Te Pourewa Mātaki
Inspector-General of Intelligence and Security

Review of NZSIS counter-terrorism and violent-extremism class warrants

Public Report

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SUMMARY FOR PUBLIC REPORT

I have reviewed three intelligence warrants issued to the New Zealand Security Intelligence Service (NZSIS) in 2022 and 2023. The warrants authorised the Service to target classes of individuals in the context of counter-terrorism and violent extremism.

I found that the first two iterations of the warrants did not meet the legal tests for necessity and proportionality in the Intelligence and Security Act 2017 (the ISA) for warrants to be issued. I considered that the target classes in the warrants were too broad and required too subjective of an assessment to justify the prior authorisation of the most intrusive powers against individuals who may fall within the target classes. I thought that the warrants gave the Service too wide a discretion to operate without any external scrutiny of the case against any particular target.

I also considered that, even if the warrant met the tests under the ISA, as a matter of policy the Service should not have applied for such a class warrant. There was no substantive reason for applying for a class warrant rather than individual warrants, other than the minimal administrative convenience of reducing the number of warrant applications the NZSIS is obliged to make. I considered that undermines the purpose of the warranting regime. In particular, by taking away an independent assessment of the proposed activities to be conducted against individuals.

The Service disagreed with my view. Following the provision of my classified report to the Service and its Minister, the Service obtained advice from Crown Law on the first two iterations of the warrants. Crown Law considered that some aspects of the class definitions were overly broad but some were sufficiently certain under the ISA. Crown Law considered that changes could be made to meet the tests under the ISA and to ensure the lawfulness of the warrants.

The Service obtained a third iteration of the warrant in September 2023, signed by the then Minister and the Chief Commissioner of Warrants. I consider that the third iteration of the warrant is an improvement and follows the advice of Crown Law. It can reasonably be argued to fit within the provisions of the ISA.

I remain concerned that it is not proper as a matter of policy for the Service to apply for such a warrant as I have been unable to see any reason why individual warrants cannot be obtained in the circumstances. In my view there should be a preference for individual warrants, all other things being equal, as this provides for better oversight of the Service's activities, greater protection of individual rights and a greater safeguard against agency overreach. This is predominately a policy issue and is under consideration as part of the ongoing review of the ISA.

The implications of my findings are that I consider that the first two iterations of the warrant did not meet the legal tests for necessity and proportionality under the ISA. However, I have seen no information to suggest that the Service has inappropriately targeted individuals. The Service appears to have been reasonably cautious in its work under the warrants. My office is carrying out an in-depth review of how both the NZSIS and GCSB have operated under class warrants to further assess how this has worked. My findings do not invalidate the warrants or the activities carried out under them and I have also not recommended to the Minister that information obtained under the two versions

of the warrant be destroyed.[1] My concerns rather go towards the integrity of the authorisation system in the ISA and ensuring proper use of intrusive powers.

[1] Section 163(2)(a) of the ISA.

INTRODUCTION

1. I have reviewed the issue and execution of three iterations of a Type 1[2] intelligence warrant issued to the Service for its activities in relation to counter terrorism and violent extremism. The first warrant was issued to the New Zealand Security Intelligence Service (NZSIS or the Service) in May 2022, the second issued in May 2023, and the third in September 2023.

2. The warrants authorised activities against classes of targets defined by certain characteristics rather than named individuals. The move away from the use of individual warrants to broader class warrants in respect to high risk counter-terrorism and violent extremism targets represents a change in approach for the Service. Given the issues this approach raises I have reviewed the warrants in depth.

3. I finalised a classified report into the first two iterations of this warrant in June 2023, in which I identified a number of issues with the warrants. This was provided to the Service and the Minister responsible for the Service. Following this report, the Service obtained advice from Crown Law on the issues raised in my report and the warrants. The Service obtained a third version of the warrant in September 2023 in conjunction with the Crown Law advice.

4. This is a public report which summarises my earlier classified report, as well as an analysis of the legal issues and the third version of the warrant. It omits details of the warrant classes and targets that come within those classes as this information is classified.

