The New Zealand Security Intelligence Service*

by

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I. INTRODUCTION

A. Historical Background

In 1941 the Security Intelligence Bureau was established with the responsibility for civil and military security in New Zealand.¹ It functioned unsatisfactorily due to the unsuitability of its personnel and to friction with the police, who were already carrying out similar tasks. In 1942 the Bureau was taken in by a confidence trickster with the result that it became subject to police control for the rest of the war. After the war the Special Branch of the police force assumed sole responsibility for civil security.

The Government in November 1956, by means of an unpublished Order-in-Council, abolished the Special Branch and set up the Security Service, directly responsible to the Prime Minister. Modelled on the British MI5 organisation, the service was “set up as a civilian, specialist body without executive powers and with a strictly advisory role”² One commonly cited reason for this change is that the United States Government was concerned that New Zealand “... could become something of a clearing house for spies who could get hold of secrets more easily here than elsewhere.”³ It is therefore argued

¹ The best account of this chapter in New Zealand intelligence history is in F. L. W. Wood, The New Zealand People at War: Political and External Affairs, (1958), 160-162.
² Submissions to the Statutes Revision Committee by the New Zealand Security Service on the New Zealand Security Service Bill 1969, 1.
that a security service is the price of our involvement in SEATO. This view is apparently supported by a section in the 1963 N.Z. Official Yearbook where it is stated that the Manila Treaty 1954 (which forms the basis of SEATO) is concerned with countering external subversive activities and in order to do so "... member governments have found it useful and indeed necessary to take more direct measures against this danger of subversion."

With Cold War tensions increasing, the Americans became more and more doubtful about the quality of New Zealand's security intelligence and less willing to entrust the Government with secret information. The police force lacked the resources to investigate and evaluate personnel checks and with regard to the Department of External Affairs a number of unresolved cases arose where allied intelligence organisations had qualms about the trustworthiness of some New Zealand diplomatic officials.

It was really not until the 1960s that the public began to know anything as to the activities of the Security Service from which time criticism began to mount, reaching a peak at the Labour Party Conference in April 1969. In May 1969 the New Zealand Security Intelligence Service Bill was introduced, which Bill was virtually identical with the Australian Security Intelligence Organisation Act 1956 (Commonwealth). In effect the Bill merely gave statutory authority to the existing situation. However, the Statutes Revision Committee made some major amendments: the doctrine of ministerial control was made explicit, the functions of the service were more closely defined, and an innovatory appeals system was added.

B. The Necessity for a Security Service

The two reasons usually put forward as to why New Zealand needs a security service are that a small minority of people could overthrow the State and that overseas governments must be assured that secret information which they send us is protected. With regard to the first reason opponents of the service reply that New Zealand faces no subversive threats and that in any case the police would be able to prevent the overthrow of the State. They claim that on the contrary the Security Service could itself be said to be subversive. Be that as

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5 (1963), 37.
6 Statement by the Secretary of External Affairs and Permanent Head of the Prime Minister's Department to the Statutes Revision Committee, June 1969, 3.
8 E.g., Submissions of J. Shallcrass, 1. Wherever submissions are mentioned the reference is to submissions made on the Bill to the Statutes Revision Committee.
it may, it has often been stated that New Zealand is a repository of secret information, originating both from within New Zealand and from our allies abroad.\(^9\) It is submitted that this "fact" must be accepted in good faith.

If one accepts that no Government could readily defend a situation in which it failed to take reasonable steps to satisfy itself as to the loyalty and integrity of the persons employed on its secret work, there is an automatic justification of the service.\(^10\)

In rebuttal, opponents say that the police could perform the task of personnel vetting but, as stated ante, page 3, the Special Branch proved itself inadequate. Whilst the service favours giving the police the responsibility of collecting vetting information, the police force is quite unwilling to resume this work.\(^11\) It is therefore submitted that some sort of security service is necessary, even if only to carry out vetting.

II. MINISTERIAL RESPONSIBILITY AND PUBLIC SCRUTINY

The words "subject to the control of the Minister" were inserted into clause 4(1) of the original Bill in order to answer criticisms as to the extent of the Director's discretion and to make it clear that the doctrine of ministerial responsibility is to apply. The minister responsible for civil intelligence organisations in New Zealand has always been the Prime Minister and there is no reason to expect that this practice will change. This is a sound practice in that security matters are brought to the highest level of government but it must be recognised that, consequently, ministerial discretion can only be in the broadest terms.

The history of New Zealand intelligence services has been one of increasing Parliamentary disclosure.\(^12\) In 1957 the Prime Minister and the Leader of the Opposition agreed that the monies for the Security Service would be provided without disclosure in the Department of Justice vote.\(^13\) The estimates were hidden under other items in the Justice vote, particularly one covering prison officers' overtime, a fact which apparently was not generally known until 1961.\(^14\) In 1962 the Security Service estimates were openly disclosed in the Justice vote, thereby allowing Parliamentary debate on the service. A major

\(^9\) E.g., Parliamentary Debates, Vol. 362, 2150 (Rt. Hon. K. J. Holyoake); Secretary of External Affairs, op. cit., 2.
\(^12\) In 1942 the Prime Minister, Mr P. Fraser, refused to discuss the Security Intelligence Bureau publicly: Parliamentary Debates, Vol. 261, 875.
\(^13\) Parliamentary Debates, Vol. 360, 37 (Holyoake).
defect remained, however, in that the Minister of Justice was not responsible for the service and was therefore often unable to answer questions whilst the responsible minister, the Prime Minister, was under no obligation to provide the House with information. The New Zealand Security Intelligence Service Act 1969 makes the Minister in charge of the Security Intelligence Service (as it is now known: section 3) directly responsible to Parliament for the service now has its own vote.

But it is a unique type of responsibility as the SIS is, after all, a secret service. There is a basic conflict between the service's need for secrecy and the public's right to know how its money is being spent. Unlike other departments, the service is not required to report annually to Parliament, nor are the estimates itemised in any way. Even the Public Expenditure Committee is given very little information, as is indicated by this description of the SIS's activities taken from a two page memorandum supplied to the Committee in 1972:

The functions of the service are limited in the New Zealand Security Intelligence Service Act 1969. These functions involve investigations which continue over lengthy periods and are of a confidential nature. They may not, therefore, be disclosed in broad terms.

It is submitted that the service should be required to report annually to Parliament, giving a general summary of its activities for the past year and commenting on the degree of success which it is enjoying. Further, the service should be prepared to provide the Public Expenditure Committee (confidentially if necessary) with specific information on such matters as the degree of success which it is enjoying and the criteria used in the recruitment of staff. The service's need for secrecy must be recognised but it is submitted that M.P.s, as the people's representatives, can be supplied with considerably more information then they are given at present without in any way endangering the efficacy of the service. Rather, more frequent and greater disclosure would serve to bolster public support for the SIS.

III The Functions of the Security Intelligence Service

Section 4(1) provides:

Subject to the control of the Minister the functions of the New Zealand Security Intelligence Service shall be:

15 SIS to Public Expenditure Committee, 4 July 1972, 1. In 1968 Mr J. L. Hunt voted against the estimates in the Committee because his questions went unanswered: Parliamentary Debates, Vol. 356, 1665.
17 All such references are to the New Zealand Security Intelligence Service Act 1969.
(a) To obtain, correlate, and evaluate intelligence relevant to security, and to communicate any such intelligence to such persons, and in such manner, as the Director considers to be in the interests of security;

(b) To advise Ministers of the Crown, where the Director is satisfied that it is necessary or desirable to do so, in respect of matters relevant to security, so far as those matters relate to Departments or branches of the State Services of which they are in charge;

(c) To co-operate as far as practical and necessary with such State Services and other public authorities in New Zealand and abroad as are capable of assisting the Security Intelligence Service in the performance of its functions.

A. The Meaning of Security

In the original Bill "security" was simply defined as "protection of New Zealand from espionage, sabotage, and subversion, whether or not it is directed from or intended to be committed within New Zealand." In the Committee stages "acts of" was inserted before "espionage", thereby bringing the definition into line with the relevant Australian provision and making it clear that the SIS is only concerned with overt actions. Also, the Statutes Revision Committee inserted definitions of "espionage", "sabotage", and "subversion" into the Bill.

1. Espionage

Under section 2 "espionage" means "any offence against the Official Secrets Act 1951 which could benefit the Government of any country other than New Zealand." This covers a wide range of activities, from straight out spying to the unauthorised communication of information gained by virtue of office by any government employee, provided that those activities could benefit any foreign government. It has been suggested that a more acceptable definition would be to adopt section 78 of the Crimes Act 1961 which makes the communication of military secrets in certain circumstances an offence. But this would be insufficient for the service's purposes because it must have the authority to protect the security of items such as the Budget and Foreign Affairs assessments of international situations. The present definition is satisfactory.

