishment, though the Government had conducted signals intelligence operations during the Second World War.[16] Specialising in signals intelligence, the GCSB also delivers information assurance in the form of advice and support to protect the Government's communications and information systems, as well as cybersecurity services. The GCSB

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[14] There is scope for additional entities to become intelligence and security agencies under the Intelligence and Security Act 2017 and this was likely the intent of the Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019 when it recommended the Government establish a new intelligence and security agency responsible for strategic intelligence and security leadership, including the development and implementation of a 'systemic' or whole-of-government counter-terrorism strategy. See W Young and J Caine *Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* at 734.

[15] See M Cullen and P Reddy *Intelligence and Security in a Free Society: Report of the First Independent Review of Intelligence and Security in New Zealand* (29 February 2016) at 38-40; See also Young and Caine, above note 14, at 469-474.

[16] D Ball, C Lord and M Thatcher, *Invaluable Service: The secret history of New Zealand's signals intelligence during two world wars* (Resource Books, Waimauku, 2011).

became an entity separate from the Defence establishment in 1982 and, in 2003, Parliament passed the Government Communications Security Bureau Act.[17]

The establishment and ongoing operation of the NZSIS and the GCSB has been justified in terms of their unique contributions to New Zealand's security, including by New Zealand Prime Ministers from Rt Hon Sydney Holland during the Cold War to Rt Hon John Key during the War on Terror.[18] Yet the term 'security' is an essentially contested concept, which means it represents different things to different people at different times.[19] During the Cold War, the New Zealand Security Intelligence Service Act 1969 initially defined security as "the protection of New Zealand from acts of espionage, sabotage, and subversion, whether or not it is directed from or intended to be committed within New Zealand." The Act was amended in 1977 to include international terrorism following a spate of high-profile airplane hijacks and hostage takings. After the Cold War, that Act was again amended in 1996 and security was redefined as any activity that helps preserve New Zealand society as independent, free and democratic, protecting it from acts of espionage, sabotage and subversion, clandestine and deceptive activities conducted by foreign organisations, and terrorism, irrespective of the territory in which such an act occurs.[20] Shortly after the War on Terror commenced, New Zealand parliamentarians did not define the term in the Government Communications Security Bureau Act 2003 but nevertheless envisaged national security as an objective achieved by providing: firstly, intelligence on the capabilities, intentions or activities of a foreign organisation or person; secondly, foreign intelligence to meet New Zealand's international obligations and commitments; and thirdly, information assurance services that protect New Zealand's official information and information systems, particularly from technical surveillance by foreign organisations. Under that Act, the security or defence of New Zealand was separate to the international relations of the Government of New Zealand or New Zealand's international wellbeing or economic wellbeing.[21]

According to the Department of the Prime Minister and Cabinet (DPMC), national security is "the condition which permits the citizens of a state to go about their daily business

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[17] Prior to the GCSB's establishment, New Zealand operated a high frequency radio interception station at the land-based naval establishment, HMNZS Irirangi, near Waiouru. In 1982, GCSB consolidated its radio-interception capability at Tangimoana, near Bulls, and in 1989 it opened its satellite communications interception station at Waihopai, near Blenheim. Department of the Prime Minister and Cabinet, *Securing Our Nation's Safety: How New Zealand Manages its Security and Intelligence Agencies* (Department of the Prime Minister and Cabinet, Wellington, 2000) at 26-27; see also Young and Caine, above note 14, at 497-499.

[18] Office of the Prime Minister "Directive on Constitution and Operation of the New Zealand Security Service" New Zealand Security Intelligence Archives, Wellington, reproduced as Appendix G of ML Wharton "The Development of Security Intelligence in New Zealand, 1945-1957" (Master of Defence Studies Thesis, Massey University, 2012). See also D Rogers "Intelligence and Security Act 2017: A Preliminary Critique" (2018) Part IV *New Zealand Law Review* 657.

[19] See B Buzan *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War* era (ECPR Press, Colchester, 2016; first published Harvester-Wheatsheaf, Hemel Hempstead, 1991); M Dunn Cavelty and V Mauer (eds) *The Routledge Handbook of Security Studies* (Routledge, New York and London, 2010); F Gros *The Security Principle: From Serenity to Regulation*. Trans. D Broder (Verso, London, 2019); J Huysmans *Security Unbound: Enacting Democratic Limits* (Routledge, London and New York, 2014); and K Krause and MC Williams (eds) *Critical Security Studies: Concepts and Cases* (Routledge, Oxon, 1997); M Neocleous, *Critique of Security (*McGill-Queen's University Press, Montreal and Kington, Ithaca, 2008).

[20] New Zealand Security and Intelligence Act 1969, s 4AAA(1)(a) (repealed).

[21] Government Communications Security Bureau Act 2003, s 7(1) (repealed).

confidently free from fear and able to make the most of opportunities to advance their way of life. It encompasses the preparedness, protection and preservation of people, and of property and information, both tangible and intangible."[22] This definition was approved by a Cabinet decision in 2011.[23] It renders opaque the distinction between external and domestic security threats, meaning the New Zealand population is now treated not only as an object worthy of the Government's protection, but also as a source of, or conduit for, serious danger.[24]

In their review of the NZSIS and the GCSB (see below in section 4), Sir Michael Cullen KNZM and Dame Patsy Reddy DNZM recommended a specific definition of national security be enshrined in law. In particular, they recommended that the term national security mean protecting not only New Zealand's status as a free and democratic society, but also its economy and international relations, from an array of unlawful acts or foreign interference. It should also cover the protection of life, safety or quality of life of the New Zealand population, the integrity of New Zealand's critical information or infrastructure, and international security from threats or potential threats as well as the protection of New Zealanders overseas from imminent threats. The term should extend, too, to protecting foreign populations from ideologically, religiously or politically motivated unlawful acts committed by New Zealanders. Parliament did not accept that recommendation, however.

The key piece of legislation governing the conduct of the NZSIS and the GCSB, the Intelligence and Security Act 2017, does not include a definition of national security even though the principal objectives of New Zealand's intelligence and security agencies are:

> (a) the protection of New Zealand's national security; and
>
> (b) the international relations and well-being of New Zealand; and
>
> (c) the economic well-being of New Zealand.[25]

Without defining any of these key terms, this Act nevertheless presents national security as something distinct from New Zealand's international relations and well-being, and as something distinct from New Zealand's economic well-being. In so doing, Section 9 of the Act dissolves the hitherto strong connection between intelligence-gathering activities and the pursuit of national security because its framing of organisational objectives provides the NZSIS and the GCSB an expansive operating environment, limited only by the elasticity of these vaguely-worded objectives.

Under the Intelligence and Security Act 2017, the functions of the intelligence and security agencies are to:

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[22] Department of the Prime Minister and Cabinet *National Security Handbook* (2016) at 7; See also Department of the Prime Minister and Cabinet, *New Zealand's National Security System* (2011) at 3.

[23] According to the Department of the Prime Minister and Cabinet's most recent *Briefing to the Incoming Minister for National Security and Intelligence* (2 November 2020 at 2), the definition was approved by a Cabinet decision in 2011 (POL Min (01) [33/18].

[24] This blurring is most evident in the concern for home-grown terrorism. Referring to the threat of violence by extremists groups, such as Islamic State, Al Qaeda and Al Shabaab, the NZSIS "remain concerned about individuals in New Zealand who subscribe to these groups' extremists views." See R Kitteridge "NZSIS Director-General ISC opening statement," 12 February 2020.

[25] S.9(a)-(c).

> (a) collect and analyse intelligence in accordance with the New Zealand Government's priorities; and (b) provide any intelligence collected and any analysis of that intelligence to 1 or more of the following: (i) the Minister; (ii) the Chief Executive of the Department of the Prime Minister and Cabinet; (iii) any person or class of persons (whether in New Zealand or overseas) authorised by the Minister to receive the intelligence and any analysis of that intelligence.[26]
>
> provide protective security services, advice, and assistance to: (a) any public authority (whether in New Zealand or overseas); and (b) any person or class of persons (whether in New Zealand or overseas) authorised by the Minister responsible for the intelligence and security agency to receive the services, advice, and assistance.[27]
>
> In relation to the Government Communications Security Bureau, the information assurance and cybersecurity activities referred to in paragraph (a)(ii) of the definition of protective security services, advice, and assistance in section 11(3) are: (a) providing information assurance and cybersecurity activities to a public authority, person, or class of persons referred to in section 11(1); and (b) doing everything that is necessary or desirable to protect the security and integrity of communications and information infrastructures of importance to the Government of New Zealand, including identifying and responding to threats or potential threats to those communications and information infrastructures.[28]
>
> (a) co-operate with (i) each other; and (ii) the New Zealand Police; and (iii) the New Zealand Defence Force; and (b) provide advice and assistance to the New Zealand Police and the New Zealand Defence Force for the purpose of facilitating the performance or exercise of the functions, duties, or powers of those public authorities.[29]
>
> (a) co-operate with, and provide advice and assistance to, a person, class of persons, or public authority (whether in New Zealand or overseas) that is responding to an imminent threat to the life or safety of: (a) any person in New Zealand; or (b) any New Zealand citizen who is overseas; or (c) any permanent resident of New Zealand who is overseas; or (d) any person in an area in respect of which New Zealand has search and rescue responsibilities under international law; or (e) any person outside the territorial jurisdiction of any country.[30]

Four of these five functions are common to both intelligence and security agencies. In order to fulfil these functions, New Zealand parliamentarians granted both intelligence and security agencies an array of greater information-gathering and surveillance powers. Part 5 of the Intelligence and Security Act 2017 broadens the agencies' information-gathering reach into other public service organisations, enabling access to official information, including New Zealanders' personal information. While the NZSIS and the GCSB have always been able to request official information, the agencies can now establish arrangements to obtain direct and ongoing access to any database containing relevant information. Access to restricted information held by the Inland Revenue Department and the Department of Internal Affairs, among others, can be approved by the relevant Minister on national security grounds, or if the information contributes to New Zealand's international relations and well-being or economic wellbeing. Part 5 also expands both agencies' information-gathering reach beyond the machinery of government to include access to records held by commercial enterprises and

[26] S.10(1)(a) and (b)
[27] S.11(1)(a) and (b)
[28] S.12(1)(a) and (b).
[29] S.13(1)(a) and (b).
[30] S.14(1)(a) and (b).

private businesses, including customer and subscriber details, bank account numbers, credit card numbers, IP addresses, call association data, device-related information and mobile data usage held by telecommunications network operators as well as statement, account and transaction information held by financial service providers. Business operators have 30 days to comply or else they commit an offence punishable by a term of imprisonment no longer than one year or a fine not exceeding $40,000.[31]

While the reach of the NZSIS and the GCSB into New Zealand's machinery of government and the financial services sector is now formidable under the Intelligence and Security Act 2017, the Telecommunications (Interception Capability and Security) Act 2013 created other duties for operators within New Zealand's commercial telecommunications industry. Under Part 2 of that Act, network operators must ensure that surveillance agencies – a term that includes both the intelligence and security agencies and law-enforcement agencies – can access any public communications network that the operator owns, controls or operates and every telecommunication service that operator provides in New Zealand. Part 3 of that Act compels those network operators to cooperate with the GCSB in situations where risks to network security exist. The GCSB can better shape the communication and information environments, making these amenable to its intrusion, monitoring and surveillance. Parliamentarians have not only granted intelligence and security agencies the power to obtain ongoing access to official information held on New Zealanders, but have also reshaped the communication and information environments in such a way as to give those agencies a centralised position from which to observe, analyse, assess and, in some cases, act.[32]

The dynamics informing, and the consequences following from, these recent transformations in New Zealand intelligence work are not well understood. By our reckoning, the key aspects of New Zealand intelligence work worthy of immediate analysis are: (i) the various services delivered by the two intelligence and security agencies to their consumers, especially those belonging to the wider intelligence and security communities; (ii) the organisational capabilities and financial and human resources required by the agencies to deliver those services; (iii) the agencies' key relationships with businesses within the financial and telecommunications sectors as well as their partnerships with foreign intelligence agencies; and (iv) the arrangements governing the operation and development of the two agencies.

Official Secrecy

Securing Our Nation's Safety: How New Zealand Manages its Security and Intelligence Agencies was the first official publication about the NZSIS and the GCSB written for the New Zealand public. In that brochure, the then-Prime Minister Helen Clark stated:

> The fact that [New Zealand's intelligence and security] agencies deal in secret information has led them to be secretive about their activities. That degree of secrecy is not always necessary. In the absence of information, people wonder about the need for the agencies in the first place, and about the checks in place to ensure the rights and privacy of New Zealanders are protected.

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31 S.118 to S.155.

32 For a more detailed analysis, See Rogers "Intelligence and Security Act 2017," above note 18.

> This [brochure] provides information about these agencies. Its publication coincides with the introduction into Parliament of a Bill which defines the functions of the Government Communications Security Bureau and provides a legislative framework for its administration and the conduct of its operational activities.[33]

Former New Zealand Prime Minister Sir Geoffrey Palmer explained that:

> In essence intelligence is secret information about an actual or potential enemy of the nation. An intelligence agency is an office that gathers such information.
>
> New Zealand has had security and intelligence agencies for many years… The existence of these agencies is often severely criticised by New Zealanders, particularly on account of their secrecy. While there has been a more open attitude to the need for security and intelligence agencies in recent years, many feel that the agencies should be more open to public scrutiny than they are.
>
> There is a contradiction here. The more that is known about the activities of the agencies, the less effective they are likely to be. Secrecy, particularly of the intelligence itself, is critical. Thus, the principles of open government and transparency that apply to so much of the New Zealand government today cannot, without qualification, apply to the security and intelligence agencies.[34]

The current minister responsible for New Zealand's intelligence and security agencies echoes these views. In his first official speech as minister responsible for the NZSIS and the GCSB, Hon. Andrew Little stated that "[m]uch of the effectiveness of [the intelligence and security agencies'] work depends on their information, their methods and their people not being exposed" and that "[n]o one can expect our security and intelligence agencies to disclose operational details, targets of their work, methods deployed or the nature of their intelligence gathering."[35]

Consultants commissioned to review various aspects of New Zealand's intelligence and security agencies reproduce these views, too. For example, Cullen and Reddy explain that:

> Activities that threaten New Zealand's national security, such as transnational crime, espionage and terrorism, are often carefully orchestrated in order to avoid the attention of the state…. The nature of these activities is such that, to be effective in countering them, collection of intelligence to detect them also needs to be done in secret. Because of this, in many instances countering covert behaviour by people of states by collecting information in secret is unavoidable.[36]

More recently, the authors of the *Report of the Royal Commission of Inquiry into the Terrorist Attack on Christchurch Masjidain on 15 March 2019* (see below in section 4) also accepted the agencies' need for secrecy, but encouraged public servants to better share their classified material, when they wrote:

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[33] H Clark "Foreword," *Securing Our Nation's Safety: How New Zealand Manages its Security and Intelligence Agencies* (Wellington: Department of the Prime Minister and Cabinet, 2000) at 5.

[34] G Palmer "Security and Intelligence Services—Needs and Safeguards" *Securing Our Nation's Safety: How New Zealand Manages its Security and Intelligence Agencies* (Wellington: Department of the Prime Minister and Cabinet, 2000) at 9.

[35] A Little, "Opening address to the Massey University National Security Conference 2018" (Massey University, Albany, 5 April 2018).

[36] Cullen and Reddy, above note 15, at 33.

> The more highly classified a document, the fewer people can see it. The main barriers to sharing highly classified information relate to human decisions and attitude. System-wide efforts to improve sharing of highly classified information have been inconsistent. The "need to know" principle appears to be applied as a rational for not sharing information rather than as an opportunity to think through whose work could be better enabled by access to it. Public sector agencies tend to over-classify information. Public sector agencies could make more effort to produce information at lower classifications either through ensuring documents are correctly classified at the lowest appropriate level or producing different versions of the information.[37]

Several provisions of the Intelligence and Security Act 2017 help strengthen this veil of official secrecy. Penalties for unauthorised disclosures of classified information now include a fine of no more than $10,000. Publicly naming a staff member of the NZSIS or the GCSB can now result in a fine of no more than $5,000 for an individual and $20,000 for a body corporate.[38] The Inspector-General of Intelligence and Security can, however, receive protected disclosures relating to classified information or the activities of the intelligence and security agencies.[39] While the agencies need to operate in secret to be effective, the veil of secrecy produces and entrenches a widespread ignorance of their work among the New Zealand public. This is also double-edged, however, because it hampers senior public servants when they seek to demonstrate the value of New Zealand intelligence work.

Government Scandals

Like other intelligence and security agencies located around the world, the NZSIS and the GCSB have a controversial past.[40] William Sutch, a senior public servant, was suspected of being a spy for Soviet intelligence in the mid-1970s, but was acquitted of charges laid under the Official Secrets Act 1951 and it was later found that the NZSIS had exceeded their powers in their investigation.[41] NZSIS officers were interrupted as they were unlawfully breaking into the home of a New Zealand citizen, Aziz Chowdry, in 1996.[42] After the end of the Cold War, New Zealand's involvement in the so-called Five-Eyes alliance was exposed when light was

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37 Young and Caine, above note 15, at 527.

38 S 22(5).

39 See C Macdonald, R Ball and WJ Hoverd "Playing Hide and Speak: Analyzing the Protected Disclosures Framework of the New Zealand Intelligence Community" (2020) 33(2) *International Journal of Intelligence and Counterintelligence* 248.

40 Cullen and Reddy cite the following reviewed triggered by various controversies in their footnote 5 at 14: Parliamentary Joint Committee on Intelligence and Security, *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* (AU May 2013); The President's Review Group on Intelligence and Communications Technology, *Liberty and Security in a Changing World* (USA, 12 December 2013); Intelligence and Security Committee of Parliament, *Privacy and Security: A Modern and Transparent Legal Framework* (UK March 2015): David Anderson QC, *A Question of Trust: Report of the Investigatory powers review* (UK, June 2015); and Royal United Services Institute, *A Democratic Licence to Operate: Report of the independent surveillance review* (UK, July 2015). Also see, more recently, Commonwealth of Australia, *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report* (2020); and United States Government Senate Select Committee on Intelligence, *The Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (2019). For excellent analyses of the "Feinstein Report," see E Guild, D Bigo and M Gibney eds. *Extraordinary Rendition: Addressing the Challenges of Accountability* (New York: Routledge 2018).

41 G Hunt *Spies and Revolutionaries: A History of New Zealand Subversion* (Reed Publishing, Auckland, 2007).

42 B Rudman "The GC(SB): A touching story of everyday spies" *The New Zealand Herald* (online ed, Auckland, 20 May 2015).

cast on the roles played by the GCSB in the ECHELON system.[43] Since then, peace activists routinely protest New Zealand's close relationship with security and intelligence agencies from the United States, culminating in the deflation of a protective dome covering satellite dishes located at the GCSB's Waihopai Station, near Blenheim, in April 2008.[44]

More recently, the actions of a few public servants have almost certainly eroded public trust and confidence in New Zealand's intelligence and security agencies. Perhaps the most high-profile scandal concerns the GCSB's unlawful surveillance of Kim Dotcom. GCSB had surveilled Dotcom, a German-Finnish entrepreneur who had been granted permanent residence status in New Zealand, to assist the New Zealand Police with the execution of a search warrant on 22 January 2012. Dotcom and his associates were arrested that day for alleged violations of US copyright law in accordance with a Mutual Legal Assistance Treaty between New Zealand and the United States.[45] The New Zealand public become aware on 9 August 2012 that the GCSB had conducted this unlawful surveillance when Detective Inspector Grant Wormald admitted, under questioning at the High Court in Auckland, that the GCSB had provided assistance to the raid he led on Dotcom's home.[46] The New Zealand public was subsequently informed that the GCSB had conducted surveillance of a further 55 cases involving 88 individuals in order to support law-enforcement agencies and that this surveillance may have also been unlawful.[47] This surveillance directly contravened New Zealand law at the time, as the Government Communications Security Bureau Act 2003 stated that "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."[48]

Another scandal involving New Zealand's intelligence and security agencies became public knowledge on 13 August 2014, with the publication of Nicky Hager's *Dirty Politics: How attack politics is poisoning New Zealand's political environment*.[49] Hager recounted how three and a half years earlier, on 14 March 2011, Dr Warren Tucker (then-Director of the NZSIS) provided a briefing on an investigation into Israeli intelligence activities to Phil Goff, (then-Leader of the Opposition). Hager showed that Tucker may have possessed a written briefing paper on that issue, but Goff neither saw nor read that paper during their meeting. This was important because Goff had earlier criticised Prime Minister John Key's handling of the matter because Goff, as Leader of the Opposition, had not been briefed on the issue when, in fact, he ought to have been. This dispute become a scandal when, on 4 August 2011, the NZSIS

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43 N Hager *Secret Power: New Zealand's Role in the International Spy Network* (Craig Potton Publishing, Nelson, 1996).