MY ROLE IN REVIEWING WARRANTS

5. It is my role under the Intelligence and Security Act 2017 (ISA) to provide independent oversight of the NZSIS and the GCSB. This involves assessing whether the intelligence and security agencies conduct their activities lawfully and with propriety.[3] Propriety is not defined in the Intelligence and Security Act but it goes beyond specific questions of legality; for example, I may consider whether the agency acted in a way that a fully informed and objective observer would consider appropriate and justifiable in the particular circumstances.

6. My role includes conducting reviews of the issue of an intelligence warrant and the carrying out of an authorised activity under a warrant.[4] My office collectively reviews every intelligence warrant that is issued to the NZSIS or GCSB, and will occasionally conduct a more in-depth review of an intelligence warrant.

7. A review of the warrant is a substantive assessment of the application and warrant against the requirements of the ISA, the NZ Bill of Rights Act and relevant case law. Under section 163 of the ISA, if I find any irregularity in the issue of a warrant I may report that to the Minister and (where relevant) the Chief Commissioner of Intelligence Warrants. A finding of irregularity by me does not invalidate the warrant. The ISA does not specify what amounts to an irregularity, but my approach (adopting that of the previous IGIS) is that I will only make this finding when I

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2 A Type 1 warrant permits activities against New Zealanders.
3 Section 156(2)(i) of the ISA.
4 Section 158(1) of the ISA.

see a significant departure by the agencies from the requirements of the ISA or from well-recognised legal principles.

INTELLIGENCE WARRANTS UNDER THE ISA

8. Part 4 of the ISA provides for the intelligence and security agencies to be authorised to carry out activities that would otherwise be unlawful. Part 4 also confers specified powers on the agencies when giving effect to an authorisation.

9. The ISA provides for two types of warrants;

   9.1. Type 1 warrants relating to activities for the purpose of collecting information about, or to do any other thing directly in relation to any person or class of person who is a New Zealand citizen or permanent resident of New Zealand [a "New Zealander"]; and

   9.2. Type 2 warrants for circumstances where a Type 1 warrant is not required, i.e. not in relation to a New Zealander or a class including a New Zealander.

10. There are different requirements for Type 1 and Type 2 warrants, including notably that a Type 1 warrant must be issued by both the Minister responsible for the intelligence and security agency and a Commissioner of Intelligence Warrants. A Type 2 warrant may be issued by the Minister alone.

11. The ISA also sets out criteria that must be met for both types of warrants to be issued. Key considerations are:[5]

   11.1. **necessity** - the proposed activity must be necessary to enable the agency to perform a function under section 10 or 11 of the ISA;

   11.2. **proportionality** – the proposed activity is proportionate to the purpose for which it is to be carried out;

   11.3. the purpose of the warrant cannot reasonably be achieved by a **less intrusive means**; and

   11.4. there are **satisfactory arrangements** in place to ensure nothing is done beyond what is necessary, all reasonable steps will be taken to minimise the impact of the proposed activity on any members of the public, and any information obtained will be retained, used and disclosed only in accordance with the law.

Class warrants

12. The ISA enables a warrant to be issued against an individual or a class of persons.[6] The Act does not specify what a class of persons can or cannot be, although:

   12.1. section 55 requires an application for a warrant to set out details of the activity proposed to be carried out under it; and

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5 Sections 58-61.
6 Sections 53 and 60.

12.2. section 66 requires a warrant to state the person or class of persons (if any) in respect of whom the otherwise unlawful activity is being carried out.

13. A class under the ISA may be any group of people of any size. Any limitation on the breadth of a class must come from elsewhere in law, most notably the test for necessity and proportionality.

14. Clarity on the scope of a class is necessary for any robust assessment of whether the proposed activities against persons within the class are necessary and proportionate. A class must be sufficiently certain and determinate that the Minister and Commissioner can tell what is being applied for and what is being approved. This does not meant that the class must be entirely objective but subjective aspects to the definition make it more difficult for a class to be sufficiently certain. The agencies have approached this issue by including in the warrant applications the criteria that the agencies intend to use when deciding if someone meets the definition of a class.

15. In relation to assessments of necessity and proportionality for activities against classes, the agencies and I agree that this analysis needs to be on an activity-by-activity basis as if the activity were being carried out in respect of all members of the proposed classes. This accords with the Crown Law advice that the agencies received in 2018.