It must be accepted that New Zealand does possess secret information and it would therefore be naive to deny at least the possibility of foreign espionage within the country. The Director of the SIS, Brig. H. E. Gilbert, has reportedly stated: 21

There is widespread and unmistakable evidence that the Soviets continue to run espionage operations which are specifically directed against the best interests of this country. There is continuing evidence that Soviet spies operate in New Zealand.

There is little accessible evidence to support the Director’s claim. One case always used by the SIS and the Government to prove that espionage occurs is the ousting in 1962 of two Russian diplomats who were said to be trying to improperly obtain Government information from New Zealand citizens. 22 At the height of the Godfrey affair 23 it was revealed how the service had played a vital part in the early stages of an episode which finally led to the expulsion of a Soviet spy from Australia in 1963. 25 If it is accepted that espionage occurs in New Zealand it is submitted that a small specialised body such as the SIS is the best means of obtaining and evaluating, by means of lengthy and continuing investigations, the necessary information.

2. Sabotage

Under section 2 “sabotage” means “any offence against section 79 of the Crimes Act 1961.” Under section 79 everyone commits an offence

... who, with intent to prejudice the safety, security, or defence of New Zealand or the safety or security of the armed forces of any other country, lawfully present in New Zealand,—

(a) Impairs the efficiency or impedes the working of any ship, vehicle, aircraft, arms, munitions, equipment, machinery, apparatus, or atomic or nuclear plant;

or

(b) Damages or destroys any property which it is necessary to keep intact for the safety or health of the public.

It is provided that it is not sabotage per se merely to take part in a strike or lockout. There can be little objection to giving the SIS this task but in practice it forms a very small part of the service’s overall functions.

22 See New Zealand Herald, 14 July 1962, 1 for this episode.
23 Post, pp. 44-45.
3. Subversion

Of the twenty-five written submissions (excluding the service's) made to the Statutes Revision Committee, twenty-two expressed concern at the failure to define "subversion". Even the New Zealand Law Society26 and the Secretary of External Affairs27 believed that a definition was desirable. The Security Service said that it "would welcome a definition of 'subversion' if a suitable form of words would be evolved for the purposes of the Bill" but felt "that experience abroad has indicated difficulty in drafting a legal definition."28 The difficulty of defining subversion is a real problem as is shown by the following comment of the Canadian Royal Commission on Security:

"We have been unable to trace any legal or other references or to devise ourselves any satisfactory, simple definition of subversion."29

However, under section 2 "subversion" now means attempting, inciting, counselling, advocating, or encouraging —

(a) The overthrow by force of the Government of New Zealand; or
(b) The undermining by unlawful means of the authority of the State in New Zealand.

Unlike the definitions of "espionage" and "sabotage", "subversion" is not related to any existing offence and therefore it is possible that perfectly legal activity is subversive and therefore susceptible to SIS surveillance. The Canadian Royal Commission observed:30

The area of subversion involves some . . . subtle issues, and the range of activities that may in some circumstances constitute subversion seems to us to be very wide indeed: overt pressures, clandestine influence, the calculated creation of fear, doubt and despondency, physical sabotage or even assassination—all such activities can be considered subversive in certain circumstances.

"Subversion" includes the existing offences of treason and sedition under sections 73 and 81 respectively of the Crimes Act but the inclusion of "advocating" in the definition "extends the responsibilities of the [SIS] to include surveillance of some entirely legitimate political activity."31 This is because advocacy, or public recommendation, is distinct from incitement, counselling, and encouragement.

The director believes that Lord Denning's Report is "penetrating and authoritative".32 The following section from it is inserted in the services submissions:33

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26 Submissions, 1.
28 Submissions, 7.
30 Ibid., 2, para. 6.
31 New Zealand Council of Civil Liberties, op. cit., 9. See ibid., 8-10 on the definition of subversion.
33 Address to the Statutes Revision Committee by the Director of Security, 1 July 1969, 1.
34 Page 77, para. 230.
No one can understand the role of the Security Service . . . unless he realises the cardinal principle that their operations are to be used for one purpose, and one purpose only, *the Defence of the Realm*. They are not to be used so as to pry into any man's private conduct, or business affairs; or even into his political opinions, except in so far as they are subversive, that is, they would contemplate the overthrow of the Government by unlawful means. This principle was enunciated by Sir Findlater Stewart in his report of 27th November, 1945, paragraph 37, which has formed the guide for the Service ever since. It was restated by Sir David Maxwell Fyfe in a Directive of 24th September, 1952, and re-affirmed by every Home Secretary since.

Likewise, the Director in 1966 defined subversion as “the attempt to overthrow our democratic and established order of Government”36 and gave a similar definition in 1969.36 However, in the service’s submissions (23rd June 1969) it is stated that the Crown Law Office had advised that37

... “subversion” in the context of the Bill would ... be commonly used and understood as the attempt to undermine the authority of the State by any means other than legal.”

Whereas Denning and the Director confine subversion to the overthrow of the Government, the present definition of subversion in the Act goes very much further by including the *undermining* of the State’s authority. Furthermore, the use of the term “unlawful means” is very unsatisfactory in the context of paragraph (b). For example, when is a strike or a demonstration unlawful? In cases of doubt it is obvious that the SIS will investigate, secure in the knowledge that its decision can never be subjected to judicial review.

Section 4(1)(a):

B. Persons to Whom Information is Communicated

This is the key paragraph in section 4 and even a cursory reading reveals that the Director possesses wide discretion as to whom he may communicate information, thus depreciating the doctrine of ministerial control. The Director has stated that security information is38

... very closely restricted in its use, and it is made available to the person who is responsible for decision, usually a Minister, in some cases say the Chairman of the State Services Commission or perhaps a Departmental Head.

This relates particularly to personnel vetting reports. “Reports other than vetting are submitted on a personal basis to the Prime Minister and other Ministers as appropriate.”39

36 Reid, loc. cit.
37 *Submissions*, 8.
39 Gilbert to Public Expenditure Committee, 2 August 1968.
The Prime Minister, Mr Marshall, said in 1972 that Ministers received very few security reports; he and the Ministers of Immigration and Internal Affairs "were the only ones likely to receive them." In 1968 it was stated that the Prime Minister received every report but if it concerned immigration or naturalisation a copy went to the Minister of Immigration or Internal Affairs. However, the service has stated that when Ministers ask for information relevant to their portfolios

... The Director makes available to the Minister as much as he can, at the same time informing him of any restrictions which are necessary on [its] dissemination. If a matter of considerable importance is involved it is appropriate to invite the attention of the Prime Minister to the circumstances.

It is relevant to note that paragraph 6 of Fyfe's Directive of 1952, which the SIS regards as authoritative states:

You and your staff will maintain the well-established convention whereby Ministers do not concern themselves with the detailed information which may be obtained by the Security Service in particular cases, but are furnished with such information only as may be necessary for the determination of any issue on which guidance is sought.

Under paragraph (a), however, the SIS does have the power to communicate intelligence to persons and organisations outside of Government. The service has pointed out that whilst it does not communicate classified information to extra-governmental bodies, it "must be empowered to consult with industrial firms engaged on classified work in New Zealand should the need arise." It is submitted that this points up a conflict between paragraphs (a) and (c).

Fyfe's Directive says that the role of the Security Service is the Defence of the Realm as a whole and continues:

3. You will take special care to see that the work of the Security Service is strictly limited to what is necessary for the purposes of this task.
4. It is essential that the Security Service should be kept absolutely free from any political bias or influence and nothing should be done that might lend colour to any suggestion that it is concerned with the interests of any particular section of the community, or with any other matter than the Defence of the Realm as a whole.

In relation to this it is relevant to consider the Laurenson affair of 1966 in which, according to the protagonists, a senior National Party official, Mr R. J. Laurenson, attempted to use the Security Service for party political purposes. Following a conversation between Laurenson and the Prime Minister's secretary, Mr P. A. Barnes, the

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60 Parliamentary Debates, Vol. 379, 1398.
62 Submissions, 3.
63 Lord Denning's Report, 80, para. 238.
64 Mr F. P. Walsh, President of the F.O.L., 1953-1956, had security reports in his possession at the time of his death: Sunday Herald, 7 May 1972, 12.
65 Submissions, 9.
66 Ante, n. 43.
67 See Salient, 3 October 1966, passim for this view.
latter rang the service on behalf of Laurenson to see whether it had any information on Mr R. W. Boshier, a person whom Laurenson sought to discredit. Laurenson apparently found out nothing that was not already public knowledge, except that Boshier had been on the files since 1962. In the ensuing debate in the House the Government sought to defend Barnes, whose actions the Opposition did not question, but apparently felt that Laurenson’s position was indefensible.\(^{49}\) The Prime Minister said that Barnes did not ask for or receive security information about Boshier.\(^{79}\) Regarding Laurenson, Mr Holyoake said he was “satisfied his conversation was not solely to secure information for the... National Party from the Security Service about Mr Boshier.”\(^{80}\) It is fair to conclude that Laurenson attempted to use the service for party political purposes and that he did obtain information on Boshier, even if it was already public knowledge. The Security Service was not at fault but the affair drew attention to the dangers of abuse to which it is susceptible.

