

PM shows why GCSB Bill must be fixed

Keypoints

On [Tuesday](#),¹ the Prime Minister dissed the Law Society's criticism of the GCSB Bill that it is "*unacceptable and inconsistent with the rule of law*". The PM's handling of the sensible and well-reasoned [Law Society submission](#)² further shows why the Bill needs to be fixed: those making decisions under the legislation – such as the Prime Minister issuing warrants to spy on Kiwis – need to have legislation that is crystal clear and allows no room for creative interpretation. If the most senior official responsible under the legislation can take such a dismissive approach to sensible views, it is apparent that the law needs to be crystal clear in its application.

It is not.

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As I've said earlier,³ contrary to what has been claimed, the existing Act is not materially ambiguous. It is straightforward to interpret, applying bog-standard statutory interpretation techniques. The idea that this new Bill clarifies what has been ambiguous is wrong. To the contrary, it moves the legislation from clarity to uncertainty.

Only those seeking "*creative*" interpretations, to try and stretch the application of the Act beyond what is legally permissible to include square pegs, would struggle under the current Act. Under the new Act, it is easy to go wide.

I've written earlier about how GCSB seems to have pushed the limits with creative interpretations and approaches under the existing Act, in areas where we have visibility (and that indicates the prospect of much wider creative approaches under the tip of that iceberg). When decision-makers have little or no external overview, spy agencies can and will do these things. Recent events internationally show how widespread this is. For example, on Friday, the Guardian – the newspaper that has revealed many of the US and UK problems in the last few weeks – quoted the GCSB equivalent in the UK, GCHQ, as having an internal document, dealing with related issues. That document states: "*we*

lean on legal and policy interpretations that are not always intuitive".⁴ "*Intuitive*"? In other words, they appear to be applying interpretations outside standard statutory interpretation legal principles, to stretch and distort. Or, to be direct, if that is happening, the agency is breaking the law: the agency is only within the law if it acts applying well accepted statutory interpretation principles.

As former Tory Shadow Home Secretary, David Davis, commented: "*To make sure they remain accountable, and their methods acceptable in a free society, our security services must operate within a clearly defined legal framework. We cannot expect James Bond to behave like Mother Theresa. That is why there must be clear limits to the spies' powers.*"⁵

So, the limits on GCSB powers need to be unambiguously articulated to avoid uncontrolled over-reach. History shows why GCSB should not be trusted to automatically do the right thing. Yes, there are some expanded monitoring arrangements, and that certainly helps. But many of the decisions do not involve direct oversight by the monitor (and indirect monitoring is constrained). Plus, if the legislation is vague, a monitor may not be able to oppose a particular decision. The monitoring regime needs a crystal clear basis too.

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As well as concluding that the GCSB Bill is inconsistent with the NZ Bill of Rights and privacy law - a decidedly worrying issue in itself - the Law Society notes multiple problems in the Bill around scope, uncertainty and so on. One comes away from reading the Law Society submission with a sense of real concern about how these powers could be abused. In a legal sense, I could debate one or two aspects of their interpretation of Bill. But the reality is that, unchecked, I expect that the GCSB decision-makers will choose to take an interpretation, justified or not, that suits what they want, not what the law, correctly interpreted, requires.

Take for example, in relation to GCSB assisting other agencies, the Law Society's observation that "enlistment of GCSB "co-operation" may confer on the activities undertaken a protected legal status which they would not otherwise receive. Indeed, the very fact of GCSB involvement may mean that the activity in question is never disclosed to those affected. This outcome is unacceptable and inconsistent with the rule of law." Whether that is a legally correct analysis doesn't really matter (although I think it is): based on how GCSB has behaved so far, we need to assume that GCSB and other agencies will leverage and stretch this to cover otherwise illegal operations.

The powers in the Bill are important, and the GCSB must be able to act reasonably, but within clearly defined constraints and with workable monitoring.

It's hard to disagree with this observation in the Law Society submission:

"The Law Society's concerns regarding the absence of clear justification for these changes are exacerbated by the use of Parliamentary urgency, and the consequent short timeframe provided for consultation and submissions. The Law Society is concerned that, in the absence of compelling grounds for urgency, its use degrades the democratic quality of the legislative process."

And it's hard to disagree with the Law Society submission that the Bill needs a revised NZ Bill of Rights review. The Law Society sets out the framework for that review, required by our highest court. The review so far falls short of what is required for the various reasons demonstrated by the Law Society, ranging from insufficient analysis of the problem (that is of particular concern) to over reach, contrary to the NZ Bill of Rights requirements.

But hold on! Hot off the press. The Law Society has apologised to the PM for getting it so wrong. See the letter of "apology" [here](#).⁶

As the "Law Society" says in its letter: "Well, Mr Key, you know best. We're just a bunch of lawyers with concerns for civil liberties, due process and the rule of law. The people who wrote our submission may have spent years studying how our legal system works, but you're the boss, right?"

Disclosure: Michael Wigley has provided advice on the GCSB Bill to InternetNZ

1. http://www.parliament.nz/en-NZ/PB/Debates/Debates/a/2/f/50HansD_20130625_00000008-Questions-for-Oral-Answer-Questions-to-Ministers.htm
2. http://www.lawsociety.org.nz/_data/assets/pdf_file/0007/68389/Government-Communications-Security-Bureau-and-Related-Legislation-Amendment-Bill-140613.pdf
3. <http://www.wigleylaw.com/assets/Uploads/Is-GCSB-spying-on-tens-of-thousands-of-Kiwis.pdf>; <http://www.wigleylaw.com/assets/Uploads/GCSB-directors-report-alarming.pdf>; <http://www.wigleylaw.com/assets/Uploads/Proposed-GCSB-powers-to-control-Telcos-network-choices.pdf>
4. http://www.guardian.co.uk/uk/2013/jun/21/how-does-gchq-internet-surveillance-work?utm_source=twitterfeed&utm_medium=twitter
5. <http://www.guardian.co.uk/uk/2013/jun/25/david-davis-spy-agencies-law>
6. <http://www.imperatorfish.com/2013/06/an-apology-from-law-society-to-john-key.html>