



PROTECTION OF FUNDAMENTAL FREEDOMS IN THE DIGITAL AGE

United Nations Human Rights Committee
United Nations High Commissioner for Human Rights
20 June 2014

This paper provides an update in relation to surveillance and human rights in New Zealand since 2013.

1. Introduction

In 2013 the New Zealand government introduced two Bills to the House of Representatives; the Government Communications Security Bureau and Related Legislation Amendment Bill ('GCSB Bill') and the Telecommunications (Interception Capability and Security Bill) ('TICS Bill').

These legislative proposals were not a response to the Snowden revelations, as for example much of the recent response in the United States of America has been. Rather the legislation was a response to the *Kitteridge Report*¹, which was a report on some domestic concerns about the operation of New Zealand's intelligence services. In particular the fact that New Zealanders had been spied upon by the Government Communications Security Bureau ('GCSB'). The Snowden revelations came very late in the legislative process.

The Prime Minister noted in the Cabinet papers proposing the legislation that:²

The proposals...were developed to be consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA) and the Human Rights Act 1993...

A final view on the consistency with the NZBORA will [be] possible once legislation is drafted.

The subsequent Bill of Rights vet by the Ministry of Justice identified a number of inconsistencies with the New Zealand Bill of Rights Act 1990 ('BoRA') in both pieces of legislation. In relation to the GCSB Bill these were the rights to freedom of expression, non-discrimination and unreasonable search and seizure found in subsections 14, 19(1) and 21.³ In the case of the TICS Bill, the rights of concern in relation to the proposed legislation were the right to freedom of expression, the right to be free from unreasonable search and seizure and

¹ Rebecca Kitteridge, *Review of Compliance at the Government Communications Security Bureau*, (March 2013, Wellington). <http://www.gcsb.govt.nz/assets/GCSB-Compliance-Review/Review-of-Compliance.pdf>

² <http://www.nzic.govt.nz/assets/Uploads/GCSB-Cabinet-paper-1.pdf> ,
<http://www.nzic.govt.nz/assets/Uploads/GCSB-Cabinet-paper-2.pdf>

³ <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/government-communications-security-bureau-and-related-legislation-amendment-bill>

the right to natural justice (subsections 14, 21, and 27(1)). The analysis concluded that all could be justified. The Commission does not agree with this conclusion.

On 9 July 2013 the New Zealand Human Rights Commission ('Commission') submitted a report to the Prime Minister on issues relating to surveillance and the human rights of people in New Zealand.⁴

The Commission provided a copy of its report to the United Nations High Commissioner of Human Rights, Navi Pillay. The High Commissioner requested the Commission to keep her office apprised of developments in New Zealand.

The Commission also provided a copy of its report to the United Nations Human Rights Committee ('Committee') to inform their consideration of New Zealand's compliance with its obligations under the International Covenant on Civil and Political Rights ('ICCPR'). New Zealand is due to undergo its 6th periodic review in early 2016.

On 25 March 2014 the Commission met with the Committee by video conference to discuss the development of its list of issues prior to reporting ('LOIPR') in relation to New Zealand's 6th periodic review. During the course of these discussions the Committee noted the Commission's 2013 report and requested an update on developments since that time.

On 15 April 2014 the United Nations Human Rights Committee ('Committee') released its LOIPR in relation to New Zealand's sixth periodic report. The Committee asked New Zealand to:⁵

...provide information on steps taken to redraft the Government Communications Security Bureau and Related Legislation Amendment Bill (GCSB Bill), taking into account the conclusions of the Human Rights Commission in the Report to the Prime Minister (July 2013) that the bill would breach the right to privacy in an unbalanced and unjustified manner.