16. The ISA does not state when an individual warrant or a class warrant should be preferred. The key factors for this decision are therefore the necessity and proportionality tests, which weigh against warrants with overly broad classes.

17. The ISA introduced the ability for the Service to obtain class warrants. Under the Service's previous governing legislation all warrants had to be in relation to specified persons, places or facilities.[7]

Exclusion of "purpose-based" warrants from the ISA

18. Purpose-based warrants were proposed in the Independent Review report that preceded the ISA.[8] They were described as warrants that "specify the type of information sought and the operational purposes for which it is required rather than identifying a particular person, premise or thing as the target".[9] The reviewers considered that such warrants were necessary to enable the agencies to perform their functions effectively.[10] They recommended however that the legislation should include a presumption in favour of targeted authorisations. This, along with necessity and proportionality requirements, and provision for conditions and restrictions on warrants, "would help to avoid the proliferation of overly broad authorisations".[11]

19. Provision for purpose-based warrants was removed from the New Zealand Intelligence and Security Bill at the select committee stage. The select committee decided that the provisions for Type 1 and Type 2 warrants [ie warrants targeting classes or individuals] were adequate to

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7 New Zealand Security Intelligence Service Act 1969, s 4B(1).

8 Sir Michael Cullen and Dame Patsy 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 [6.57]-[6.63].

9 At [6.57].

10 At [6.59].

11 At [6.63].

meet the agencies' operational needs, while providing "more safeguards, greater legal certainty and more effective oversight".[12]

20. Clearly an intelligence warrant cannot be a purpose-based warrant, given the removal of provision for such warrants from the legislation. This is not in debate, with the agencies or with Crown Law.

Common law rule against general warrants

21. The courts have long held that "general" warrants are invalid in law. A general warrant was described in *Tranz Rail Ltd v Wellington District Court* as "a warrant that does not describe the parameters of the warrant, either as to subject-matter or location, with enough specificity".[13] Tipping J explained the principles that make a general warrant bad in law:[14]

> A search warrant is a document evidencing judicial authority to search. That authority must be as specific as the circumstances allow. Anything less would be inconsistent with the privacy considerations inherent in s 21 of the Bill of Rights. Both the person executing the warrant, and those whose premises are the subject of the search, need to know, with the same reasonable specificity, the metes and bounds of the Judge's authority as evidenced by the warrant […]
>
> Judges who issue warrants which are not as specific as reasonably possible are not balancing the competing interests appropriately […]

22. In one of the *Dotcom* decisions Winkelmann J (as she then was) described a general warrant simply as one "which on its face is so lacking in particularity that it provides no proper justification for the scope of the search".[15]

23. I see no reason why general warrants should be any more acceptable in the intelligence context than in law enforcement. The underlying purpose of warranting is the same in each case: to enable the applicant agency to take otherwise unlawful measures to fulfil its functions, while ensuring that protected rights are infringed no more than necessary and with sufficient justification. It follows in my view that the common law preference for specific rather than general warrants applies to warrants under the ISA. Intelligence warrants, including class warrants, must be "as specific as the circumstances allow".

24. This need for specificity for warrants targeting classes of people in the intelligence context has not been considered by the New Zealand courts but has been considered by the United Kingdom High Court in *Privacy International v Investigatory Powers Tribunal*[16]. In this case the High Court was considering the question of "does section 5 of [the Intelligence Services Act 1994] permit the issue of a "thematic" computer hacking warrant authorising acts in respect of an entire class of people or an entire class of such acts". In making its findings on what would be sufficiently specific for a warrant, the High Court noted at [57]:

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12 New Zealand Intelligence and Security Bill 2016 (158-2) (select committee report) at 6.

13 *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 at [38]. Cited with approval by a majority of the Supreme Court in *Dotcom v Attorney-General* [2014] NZSC 199 [2015], 1 NZLR 745 (SC) at [99].

14 At [41]-[42].

15 *Dotcom v Attorney-General* [2013] NZHC 1269 At [26].

16 [2021] *EWHC* 27

> The real point, as it seems to us, is whether the warrant is on its face sufficiently specific to indicate to individual officers at GCHQ […] whose property, or which property, can be interfered with, rather leaving it to their discretion. This is what we understand by the word "objectively ascertainable" (though they are not used in statute).

