Office of the Inspector-General of Intelligence and Security

Warrants issued under the Intelligence and Security Act 2017

2019 update

Report

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INTRODUCTION

1. In December 2018 the Inspector-General published a report on warrants issued in the first nine months under the Intelligence and Security Act 2017 (ISA).[1] This update summarises the position in November 2019 on the issues raised in that report.

2. The Office of the Inspector-General reviews all warrants after they are issued. We provide questions and comments to the agencies and discuss them at regular meetings. The 2018 report and this update reflect this process.

TRANSPARENCY

3. The law requires an application for an intelligence warrant to set out details of the activity proposed to be carried out under the warrant.[2] These details are essential to the assessment of whether the warrant is necessary and proportionate.

4. Our 2018 report noted initial shortcomings in the level of detail on proposed activities in NZSIS warrant applications. This included giving less information on the proposed scope of visual surveillance than had been the practice under previous legislation. The Service's approach had been that a statement of the bare powers they might exercise was sufficient, as opposed to describing what they actually intended to do under the warrant. Our report noted that after the report period NZSIS began providing more detail on proposed activities. This was largely due to receipt of external legal advice that supported the Inspector-General's view of what the law required.

5. The Service now generally provides good detail on proposed activities in its warrant applications. For visual surveillance and some other activities where the operational plan cannot be fully predetermined, NZSIS indicates where it seeks flexibility while stating the maximum extent of intrusiveness anticipated at the time of application — what has become known as a 'high water mark'.

6. When seeking to continue previously warranted activities, the Service and Bureau have both improved the level of information they provide in applications on the value of previous collection.

7. Both agencies have also made efforts to improve their assessment of likely third party (ie non-target) impacts of proposed activities. In its warrant applications the Service provides more information on likely and possible effects on third party rights, and how they can (or cannot) be reduced or mitigated. Questions arise more commonly in relation to Bureau warrants, given the typical breadth of their purposes and collection methods. These methods often have likely impacts on broad categories of third parties. The impacts may be less predictable and less susceptible to mitigation than the likely effects of operations focused closely on single persons (which is commonly the case for the Service). Bureau warrant applications have

[1] Cheryl Gwyn "Warrants issued under the Intelligence and Security Act 2017" (Office of the Inspector-General of Intelligence and Security, December 2018).

[2] ISA, s 55(1)(b).

tended to address third party impacts with generic assurances that they will be moderated by the 'tailoring' of collection activities and 'standard arrangements' for handling collected data. We do not always find it clear which specific 'standard arrangements' apply and what their effect is. The Bureau has acknowledged that it can improve its efforts to assess and possibly quantify anticipated third party impacts and it is willing to explore ways to do this.

CLARITY

8. Our 2018 report noted that the NZSIS quickly improved on deficient statements of purpose presented in its earliest ISA warrants. There was a more persistent issue with the Bureau drafting broad, high-level warrant purposes. The Inspector-General was concerned that some GCSB warrants were so broadly framed that it was difficult if not impossible to reach a functional understanding of what would and would not be done under them, and therefore to assess the necessity and proportionality of the proposed activities.

9. In September 2018 the Inspector-General provided the Bureau with specific queries about its justification for seeking broad, multi-purpose, warrants. The issue, we have since agreed, particularly concerns a group of Type 2 warrants that each authorise intelligence collection by a particular method used by the Bureau for a wide range of purposes. The Bureau took nine months to respond to the Inspector-General's letter — an unreasonably long time, especially given our concerns about some of the extant warrants. The Bureau's response was thoughtful and pragmatic when it came, and is discussed below.

10. While awaiting a response to the September letter, the office advised the Bureau in March this year of our preliminary view that one of the Type 2 warrants at issue was irregular.[3] In our assessment it combined a very broad purpose with minimal specification of proposed activities, so that no meaningful assessment of necessity and proportionality was possible. The Bureau defended the warrant but we were unpersuaded. By the time the Inspector-General advised the Bureau of her final view on its irregularity, the warrant had been revoked, at the Bureau's request, on the grounds that no further operations were to be performed under it. While not accepting our view that the warrant was irregular, the Bureau advised that the drafting approach would not be replicated in future applications. It has since sought a new warrant, for the same type of operation, that is much more precise in purpose and scope and so, in our view, much more appropriate.

11. In May this year the Bureau sought to renew a Type 2 warrant that, in its first iteration under the ISA, the Inspector-General had identified as excessively broad in purpose. The warrant was re-framed to be focused on collection against defined classes of targets, rather than on broadly defined topics. We considered this a significant improvement. The classes were well defined. As a result of this, and the inclusion of more information on other matters, the scope of the authorised activity was clearer, enabling a more persuasive analysis of necessity and proportionality.