10. Please clarify whether the comments of the Human Rights Commission in the Report to the Prime Minister (July 2013) were taken into account in the Telecommunications (Interception Capability and Security) (TICS) Act of 91 of 2013 (11 November 2013). In particular, please clarify the following points in the TICS Act: (a) the definition of 'national security'; (b) to what extent information on users, including their personal data, may be provided to relevant authorities by a service or network operator; (c) to what extent intercepted information and information on the receivers may be provided by a service or network operator to relevant authorities; (d) under what conditions information may be classified and (e) under what conditions classified security information may be used by law enforcement authorities

⁴ New Zealand Human Rights Commission, *Report to the Prime Minister; Government Communications Security Bureau and Related Legislation Amendment Bill; Telecommunications (Interception Capability and Security) Bill, and associated wider issues relating to surveillance and the human rights of people in New Zealand*, (09 July 2013, Wellington). <http://www.hrc.co.nz/wp-content/uploads/2013/07/09072013-Human-Rights-Commission-Report-to-the-Prime-Minister-re-GCSB-and-TICS-Bills-FINAL.pdf> Note this report was made pursuant to the direct reporting function of the Commission under section 5(2)(k) of the Human Rights Act 1993.

⁵ Human Rights Committee, *List of issues prior to submission of the sixth periodic report of New Zealand*, CCPR/C/NZL/QPR/6, <http://www.ccrpcentre.org/country/new-zealand/>

and the judiciary.

2. Historical Context

New Zealand is one of the five countries in the *five eyes* alliance. This alliance has its origin in a wider and slightly earlier alliance involving those countries that had the objective: “to defend life, liberty, independence and religious freedom, and to preserve human rights and justice.”⁶

New Zealand and the four other *five eyes* nations were part of the small group of nations that in 1942 declared themselves to be the “United Nations”. Those nations accepted the Principles of the Atlantic Charter⁷. As members of the British War Cabinet the Prime Ministers of New Zealand, Canada, the United Kingdom and Australia helped draft the Atlantic Charter. The Charter was signed by the President of the United States and the British Prime Minister. The eight Principles of the Atlantic Charter were:⁸

First, their countries seek no aggrandizement, territorial or other;

Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;

Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them;

Fourth, they will endeavour, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity;

Fifth, they desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labour standards, economic advancement and social security;

Sixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want;

Seventh, such a peace should enable all men to traverse the high seas and oceans without hindrance; and

Eighth, they believe that all of the nations of the world, for realistic as well as spiritual reasons must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments

⁶ http://www.nato.int/cps/en/natolive/official_texts_16912.htm

⁷ Ibid.

⁸ Ibid.

continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measure which will lighten for peace-loving peoples the crushing burden of armaments.”

In the 1942 Declaration of the United Nations those nations said that they were:⁹

convinced that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands, and that they are now engaged in a common struggle against savage and brutal forces seeking to subjugate the world.

That victory was achieved at horrific cost of human life and suffering. That victory could not have been achieved without signals intelligence. Our freedom and our security have always been interlinked. That reality is clear in the Atlantic Charter, the Declaration of the United Nations, the Charter of the United Nations, the Universal Declaration of Human Rights and the Human Rights Treaties including the ICCPR that followed it - freedom and security is a human rights issue and the trick is to get the balance right.

It is not as some would have it a choice of either freedom or security. We were and are dealing with people who were and are too certain they are right. Their version of freedom was and is freedom for them to kill or harm whoever they wish to kill or harm. The antidote to that distortion is the principles that are most simply put in the Universal Declaration of Human Rights. That includes getting the balance right between the human rights of freedom and security.

3. The Commission’s Report

The Commission’s report was submitted to the Prime Minister pursuant to section 5 of the Human Rights Act (1993) (‘HRA’).¹⁰ In its report the Commission stressed the human rights aspects of the work of intelligence agencies as well as the other human rights that needed to be balanced. The Commission stated that:¹¹

... [it] recognises that States have a duty – which is in part a human rights related duty – to protect their citizens from both physical harm and from interference with their civil and political rights. Most law enforcement involves active protection of human rights. Legislation has an important role to play; however, legislation can be unduly intrusive. Careful consideration

⁹ United Nations, *Joint Declaration by Members of the United Nations*, (17 December, 1942).

¹⁰ Under section 5(2)(k)(i) the Commission can report directly to the Prime Minister on ‘any matter affecting human rights, including the desirability of legislative, administrative, or other action to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights’, and under section 5(2)(k)(iii) on ‘the implications of any proposed legislation (including subordinate legislation) or proposed policy of the Government that the Commission considers may affect human rights’.

¹¹ Supra note 4 at [8], [9].

is required to ensure that resulting legislative measures are consistent with international and domestic human rights obligations.