C. Section 4(1)(b): Advice to Ministers

In New Zealand, as overseas, each Government department is responsible for its own internal security whilst the SIS is responsible for national security as a whole.\(^{51}\) Under paragraph (b) the SIS advises departments on security matters where the Director thinks fit. Much of this work comprises the routine task of vetting immigrants, applicants for jobs, and prospective citizens at the initiation of and on behalf of Government departments and agencies.

The department or agency concerned stipulates the depth of investigation necessary into a person’s background and also whether a negative or a positive vetting is required according to the degree of “security sensitivity” of the post involved.\(^{52}\) Negative vettings, which are used principally by the police, armed services, and departments of Immigration and Internal Affairs, involve simply a check of SIS (and sometimes police) files for any adverse information. Only an estimated one-half of one per cent of such checks result in adverse information being disclosed and where nothing is disclosed no record is kept.\(^{53}\)

Positive vettings apply “only to the very small number of people likely to be engaged in specially secret and delicate work” such as


\(^{45}\) Ibid, 3101.

\(^{50}\) *Auckland Star*, 6 October 1966, 1.


\(^{52}\) Much of what follows derives from an authoritative article by Mervyn Cull, *New Zealand Herald*, 30 September, 1968, 6.

\(^{53}\) Ante, n. 39.
all Foreign Affairs officials. These checks involve both a negative vetting and an investigation into the subject's character and background in order to ascertain his integrity and reliability. The investigation is done with the subject's co-operation and he is required to fill in a questionnaire by giving information, on his background, previous employment, family, and any connections he may have with subversive organisations. He must also give the names of four New Zealand residents "who are well acquainted with [him] in private life and who can be approached to vouch for [his] character (not near relatives)."

Two of these referees (sometimes more) are approached by the SIS which requests them to fill out a questionnaire in the strictest confidence. Evidently, most people approached are co-operative. The questionnaire contains a total of six questions such as:

As far as you know is the candidate—(a) Reliable? (b) Sober? (c) Conscientious? (d) Of good character? (e) Discreet? (f) Free from any significant history of mental or physical disability? (g) Free from undue financial pressure? As far as you know—(a) Is the candidate associated in any way with a Communist Party or with any body that is looked upon with favour by Communist Parties, e.g. in New Zealand, the New Zealand Peace Council, the N.Z.-U.S.S.R. Society, the Chinese Cultural Association, the New Zealand China Society? (b) Is the candidate associated in any way with a Fascist organisation? (c) Has the candidate had association in the past with any of the parties or societies named in (a) and (b)?

The referee is also asked whether he would like to make any other comments, if he can give the name of another person who could assist and whether he would prefer a security officer to call and discuss the matter with him. Information derived from positive vetting is kept by the SIS but is filed separate from the main files. The information is evaluated and assessed and a report made to the initiating agency. Reasons for an unfavourable recommendation must be given whilst the final decision is made by the agency concerned.

None of this information essential to effective vetting would be forthcoming if the person who supplied it suspected that his remarks would be reported back to the person about whom he was speaking.

But a real danger exists in that a referee can supply false information, either intentionally or unintentionally, which could pass by unchallenged. A defect as far as the service is concerned is that a

55 Quoted in "Report of Commission to Inquire into Administration of Security Service so far as it relates to attendance of officers thereof at a University and matters incidental thereto (Hutchison Commission), Appendix to the Journals of the House of Representatives", 1966, H. 48, 15-16.
56 This questionnaire is reprinted in "Salient", 27 April, 1972, 20.
58 The service's recommendation is not always accepted: Parliamentary Debates, Vol. 363, 2691 (Finlay).
subject chooses his own referees and, to obviate this weakness, referees are themselves subjected to a negative vetting. It has been said:

The inherent weakness in Positive Vetting . . . is that the field enquiries only rarely throw up material which is "hard" enough for any conclusive action to be founded upon them. Traces of Communist association are usually derived from intelligence records, rather than from the field enquiries or security questionnaires. What the investigations covered by Positive Vetting do expose—on the rare occasions when anything adverse turns up at all—are defects of character or combinations of circumstances—insobriety, financial instability, untruthfulness, irregular sexual or marital relations, family connexions behind the Iron Curtain, etc.—the significance of which is largely dependent upon their particular context.

The Canadian Royal Commission on Security, however, felt that positive vetting was worthwhile because "ultimately the reliability and discretion of individuals is the base upon which all true security must rest."61

The Canadian Royal Commission observed that in some cases after the fullest investigation doubts about a person's reliability remain even though nothing may have been proved by legally acceptable standards. Such doubts must be resolved in favour of the state rather than in favour of the individual, or at least some greater weight must be attached to the interests of the state than would be appropriate in legal proceedings.

This is acceptable but it is submitted that where a New Zealand resident is subject to an adverse positive vetting report, the recommendation in which is acted upon, he should be notified of the real reasons for the adverse report. As many details as can be provided without imperilling sources of information should also be given.

Brigadier Gilbert has emphasised that information on security files is used not only to denigrate people but also used to repudiate false accusations. When asked in 1966 whether there was such a positive side to the work of the service he replied:

. . . [I]t's a very important part of our work. I place great importance on this. It's a common practice, sad to say, in this country to smear anybody whose views are just a fraction Left of centre by calling him a Communist. We very frequently, many times a week, are asked for information either officially or in writing or otherwise about certain individuals, and we are emphatic in most cases in wiping out the smear completely.

In 1969 he said:65 "It is our job to clear the innocent person, and in the course of this procedure a file will be made."

60 Security Procedures in the Public Service (1962; Cmnd. 1681), 18, para. 62.
62 Ibid., 28-29, para. 81.
63 A similar provision exists regarding the transfer of State servants on the ground of security; State Services Act 1962, s. 38(1).
64 N.Z. Listener, 15 July 1966, 27.
65 Reid, op. cit., 5.
D. Section 4(1)(c): Co-operation With Other Organisations

The word "public" was inserted by the Statutes Revision Committee, thereby bringing paragraph (c) into line with the analogous Australian provision. However, as suggested ante. pages 16-17, it is submitted that there is a conflict between paragraphs (a) and (c) in that communication of intelligence with private organisations is permissible under paragraph (a) but co-operation between the SIS and private organisations is forbidden under paragraph (c). Communication in this context surely involves some degree of co-operation. Furthermore, the Director believes that the Service has the power to consult with industrial organisations and this would also seem to involve some element of co-operation.

Co-operation with overseas intelligence services in its widest sense will now be considered. The Director has stated: 66

From time to time we do exchange information with friendly services abroad. We must do that as part and parcel of our continuing investigation of espionage and Communist activities.

The Government also relies on overseas intelligence organisations for information. 67

... about foreign nationals seeking to enter New Zealand, and about the activities of New Zealand nationals abroad. Such information is exchanged with mutual agreement on its dissemination.

Where a person wishes to immigrate a report will be sought from the relevant overseas organisation whilst it also seems that if a New Zealander requires a visa to enter another country the SIS will in some cases submit a report to the authority concerned. 68

The Central Intelligence Agency has helped train SIS officers and advised New Zealand on the operation of its security service. The Deputy-Director of the CIA, Mr R. Amory, visited this country in 1958 for talks with the Government whilst the Director-General, Mr R. Helms, came here in 1972. Mr Marshall said that this latter visit was not made at the proposal of the Government but was welcome when made. It has been claimed that the service has co-operated with the South African Bureau of State Security11 but the Secretary of Foreign Affairs has stated: 72

... In answer to my own enquiries [to the SIS] I have been assured that the New Zealand Security Service has neither been requested to give, nor given, any assistance to that agency. The New Zealand Security Service has not been involved in making any checks on South African nationals or other such enquiries.

66 Ante, n. 64. See also Evening Post, 24 June 1966, 13.
68 E.g., Sunday Herald, 7 May 1972, 12.
72 R. Boshier, op. cit., 286.
E. Section 4(2): Co-operation with the Police Force

This section states that "it shall not be a function of the Security Intelligence Service to enforce measures for security." The SIS is a civilian body with a strictly advisory role.

