

# THE CRIMINAL LAW, THE INTELLIGENCE AND SECURITY ACT 2017 AND THE PROTECTIVE SECURITY REQUIREMENTS

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*New Zealand was a pioneer in the codification of its criminal law. The Criminal Code Act was passed in 1893, after a lengthy gestation period. The work owed its origins to law reform activities in India, a tendency spread from India to other British jurisdictions, notably Canada and parts of Australia, but never England. The requirement that common law offences were no longer valid and criminal offences had to be clearly defined in statutes passed by Parliament became accepted orthodoxy here and never questioned. But it is possible, as this article argues, that New Zealand has forgotten the legal implications of its own history of codification. This article argues that s 78AA of the Crimes Act 1961, inserted by the Intelligence and Security Act 2017, is in breach of the codification principle. The vice of the provision is that the content of the Protective Security Requirements is dependent upon the actions of the executive and what it posts on the Internet, not upon law passed by Parliament. It is submitted that the present situation is poor legislative practice and leaves the state of the law in doubt. For security issues to be handled in this fashion is less than satisfactory in a free and open society. The article goes on to analyse the background of New Zealand's criminal law codification and outlines the extensive range of the modern law dealing with the intelligence agencies and how it has expanded in recent years. This history of the agencies is briefly canvassed, including controversial features that have arisen in the past. It concludes that remedial action is necessary and mentions work that is going on within the executive to bring about change. It concludes that issues of legality, human rights and the agencies deserve careful attention and require analysis of the risks to an open society from these developments.*

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## I INTRODUCTION

The rule of law has a long history. It is an achievement of the past four thousand years. But that is a short time in the history of humankind. It has emerged time and again to confront and challenge those who wield power, but it is neither inevitable nor invulnerable. It is also ours to love.<sup>1</sup>

This article is part of a festschrift to honour the career of Professor Tony Smith who has served at this faculty with elegance and distinction as Dean and Professor. As a New Zealander, he also had an outstanding academic career in the United Kingdom at the universities of Cambridge, Durham and Reading. We have spent wonderful times together at the University of Cambridge and his college, Gonville and Caius, where he is a life fellow, and attending functions at the Middle Temple. When I returned to New Zealand after a demanding United Nations inquiry in 2011, Tony was exceedingly helpful to me. Tony, of course, has superb command of the criminal law and has written extensively upon it. I like to think his New Zealand heritage of a codified criminal law influenced his scholarship in the United Kingdom, where he has been a powerful advocate of the need for a criminal code. His work has certainly been of material assistance for this article.

This article analyses the relationship between three spheres of law. The first sphere is the codified criminal law and the offences created by s 78AA of the Crimes Act 1961. These involve the wrongful communication, retention or copying of official information. The provision was inserted in the Crimes Act 1961 by the Intelligence and Security Act 2017, which followed an extensive review of New Zealand's intelligence and security legislation. The legislation expanded substantially the range of activities and functions of both the New Zealand Security Intelligence Service (NZSIS) and the Government Communications Security Bureau (GCSB). The 2017 Act itself makes up the second sphere. This statute occupies 180 pages of the statute book and requires careful navigation due to its complexity. The third sphere is the Protective Security Requirements (PSR) laid down by government in a Cabinet Directive, but which are not explicitly authorised by any statute, although they have been agreed by Cabinet.<sup>2</sup>

Section 78AA of the Crimes Act 1961 is an important provision. It relates also to s 78A, which was inserted into the Crimes Act 1961 in 1982 as a result of the Official Information Act 1982 of that year, following the Danks Committee report.<sup>3</sup> That report recommended repealing the notorious Official Secrets Act 1951, which had been copied from an emergency measure in the United Kingdom

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1 Fernanda Pirie *The Rule of Laws: A 4,000-Year Quest to Order the World* (Profile Books, London, 2021) at 456.

2 Cabinet Office Circular "Directive on the Security of Government Business" (8 December 2014) CAB MIN (14) 39/38.

3 Committee on Official Information *Towards Open Government: General Report* (Government Printer, 19 December 1980) vol 1.

passed in 1911. Section 78A was the substitute and more limited in its application than the Official Secrets Act 1951.<sup>4</sup>

**78AA Wrongful communication, retention, or copying of classified information**

- (1) Every person specified in subsection (2) is liable to imprisonment for a term not exceeding 5 years if the person, within or outside New Zealand,—
- (a) knowingly or recklessly, and with knowledge that he or she is acting without proper authority, communicates any classified information to any other person; or
  - (b) knowing that he or she is acting without proper authority, retains or copies any classified information; or
  - (c) knowingly fails to comply with any directions issued by a lawful authority for the return of any classified information that is in his or her possession or under his or her control.
- (2) Subsection (1) applies to—
- (a) a person who holds, or has held, a government-sponsored national security clearance to access classified information; or
  - (b) a person to whom classified information has been disclosed in confidence if—
    - (i) the disclosure is authorised; and
    - (ii) the person knows that the disclosure is in respect of classified information.

- (3) In this section,—

**classified information** means—

- (a) information that—
  - (i) is, or was, official information; and
  - (ii) is classified under the New Zealand Government Security Classification System as being accessible only to persons who have a national security clearance:
- (b) foreign government information that is—
  - (i) classified in a foreign country; and
  - (ii) accessible only to persons having a government-sponsored national security clearance

**New Zealand Government Security Classification System** means the security classification system applying to official information that is published (and from time to time amended) on an Internet site maintained by or on behalf of the New Zealand Security Intelligence Service

**official information** has the meaning given to it by section 78A(2).

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4 Committee on Official Information *Towards Open Government: Supplementary Report* (Government Printer, 20 July 1981) vol 2 at 95–96.

It will be contended that these arrangements are not satisfactory as a matter of proper legislative practice. Further, it will be suggested the situation is of dubious legality and may indeed be unlawful. The values of an open society and clarity in the range of the criminal law demand more transparency. It is an issue of fundamental importance, with constitutional dimensions. Coherent legislative systems are required in order to produce effective governance and accountability. The fourth part of the article questions whether the present systems are fit for purpose and notes they are under active reconsideration at the time of writing.

## **II THE NEW ZEALAND CODIFICATION OF THE CRIMINAL LAW**

New Zealand codified the serious offences of the criminal law in 1893.<sup>5</sup> The short title was the Criminal Code Act 1893. The word "code" had a provenance. New Zealand reform efforts were heavily reliant on what could be called an Imperial project of codification that spread around the British Empire after the enactment of Thomas Macaulay's Indian Penal Code 1860.<sup>6</sup> The Penal Code was enacted shortly after the Indian mutiny.<sup>7</sup> Macaulay was a Whig politician and became a Baron. He was a founder of the Whig view of history and well published. He was trained in the law and was appointed to India in 1834 as the law member of the Supreme Council of India. He chaired the Law Commission that produced the code and did most of the drafting.<sup>8</sup> The Indian code was adopted in other countries where it survives still, such as in Pakistan, Bangladesh, Burma, Sri Lanka, Malaysia, Singapore and Brunei.<sup>9</sup>

Sir James Fitzjames Stephen, a distinguished lawyer who became a judge, also had experience in India between 1869 and 1872, as the legal member of the Viceroy's Executive Council, where he drafted Acts and guided them through the Legislative Council.<sup>10</sup> He became an ardent admirer of the Macaulay code. Later, back in England, Stephen took up the cause of codification of the law and drafted a criminal code for England. It was referred to a Royal Commission of which Stephen himself was a member. The draft Bill produced by the Commission in 1879 was not enacted in England,

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5 Criminal Code Act 1893.