The Commission recognises that some level of surveillance is inevitable and can be justified in contemporary democratic society. However, there is nothing to suggest that surveillance in a democratic society such as New Zealand cannot be subject to human rights principles, and consistent with an approach that protects human rights, by limiting rights in a manner which is proportionate and justified, in accordance with law.”

The Commission’s primary recommendation was “that a full and independent inquiry into New Zealand’s intelligence services be undertaken as soon as possible.”¹²

It is important to stress that the Commission’s report was not a submission to the Select Committee of the Legislature that was considering the two proposed Bills. The Commission’s report was to the Prime Minister and the key point was that the Commission wanted a wider review before the legislation was passed. There has been considerable confusion about this with the Prime Minister publicly criticising the Commission for being tardy in making its “submission.”¹³

The day after that criticism, a Member of Parliament, the Honourable Peter Dunne publicly stated that the Commission “was right” and vowed to ensure improvements were made to the legislation.

4. The Legislation

Mr Dunne did achieve some improvements in the legislation. These changes included:¹⁴

- the addition of a set of guiding principles into the legislation;
- the establishment of a two person advisory panel to assist the Inspector-General of Intelligence and Security;
- the removal of the proposed Order in Council mechanism which would have allowed other agencies to be added to the list of agencies able to request assistance from the GCSB;¹⁵
- increasing oversight of the warrant process;
- the inclusion of additional annual reporting requirements; and
- the addition of a requirement that an independent review of the operations and performance of the GCSB and the New Zealand Security Intelligence Service (‘NZSIS’) and their governing legislation be undertaken in 2015, and thereafter every 5-7 years.

¹² Supra note 4, at [4].

¹³ <http://tvnz.co.nz/politics-news/pm-unimpressed-tardy-gcsb-report-5506900>

¹⁴ <http://www.voxy.co.nz/politics/major-changes-agreed-gcsb-bill-dunne/5/162025>

¹⁵ Any additions beyond the Police, SIS and NZ Defence Force will now be required to be made by a specific amendment to the legislation, and not just by regulation as the Bill currently proposes.

His work was favourably acknowledged by the Prime Minister and other Ministers in the debate in the legislature. However, his work was less well received by some opposition parties. Only one of the other parties (represented by one member) and the majority governing party in the legislature supported the legislation as amended by Mr Dunne's intervention. Some of those parties opposed to the legislation wanted a full independent inquiry of the intelligence services before legislation was passed. One party sought further tightening of the oversight of the intelligence services.

Ultimately the legislation was passed by a single vote. The consensus that has marked the passage of previous legislation of this nature in New Zealand was not achieved. Each side of the debate blamed the other for the failure to achieve this consensus.

4.1 *The Commission's views*

The Commission was grateful for Mr Dunne's efforts but remained concerned that all the issues that a fuller independent review might have revealed and addressed were not raised before the legislation was passed.

There is a significant difference between the state of New Zealand's civil and political human rights obligations at international law and the New Zealand's domestic protections, primarily through the BoRA. The BoRA does not mirror the international obligations. This is important because the human rights standards that officers of the intelligence and security agencies are required to have regard to are the human rights standards recognised by New Zealand law and not the obligations New Zealand has agreed to as a matter of international law.

While search and surveillance, privacy and some aspects of the security and intelligence legislation provide protection, far greater protection would be provided by the insertion of all the Article 17 rights regarding arbitrary or unlawful interference with privacy, family, home or correspondence into the BoRA. As noted in the Commission's report to the Prime Minister:¹⁶

The right to privacy is found in both the Declaration and the ICCPR but is not found in the New Zealand Bill of Rights Act 1990 and the Privacy Act 1993 is no substitute for the failure to include the right to privacy in the New Zealand Bill of Rights Act. The failure to include the right to privacy in the New Zealand Bill of Rights weakens the domestic protections of right to privacy.

One of the Commission's specific recommendations was:¹⁷

that the Government commit to providing human rights training to all members of the New Zealand intelligence services. The Commission would be happy to provide this training. Alternatively, the Commission recommends that oversight and development of such training is undertaken by the Director General of Defence Legal Services, New Zealand Defence Force, in

¹⁶ Supra note 4 at [14].