The members of the Service are, in the eye of the law, ordinary citizens with no powers greater than anyone else. . . . We would rather have it so, than have anything in the nature of a "secret police". . . . Those absences (they are not deficiencies)—the absence of powers and the absence of numbers—are made up for by the close co-operation of the Security Service and the police forces.73

As far as is known there is no special branch of the Police Force in New Zealand solely concerned with security matters as in Britain. But section 4(1a) clearly provides for the communication of intelligence (evidence?) between the SIS and the police whilst section 4(1c) allows for co-operation between the two organisations. In 1972 the Prime Minister, Mr Marshall, was asked whether there was "any tie-up or consultation at any stage between the Security Intelligence Service and the police."74 He replied that "any association with the Police Department was of a routine nature" and when pressed as to the frequency of consultation he reported that "consultation took place only on routine matters."75

It is desirable that the service's activities result in police prosecutions for the matter would be dealt with publicly usually and the defendant would have certain well-established safeguards and rights. When asked how many prosecutions had taken place as a result of the service's activities Mr Marshall said: "No prosecutions had been undertaken because they were not a function of the service."76 The number of prosecutions which have occurred as a result of SIS information is therefore unknown, although the Director did refer in 1966 to the prosecution of some neo-Fascists as a result of service activity.77

Although it is recognised "that security procedures must not be viewed primarily in the context of the detection and prosecution of illegalities,"78 if the SIS was enjoying success in the detection of sabotage and, especially, espionage, one would expect a number of prosecutions to have occurred but New Zealand, unlike Britain or Australia, has never had a spy trial. Asked in 1966 why there had never been a public prosecution resulting from the activities of the service, Brigadier Gilbert replied: 79

75 Ibid., 1398-1399.  
76 Idem.  
79 Ante, n. 77.
In the first place the scale of espionage activity in a small country like New Zealand is naturally much smaller [than overseas]. In the second place... for the first 10 years or so after the establishment of an Iron Curtain mission in New Zealand there was no Security Service.

IV. THE SCOPE AND NATURE OF SECURITY INTELLIGENCE SERVICE ACTIVITIES

A. The Number of Personnel Checks per Year

This question has been characterised by a large amount of misinformed public comment over the years. The Prime Minister in 1963 stated that "... [a]bout 1,000 names a month were checked for various purposes." 80 But in 1966 the Director said that the figure was about 1,500 names a month 81 and in 1968 he said that 82

[the number of personnel checks carried out between June 1967 and June 1968 continued to average 1,500 per month. The great majority of these have been, as in the past, of a "negative vetting" type.]

This announcement led to much consternation as to the necessity for so many checks in such a small country. 83

Mervyn Cull in an authoritative article 84 said that perhaps only 1,300 or 1,400 of the annual total figure of 18,000 were positive checks. He observed that the figure of 18,000 was inflated by the fact that each positive check requires four negative vettings of the referees (4 x 1,400 = 5,600) and that most staff handling information have to be re-vetted every five years. Given the comment in 1966 by the Hutchison Commission that usually only two referees are approached, 85 it is submitted that Cull's figure of 5,600 is too large. Cull also said that the armed forces make the greatest demand for personnel checks, about 4,000-5,000 per year, whilst about 2,500 Government employees are checked each year. 86 If the above figures of 5,000, 2,500 and 1,400 (assuming that the latter figure is exclusive of the former two) are added together, together with about 3,500 for checks on referees the total is 12,400. This leaves a total of 5,600 for immigrants, people seeking naturalisation or citizenship, and applicants for other Government departments.

Roger Boshier, writing in 1969, 87 claimed that if it is assumed that 18,000 people have been vetted each year that New Zealand has had

81 Ante, n. 77.
82 Gilbert to Public Expenditure Committee, 2 August 1968.
83 E.g., Parliamentary Debates, Vol. 356, 1662 (Mr A. J. Faulkner).
84 New Zealand Herald, 30 September 1968, 6.
86 Cf. Mr M. Mitchell, Deputy-Secretary of the Public Service Association, who told the Statutes Revision Committee in 1969 that at least 5,000 public servants were checked in the last year.
some kind of security service it would mean that "a number equivalent to about half of the adult population of New Zealand have been vetted." Not only is his assumption false but the conclusion he draws from it is also highly misleading. Boshier's conclusion that "about half of the adult population . . . have been vetted" fails to take account of the number of re-vettings and ignores the important distinction between negative and positive vettings. Also, many negative vettings are merely checks of character referees and therefore not security checks in the usual sense.

In 1969 the Public Expenditure Committee was told by the service that as at 31st March 1,500 checks a month were still being made. Unfortunately, no further inquiries were made until 1972 when, in answer to a question as to how many checks had been made in the past year, the Prime Minister said: "About 13,000 security checks had been made," which "number included people in Government departments, as well as immigrants and those seeking naturalisation." Mr Marshall also said that approximately 650 of the 13,000 were positive vettings, thus throwing doubt on Cull's figure of 1,300-1,400. Unless there has been a drastic cut in the number of personnel vettings (which is highly unlikely), it seems that Mr Marshall omitted the figure for some group such as the Armed Forces. This figure, given by Cull, of 4,000-5,000 would likely bring the 13,000 up to the normal 18,000.

B. The Cost and Size of the Security Intelligence Service

The financial estimates for the SIS (with the year given) are: 89

<table>
<thead>
<tr>
<th>Year</th>
<th>Voted</th>
<th>Expended</th>
</tr>
</thead>
<tbody>
<tr>
<td>1961-62</td>
<td>$180,000</td>
<td>$189,986</td>
</tr>
<tr>
<td>1971-72</td>
<td>$394,000</td>
<td>$433,484</td>
</tr>
<tr>
<td>1972-73</td>
<td>$487,000</td>
<td>$504,000</td>
</tr>
<tr>
<td>1973-74</td>
<td>$568,000</td>
<td></td>
</tr>
</tbody>
</table>

Between 1961-1962 and 1973-74 the vote has been increased approximately 315 per cent, the bulk of which increase is no doubt due to inflation.

It was the policy of the last Government not to reveal the number of officers or their salaries. However, their salary scales are in accord-

90 Ibid, 1399.
91 Appendixes to the Journals of the House of Representatives B-7 [pt. 1].
92 Increases in salaries and rising costs was the reason given for the increase last year: SIS to Public Expenditure Committee, 4 July 1972, 1.
93 Parliamentary Debates, Vol. 356, 1666-1667 (Hanan); Reid, op. cit., 5.
The New Zealand Security Intelligence Service

ance with State Services Commission salary scale and it should therefore be possible to estimate the approximate number of salaried officers. Eighty per cent of the total vote is used for salaries whilst the rest is for running costs, equipment, etc.\(^{94}\) Eighty per cent of $568,000 is $454,400. The Deputy-Director told the Public Expenditure Committee in 1969 that the eighty per cent figure included both salaries and personnel costs (i.e., non-salaried employees' wages)\(^{95}\) and it is assumed that this is still the position. Deducting $54,000 to cover these costs gives $400,000. Assuming that each officer (including the Director) is paid an average of $6000 per year, then there are approximately sixty-six officers in the SIS.\(^{96}\)

C. Means of Obtaining Information

The Director has stated: \(^{97}\)

The service has a duty to follow the activities of Communists and other subversive individuals, into whatever organisation or work of life they attempt to penetrate.

The SIS prefers to use overt means of obtaining information\(^{98}\) but critics claim that it uses whatever means it can, legal and illegal. Predictably, this aspect of the service's activities is characterised by rumours and allegations and one can do little more than state the various claims.

Accusations of using informers have been made.\(^{99}\) In 1964 a security officer, Mr D. Godfrey allegedly approached a young woman and asked her if she would take up a position as secretary of the peace council and give him copies of minutes of its meetings.\(^1\) In 1972 an officer is reported to have asked a Mr J. S. Watkins to inform for payment on the Auckland Anti-war Mobilisation Committee.\(^3\)

The dangers involved in seeking information by offering financial inducements are obvious. The SIS will accept information proffered on a voluntary basis but it would presumably be careful to examine the motives of the offeror.

Orsman notes how a Labour cabinet minister, Sir Eruera Tirikatene, in 1960 caught a security officer going through Sir Eruera's files at a

\(^{95}\) Mr J. L. Hunt.
\(^{96}\) A list of security officers produced by Mr R. Boshier at the 1969 Labour Party conference contained about 70 names and caused the Official Secrets Act 1951 to be invoked: Auckland Star, 1 May 1969, 5.
\(^{97}\) Salient, 30 April 1969, 5.