44 NZPA "Three arrested as activists attack Waihopai spy base domes, deflating one" *Newshub* 29 April 2008; H Stuart "Waihopai activists found not guilty" *Stuff* 17 March 2010. See also A Leason "Ploughshares at Waihopai" in G Troughton & Philip Fountain (eds) *Pursuing Peace in Godzone: Christianity and the Peace Tradition in New Zealand* (Wellington, Victoria University Press 2018).

45 See Cullen and Reddy, footnote at 14.

46 H Winkelmann (2013) Judgement of Justice Helen Winkelmann: Dotcom v Attorney-General of New Zealand, return of evidence. See also D Rogers "Extraditing Kim Dotcom: a case for reforming New Zealand's intelligence community?" (2015) 10(1), *Kotuitui: New Zealand Journal of Social Sciences* 46.

47 R Kitteridge *Review of Compliance at the Government Communications Security Bureau* (March 2013).

48 S 14.

49 N Hager *Dirty Politics: How attack politics is poisoning New Zealand's political environment* (Craig Potton Publishing, Nelson, 2014).

released redacted documents to a blogger named Cameron Slater – who claimed a close association to the Prime Minister and is the son of a former National Party President – while refusing media requests for the same information.

An inquiry undertaken in late 2014 by the Inspector-General of Intelligence and Security found that the NZSIS provided information to Slater that was incomplete, inaccurate and misleading and provided similar, yet more detailed, information to the Prime Minister and his office.[50] It also found those disclosures resulted in unfair criticism of Goff by Slater, other commentators and news reporters while providing the basis for certain public comments aimed to discredit Goff by the then-Prime Minister and Deputy Prime Minister during an election year. It found, too, that the NZSIS not only failed to clarify or correct the information they had disclosed after the impact of these errors became apparent, but also denied the information requests made by political reporters while granting the request made by Slater. The report arising from the inquiry was highly critical of the NZSIS and of Dr Tucker's lack of judgement in managing the controversy over his meeting with Goff. Even though the inquiry could not focus on the conduct of the Prime Minister's office, the report revealed that a staff member from that office provided the NZSIS information to Slater for Key's political advantage. The inquiry resulted in the new Director of the NZSIS Rebecca Kitteridge offering a public apology to Goff on 25 November 2014.

The actions of some parliamentarians have also almost certainly helped erode public confidence in New Zealand's intelligence and security agencies. Several scandals, which have occurred within the corridors of power, embroiled the then-Prime Minister, John Key.

Firstly, Key misled the public, in late 2012, over when he first became aware of Dotcom's existence and learnt of the GCSB's interest in him. Dotcom is no ordinary New Zealander. He resided in one of the country's most expensive properties located in Key's own electorate of Helensville and funded a massive firework display for Aucklanders on New Year's Eve of 2011 as a means of celebrating his residency status. Key insisted that he had not heard of Dotcom until 17 September 2012. However, on a visit to the GCSB on 29 February 2012, Key received a briefing that included a photo of Dotcom. Key and GCSB Director Fletcher both disputed this fact until a junior staff member who had prepared the briefing insisted it took place. Confronted with the junior staff member's evidence that he misled the New Zealand public, Key corrected the Hansard record on 16 October 2012.[51] In what may have been a rare moment of candor, Key subsequently admitted to his biographer, John Roughan, that he considered resigning over the scandal given the sustained political pressure it generated.[52]

Secondly, Key admitted on 3 April 2013 that he intervened in the selection process to fill the vacant post of the GCSB Director.[53] During 2010, a shortlist of possible candidates drawn

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50 C Gwyn *Report into the release of information by the New Zealand Security Intelligence Service in July and August 2011* (25 November 2014).

51 Editorial "Editorial: Kim Dotcom sets off year of fireworks for politicians "*New Zealand Herald* (online ed, Auckland, 27 December 2012); J Key "PM releases results of the GCSB file review" (press release, 4 October 2002). See also D Rogers "Intelligence and Security Act 2017" above note 18.

52 J Roughan *John Key: Portrait of a Prime Minister* (Penguin, Auckland, 2017) at 210-213.

53 Editorial "Key 'had forgotten' call to Fletcher" *3 News,* 3 April 2013; Editorial "Key's role upsets former spy chief" *New Zealand Herald*, 4 April 2013; A Vance "Key met spy candidate for breakfast" *Dominion Post*,

up by a recruitment consultant was rejected by State Services Commissioner Ian Rennie before those on the list could be assessed. Key phoned Ian Fletcher, a family friend during Key's childhood, encouraging him to apply for the post after he had raised Fletcher's name with Rennie. Fletcher, who was originally unaware there was a vacancy, was subsequently appointed to the role by Key on Rennie's recommendation. Fletcher was the only name on the revised short-list. At first, Key denied intervening in the process, but subsequently conceded that he had called Fletcher about the job. Although Key claimed he had forgotten making the call, only vaguely knew Fletcher and could not recall meeting Fletcher around that time, Fletcher confirmed that they had met over breakfast or lunch on at least three occasions within a short time span. Key subsequently corrected himself, citing a faulty memory. For some political commentators and members of the Opposition, these lapses in Key's recollection strained belief.[54]

Thirdly, in June 2013 Peter Dunne, a Minister in Key's Cabinet, resigned his ministerial portfolio after withholding information from an investigation conducted by David Henry into the leaking of a top-secret report that investigated GCSB's unlawful surveillance to Andrea Vance, a political reporter working at that time for Fairfax.[55]

We think it implausible that the abovementioned scandals could create a positive impression of the agencies and believe, instead, that these successive scandals play a role in New Zealanders' low public trust and confidence in the NZSIS and the GCSB.

Public Trust and Confidence

Several surveys of the New Zealand public have been undertaken during the past decade, providing us with some insight into New Zealanders' awareness of security issues, including their appreciation of the major threats confronting New Zealand. These surveys also provide insight into New Zealanders' understanding of the NZSIS and the GCSB. These surveys only indicate a level of public trust and confidence and are not, of course, an authoritative reflection of every New Zealander.

DPMC commissioned two surveys on security issues in October 2014 and November 2016.[56] According to those surveys, in 2014 only 10% of respondents thought New Zealand was at strong or great risk of terrorism, major cyberattacks and espionage, with almost half thinking there was minimal or no risk, though 70% of respondents thought there was a great or very great risk globally from terrorism, with half thinking that the risk was greater than in the previous year. In 2016, 10% of respondents still thought New Zealand was at great or very great risk of a terrorist attack, whereas almost half thought there was no or minimal risk, though only 32% thought the risk of terrorist attack was higher than a year before. In 2016, 39% of

24 April 2013; A Vance "Key forgets tip to friend over spy job" *Stuff*, 4 April 2013; and G Robertson "John Key right on one thing –he is clueless" (press release, 16 April 2013).

54 V Small "Inquiry into future of GCSB warranted" *Dominion Post,* 11 April 2013; and J Armstrong "GCSB trickery and deception revealed" *The New Zealand Herald*, 11 April 2013.

55 The report was written by Rebecca Kitteridge, which was subsequently released without the classified material contained in appendices. See Editor "Peter Dunne resigns in spy leak fallout" *Dominion Post*, 10 June 2013.

56 Curia Market Research, "Security Issues Poll" November 2016; and Curia Market Research, "Security Issues Poll" October 2014.

respondents thought New Zealand was at great or very great risk of a major cyberattack, and only 21% thought there was no or minimal risk; almost half thought the risk of a major cyberattack had increased over the past year.

In 2014, 76% of respondents thought the NZSIS was doing a good or very good job, and 68% thought the GCSB was doing a good or very good job. In 2016, over three quarter of respondents thought the NZSIS were doing a good or very good job whereas only 60% thought the GCSB was doing a good or very good job. In 2016, most respondents thought New Zealand's membership to the Five Eyes was good or very good, though in 2014 71% had thought New Zealand's membership to the Five Eyes was good or very good. In both 2014 and 2016, only 9 percent could name both intelligence and security agencies, however. (As far as we are aware DPMC has not released the results of any further surveys since 2016.)

Horizon have also conducted surveys concerning New Zealanders' understanding of security issues. In late 2010, Horizon found that more than half of their respondents had not heard of the Search and Surveillance Bill which was, at the time, progressing through Parliament.[57] In 2015, Horizon found that nearly half of their respondents strongly agreed that companies involved in the provision of internet and telecommunications services had a duty to protect personal information from interception by governments, and that over half of these respondents wanted to know if the New Zealand Government collected personal communications data using software from the US National Security Agency.[58] Horizon also found that most people were either angry, afraid, nervous or concerned by the attitude on mass interception of personal data held by then Prime Minister John Key. In 2016, HorizonPoll found that 13 percent of their respondents felt unsafe whereas most people felt safe, and that most respondents did not think New Zealand was any less vulnerable to a terrorist attack when compared to most countries.[59] 37% of their respondents thought a terrorist attack in New Zealand was more likely than not.

There are, of course, other indicators of low public trust and confidence, including by parliamentarians and senior public servants. On 27 September 2012, the then Leader of the Opposition, David Shearer, wrote a letter to the Prime Minister requesting:

> a wide-ranging and independent inquiry into the performance of all New Zealand's intelligence agencies in order to restore public confidence in our intelligence operations… Parliament and the New Zealand public have a right to be confident that New Zealand's intelligence agencies, which by their very nature operate secretively, are using their powers as intended, in accordance with the law. It is also important to restore our reputation internationally as a country of the highest integrity and transparency.[60]

Following Shearer's letter, several leading political reporters also pointed to the need to restore the low public trust and confidence in the agencies.[61] A Cabinet Paper by officials reporting back to the Minister responsible for the GCSB and the NZSIS in May 2019, also acknowledges

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57 Horizon Poll, "Strong public backing for new surveillance powers, curbs to media freedoms," 26 November 2010.

58 Horizon Poll, "Surveillance: 75% want to know what the Government is doing," 22 April 2015.

59 Horizon Research, "Summary: Surveillance by Government Agencies," March 2015.

60 D Shearer Letter to Rt. Hon. John Key, Prime Minister. http://www.labour.org.nz/sites/.../20120928_Request_for_Inquiry_letter.pdf (accessed 3December 2013)

61 See both Small and Armstrong, above note 54.

that "[p]ublic confidence in the agencies was at a low ebb following allegations of potentially illegal surveillance, which led to the Review of Compliance at the GCSB."[62]

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In summary, Cabinet approved, in 2011, an expansive definition of national security that renders opaque the distinction between external and domestic security threats, meaning the New Zealand population is now treated not only as an object worthy of the Government's protection, but also as a source of, or conduit for, serious danger. In 2017, New Zealand parliamentarians provided the NZSIS and the GCSB with a common purpose that dissolved the hitherto strong connection between intelligence-gathering activities and the pursuit of national security. Intelligence work has changed significantly since the beginning of the War on Terror, though the dynamics informing, and consequences following from, these transformations are not well understood. This lack of understanding is due, at least in part, to the need for intelligence agencies to conduct operations in secret, hidden from most New Zealanders behind a veil of official secrecy; this produces a widespread ignorance of intelligence work among New Zealanders. This secrecy also hampers efforts to demonstrate the value of intelligence work. Several controversies embroiling parliamentarians or public servants appear to contribute to the public's low trust and confidence in the NZSIS and the GCSB. We think this is a complex and urgent problem for parliamentarians and senior public servants responsible for directing and managing New Zealand's intelligence and security agencies, and they have so far responded to it by taking steps to revise governance arrangements and strengthen public accountability measures, and by commissioning consultants to conduct reviews and inquiries. In the two sections that follow, we examine each of these responses in turn.

[62] A Little "Strategic Capability and Resourcing Review Report Back" (28 May 2019) at 4.

3. Recent Transformations

In this section we pay close attention to the major transformations that have occurred within New Zealand's intelligence and security agencies since the beginning of the War on Terror. We begin by tracing changes to service delivery in terms of organisational visions, mission statements, narrative framings, outputs and outcomes before noting new organisational capabilities and increases in resourcing. We describe the agencies' close connections with the wider intelligence and security communities, deepening relationships with commercial enterprises operating within New Zealand's economy as well as the ongoing importance of key international partners. We close out this section by focusing on revised governance arrangements. Drawing heavily on successive Annual Reports presented to the House of Representatives throughout the long aftermath of 11 September 2001, this section does not pretend to offer a comprehensive history of every recent change that has occurred within the NZSIS and the GCSB over these years.

Service Delivery

The first four men to lead the NZSIS – Sir William Gilbert (1956-1976), Judge Paul Molineaux CMG (1976-1983), Lindsay Smith CMG CBE (1983-1991) and Don McIver CMG OBE (1991-1999) – each served in the New Zealand Army. The appointment of Richard Woods as Director of Security in 1999 ended the succession of NZSIS leaders with military backgrounds. Prior to his appointment with the NZSIS, Woods had worked as a diplomat for over thirty years, serving as ambassador in Paris, Moscow, Athens and Tehran. Woods held the post of Director until he retired from public service in 2006.

During Wood's tenure, the mission statement of the NZSIS was as follows: "The New Zealand Security Intelligence Service provides the Government with timely and accurate intelligence and advice on national security issues within the terms of the NZSIS Act 1969 and its amendments."[63] In the immediate aftermath of 11 September 2001, Woods used terrorism to frame much of the NZSIS's key activities. Woods reported in 2002 that the previous year "was dominated by the 11 September 2001 attacks on the United States which demonstrated the will and ability of terrorists to wreak havoc and destruction on a previously unexpected scale. The New Zealand [G]overnment, like others all over the world, moved to increase its counter-terrorist capabilities. This had major implications for the Security Intelligence Service."[64] The following year Woods explained that "[j]ust as last year was dominated by the 11 September 2001 terrorist attacks on the United States, this year was dominated by the 12 October attack on Bali, Indonesia. New Zealanders died in both attacks, but the one in Bali brought the threat of terror much closer to home for New Zealand."[65] Woods also explained that the NZSIS was "well on the way to … a doubling of counter-terrorist activity while

[63] NZSIS *Annual Report: For the year ended 30 June 2002* at 3.
[64] At 6.
[65] NZSIS *Annual Report: For the year ended 30 June 2003* at 6.

maintaining the overall level of other activity."[66] Moreover, in his 2004 Annual Report, Woods wrote:

> International terrorism continued to be the Service's main preoccupation during 2003/04, as it has been in recent years. The attacks in Jakarta in August 2003, Istanbul in November 2003 and Madrid in March 2004 as well as those in Iraq and elsewhere, demonstrated again the will and ability of international terrorists to wreak havoc and destruction, killing and maiming hundreds of innocent people in the process.[67]

The following year the London Bombings of 7 July 2015 took precedence in Wood's overview. Even though other areas of focus are mentioned – specifically counter-proliferation of nuclear weapons and other weapons of mass destruction, illegal migration and counter-intelligence – Woods acknowledges, in his final Annual Report, that "[i]nternational terrorism has thus dominated the last five years of my several years in the job… terrorism has been the big issue, and will continue to be for the foreseeable future."[68]

According to its 2002 Annual Report, the NZSIS provided security intelligence advice, foreign intelligence, protective security advice, and conducted overseas liaison. However, the following year saw overseas liaison disappear from these outputs because it was understood to be an input.[69] Otherwise, the NZSIS's output classes remained constant under Wood's leadership. The NZSIS Annual Reports presented to the House of Representatives between 2002 and 2006 contained no formal statements about broader outcomes sought by the agency.

Dr Warren Tucker was appointed Director of Security in November 2006 and served in that role until he retired in May 2014. While he had served in the Army earlier in his career, he had also been employed by the GCSB since 1982 where his professional experience included periods as the GCSB's liaison officer to the US National Security Agency and as Intelligence Coordinator within the DPMC. Tucker became Director of the GCSB in 1999 (see below).

In his first Annual Report for the NZSIS, Tucker instituted a new organisational vision which shifted focus away from national security. This vision was as follows: "We are a dynamic professional intelligence service, focused on the requirements of our core customers and stakeholders in government, working collaborative at home and abroad and striving to achieve a safe and prosperous New Zealand."[70] Tucker also instituted a new mission statement for the NZSIS, which was: "We make the difference by providing comprehensive, high quality security services and advice in conjunction with relevant, timely, critical intelligence that enhances and protects the interest of New Zealand and New Zealanders."[71]

Tucker used terrorism to frame NZSIS activities in 2007 when he wrote "[a]round the world acts of terrorism continue to occur, often affecting innocent bystanders. We continue to see items on the television news and headlines in the newspapers of bombs, either having been discovered or having gone off, kidnapping and slayings."[72] In the following year, however, he

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[66] At 7.
[67] NZSIS *Annual Report: For the year ended 30 June 2004* at 6.
[68] NZSIS *Annual Report: For the year ended 30 June 2006* at 8.
[69] NZSIS, *Annual Report 2002*, above note 63, at 16.
[70] NZSIS *Annual Report: For the year ended 30 June 2007* at 6.
[71] At 6.
[72] At 4.

relegated terrorism to one of a number of contending areas of work for the NZSIS; according to Tucker "New Zealand continually faces threats from espionage, sabotage, subversion, terrorism, and clandestine and damaging actions by foreign entities; some substantial."[73] By 2012, the NZSIS was promoting the use of its intelligence as a means of "detecting people smuggling, combating organised crime, safeguarding national borders and protecting natural resources against illegal exploitation."[74]

NZSIS outputs remained as they had been under Woods until 2009, when they became protective security, threat management and foreign intelligence. The following year, international contribution was added to foreign intelligence, indicating something of a reversal from Wood's thinking that saw overseas liaison removed as an output because international partnerships were understood to be a means rather than ends; now the NZSIS' work could be performed in the service of other countries' objectives and were treated as an output delivered to, or on behalf of, the New Zealand Government.

Tucker also began refocusing the outcomes to which the NZSIS contributed. This new focus saw key outcomes articulated in the following terms: "New Zealand's interests are protected from acts of terrorism, espionage, sabotage and subversion" as well as "New Zealand's international wellbeing and economic wellbeing are advanced and protected from foreign threats."[75] The outcomes changed again to become in 2009 "Safer New Zealand" and "Thriving and Confident New Zealand,"[76] which were reworded in 2010 to become "New Zealand and New Zealanders are safer from threats" and "Thriving and confident New Zealand."[77] In 2012, the performance of the NZSIS was "set against the Joint Statement of Intent of 2011-2016, which represents the direction and goals of the New Zealand Intelligence Community (NZIC)."[78] The outcomes were revised again in 2012 to "Building a safer and more prosperous New Zealand," "New Zealand is protected from harm," "New Zealand's decision makers have an advantage" and "New Zealand's international reputation and interests are enhanced."[79]

Rebecca Kitteridge was appointed Director of Security on 1 May 2014 and is the incumbent.[80] Kitteridge previously undertook a major review of the GCSB's compliance policies and procedures following its unlawful surveillance of Kim Dotcom (see Section 4). Immediately prior to conducting that review, Kitteridge had been Secretary of the Cabinet. Her professional background also includes periods of time as a lawyer in private practice and within the legal division at the Ministry of Foreign Affairs and Trade, and as Crown Counsel to the Cabinet Office.