¹⁷ Ibid at [55].

conjunction with the Police Commissioner.

It is important to understand why the Commission specifically made reference to the agencies and the two individuals concerned.¹⁸ The Commission considers the New Zealand Defence Forces and the New Zealand Police as agencies that take their human rights obligations particularly seriously and have training programs designed to educate staff in their human rights duties and responsibilities. The Defence Forces have developed particular training in human rights relating to peacekeeping and conflict. Much of the work behind this was led by the recently retired Director General of Defence Legal Services.

The staff of these agencies are at what might be called the sharp end of human rights work, where in their daily work and interactions they need to make the right decision in short and often pressured timeframes. It is very different from drafting legislation or making policy decisions. Security and intelligence staff are in similar situations. If they make the right decisions they are human rights defenders. If they make the wrong decisions they can be accused of being human rights abusers. Good training and strong values are the keys to being a defender of human rights.

5. Subsequent developments

Other countries, including the United States of America have, since New Zealand passed its legislation, conducted extensive reviews of their intelligence and security services. Furthermore since the passage of the legislation New Zealand has supported United Nations General Assembly resolutions that are in line with the position that the Commission took in its report to the Prime Minister.

There is an election of the legislature in September 2014 and the legislature will rise in June 2014 to allow that election to be contested. The net effect, whatever happens in the election, is that there will be some sort of review of the intelligence and security services in 2015.

If the current Government is re-elected the review contained in the legislation will presumably proceed. Other parties are promising reviews of a different nature. In any event, prior to the Committee's review of New Zealand's compliance with the ICCPR, the government will have a domestic review to consider.

5.1 United States Review of intelligence and security services

The United States Secretary of State explained the United States position to the *Freedom Online Coalition Conference* in April 2014. He said:¹⁹

But let me be clear – as in the physical space, cyber security cannot come at the expense of cyber privacy. And we all know this is a difficult challenge. But I am serious when I tell you that we are committed to discussing it in an absolutely inclusive and transparent manner, both at home and abroad. As President Obama has made clear, just because we can do something doesn't

¹⁸ We note in doing so that both the individuals have moved on from their roles since then.

¹⁹ <http://www.humanrights.gov/2014/04/28/secretary-kerry-on-freedom-and-the-internet/>

mean that we should do it. And that's why he ordered a thorough review of all our signals intelligence practices. And that's why he then, after examining it and debating it and openly engaging in a conversation about it, which is unlike most countries on the planet, he announced a set of concrete and meaningful reforms, including on electronic surveillance, in a world where we know there are terrorists and others who are seeking to do injury to all of us.

So our reforms are based on principles that we believe are universally applicable. First, rule of law – democracies must act according to clear, legal authorities, and their intelligence agencies must not exceed those authorities. Second, legitimate purpose – democracies should collect and share intelligence only for legitimate national security reasons and never to suppress or burden criticism or dissent. Third, oversight – judicial, legislative or other bodies such as independent inspectors general play a key role in ensuring that these activities fall within legal bounds. And finally, transparency – the principles governing such activities need to be understood so that free people can debate them and play their part in shaping these choices. And we believe these principles can positively help us to distinguish the legitimate practices of states governed by the rule of law from the legitimate practices of states that actually use surveillance to repress their people. And while I expect you to hold the United States to the standards that I've outlined, I also hope that you won't let the world forget the places where those who hold their government to standards go to jail rather than win prizes.

5.3 Relevant Recent United Nations Resolutions that New Zealand Supported

In November 2013 New Zealand supported the Brazil/Germany initiated General Assembly Resolution 68/167²⁰ on *The Right to Privacy in the Digital Age*. New Zealand also supported General Assembly Resolution 68/178²¹ on *Protection of human rights and fundamental Freedoms while Countering Terrorism*.