[3] Section 163 of the ISA provides that the Inspector-General may find a warrant, or activity under a warrant, to be irregular. This is discussed further below at paragraph 25.

12. In the Bureau's eventual written response to the queries raised in the Inspector-General's September 2018 letter about broad-purpose/access-based warrants, it maintained that such warrants were lawful and appropriate, but invited further engagement on the approach to be taken to renewing the broadest example currently in effect. We continue to engage with the Bureau on how the warrants about which we are most concerned might be re-framed. The Bureau's revised approach to the two warrants mentioned above is in our view a positive indication of its readiness to consider alternatives.

13. Criticisms in the Inspector-General's 2018 report of both agencies' early attempts at defining classes of targets have been followed by improvements. NZSIS now consistently and informatively provides information in applications on factors that will go toward placing a person within a targeted class. The Bureau's applications also address the matter, but with a tendency to repeat generic explanations.

14. The Bureau has also made changes to the structure of its warrant applications. In particular it now always includes an introductory section explaining what the warrant is designed to achieve and what the key points are. This is helpful. It serves to pull together the different parts of the warrant application.

15. Bureau warrants continue to present a complex web of definitions, but as noted in the 2018 report the definitions are better than those in its early ISA warrants. The Bureau also continues to cross-reference warrants, a practice that in our view compounds the issues arising from their breadth and complexity. Warrant A, for example, will authorise the activities authorised under warrants B and C, but against different classes of persons for distinct purposes. The resulting scope of the authorisation is challenging to interpret, which makes the necessity and proportionality of the proposed activity difficult to analyse.

16. In effect the Bureau has assembled an interlocking framework of warrants covering all its activity relevant to government intelligence priorities. Individual warrants cannot necessarily be fully understood solely on their own terms, but require a broader understanding of the enterprise as a whole. We have expressed concern that this requires the warrant issuers to consider the warrant application before them in the context of previously issued warrants or future warrants it may affect. This adds an undesirable layer of complexity to an already complex warranting exercise.

ANALYSIS

17. Questions about the adequacy of the agencies' analysis of necessity and proportionality continue to arise, as I expect they always will. Whether warranted activities are necessary (for national security, or to contribute to New Zealand's international relations or economic well-being)[4] and whether they are proportionate to their purpose[5] are matters of legal and factual judgement.

[4] ISA, ss 58-60.

[5] ISA, s 61.

18. NZSIS now produces better-structured applications so that the nature of their argument is clearer, even if we question it. Occasionally we have particular concerns (see comments on irregular warrants below).

19. The issues with GCSB's analyses of necessity and proportionality arise typically where warrants are broad in scope with high-level and/or multiple purposes. Additionally, the Bureau sometimes defines classes of targets in warrants to encompass a significant number of people when the anticipated and actual collection activity is much more limited. We have advised both agencies that where activity against only a limited number of persons within a target class is planned, that is a proportionality factor worth highlighting in the application.

20. The 2018 report raised the important and difficult question of whether a Type 1 warrant is required when an agency will acquire New Zealanders' communications as collateral on collection undertaken for a foreign intelligence purpose.

21. For the agencies, the question has since been answered by advice from the Solicitor-General, which they are bound to follow.[6] The Act requires a Type 1 warrant for activities "for the purpose of collecting information about, or to do any other thing in relation to" New Zealanders.[7] The interpretation of the agencies and the Solicitor-General is that a Type 1 warrant is not required if the agencies have no *intention* to collect the communications of New Zealanders, even if such collection is a possible or likely collateral effect of collection targeting non-New Zealanders. A Type 2 warrant is sufficient in those circumstances. A Type 1 will have to be sought later, however, if an agency acquires collateral information on a New Zealander and wishes to use it as intelligence about them.

22. Our view remains that a Type 1 warrant should be sought when collateral collection of New Zealanders' communications is reasonably expected, as the Type 1 process gives additional protection to the rights of New Zealanders. A Type 1 warrant requires the approval of a Commissioner of Intelligence Warrants as well as the Minister, whereas a Type 2 warrant can be issued by the Minister alone. Our preferred approach focuses on the effects of a warrant on the privacy interests of New Zealanders, rather than on the agency's subjective collection purpose. It reflects a view that state collection of personal data, even if it is not examined, is an intrusion on privacy that must be justified. We consider this approach consistent with the overarching goals of the ISA and with fundamental rights, such as the right to be secure against unreasonable search and seizure.[8]

23. The protracted exercise of addressing this matter has clarified for all parties some fundamental difficulties with implementation of the Type 1 / Type 2 distinction in the legislation. NZSIS, because of the way it manages collected information, is now obliged to ensure it has Type 1 warrants in place, alongside Type 2 warrants, in most if not all situations

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[6] As noted in the December 2018 Warrants Report (at [18] and note 19) it is the Solicitor-General who ultimately determines the Crown's view of the law and the NZSIS and the GCSB must accept and apply the Solicitor-General's advice. The Inspector-General is not a legal advisor to the Crown and may take an independent view. The Inspector-General has not asked the agencies to seek waiver of legal privilege in relation to the Solicitor-General's advice mentioned here and so its content is not discussed.