25. The Court went on [63]:

> A warrant in respect of "any device used at the Acacia Avenue Internet Café during the period of six months from the date of issue of the warrant" would in our view be sufficiently specific, as would "anyone who appears on the FCDO Ruritanian diplomatic list during the period of six months from the date of the warrant".[17]
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> However, we consider that a warrant which referred to the property of anyone engaged in an activity (for example "the mobile phone of any person conspiring to commit acts of terrorism") would be insufficiently specific to satisfy the requirements of section 5(2) [of the Intelligence Services Act 1994]. Whether a warrant which refers to the property of anyone suspected of being a member of an organisation, but not named or otherwise identified in the warrant, is sufficiently specific will be a fact-sensitive question, the answer to which will depend on whether a person's membership of the organisation is objectively ascertainable.
>
> We would therefore answer the question of law […] by declaring that a warrant under section of the 1994 Act will be lawful if it is sufficiently specific for the property concerned to be objectively ascertainable on the face of the warrant […]

26. The Law Commission has observed that specificity in warrant applications helps ensure the issuing officers have enough information to assess what is necessary and achievable in the particular circumstances.[18] This is important, the Commission noted, "*because it gives the issuing officer the opportunity to impose conditions on the warrant that are designed to minimise the privacy intrusion on persons likely to be affected*".[19] Again I consider this as relevant to intelligence warrants as to law enforcement warrants. The ISA provides for conditions or restrictions to be imposed on intelligence warrants by the issuers.[20] To enable this the Minister and (where relevant) Commissioner need to be supplied with sufficient information to enable them to determine whether any restrictions or conditions are necessary.

27. Finally I note that "common errors" identified by the Court of Appeal in warrant applications (in the criminal context) include "stat[ing] conclusions without saying why" and including "standard form material on the criminal activity being investigated unless it is relevant to the particular application".[21] I think it clear the underlying rationale is that warrant applications should not presume acceptance of assertions that should be justified, or offer generic justifications for proposed activities that require particular justification. This too must be as important for intelligence warrants as for law enforcement warrants, or the applications would beg questions they ought to answer.

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17 I note that the Court was not deciding on whether such warrants would be necessary and propritionate, wchih the Court noted were separate issues.

18 Law Commission *Review of the Search and Surveillance Act 2012 – Ko te Arotake I te Search and Surveillance Act 2012* (NZLC R141, 2017) at 4.64.

19 At [4.64], referencing as an example *R v Middledorp* [2015] NZHC 1137.

20 ISA, s 64.

21 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [223(b)-(c)].

Summary

28. In summary:

    28.1. the ISA enables the Service to apply for a warrant against a class of persons;

    28.2. the warrant application must detail the activity proposed to be carried out under it and must state the class of persons in respect of whom that activity is to be carried out;

    28.3. a class must be sufficiently certain and determinate that the Minister or Commissioner can tell what is being applied for and what is being approved;

    28.4. the unlawful activity must be necessary to enable the agency to perform a function and be proportionate to the purpose for which it is to be carried out;

    28.5. the proportionality and necessity assessment should be carried out on an activity-by-activity basis, as if the activity were being carried out in respect of all members of the class or classes;

    28.6. the purpose of the warrant must be something that cannot reasonably be achieved by less intrusive means; and

    28.7. the warrant cannot amount to a "purpose-based" warrant, or to a general warrant under common law.

THE FIRST TWO WARRANTS

29. The first warrant was applied for in May 2022, for a term of 12 months, by the Minister and a Commissioner of Intelligence Warrants. The Minister included a condition that a report be provided to the Minister during the course of the warrant.

30. The second warrant was issued in May 2023 for a term of six months.

31. The warrants presented a new approach for the Service to class warrants for counter-terrorism matters, whereby most if not all of its targets would now be managed under class rather than individual warrants.

32. The purposes of both warrants are near identical. Both were framed with reference to the counter-terrorism and violent extremism related National Security Intelligence Priorities.