General Assembly Resolution 68/167 calls on States (such as New Zealand) to:²²

- respect and protect the right to privacy, including in the context of digital communication;
- take measures to put an end to violations of those rights and to create the conditions to prevent such violations, including by ensuring that relevant national legislation complies with their obligations under international human rights law;
- review their procedures, practices and legislation regarding the surveillance of communications, their interception and the collection of personal data, including mass surveillance, interception and collection, with a view to upholding the right to privacy by

²⁰ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/167&referer=http://www.un.org/depts/dhl/resguide/r68_en.shtml&Lang=E

²¹ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/178

²² Supra note 20.

ensuring the full and effective implementation of all their obligations under international human rights law; and

- establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception and the collection of personal data;

General Assembly Resolution 68/178 among other things calls on States (such as New Zealand) to:²³

- safeguard the right to privacy in accordance with international law, in particular international human rights law, and to take measures to ensure that interferences with or restrictions on that right are not arbitrary, are adequately regulated by law and are subject to effective oversight and appropriate redress, including through judicial review or other means;
- protect all human rights, including economic, social and cultural rights, bearing in mind that certain counter-terrorism measures may have an impact on the enjoyment of these rights;
- not resort to profiling based on stereotypes founded on grounds of discrimination prohibited by international law, including on racial, ethnic and/or religious grounds;
- ensure that any person who alleges that his or her human rights or fundamental freedoms have been violated has access to a fair procedure for seeking full, effective and enforceable remedy within a reasonable time and that where such violations have been established, victims receive adequate, effective and prompt reparation, which should include, as appropriate, restitution, compensation, rehabilitation and guarantees of non-recurrence, including where the violation constitutes a crime under international or national law, to ensure accountability for those responsible for such violations;
- ensure due process guarantees, consistent with all relevant provisions of the Universal Declaration of Human Rights, and their obligations under the International Covenant on Civil and Political Rights, the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977, and the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto in their respective fields of applicability;
- shape, review and implement all counter-terrorism measures in accordance with the principles of gender equality and non-discrimination; and
- call upon States and other relevant actors, as appropriate, to continue to implement the United Nations Global Counter-Terrorism Strategy, which, inter alia reaffirms respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism

General Assembly Resolution 68/178 also “calls upon international, regional and sub-regional

²³ Supra note 21.

organisations to strengthen information-sharing, coordination and cooperation in promoting the protection of human rights, fundamental freedoms and the rule of law while countering terrorism.”²⁴ This would seem to apply to international, regional and sub-regional intelligence gathering organisations as much as other international, regional and sub-regional organisations. It may therefore be relevant to some of the organisations New Zealand is a member of, such as the intelligence agencies involved in the five eyes arrangement.

It is also relevant, in terms of acknowledging progress, that in November 2013 New Zealand joined the Open Government Partnership. The Government said at the time:²⁵

In joining the Open Government Partnership, New Zealand is showing we are committed to promoting open and transparent government, and we look forward to sharing best practices and expertise with our overseas partners.

It is unclear to the Commission whether Minister for Communications and Information Technology, Amy Adams’, attendance at the 2014 Conference of the Freedom Online Coalition in Estonia is evidence of New Zealand’s intention to join the Freedom Online Coalition. The Commission would support New Zealand joining that coalition.²⁶

5.3 *The 2015 Inquiry into Intelligence and Security Services*

The requirement for the review of the intelligence and security agencies is found in the Intelligence and Security Committee Act 1996²⁷. It provides that:²⁸

- a review of the intelligence and security agencies, the legislation governing them, and their oversight legislation must, in accordance with the terms of reference specified pursuant to the Act be commenced before 30 June 2015 and afterwards, held at intervals not shorter than 5 years and not longer than 7 years;
- the review must be conducted by two persons appointed by the Attorney General;
- the Attorney-General must , in order for the review to commence, also specify:
 - o the terms of reference for the review, which may include any matter relevant to the functions, effectiveness, and efficiency of the intelligence and security agencies and their contribution to national security; and
 - o any matters that he or she considers that the reviewers should take into account in determining how to conduct the review; and

²⁴ Ibid.

²⁵ <http://www.transparency.org.nz/2014/New-Zealand-To-Join-Open-Government-Partnership.htm>

²⁶ At that conference Minister Adams tweeted the Secretary of State’s address. She then tweeted her own thought that “[f]reedom and security online are not mutually exclusive, in fact they are interdependent.” The Commission agrees with that sentiment in the real and digital worlds.