6 Wing-Cheong Chan, Barry Wright and Stanley Yeo (eds) *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Ashgate Farnham, Surrey, 2011).

7 See William Dalrymple *The Last Mughal: The Fall of a Dynasty, Delhi 1857* (Bloomsbury Publishing, London, 2006) for a historical account of the Indian mutiny.

8 "Macaulay, Thomas Babington, Baron Macaulay" in *Oxford Dictionary of National Biography* (Oxford University Press, Oxford, 2004) at 7: "Macaulay completed the code more or less single-handed in May 1837."

9 Kenneth Keith "Codification, Macaulay and the Indian Penal Code: the legacies and modern challenges of criminal law reform (review)" (2012) 38 CLB 190.

10 "Stephen, Sir James Fitzjames" in *Oxford Dictionary of National Biography* (Oxford University Press, Oxford, 2004) at 4–5.

despite substantial efforts.<sup>11</sup> Resistance of the common lawyers in the legal profession was strong and there was judicial opposition. The work did not die. Codification of crimes based on the English work occurred not only in New Zealand, but also in Canada<sup>12</sup> and a number of Australian states.<sup>13</sup> Despite serious attempts in the 19th century and further efforts by the English Law Commission in the 1960s, chaired by Lord Scarman,<sup>14</sup> codification has never been easy to pursue in England. Seldom has it been realised. Scarman himself produced a useful definition of what "code" means in this context:<sup>15</sup>

A Code is a species of enacted law which purports so to formulate the law that it becomes within its field an authoritative, comprehensive and exclusive source of the law.

This seems a satisfactory definition for the purposes of this article, even though the general part of the criminal law is not codified in the Crimes Act 1961. The process of codifying the New Zealand criminal law should be completed and the writer tried to bring it about when Minister of Justice, as indicated later in this article.

The criminal law in England remains uncodified, the most notable feature of which is the existence of common law offences. Although it seems new ones cannot now be created, the existing ones can be developed and have life.<sup>16</sup>

For the first 30 years after 1840, English criminal law applied in New Zealand, both statutory and common law. The legislative history of New Zealand's 1893 criminal code was sputtering and awkward; it took 10 years. The New Zealand Statutes Revision Commission report was completed in

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11 Criminal Code Bill Commission *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences: With an Appendix Containing a Draft Code Embodying the Suggestions of the Commissioners* (Command Paper, London, 1879).

12 Criminal Code RSC 1985 c C-46.

13 Jeremy Finn "Codification of the criminal law: the Australasian parliamentary experience" in Barry Godfrey and Graeme Dunstall (eds) *Crime and Empire 1840–1940: Criminal justice in local and global context* (Willan Publishing, Cullompton, 2005).

14 Geoffrey Palmer "The Law Reform Enterprise: Evaluating the Past and Charting the Future" (Scarman Lecture 2015, Middle Temple Hall, London, 24 March 2015). The lecture was published in Geoffrey Palmer "The Law Reform Enterprise: Evaluating the Past and Charting the Future" (2015) 131 LQR 402.

15 Lord Scarman "Codification and Judge-Made Law: A Problem of Coexistence" (1967) 42 Ind LJ 355 at 358. The absence of the general part of the criminal law in the New Zealand statute means the New Zealand code needs further work.

16 Professor Tony Smith has written, "Judges rarely any longer claim to be able to create new offences, but they do assert a power to be able and free to develop existing ones": ATH Smith "Codification of the Criminal Law: The Case for a Code" [1986] Crim LR 285 at 288.

1883.<sup>17</sup> The Commissioners were two New Zealand Supreme Court judges, Alexander Johnston and WS Reid. The various steps taken over the years culminating in enactment have been the subject of published research and will not be repeated here.<sup>18</sup>

The premier in 1883 was Frederick Whitaker, a lawyer who was, according to one biographer, the most successful Attorney-General of the 19th century, a brilliant lawyer and draftsman who was the Attorney on seven occasions.<sup>19</sup> He was an enthusiastic supporter of the criminal code project. He moved the first reading in the Legislative Council in 1883.<sup>20</sup> The Commissioners decided to concentrate their efforts on the Imperial Bill of 1880 as the foundation for their 1883 report.<sup>21</sup> The Commissioners were not ardent advocates of codification. They thought it desirable that New Zealand postpone its legislation until the Imperial Parliament had passed a code first.<sup>22</sup> The measure was reported by the Joint Statutes Revision Committee in 1883 and passed by the Legislative Council in 1885.

It was a massive Bill of 450 clauses, and contained a number of controversial issues, such as blasphemous libel, now abolished.<sup>23</sup> Its size and complexity was one reason it took so long; big Bills are always hard to handle in Parliament. Elections and ministers came and went. Eventually the measure was passed in 1893 and it differed very little from the measure as first introduced. This was a real sign perhaps that New Zealand did not have to wait for England to act before it made legal innovations. It was a big and beneficent legal reform. The 1893 Act was re-enacted and consolidated

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17 It is not an easy document to locate. It is published as "Report on the Criminal Code, as Reported from the Joint Statutes Revision Committee, 7th August, 1883" in *Public Acts of New Zealand* (Reprint, Wellington, 1908–1931) vol 2, 173.

18 See Stephen White "The making of the New Zealand Criminal Code Act of 1893: A sketch" (1986) 16 VUWLR 353 at 371–375 and Appendix; and Barry Wright "Criminal Law Codification and Imperial Projects: The Self-Governing Jurisdiction Codes of the 1890s" (2009) 12 *Legal History* 19 at 37–40 for a discussion of New Zealand.

19 RCJ Stone "Whitaker, Frederick, 1812–1891, lawyer, entrepreneur, politician, premier" in WH Oliver (ed) *The Dictionary of New Zealand Biography: 1769–1869* (Bridget Williams Books/Department of Internal Affairs, Wellington, 1990) vol 1, 586. Whitaker was a land speculator and as Attorney an active supporter of the war in the Waikato in 1863. He favoured obtaining more land for settlers from Māori and supported the New Zealand Settlements Act 1863 confiscating land.

20 (19 June 1883) 44 NZPD 7. Whitaker moved the second reading a little later in the session: (20 June 1883) 44 NZPD 43. He argued "it was of greatest importance to have a code" and he wanted to get on with it. The Bill passed the second reading only to be held up when it reached the Committee of the Whole, because many thought New Zealand should wait until England had legislated: (14 August 1883) 45 NZPD 578. One member said, "This Bill has not been asked for at all, and it would throw enormous burdens on the Judges." It was withdrawn on 21 August 1883: (21 August 1883) 46 NZPD 106.

21 "Report on the Criminal Code", above n 17, at [2].