Conveying the NZSIS's operational highlights from 2013/14, Kitteridge warned of the "the increasing threat of violent extremism in New Zealand and offshore. Our activities involved

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73 NZSIS *Annual Report: For the year ended 30 June 2008* at 5.
74 NZSIS *Annual Report: For the year ended 30 June 2012* at 5.
75 NZSIS, *Annual Report 2008,* above note 73, at 11.
76 NZSIS *Annual Report: For the year ended 30 June 2009* at 11.
77 NZSIS *Annual Report: For the year ended 30 June 2010* at 17.
78 NZSIS, *Annual Report 2012,* above note 74, at 5.
79 At 22.
80 See https://www.nzsis.govt.nz/about-us/director-generals-biography.

monitoring a number of New Zealanders under warrant whom we determined posed a threat to security."[81] Kitteridge concluded her first overview as Director by emphasising that:

> [i]n the months following the period to which this report applies, the global terrorist threat has evolved alarmingly both in terms of scale and mode of operation. Random acts of extreme violence, and the promotion of extreme ideology through global social media remain distasteful and shocking to the vast majority of New Zealanders, but plant seeds in the minds of a very small minority of susceptible individuals. Violent extremism has no place in New Zealand and it is the job of the NZSIS, working closely with the New Zealand Police and other agencies, to protect New Zealand from that small number of people who combine extreme views with a propensity for violence.[82]

Kitteridge continued to use terrorism as a means of framing the NZSIS's activities after her first year; for instance, Kitteridge explains the "past 12 months has seen a significant increase in the global terrorism threat" which was driven by "the so-called Islamic Sates of Iraq and the Levant" and "[t]he threat to our security posed by foreign terrorist fighters is real and continues to develop rapidly."[83] Kitteridge opens a recent Annual Report by lamenting that "[t]he terrorist attacks on Christchurch Al Noor mosque and Linwood Islamic Centre on 15 March 2019 took 51 lives; left dozens physically injured and affected countless family's friends and communities."[84]

Kitteridge instituted a new vision for the NZSIS in 2016; namely, "to be ahead of the curve: providing indispensable security and intelligence services, underpinned by high public confidence and trust" as well as a new mission for her organisation, which is "to keep New Zealand and New Zealanders secure."[85] In that same year Kitteridge changed the NZSIS's outputs to: threat management and security intelligence; foreign intelligence and international contribution; protective security; and delivering the strategy, capability and resourcing review.[86] (Incidentally, it is not clear to us how the latter constitutes an output in and of itself, though we believe it is a worthy objective to include in an organisation's strategic plan.) In 2017, Kitteridge introduced new outcomes, specifically: New Zealanders are safe; New Zealand's key institutions are protected; and New Zealander's national advantage is promoted.[87]

Like the first Directors of Security, the first two Directors of the GCSB – Colin Hanson OBE (1977-1988) and Ray Parker (1988-1999) – also had military backgrounds. As mentioned, Dr Warren Tucker became the Director of the GCSB in 1999 and held the post until 2006. Under his leadership, the GCSB's vision was, in 2003, "[t]o be the leading source of foreign intelligence and information systems security advice to Government."[88] To that end the GCSB's mission was four-fold: to contribute to the national security of New Zealand through (a) providing foreign signals intelligence to support and inform government decision making (b) provide an all-hours foreign intelligence watch-and-warn service to government; (c)

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81 NZSIS *Annual Report: For the year ended 30 June 2014* at 4.
82 At 6.
83 NZSIS *Annual Report: For the year ended 30 June 2015* at 5.
84 NZSIS *Annual Report: For the year ended 30 June 2019* at 6.
85 NZSIS *Annual Report: For the year ended 30 June 2016* at 29.
86 At 35.
87 NZSIS *Annual Report: For the year ended 30 June 2017* at 9.
88 GCSB *Annual Report: For the year ended 30 June 2003* at 7.

ensuring the integrity, availability and confidentiality of official information through information systems security services to Government; and (d) assisting in the protection of national critical infrastructure from information-born threats. In Tucker's final Annual Report for the GCSB his vision had changed slightly to become "to provide world-class intelligence and information assurance services to the New Zealand [G]overnment."[89] The focus of this vision was broader than national security.

Tucker wrote in 2003 that "[t]he ongoing war against terrorism was a major focus of the Bureau's signals intelligence operations…," though this was contextualised against a "growing range of transnational and regional security issues."[90] In 2004 Tucker framed the GCSB's key activities as support to military operations conducted by the NZDF and as support to law enforcement agencies in relation to the prevention and detection of serious crime. In 2005, however, he wrote that "[c]ounter-terrorism and regional issues continue to be the major focuses of the Bureau's intelligence efforts in support of the Government's foreign intelligence requirements,"[91] through support to military operations and law enforcement received mention too.

GCSB reported to the House of Representatives in 2003 that it provided: foreign signals intelligence; an all-hours foreign intelligence watch-and-warn service; information security services relating to the integrity, availability and confidentiality of official information; and assistance protecting national critical infrastructure from information-bourn threats. Those outputs were delivered as a contribution to two broader sought-after outcomes; firstly, New Zealanders and New Zealand interests are protected and advanced through the provision of relevant, accurate and timely foreign intelligence, and threat warning information; and secondly, national and public interests are properly served through the appropriate protection of official information and national critical infrastructure. These two outcomes remained constant throughout Tucker's tenure as Director of the GCSB.

Sir Bruce Ferguson KNZM, OBE, AFC was appointed as Director of the GCSB towards the end of 2006 and served in that role until he stepped down in 2011. Prior to taking up the post, Ferguson had a distinguished military career, including as Chief of Defence Force. Ferguson introduced a new vision for the GCSB: "Mastery of cyberspace for the security of New Zealand." In 2007 Ferguson partially framed GCSB's activities in terms of terrorism when he wrote that "[t]he Bureau still remains focused on counter-terrorism and regional issues, providing support to the NZDF and developing closer working relationships with other government departments…"[92]

In that same year, the GCSB's output classes were signals intelligence and information assurance. The outputs delivered by the GCSB were, firstly, signals intelligence reports; intelligence alerts and warnings; and signals intelligence policy and support; and secondly, information assurance policy and support; information assurance security services; and critical infrastructure protection services. Ferguson instituted new organisational outcomes too. There

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89 GCSB *Annual Report: For the year ended 30 June 2006* at 6.
90 GCSB, *Annual Report 2003,* above note 88, at 1.
91 GCSB *Annual Report: For the year ended 30 June 2005* at 5.
92 GCSB *Annual Report: For the year ended 30 June 2007* at 1-2.

were "a better informed government; a government alerted to any external threats; New Zealand's international standing is enhanced; official information is protected; critical national infrastructure is protected."[93] However, in 2008, the following new 'sector' outcomes were introduced: namely, "increased national security; prevention of terrorism and major criminal activity; increased international security and global order; improved government decision making and planning; and improved economic performance."[94]

Simon Murdoch CNZM was twice appointed Acting Director of the GCSB, firstly, between November 2010 and February 2011 and, secondly, between July and December 2011. Prior to those appointments, Murdoch had been a diplomat rising to become Secretary of Foreign Affairs 2002-2009 after having been High Commissioner to Australia and Chief Executive of the DPMC. Murdoch had also been engaged as a consultant to review aspects of New Zealand's intelligence and security agencies (see section 4). As caretaker Murdoch did not undertake much change while at the GCSB, though in 2011 he introduced a new output class: geospatial intelligence was added alongside signals intelligence and information assurance. At the top of the operational focus areas for 2010/11 was "enhancing our contribution to New Zealand trade and the economy,"[95] rather than domestic or international terrorism.

Ian Fletcher was appointed as Director of the GCSB in February 2012, but he resigned in early 2015 before his term had expired. Fletcher was a New Zealand diplomat before working in the British Civil Service on currency regulation, intellectual property rights issues, and in the Queensland State Government on commercial gas extraction matters.[96] Fletcher retained Ferguson's vision for the GCSB in his first Annual Report, but then, rather than create his own vision, omitted all reference to an organisational vision in his subsequent reports. GCSB's mission statement was retained by Fletcher, but in 2013 the order of key functions was rearranged, with cyber security elevated above foreign intelligence and the watch-and-warn service. In the GCSB's 2014 Annual Report, Fletcher's last, he moved away from visions and mission statements, preferring instead to cite verbatim the functions set out in the amended GCSB Act.

Fletcher also reframed the GCSB's activities by shifting attention away from terrorism and towards "cyber security, in the sense of both detecting and defending against sophisticated attacks."[97] In the GCSB's Annual Report for 2013, Fletcher does not even mention terrorism among the other areas of concern: transnational organised crime; threats to natural resources; counter proliferation of weapons of mass destruction; and fragile and failing states. Instead, he writes that "[t]he rapid take up of advanced digital services using internet protocol-based networks has led to an explosion in economically valuable services offered and delivered over the internet. It has also led to an explosion of opportunity for cyber borne espionage, crime and (increasingly) aggression."[98]

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93 At 3.
94 GCSB *Annual Report: For the year ended 30 June 2008* at 2.
95 GCSB *Annual Report: For the year ended 30 June 2011* at 2-3.
96 J Key "New GCSB Director appointed" (press release, 9 September 2011).
97 GCSB *Annual Report: For the year ended 30 June 2012* at 6.
98 GCSB *Annual Report: For the year ended 30 7June 2013* at vi.

In 2012 the GCSB's output classes were signals intelligence, geospatial intelligence and information assurance, and the GCSB's sought-after outcomes were: New Zealand is protected from harm; New Zealand's decision makers have an advantage; New Zealand's international reputation and interests are enhanced. In 2013 the outputs were described as: foreign intelligence reports; intelligence alerts and warnings; policy and support; advise and services; and cyber security operations.[99] GCSB's 2014 Annual Report omits mention of specific outputs and outcomes. GCSB's 2015 Report, produced under Acting GCSB Director Una Jargose, also omit details on organisational vision, mission statement, specific outputs and sought-after outcomes.

Andrew Hampton was appointed Director-General of the GCSB in April 2016 and is the incumbent. Prior to joining the GCSB, Hampton held several senior positions within the public service, including Director of the Office of Treaty Settlements, Deputy Secretary for Courts, and Deputy Chief Executive at the Crown Law Office as well as Deputy Secretary and Director of the Secretary's Office at the Ministry of Education and first Government Chief Talent Officer at the State Services Commission. He is the first civilian agency head without direct work experience in New Zealand diplomacy.

Under Hampton the GCSB's mission become in 2016 "protecting and enhancing New Zealand's security and wellbeing."[100] However, this was replaced in 2018 with a strategic vision that identified two sought-after outcomes – "New Zealand's important information infrastructures are impenetrable to technology-borne compromises, and GCSB's intelligence consistently generates unique policy and operational impacts for New Zealand."[101]

GCSB's activities were reframed in 2017 through three lenses: cyber security, foreign interference and violent extremism, and in that order.[102] While the following year, 2018, these were cyber security, foreign interference, and security in the Pacific, with violent extremism last of those mentioned.[103] In the 2019 Annual report, following the Christchurch attacks, counter-terrorism was located behind cyber security and changes in technologies but ahead of foreign influence and security in the Pacific.[104] In his overview of the 2018 report, Hampton explained that:

> Historically there has been far more focus on the agency's intelligence roles and lesser focus on its protective security functions. I believe this is changing in part due to the GCSB's focus on increased transparency and openness, but also due to global circumstances. These changes are particularly noticeable in the reporting period covered by this report.
>
> New Zealand organisations continue to be subject to both direct and indirect cyber threats, and are being used as staging points by threat actors to target systems in other countries. To help keep the information and intellectual property of New Zealand's

[99] GCSB *Annual Report: For the year ended 30 June 2013* at 3.
[100] GCSB *Annual Report: For the year ended 30 June 2016* at 8.
[101] GCSB *Annual Report: For the year ended 30 June 2018* at 10.
[102] GCSB *Annual Report: For the year ended 30 June 2017* at 15.
[103] GCSB, *Annual Report 2018,* above note 101, at 14.
[104] GCSB *Annual Report: For the year ended 30 June 2019* at 14-15.

> nationally significant organisations safe and secure, the GCSB can now provide cyber security services with their consent.[105]

Hampton opens his overview of the GCSB's 2019 Annual Report by acknowledging "[t]he horrific terrorist attacks in Christchurch on 15 March were a challenge to everything New Zealand holds dear. How New Zealanders responded showed the best of us as a country as we rallied to support and care for those affected by the attacks." However, he immediately shifts focus to frame the GCSB's activities as cyber security when he writes: "[w]hile the Christchurch attacks have been a major focus for the intelligence community, 2018/19 has been a very busy year for GCSB's other functions, including its cyber security and regulatory roles."[106] The Annual Reports submitted by the GCSB to the House of Representatives since 2016 omit all specific detail of outputs.

Here, then, the respective leaders of the NZSIS and the GCSB altered the services delivered by their respective agencies throughout the War on Terror. We think the military backgrounds of the Directors of the NZSIS and the GCSB employed during the Cold War signal the close connection between intelligence work and the use of deadly force. At the close of the 1990s, almost decade after the end of the Cold War, there was a discernible shift in the type of professional experience held by those leading the agencies. Except for Sir Bruce Ferguson and, briefly, Sir Jerry Matepare, both former Chiefs of the Defence Force, the recent Directors each have civilian backgrounds with legal and diplomatic experience (except for Hampton) and this has continued throughout the War on Terror. This is part of the mainstreaming of intelligence work into the wider public service, possibly, in part, as a response to the low public trust and confidence in the intelligence and security agencies.

During the War on Terror, the NZSIS's mission statements and organisational visions begun with a primary concern for New Zealand's national security, but broadened to include New Zealand's prosperity and other interests. Over the same time period the GCSB's organisational vision was one of a service delivery agency, though its mission statement focused exclusively on contributing to New Zealand's national security. This exclusive focus on New Zealand's security was maintained as the operational domain was defined as cyberspace until trade and the economy was introduced by Simon Murdoch, and largely retained by successors and appears now as economic wellbeing.

Despite broadening the value proposition of intelligence work beyond national security to include international trade and economic wellbeing, NZSIS heads have often framed their organisational activities in terms of terrorism or, more precisely, as part of a transnational counter-terrorism and violent extremism effort, though sometimes this is one of an array of new transnational security challenges. The GCSB also acknowledges the ongoing War on Terror to frame its organisational support to those who use deadly force – military and police – until it shifted focus to cyber security. Following the 15 March 2019, both agencies have reverted back to the counterterrorism framing.

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[105] GCSB, *Annual Report 2018,* above note 101, at 6.
[106] GCSB, *Annual Report 2019,* above note 104, at 5.

Capabilities and Resources

From our review of the Annual Reports to the House of Representatives, we note the following new major operating capabilities within the intelligence and security agencies:

2002	Centre for Critical Infrastructure Protection was established within the GCSB to ensure New Zealand's critical infrastructure did not fail due to 'cyber threat'[107]
2003	Joint Section on Counter Proliferation was established within the NZSIS, with staffing contributions from the GCSB and the New Zealand Customs Service[108]
2004	New Zealand Intelligence Community Network (NZICNet) was established by GCSB[109]
	New 7.3m antenna installed at the GCSB's Waihopi station[110]
	Combined Threat Assessment Group, hosted by the NZSIS but including staff from Police, the GCSB and the Directorate of Defence Intelligence and Security as well as New Zealand Customs and Maritime New Zealand, commences operations to provide assessment on terrorist or criminal threats of physical harm to New Zealand and New Zealand interests at home or overseas, based on all sources of information and intelligence available to the New Zealand Government[111]
2010	A national geospatial intelligence capability was established within the GCSB[112]
2011	GCSB relocated to a purpose-built facility in Pipitea House, followed by the NAB and the NZSIS[113]
2012	National Cyber Security Centre established within the GCSB[114]
2012	Security Capability Team was established within the NZSIS in order "to refine and enhance our security arrangements and foster a security environment that meets the needs of protecting the staff, information and assets of the NZSIS while also enabling and advancing our intelligence and security role on behalf of New Zealand"[115]
2015	Cortex cyber defence programme implementation commences[116]
2016	GCSB opened an office at an undisclosed site in Auckland[117]
2019	GCSB, NZSIS and DPMC agreed to establish a Joint Customer Services team[118]

Given the secrecy surrounding intelligence collection and analysis methods, this list is, of course, far from complete.

In addition to acquiring those new capabilities, New Zealand's intelligence and security agencies have grown significantly during the War on Terror. Both the NZSIS and the GCSB have received appreciable increases in Government funding since 2001. The budget of the NZSIS in 2000/01 was $11.5m and the budget of the GCSB was just over $20m, combining to

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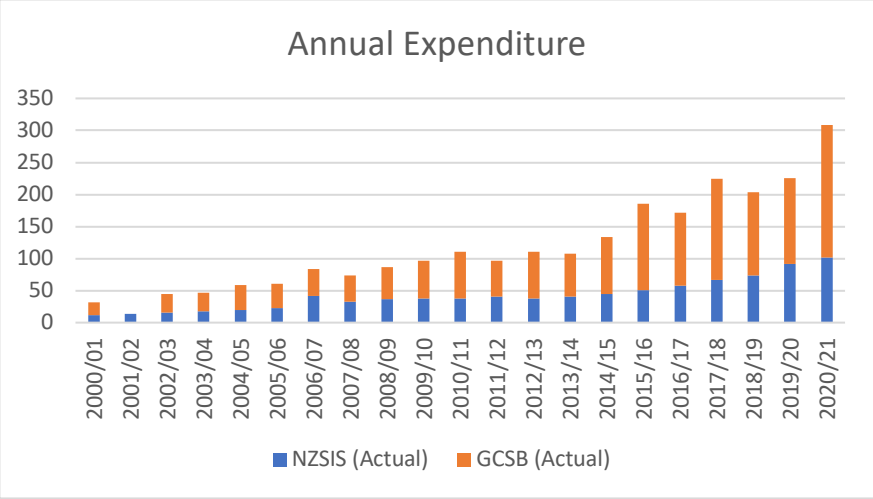
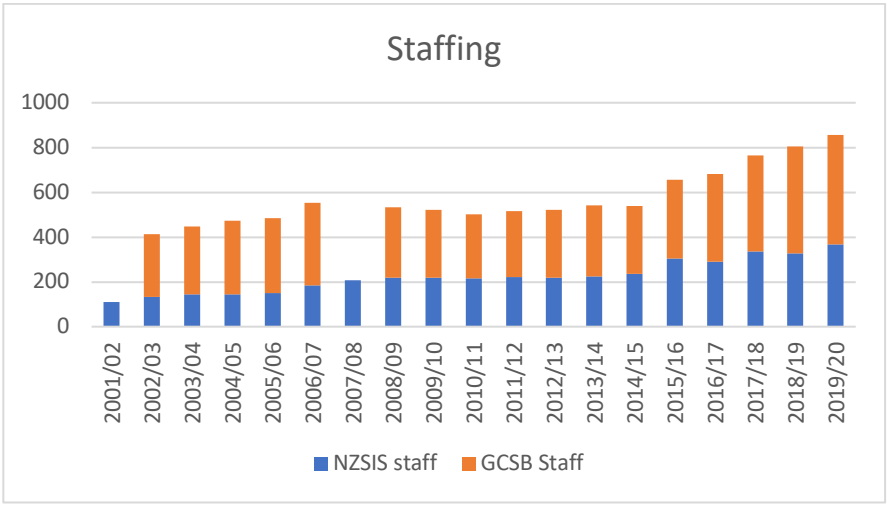
[107] GCSB, *Annual Report 2003*, above note 88, at 13.
[108] NZSIS *Annual Report: For the year ended 30 June 2005* at 12.
[109] GCSB *Annual Report: For the year ended 30 June 2004* at 7.
[110] At 7.
[111] NZSIS, *Annual Report 2004*, above note 67, at 11.
[112] GCSB *Annual Report: For the year ended 30 June 2010* at 4.
[113] GCSB, *Annual Report 2011*, above note 95, at 1.
[114] GCSB, *Annual Report 2012*, above note 97, at 6.
[115] NZSIS, *Annual Report 2012*, above note 74, at 6.
[116] GCSB *Annual Report: For the year ended 30 June 2015* at 5.
[117] GCSB, *Annual Report 2016,* above note 100, at 33.
[118] GCSB *Annual Report: For the year ended 30 June 2020* at 9.

$31.6m.[119] In 2019/20 the NZSIS's expenditure was $99.5m and GCSB's was nearly $179m, combining to over $278m.[120] That constitutes an increase by a factor of 9 over twenty years whereas the Government's overall budget has only doubled between 2000/01 and 2019/20.