²⁷ ss 21 -27 (as amended by the Intelligence and Security Amendment Act 2013)

http://www.legislation.govt.nz/act/public/1996/0046/latest/DLM392242.html?search=ts_act%40bill%40regulation%40deemedreg_intelligence_resel_25_a&p=1

²⁸ Ibid.

- o the date by which the review is to be concluded.
- the persons appointed as reviewers, the terms of reference of the review, any matters specified in relation to the conduct of the review, and the date by which the review must be concluded must be publicly notified in the Gazette as soon as practicable after the appointment of the reviewers.

Before doing any of that, the Attorney-General must consult the Security and Intelligence Committee. As noted above the terms of reference for the Security and Intelligence Committee Act review are required to be published by June 2015. At present it is unclear if the terms of reference will be settled before the Parliament rises in June this year for the September election.

The Commission believes that the key to the 2015 inquiry and future inquiries will be the terms of reference set by the current or future Attorneys General. Some will be concerned about the independence of a process where the Attorney General both sets the terms of reference and appoints the reviewers. The Attorney General is, however, not the Minister responsible for the organisations under review. This is a significant improvement on the previous process where the Prime Minister, who is the Minister responsible, determined the review and the reviewer who reported to him. The only real alternatives available are that:

- the Parliament appoints the reviewer and sets the terms of reference - perhaps through the Security and Intelligence Committee; or
- the Chief Ombudsman and the Privacy Commissioner could be designated the reviewers and set the terms of reference.

Practically there will not be any change to the process if the current government is re-elected and exactly what would happen if they were not depends on the composition of any new government.

The Commission would hope that if the review proceeds as currently proscribed, the Attorney General ensures that the terms of reference reflect the relevant human rights principles that New Zealand has agreed to and urged on other States in the General Assembly of the United Nations since the legislation was passed.

6. Reviews before international bodies

6.1 United Nations Human Rights Council Second Universal Periodic Review of New Zealand

In the Universal Periodic Review of New Zealand by the United Nations Human Rights Council in January 2014 Switzerland made a recommendation that New Zealand “ensure that the new legislation on surveillance of communications by the intelligence service complies with international law, particularly with the principle of proportionality.”²⁹

²⁹ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: New Zealand*, A/HRC/26/3 at [128.154].

New Zealand accepted Switzerland's recommendation stating that "[r]espect for human rights, individual privacy, and traditions of free speech in New Zealand were guiding principles in undertaking the review of the Government Communications Security Bureau Act 2003. The amendments to the Act were compliant with the Bill of Rights Act 1990. The GCSB Act will be subject to further review in 2015."³⁰

On this basis the Attorney General should, as part of the 2015 review, ensure that the reviewers report on the compliance by the intelligence services with relevant human rights, individual privacy, and traditions of free speech in New Zealand.

6.2 *Human Rights Committee's Review of New Zealand*

The Committee's review of New Zealand's compliance with its ICCPR obligations is the next opportunity for review of civil and political rights in the UN system. The Commission, the New Zealand Law Society, Peace Movement Aotearoa, the International Disability Alliance, Child Advocacy New Zealand, Amnesty International, and the International Fellowship of Reconciliation have already filed reports with the Human Rights Committee.

The Commission has noted that at its meeting (CCPR/C/SR/3061), held on 26 March 2014, the Committee adopted the following concluding observations in regard to the fourth ICCPR review of the United States:³¹

National Security Agency Surveillance

The Committee is concerned about the surveillance of communications in the interests of protecting national security, conducted by the National Security Agency (NSA) both within and outside the United States through the bulk phone metadata program (Section 215 of the PATRIOT Act) and, in particular, the surveillance under Section 702 of Amendments to the Foreign Intelligence Surveillance Act (FISA) conducted through PRISM (collection of the contents of communications from U.S.-based companies) and UPSTREAM (tapping of fiber-optic cables in the U.S. that carry internet traffic) programs and their adverse impact on the right to privacy. The Committee is concerned that until recently, judicial interpretations of FISA and rulings of the Foreign Intelligence Surveillance Court (FISC) have largely been kept secret, thus not allowing affected persons to know the law with sufficient precision. The Committee is concerned that the current system of oversight of the activities of the NSA fails to effectively protect the rights of those affected. While welcoming the recent Presidential Policy Directive (PPD-28) that will now extend some safeguards to non-US persons "to the maximum extent feasible consistent with the national security", the Committee remains concerned that such persons enjoy only limited protection against excessive surveillance. Finally, the Committee is concerned that those affected have no access to effective remedies in case