22 At [3].

23 Crimes Amendment Act 2019, s 5.

in 1908.<sup>24</sup> In the 1960s a more extensive revision was done, resulting in the Crimes Act 1961. It made many changes and gave the criminal law greater clarity and a more modern look.<sup>25</sup>

The 1961 Act abolished the death penalty for murder by deleting it from the Bill on a free vote in the House of Representatives.<sup>26</sup> A number of National Party members voted with the Labour Opposition members, who had for many years opposed the death penalty and previously had abolished it for murder when in government in 1941, only to see that reversed when National came to office in 1949.<sup>27</sup> In 1961, the Minister of Justice Hon Ralph Hanan voted against the death penalty, along with 10 other National members, making a majority of 11 for abolition.<sup>28</sup>

The 19th-century legal reformers in England laboured hard to codify various aspects of the law but largely failed.<sup>29</sup> Efforts to reform the English criminal law began as early as 1833.<sup>30</sup> The mid-20th-century move to law commissions in the 1960s brought a revival. The first chair of the Law Commission for England and Wales, Lord Scarman, was keen on codification, including the criminal law.<sup>31</sup> But efforts did not secure legislative support. The English Law Commission's work to codify the criminal law remains unadopted.<sup>32</sup>

Codification was a great aim of Jeremy Bentham, who had been a student of Sir William Blackstone at Oxford but rejected Blackstone's common law approach. Bentham urged the need for codification and offered to codify laws for all countries professing liberal opinions, because the greatest happiness principle of utilitarianism demanded clear, rational laws that were knowable and

24 Crimes Act 1908.

25 See ID Campbell "Criminal Law" in JL Robson (ed) *The British Commonwealth: The Development of its Laws and Constitutions – New Zealand* (2nd ed, Stevens, London, 1967) vol 4, 361 at 364–369 for a discussion of codification.

26 (12 October 1961) 323 NZPD 2290.

27 "Capital Punishment" in AH McLintock (ed) *Encyclopedia of New Zealand* (RE Owen Government Printer, Wellington, 1966) vol 1 at 308.

28 See above n 26. A motion that the clause imposing the death penalty for murder stand lost at the Committee of the Whole House. The ayes were 30 and the noes 41. Life imprisonment was substituted.

29 Four major Acts codifying the work of Sir MacKenzie Chalmers enacted in the United Kingdom were adopted in New Zealand, re-enacted as the Sale of Goods Act 1908, Partnership Act 1908, Bills of Exchange Act 1908 and Marine Insurance Act 1908.

30 Wright, above n 18, at 23.

31 Lord Scarman *Code of English Law?* (University of Hull, Hull, 1966).

32 Chris Clarkson "Recent Law Reform and Codification of the General Principles of Criminal Law in England and Wales: A Tale of Woe" in Wing-Cheong Chan, Barry Wright and Stanley Yeo (eds) *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Ashgate Farnham, Surrey, 2011) 337; and Law Commission for England and Wales *Criminal Law: Codification of the Criminal Law* (Law Com No 143, 1985). See also Palmer, above n 14, at 412–413.

accessible.<sup>33</sup> He wanted to stop Judge and Co from making it up. It is hard to resist the conclusion that common lawyers have something of a phobia about codification.

That continuing theme is reflected in the failure of efforts in the 1980s to codify the general part of the criminal law in New Zealand.<sup>34</sup> The effort was resisted by Sir Robin Cooke, then President of the Court of Appeal, who gave a lecture and published it, severely criticising the draft that was then out for consultation.<sup>35</sup> Among other things, he said it would produce completely unpredictable results and that this was worrying. And he opined some of it was "dangerous or undesirable or unnecessary".<sup>36</sup> Sadly, the New Zealand proposal did not proceed. Some years later Elias CJ and Baragwanath J appeared at a select committee hearing to resist the passage of the Evidence Bill 2005 (256-3) resulting from a Law Commission report.<sup>37</sup> The Bill effectively codified the common law of evidence. Despite the judicial opposition, it was enacted as the Evidence Act 2006 and has been successful.<sup>38</sup> Yet the ghost of Jeremy Bentham haunts the common law still. As the current edition of the leading work on statute law in New Zealand puts it, "[t]he common law dies hard".<sup>39</sup>

### **III WHAT WAS THE LEGAL EFFECT OF CODIFICATION?**

There are a number of strands to the substance of what is envisaged by codification. Codification is not the same as "consolidation" or "revision", although there is overlap between them and some confusion. The Legislation Act 2019 makes provision for both—s 70 for consolidations and pt 3, sub-pt 3 for revisions. A consolidation Act does not change the law but restates it in a more accessible form. Revisions are also designed to make statutes more accessible without changing their substance

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33 Jeremy Bentham *A Fragment on Government* (Blackwell, Oxford, 1948). Bentham's writings are so extensive that further citation is unnecessary.

34 Geoffrey Palmer "The Reform of the Crimes Act 1961" (1990) 20 VUWLR 9.

35 Robin Cooke "The Crimes Bill 1989: A Judge's Response" [1989] NZLJ 235.

36 At 243.

37 (23 November 2006) 635 NZPD 6805–6806. The two Judges appeared before the Select Committee but were not named in the parliamentary debate. There is sensitivity about judges giving evidence on legislation: Mary Harris and David Wilson *McGee Parliamentary Practice in New Zealand* (4th ed, Oratia, Auckland 2017) at 331.

38 Geoffrey Palmer *Reform: A Memoir* (Victoria University Press, Wellington, 2013) at 141. I was present at the hearing of the Select Committee. Sir Ivor Richardson, the retired President of the Court of Appeal, gave evidence to the contrary of that of the two Judges.

39 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 741.

and were recommended by a Law Commission report in 2008.<sup>40</sup> The Law Commission report, which was done in conjunction with the Parliamentary Counsel Office, put it this way:<sup>41</sup>

The whole point is that revision does not change the substance of the law, only presentation. It is about access to the law and about understanding it. Sometimes the process is called consolidation, but we have avoided using that word because it has been used in different senses over the years.

The Commission took the view that "codification" in the sense of statutes meant combining statutes into one single coherent code arranged in a logical order, according to subject matter. This is the practice in a number of American states. It recommended that the prospect of codification in this sense "should be considered at such time as a programme of revision has been completed or nearly completed".<sup>42</sup> That will be a long time in the future and in any event it may not be a code in the sense the Crimes Act 1961 is a code.

Since the Crimes Act 1961 is a code in the Scarman sense, what is the proper way to approach its interpretation? Sections 5 and 9 of the Act itself help answer this question:

#### **5 Application of Act**

- (1) This Act applies to all offences for which the offender may be proceeded against and tried in New Zealand.
- (2) This Act applies to all acts done or omitted in New Zealand.

Section 9 adds:

#### **9 Offences not to be punishable except under New Zealand Acts**

- (1) No one shall be convicted of any offence at common law, or of any offence against any Act of the Parliament of England or the Parliament of Great Britain or the Parliament of the United Kingdom: provided that—
  - (a) nothing in this section shall limit or affect the power or authority of the House of Representatives to punish for contempt;
  - (b) nothing in this section shall limit or affect the jurisdiction or powers of the Court Martial, or of any officer in any of the New Zealand forces.
- (2) The jurisdiction, authority, or power of a court to punish for contempt is subject to the Contempt of Court Act 2019.