Both agencies have enlarged their respective workforces too. In 2000 NZSIS employed about 115 staff whereas the GCSB had about 220 staff.[121] In 2020 NZSIS employed about 367 staff whereas the GCSB employed 488.[122]



[119] Department of the Prime Minister and Cabinet, above note 17, at 22 and 27.
[120] Figures taken from GCSB and NZSIS Annual Reports.
[121] Department of the Prime Minister and Cabinet, above note 17, at 22 and 27.
[122] Figures taken from the GCSB, *Annual Report 2020*, above note 118, and NZSIS *Annual Report for the year ended 30 June 2020*.

Relationships and Partnerships

The relationship between the NZSIS and the GCSB has matured throughout the War on Terror. Whereas in the early 2000s both agencies seldom referred publicly to one another, by the mid 2000s both were noting new joint enterprises, such as the Combined Threat Assessment Group and the Counter-Proliferation Joint Service noted above.[123] In the early 2010s, the agencies mentioned: the development of a Joint New Zealand Intelligence Community Statement of Intent and Four-Year Budget Plan;[124] the establishment of a new business unit called Intelligence Community Shared Services and their concomitant intent to foster a culture of cooperation and shared purpose;[125] and a One Workforce Strategy designed to enable lateral transfers between the NZSIS and the GCSB.[126] The NZSIS's relocation to Pipitea House alongside the GCSB sought "to achieve deepened collaboration and an efficiency dividend for NZSIS and GCSB through operations and combined support functions"[127] In 2011, the NZSIS reported that it continued to work closely with the GCSB to counter cyber-related threats and by 2015 both agencies acknowledged they worked together on national security operations, including on counter terrorism.[128]

The relationship between the NZSIS and the GCSB on the one hand, and the wider intelligence community on the other hand, has also matured since 2001. This wider community includes the National Assessment Bureau (NAB) of the DPMC, but also comprises specialist units or groups within various government departments that undertake intelligence collection, analysis, production or assessment capabilities to fulfil their respective organisational purposes. In other words, these specialist units or groups produce intelligence as an input for internal use within their organisations, though these products may be shared with other relevant agencies. Some departments maintaining intelligence units are responsible for administering and enforcing compliance with regimes that regulate the flow of goods and services, currency, and people across New Zealand's border, or that regulate the commercial extraction of natural resources.[129] In 2003 the GCSB announced that it was "working closely with customer departments to help them achieve their outcomes through a partnership rather than a purely customer-client approach."[130] However, by 2016 GCSB had reverted to a customer-client model for the 19 government agencies that receive its products and services.[131] The NZSIS has long acknowledged it works closely with an array of government agencies.[132] In 2011 the

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123 NZSIS, Annual Report 2004, above note 67, at 11; and NZSIS, *Annual Report 2005*, above note 108, at 12.

124 NZSIS *Annual Report: For the year ended 30 June 2011* at 7; GCSB, *Annual Report 2012*, above note 97, at 6; NZSIS, *Annual Report 2012*, above note 74, at 5 & 17; and GCSB, *Annual Report 2016*, above note 100, at 19.

125 GCSB, *Annual Report 2013*, above note 99, at 13 &14.

126 GCSB *Annual Report: For the year ended 30 June 2014* at 21.

127 NZSIS *Annual Report For the year ended 30 June 2013* at 6-7.

128 GCSB, *Annual Report 2015*, above note 116, at 20; GCSB, *Annual Report 2017*, above note 102, at 20; and NZSIS, *Annual Report 2012*, above note 74, at 25.

129 These departments include Immigration New Zealand, New Zealand Customs Service and the Ministry for Primary Industries. Department of the Prime Minister and Cabinet, above note 22, at 34.

130 GCSB, *Annual Report 2003,* above note 88, at 11.

131 GCSB, *Annual Report 2016*, above note 100, at 11.

132 NZSIS, *Annual Report 2002,* above note 63, at 18. These were: Ministry of Foreign Affairs and Trade; External Assessments Bureau; Government Communications security Bureau; Department of the Prime Minister and Cabinet; Ministry of Defence; New Zealand Defence Force; Immigration New Zealand; Department of

NZSIS drew public attention to its role in keeping New Zealand's border secure by checking passenger names against a list that contains details of international terrorists or individuals involved in the proliferation of weapons of mass destruction,[133] though it did not disclose the content of that list or its origin, or the list's criteria for inclusion and exclusion.

The NZSIS and the GCSB operate at the core of New Zealand's wider intelligence community at a time when that community began to use new and emerging technologies to surveil members of the New Zealand public, especially, but not exclusively, at the border. Following the introduction of the SmartGate system by New Zealand Customs, Immigration New Zealand introduced in mid-2016 a new identity management system, referred to as IDMe, which uses fingerprinting and facial image matching capabilities to confirm a person's identity.[134] Facial recognition technology is now used not only by Immigration New Zealand and the New Zealand Customs Service, but also by the Department of Internal Affairs (verifying passport photos) and the New Zealand Police.[135] Body scanners have been operating at four New Zealand airports since mid-2019 as a more effective means of detecting dangerous items worn or carried by passengers than walk-through metal detectors.[136]

The relationship between the NZSIS and the GCSB, and the agencies comprising New Zealand's security community, has also matured during the War on Terror.[137] As mentioned, the GCSB grew out of the defence establishment and has always enjoyed a close working relationship with the NZDF. In 2004, the provision of intelligence and information systems security support to deployed NZDF elements was a significant focus of the GCSB's operations.[138] GCSB also provided "intelligence and threat warning support to NZDF operations"[139] and geospatial intelligence was so important to certain elements of the defence force that the national authority responsibility for it was reassigned from the GCSB to the NZDF in 2012.[140] The GCSB freely acknowledge they work in partnership with the NZDF, providing support to military operations and contributing to the protection of force sent

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Internal Affairs; Ministry of agricultural and Forestry, Ministry of Fisheries; New Zealand Customs Service; and Internal Revenue Service. It added Crown Law to the list in 2004.

133 NZSIS, *Annual Report 2011,* above note 124, at 22-23.

134 "IDme-Immigration New Zealand getting real on identity," in *Line of Defence: New Zealand's Defence and National Security* Magazine 1:2 (2016/17), at 34-35.

135 N Lynch, L Campbell, J Purshouse and M Betkier *Facial Recognition Technology in New Zealand: Towards a Legal and Ethical Framework*. The Law Foundation New Zealand, 2020).

136 Aviation Security Service, Our new body scanners explained – protecting you and your privacy (8 April 2021), available at https://www.aviation.govt.nz/about-us/media-releases/show/Our-new-body-scanners-explained%E2%80%93protecting-you-and-your-privacy.

137 While their primary purposes are to ensure the defence of New Zealand and the safety of New Zealand's population, both the NZDF and the Police maintain various units and groups that provide intelligence support and products in accordance with their organisational purposes and functions. The intelligence, however, is not produced as an end of itself, but rather, is a means to help achieve their organisational ends, like other organisations within the wider intelligence community. The most notable example for the New Zealand Defence Force is the Directorate of Defence Intelligence and Security. The New Zealand Police have, or have had, the following: Financial Intelligence Unit; Gang Intelligence Unit, Identity Intelligence Unit; National Bureau of Criminal Intelligence; Police Terrorism investigation and Intelligence Group; Special Investigation Group;; Strategic Intelligence Unit, and Threat Assessment Unit.

138 GCSB, *Annual Report 2004*, above note 109, at 7.

139 GCSB, *Annual Report 2005*, above note 91, at 10.

140 GCSB, *Annual Report 2012*, above note 97, at 9.

abroad.[141] That support was evidently well received, with then-Chief of the Defence Force Rhys Jones stating that "[t]he role of GCSB has been critical in providing force protection intelligence to our personal. The work carried out by GCSB saved lives of NZDF personnel on a number of occasions." [142] The NZSIS also freely acknowledge they have worked closely with the NZDF too:

> Following a significant spike in New Zealand Defence Force casualties in August 2012, the Chief of Defence Force requested NZSIS intelligence support in Afghanistan as a result of the heightened threat environment. The initial scoping exercise was determined to be of substantial value, and NZSIS staff were accordingly reassigned from other priorities and deployed into Kabul and Bamyiam in support of the PERT up until their scheduled withdrawal in April 2013. This would not have been possible without the substantial NZDF assistance.[143]

Since 2001, however, the purposes for which the NZDF is deployed evolved sharply. While the NZDF's primary purpose is to defend New Zealand in the case of an armed attack by another sovereign state, the likelihood of such an attack was so remote at the turn of the millennium that it was unthinkable. The Government took the decision to moth-ball its A-4K Skyhawks in 2001 after Prime Minister Clark suggested New Zealand lived in "an incredibly benign strategic environment."[144] The NZDF could, however, be used to offset any future risk of armed attack while offering present utility to the New Zealand Government. Significant here is the *Maritime Patrol Review* which – led by the DPMC but including representatives from the Ministry of Defence, NZDF as well as the Maritime Safety Authority, Ministry of Fisheries, Ministry of Foreign Affairs and Trade, New Zealand Customs Service, and the Treasury – delivered its report in February 2001. It found that the surveillance requirements for New Zealand's civilian agencies would be met most cost effectively by using commercial aerial surveillance services at short-medium distances and a mix of civil and naval vessels for sea surface surveillance requirements. It also found that "it is hard to justify the retention of a comprehensive military maritime surveillance capability in New Zealand seas area… If some of the [P-3] Orions were to be retained they could perform the long-distance civilian tasking with high quality civilian equipment matched to New Zealand's civilian needs."[145] The Government agreed and, under Project PROTECTOR, the operational capabilities of the NZDF were developed to meet its non-military purposes. The Navy acquired a Multi-Role Vessel with a tactical sealift capability, as well as Offshore and Inshore Patrol Vessels to undertake civilian tasks for New Zealand Customs, the Department of Conservation, Ministry of Agriculture and Forestry, Ministry of Foreign Affairs and Trade, Ministry of Fisheries, Maritime New Zealand and the New Zealand Police.

The relationship between the two intelligence and security agencies and the New Zealand Police has also matured during the War on Terror. As mentioned, the NZSIS grew out of the New Zealand Police. The NZSIS works closely with the New Zealand Police in domestic

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141 GCSB, *Annual Report* 2014, above note 126, at 17.
142 GCSB, *Annual Report 2013,* above note 98, at 21.
143 NZSIS, *Annual Report 2013*, above note 127, at 6.
144 C James "Three-step Matilda: Trans-Tasman Relations" in R Alley ed, *New Zealand in World Affairs IV, 1990-2005* (Victoria University Press, Wellington, 2007) at 33.
145 Department of the Prime Minister and Cabinet *Maritime Patrol Review* (February 2001).

counter-terrorism efforts and to identify threats from extreme ideologies,[146] though the NZSIS has always recognised the Police have primary responsibility for detecting and preventing acts of terrorism within New Zealand.[147] In the aftermath of the earthquake that struck Christchurch on 22 February 2011, the "NZSIS and NZ Police had to work shoulder-to-shoulder."[148] GCSB has long acknowledged its statutory responsibility to help prevent and detect serious crime,[149] though by 2017 this responsibility was described more broadly in terms of supporting domestic efforts to counter criminal activity targeting New Zealand.[150] More recently, the GCSB has re-positioned itself as a provider of services, rather than a collaborating partner, as it now only responds to specific requests for intelligence or technical assistance from the NZSIS and the New Zealand Police. In the aftermath of the 15 March terrorist attacks, the GCSB received tasking from the NZSIS and the New Zealand Police, to which it responded quickly and made what it asserts to be a unique, material contribution to the immediate investigation and the ongoing wider response.[151]

Whereas the NZDF underwent an organisational transformation that saw it contributing to non-military purposes by fulfilling the surveillance needs of civilian agencies, the New Zealand Police has taken steps towards becoming more militaritised. The New Zealand Police has, of course, had specialist units trained to use lethal force to counter lethal force; firstly, the Armed Offenders Squad in 1963; and secondly, the Anti-terrorist Squad in 1975 (renamed as the Special Tactics Group in 1992). Both units train with certain military units, including the New Zealand Special Air Service, and use military weapons.[152] In the aftermath of the mass shooting of Muslims in Christchurch on 15 March 2019, the Police launched a pilot project which saw Armed Response Teams draw on members of the Armed Offenders Squad, who were no longer 'on call' to respond to situations involving firearms, but rather, were routinely armed and equipped to respond to such incidents. The project ended on 26 April 2020 and Police Commissioner Andrew Coster announced that those armed teams would not feature within New Zealand's current or future policing models.[153] Notwithstanding the very public trial and its discontinuation, frontline Police Officers are now routinely armed, though their weapons are carried in vehicles rather than on their person.[154] According to Dr Richard Shortt, the routine arming of the New Zealand Police was "probably one of the most momentous" in the history

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146 NZSIS and GCSB *Briefing to the Incoming Minister Responsible for the GCSB and for the NZSIS* (2020) at 10 and 11.

147 NZSIS, *Annual Report 2002*, above note 63, at 6.

148 NZSIS, *Annual Report 2011,* above note 124, at 23.

149 GCSB, *Annual Report 2004*, above note 109, at 7.

150 GCSB, *Annual Report 2017,* above note 102, at 21.

151 GCSB, *Annual Report 2019,* above note 104, at 29.

152 For an insider account, see Ray Van Beyen, *Zero-Alpha: The NZ Police Armed Offenders Squad official history: From Armed Constabulary to Anti Terrorist Commandos (*Auckland, Howling at the Moon Productions, 1998). See also Garth den Heuer "Mayberry revisited: a review of the influence of police paramilitary units on policing" *Policing and Society* (2014) 24:3, 346.

153 S Sherwood & C Devlin "Police Commissioner rules out bringing back Armed Response Teams" *Stuff* (09 June 2020).

154 For the dangers of militarized policing, see J McCulloch *Blue Army: Paramilitary Policing in Australia* (Melbourne, Melbourne University Press, 2001; M Seigel *Violence Work: Sate Power and the Limits* of Police (Durham and London, Duke University Press, 2018); AS Vitale *The End of Policing London*, New York, Verso 2017); and LJ Wood, *Crisis and Control: The Militarization of Protest Policing* (London, Pluto Press, 2014).

of New Zealand policing, but "seemingly passed without comment." He describes the New Police as "a well-armed police service."[155]

By providing protective security services – such as the development, implementation and monitoring of arrangements that include personnel security, information security and physical security through security clearance assessments, information assurance and cybersecurity activities and the inspection of premises – the NZSIS and the GCSB become guardians of the Government's sensitive official information and communications and, by extension, its information and communications systems. While this helps to preserve the integrity of New Zealand's democratic institutions, the GCSB's special information assurance and cybersecurity function extends its guardianship role to certain key infrastructure providers and firms of national significance, though the names of those organisations remain classified.[156] The National Cyber Security Centre, which is part of the GCSB, has assisted 250 organisations to deepen their understanding of security resilience and has provided them with advice on increasing resilience in governance, investment, readiness, and supply chain security.[157] As mentioned above, the intelligence and security agencies now enjoy an asymmetric and, at times, coercive relationship over commercial enterprises operating within New Zealand's financial and telecommunication industries.

New Zealand's intelligence and security agencies prize their ongoing international partnerships with foreign intelligence agencies. These partnerships are especially important for the GCSB as:

> [i]t is not possible for an organisation the size of GCSB to collect foreign intelligence on all matters relevant to New Zealand's interests. However, through long-standing relationships with our Five Eyes partners [Australian Signals Directorate, Australia; Communications Security Establishment, Canada; Government Communications Headquarters, United Kingdom; and National Security Agency, United States] we can draw on greater support, technology and information than otherwise be available to us.[158]

Cullen and Reddy echo this assessment when they explain that "New Zealand also gains considerably more from its international partnerships than we provide in return. For every intelligence report the NZSIS provides to a foreign partner, it receives 170 international reports. Similarly, or every report the GCSB makes available to its partners, it receives 99 in return."[159] They also conclude that "[t]he Five Eyes is by far New Zealand's most valuable intelligence arrangement, giving us knowledge and capability far beyond what we could afford on our own."[160]

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[155] N Dynon "ARTS and the myth of the unarmed police officer" *Line of Defence: New Zealand's Defence and National Security Magazine* 2020 Issue 16, at 44-46.

[156] A Little, "Opening address to the Massey University National Security Conference 2018" (Massey University, Albany, 5 April 2018).

[157] A Little *Strategic Capability and Resourcing Review Report Back* 2019, at 6

[158] GCSB, *Annual Report 2016,* above note 100, at 19.

[159] Cullen and Reddy, above note 14, at 45.

[160] At 46.

Governance Arrangements

Sir Geoffrey Palmer explained in late 2000 that "[i]t is one thing to convince people that security and intelligence agencies are necessary for New Zealand. It is another to demonstrate that they are sufficiently accountable in both legal and political terms to be compatible with New Zealand's democratic traditions."[161] Drawing on his experience as New Zealand Prime Minister and Attorney-General, Palmer concludes that "a robust legislative framework makes sure these agencies operate within the law and do not infringe the rights and privacy of law-abiding citizens…The protections against misuse of powers are substantial… And they are carefully regulated and controlled in the public interest."[162]

At that time the New Zealand Parliament, but especially the Cabinet and the Prime Minister, sat at the apex of the governance arrangements for the intelligence and security agencies and had ultimate accountability for their conduct. The ISC, with a statutory role to examine a wide range of intelligence and security matters, was accountable to Parliament, included members of the opposition and was chaired by the Prime Minister. The ad-hoc Cabinet Committee on Intelligence and Security, which reported to the Cabinet on intelligence and security matters, was also accountable to Parliament, though both the Cabinet and the Ad-hoc Cabinet Committee were chaired by the Prime Minister.

The Directors of the NZSIS and the GCSB reported to the Prime Minister, who was the Minister-in-charge, while the External Assessment Bureau (EAB) was a business unit within DPMC, the chief executive of which also reported to the Prime Minister. Senior public servants, including the Secretary for Foreign Affairs and Trade, Secretary of Defence, Secretary of Treasury, as well as the Chief of the Defence Force and the Directors of the NZSIS, the GCSB and the EAB, comprised an Officials Committee for Domestic and External Security Coordination, which gave strategic policy advice to the Prime Minister.

The Commissioner of Security Warrants, whose role was to "advise, consider and deliberate with the Minister-in-charge of the NZSIS on applications for domestic interception warrants, and to issue those warrants jointly with the Minister-in-charge,"[163] played something of a check on the agencies' intrusive powers. The Office of the IGIS was established in 1996 and touted then as "a public watchdog of considerable authority, power and prestige. If the intelligence and security agencies were to indulge in activities outside their lawful purpose, the Inspector-General is in a position to blow the whistle."[164]

These governance arrangements have evolved appreciably during the War on Terror. Parliament still reigns supreme, but not all the roads to public accountability are centralised through the Prime Minister.

In 2014, Prime Minister Key created a new ministerial portfolio for National Security and Intelligence, responsible for leading the national security system, which is animated by an "all hazards – all risks" approach that covers "state and armed conflict, transnational organised

[161] Palmer, above note 34, at 12.
[162] At 16.
[163] At 21.
[164] At 5.

crime, cyber security incidents, natural hazards, biosecurity events and pandemics."[165] The ministerial responsibility for the two intelligence and security agencies was shifted to Christopher Finlayson, who was at that time Attorney-General. Whereas under the previous arrangement the Prime Minister was, in effect, holding him or herself to account, under Section 193 of the Intelligence and Security Act 2017, the Minister responsible for the NZSIS and the GCSB is held accountable for the proper and efficient performance of agency functions by the House of Representatives through the ISC, though that Minister serves on that Committee, rather than called before it.