Target classes

33. A "background to the warrant" section of the first warrant application stated that this was NZSIS' first application for a class warrant agnostic of the type of terrorism or violent extremism. This meant that it was aimed at terrorism or violent extremism generally and not concerned with specific ideologies, with decisions made around targeting individuals made by the Service on a case by case basis.

34. The first warrant had three target classes and the second warrant had two target classes, rephrasing the definition of Group 1 and combining Groups 2 and 3 into a single class. Group 1 targets being subject to more intrusive activities as discussed below.

35. The warrant applications noted the likely size of each target class at the time of the application.

How the Service determined a target is a member of a warrant class

36. The applications set out how the NZSIS would determine membership of a target class.

37. The Service would first consider whether its intelligence requirements can be met by less intrusive means (ie non-warranted activity). If not, it would assess whether the person was targetable under the warrant and met the definition of one of the warrant classes.

38. Inclusion in a target class required an assessment of a number of set indicators, although the application noted the stated lists were non-exhaustive, together with supporting reasoning and rationale for approval at stated managerial levels. If approved confirmation was recorded on a register.

Moving targets between classes

39. The applications also anticipated targets could change classes if circumstances changed. The second application said this would depend on the "evolving intelligence picture and subsequent confirmation they are now in the other Group".

40. While not explicit, movement between classes had to follow the same approvals process as for adding a target to the warrants.

Activities approved under the warrant

41. The warrant applications stated that the NZSIS sought to undertake "a full range of authorised activities to a high level of privacy intrusion in respect of targets in Group 1, and up to a moderate level for targets in Group 2" (and 3, under the first warrant).

42. The full list of proposed activities under the second warrant is classified. In short the Group 1 targets may be subject to the maximum level of intrusive activities the Service is capable of exercising. For Group 2 there are some limitations on activities.

43. The Service uses a "high watermark" approach in its warrants, whereby activities against a class are approved up to a defined maximum level of intrusion for each type of activity. This means the Service may undertake all authorised activities up to the maximum authorised extent, or to any less intrusive extent.

How adding targets to classes worked in practice

44. I have reviewed the briefing notes prepared for adding each target to a target class under these warrants, the details of which are classified.

MY REVIEW OF THE FIRST TWO WARRANTS

45. I was concerned that the classes used in the warrants lacked clarity and were too broad. The criteria used by the Service in the warrants to determine membership of the classes were examples of possible *conclusions* of NZSIS assessments. Each was an example of an assertion about a person that, in an individual warrant application, would be justified by citing the underlying intelligence and the assessment of it, including where relevant any possible benign explanations for activities otherwise providing grounds for security concern. Many NZSIS individual warrant applications preceding these warrants had presented the intelligence cases for such assertions about proposed targets to the warrant issuers, often in considerable detail. Those applications enabled the issuers to consider whether they were satisfied that the proposed activities against the warrant targets were necessary and proportionate.

46. Under the warrants at issue that would not occur for any individual targeted. Further, the indicators are statements only of conclusions the Service *might* reach, in respect of particular individuals, at some time in the term of the warrant, on the basis of information it might acquire. Nor are they the only conclusions the Service might reach, about yet-to-be-identified future targets, as the list was "non-exhaustive". Apparently the Service could reach other conclusions, beyond those signalled, that would lead it to assign people to a target class and commence operations against them.

47. In my view this was an intolerably imprecise basis on which to authorise covert activities by the Service against individuals, up to the maximum possible level of intrusion.

48. The warrant classes required inferences about a potential target's intentions or purposes. This is inherently more challenging than inferring objective facts about potential targets. Inferences of intent and purpose might be sufficient to justify intrusive intelligence collection activities, but that is what the warrant process should test, by subjecting the case to external scrutiny. I considered that the high level of discretion conferred on the agency under the warrants was compounded by the fact that the non-exhaustive factors in the warrant and the Service's guidance were so broad, diverse, and numerous. The essential criterion for including a target under the warrant appeared to be relevance to the Service's counter-terrorism and violent extremism efforts, ie the purpose of the warrant, with the different classes representing the different types of risks present for this effort.

49. Notably, the warrant purpose and target classes did not appear to focus the proposed activities any more precisely than the National Security Intelligence Priorities. As the NZSIS' intelligence gathering function is "to collect and analyse intelligence in accordance with the New Zealand Government's priorities"[22] the warrants therefore seem to do little more than seek confirmation of intelligence-gathering priorities already specified, coupled with a request for expansive discretion to conduct authorised activities accordingly.