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40 Law Commission *Presentation of New Zealand Statute Law* (NZLC R104, 2008). For more detail on these provisions, see Carter, above n 39, at 38 (for revision Bills) and 219 (for definitions).

41 Law Commission, above n 40, at 6.

42 At 132.

This last exception is in my view an unfortunate and unnecessary lapse from the code principle, since elements of the common law offence of scandalising the court are preserved by the Contempt of Court Act 2019.<sup>43</sup> The offence has been abolished for England and Wales.<sup>44</sup> The New Zealand Act, by s 22, makes it an offence to publish a false statement about a judge or court—this is not exactly a ringing endorsement of free speech. An interesting feature of the Queensland criminal code is that it transfers to the courts the criminal sanctions for parliamentary privilege, also an exception to the New Zealand code.<sup>45</sup>

It is clear that common law offences are excluded by s 5, along with Imperial statutes. Thus, cases such as *Shaw v Director of Public Prosecutions*, which created the vague offence of a conspiracy to corrupt public morals, being the publication of the Ladies Directory dealing with the services of prostitutes, are impermissible in New Zealand.<sup>46</sup>

A person in New Zealand can only be convicted of an offence under New Zealand law. And decided cases here suggest the combined effect of the two statutory provisions set out above mean it is for Parliament to prescribe the offences. These offences, according to the Court of Appeal in 2011, "cover the entire field and leave no room for alternative bodies of law or tribunals".<sup>47</sup> The New Zealand criminal law textbooks all sing a similar song on the issue of codification and the combined effect of ss 5 and 9.<sup>48</sup>

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43 Contempt of Court Act 2019, s 22 makes it an offence to publish a false statement about a judge or court, subject to certain qualifications.

44 Law Commission for England and Wales *Contempt of Court* (Law Com No 335, December 2012); and David Eady and others *Arlidge, Eady and Smith on Contempt of Court* (5th ed, Sweet and Maxwell, 2017) at 5-211–5-215.

45 Criminal Code Act 1899 (Qld), ch 8 "Offences against the executive and legislative power".

46 *Shaw v Director of Public Prosecutions* [1962] AC 220 (HL). But see also the restrictions imposed in *Kneller v Director of Public Prosecutions* [1973] AC 435 (HL).

47 *Mason v R* [2013] NZCA 310, (2013) 26 CRNZ 464 at [25]. See also *Field v R* [2010] NZCA 556, [2011] 1 NZLR 784. The first was a case that held no valid claim to Māori customary procedure for alleged murder could prevail; such efforts could not usurp the function of Parliament to define offences: *Berkett v Tauranga District Court* [1992] 3 NZLR 206 (HC).

48 Simon France, Jeremy Finn and Debra Wilson *Adams on Criminal Law* (5th ed, Thomson Reuters, Wellington, 2021). Citing *Mason*, the commentary states "the combined effect is that the statutes passed by the New Zealand Parliament which create criminal offences and prescribe how criminal cases are to be handled cover the entire field and leave no room for alternative bodies of law or tribunals". See also Stephanie Bishop and others *Garrow and Turkington's Criminal Law* (online ed, LexisNexis) at [CRI.5.2]: "Constitutionally, the combined effect of ss 5 and 9 is to restrict offences for which a defendant may be tried to those set out in a New Zealand statute." On the application of the principle to Māori, see [CRI.9.2], where the authors quote the 1879 English report of the Criminal Code Commissioners: "Parliament is regular in its sittings and active in its labours; and if the protection of society requires the enactment of penal laws, Parliament will soon supply them." See also AP Simester and WJ Brookbanks *Principles of Criminal Law*

On the question of the prerogative the Crimes Act 1961 provisions are silent. But it would be impossible for an offence to be created by the prerogative alone. If offences can be created by the prerogative or by Cabinet decision without statutory authority, that would be contrary to the provisions in the Crimes Act 1961 set out above. One issue is whether the text of s 78AA provides sufficient legislative authority to say the provision does not offend against the code concept in the Act. The process by which secrecy and the protection of documents is established is not statutory; nor is the substance or the processes to bring it about. To continue without a statutory scheme when a massive statute was designed seems anomalous. The process lacks transparency. Anything at all can be protected from disclosure by a process that can be changed by an entry on a PSR website on the Internet. And it does not necessarily involve ministers. Perhaps it was because the executive prefers flexibility and room to manoeuvre. The executive usually does, but this is a parliamentary issue that goes to the heart of the policy justification for a criminal code, not to mention proper law-making.

To sum up, the argument made in this article is that the PSR provision breaches the code principle, and is based on the following points:

- (a) The law is not fixed, knowable and certain.<sup>49</sup> It can be altered at will by posts on the Internet;
- (b) Uncertainty looms within such a system;
- (c) There is no fair warning given to people;
- (d) The system is neither transparent nor efficient;
- (e) It could be retroactive, as the Internet will always be live;
- (f) The PSR is not legally drafted as a statute is;
- (g) There is opportunity here for officials to exercise arbitrary power;
- (h) Accessing the law is difficult since much of what is posted is advisory only;
- (i) It is no argument to say once the classification of documents has been determined, breaches can be punished. How can one tell what is covered and what is not, and whether the classification was lawful? There are no requirements as to the methods to be followed or the tests applied in law in making the classification decisions; and
- (j) The method chosen is an unacceptable way to make law in a democracy and is not, as matters stand, within the control of Parliament.

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(5th ed, Thomson Reuters, Wellington, 2019) at 30, where the authors state that the rule of law requires "certainty, clarity, and prospectivity", all qualities that are missing from the PSR. Government should operate under the law. Citizens should be able to successfully live within the law "by deriving guidance from the law itself". Law needs to be fixed and knowable. And it needs to be predictable and give fair warning of what it contains. It should not be retroactive: at 33. See also Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 24: "a person must be proven to have breached the legal requirements of an offence that is enacted in a New Zealand statute in order to be convicted of a crime in New Zealand".

49 Joseph Raz *The Authority of Law* (Oxford University Press, Oxford, 1979) at 214–215. See also Andrew Ashworth *Principles of Criminal Law* (5th ed, Oxford University Press, Oxford, 2006) at 68–77.

#### ***IV THE POLICY JUSTIFICATION***

In the codifying provision, s 6 of the 1893 criminal code, the expression of codifying intent was, if anything, even stronger than in the 1961 Act. A clear set of policy principles justify codification of the criminal law in New Zealand, relying on the long history of codification summarised above, and purposes that have been articulated for it. It involves limiting judicial law-making in the criminal law.<sup>50</sup>

- (1) The responsibility for a criminal law code lies with a democratically elected legislature. It must provide "a fixed starting point for what the law is".<sup>51</sup> It speaks as to where responsibility for the content of the criminal law lies as between Parliament and the courts.<sup>52</sup> The responsibility of the judges is to make the code work.
- (2) The code is an authoritative, comprehensive and exclusive source of the law. The forensic process is unsuitable for the creation or abrogation of offences.
- (3) The statement of the law in a code must be easily comprehensible, precise and clear in order to remove uncertainty as much as possible. The code should not contain gaps.
- (4) The code must be easily accessible in the sense that people can easily find it and read it.
- (5) The code must be interpreted on its own terms within its context without reliance on the common law. It should contain all elements of offences and the defences.