Parliamentarians moved away, in 2017, from the explicit protection of New Zealanders provided by the Government Communications Security Bureau Act 2003, which (as mentioned above) stated unequivocally that: "Neither the Director, nor any employee of the Bureau, nor any 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." Instead, Parliament introduced an authorisation regime using two types of intelligence warrants. Type 1 intelligence warrants must be sought by the agencies when their focus is a New Zealand citizen or permanent resident and are issued jointly by the Minister responsible for the NZSIS and/or the GCSB and a Commissioner of Intelligence Warrants. Type 2 intelligence warrants relate to everyone else and are issued only by the authorising Minister(s), but can involve the Minister of Foreign Affairs in certain situations. This new authorisation regime seeks to introduce a special measure through Type 1 warrants that protects the privacy rights of New Zealanders, leaving foreigners fair game for intelligence collectors. Both types of warrants can be issued for the purposes of New Zealand's national security, international relations and wellbeing, and economic wellbeing.[166]

As demonstrated above, the leaders of the NZSIS and the GCSB have used their Annual Reports to the House of Representatives, which are a key public accountability document, to articulate their respective organisational visions and frame their organisational activities, outputs and sought-after outcomes. But these reports have also become tools to showcase the agencies' efforts towards greater transparency. In 2009, the NZSIS used its Annual Report to explain that it:

> endeavored to be more open in interaction with the New Zealand public. The NZSIS' Director has spoken at a number of fora during the year under review, for example at Rotary Clubs and academic courses. We are aware that further work needs to be done on our website to enhance our interaction with the public. This work will be undertaken as resourcing allows. The NZSIS is committed to raising the level of public interaction, and is actively looking for other opportunities to meet our public stakeholders' expectations.[167]

This approach was reiterated by acting GCSB Director Una Jagose when she used the GCSB's Annual Report for 2015 to explain that:

> We have heard, and are responding to, public calls for greater transparency. That remains a focus for both GCSB and the [New Zealand Intelligence Community] more broadly.

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[165] Department of the Prime Minister and Cabinet, above note 22, at 7.
[166] See Rogers, above note 18.
[167] NZSIS, *Annual Report 2009*, above note 76, at 15.

> Transparency and openness are not entirely straight forward in the security environment but we remain committed to them as concepts underpinning our work. We have to ensure that we do not inadvertently increase our vulnerabilities to people who do not have New Zealand's best interests at heart by revealing our sources, methods or targets. We don't want people we are gathering intelligence on, or defending computer networks from, to know that we are looking at them or how we are doing that. We don't even want them to know what we are or are not capable of. Getting the balance between security and transparency right requires the independent oversight functions now embedded in the system. We are not a closed shop, setting our own standards, judging ourselves against them and saying "trust us." Far from it; we work under a rigorous authorising regime and we are the subject of significant, strong and independent oversight by the Inspector-General of Intelligence and Security, the Parliamentary Intelligence and Security Committee, the Ombudsman and the Privacy Commissioner.[168]

The NZSIS Annual Report for 2011 included a section entitled "Industry, Academia, and Community Outreach." It highlighted efforts at greater transparency ranging from producing a new booklet "An Introduction to NZSIS – How we contribute to New Zealand's National Security" to the Director of Security giving speeches to the Institute of Internal Auditors, the Victoria University of Wellington's Master of Strategic Studies Programme, and the New Zealand Institute of Intelligence Professionals in Auckland, Wellington and Christchurch. The NZSIS Annual Report for 2016 explained that the Director-General of the NZSIS "has made herself available for interviews and briefing and media and has spoken at a number of functions and conferences across the country…. [and] has spoken at a number of academic conferences, sits on the Strategic Advisory Board for the Centre of Defence and Security Studies for Massey University, has presented to students undertaking study in areas relating to national security and is working with the academic sector to identify opportunities for research."[169] Building on the efforts of their predecessors, both Hampton and Kitteridge deliver opening statements to the ICS, and have given public speeches and occasional interviews to political reporters.[170]

The 'watchdog' component of the governance arrangement has also been strengthened. Building on the provisions contained in the Inspector-General of Intelligence and Security Act 1996, the scope of IGIS's powers have not only been recalibrated to match the intelligence and security agencies' new functions under the Intelligence and Security Act 2017, but the prohibition on inquiring into any matter that is operationally sensitive, including matters relating to intelligence collection, methods and sources, has also been removed. The IGIS can now conduct inquiries into the propriety of the agencies' activities, and conduct reviews of any activities conducted by those agencies performing its function under Section 14; that is, the agencies' new imminent threat to life emergency powers. However, the substantive strengthening of the IGIS's role occurred earlier, following the Dotcom affair in late 2013. According to Cheryl Gwyn: "[p]reviously the Inspector-General had been a retired Judge, working part-time, with no investigatory capacity. Under the 2013 amendments [to the GCSB Act] it became a fulltime role and the powers and resources of the office now more closely

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168 GCSB, *Annual Report 2015*, above note 116, at 5.

169 NZSIS, *Annual Report for 2016*, above note 85, at 31.

170 See, for instance: A Hampton "Opening statement to the Intelligence and Security Committee," 21 March 2018; R Kitteridge "Opening statement to the Intelligence and Security Committee," 20 February 2019; R Kitteridge, "Speech: Understanding Intelligence" 18 September 2019.

match the mandate."[171] IGIS now possesses investigative powers like those enjoyed by a Royal Commission, such as the power to compel persons to answer questions, produce documents or give sworn evidence. During her almost six years in the role, Gwyn released 11 substantive reports whereas her three predecessors – Hon Laurence Greig, Hon Paul Neazor and Hon RA McGechan – released only five reports among them.[172] At the time of writing, Brendan Horsley, who took up the role in May 2020, has issued two 'baseline' reports, though the period in question as seriously disrupted by Covid-19 lockdowns.[173]

IGIS's powers are not unlimited, however. IGIS cannot, for example, declare warrants invalid where serious deficiencies are identified in those authorisations. Furthermore, IGIS's powers are easily undermined when the intelligence and security agencies refuse to cooperate, which occurred during 2015, 2016 and 2017 when Gwyn undertook a review of the NZSIS's access and use of information held on a system managed by the New Zealand Customs Service, but found the NZSIS "reluctant to engage with [her] office on the substantive issues."[174]

* * * * *

We think the military backgrounds of the NZSIS and the GCSB Directors employed during the Cold War illustrate the close connection between intelligence work and the use of deadly force. Almost a decade after the end of the Cold War, there was a discernible shift in the type of professional experience held by those leading the agencies. The preference for civilian backgrounds with legal and diplomatic experience appears to be part of the mainstreaming of intelligence work into the wider public service, and could be one of the earliest responses to the question of low public trust and confidence in New Zealand's intelligence and security agencies. The respective leaders of the NZSIS and the GCSB altered the services delivered by their respective agencies throughout the War on Terror. The NZSIS's mission statements and organisational visions were initially focused on New Zealand's national security, but broadened to include New Zealand's prosperity and other interests, before returning to national

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[171] C Gwyn, "Speech" New Zealand Centre for Public Law Public Officeholders' Lecture Series "Spotlight on Security", Victoria's Faculty of Law, 4 May 2016.

[172] See, for instance: M Laracy, *Report of Inquiry into the role of the GCSB and the NZSIS in relation to certain specific events in Afghanistan*. Office of the Inspector-General of Intelligence and Security, 2020; C Gwyn, *Best Practice Approaches to Information Sharing and Cooperation: Ensuring Lawful Action (from the Inquiry's classified Report),* Supplementary Paper to the Inquiry into possible New Zealand intelligence and security agencies' engagements with the CIA detention and interrogation programme 2001-2009. Office of the Inspector-General of Intelligence and Security, 2019; C Gwyn, *Inquiry into possible New Zealand intelligence and security agencies' engagement with the CIA detention and interrogation programme 2001-2009*. Office of the Inspector-General of Intelligence and Security, 2019; C Gwyn, *Complaints arising from reports of Government Communications Security Bureau intelligence activity in relation to the South Pacific, 2009-2015*. Office of the Inspector-General of Intelligence and Security, 2018; C Gwyn, *Lawfulness of NZSIS access to data under the Customs and Excise Act 1996 and the Immigration Act 2009*. Office of the Inspector-General of Intelligence and Security, 2017; and C Gwyn, *Report into the release of information by the New Zealand security Intelligence service in July and August 2011*. Office of the Inspector-General of Intelligence and Security, 2014.

[173] B Horlsey *Report into a review of GCSB and NZSIS activity and assessments under the Outer Space and High-altitude Activities Act 2017*. Office of the Inspector-General of Intelligence and Security, 2021; and B Horsley *Review of NZSIS use of closed circuit television*. Office of the Inspector-General of Intelligence and Security, 2021. Horsely has also reported on an investigation into a complaint against the NZSIS.

[174] C Gwyn *Annual Report: For the year ended 30 June 2017* at 16.

security in the immediate aftermath of 15 March 2019. Over the same time period, the GCSB's mission statements focused exclusively on contributing to New Zealand's national security and its organisational vision was one of a service delivery agency. This exclusive focus on New Zealand's security was maintained as the operational domain was defined as cyberspace until trade and the economy was introduced by Murdoch, largely retained by his successors and appears now as economic wellbeing. While terrorism was a recurring frame through which the value of New Zealand intelligence work was expressed, the intelligence and security agencies have grown and further developed their capability to surveil New Zealanders when authorised to do so. To offset any apprehension about those increased surveillance capabilities, New Zealand parliamentarians strengthened governance arrangements, including the public accountability measures. The leaders of the intelligence and security agencies have used those measures to increase transparency of their organisational activities, though there are obvious limits to those efforts.

4. Reviews and Inquiries

In this section we examine several reports resulting from various reviews and inquiries into New Zealand's intelligence and security agencies, which were commissioned by senior public servants or parliamentarians. We note commonalities among the professional backgrounds of the reports' authors and explain how these consultants were appointed and under what authority. We then outline the relevant terms of reference and describe each report's substantive findings as well as any recommendations to improve service delivery performance and organisational development or to strengthen governance arrangements. While each report considered here momentarily pierces the veil of official secrecy and offers a limited degree of transparency into these agencies' conduct, only some of the authors made specific recommendations to restore public trust and confidence in New Zealand's intelligence and security agencies.[175]

Public Service Reports

Simon Murdoch, a former chief executive of the DPMC (see section 3 above), conducted the first of these recent reviews of New Zealand's intelligence and security agencies initiated from within the public service. Murdoch was appointed by the State Services Commissioner on 27 May 2009 under Section 6(a) of the State Sector Act 1988 and, in respect to the NZSIS, at the invitation of the Prime Minister in accordance with Section 11 of that Act. Paragraphs 10 to 13 of his terms of reference state that:

> There is a need to examine: How we can optimise the effectiveness of our intelligence and security arrangements across the New Zealand intelligence community as a whole; [and] how we can extract further efficiency gains from the funding already provided, so as to be able to reinvest those gains back into more effective intelligence and security capability and delivery of result.
>
> A review will be undertaken of the structure of New Zealand's current intelligence activities, to assess whether the present configuration across these agencies is optimal, or whether an alternative arrangement would be preferable. The Review will examine the three core intelligence agencies and assess whether their current structures and modes of operation are optimal for the Minister, and the government as a whole.
>
> The review may, as appropriate, examine linkages with other agencies which generate or use intelligence, and may consider coordination mechanisms including [the Officials Committee on Domestic and External Security Coordination (Intelligence)].
>
> The review will determine whether there are practical options for change in the way the intelligence agencies work to improve overall intelligence outcomes.[176]

Murdoch completed his report on 12 October 2009, though some text remains redacted. In the substance of the report, which is expressed in six pages, Murdoch clearly states his prognosis:

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[175] Young and Caine identified 35 such reports released between 2003 and 2019. Six of these reports were produced by the Office of the Inspector-General of Intelligence and Security. Six were related to the Performance Framework Reviews. Three were produced by the Office of the Controller and Auditor-General. Ten were written by consultants. The remainder were produced by government departments and the New Zealand Law Commission. See Young and Caine, above note 14, at 415 – 417. It does not appear, however, that they undertook a substantive analysis of the content or impact of these reports.

[176] S Murdoch *Intelligence Agency Review: Report to the State Services Commissioner* (2009) at 12.

> The main challenge to the new or contemporary [New Zealand Intelligence Community (NZIC)] today lies in whether it can sustain its present levels of productivity across a widening range of outputs driven by stakeholder demands which continue to intensify, without becoming operationally sloppy or intellectually mediocre. In terms of their 'return on investment' offshore partners will expect NZIC to sustain niche contributions of high professional quality. NZIC's value to this and future government lies in its overall operational consistency in its protective functions and in its offering timely and well-integrated assessments that enable national security decision makers to manage risks, short and medium term to our domestic and external interest. If it performs well, the NZIC can help protect the state and gives advantages that negate the limitations of small nations in the modern world.
>
> […] Given the emerging need for quite firm and ongoing fiscal restraint, it is only sensible to be asking what could be done, structurally or managerially to assure Ministers about NZIC's future performance.[177]

The report's substantive section is supported by another fifty pages of text spread across ten annexes that, in addition to reproducing the terms of reference and providing a list of acronyms featuring throughout the report, describes the role of intelligence and signals its limitations, explains how New Zealand's intelligence capabilities have evolved since their establishment, and identifies factors that have shaped the culture and practices of New Zealand intelligence work. The annexes deal with the agencies' funding, governance arrangements, international partnerships, intra-agency communications as well the agencies' self-assessment under the central agency designed Performance Improvement Framework (PIF).

For the most part Murdoch's report recommended incremental, rather than radical, change across the intelligence and security agencies. In terms of the delivery of intelligence outputs, Murdoch suggested that the NZSIS and the GCSB consider making plans for "cross-agency service delivery in selected areas"[178] and consider adjusting "the balance between those intelligence outputs directed at present risk mitigation and what needs to be devoted to revealing and understanding medium-term trends and intentions."[179] The delivery of intelligence products and services could be better informed by "a more dynamic process for priority setting"[180] beyond simply imposing a hierarchy across a plethora of subjects of possible interests to intelligence consumers. Murdoch also saw scope for the NZSIS to find more operational synergies with law-enforcement agencies "as part of a contemporary national security agenda" that features new globalised threats.[181]

Murdoch's report largely dismissed organisational reform of the intelligence and security agencies on the grounds that these agencies provided different core outputs and had different professional cultures and business practices. While a merger of the NZSIS and the GCSB into a single agency would not unlock any 'high-hanging' operating synergies, Murdoch suggested the two agencies might operate more efficiently together. In particular, this meant "pooled corporate and back office functions and shared processing and distribution technologies."[182]

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[177] At 4.
[178] At 6.
[179] At 5.
[180] At 5.
[181] At 6-7.
[182] At 5.

Murdoch did suggest, however, that the External Assessments Bureau (renamed National Assessments Bureau (NAB) in 2010 in light of his report's recommendations) could be merged with the Combined Threat Assessment Group and be collocated with the Directorate of Defence Intelligence and Security to build "critical mass" and foster an "assessment cluster"[183] with a closer connection to the New Zealand Signals Intelligence Operations Centre, which is located with the GCSB.

The recommendations of Murdoch's report took aim squarely at the governance of the intelligence and security agencies. Murdoch opened his report by remarking that "[b]y and large, in New Zealand, as far as the control of secret agencies goes, we have strong and internationally orthodox external public accountability arrangements,"[184] though he went on to write that "[i]t has long been recognized that there needs to be effective coordination and oversight at a 'sectoral' level."[185] Murdoch then proceeded to make the case for three central agencies – namely, the Department of the Prime Minister and Cabinet, The Treasury and the State Services Commission – to have a much stronger role in governing the agencies' growth and conduct. He cautioned that "the central agency leadership and ultimate accountability should remain with the C[hief] E[xecutive] of the Department of the Prime Minister and Cabinet and operate through a DPMC unit. Even if, in future, the Prime Minister were not the portfolio Minister for all three agencies, he or she would still be the essential actor on national security issues, and would chair the Cabinet D[omestic and] E[xternal] S[ecurity Coordination] Committee."[186] However, Murdoch's report did not call for the formulation of intelligence policy, describing intelligence as "a means to an ends" that "enables the nation state and its institutions to manage risk by discerning policy choices that are better judged because the decision-makers are better informed."[187] Nor did his report call for major law reform either (except for managing the performance of agencies heads, who should, in Murdoch's view, become subordinate to the State Service Commissioner, now the Public Service Commissioner).[188]

Murdoch's review, which was undertaken while those responsible for deflating the protective dome covering satellite dishes located at the GCSB's Waihopai Station in 2008 were prosecuted through the courts, was written for senior public servants responsible for managing the NZSIS and the GCSB. Originally classified as secret, it was not crafted for public consumption and did not seek to address the issue of low public trust and confidence in New Zealand's intelligence and security agencies.

A second review, which considered the relationship between New Zealand's intelligence and security agencies, and national security, was conducted in 2009. Prepared by Michael Wintringham (a former State Services Commissioner) and Jane Jones, the resulting report was delivered in late 2009. Entitled "A National Security and Intelligence Framework for New Zealand," it dealt with "vectors of harm" that included terrorism, sabotage, subversion,

[183] At 7.
[184] At 3.
[185] At 11.
[186] At 7.
[187] At 14.
[188] At 8.

espionage, cyberattacks and weapons of mass destruction. Wintringham's terms of reference, findings and recommendations remain classified, however.[189] Like Murdoch's review, Wintringham's review was undertaken as those responsible for deflating one of the GCSB's protective domes were prosecuted through the courts. The resulting report was similarly written for senior public servants responsible for managing the intelligence and security agencies and was not crafted for public consumption, nor sought to influence public opinion on New Zealand's intelligence work.

A third review was conducted between late 2012 and early 2013 by then-Cabinet Secretary Rebecca Kitteridge (see Section 3). At the request of Ian Fletcher (Director, GCSB) and Andrew Kibblewhite (Chief Executive, DPMC), Kitteridge accepted a secondment to the GCSB to reassure Fletcher that the GCSB's activities were undertaken within its powers and under adequate safeguards. According to the terms of reference:

> The reviewer will deliver a report to the Director that will address the following matters: whether the Bureau has been conducting its activities within it statutory powers, and whether there are any areas of ambiguity or difficulties of interpretation in relation to the legislative framework; whether the structure and capabilities of GCSB have contributed to GCSB carrying out any of its functions without clear legal authority (e.g. lack of capability or capacity, lack of checks and balances in the organisation's structure); whether the systems and processes within GCSB (e.g. compliance resources and procedures, IT systems, documentation and record keeping, internal legal scrutiny and challenge, internal audit) are adequate; whether the oversight regime and other accountability mechanisms (e.g. Inspector-General of Intelligence and Security, Intelligence and Security Committee, Audit Office, Office of the Ombudsmen) are sufficiently robust to ensure that GCSB is operating lawfully and in accordance with the government's objectives; and how to make best use of these mechanisms; the culture of the organisation and its role in the way that GCSB conducts its activities; public trust in GCSB (and the IC generally) and what changes may be required to build it.
>
> The report will recommend actions to address the issues identified in the review, aligned as much as possible with GCSB's and the IC's objectives and future direction. Recommendations may include suggested changes to GCSB's and/or the IC's: structures, capability and capacity; internal procedures, systems, documentation, audit, governance; oversight regime; organizational culture; transparency and public communications regarding its activities; [and] legislation.[190]

Kitteridge delivered her report on 22 March 2013. It was divided into two main parts and supported by an introduction and conclusion, as well as by seven appendices that contain a consolidated list of recommendations made throughout the report and the terms of reference enacting the review's scope. The introductory section articulates the GCSB's value proposition in light of New Zealand's security, policy decisions and "a wide range of other things that are essential to the well-being and prosperity of New Zealand."[191] Kitteridge uses the introduction to outline the composition of the intelligence community's core agencies and acknowledges two previous reviews (both mentioned above) before elaborating her approach to undertaking the review and indicating the significance of legal interpretation. Here, Kitteridge expands the

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[189] Wintringham's review is mentioned by: Murdoch, above note 176, at 4 and 13; R Kitteridge *Review of Compliance at the Government Communications Security Bureau* (2013) at 12; and Young and Caine, above note 14, at 415.

[190] Kitteridge, above note 189, at 81-82.

[191] At 11.

scope of her review by explaining that "the problems concerning compliance at GCSB are symptomatic of broader organisational issues."[192] The first main part of Kitteridge's report deals with the compliance frameworks that support the Government Communications Security Bureau Act 2003 and its prohibition on the GCSB's interception, analysis and reporting on the communications of New Zealanders. The second part of the report focuses on an array of factors that may have contributed to the GCSB's compliance problems, specifically the GCSB's organisational structure, governance arrangements and work culture.