50. It appeared that any person of interest to the Service relating to the purpose of investigating terrorism and violent extremism, at any level from target discovery to maximum investigative effort, could fit under the current warrants, although I have not observed it used in this way.

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[22] ISA, s10(a)(a).

This gave the Service, in my view, too wide a discretion to operate without any external scrutiny of the case against any particular target before activities are undertaken. To my mind this effectively made the purpose of the warrant the only effective limitation on the Service's ability to target an individual – a purpose no more specific than that provided already by the Government priorities that delimit the Service's intelligence gathering function.

51. Consideration of individuals under the warrant show that those targeted by the Service have vastly different circumstances and apparently present significantly different threats, raising questions about what action by NZSIS is necessary and proportionate in each case and what would be the least intrusive means of collection available, including with regard to the privacy of third parties. The targets were known to the Service, due to previously being under other warrants or subject to unwarranted investigation, so the Service could present detailed intelligence cases to the warrant issuers to enable assessment of these matters. Under these warrants, however, they were in the same target class, with no practical limits on the Service's activities. Any necessary tailoring of activities to the particular circumstances of these targets and the nature of the threat they are assessed to present was left to the NZSIS.

The necessity and proportionality of authorised activities under the warrants

52. I was not convinced that the warrants adequately made the necessity and proportionality cases required for an intelligence warrant. The breadth of the classes meant it was difficult to make a compelling case that the authorised activities were necessary for all possible members of the class, to achieve the purpose of the warrant. In my view some of the specific activities approved were precisely the kind of operational permission that should be granted sparingly, strictly where necessary and on a case by case basis, rather than being made broadly available to the Service, at its discretion, for any counter-terrorism investigation.

53. For similar reasons, it was difficult to make out proportionality for the activities approved. To be proportionate the activity needs to be rationally and reasonably connected to achieving the purpose for which it is undertaken. The purpose of the warrant is wide, protecting against terrorism and violent extremism. The classes were broad and the proposed activities are so extensive that I could not see a sufficiently specific case for proportionality against all possible targets.

54. I was particularly concerned about the authorising of the most intrusive authorised activities for Group 1 targets. The warrants authorised highly intrusive activities and I found it difficult to see how it is proportionate to authorise this level of intrusion for a broad and imprecise warrant and class. In my view, the targets who fall under Group 1 should have more appropriately been considered under individual warrants to adequately set out the proportionality for this type of activity.

55. The condition on the first warrant and second warrant application of some retrospective reporting to the Minister does not mitigate my concerns. A warrant is a prior authorisation mechanism and post-facto reporting is no substitute for prior authorisation. A person could be targeted under the warrant, subjected to the maximum level of intrusive activities, and de-targeted within the term of the warrant. Targets can therefore be subject to the most intrusive activities solely at the discretion of the NZSIS.

56. Under the warrants, the breadth of the warrants meant it was entirely for the Service to determine who was included under the warrant and when they should be removed, with no mandatory external consideration of this. This effectively gave the Service licence to act against any counter-terrorism or violent extremism target as it sees fit, making its own determinations of necessity and proportionality. I think this was insufficient to satisfy the purpose and letter of the authorisation requirements of the ISA.

57. My above comments detail the concerns I have about the risks of the Service being authorised to operate under such a broad warrant that provides scope for expansive and intrusive action. I acknowledge that to date there is no evidence to suggest that the Service has targeted individuals in a way that gives rise to these risks. This does not change my view that the warrants did not meet the legal tests of necessity and proportionality.

Is the warrant a "general warrant"?

58. In my view the warrants (in both the first two iterations) were likely a "general warrant" at common law. For many of the reasons set out above, the warrants did not provide sufficient specificity in its classes and authorised activities. This is despite the Service being able to make individual cases in detail to the warrant issuers, as it has done for most of its history.

59. Most targets under the warrant were already well known to the Service and had been subject to previous warrants or other investigative activity. The Service had sufficient information to make individual cases for each target that has been added. The number of targets under the warrant was not so high as to preclude this.