Such an approach to the administration of the criminal law is obviously superior to the common law method. The problem of the common law lies in the case law, its obscurity, inaccessibility and the use of judicial and lawyer time finding out what the law is. New Zealand made this decision nearly 130 years ago and it has served us well. We need to protect that heritage and enhance it, not allow it to wither away.

#### ***V THE INTELLIGENCE AND SECURITY ACT 2017***

The New Zealand intelligence agencies were the subject of a full and independent review in 2016.<sup>53</sup> A totally new legislative regime was passed on the basis of the report. Both of the agencies—the NZSIS and GCSB—are concerned to prevent acts of terrorism being carried out in New Zealand. They are designed to protect national security generally, New Zealand's international relations and

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50 ATH Smith "Judicial Law Making in the Criminal Law" (1984) 100 LQR 46. This article has been a most useful source for the principles set out below.

51 Smith, above n 16, at 289.

52 In my view such a position is compatible with an enhanced weight being given to the New Zealand Bill of Rights Act 1990.

53 Michael Cullen and Patsy Reddy *Intelligence and Security in a Free Society: Report of the First Independent Review of Intelligence and Security in New Zealand* (G.24a, 29 February 2016).

economic well-being. They deal in signals intelligence and human intelligence. They have counter-espionage duties and intrusive powers.

The GCSB and the NZSIS carry out a range of functions. The GCSB guards the government against cybersecurity threats and intercepts communications for intelligence purposes. The NZSIS vets public servants for security clearances and liaises with overseas intelligence agencies concerning terrorists and persons arriving in New Zealand who may pose a threat. The objectives and functions of both agencies are the same but they use different capabilities to address them. In broad terms the NZSIS "collects intelligence for the purpose of protecting against threats to the state, whether those threats originate from within or outside New Zealand."<sup>54</sup> The GCSB collects foreign intelligence.<sup>55</sup>

These agencies operate secretly for the most part. They conduct surveillance over communications and over people as well. They cannot prosecute people; they are not law enforcement agencies. They are required to act within the law and follow human rights obligations. The agencies must be free from improper influence and be politically neutral. They must not limit freedom of expression in New Zealand. The Leader of the Opposition is regularly briefed on their activities.

The agencies provide intelligence to those who need to know it to facilitate the performance of their functions. That involves cooperation with the Department of the Prime Minister and Cabinet, New Zealand Police, the New Zealand Defence Force, the Ministry of Foreign Affairs and Trade and Customs Service.

Some of the activities of the intelligence agencies are sensitive and intrusive. They require strong supervision and accountability. While there is ministerial responsibility for the activities of the agencies, it is not sufficient. The 2016 review found that more checks and balances were required.<sup>56</sup> The review of the legislation required by the statute is underway at the time of writing.<sup>57</sup>

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54 At [5.5].

55 At [5.8].

56 At [4.11] and [4.12].

57 Intelligence and Security Act 2017, s 235. The review currently underway is aimed at determining whether improvements should be made and to consider the recommendations and issues arising from the Royal Commission report on the 2019 Christchurch mosque shootings. The chair is Sir Terence Arnold, and its time for reporting was extended from September to 2023. There was an opportunity for public participation and submissions. See Ministry of Justice "Review of the Intelligence and Security Act 2017: Terms of Reference" (1 August 2022) <[www.justice.govt.nz](http://www.justice.govt.nz)>. The report was completed at the end of 2022 and published by the Government in May 2023: Terence Arnold and Matanuku Mahuika *Taumarū: Protecting Aotearoa New Zealand as a free, open and democratic society* (Ministry of Justice, 31 January 2023). The report does not engage with the issue raised in this article other than to note that the NZSIS is responsible for the Protective Security Requirements, and that the two streams of information within the public service, classified and unclassified, causes some problems. The precise issue canvassed in the article may have been outside the

The Intelligence and Security Act 2017 contains a set of oversight mechanisms and checks and balances. The legislation must be reviewed periodically.<sup>58</sup> Interception of communications is strictly controlled by the issuing of warrants authorised by judicial commissioners. The Act is superior to anything that went before. Both agencies are now departments of state, a more accountable form of government body than previously. The agencies are now more open and less opaque. A committee of MPs also examines their performance, although it sits in secret. Further, this committee is a creature of statute not of the House of Representatives, as with all other committees—another mark of executive control.

Section 3 of the 2017 Act sets out its purpose:

The purpose of this Act is to protect New Zealand as a free, open, and democratic society by—

- (a) establishing intelligence and security agencies that will effectively contribute to—
  - (i) the protection of New Zealand's national security; and
  - (ii) the international relations and well-being of New Zealand; and
  - (iii) the economic well-being of New Zealand; and
- (b) giving the intelligence and security agencies adequate and appropriate functions, powers, and duties; and
- (c) ensuring that the functions of the intelligence and security agencies are performed—
  - (i) in accordance with New Zealand law and all human rights obligations recognised by New Zealand law; and
  - (ii) with integrity and professionalism; and
  - (iii) in a manner that facilitates effective democratic oversight; and
- (d) ensuring that the powers of the intelligence and security agencies are subject to institutional oversight and appropriate safeguards.

Plainly the responsibilities of the agencies are wide under the new Act, and wider than previously. There has been some scepticism and criticism of the extent of the power conferred by the legislation and the range of activities they can engage in with respect to individuals. One academic critic Damien Rogers, who has a background in intelligence, has reservations about the range of the new legislation in terms that demand attention.<sup>59</sup> Points made include that the Act greatly expands the range of strategic possibilities open to the agencies. They are now charged with duties to advance New

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review's terms of reference. It is submitted that the issue dealt with in this article is a further reason why the existing legislation is not fit for purpose.

58 Section 235 requires periodic reviews at intervals not shorter than five years and not longer than seven years.

59 Damien Rogers "Intelligence and Security Act 2017: A Preliminary Analysis" [2018] NZ L Rev 657.

Zealand's international relations and economic well-being. There are few limits to the expanded reach and depth of the information-gathering power. He argues surveillance is entrenched and has produced a new apparatus of control. There will be much more monitoring of the population and this will cause unease among the public. Much more public scrutiny is required, he contends. Close statutory analysis is required to examine the claims made by Rogers and it will not be undertaken here, the purpose here being the context for the discussion on the PSR that follows.

## ***VI WHAT DOES THE INTELLIGENCE AND SECURITY ACT 2017 SAY ABOUT THE PROTECTIVE SECURITY REQUIREMENTS?***

The short answer is "not much".

Does the Intelligence and Security Act 2017 provide statutory authority for the PSR through the two Crimes Act 1961 sections, ss 78A and 78AA, sufficient to make the non-statutory PSR part of the criminal code? The first point to be made is that the 2017 Act binds the Crown as provided in s 6. That would suggest that the capacity to find extra powers within the prerogative to supplement what is a most extensive statute, and which appears to cover the field, would be an uphill job. And it is tolerably clear the Crown does not rely on the prerogative and cannot.