Kitteridge's report made eighty recommendations, though none concerned the GCSB's service delivery. The report did, however, (like Murdoch's) suggest improving the "process for coordinating all Requests for Information and Requests for Assistance across the Bureau be standardised, centralised and triaged through one centralised point of contact at the Bureau."[193] Kitteridge also suggested "one centralised point of contact within the Bureau for all day-to-day engagement with external agencies."[194]

Kitteridge's recommendations concerned the GCSB's organisational design. The report recommended that the GCSB be restructured in "a simpler, less fragmented way,"[195] the number of its small units and managers be reduced, and Bureau-wide roles be centralised. The report called for a new unit responsible for internal compliance and operational policy be established as well as for a "structured programme of secondments between GCSB and other public service departments."[196] It also suggested the organisational location of the National Cyber Security Centre and the geospatial intelligence capability within the GCSB be better explained.

Some of Kitteridge's recommendations concerned the GCSB's governance arrangements. The report suggested that the GCSB strengthen its internal governance by ensuring its Board remain focused on matters of strategic concern, rather than on operational affairs. It also suggested strengthening the Office of the Inspector-General of Intelligence and Security by increasing its resourcing and public visibility, and by broadening the pool of candidates for the post beyond retired judges. The most significance recommendation of Kitteridge's report suggested that Parliament consider undertaking legislative reform to clarify the application of the GCSB Act 2003 to the GCSB's current work. She also recommended that the GCSB assess all existing law (common law and international law) relevant to its purposes and functions, create and maintain a repository of relevant legal material, and better monitor and respond to developments in that law.[197]

Unlike Murdoch's and Wintringham's reports, Kitteridge's report focused on only one agency. This was because the review was undertaken in response to the scandal that surrounded the GCSB's unlawful surveillance of Kim Dotcom and the resulting report was written for public consumption (except for five secret annexes that were withheld). Kitteridge used her introduction to frame the ensuing report as a means of restoring public trust and confidence in

[192] At 6.
[193] At 73.
[194] At 77.
[195] At 76.
[196] At 77.
[197] At 72

the GCSB, explaining that: "[i]t is my strong belief that when GCSB has addressed the issues raised in this report, it will not only be an organisation that continues to provide great public value, but also an institution in which the public can have trust and confidence."[198] The report's conclusion, which is brief and emphasies the GCSB's challenging operating environment, states:

> I am sure that the right balance can be struck so that GCSB can continue its work, in the interests of New Zealand, and that the public can be confident that systems are in place to ensure that its work is being conducted lawfully. If the oversight can be strengthened, that too will make a significant contribution to the rebuilding of public trust.[199]

With the aim of helping to restore public trust and confidence in the GCSB in the aftermath of the Dotcom affair, Kitteridge's report reviewed the GCSB's internal policies and processes before offering a new approach to ensure compliance with the agency's legal duties that would strengthen capability in this area and improve performance. It was not an inquiry in the strict sense as it did not investigate the circumstances leading to the GCSB's unlawful surveillance.

A PIF Review of New Zealand's intelligence and security agencies was undertaken in late 2013.[200] Commissioned by the State Services Commission (now Public Services Commission), this review assessed the capability of New Zealand's intelligence and security agencies to achieve their future objectives or, put in another way "best perform within existing resources."[201] In July 2014, a 19-page unclassified summary of the review of the agencies in the core of New Zealand's intelligence community, by Peter Bushnell (former Deputy Secretary at The Treasury) and Garry Wilson (former Chief Executive of Accident Compensation Corporation), was released. Unlike other PIF reviews, Bushnell and Wilson focused on a group of government agencies, rather than on single organisation. They defined the core agencies of the intelligence community as the NZSIS and the GCSB, as well as the NAB and the Intelligence Coordination Group – both of which are business units of the DPMC. While the review had no specific terms of reference, it followed a standardised framework that addresses two results areas (delivering on government priorities and conducting core business) and four organisational management areas (leadership, direction and delivery; external relationships; people development; and financial and resources management). The reviewers asked a central question: "what is the contribution that New Zealand needs from its core intelligence community and therefore what is the performance challenge?"[202] The report did not contain a consolidated list of specific recommendations, but rather sets out an aspirational "Four Year Excellence Horizon."

This PIF review was routine and undertaken for the benefit of senior public servants. Its purpose was to help the intelligence and security agencies improve their performance and

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[198] At 11.

[199] At 71.

[200] The Performance Improvement Framework (PIF) is a joint central agency initiative established by the Public Service Commission to "help senior leaders in the Public Service lead performance improvement in their agencies and across the system. Public Services Commission "Performance Improvement Framework" https://publicservice.govt.nz/our-work/performance-improvement-framework/.

[201] P Bushnell and G Wilson *Review of the agencies in the core New Zealand Intelligence Community* (Unclassified Summary, 2014) at 5.

[202] At 5.

strengthen their organisational capability. Echoing Murdoch, the reviewers explain that the "performance challenge is to clarify the scope of the [New Zealand Intelligence Community's] role given the constraints of resources allocated to it, and then to create a more seamless collaboration and efficient allocation of resources and skills in support of that purpose."[203] Their detailed report, which was classified Top Secret and for New Zealand Eyes Only, was not written for public consumption. However, the consultants authoring the report noted that senior public servants, committed to transparency, commissioned an unclassified summary of the key findings and main themes of the PIF review to provide a reflection of the operating environment and performance challenge for the New Zealand intelligence community.

A follow-up PIF review was conducted by Sandi Beatie (former Deputy State Services Commissioner) and Geoff Dangerfield (former Deputy Secretary of The Treasury). Released in August 2018, their resulting report focused specifically on addressing "how well the community is placed to take full advantage of the potential opportunities the [new Intelligence and Security Act 2017] provides,"[204] as well as what is needed for those agencies to better demonstrate their value and better manage their growth.[205] The report essentially affirms the agencies are "on the right track," endorsing and encouraging their current approach. Although the review was not commissioned in response to a government scandal, it was undertaken during a period of low public trust and confidence in New Zealand's intelligence and security agencies. The report notes that the "agencies are working to build a stronger public engagement on what they do and why, and to be more transparent in their public reporting on activities and outcomes."[206] The commissioning of this review and its release of this report to the public, and the absence of anything to indicate there was a more detailed, classified version written for senior public servants, suggest this follow-up report was produced for public consumption in the hope that it might address the issue of low public trust and confidence in the agencies.

In early 2018, the State Services Commissioner appointed Doug Martin (former Deputy State Services Commissioner) to undertake an inquiry into surveillance conducted by Thompson and Clark Investigations Ltd under contract to a New Zealand Government-owned company. In mid 2018, that inquiry was broadened to include the relationship between Thompson and Clark Investigations Ltd and employees of the NZSIS. The State Services Commissioner appointed Simon Mount QC to join Doug Martin. Their terms of reference focused on:

> circumstances of, and reasons for, any engagement by Crown Agencies of external security consultants including but not limited to Thompson and Clark Investigations Limited and its associated companies and entities; the nature and outcomes of any such engagement; and the nature of the relationship between current and former employees of Crown Agencies and TCIL and its associated companies and entities.[207]

The terms of reference also required Martin and Mount to report on:

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[203] At 5.
[204] S Beatie and G Dangerfield *Follow-up Review for the New Zealand Intelligence Community* (2018) at 3.
[205] At 17-19.
[206] At 18.
[207] D Martin and S Mount *Inquiry into the Use of External Security Consultants by Government Agencies* (2018) at 80.

> whether external security consultants have carried out surveillance activities directly or indirectly on behalf of any Crown Agencies and if so the nature of such surveillance, either generally or relating to specific individuals; the extent to which Crown Agencies requested that surveillance and/or received information relating to that surveillance; and any actions undertaken as a result of information received; any internal or external advice to Crown Agencies relating to or produced as a result of engaging external security consultants and/or any monitoring undertaken, including but not limited to advise relating to potential disclosure of the existence, nature or circumstances of any surveillance undertaken; governance and reporting mechanisms (or lack thereof) relating to the engagement of security consultants; and whether or not, and the extent to which, any matter identified by the inquiry amounted to a breach of the State Services Standards of Integrity and Conduct or would have amounted to a breach if the standards had applied.[208]

Their investigation included conducting 100 interviews of witnesses, two of which required summons.

On 18 December 2018, the State Services Commissioner released Martin and Mount's report, entitled *Inquiry into the Use of External Security Consultants by Government Agencies*. At over one hundred pages in length, the report was structured into four sections – namely, (i) an executive summary and consolidated list of agency-specific findings; (2) legal and ethical framework; (3) use of external security consultants by government agencies; and (4) the relationship between government employees and agencies and Thompson and Clark. It was supported by four appendices. In their preface, Martin and Mount make clear the following:

> The issues traversed in this inquiry go to the heart of public trust and confidence in the state sector. Our objective has been to undertake a comprehensive and thorough inquiry to provide sunlight on the concern raised [about the use of external security consultants by government agencies to undertake intrusive activities]. These were not only raised by organized interests such as Greenpeace and more established groups. They were also conveyed to us by representatives of community groups and individuals – ordinary New Zealanders who have grown concerned about the relationship between government agencies and external security consultants.[209]

The reviewers found that "Southern Response, the Ministry of Agriculture and Forestry, Crown Law and the Ministry of Social Development breached the Code of Conduct."[210] They also found that the emails of a NZSIS employee to Thompson and Clark Ltd "displayed a degree of informality and closeness that was inconsistent with the professionalism expected of state servants. The emails involved an NZSIS employee assisting Thompson and Clark's business development in a way that was related to his role but without an appropriate degree of attachment. These emails risked harming the reputation of the NZSIS and were therefore inconsistent with the Code."[211] While the report made recommendations for the senior public servants to reflect on, none of those recommendations directly concerned improving service delivery performance, organisational development or governance arrangements of the intelligence and security agencies.

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[208] At 80.
[209] At 1.
[210] At 5.
[211] At 11.

Parliamentary Reports

The Government Communications Security Bureau Amendment Act 2013 required periodic reviews – that is, between every five to seven years – of the intelligence and security agencies, the legislation governing them and their oversight legislation.[212] Sir Michael Cullen KNZM and Dame Patsy Reddy DNZM were appointed to undertake the first such review. According to their terms of reference:

> The purpose of the review, taking into account that subsequent reviews must occur every 5-7 years, is to determine:
>
> (1.) whether the legislative frameworks of the intelligence and security agencies (GCSB and NZSIS) are well placed to protect New Zealand's current and future national security, while protecting individual rights; (2.) whether the current oversight arrangements provide sufficient safeguards at an operational, judicial and political level to ensure that GCSB and NZSIS act lawfully and maintain public confidence.
>
> The review will have particular regard to the following matters:
>
> (3.) whether the legislative provisions arising from the Countering Foreign Terrorist Fighters legislation, which expire on 31 March 2017, should be extended or modified; (4.) whether the definition of "private communication" in the legislation governing the GCSB is satisfactory; (5.) any additional matters that arise during the review as agreed by the Acting Attorney General and notified in writing in the NZ Gazette.
>
> When determining how to conduct the review, the reviewers will take into account:
>
> (6.) the need to ensure that a wide range of members of the public have the opportunity to express their views on issues relating to the review; (7.) the need for the law to provide clear and easily understandable parameters of operation; (8.) the Law Commission's work on whether the current court processes are sufficient for dealing with classified and security sensitive information; (9) previous relevant reviews and progress towards implementing their recommendation; (10.) relevant overseas reviews to identify best practice in areas relevant to this review, including oversight arrangements; and (11) that traditionally, signals and human intelligence have been carried out separately and the Government does not intend to consider merging those functions within a single agency.[213]

The resulting report, *Intelligence and Security in a Free Society*, is divided into eight chapters and is about 170 pages in length. Its introduction sets the scene in terms of a tension between collective security and individual rights where security and privacy are understood to be "complementary rights," outlines the objectives of the report and the reviewers' methods, and signals the common themes found across the public submissions for which the reviewers called. Included here too is a description of the global context of threats, including the impact that Edward Snowden's unauthorised disclosures had on New Zealanders' confidence in its intelligence and security agencies. The report's first substantive chapter, "Intelligence," explains what intelligence is, why it is often secret and how the government uses it. The reviewers articulate the value of intelligence by suggesting that "[i]ntelligence informs both strategic policy decisions that influence New Zealand's future position in the world and more immediate decisions relating to specific solution"[214] and explain why intelligence collection

[212] Repealed; now required under S 235 of the Intelligence and Security Act 2017.
[213] Cullen and Reddy, above note 15, at 148.
[214] At 32.

takes place independently of policy advice or enforcement action over individuals. The second chapter explains the intelligence cycle and how New Zealand's intelligence system operates while providing some useful background information on the origins and development of the NZSIS and the GCSB. The third chapter makes a case for stronger accountability measures, including integrating both agencies within the public sector, strengthening the office of the IGIS, and creating new functions for the ISC. Chapter four argues for both agencies to be given revised objectives and functions while chapter six deals with how the agencies should operate and what powers and associated immunities their staff require. Chapter seven concerns what official information the agencies can access and on what conditions they can use it. The penultimate chapter considers whether the legislative provisions of the Countering Foreign Terrorist Fighters Legislation Bill should persist before the reviewers offer their brief concluding remarks. The report closes with seven annexes, which includes the full list of recommendations.

The reviewers explain that "the primary purpose of our report is to set out a basis for comprehensive reform of the legislation relating to those agencies"[215] in part because the existing legislative framework was poorly understood by the public and, in part, because it was difficult for the intelligence and security agencies to navigate. The reviewers explain, moreover, that there ought to be a single Act of Parliament that uses plain English to explain not only how New Zealand's intelligence and security agencies are constituted, but also what their purposes are, how their activities are authorised and overseen.[216] To that end, they explain that the agencies' objectives, functions and powers, as well as the relevant oversight measures, should be found in a single Act that protects New Zealand's status as a free, open and democratic society in accordance with human rights law.[217] A single comprehensive Act would "avoid inconsistences and gaps between various statutes and enable a consistent set of fundamental principles to be applied to the agencies and their oversight."[218]

While the recommendations were mostly concerned with the frameworks needed to enable the intelligence and security agencies to operate more effectively and efficiently, the report does suggest ways in which the agencies could work together to improve their service delivery performance. In addition to creating new common objectives and shared functions, the reviewers proposed the agencies also "develop joint operating protocols with other government agencies."[219] The reviewers also recommended that the NZSIS become a public service department and the Directors of both the NZSIS and the GCSB should be appointed by the State Services Commissioner, which draws on ideas found in Murdoch's earlier review.[220]

Given that their terms of reference stated the Government does not intend to consider merging those functions within a single agency (an idea rejected in Murdoch's report), it is not surprising that reviewers did not address organisational reform in their report. The authors did note, however, that the GCSB and the NZSIS "are currently separated based on how they

[215] At 1.
[216] At "foreword."
[217] At 152.
[218] At 55.
[219] At 156.
[220] At 152.

collect information (signals intelligence versus human intelligence) and whether they are collecting foreign intelligence or intelligence relating to New Zealand's security. Although these separations may have made sense historically, they are less applicable in the modern technological and threat context where all-source intelligence analysis is necessary to 'connect the dots.'"[221]

The report made several recommendations to strengthen measures ensuring the agencies' public accountability. This included recommending the introduction of a new authorisation regime covering all activities undertaken by the agencies. It also included the further strengthening of the Office of IGIS by clarifying its purpose, protecting its independence and extending the term of the IGIS from three to five years, and expanding the membership of the parliamentary ISC and granting it the power to request IGIS to inquire into any matter relating to the agencies' compliance with the law and/or the propriety of any particular activity undertaken by one or both of the agencies, including sensitive operational matters.[222] Cullen and Reddy explain that:

> Independent external oversight is therefore essential to ensure that by working to secure populations against internal and external threats and advance the interests of the nation as a whole, intelligence and security agencies do not undermine democracy or the rights of individuals in the process. As publicly funded agencies, they must also be held accountable for how they use public money. Oversight must ensure the Agencies are operating efficiently and effectively in the interests of the country and in accordance with the values of its citizens.[223]

The report acknowledged that Snowden's revelations and the GCSB's unlawful conduct "raised some significant public concern about what the Agencies are here for, what they should be allowed to do and what they should be prohibited from doing."[224] Cullen and Reddy explained that:

> This review comes at a time of unique challenges. In New Zealand, there is a public perception that we are relatively sheltered from the threats currently faced by many other countries. There is also increasing concern about the privacy of New Zealanders, the Agencies compliance with the law and the prospect of widespread data collection, particularly in the wake of Edward Snowden's information leaks and controversies such as the GCSB's involvement in the events leading up to Kim Dotcom's arrest…. In New Zealand, there remains a much greater degree of public scepticism about the need for intelligence and security agencies, and suspicion of their activities. We hope this report will help de-mystify the work of the Agencies, so far as possible, and inform the public debate in a simple and helpful way.[225]

These reviewers sought to restore public trust and confidence in New Zealand's intelligence and security agencies by actively seeking input from members of the public and by informing New Zealanders on what these agencies can and cannot do. Cullen and Reddy saw their review "as an opportunity to raise public awareness about what the Agencies do…"[226] That is why these consultants produced a single report, which could be presented to the House of

[221] At 62.
[222] At 154.
[223] At 52.
[224] At 24.
[225] At 14.
[226] At 18.

Representatives and made available to the New Zealand public without any redactions.[227] Like the consultants engaged by the public service, Cullen and Reddy stopped short of recommending any actions that might help build the capacity of everyday New Zealanders to better understand intelligence and security matters. Furthermore, they only consulted three *bone fide* subject-matter experts in the field of security studies employed at New Zealand universities, two of which are academics who work for the Centre of Strategic Studies at the Victoria University of Wellington.[228]

In the immediate aftermath of Brenton Tarrant's terrorist attack in Christchurch on 15 March 2019, Prime Minister Jacinda Ardern announced that the Government would establish a Royal Commission of Inquiry. A Royal Commission of Inquiry, established in accordance with the Inquiries Act 2013, is reserved for the most serious matters of public importance. On 8 April 2019, the Royal Commission of Inquiry into the terrorist attack in Christchurch on 15 March 2019 was established by an Order in Council and Sir William Young (Supreme Court Judge) was appointed as chair of the Royal Commission under an Act of Parliament, and on 22 May 2017 Jacqui Caine (New Zealand diplomat) was appointed as member.

According to their terms of reference, Young and Caine:

> The matter of public importance that the inquiry is directed to examine is
>
> (a) what relevant State sector agencies knew about the activities of the individual who has been charged with offences in relation to the 15 March 2019 attack on the Al-Noor Mosque and the Linwood Islamic Centre in Christchurch, before that attack; and (b) what actions (if any) relevant State sector agencies took in light of that knowledge; and (c) whether there were any additional measures that relevant State sector agencies could have taken to prevent the attack; and (d) what additional measures should be taken by relevant State sector agencies to prevent such attacks in the future.
>
> In order to achieve its purpose, the inquiry must inquire into
>
> (a) the individual's activities before the attack, including (i) relevant information from his time in Australia; and (ii) his arrival and residence in New Zealand; and (iii) his travel within New Zealand, and internationally; and (iv) how he obtained a gun licence, weapons, and ammunition; and (v) his use of social media and other online media; and (vi) his connections with others, whether in New Zealand or internationally; and (b) what relevant State sector agencies knew about this individual and his activities before the attack, what actions (if any) they took in light of that knowledge, and whether there were any additional measures that the agencies could have taken to prevent the attack; and (c) whether there were any impediments to relevant State sector agencies gathering or sharing information relevant to the attack, or acting on such information, including legislative impediments; and (d) whether there was any inappropriate concentration of, or priority setting for, counter-terrorism resources by relevant State sector agencies prior to the attack.
>
> The inquiry must report its findings on the following matters:
>
> (a) whether there was any information provided or otherwise available to relevant State sector agencies that could or should have alerted them to the attack and, if such information was provided or otherwise available, how the agencies responded to any

[227] At 19.

[228] At 150. The three academics named here are Professor Robert Ayson and Dr Jim Rolfe from the Centre for Strategic Studies at the Victoria University of Wellington, and Associate Professor John Ip, Faculty of Law, University of Auckland.