\(^1\) Hutchison Commission, op. cit., 16.
\(^2\) Craccum, 20 April 1972, 1.
time when all those who supported the “No Maoris, No Tour” movement were regarded as security risks. It is, however, with regard to bugging and wire tapping that the most persistent allegations and fears have occurred of recent years. In 1960 the Communist Party office in Auckland was broken into by two security officers and microphones were installed\(^4\) whilst in 1966 the party allegedly discovered microphones in the rooms of delegates to their conference.\(^5\) In the Weekly News interview\(^6\) the Director, when asked whether bugging was used, is reported to have said: “Oh yes. We are expert in the use of bugging devices. As I said, we use whatever means we can to get the raw information.” But because of the Director’s denial of the accuracy of some things in this report it seems that this admission must be discounted.\(^7\)

Frequent allegations of telephone tapping have been made but for the most part they seem to be motivated by paranoia and in any case are very difficult to prove. For example, Mr J. T. Thew of Hastings, following previous complaints he had made about his telephone, discovered tapping equipment connected to his telephone line.\(^8\) Regarding this discovery, the Director said:\(^9\)

I have looked into the matter raised by Mr Thew and have come to the conclusion that it does not come within the ambit of the Security Service.

Allegations made in 1972 by Resistance Bookshop and the Progressive Youth Movement also seem to be of doubtful validity.\(^10\)

In 1969, Brig. Gilbert told the Statutes Revision Committee that the service never tapped phones nor tampered with mail and Mr Holyoake said that whilst he was Prime Minister there never had been, and never would be, permission to tap phones or interfere with mail.\(^11\) Whilst Prime Minister, Mr Marshall denied the existence of telephone tapping in New Zealand\(^12\) it is known that the present Prime Minister, Mr Kirk, has given a definite instruction to the Director that the service is not to tap phones.

It is no doubt true, as Mr Kirk has stated, that the SIS is frequently blamed for things which have been done by private inquiry agents.\(^13\)

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\(^4\) Holliss, op. cit., 12, 23 (includes a photograph).
\(^5\) Ibid, 15 (photograph); Boshier, 22-23.
\(^6\) Reid, op. cit., 5.
\(^7\) Dr Finlay said that Brig. Gilbert claimed (and Dr Finlay accepted his assurance) to have been unaware he was being interviewed in the manner he was and that he denied many of the statements attributed to him: Parliamentary Debates, Vol. 362, 2111.
\(^8\) Submissions of J. T. Thew, passim.
\(^9\) Gilbert to Mr D. MacIntyre, M.P., 9 March 1964, in Thew submissions.
\(^10\) Sunday Herald, 16 April 1972, 1.
\(^12\) Parliamentary Debates, Vol. 379, 1398.
\(^13\) New Zealand Herald, 11 April 1973, 8.
But tapping can apparently be carried out without official connivance and it is possible that the officer in the field occasionally resorts to it without the Director’s or Minister’s knowledge. A sub-clause in an officer’s service contract, which the writer has perused, provides that he may be dismissed if he is convicted of a criminal offence. Theft of documents would come under this head, as would the interference with telephone equipment. It is submitted that the Act should prohibit the use of illegal means of obtaining information, save in special cases where the approval of some person or tribunal must first be sought.

D. The Accuracy of Security Intelligence Files

On the few occasions on which information contained in security files has become public some alarming inaccuracies have been revealed. Mr W. W. Freer in 1969 told the House that over the preceding twelve months he had been able to prove that security reports (which are made on the basis of files) were one hundred per cent wrong on three occasions. In one of these cases the service had told a Minister that a woman had lived with her husband in a provincial town for eleven months. He was a Communist and her position was therefore jeopardised. Mr Freer and others had allegedly been able to prove that the woman had in fact been living in the nurses’ home of the town’s public hospital and had met her husband only two times in the relevant eleven months.

In a speech to the Dominion Council of the Returned Servicemen’s Associations in 1962 Brig. Gilbert claimed that a recent Campaign for Nuclear Disarmament meeting at Auckland had been managed by Communists:

The resolutions adopted by the meeting by acclamation were prepared by a man who is closely associated with the Communist party executives. This man appeared on the platform to hand them to the chairman of the meeting, who dutifully read them out.

When Mr Frank Haigh, who had chaired the above meeting and prepared the first resolution discovered this allegation he requested an apology and damages. The Director gave him $2,400 and publicly apologised:

14 A Post Office employee gave evidence in the Magistrate’s Court last year that he “had had previous experience with phone connexions for the security branch”: Auckland Star, 11 July 1972, 3. But it is Post Office policy not to tap or authorise the tapping of telephones: Director-General of the Post Office to District Controlling Officers, 20 July 1972.
15 It is an indictable offence to interfere with telephone equipment: Post Office Act 1959, s. 158.
16 Mail may be opened at present if a special procedure is followed: Post Office Act 1959, s. 34.
I am happy to accept Mr Haigh's assurance that this anti-nuclear meeting was non-political and I now believe that it was not sponsored by any political party. Consequently, my statement that the intervention of Communists was quite apparent at this meeting was unfounded. I am satisfied that my statement that the resolutions adopted by the meeting were prepared by a person closely associated with Communist Party executives was similarly unfounded. Accordingly, I hereby unreservedly withdraw these statements and tender my sincere regret and apologies to Mr Haigh for having made them.

In the same R.S.A. speech the Director quoted from an article in the *N.Z. Monthly Review*, July 1962 by Mr T. P. Hogan on the refusal of Victoria University to allow its rolls to be used for the purpose of tracing youths who had not registered for military training. The Director then said: "The author is a schoolmaster... with a lengthy record of membership in communist front organisations." This statement was incorrect in that not only had Mr Hogan never been a schoolmaster but he had never belonged to any communist fronts, unless his chairmanship of the Canterbury section of the PSA could be considered to constitute such membership. Mr Hogan demanded an apology from the Director and, whilst Brig. Gilbert apologised for calling him a schoolmaster, he refused to make any further retraction. Mr Hogan wrote to the Prime Minister, who refused to take any action, and Mr Hogan's early death prevented him from taking the matter further.

In view of the above it is somewhat surprising that in 1969 the Director reportedly said: "... [W]e take a great deal of care when any of our information gets to the stage where it might affect someone's career." He also stated:

> The files can be a bit misleading to the uninitiated. I could show you ones which describe upright citizens as security risks. But that might be graded F6—untested in formation from an unreliable source—rather than A1.

The information which the service had on Haigh and Hogan would presumably have been A1, or very reliable information, "since the Brigadier wouldn't be so foolish as to use F6 material for public statements." Yet it has been shown how inaccurate the material in fact was.

**E. Areas of Interest**

1. **Communist and other left wing groups**

   In 1966 Brig. Gilbert said:

> The service does not apologise for recognising as its main target the Communist Party of New Zealand and its fringe of associated bodies and sympathisers. But it should be noted that it is also concerned with other subversive activities as neo-Fascism.
At this juncture it is relevant to recall paragraphs 3 and 4 of Fyfe’s directive, ante page 17.

The Director in 1962 wrote an article for *Salient* in which he outlined his views on the Communist threat: 25

As a New Zealander, I regard Communism as evil and subversive. A New Zealand Communist by conscious act when he joins the Party abandons his loyalty to God and country and gives allegiance to an atheistic and materialistic movement operated in the interests of and directed by a foreign power. In the international field the proven duplicities of the Communist bloc countries are legion.

Brian Edwards in 1969 suggested that this statement was fanatical, to which the Director replied by saying it was factual and that Communism by its very nature was subversive. 26

In his article Gilbert went on to mention that whilst many members had left the Communist Party in the 1950s, most of them still maintained their old friendships and continued to support pro-Communist policies. 27

For example, current Communist propaganda themes include recognition of the Chinese People’s Government and its admission to the United Nations, withdrawal from SEATO and ANZUS, trade with the Communist Bloc, and support for the Soviet position on disarmament.

Reminded in 1969 of this statement, the Director said that it 28 . . . was made a good many years ago and I am not prepared at this moment just to update it, but those were the Communist themes of the moment.

Gilbert concluded his article by saying that “[i]t is in the nature of things for a Communist to be a fanatic.”

The SIS is almost exclusively concerned with left wing organisations but within this sphere the emphasis is continually changing. Thus the service’s attention has swung away from such groups as the Campaign for Nuclear Disarmament and the Citizens’ All Black Tour Association towards groups such as Halt All Racist Tours and the Progressive Youth Movement. The Director is reported to have said that the New Left is now the greatest problem, along with the problem of countering Soviet espionage. 29

2. Neo-Fascists

The Director has always been at pains to point out that the service is always interested in extreme right wing groups. 30 In 1966 he said: 31

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26 *Dominion Sunday Times*, 4 May 1969, 7 (edited transcript of interview with Gilbert).
27 The identification and assessment of these people is still a most difficult job for the service: ante, n. 21.
29 Ante, n. 21.
30 E.g., ante, n. 26.
We are concerned just as much with threats from neo-Fascism or neo-Nazism as we are with threats from Communism. In fact, it's not so very long ago since we were successful in defecting some neo-Fascist activity here which resulted in police prosecutions and breaking-up of the activity.