Second, the machinery relating to the protection of information is extensive and contained in so many sources of a non-legal nature that advising anyone who may be subject to ss 78A and 78AA of the Crimes Act 1961 would be difficult. The concatenations of circumstances that could be involved are infinite, in particular when the vast amount of information that is classified is considered. Improper, irregular or unnecessary classification widens the legal net for criminal liability to unacceptable levels.

Third, it may be regarded as something of a protection that prosecutions for wrongful communication retention or copying of classified information requires the consent of the Attorney-General.

Fourth, the range of people who are caught by the provision are not necessarily all within the employ of the state. They may be contractors or consultants.

Remember, s 78AA resulted from the review of the security and intelligence system, whereas s 78A came into the law by an amendment to the Crimes Act 1961 in 1982, after the repeal of the Official Secrets Act 1951 effected by the enactment of the Official Information Act 1982. We may be heading back in the direction of the old Official Secrets Act.

Section 78AA is different from s 78A in that it defines classified information as material that is or was official information and is "classified under the New Zealand Government Security Classification System as being accessible only to persons who have a national security clearance".

The Act says the "New Zealand Government Security Classification System" is "the security classification system applying to official information that is published (and from time to time amended) on an Internet site maintained by or on behalf of the New Zealand Security Intelligence Service".<sup>60</sup> Thus, the codified system of New Zealand criminal law will apply to a vast amount of classified information, the process for the preparation of which enjoys no legally binding requirements. Had there been statutory requirements provided for the PSR, there would be assurance that whatever was done under its authority was lawful and authorised. A legally transparent system would so provide.<sup>61</sup>

It is unsatisfactory to have a complicated set of instructions about how to handle information that should be kept secure, through a system that can be altered at will. The rules are not tied down and the system contains no legal principles and no processes are mandated by law. How can it be right to subject people who breach a system with those characteristics to heavy penal sanctions?

### **VII THE PROTECTIVE SECURITY REQUIREMENTS THEMSELVES**

On the Internet, there is available a most extensive set of material on the Government's Protective Security Requirements. It covers many pages. The overview booklet covers 30 pages and is also published on the Internet.<sup>62</sup>

The drafting is not at all like statutes or secondary legislation. Yet it follows a prescriptive approach, not a risk-based one. Clearly it has not been drafted by Parliamentary Counsel. It appears to be addressed to the whole of the public service. It sets out what public servants should do to keep

<sup>60</sup> Crimes Act 1961, s 78AA.

<sup>61</sup> Three recent Acts of Parliament relate to these issues. Sections 3 and 4 of the Protected Disclosures (Protection of Whistleblowers) Act 2022 are relevant. Classified information has the same meaning as in s 78AA of the Crimes Act 1961. And classified information is then incorporated in the definition of "intelligence and security information". The inference appears to be that if there is disclosure outside these requirements an offence is committed. This appears to be a back door attempt to rectify the weakness of using material posted on the Internet as a foundation for an offence. There cannot be a code with features at large that can continually change and that are not contained in a statute. The legal architecture is further complicated by two new Acts. The Security Information in Proceedings Act 2022 contains elaborate requirements for a new system for dealing with situations that arise when classified information is in issue in court proceedings. Special advisers are made subject to s 78AA of the Crimes Act 1961. The new regime has a complicated set of transitional arrangements contained in the Security Information in Proceedings (Repeals and Amendments) Act 2022. In April 2023 the intricate statutory regime erected in 2022 is further extensively amended by the Counter-Terrorism Acts (Designations and Control Orders) Amendment Bill that has been reported back and a supplementary order paper of amendments tabled.

<sup>62</sup> New Zealand Government *Overview of Protective Security Requirements: Protecting our people, information, and assets*. See also Government Communications Security Bureau *New Zealand Information Security Manual* (September 2022), published by the GCSB, a very large and technical document of 24 chapters recently revised.

material secure. In the words of the Inspector-General of Intelligence and Security, in a public report she did on the New Zealand Security Classification System, the PSR is "a set of policies on security governance, personnel security, information security and physical security. It sets out a mixture of mandatory requirements and recommended practices".<sup>63</sup>

The 2017 Act has a great deal to say about the protection of information and its distribution and sharing. What it does not specify is the PSR itself, its principles and processes. There are a number of provisions that could be called in aid since much of the Act is designed to protect information. But the absence of provisions about the PSR itself is a bit like playing Hamlet without the Prince. Section 11 provides that it is the function of an intelligence and security agency to provide protective security services, advice and assistance to any public authority, or any person or class of persons authorised by the minister in charge of the agencies. Subsection 3 defines the terms "protective security services, advice, and assistance". Yet these do not provide a justification for breaching the code principle.

As a matter of statutory interpretation, it appears to be an impermissible stretch to say that those provisions or others like them provide authority for the PSR. The Inspector-General reports that the security classification system is applied under the authority of Cabinet.<sup>64</sup> The primary source of policy on classification is the PSR, which was approved by Cabinet in December 2014.<sup>65</sup> These Cabinet decisions are identified in the Inspector-General's report.<sup>66</sup> They were released under the Official Information Act 1982 on 1 August 2018 by the State Services Commission.<sup>67</sup>

From a legal point of view, the fascinating thing about both the Security Manual and the PSR is that neither is law. Cabinet decisions are not law. Law has to be enacted, unless it is common law that is made by the judges or secondary legislation made by the executive and authorised by an Act of Parliament. The 2017 Act appears to have no general provisions allowing for the making of regulations. The State Services Commission stated in a note accompanying the Official Information Act 1982 release that while controls could be made binding, that has not occurred.<sup>68</sup>

The Inspector-General's report states that:<sup>69</sup>

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63 Cheryl Gwyn *A review of the New Zealand Security Classification System* (Office of the Inspector-General of Intelligence and Security, August 2018) at 8–9.

64 At [26].

65 At [27].

66 At [26], n 22, and [27], n 23.

67 State Services Commission *Official Information Request* (SSC2018/0115, 1 August 2018). See also Government Communications Security Bureau, above n 62. The NZSIS is responsible for the PSR.

68 State Services Commission, above n 67.

69 Gwyn, above n 63, at [28].

One of the mandatory requirements for information security is that agencies must implement policies and protocols for the protective marking and handling of information in accordance with the PSR, New Zealand Government Security Classification System (GSCS), and the New Zealand Information Security Manual.

Both manuals are available on the Internet.<sup>70</sup>

The notion that domestic law does not need to reflect or authorise the system of classification is long-standing. The Danks Committee in its second report analysed the issues in some depth.<sup>71</sup> It seems that the issues relating to the PSR were first raised but not resolved in the Powles report, arising out of the Sutch case discussed later.<sup>72</sup> The Committee described security classifications as an administrative device.<sup>73</sup> And it had been in use since 1951. It does not appear in legislation and the Committee did not recommend that it should.<sup>74</sup> The Danks Committee said:<sup>75</sup>

We propose that these prescriptions be promulgated by executive decision as they have been in the past. We do not see it as appropriate to enshrine them in legislative form: there need be no obligation in terms of domestic law to classify, and no penalty for not doing so.

Sanctions should revolve around the sensitivity of the information and the consequences of its disclosure. Thus, it was that the Committee recommended a measure similar to what is now s 78A of the Crimes Act 1961, in effect in substitution for the provisions of the Official Secrets Act 1951 that it successfully recommended be repealed. The extended provision was inserted in 2017 to sit alongside the 1982 amendment, yet it takes things further. It seems difficult to sustain what has been done if the principle of codification is taken seriously.