60. The first warrant was issued for 12 months. The issue of the second for six months was apparently due to the concerns I raised about the first. While I think that was prudent it did not fundamentally alter my concern that within the term of the warrant any targeted person could be subject to authorised activities, up to the maximum extent of the NZSIS' capabilities, for any duration. The warrant functions as a general authorisation for activity against targets selected by the Service, within the warrant's broad parameters, for periods at the Service's discretion.

61. A broad class warrant might be justified to enable limited activities against targets about which little is known, ie for target discovery purposes. The 'generality' of such a warrant in its class definitions could be mitigated by restraint on the authorised activities and an undertaking to seek individual warrants in respect of targets requiring further investigation. That was the Service's model for a previous counter-terrorism warrant, with which I took no issue.

62. The warrant does not however anticipate that the Service would provide that specificity on individual cases after initial investigation. There is no point at which the rights and circumstances of specific targets can be considered by an independent issuing officer, as the doctrine against general warrants clearly favours. The accommodating scope of the target classes, the breadth of powers authorised against them and the resultant extent of the discretion conferred on the Service mark the warrants, in my view, as general warrants.

Propriety

63. I had found the first two warrants did not meet the requirements of the law. I also considered that, even if such a warrant was legally available, I would have thought it improper in the circumstances that the agencies apply for it.[23] I had been unable to see any reason why a class warrant was necessary. It is difficult to see why it was sought other than for the administrative convenience of reducing the number of warrant applications the NZSIS is obliged to make. I consider that undermined the purpose of the warranting regime. That in my view was not a proper approach for an agency to take in applying for those warrants.

64. The authorising framework in the ISA provides for a process to give the public confidence in the justification for the agencies' actions, by requiring external authorisation for the use of highly intrusive powers. Prior authorisation is a safeguard against agency overreach. It helps to ensure that breaches of protected rights in the interests of national security are justified and according to law. In the development of the ISA, this was described as a "triple-lock" of protection for individuals, with the three locks being control from the Minister, the Commissioner of Intelligence Warrants, and post-facto review by the IGIS. The effective delegation to NZSIS, under these warrants, of decisions on who to target for counter-terrorism or violent extremism purposes, by what means and for how long, and to undertake the most intrusive activities available, effectively leaves the scrutiny of individual cases to my office alone, after the fact. That is not what the public was led to expect.

Conclusions on first two warrants

65. I found that the warrants did not meet the necessity and proportionality requirements for a warrant under the ISA and was a general warrant at common law.

66. Even if a warrant such as the first two warrants were legally available to NZSIS, I consider that the Service should not be applying for such a warrant as a matter of policy.

THE SERVICE'S RESPONSE TO MY REPORT ON THE FIRST TWO WARRANTS

67. Following the provision of my classified report to the Service and their Minister, the Service asked Crown Law to review the first two iterations of the warrants.

68. Having received the draft advice from Crown Law, the Service were of the view that:

    68.1. some aspects of the class definitions in the warrants were sufficiently certain for a permissible class warrant under the ISA, while others aspects of the definitions were not, particularly for the Group 2 class. The more evaluative judgements that NZSIS had to apply to determine class members, the more uncertain and indeterminate the class becomes, and some aspects of the definitions had an impermissible degree of evaluation and judgement;

    68.2. if the definitions were narrowed and if the Service included exhaustive criteria for determining membership of a class, the necessity and proportionality of targeting all

[23] Propriety interpreted as what a fully informed and objective observer would consider appropriate in the circumstances.

possible members of Group 1 with the full extent of authorised activities would be made out due to the high level of threat anyone in that category may pose;

68.3. more needed to be done to justify the necessity and proportionality of the authorised activities in respect of Group 2;

69. The Service disagreed with me that the warrants were general warrants at common law, provided the class definitions were tightened, and this was a view supported by Crown Law.

70. On the question of whether the most intrusive activities should be authorised by an individual warrant, rather than a class warrant, the Service considered that there was nothing in the ISA to suggest any circumstances when an individual warrant is to be preferred, and it is not necessary to read in a requirement for an individual warrant.