[7] ISA, s 53.

[8] New Zealand Bill of Rights Act 1990, s 21.

where the primary purpose of its operations is to collect foreign intelligence. The Bureau, which has different information management systems, is able to continue to conduct some foreign intelligence operations covered only by Type 2 warrants.

24. Consideration of the Type 1 / Type 2 issue has highlighted the question of how the agencies — particularly the Bureau — should address the risk, where relevant, of intelligence activities resulting in 'collateral' collection of the private and personal information of New Zealanders. We anticipate further improvement, in consequence, in their efforts to mitigate that risk by the application of conditions and restrictions on warranted powers and on the management of collected information.

'IRREGULAR' WARRANTS

25. The Inspector-General's 2018 report noted that she had not, in the period covered, declared any warrant or warranted activity to be 'irregular' under s 163 ISA. The ISA does not define irregularity, but the report explained that the Inspector-General would consider an authorisation irregular if it involved a significant departure from the requirements of the Act or from well-recognised legal principles.

26. As noted above (paragraph 10) the Inspector-General reached the view this year that one of the Bureau's Type 2 warrants was irregular for a lack of sufficient operational detail in the application and a consequently inadequate demonstration of necessity and proportionality. We have since found that another Bureau Type 2 warrant was irregular for deficiency of information on one of the activities for which authorisation was sought. The Bureau is working to address the issues raised by this warrant.

27. Late last year we formally advised NZSIS that activity under one of its Type 1 warrants was irregular, as it involved a privacy intrusion beyond what was articulated in the warrant application. The Service did not agree. Its view was that what mattered was how the Minister and the Commissioner of Intelligence Warrants had read and understood the warrant application. The Inspector-General's role in reviewing warrants, however, is independent. We make our own assessment, after the warrant has been issued, of the adequacy and correctness of the Service's documentation in support of it and the legality of activity conducted under the warrant. The review question for us is how a warrant and application can reasonably and objectively be understood. Our answer might differ from how the warrant issuers actually understood it. That does not matter. We are not assessing their decision, but evaluating what the agency presented. We have clarified this with the Service.

28. More recently we advised the NZSIS that one of its Type 1 warrants (rather than activity under it) appeared to be irregular. On its face the application identified a specified individual as a member of a target class on such an inadequate basis that it was not possible to see the warranted powers as necessary and proportionate. The Service responded that the description of the person as a target was an error and no warranted activity had been carried out against them. NZSIS formally briefed the Minister and Chief Commissioner accordingly. We were satisfied with the Service's response.

CURRENT ISSUES

29. We anticipate focusing our attention in the next 12 months on:

- the level of information or suspicion required (the 'threshold') for identifying an individual, especially a New Zealander, as the target of an intelligence warrant;
- the persuasiveness of the inferences drawn by the agencies, from the information available, to make the case for a warrant;
- the quality of the proportionality analysis in warrant applications;
- whether incidental collection is adequately anticipated and described in warrant applications, with the impact mitigated as far as possible;
- whether conditions or restrictions are necessary in a warrant, especially where limitations on proposed activities are specified in the application;
- whether warrant applications identify any intention to share intelligence with partner agencies, with what implications and subject to what controls;
- whether warrant applications adequately describe how information collected will be managed internally, including sufficient references to the controls on who will have access to it, how it will be searched, how searches will be tailored to minimise unnecessary intrusions on privacy, how long it will be retained, and when and how it will be deleted.

CONCLUSION

30. Overall, it is fair to say that warrant applications from both agencies are significantly better than they were a year ago. The agencies' engagement on the Inspector-General's concerns and questions has become more open and responsive. There has been an increased willingness to make changes as a result of our discussions and to see our warrant reviews as a spur to continual improvement. While the Bureau has significantly improved its response times to the bulk of our questions arising from warrant reviews, its responses to some of the core statutory interpretation issues we have raised have taken far too long. But it has made a strong effort to clear a backlog of specific queries from previous warrant reviews. Our discussions with both agencies are increasingly concerned with technical questions and with understanding how the specific facts of proposed activities relate to particular legal thresholds, rather than debating the law. That is progress.