He elaborated in 1969, saying that...

... fascist activity is not widespread and usually occurs only in occasional outbursts. It invariably involves foolish young people and there is little evidence of internal organisation.

3. Universities

In this realm of the service's activities the clash between the State's right to security and the citizen's right to individual liberties is most clearly portrayed. The Godfrey affair and subsequent incidents have exemplified this conflict. The best account of the Godfrey affair is in the report of the Hutchison Commission, set up after Godfrey's exposure on campus in May 1966. In 1966 David Godfrey, a security officer was a bona fide part-time student at Auckland University, where he carried out three types of security task. The first was positive vetting, the second was keeping an eye open for possible recruits, and the third could be described as a general watchfulness. He made twenty-five or thirty reports on university matters, of which about ten were in relation to positive vetting and two or three concerned recruitment. The remaining reports related to matters of general security interest. For instance, Godfrey made inquiries on campus as to the purpose of a forthcoming visit by two Russian students and as to a proposed student interchange visit with China and Russia.

The Commission stated that...

... the Security Service acted with propriety throughout. The result of the experience gained on this occasion, however, is that the Director of the Service has announced that, as a matter of policy, future security inquiries within a University will not be made by an officer who is a student of the University.

The N.Z. Listener had editorialised in similar vein, saying that “Mr Godfrey was merely doing his duty, but he should not have been placed in a position where some conflict of loyalties was inevitable.” According to the Director, the service is “absolutely uninterested in student activities as such, except insofar as there may perhaps be a manifestation of a Communist movement in a university” and it had no interest “in recording opinions expressed by students in class.” Godfrey, for example, was a bona fide student who pursued security

32 Ante, n. 21.
34 Ibid., 16.
35 15 July 1966, 27.
36 Idem (interview).
inquiries on campus solely out of class. The Commission recommended:

1. That no member of the Security Service enrolled as a student at a university should carry out any inquiries into security matters within the precincts of the University.
2. That the proposed attendance of a member of the Security Service at a university should be discussed between the Security Service and the University Authorities before his enrolment.

The next episode occurred in 1969 when a security officer, Rex J. Banks, who had been a student at Victoria University for the previous two years, attempted to recruit students at Victoria to spy on outside organisations such as the Committee on Vietnam. Then in 1972 it was alleged that Devon E. Biggs, a Political Science Master's graduate for Victoria, had been working for the SIS for the past three years as well as being a student. Biggs was said to have admitted that he was employed by the service. The Vice-Chancellor of Victoria University, Dr P. B. C. Taylor, told the Students' Association that he was unaware that Banks and Biggs were security officers whilst they were studying at Victoria but that he knew of no evidence to suggest that they were, that he knew of no other security officers at present studying at Victoria, and that the effect of the Hutchison report is that the initiative as regards approaching University Authorities over the proposed attendance of a SIS member rests with the service. In reply to questions from the Students' Association, Brig. Gilbert said that neither Banks nor Biggs had been SIS members whilst students, that he felt himself bound by the Hutchison report, and that there was consultation at Victoria in 1967 and consultations with another university in 1970.

The present situation is unsatisfactory and does little to further the interests of students or of the SIS. Firstly, because the initiative to consult with the university rests with the service, there is nothing to prevent a security employee from enrolling at a university without consulting the university. Secondly, in his evidence to the Commission the Director said that

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38 See Salient, 17 April 1969, passim.
39 Cock, 16, February 1972, 4; Salient, 19 April 1972, 1.
40 Dr P. B. C. Taylor to Mr P. J. B. Cullen, 13 April 1972, reprinted in Salient, 27 April 1972, 20.
41 Idem.
42 Cf. Dr C. J. Maiden, Vice-Chancellor of Auckland University, who has suggested that the recommendations of the Hutchison Commission are "fair and reasonable": New Zealand Herald, 9 June 1973, 3.
43 This point and the following are mentioned in Salient, 19 April 1972, 1.
44 Hutchison Commission, op. cit., 22.
... if something which was clearly of security interest was revealed or becomes known to one of our officers who is taking courses he will be expected to report on it. . . .

This in itself is acceptable but an officer's "security awareness" extends further than this in that he will always tend to look at things from a security point of view, whether or not he reports them. He is never "switched off" Therefore the presence of a security officer in classes, etc. must inevitably adversely affect the freedom of thought and discussion for which universities are traditionally renowned.

It is submitted that the Act should be amended so as to provide that no SIS employee or officer shall attend university for the purposes of study. This could be tied in with the appeals system so as to allow someone who felt the provision was being breached to file a complaint. At the same time it is accepted that the SIS has the right to enter campuses for the purpose of recruitment and in the pursuit of legitimate security inquiries.

V. MEMBERS OF THE SECURITY INTELLIGENCE SERVICE

A. The Director

1. Security of Tenure

Section 5 provides:

(1) There shall be a Director of Security who shall control the Security Intelligence Service.
(2) The Director of Security shall be appointed by the Governor-General and (subject to subsection (4) of this section) shall hold office on such terms and conditions as the Governor-General determines.
(4) The person employed as Director of Security immediately before the commencement of this Act, shall be deemed to have been appointed under this section, and shall hold office on the same terms and conditions as are specified in the agreement under which he was so employed unless and until he agrees to accept other terms and conditions.

Section 11 provides:

The appointment of the Director, and the employment of an officer of the Security Intelligence Service, shall be terminated only in accordance with a term or condition of his appointment or employment.

At the Labour Party Conference in 1969 (an election year) Dr Finlay commented that "he did not think certain incumbents could look forward to a long tenure under a Labour Government" and sections 4(4) and 11 were seen as countering this warning.46

46 The Director has rejected this point: *N.Z. Listener*, 15 July 1966, 27.
48 *New Zealand Herald*, 17 May 1969, 1. Sections 9(a) and 11 preserved the position of existing officers.
It is generally thought that, at common law, State employees have no security of tenure, for as O'Leary C. J. said in *Campbell v. Holmes* [1949] N.Z.L.R. 949 at 980, "the result of [the] authorities is that it is an implied term in the engagement of every person in the Public Service that he holds office during pleasure, unless the contrary appears by statute." 48

The effect of section 11 therefore is that neither the Director nor an officer may be dismissed at pleasure—the common law rule is excluded. 49

It has been argued that under sections 5 and 11 the Government can appoint a Director for life or a term of years with no provision for removal, thereby giving the Director greater security of tenure than a Supreme Court Judge and enabling him to be removed only upon the passing of an Act of Parliament. 50 It has been suggested that the present Director enjoys this degree of security of tenure. 51 However, it is submitted that the present Director, at least, enjoys a far lesser security of tenure than does a judge. During the Second Reading debate on the Bill Dr Finlay quoted clause 14 of the service contract which all officers are required to sign. 52 Clause 14 provides:

The Director may terminate forthwith the employment of the Member by the Crown under this Agreement if the Member in the opinion of the Director after due investigation:

(a) Commits a breach of any of the provisions of clause 10 of this Agreement which relates to secrecy;

(b) commits a wilful and serious breach of any of the provisions of clause 11 of this Agreement [which relates to obeyance of order and care of property;

(c) is negligent in the discharge of his duties;

(d) becomes inefficient or incompetent as a result of his own wrongful conduct;

(e) uses to excess intoxicating liquors or drugs;

(f) becomes bankrupt or makes an assignment or arrangements for the benefit of his creditors;

(g) is convicted of a criminal offence;

(h) is guilty of scandalous or improper conduct; or

(i) is guilty of an act or omission likely or intended to cause serious prejudice to the interests of the Crown or of the New Zealand Security Service except an act or omission by or on behalf of the Director and in case of an act performed as so ordered.

50 *Submissions of N. R. Taylor*, 5.
Dr Finlay said that this conduct applies also to the Director, in whose case “Minister” should be substituted for “Director”. If this is correct then it is obvious that the present Director does not enjoy greater security of tenure than a Judge. 53 He does enjoy greater security than an ordinary public servant (as do his officers) but it is submitted that section 11 is valuable in that it prevents the SIS being subjected to political abuse in the form of instant dismissals. The SIS must be kept free from political bias or influence.