THIRD VERSION OF THE WARRANT

71. Having received the draft advice from Crown Law, the Service applied for a third version of the warrant in September 2023. This warrant's classes were reviewed by Crown Law. The warrant was approved by the Minister and Chief Commissioner Intelligence Warrants.

72. This version of the warrant made a number of key changes:

72.1. Group 1 and 2 were more clearly defined and the scope of the definitions were narrowed, particularly for Group 2;

72.2. exhaustive criteria were used to help guide how the Service would determine membership of a class;

72.3. authorisation for some activities was not sought for Group 2, following concerns raised in my classified report; and

72.4. a third group focussed on discovery work was introduced with limited activities approved against it.

My analysis of the third version of the warrant

73. While there are still some aspects of the warrant and the definitions used that I consider are not sufficiently clear, I consider that the third version of the warrant is at least consistent with the advice provided by Crown Law. It does not raise the same lawfulness concerns that I found for the first two versions of the warrants. The narrower and clearer definitions, alongside tighter criteria to aid the determination of membership of those classes, enable a reasonable necessity and proportionality case to be made for all potential members of the class. I continue to consider that the approach taken by the Service for this warrant undermines the spirit of the warranting regime under the ISA and improperly delegates to the Service the decision-making on what ideologies are considered terrorism or violent extremism, who is a valid target, and what intrusive activities would be carried out, up to the maximum level of intrusiveness that the law allows. I still cannot see any reason for preferring a broad class warrant in these

circumstances, other than administrative convenience for the Service. To me this differentiates it from other class warrants that the NZSIS and GCSB had obtained.

74. This is predominately a policy question about how the warranting regime is intended to work for the intelligence and security agencies. The ISA is not explicit in indicating a preference for an individual warrant over a class warrant. There is no doubt that an individual warrant provides greater protection for the rights of an individual over a class warrant. It enables a warrant decision-maker to assess a person's individual circumstances to determine what activities are necessary or proportionate in the circumstances and if any conditions need to be placed to protect the specific rights of that individual. The assessment of these factors is abstract in a class warrant and therefore provides a weaker safeguard than an individual warrant.

75. I consider that there should be a preference for an individual warrant over a class warrant, where there are no extenuating factors that necessitate a class warrant. I consider that this could potentially be read into the current law and the tests for necessity and proportionality. Crown Law did not agree with my view, which leaves the policy position unclear.

76. The policy issue was considered by the 2022/23 reviewers of the ISA in *Taumaru: Protecting Aotearoa New Zealand,* who agreed that there should be a preference for an individual warrant over a class warrant, although noting that there was a clear need for class warrants for intelligence and security and that further policy work was required on this issue. The reviewers stated:[24]

> In principle, the use of highly intrusive covert surveillance activities against any individual, who may be of national security concern, should be authorised by way of an individual warrant. This provides the issuers with the opportunity to consider the particular circumstances of the individual concerned and gives them an opportunity to impose additional restrictions or conditions on the warrant, specific to the individual, should they wish to do so. Establishing a process within the warrant for determining whether a person fits within a class warrant, even if there is reporting to the warrant issuers of the number of persons that are part of the class, does not allow the issuers the opportunity to assess the necessity and proportionality of the proposed activities against a specified individual or individuals. Instead, with class warrants the Agencies are effectively given the discretion to decide whether an individual should be included within a class without having to go through the external checks that accompany the warranting process.

77. The Reviewers also noted that they had been unable to properly consider the matter as it came to their attention at a late stage.

78. The Government response to the review of the ISA is ongoing and provides an opportunity for the law around warrants to be reconsidered. I will continue to engage with the Department of Prime Minister and Cabinet on these issues.

79. While the law is being reviewed, I intend to look closer at how both agencies operate under class warrants, as there is generally no prior external consideration of the cases against individuals. I will be undertaking in-depth reviews of the cases made within the agencies against individuals that the NZSIS and GCSB have added to their class warrants, as well as how the agencies decide which activities will be undertaken against those individuals and how long

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[24] Hon Sir Terence Arnold KNZM and Matanuku Mahuika (2023) *Taumaru: Protecting Aotearoa New Zealand as a free, open and democratic society.* Wellington: Ministry of Justice. At [7.55].

someone is subject to warranted activities. I will start these reviews shortly and will report publicly on my findings.