> such information, and whether that response was appropriate; and (b) the interaction amongst relevant State sector agencies, including whether there was any failure in information sharing between the relevant agencies; and (c) whether relevant State sector agencies failed to anticipate or plan for the attack due to an inappropriate concentration of counter-terrorism resources or priorities on other terrorism threats; and (d) whether any relevant State sector agency failed to meet required standards or was otherwise at fault, whether in whole or in part; and (e) any other matters relevant to the purpose of the inquiry, to the extent necessary to provide a complete report.
>
> The inquiry must make any recommendations it considers appropriate on the following:
>
> (a) whether there is any improvement to information gathering, sharing, and analysis practices by relevant State sector agencies that could have prevented the attack, or could prevent such attacks in the future, including, but not limited to, the timeliness, adequacy, effectiveness, and co-ordination of information disclosure, sharing, or matching between relevant State sector agencies; and (b) what changes, if any, should be implemented to improve relevant State sector agency systems, or operational practices, to ensure the prevention of such attacks in the future; and (c) any other matters relevant to the above, to the extent necessary to provide a complete report.
>
> To avoid doubt, recommendations may concern legislation (but not firearms legislation), policy, rules, standards, or practices relevant to the terms of reference, maintaining consistency with the widely-accepted values of a democratic society.[229]

The report was initially due on 19 December 2019, but was twice extended; the report was delivered to the Governor-General on 26 November 2020. It was 800 pages long and divided into ten parts, which were segmented into four volumes. These parts were: (1) Purpose and process; (2) Context; (3) What communities told us; (4) The terrorist; (5) The firearms licence; (6) What public sector agencies knew about the terrorist; (7) Detecting a potential terrorist; (8) Assessing the counter-terrorism effort; (9) Social cohesion and embracing diversity; and (10) Recommendations. The report found that there was no failure of information-sharing among the relevant agencies and that none of the public sector agencies involved in New Zealand's counter-terrorism effort was at fault in not detecting Tarrant's planning and preparation for his attack. It also found that what it describes as the "inappropriate concentration of resources on the threat of Islamic terrorism" did not lead to those agencies not detecting Tarrant as he planned and prepared his attack.[230]

The report makes 44 recommendations, which are divided into five clusters. The first cluster contains 18 recommendations to improve New Zealand's counterterrorism effort. The second cluster contains six recommendations to improve New Zealand's firearms licensing system whereas the third cluster makes three recommendations to better support the ongoing recovery needs of what the Royal Commissioners have phrased as affected whanau, survivors and witnesses. The fourth cluster contained 15 recommendations to improve social cohesion and New Zealand's response to its increasingly diverse population. The final cluster makes two recommendations regarding the implementation of the other recommendations, specifically appointing a Minister to lead and coordination the implementations and establishing an Oversight Advisory Group to support that new Minister.

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[229] Available at https://www.legislation.govt.nz/regulation/public/2019/0072/latest/LMS183988.html

[230] Young and Caine, above note 14, at 19-20.

Some of these recommendations from the Royal Commission of Inquiry concern the service delivery of the NZSIS and the GCSB. Recommended here, for example, is the development and implementation of a public-facing strategy to counter violent extremism and terrorism that is co-designed by public servants and members of the public.[231] Another recommendation would see improvements to the sharing of information on intelligence and security at the operational level.[232]

The Royal Commission of Inquiry also recommended that the Government establish a new national intelligence and security agency responsible for strategic intelligence and leading the security sector.[233] This new agency would produce the abovementioned counter-terrorism strategy and would be the primary conduit of intelligence advice to the Prime Minister and Cabinet while leading the engagement on strategic intelligence and security issues with the public. If implemented, this recommendation would result in the most significant transformation of intelligence work since the NZSIS and the GCSB were established.

Many of the 18 recommendations to improve New Zealand's counterterrorism effort concern the governance arrangements for the intelligence and security agencies. The Royal Commissioners recommended the Government ensure a minister is given the responsibility to lead New Zealand's counter-terrorism effort.[234] Other recommendations call for the role of the ISC to be strengthened and thought be given to establishing a new Interdepartmental Executive Board.[235]

Young and Caine acknowledge the public's low trust and confidence in New Zealand's intelligence and security agencies. The abovementioned scandals have meant parliamentarians likely eschewed opportunities to discuss terrorism and counterterrorism in public, though Young and Caine suggest these 'hard issues' need to be confronted[236] and they "wish to see discussion about counter-terrorism normalised."[237] And like the previous reports written for public consumption considered in this section, the Royal Commissioners "hoped [their] report will encourage members of the public, officials and politicians to engage in frank debate so that everyone understands their roles and responsibilities in keeping New Zealand safe, secure and cohesive."[238]

Unlike all other reviewers considered in this section, Young and Caine make recommendations that help build the public's capability to understand security and intelligence matters and create meaningful two-way consultation pathways between the intelligence and security agencies, and the public. In this respect Young and Cain make some bold and far-reaching recommendations. They recommend, for example, involving communities, civil society, local government and the private sector with ongoing work on strategic intelligence

[231] At 24.
[232] At 25.
[233] At 23.
[234] At 23.
[235] At 24-25.
[236] At 7.
[237] At 160.
[238] At 17.

and security issues,[239] as well as in the co-creation of a whole-of-society strategy to counter violent extremism and terrorism.[240] They recommend an advisory group comprising a membership drawn from the community, civil society and the private sector be established to provide advice to the Government on countering terrorism.[241] They recommend, too, the Government establish a programme to fund independent New Zealand-specific research on the causes of, and measures to prevent, violent extremism and terrorism[242] and host an annual hui as a means of building relationships and sharing understanding of countering violent extremism and terrorism among central and local government agencies, communities, civil society, the private sector and researchers.[243]

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Here, then, senior public servants engaged consultants in the aftermath of the above-mentioned government scandals and their reports make recommendations to strengthen the governance arrangements of the NZSIS and the GCSB. Some of these consultants suggest that releasing their reports to the public is as a useful act of transparency, but none recommended any action that would promote collective understanding of intelligence work among New Zealand society. Most of these consultants appear focused, instead, on enhancing the effectiveness and efficiency of the agencies' performance – including the capability to surveil members of the New Zealand public – as a means of demonstrating greater public value from the Government's ongoing investment, but without ever questioning the definition of national security or the purposes of intelligence work. Only one report (Martin & Mount) aimed to enact the ethical limits of efforts to expand the utility of intelligence work. None of these consultants are subject-matter expertise however, notwithstanding their impressive professional backgrounds. If the Annual Reports prepared by public servants are a clear expression of conventional thinking, then the reports written by consultants are an obvious manifestation of received wisdom. Unlike the public servant-initiated reports, the parliamentarian-initiated reports tend to engage more meaningfully with concerned everyday New Zealanders and are written with the public in mind. The latter take a broader view of the relationship between the agencies and the public they serve.

[239] At 23.
[240] At 24.
[241] At 25.
[242] At 26.
[243] At 27.

5. Conclusions

We organised this report into six sections. Our first section explained that we sought – under the auspices of academic freedom and by accepting the role of society's critic and conscience – to test conventional thinking and challenge received wisdom on the current relationship between New Zealand's intelligence and security agencies and the public they serve. We envisaged our primary audience as those parliamentarians and senior public servants with responsibilities for directing and managing the NZSIS and the GCSB. We also acknowledged that we relied heavily on official information that was publicly available because we sought to facilitate a greater level of engagement between those agencies and members of the public. We suggested that independent and applied research undertaken by academics into New Zealand's intelligence and security agencies was valuable as it can speak a truth to executive and bureaucratic power in a way that other forms of research cannot.

In our second section we noted the expansive notion of national security endorsed by Cabinet and we described the purposes, functions and powers of New Zealand's intelligence and security agencies, thereby demonstrating the Government's main intelligence-gathering efforts were no longer tied exclusively to the search for national security. We conveyed the reasons why New Zealand's intelligence and security agencies need official secrecy before suggesting that recent scandals have helped to undermine the public trust and confidence in those agencies and their work. However, secrecy – important for operational and strategic reasons – hampers the ability for agency heads to articulate the value propositions underpinning intelligence work. All of this, in our view, constitutes a complex and urgent problem for parliamentarians and public servants with responsibilities for directing and managing New Zealand's intelligence and security agencies.

In our next section we traced recent transformations that have occurred within New Zealand's intelligence and security agencies. We found that agencies frequently framed their service delivery operations in terms of transnational terrorism, but there were important attempts to broaden the narrative beyond national security concerns to include prosperity and economic wellbeing. This shift in framing service delivery coincided, more or less, with leadership changes as the professional backgrounds of the Directors shifted from military experience to career public servants with legal or diplomatic experience. We also found that the NZSIS and the GCSB have grown significantly during the War on Terror in terms of government funding and their respective workforces. We revealed the large extent to which these changes have strengthened those agencies' connections with New Zealand's wider intelligence community, the reach of which has broadened and deepened through the introduction of new sophisticated surveillance technologies within New Zealand. These changes have also deepened the relationship between the intelligence and security agencies and the NZDF and the New Zealand Police. Beyond these wider intelligence and security communities, the NZSIS and the GCSB have formalised their working relationships with commercial enterprises operating within New Zealand's economy, and continue to develop their partnerships with foreign intelligence agencies. By all accounts, the surveillance apparatus operated by the New Zealand Government is a formidable beast.

We then examined, in our fourth section, several reports resulting from various reviews and inquiries into the intelligence and security agencies undertaken by consultants who were commissioned by public servants or parliamentarians. We described each report's substantive findings as well as major recommended changes to improve service delivery performance and organisational redesign, or to revise governance arrangements. We noted that only some of the reports' authors recommended action that aimed to restore public trust and confidence in New Zealand's intelligence and security agencies, though most of these reports momentarily pierce the veil of secrecy and offer a limited degree of transparency into intelligence work. None of the consultants engaged to undertake reviews were subject-matter experts however, and none tested the conventional thinking they encountered.

In this, our penultimate section, we suggest the current approach to addressing low public trust and confidence in New Zealand's intelligence and security agencies is limited – and has now reached those limits. Over the past twenty years, both agencies have grown and increased the reach of the surveillance apparatus over the New Zealand population, which is now treated as a source of, or conduit for, serious danger. Notwithstanding any improvements in efficacy and efficiency to this apparatus, we suggest that New Zealand's intelligence and security agencies generate an unease among the wider public that runs counter to those agencies' objectives, despite several reviews and inquiries into their conduct, and despite stronger external oversight of, and increased transparency from, those agencies. We believe the low public trust and confidence in the NZSIS and the GCSB is intensified by successive scandals, but suspect this unease with New Zealand intelligence work will be sustained by concerns over the quality of organisational leadership, the close working relationship with the New Zealand Defence Force and Police, and the deep connections to United States intelligence and security agencies.

We then introduce two concepts that frame the findings of our analysis of the empirical record and inform our conclusions: namely, social licence to operate and democratic security practice. We also identify several conditions required for New Zealand's intelligence and security agencies not only to acquire and maintain a social licence to operate, but also to become bulwarks of democratic security practice. The New Zealand Government has already taken some important steps in this direction. While these laudable steps are a good start, we believe more could, and should, be done. In the following sub-section we signal the distance that remains to be travelled before New Zealand society comprises a citizenry capable of granting informed consent to be subject to state surveillance.

New Public Unease

According to a survey specifically conducted for this report, more than two-thirds of respondents felt that the world was less safe two decades after the War of Terror commenced, compared to 10% of respondents who felt somewhat safer or much safer. Almost half of our respondents could identify Al-Qaeda or Osama Bin Laden as the mastermind behind the terrorist attacks on 11 September 2001. Only 33% of respondents felt New Zealand was a safer place since the terrorist attack that took place in Christchurch on 15 March 2019 and over 60% of our respondents could name Brenton Tarrant as the terrorist. Over half of our respondents considered climate change to be serious security threat whereas 28% of our respondents thought terrorism, and 16% of our respondents thought cyberattacks, constitute a serious security threat. A quarter of our respondents had no confidence in New Zealand's intelligence and security agencies to keep them safe, compared to 11% of respondents who had no confidence in the New Zealand Police. Less than a quarter of our respondents could name both intelligence and security agencies, however. 30% of our respondents did not believe the United States was a beneficial security partner for New Zealand while 37% did not believe the Peoples Republic of China was a beneficial security partner for New Zealand. The fact that only 8% of our respondents thought the world was safer after 9/11 and 21% thought New Zealand was a safer place after 15 March 2019, should concern the NZSIS and the GCSB if they seek to better demonstrate their value in terms of beneficial societal outcomes.[244]

It seems reasonable to us that New Zealanders have good cause to be concerned about the quality of leadership of the NZSIS and the GCSB. During the Cold War, the agencies were led by former military professionals, but, since the War on Terror, there has been a shift towards appointing career bureaucrats, with backgrounds in law and diplomacy, to key leadership roles. The shift in the professional backgrounds of those who lead the intelligence and security agencies aims, at least on its face, to mainstream intelligence work within the machinery of government and, in part, addresses the important question of public trust and confidence in the agencies. But these appointments deprive the intelligence profession within New Zealand of credible leadership. Young and Caine also raised concerns with the quality of leadership over New Zealand's inter-agency counter-terrorism efforts.[245] We think this is especially acute in the present moment, given the highly credible leadership demonstrated by Dr Ashley Bloomfield in his role as chief executive of the Ministry of Health and New Zealand's Director-General of Health. (We see Bloomfield's credibility built on his relevant academic qualifications and practitioner experience, including at a world body, and his ability to communicate to the wider public through news media.)

It also seems reasonable to us that New Zealanders would be concerned about the close working relationship between the NZSIS and the GCSB on the one hand, and the NZDF and New Zealand Police on the other hand. The lawful function empowering the intelligence and

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[244] Information on this survey's methodology is included in Appendix 3: Public Survey Methodology. Our report is part of a broader research project, which was evaluated by Massey University's Human Ethics Committee. I was notified in July 2018 that this research was judged to be low risk (Ethics Notification Number 4000020057). The assessment is valid for three years. The survey is available on request at d.r.rogers@massey.ac.nz.

[245] Young and Caine, above note 14, at 422

security agencies to co-operate with the New Zealand Defence Force and the New Zealand Police positions the NZSIS and the GCSB as close working partners to the only organisations in New Zealand authorised to use deadly force. This renders the NZSIS and the GCSB as force-enablers and force-multipliers within New Zealand's security community. Concerns surrounding the close working relationship with the NZDF informed at least one IGIS report and featured within the Inquiry into Operation Burnham, which, led by Supreme Court judge Sir Terence Arnold and former Prime Minister Sir Geoffrey Palmer, examined serious allegations that members of the New Zealand Special Air Service (NZSAS) intentionally killed civilians in Afghanistan.[246]

It would be reasonable to expect that many New Zealanders would share analogous concerns over the relationship with the New Zealand Police – particularly after they conducted a series of armed raids in the Urewera mountains in October 2007[247] – in an international context that includes the murder of George Floyd by a white police officer within the USA and the wider Black Lives Matter movement. Involving some 300 police officers, including members of the Armed Offenders Squad and the Special Tactics Group, Operation 8 seized only four guns and some ammunition.[248] The Solicitor-General, David Collins, subsequently declined to press charges under Terrorism Suppression Act 2002. Four of the seventeen individuals arrested were tried in Court and found guilty on firearms charges. Particularly chilling, the New Zealand Police also conducted an unlawful search on Nicky Hager's home and accessed his financial records in 2014, after he co-authored a book entitled, *Hit and Run: The New Zealand SAS in Afghanistan and the meaning of honour*, which made the above-mentioned allegations about members of the NZSAS committing war crimes in Afghanistan.[249]

It seems reasonable to us, moreover, that New Zealanders also have good cause to be concerned about the deepening connection between New Zealand and US intelligence and security agencies, especially after the US Senate Select Committee on Intelligence's *Study of the Central Intelligence Agency's Detention and Interrogation Program* (the so-called Feinstein Report) documented the use of torture (prohibited under international law) and the existence of extraordinary rendition programmes.[250] The CIA's use of drones to conduct assassinations in situations beyond those considered to be armed conflict is equally chilling.[251] Such concerns are genuine and have informed an inquiry undertaken by IGIS.[252] We think the final report delivered in late 2020 by the Inspector-General of the Australian Defence Force

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[246] See Laracy, *GCSB and NZSIS in Afghanistan,* above note 172; T Arnold and G Palmer *Report of the Government Inquiry into Operation Burnham and Related Matters* (2020).

[247] For excellent academic treatments of the use of force by police in jurisdictions other than New Zealand, see also McCulloch, above note 154; and Seigel, above note 154.

[248] See D Keenan (ed) *Terror in Our Midst? Searching for Terror in Aotearoa New Zealand* (Hui, Wellington, 2008).

[249] N Hager and J Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton and Burton, Nelson, 2017).

[250] Senate Select Committee on Intelligence's *Study of the Central Intelligence Agency's Detention and Interrogation Progam: Executive Summary* (2014). See also Guild, Bigo and Gibney, above note 40.

[251] R Sanders *Plausible Legality: Legal Culture and Political Imperative in the Global War of Terror* (Oxford, Oxford University Press, 2018).

[252] Gwyn, *CIA detention and interrogation programme,* above note 172; and Gwyn, *Information Sharing and Cooperation,* above note 172.

following a major investigation, which found war crimes were committed by the Australian Defence Force during the War in Afghanistan between 2005 and 2016, will do little to quell this unease.[253]

Social Licence to Operate

Social licence to operate is a well-established concept that was developed and applied in natural resource extraction sectors, initially the mining industries, but later in forestry and other sectors. There is no authoritative definition of the term and scholars identify different varieties of this concept, though for some the concept "appears to be little more than new name for legitimacy."[254] Put simply, the concept offers a useful way of including local communities in corporate decision-making processes and of managing expectations around the greater sharing of benefits accrued from extraction efforts.

Kevin Jenkins recently argued that this concept has passed its 'use-by date.' He says that "[t]he problem is that it suggests something sharp-edged and clearly defined, when in fact this terrain is inherently fuzzy and indistinct…" and, thus, prefers a networked governance approach.[255] Jenkins did not specifically consider the usefulness of the concept to New Zealand's intelligence and security agencies. This is somewhat surprising because he mentions social contact theory, which involves a citizenry relinquishing its individual right to protect itself with force to a state with a monopoly over the coercive use of force.

Social licence to operate is, however, a concept that could assist parliamentarians and senior public servant seeking to restore public trust and confidence in New Zealand's intelligence and security agencies, which are – with their requirements for secrecy while exercising highly intrusive powers – the most obvious set of public institutions in need of society's acquiescence to function well. Leaders of New Zealand's intelligence and security agencies occasionally call for a social licence to operate.[256] Young and Caine uncritically reproduced these calls too; they cited the term – which they define as "the ability of a business, organisation or government to do its work because it has the ongoing approval or acceptance of society to do so"[257] – frequently throughout their report.

By our reckoning, before the NZSIS and the GCSB can obtain a social licence to operate New Zealanders must acquire not only high levels of awareness around the purpose, functions and powers of New Zealand's intelligence and security agencies, but also high levels of confidence that the intelligence work being done by those agencies is both lawful and proper. Put simply, high levels of public awareness of, and public trust and confidence in, New Zealand

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253 See Inspector-General of the Australian Defence Force Afghanistan Inquiry Report.

254 J Gehman, LM Lefrud and S Fast "Social licence to operate: legitimacy by another name?" (2017) 60(2) *New Frontiers, Canadian Public Administration* at 311.

255 K Jenkins "Can I See You Social Licence Please?" (2018) 14(4) *Policy Quarterly* at 28.

256 See, for instance, R Kitteridge, "Letting in the Light – Increasing Transparency in the New Zealand Intelligence Community: Speaking Notes for Transparency International NZ AGM; Monday 30 October 2017, Wellington.

257 Young and Caine, above note 14, at 782.

intelligence work are required for the public to grant an informed consent to be surveilled by the state beyond times of crisis and states of emergency.

Furthermore, while Annual Reports delivered to the House of Representatives might offer some transparency over New Zealand intelligence work, and reports published by oversight bodies, especially IGIS, might demonstrate scrutiny of intelligence work, these accountability documents need to be the object of much more public discussion and debate than is the case today. The most important condition needed for these agencies to obtain a social licence to operate is, in our view, a citizenry capable of granting informed consent. This citizenry needs access to up-to-date and accurate relevant information to inform their discussion and debate. They need to be socially aware and politically literate, too, to understand complex intelligence and security matters, and require forums to deliberate within and conduits through which to express their views to those who hold executive and bureaucratic power within our democracy.