2. Responsibility of Director to the Minister.

Under section 5(3) the Director is “responsible to the Minister for the efficient and proper working of the Security Intelligence Service.” Ministerial control of the service is also provided for by section 4(1). But ministerial control of the SIS is very different to ministerial control of an ordinary department in that direction is only given in the broadest terms and the Minister does not concern himself with the detailed operations of the service. Sir Findlater’s Stewart Report in 1945 sets out the position: 54

... [F]rom the very nature of the work, need for direction except on the very broadest lines can never arise above the level of Director-General. That appointment is one of great responsibility, calling for unusual experience and a rare combination of qualities; but having got the right man there is no alternative to giving him the widest discretion in the means he uses and the direction in which he applies them—always provided he does not step outside the law.

Critics in New Zealand criticise the discretion and the degree of independence from ministerial control which the Director enjoys but they overlook an essential requirement of a security service, i.e., that it should be absolutely free of any taint or suggestion of political bias. 55 Brig. Gilbert has said that he, 56

... as Director, must be able to decline to carry out any investigation which [he does] not consider to be related to the protection of the country as a whole.

For the same reason, the Director can refuse to supply information from the service’s files. In 1969 he was asked whether the Prime Minister read all the extremely secret files, to which Brig. Gilbert reportedly replied: 57

There are some files held by the Security Service that only I have seen. I don’t tell the Prime Minister everything and he does not have access to all our files. We are not a department of the Prime Minister and it is essential we jealously guard a position where we are free of political influence. ... I have got to have a degree of independence. The Prime Minister

53 A Judge holds office during good behaviour: Judicature Act 1908, s. 7.
55 Address to the Statutes Revision Committee by the Director of Security, 1 July 1969, 3.
56 Idem.
57 Reid, op. cit., 7.
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has general oversight, but no oversight of our day-to-day activities. I'll give him the information he needs to know. But I won't tattle about, say, an important new source of information. . . .

Any suggestion that the Director is entitled in law to withhold information from the Prime Minister which the latter has requested or to refuse to carry out investigations requested by the Prime Minister is incorrect. In practice the Prime Minister, both of necessity and because the service must be free of political influence, will not concern himself with the details of the SIS's activities but under the Act the Director is ultimately subject to the Minister's control. Mr Holyoake stated in 1969 that anything he had ever requested of the service had been made readily available to him\textsuperscript{78} whilst Mr Kirk has said that he has "no reasons to believe it has done other than what [he] wanted."\textsuperscript{79}

In fact the Prime Minister has very little contact with the Director, perhaps too little. In 1966 Mr Holyoake said:\textsuperscript{80}

I am not certain how often I have seen the Director of Security this year —I think three times, once on the question of the estimates. I have very little contact with the service.

In 1971 he stated that he only saw the Director two or three times a year had spoken with him on the telephone only once in the past year.\textsuperscript{81} When asked in 1972 how many times he had met the Director on security matters in the past year, Mr Marshall said three or four times (he had only been Prime Minister for six months).\textsuperscript{82} The best guarantee against the danger of the SIS running wild therefore lies in the ability and integrity of its members, especially the Director. This point cannot be overstressed.

B. Officers and Employees

1. Distinction between

Section 8(1) exempts the SIS from the State Services Act 1962. This was not designed to exclude the service from the Ombudsman's jurisdiction for\textsuperscript{83}

\[ \text{[t]he Service has never fallen within his jurisdiction, and has been exempted by Order-in-Council from the provisions of the Public Service Act and the State Services Act since 1956.} \]

The reason for the exemption is that the State Services Act would create difficulties as regards advertising all vacancies, rights of appeal, etc.\textsuperscript{84}

\begin{footnotes}
\item[58] Parliamentary Debates, Vol. 362, 2150.
\item[59] Auckland Star, 10 May 1973, 2.
\item[60] Parliamentary Debates, Vol. 348, 3102. See also Reid, op. cit., 7.
\item[61] Parliamentary Debates, Vol. 373, 2011.
\item[63] Submissions of Security Service, 13.
\item[64] Idem.
\end{footnotes}
Section 6(1) provides that the Director may:

(a) Employ under agreements in writing, such officers of the Security Intelligence Service as he thinks necessary for the purposes of [the] Act; and

(b) Engage such employees as he thinks necessary for those purposes.

Officers enjoy security of tenure but employees do not. The service contract which all officers enter into provides that the Crown will indemnify an officer for any loss or liability to pay damages arising from the performance of his duties. Either party may terminate the agreement upon three months' notice whilst an officer may immediately determine his employment if the SIS undergoes a fundamental change. If the service is abolished and its responsibilities are not transferred to another body his employment immediately determines. An unusual clause in the contract provides that where an officer is given three months notice, where an officer resigns because of a fundamental change in the SIS, or where the SIS is abolished, he is entitled to compensation up to a maximum of the two preceding years' salary. It was revealed in 1967 that $16,000 compensation had been paid to three ex-members of the service, one of whom was presumably Godfrey, and it was said that the compensation clause was in the contract to provide for the eventuality of a man being identified and no longer of use to the service.

Unlike officers, employees of the SIS are not engaged under written agreements. Allegations have been made that the service employs informers and it is into this category that they would come. In 1966 Mr R. J. Tizard, M.P. said that the Director had told him that the service did not employ part-timers and yet Godfrey had offered an Auckland student £10 a week to inform. Mr P. A. Ames said in 1968 that the Public Expenditure Committee had been told that eighty per cent of the staff was salaried and that twenty per cent received all expenses. But in 1969 the Director stated: “To remove misunderstanding about the term ‘employee’ I can state that these people are the full-time clerical and administrative staff of the service.” Asked in 1972 whether the SIS employed people on a part-time basis, Mr Marshall replied that “part-time employees were few but there were some who were cleaners.” The SIS and the Government apparently claim that paid informers are not employed.

69 Address to the Statutes Revision Committee, 5.
2. Recruitment of Officers

Under section 6(1) the Director has an absolute discretion, subject to the control of the Minister, as to whom he employs as an officer or an employee. Mr Holyoake has said: 71

Doubt should not be cast upon the ability of the officers. They are well trained, but of course not as highly trained as those in MI5 or the American organisation. They . . . sent officers overseas to regular Commonwealth schools, and visited America to study latest information. . . . They were not just tyros, not just raw recruits and amateurs.

According to the Director, the “officers have a high degree of political sophistication.”72

Despite these averments, continuing doubts here have been expressed as to the quality of security officers, particularly in that many of them are reportedly ex-colonial service and ex-army officers.73 It is therefore commendable that the SIS has a policy of recruiting university graduates.74 If we are going to have a security service the citizen should at least have the right to expect that its members possess a high degree of competence and impartiality.

The turnover of officers is apparently very low but there is a need “to recruit a small number of young men to replace officers nearing retirement.”75 Recruitment is not done by advertising but all staff are on the look-out for recruits. However, “the responsibility for making approaches is delegated by the Director to only a few designated senior officers.”76 University campuses are entered for the purposes of recruitment, the only objection to this being that recruits are reportedly approached up to one year before they actually join the SIS and the danger therefore exists that they will report on university matters during that year.77

VI. THE APPEALS SYSTEM

Twenty-one of the twenty-five written submissions (excluding the service’s) to the Statutes Revision Committee recommended that some right of review ought to be included in the Bill. The Director said the service78

... would welcome an extension of the responsibilities of the Review Authority provided for in Section 38 of the State Services Act 1962. This would rid the Service of some of the criticism at present wrongly directed towards it.

72 Reid, op. cit., 6.
73 Godfrey was ex-colonial service: Hutchison Commission, op. cit., 7.
75 SIS to Public Expenditure Committee, 4 July 1972, 2.
76 Idem. The approach is usually made by the Deputy-Director.
78 Address to the Statutes Revision Committee, 4.
But he pointed out that information from character referees and overseas organisations, by agreement would not be disclosed to persons outside the Security Service. This was one of the reasons why the service rejected the suggestion to extend the ombudsman’s jurisdiction to the service. The appeals system which was subsequently incorporated into the Bill is radical, relative to other countries, but really guarantees very little in the way of safeguards to individual liberties.

A. The Commissioner of Security Appeals and his Functions

The New Zealand Security Intelligence Service Act now provides for the appointment of a Commissioner of Security Appeals who shall be a barrister or solicitor of at least seven years standing. His function shall be to inquire into complaints made in accordance with [the] Act by any person ordinarily resident in New Zealand that his career or livelihood is or has been adversely affected by an act or omission of the [SIS].

In pursuing his function he is to have regard to the requirements of security.

This is obviously a very limited right of complaint. The “ordinarily resident in New Zealand” requirement prevents prospective immigrants from appealing whilst the “career or livelihood” stipulation means that people such as housewives will be unable to appeal, as will people who have only had their general reputation harmed. Further, before a person can file a complaint he has actually to know about a particular act or omission of the SIS and then he has to be aware (and later able to show) that there is a causal link between that act or omission and the adverse state which his career or livelihood is in.