³⁰ Ministry of Foreign Affairs and Trade, *New Zealand Government Response to the 2014 UPR recommendation*. at [19]. <http://www.hrc.co.nz/wp-content/uploads/2013/03/New-Zealand-Government-Response-to-2014-UPR-recommendations.pdf>

³¹ UN Human Rights Committee, *Concluding Observations on the fourth periodic report of the United States of America*, CCPR/C/SR/3061 at 22

of abuse (arts. 2, 5(1), and 17).

The State party should:

- (a) *take all necessary measures to ensure that its surveillance activities, both within and outside the United States, conform to its obligations under the Covenant, including article 17; in particular, measures should be taken to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity regardless of the nationality or location of individuals whose communications are under direct surveillance;*
- (b) *ensure that any interference with the right to privacy, family, home or correspondence be authorized by laws that (i) are publicly accessible; (ii) contain provisions that ensure that collection of, access to and use of communications data are tailored to specific legitimate aims; (iii) are sufficiently precise specifying in detail the precise circumstances in which any such interference may be permitted; the procedures for authorizing; the categories of persons who may be placed under surveillance; limits on the duration of surveillance; procedures for the use and storage of the data collected; and (iv) provide for effective safeguards against abuse;*
- (c) *reform the current system of oversight over surveillance activities to ensure its effectiveness, including by providing for judicial involvement in authorization or monitoring of surveillance measures, and considering to establish strong and independent oversight mandates with a view to prevent abuses;*
- (d) *refrain from imposing mandatory retention of data by third parties;*
- (e) *ensure that affected persons have access to effective remedies in cases of abuse*

The Committee's concluding observations in relation to the United States of America is relevant in the New Zealand context. The concern of the Committee that despite the reforms in the United States, non-US persons enjoy only limited protection against excessive surveillance applies to all persons in New Zealand. The Prime Minister and Chief Executive of the GCSB have recently assured New Zealanders that the United States is not engaging in such surveillance in New Zealand.³² This assurance is the only protection people in New Zealand currently have because the protections in the recent legislation only protect people in New Zealand from the activities of the New Zealand agencies.

The Committee's concerns that those affected have no access to effective remedies in case of abuse (arts. 2, 5(1), and 17) applies to non US persons in New Zealand in regard to conduct of non- New Zealand agencies.

³² <http://www.radionz.co.nz/news/national/229259/pm-says-nsa-not-spying-on-new-zealanders>

The Committees report on the United States also points to matters that should be considered in the regular review of the security and intelligence services and will no doubt be considered in the Human Rights Committee Review of New Zealand, including:

- does current system of oversight of the activities of the security and intelligence agencies effectively protect the rights of those affected?
- has New Zealand taken all necessary measures to ensure that its surveillance activities, both within and outside New Zealand, conform to its obligations under the ICCPR, including article 17? More specifically, have measures been taken to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity regardless of the nationality or location of individuals whose communications are under direct surveillance?
- has New Zealand ensured that any interference with the right to privacy, family, home or correspondence is authorised by laws that:
 - (i) are publicly accessible;
 - (ii) contain provisions that ensure that collection of, access to and use of communications data are tailored to specific legitimate aims;
 - (iii) are sufficiently precise specifying in detail the circumstances in which any such interference may be permitted; the procedures for authorising; the categories of persons who may be placed under surveillance; limits on the duration of surveillance; procedures for the use and storage of the data collected; and
 - (iv) provide for effective safeguards against abuse?
- does New Zealand's current system of oversight of surveillance activities ensure its effectiveness, including by providing for judicial involvement in authorisation or monitoring of surveillance measures?
- is New Zealand's system considering the establishment of strong and independent oversight mandates with a view to prevent abuses?
- does New Zealand refrain from imposing mandatory retention of data by third parties?
- does New Zealand ensure that affected persons have access to effective remedies in cases of abuse by New Zealand's intelligence and security agencies?