Democratic Security Practice

The attributes of this 'informed citizen' signal the possibility of an active involvement in democratic security practice, that is, *security for the people, by the people, of the people*. By democratic security practice, we mean that security work is undertaken *for the people* in the sense that New Zealanders are the objects of protection and not the subjects of state surveillance; the people of New Zealand are made safe, in other words, from the multitudinous harms that accompany various forms of political violence and the integrity of our democratic institutions are ensured. We also mean that security work is undertaken *by the people* in this sense that New Zealand public servants involved in intelligence work are as diverse as New Zealand society, but not so that they can better infiltrate suspicious' minority communities and marginalised ethnic groups, but so that professional cultures, attitudes and everyday work practice embody and reflect those found across New Zealand society. Finally, we also mean that this security work is o*f the people* in the sense that security work is framed and enabled by regular, direct and meaningful public engagement with parliamentarians and the public service.

By democratic security practice, we do not mean a theory of liberal peace, whose proponents claim that increasing and intensifying interconnections among different markets reduces the risk of international armed conflict. Nor do we mean a theory of democratic peace, whose proponents claim that democracies are less likely to attack another democracy than are authoritarian regimes.[258]

Enacting democratic security practice will require intelligence and security agencies to do something more than enhance the visibility of their high-level policies and public-facing strategies; openly share their interpretations of the law governing their conduct; publicly explain changes in their organisational design; and justify to parliamentarians their allocations of resources against strategic and operational priorities. It will require those agencies to do something more than engage in additional outreach activities with traditional stakeholders. Indeed, it behooves intelligence and security agencies, and the leaders of those agencies, to

[258] R Paris *At War's End: Building peace after civil conflict* (Cambridge University Press, Cambridge, 2004), particularly chapter 2.

play an active role in co-creating opportunities for dialogue and engagement that enable and value differences of opinion, dissent, criticism and even critique – all of which are, of course, attributes of a vibrant liberal democracy. Parliamentarian and other public servants will need to play an active role as supporters and enablers here. This vision of democratic security heralds a major shift from a whole-of-government to a whole-of-society approach to intelligence and security matters.

New Zealand has already taken important steps in this direction. The Ministry of Defence has consulted with the public, including academics, during the development of its Defence White Papers 2010 and 2016. The former Inspector-General of Intelligence and Security Cheryl Gwyn established a reference group comprising individuals from beyond the public service to provide her with advice on legal, social and security developments in New Zealand and overseas, inform her work programme and provide feedback on her performance. Cullen and Reddy sought to restore public trust and confidence in New Zealand's intelligence and security agencies by actively seeking input from members of the public into their review and by informing New Zealanders on what these agencies can and cannot do by publishing their report. The Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019 went further by establishing a Muslim Community Reference Group as a means of ensuring that the Royal Commission provided opportunities for Muslim communities to engage with the inquiry. The Commission's report calls for an advisory group on counter-terrorism, comprising representatives from communities, civil society, local government and the private sector to offer advice to the Government on preventing people from engaging in extremism, violent extremism and terrorism. It also calls on the Government to establish a programme to fund independent New Zealand-specific research on the causes of, and measures to prevent, violent extremism and terrorism. We think more could be done, however, and that is the focus of our final section of this report.

6. *Future Thinking on New Zealand Security*

In this, our report's final section, we highlight several ideas for further consideration by parliamentarians, senior public servants and university leaders. We do not call for stronger external oversight of, or more transparency from, the NZSIS and the GCSB, nor do we call for further reviews and inquiries into these agencies. Instead, we reframe the nature of the current relationship between New Zealand's intelligence and security agencies and the public they serve, suggesting that fostering a society of citizens capable of granting informed consent to be subject to state surveillance is a necessary pre-condition for those agencies to hold a social licence to operate. We identify several ideas here because we think consideration of them may help turn the dial – *from* the current situation where the Directors-General of the intelligence and security agencies seek a social licence to operate *towards* a future state where parliamentarians, senior public servants and university leaders co-create opportunities that foster an informed citizenry capable of directly participating in the practices of democratic security. This vision of democratic security heralds a major shift in thinking on intelligence and security matters, from whole-of-government to whole-of-society approaches. We appreciate this vision of democratic security cannot be realised through the exclusive efforts of the intelligence and security agencies, though the efforts of these agencies are vital to realising this vision. Other senior public servants, parliamentarians and university leaders have important roles to play, too, in establishing the conditions needed for the New Zealand public to engage meaningfully on these important issues.

We are mindful that the Government has accepted all 44 recommendations of the Royal Commission of Inquiry into the Christchurch Mosque on 15 March 2019, 18 of which specifically focusing on improving New Zealand's counter-terrorism effort. By our reckoning the key recommendations call for the Government to:

- Establish a new intelligence and security agency responsible for strategic intelligence and security leadership functions (Recommendation 2);
- Develop and implement a public-facing strategy that addresses extremism and preventing, detecting and responding to current and emerging threats of violent extremism and terrorism (Recommendation 4);
- Strengthen the role of the Parliamentary Intelligence and Security Committee (Recommendation 6);
- Establish an Advisory Group on counter-terrorism (Recommendation 7);
- Establish a programme to fund independent New Zealand-specific research on the causes of, and measures to prevent, violent extremism and terrorism (Recommendation 14);
- Create opportunities to improve understanding of extremism and preventing, detecting and responding to current and emerging threats of violent extremism and terrorism in New Zealand (Recommendation 15);
- host an annual hui involving central and local government, communities and civil society the private sectors and researchers (Recommendation 16); and
- publish the National Security and Intelligence Priorities during every election cycle and a threat-scape report each year (Recommendation 17).

We think the implementation of these recommendations creates an opportunity to continue thinking through several thorny security-related issues. We hope what follows will help light a pathway forward to a safer and more inclusive New Zealand.

Parliamentarians

We believe New Zealand parliamentarians, especially Ministers and senior members of the opposition, have an important role to play in fostering an informed society of citizens, which, as mentioned above, is needed not only for the intelligence and security agencies to obtain a social licence to operate, but also for more democratic security practices to take root in New Zealand and flourish.

Firstly, we think the House of Representatives is the prime site where parliamentarians can model good debating practice that not only respects, but also values and encourages differences of opinion, dissent and criticism relating to intelligence and security matters. We think that debate on substantive issues relating to intelligence and security – that is, what, exactly, is to be protected, how those objects are to be secured and where the limits of those securing efforts lie – could be better informed by an annual address on New Zealand security delivered by the Prime Minister in the House of Representatives. We also think that the intellectual quality of the current debate on New Zealand intelligence and security matters by parliamentarians could be improved by adding to, and strengthening, the conceptual tools they use to make sense and explain such matters.

Secondly, we think Ministers could provide clearer direction for the intelligence and security agencies and ensure greater public accountability for their agencies' performance. Members of the Intelligence and Security Committee (ISC) are especially important here. We think ISC members need not only to be capable of engaging meaningfully with subject-matter experts on complex matters of security and intelligence, but also willing to re-politicise issues that have previously been securitised.[259] A useful starting point would be a much tighter definition of national security that focused on ensuring the integrity of our democratic institutions and protecting all New Zealanders from the harms associated with various forms of political violence. Furthermore, when planning for major reviews, such as the periodic statutory reviews envisaged under s. 235 of the Intelligence and Security Act 2017, Ministers could ensure the reviewers they appoint possess relevant expertise. Sir Michael Cullen (a former Deputy Prime Minister and former Finance Minister) and Dame Patsy Reddy (former lawyer and businesswoman) did not demonstrate a depth of understanding normally expected of any expert on intelligence and security matters. The same must be said of Justice Sir Willian Young KNZM (Supreme Court Judge) and Jacqui Caine (diplomat), both appointed to the Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019.

Thirdly, we think parliamentarians could engage more frequently and more intensely with the public on intelligence and security issues, including by hosting an annual public conference on New Zealand Security at Parliament, perhaps coinciding with any annual statement on

[259] By 'securitisation' I mean the process by which a routine matter of political contestation is transformed into a security issue by a speech act, or other discursive practice, made by a figure in possession of political authority, which is generally accepted by a broader audience. See T Balzacq "Constructivism and securitization studies" in M D Cavelty and V Mauer (eds) *The Routledge Handbook of Security Studies* (London and New York, Routledge, 2012). See also A W Neal *Security as Politics: Beyond the State of Exception* (Edinburgh, University of Edinburgh, 2019).

national security made by the Prime Minister in the House of Representatives, and in their constituencies and local communities.

To help foster an informed citizenry, parliamentarians, as well as those researchers and analysts who support and advise them, will need to further develop their own ability to think independently on intelligence and security matters. We think the House of Representatives would benefit significantly from the establishment of a Parliamentary Commissioner for Security.[260] The Commissioner should maintain and improve New Zealand's security through providing advice to Parliament, local councils, businesses, tangata whenua, community groups and associations, universities and other public agencies. This could include, but not be limited to: how national security is conceptualised; how security issues are assessed; and how security challenges are dealt with. The Commissioner would be an Officer of Parliament supported by a relatively small team of experienced and qualified researchers, analysts and advisors. Independent of the executive, he or she may review activities of the Government, reporting directly to Parliament. The Commissioner's functions would be, essentially, to review and provide advice on security issues and the system of agencies and processes established by the Government to manage security, including intelligence. (This includes the Office of the Inspector-General of Intelligence and Security that ensures the intelligence and security agencies act lawfully and with propriety.) The Commissioner should investigate any matter where, in his or her opinion, New Zealand's security may be, or has been, adversely affected and assess the capability, performance and effectiveness of New Zealand's national security system, its intelligence and security agencies and wider intelligence and security communities.

Senior Public Servants

We believe New Zealand public servants have the most important role to play in fostering an informed society of citizens. Firstly, we believe New Zealand public servants, especially those who lead the NZSIS and the GCSB, could more often respond positively to requests for interviews by academics, among others, and could better resource the parts of their agencies responsible for declassifying documents and fulfilling requests for official information made by journalist, academics and other members of the public. They could commission and publicly release their assessments on issues, trends and events impacting on New Zealand's security, including along the lines of the Strategic Assessment released to the public by the then External Assessments Bureau in 2000.[261] The agencies could fund more scholarships encouraging students to undertake courses in undergraduate and postgraduate security studies currently offered at New Zealand universities. They could establish a fund to provide for academics with an international reputation for research excellence in security studies to visit New Zealand and address Parliament, consult with the Intelligence and Security Committee, and give a series of public lectures at New Zealand universities. We think the agency should also introduce a new output class – public engagement and capacity building – and a new outcome – building a society of informed citizens – then report annually to Parliament against their efforts.

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[260] Compare with the objective and functions of the Parliamentary Commissioner for the Environment found in S.16 of the Environment Act 1986.

[261] Department of the Prime Minister and Cabinet, *External Assessment Bureau: Strategic Assessment 2000.*

Furthermore, when preparing for major reviews of their agencies, the Directors-General could ensure the consultants they appoint are truly independent and *bone fide* subject-matter experts. Former State Service Commissioners or former Secretaries of Foreign Affairs are neither intellectually independent from the machinery of government they review, nor are they likely to seriously challenge conventional thinking on security and intelligence matters. We think reviewers need to be *bone fide* subject-matter experts, credentialed with university qualifications, responsible for authoring a body of respected work on intelligence and security matters, and have this expertise recognised as such by other experts in the field.

We think that as the leaders of New Zealand's intelligence and security agencies move from thinking about security in terms of a whole-of-government approach to a more inclusive whole-of society approach, they will need to focus their efforts on fostering an *informed* society of citizens while guarding against creating an *informing* society; that is, a society of informers. We also see a need for attitudes held by those performing intelligence work to shift away from viewing minority and marginalised communities as either suspect communities or victim communities.

We also think the Office of the Inspector-General of Intelligence and Security (IGIS) should be empowered to examine all use of products and services, as well as the sharing of any capabilities, provided by the NZSIS and/or the GCSB. In other words, IGIS's remit should include the New Zealand Defence Force and the New Zealand Police, the two New Zealand agencies authorised to use deadly force in New Zealand, where the NZSIS and/or the GCSB enable, assist and support in any way. It should similarly examine the use and impact of these products, services and capabilities by members of the wider intelligence community, including those agencies with responsibilities for regulating the flow of people good and services across New Zealand's international border or for ensuring compliance with regulatory regimes managing the extraction of natural resources found within New Zealand's Exclusive Economic Zone. IGIS should also be empowered to examine the use of these products, services and capabilities by the National Assessment Bureau with the Department of the Prime Minister and Cabinet. IGIS should be empowered to examine the work of that National Security Group within DPMC that leads, coordinates and supports a risk-based national security system that delivers a secure and resilient New Zealand. This would give New Zealanders good reason to believe not only the agencies', but also the Government's activities undertaken under the auspices of national security, are conducted lawful and with propriety.

University Leaders

Finally, we think New Zealand universities have an important role to play, too, in fostering an informed society of citizens. Firstly, academics who undertake independent research in the fields of security studies within New Zealand universities are *bone fide* subject-matter experts and well placed to support both parliamentarians and public servants. We think there is plenty of scope for these academic specialists to build on their own individual research efforts, forge connections and establish networks with other academics with an interest in New Zealand's security, and to collaborate on major research projects that may advance understanding of security in New Zealand. Universities could, as a matter of strategic priority, club fund one or two of these major initiatives as a way of providing seed resourcing at the early stages of research design and to provide alternatives to established funding providers. Universities will need to guard their intellectual independence against the desire for others to instrumentalise academic research efforts. Sustained and serious critiques of New Zealand's intelligence and security agencies must not be confused with, or conflated to, some act of treason.[262] Rather, dissent from, and critique of, authority is a symptom of a vibrant democracy and ought to be championed as such.

Secondly, academics who undertake teaching, which is informed by their research in the field of security studies, within New Zealand universities are similarly well placed to support both parliamentarians and public servants. We think there is scope for academics to leverage their own individual teaching efforts to co-design and co-deliver a set of professional short courses which aim to develop and enhance understanding of intelligence and security matters by parliamentarians and their staff, public servants within agencies, as well as news media professionals who cover these issues. Drawing on expertise found across New Zealand universities to deliver a series of professional short courses builds on the notion of a national centre of excellence model and the Canadian example referred to by the Royal Commission.[263]

Thirdly, we think academics with expertise in security matters and who are employed by universities that have campuses located in New Zealand's main cities (Auckland, Hamilton, Wellington, Christchurch and Dunedin) and the regions (Palmerston North) could plan and coordinate their efforts to engage directly with the New Zealand public through public lectures given on university campuses and regular contributions to mainstream media. The aim here could be to build and enhance New Zealanders' political literacy in security and intelligence matters – that is, the intellectual capacity, through an understanding of key concepts and history of, to comprehend complex and dynamic security issues – so that everyone may better engage in meaningful public discussion and actively participate in democratic processes if they so choose.

We believe these ideas, if seriously considered, would light up a pathway to a safer, and more inclusive, New Zealand.

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[262] As I have noted elsewhere, William C Bradford, an assistant professor in law at WestPoint Military Academy, argued that legal scholars who were critical of the way in which the US Government conducted itself during its War on Terror constitute a treasonous fifth column and should be targeted as enemy combatants; see Rogers, above note 7, at 321.

[263] Young and Caine, above note 14, at 743.

APPENDIX 1: Distribution List

House of Representatives

- Minister for National Security and Intelligence
- Minister for the New Zealand Security Intelligence Service
- Minister for the Government Communications Security Bureau
- Minister for Implementing the Recommendations of the Royal Commission of Inquiry into the Terrorist Attacks on Christchurch Mosques on 15 March 2019
- Minister of Defence
- Minister for Police
- Minister for Customs
- Minister of Immigration
- Minister for Primary Industries
- Minister of Foreign Affairs
- Minister for Disarmament and Arms Control
- Attorney-General
- Minister of Justice
- Members of the Intelligence and Security Committee
- Opposition spokesperson on national security and intelligence
- Opposition spokesperson on the New Zealand Security Intelligence Service and the Government Communications Security Bureau

Senior Public Servants

- Chief Executive, Department of the Prime Minister and Cabinet
- Deputy Chief Executive – National Security, Department of the Prime Minister and Cabinet
- Director-General, New Zealand Security Intelligence Service
- Director-General, Government Communications Security Bureau
- Secretary of Defence
- Chief of the New Zealand Defence Force
- Commissioner of the New Zealand Police
- Comptroller of the New Zealand Customs Service
- Chief Executive, Ministry for Business, Innovation and Employment
- Director-General, Ministry for Primary Industries
- Secretary of Foreign Affairs and Trade
- Secretary of Justice

Independent Crown Entities with Integrity Mandates

- Inspector-General of Intelligence and Security
- Auditor-General
- Chief Human Rights Commissioner
- Privacy Commissioner
- Chief Ombudsmen
- Chief Censor

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APPENDIX 3: Public Survey Methodology

In total, 1,908 responses were received between 18 and 30 December 2020. 1,852 responses were deemed valid and usable, and incorporated into the analysis stage of this research. The remaining 56 (2.9%) responses were removed during validity checks. All respondents were attracted to the survey via a self-selection methodology through social media advertising, namely via Facebook, LinkedIn, and Instagram. All respondents who completed the survey were offered the chance to enter a prize drawing for a $50 Mighty Ape e-gift voucher. This drawing was conducted via an online random number generator. Quotas were applied to ensure respondents represented the New Zealand population over 18 and to the most recent Statistics New Zealand data (with a margin of error of 3%). This ensures that the resulting sample is representative of the New Zealand population (to a similar margin of error).

Age Group		
Age Group	**Count**	**%**
18 to 24	226	12%
25 to 34	341	18%
35 to 44	276	15%
45 to 54	295	16%
55 to 64	272	15%
65 to 74	325	18%
75+	117	6%

Gender		
Gender	**Count**	**%**
Female	946	51%
Male	899	49%
Non-Binary	7	0.4%

All open-ended responses were coded inductively and then placed into common themes. Themes are shown as the percentage of respondents who gave a comment under that theme, not the percentage of comments total. All percentages have been rounded to the nearest whole number. All mean ratings rounded to one decimal place.

APPENDIX 4: About the Authors

Damien Rogers is a Senior Lecturer in Politics and International Relations at Massey University and currently serves as the Regional Director of the College of Humanities and Social Sciences at Albany, Auckland. A graduate of four universities, he holds a PhD in Political Science and International Relations from the Australian National University and a PhD in Law from the University of Waikato as well as Masters' degrees from Victoria University of Wellington and the University of Canterbury. Rogers is sole author of two monographs, one on the international community's response to the challenge of controlling small arms and light weapons, the other on the international prosecution of atrocity crime. He is currently editing a volume on Human Rights in War and has published articles and chapters on New Zealand intelligence work. Before joining Massey University, Rogers worked within New Zealand's intelligence community, including at the Government Communications Security Bureau, Border Security Group of Immigration New Zealand and the Ministry of Fisheries, as well as brief secondments to the Ministry of Defence and the New Zealand Defence Force. Embracing the university's responsibility to function as society's critic and conscience, Rogers occasionally comments publicly on matters of politics, international relations and security, and is a serving member on the New Zealand Public Advisory Committee on Arms Control and Disarmament.

Shaun Mawdsley has a Bachelor of Arts Degree, a Bachelor of Arts (Honours) Degree (First Class) in Defence and Strategic Studies and a Master of Arts Degree (with Merit) in Defence and Security Studies. Currently a PhD Candidate in History at the School of Humanities, Media and Creative Communication, Massey University, Mawdsley's thesis is provisionally entitled "Combat Effectiveness in the Western Desert Campaign: A comparison of the 9th Australian and 2nd New Zealand Divisions, March 1941 - December 1942." This research project relies heavily upon archival research from institutions in New Zealand, Australia and the United Kingdom. Mawdsley is also a part-time tutor at the Centre for Defence and Security Studies and has delivered lectures and tutorials for courses on the 'History of Modern Warfare', 'War & Society,' 'Second World War' as well as 'Introduction to Security Studies' 'Terrorism and Political Violence' and 'Security and Diplomacy in the Asia Pacific.' Mawdsley recently conducted independent research on behalf of the New Zealand Defence Force, and was a Country Assessor for Transparency International's Defence Integrity Index 2020 and the Subject Specialist Advice and Research Consultant for the Auckland War Memorial's Centenary Armistice Exhibition in 2018.