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70 See Government Communications Security Bureau "New Zealand Information Security Manual" (September 2022) <[www.nzism.gcsb.govt.nz](http://www.nzism.gcsb.govt.nz)>.

71 Committee on Official Information, above n 4, at 39.

72 NZSIS "Release of selected Sutch Papers and Sir Guy Powles' top secret report 2" (media release, 6 June 2008); Helen Clark "NZSIS releases historical Sutch papers" (media release, 6 June 2008); and *Security Intelligence Service: Report by Chief Ombudsman* (PD Hasselberg Government Printer, 16 July 1976) [Powles report].

73 Committee on Official Information, above n 4, at [5.05].

74 At [5.11].

75 At [5.11].

Some further enlightenment is available from the departmental report on the New Zealand Intelligence and Security Bill to the Foreign Affairs, Defence and Trade Committee of the House.<sup>76</sup> It makes no reference to the Danks Committee report, which was clearly relevant to the new policy.

The report describes s 78 AA as a mirror to s 78A.<sup>77</sup> It stated there was a gap in the suite of espionage offences in the Crimes Act 1961.<sup>78</sup> The gap occurs at the low end. Specific intent to prejudice the security or defence of New Zealand in s 78 and in s 78A deals with wrongful communication, retention or copying of official information, where the acts are likely to prejudice the security or defence of New Zealand. The report notes there is nothing aimed simply at the protection of classified information by those entrusted with it:<sup>79</sup>

The new offence is focused on the breach of trust that improperly disclosing classified information involves (noting that proper channels for raising concerns are included in the Protected Disclosures Act 2000 ...). Unlike section 78A, the likely impact of the breach is irrelevant; the harmful conduct being targeted is the failure to comply with the requirements implicit in the granting of a national security clearance.

The justification for extending the range of the offences is not extensively argued in the report and it seems rather unsatisfactory. The justification is that it applies only to information classified "Confidential" or higher. And it applies only to a person who holds a national security clearance or who otherwise owes a special obligation of confidence in respect of that information. Those limitations are desirable, but do not provide an answer to the main point, namely that the codification principle is breached. That principle is never engaged with. The report argues that the classification system itself can be used because the offence is about the fact that a person has been vetted and given a security clearance, and that is sufficient to constitute an offence. This seems dubious in principle.

New Zealand has a codified system of criminal law. In relation to material classified under the PSR there is no statutory process for classifying, declassifying and managing security information. It is subject to government decisions published on the Internet and can be amended the same way. This is in breach of the principles traditionally used in New Zealand to make the criminal law. It means the precise content of the law to be applied in a criminal case is neither clear nor accessible. What is lacking here is a fixed starting point for what the law is. It is not good enough to say the PSR is what

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76 Department of the Prime Minister and Cabinet *New Zealand Intelligence and Security Bill: Departmental Report to the Foreign Affairs, Defence and Trade Committee from the Department of the Prime Minister and Cabinet* (December 2016) at 228–231.

77 At [1241].

78 At [1245].

79 At [1245]. There is a reference to the security classification of documents in Cabinet Office *Cabinet Manual 2023* at [8.7] and [8.46]. But the Cabinet Manual is no more law than are documents posted on the Internet.

a Cabinet decision says it is. That is an affront to Parliament, perpetuated by the executive government.

The law is neither precise nor clear. And it is not easily accessible on the face of the statute. Section 11 of the Intelligence and Security Act 2017 lays down that it is the function of an intelligence and security agency to provide protective security services, advice and assistance to any public authority or any person or class of persons authorised by the minister responsible for the agencies. Subsection 3 defines protective security services and advice and assistance, including "services and advice relating to the developing and implementing of protective security arrangements" for a number of purposes. But the definition does not provide authority for the PSR.

The 2017 statute is clearly deficient. The legislation contains reference to important democratic values, but underneath, because the critical tests remain legally undefined, it leaves matters at large. That makes legal accountability more difficult, if not impossible. It opens the gates of criminal liability and may easily produce injustice.

In constitutional terms, the situation demonstrates serious failure of a type likely to occur in a legislature with one chamber. Parliamentary scrutiny has failed. The policy of Parliament on the codification issue has been by default to the effect that the executive can do what it likes in this field. Parliament has made no law. There can be few more egregious examples of executive power. It is a further demonstration that the House of Representatives in New Zealand is weak and the executive is strong. For example, the executive could decide to classify as secret the number of cups of tea drunk by public servants and any release of the information would be punishable in the view of the executive. Since vast amounts of material remain classified in New Zealand, despite the fact that the need for protection has long passed, it can be seen what an anomaly this is. A parade of further horrible examples is not necessary.

Fortunately, this is a defect with a relatively simple remedy. The interest of the liberty of the subject can be fixed by relatively brief amendments to the Official Information Act 1982, creating a new Part and placing the PSR on a legally defined footing, with proper systems laid down by law and a commitment to continuous declassification in order to reduce the legal peril from the disclosure of stale material that can no longer do harm.

### ***VIII ROYAL PREROGATIVE AND THIRD SOURCE NOT AVAILABLE***

The royal prerogative sits heavily on this field. It is important to dispel the notion that it can be used to repair the weakness analysed here. The history is that before the agencies needed to have specific legal power to do things that were otherwise outside the law, they could function perhaps under the royal prerogative or just because they were not breaking the law. It is plain from the authorities that an elaborate statute, such as the Intelligence and Security Act 2017, may occupy the field and leave

no room for the prerogative.<sup>80</sup> New prerogatives cannot be created by either the courts or the executive.<sup>81</sup> As Coke CJ told James I, the King had only those prerogatives that the law of the land allowed and it was for the judges to determine their existence and scope.<sup>82</sup>

Further, domestic law cannot be altered by the prerogative alone.<sup>83</sup> As Sir Swinfen Eady MR observed in the Court of Appeal in the *De Keyser's* case, as approved by the Lord Atkinson in the House of Lords:<sup>84</sup>

Where, however, Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?

Further, the New Zealand Bill of Rights Act 1990 makes it clear in s 27 that judicial review of prerogative powers can be undertaken.<sup>85</sup> The prerogative cannot be exercised in a way that derogates from statutory duties. The duty is to enact the content of the criminal law with clarity and certainty.<sup>86</sup>

Reliance on the prerogative has been dying gradually as the sweep of reform and human rights issues in public law have increased challenges to its exercise.<sup>87</sup> The third source of residual executive power will not be available to the Crown here if the prerogative is not. The so-called "third source", of which there has been qualified acceptance in New Zealand,<sup>88</sup> argues that a government has a degree of residual freedom to undertake any action not prohibited, although it has not been authorised.<sup>89</sup> In

80 *Quake Outcasts v Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd* [2015] NZSC 27, [2016] 1 NZLR 1; and *Attorney-General v De Keyser's Hotel Ltd* [1920] AC 508 (HL).

81 Bruce Harris *New Zealand Constitution: An Analysis in Terms of Principles* (Thomson Reuters, Wellington, 2018) at 150.