7. Conclusion

The Commission would hope that whatever the result of the upcoming election in New Zealand that an "absolutely inclusive and transparent" discussion of the sort initiated and led in the United States by President Obama takes place in New Zealand in the context of the review of

the intelligence services that will take place in 2015.

The Commission believes that principles of respect for the Rule of Law (including respect for human rights obligations), legitimate purpose, oversight and transparency (including respect for the human rights principles agreed by those who subscribe to the International Bill of Rights) are the principles on which such a discussion and review should take place.

In supporting the recent General Assembly resolutions New Zealand has called on States to have regard to matters set out in those resolutions. It would be our fervent hope that the State in New Zealand would reflect those principles in all reviews of our intelligence services. Both these resolutions bring clarity to the human rights issues, including rule of law and security of person issues, which need to be balanced. This balancing is not limited to safety verses security as the resolutions make clear.

General Assembly Resolution 68/167³³ requests the United Nations High Commissioner for Human Rights to submit a report on the protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or the interception of digital communications and the collection of personal data, including on a mass scale, to the Human Rights Council at its twenty-seventh session and to the General Assembly at its sixty-ninth session, with views and recommendations, to be considered by Member States. The sixty-ninth session of the General Assembly will take place from 16 September 2014. This report will therefore be available before the scheduled review in New Zealand in 2015.

The General Assembly has also decided to examine the question at its sixty-ninth session, under the sub-item entitled “Human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms” of the item entitled “Promotion and protection of human rights”. That too will be able to inform the review in New Zealand in 2015.

General Assembly Resolution 68/178³⁴ requires the Secretary General of the United Nations to submit a report on the implementation of the resolution to the Human Rights Council and to the General Assembly at its seventieth session. The seventieth session will take place from 15 September 2015. It is not clear whether that report will be made before or after the review in New Zealand in 2015 will have been completed. The Secretary General will, however, be able to comment on the terms of reference of the 2015 review and draw the Human Rights Council and the General Assembly’s attention to the application or non-application by New Zealand of the principles of Resolution 68/178.

Ultimately this is an issue of trust – the trust of the people. If the trust of the people in the intelligence services is undermined, those services will be less able to do their work for the people. This trust is strengthened by oversight that the people have confidence in. It is the nature of Parliamentary democracy that political opponents allege the other side is not worthy of being trusted with governing the country. A Parliamentary consensus that the oversight mechanisms are in place is therefore the best evidence the people can have that no matter who governs the country and controls the intelligence services freedom and human rights will

³³ Supra note 16.

³⁴ Supra note 17.

be respected.

When considering whether deviation from the rule of law and some human rights is essential to combat the risk of terror the Commission agrees with learned judges like Lord Bingham³⁵, Sir Gerard Brennan³⁶ and the philosopher A. G. Grayling³⁷ all of whom have reminded us of the cautionary words, applicable to any democracy, of Justice William Brennan³⁸ of the United States Supreme Court in 1987:

...here is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to national security ... After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.

The risk reward ratio any member of any democratic legislature confronts explains some of this behaviour but A. G. Grayling's challenge is valid:³⁹

We should not wish future men and women who have to fight all over again for liberty to think that we gave up the courageous work of centuries without a struggle

The Commission will keep the Committee and the Office of the High Commissioner for Human Rights advised of developments in the 2015 review process.

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³⁵ William J Brennan Jr, *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises* 18 Israel Yearbook of Human Rights (1988) 11, cited by Lord Bingham in the Sixth Sir David Williams Lecture <http://www.cpl.law.cam.ac.uk/Media/THE%20RULE%20OF%20LAW%202006.pdf>

³⁶ Honourable Sir Gerard Brennan AC KBE, *The Role of the Legal Profession in the Rule of Law* An address in the Supreme Court of Queensland at Brisbane on 31 August 2007, http://www.hearsay.org.au/index.php?option=com_content&task=view&id=188&Itemid=48

³⁷ A. G. Grayling *Liberty in the Age of Terror – A Defence of Civil Liberties and Enlightenment Values*, 243

³⁸ William J Brennan Jr, *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises* 18 Israel Yearbook of Human Rights (1988) 11

³⁹ Supra note 37.