B. Refusal of the Commissioner to Inquire

Section 19 provides:

(1) The Commissioner may in his discretion decide not to inquire into any complaint if—

(a) In his opinion the subject matter of the complaint is trivial; or

79 Idem.
80 Submissions, 12.
81 The Canadian Royal Commission on Security, op. cit., recommended the establishment of a Security Review Board to review employment, immigration, and citizenship matters.
82 Section 14. The present Commissioner, Sir Douglas Hutchison, is a retired Supreme Court Judge.
83 Section 17(1).
84 Section 17(2).
(b) In his opinion the complaint is frivolous or vexatious or is not made in good faith; or
(c) The complainant is not a New Zealand citizen.

(2) If in the course of his inquiries it appears to the Commissioner—
(a) That there is an adequate remedy or right of appeal under section 38 of the State Services Act 1962 or otherwise; or
(b) That, having regard to all the circumstances of the case, further inquiries are unnecessary—

he shall refuse to inquire into the matter further.

(3) In any case where the Commissioner decides not to inquire into a complaint or proceed with his inquiries he shall advise the complainant of that decision.

Subsections (1) and (2) are similar to section 14(1) and (2) of the Parliamentary Commissioner (Ombudsman) Act 1962, excepting that the Ombudsman has a discretion in all cases. Under section 14(3) the Ombudsman may give reasons for his decision and it is submitted that the Commissioner of Security Appeals should have a similar discretion. Interestingly, the Commissioner may refuse to inquire into the complaint of a non-naturalised New Zealander, even though that person has a right of appeal under section 17(1).

A public servant transferred on security grounds has the right to appeal to a Security Review Authority. Although it was first provided for in 1951, Mr Holyoake said in 1969 that no one had ever appealed to it and it had never been set up. State servants passed over for promotion on the grounds of security already have other appeal procedures open to them. Therefore persons appealing to the Commissioner of Security Appeals will be those who have been rejected for a state job and those whose non-State career or livelihood has been adversely affected by the SIS.

C. Proceedings of the Commissioner

The Commissioner is to "regulate his procedure in such manner as he thinks fit having regard to the requirements of security" and is to hear separately and in private such evidence as the complainant may adduce and such evidence as the Director may adduce. It has

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85 State Services Act 1962, s. 38. It is based on the Three Advisers in Britain, as to which see Security Procedures in the Public Service, 14 para. 52; D. Williams, Not in the Public Interest: the Problem of Security in Democracy, (1965), 173-175.
87 Section 20(2).
88 Section 20(3).
been suggested\(^9\) that the Commissioner must hear the complainant's evidence before he hears that of the Director but it is submitted that this is incorrect. The complainant is entitled to be heard and represented by counsel\(^9\) but the Commissioner may receive such evidence as thinks fit, whether admissible in a court of law or not\(^91\) and this means that hearsay evidence, upon which most SIS information is based, is admissible. The Commissioner may summon anyone before him and examine him on oath\(^92\) but the complainant is not required to subject himself to examination or cross-examination, on oath or otherwise.\(^93\) It is further provided that "no proceeding, report, or finding of the Commissioner shall be challenged, reviewed, quashed or called in any question in any Court"\(^94\).

The Canadian Royal Commission on Security said that\(^95\)

... fully judicial procedures are ill-suited to the review of decisions based on security grounds. ... One reason ... is the need to protect information and sources from disclosure in any form of hearing. A second reason ... is the fact that decisions in this area ultimately relate to the defence of the state, for which the government and only the government is responsible. A third reason [is that] ministers and deputy ministers are responsible for the security of their departments; they cannot reasonably be required to be bound by an outside decision ... on questions of individual access to the classified material for which they are responsible.

The reasons for the absence of a fully judicial review in New Zealand are similar.\(^96\) Thus the Commissioner has no power to compel the Director to produce SIS files because this would reveal sources of information and disclose continuing investigations. The normal rules of evidence and proof are in abeyance because in the interest of national security different criteria are applied to matters such as reliability than are applied in Courts of law. The Commissioner does not make a decision binding on both parties.

Given the overriding need for security, the proceedings are generally satisfactory. But one important defect is that at present the complainant has no opportunity to discover the SIS's "case" or evidence against him. Therefore it is submitted that before any hearing takes place the complainant ought to be supplied with a written statement setting out as fully as possible the service's position on the complainant.\(^97\) This would in no way harm security. It was recommended ante, page 23 that a person subject to an adverse positive vetting

\(^{910}\) Section 20(4).
\(^{911}\) Section 20(5).
\(^{912}\) Section 20(6).
\(^{913}\) Section 20(7).
\(^{914}\) Section 20(9). Guild, op. cit., 186-188 considers the effect of this provision and what an appropriate remedy would be.
\(^{916}\) Parliamentary Debates, Vol. 362, 2116.
\(^{917}\) The Canadian Royal Commission on Security, op. cit., 43, para. 117 made a similar recommendation.
report should be provided with a statement setting out, as fully as possible, the reasons for the adverse recommendation. In such case it would not be mandatory for the SIS to supply another statement if a complaint was filed.

D. Action by the Commissioner and by the Minister

Section 21 provides:

(1) After completing his inquiries, and having regard to the requirements of security, the Commissioner shall—

(a) Forward to the Complainant his findings regarding the complainant; and

(b) Report to the Minister, and (together with his report) forward to the Minister all documents, and materials relating to the complaint, including his findings regarding the complainant; and the report, documents, materials and findings shall be placed on the appropriate file of the service.

(2) If at any stage during the course of his inquiries the Commissioner is of the opinion that there is evidence of any breach of duty or misconduct on the part of any officer or employee of the service, he shall inform the Director immediately.

It is to be hoped that the Commissioner would give the complainant as many reasons for his conclusion as security allowed. The Law Society submitted that "where the Director of Security reports to any outside party, he should then be required to refer to the Commissioner's report and recommendation."98 This would be a worthwhile reform but in the case of a justified complaint the damage would have already been done. Section 21(2) is significant, especially when it is recalled that an officer's service contract provides for his immediate dismissal in the event of misconduct or breach of duty.

The Minister is to take whatever further action he thinks appropriate and may direct any file to be appropriately noted.99 Speaking in 1969 of this provision, Dr Finlay said that1

... there is little doubt that there is no legal right of action against anyone for any damage done and, indeed, there is considerable doubt whether it would be effectively possible to sue the service or the director for libel.

In any case, the Minister apparently has sufficient power to make an ex gratia payment of compensation.9

However, section 23(1) provides that "no report or account of any application, evidence, or proceedings before the Commissioner or of

98 Submissions (2nd), 1.
99 Section 22.
2 Idem; Guild, op. cit., 186.
any decision of the Commissioner or the Minister shall be published" in any manner without the Minister's consent, save that the reporting or broadcasting of Parliamentary proceedings are unaffected. The complainant ought to be able to publish the result of his complaint for if his complaint was successful he would be able to vindicate himself. If the SIS is functioning satisfactorily, publication would in no way harm it because the overwhelming majority of complaints would be unsuccessful. Publication would serve to bolster public confidence in the SIS.

E. The Number of Complaints Which Have Been Filed

Mr Holyoake observed in 1969 that "[t]here may never be an appeal necessary "under the Act" but by July 1971 he was able to state that

... four appeals had been received. The commissioner had submitted his findings ... in respect of one complainant, the three other appeals were under examination and therefore sub judice.

The Public Expenditure Committee was advised in 1972 that "[t]here have been no appeals during the year nor are there any under action at this time." Asked in August 1972 how many complaints had been made and what had been the result of each appeal the Prime Minister, Mr Marshall, replied that since the Act's enactment

... the Commissioner ... has received four complaints. Two complaints have not been pursued by the appellants and have not, therefore, been heard, by the commissioner. The commissioner has dealt with the other two complaints, and I understand, that both complaints have been resolved.

Questioned whether the resolved complaints had been successful, Mr Marshall said that

... he was not able to disclose personal details; he did not know the details, and did not want to know them. It was better that individual cases should be dealt with by the commissioner and should not become public.

According to Sir Douglas Hutchison, however, two complaints had been heard, further submissions were awaited with regard to one other complaint, and a further complaint had not been proceeded with as yet.

Any extensions to the appeals system beyond those outlined above would adversely affect the interests of security and would therefore be untenable. The most effective guarantee of civil liberties in this area continues to be entrusted to the quality of SIS personnel.

5 SIS to Public Expenditure Committee, 4 July 1972, 1.
8 Hutchison to the writer, 30 August 1972.