82 *Case of Proclamations* (1610) 12 Co Rep 74, 77 ER 1352 (KB), affirmed in *Regina v (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373.

83 *Regina (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.

84 *De Keyser's Royal Hotel Ltd v The King* [1919] 2 Ch 197 (CA) at 216. See also *De Keyser's*, above n 80, at 538.

85 PA Joseph *Laws of New Zealand Constitutional Law: The Royal Prerogative* (online ed) at [149].

86 *Regina v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513 (HL).

87 AW Bradley, KD Ewing and CJS Knight *Constitutional and Administrative Law* (17th ed, Pearson Education, Harlow, 2018) at 274. See also *Halsbury's Laws of England* (2014) vol 20 Constitutional and Administrative Law at [167].

88 Harris, above n 81, at 158.

89 Bruce Harris "The 'Third Source' of Authority for Government Action" (1992) 108 LQR 626; and Harris, above n 81, at 154–161.

English law, the Ram Doctrine teaches that ministers may have some freedom to act in the absence of a specific statutory power or the prerogative.<sup>90</sup> It is made clear the doctrine can only be exercised when it does not infringe any other person's existing legal rights. So, the right to a codified criminal law trumps it. Further, the doctrine cannot apply to any statutory public authority. Professor Harris agrees the third source cannot "override competing justiciable legal rights".<sup>91</sup> The courts would have to decide to confer the discretion. It is not persuasive in the context of a codified criminal law to say the authority for the PSR can be derived from the 2017 statute. It also cannot override existing positive law—that is the say of the provisions in the Crimes Act 1961, ss 5 and 9.

### ***IX WHAT ABOUT THE INSPECTOR-GENERAL'S REPORT?***

The New Zealand Security Classification System sits within the PSR and the Information Management Protocol, according to the Inspector-General's report.<sup>92</sup> The heart of the system is the obligation to protect documents, and to specify how people must protect them and who is eligible to read them. For National Security Information, the system of classification is as follows:

- (a) Restricted;
- (b) Confidential;
- (c) Secret; and
- (d) Top Secret.

Section 78AA is directed to protecting classified information. The Inspector-General reviewing the classification system in her August 2018 report found the situation in relation to classification unsatisfactory to say the least. She found it was ripe for reform and needed to be reformed. Among the issues she identified were:

- (a) the harmful effects of over-classification;<sup>93</sup>
- (b) an inherent systems bias toward over-classification;<sup>94</sup>
- (c) the waste of public funds in high levels of classification involving expense and storage expense;<sup>95</sup> and
- (d) the unnecessary restrictions on material that should be on the public record.<sup>96</sup>

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90 David Feldman (ed) *English Public Law* (Oxford University Press, Oxford, 2004) at [3.119]–[3.120].

91 Harris, above n 81, at 154.

92 Gwyn, above n 63, at [28].

93 At [106].

94 At [106].

95 At [107].

96 At [107].

The restricted classification was brought back in late 2000 after its abolition following the report of the Danks committee. The Inspector-General's recommendations from the report are extensive and designed to simplify the system:<sup>97</sup>

- (a) abandon the distinction between national security and the policy/privacy classifications as an organising principle;
- (b) organise the classification around the distinction between high side information systems (highly secure, non-Internet facing) and the low side classification, "Protected". Thus, six classifications would be reduced to three: "Secret", "Top Secret" and "Protected".
- (c) the Department of the Prime Minister and Cabinet should be the owner of the classification system and the leader of any change. In other words, not the intelligence agencies; and
- (d) devise a system of declassification supervised by a multi-agency group.

The key point in the report that impinges on the present analysis is that the Inspector-General found the systematic declassification programmes of agencies "modest, meagre or non-existent".<sup>98</sup> She recommended a new topic-based approach, supervised by a multi-agency group of officials.<sup>99</sup> The continuing situation of over-classification and inactive review poses serious issues for criminal law enforcement. The report has yet to be adopted.

The report of the Government Inquiry into Operation Burnham made some observations on the amount of secrecy and problems relating to classification:<sup>100</sup>

Each of us has, in our past professional lives, been involved in the public sector, including in relation to classified material. Indeed, one of us has held the positions of Prime Minister, Deputy Prime Minister, Minister of Justice and Attorney-General. Each of us has been astonished at how the classification system has grown since the time of our work in the public sector. One measure of this is the proliferation of facilities to handle classified material.

Extensive classification of information in the public sector is costly in financial terms, given its surrounding apparatus of facilities, clearance processes and the like. More importantly though, it has the potential to cut across — and significantly undermine — the freedom of information regime that New Zealand adopted in 1982 in the Official Information Act. When the Inspector-General of Intelligence and Security reviewed the New Zealand Security Classification System in 2018, she made the point that classification systems have an "inherent bias towards over-classification", noting that "security bureaucracies give officials powerful reasons to over-classify and little or no reason to avoid or challenge

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97 At 54.

98 At [252].

99 At [249].

100 Terence Arnold and Geoffrey Palmer *Report of the Government Inquiry into Operation Burnham* (July 2020) at [84]–[85] (footnotes omitted).

over-classification." She described several harmful effects of this, notably that "[p]ublic access to official information, including the historical record, is excessively restricted." Our experience on this Inquiry is consistent with the Inspector-General's views.

## ***X LEGALITY, HUMAN RIGHTS AND THE AGENCIES***

Some wider policy considerations should be brought to bear on the general context in which the expanded intelligence agencies now work. The history is not one that inspires confidence that legal requirements will be met or that the values of an open society will be adequately protected. Public attention to the intelligence agencies over the years has been relatively frequent and often controversial. That context needs to be understood in assessing the central issues advanced in this article concerning the PSR. The issue with the PSR can be fixed relatively easily. The wider issues, however, are not so simple.

The levels of expenditure for the agencies have increased steeply over the last decade or more and they are now both large with increased numbers of staff and extended responsibilities. Accountability is accordingly more complicated. Budget 2022/23 contained significant expenditure initiatives for the GCSB and the NZSIS.<sup>101</sup> Both agencies appear to share in the initiatives. For the GCSB, the initiative was for maintaining and enhancing cyber security.<sup>102</sup> The investment was to enhance protections against cyberattacks. The new appropriation amounted to \$18.9 million over four years, although big appropriations for the previous year had been significantly under-spent. The second initiative aims at meeting and extending counter-terrorism and financing the recommendations of the Royal Commission arising out of the terror attacks at the Christchurch mosques.<sup>103</sup> The new expenditure totals \$12.6 million dollars. The 2022/23 appropriation and capital injections for each agency are: \$234,470,000 for the GCSB; and \$108,702,000 for the NZSIS.<sup>104</sup> It should be noted that intelligence and security departments each administer one aggregated appropriation for both expenses and capital expenditure.

The calls for increased accountability and transparency have resulted in numerous official reviews, reports, inquiries and public comments.<sup>105</sup> Included in such events where the activities of the agencies and those who investigate them have been at issue are as follows:

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101 "Summary of Initiatives" in The Treasury *Budget 2022* (19 May 2022) 85 at 98.

102 At 98.

103 At 98.

104 At 98.

105 Damien Rogers and Shaun Mawdsley "Restoring Public Trust and Confidence in New Zealand's Intelligence Agencies: is a parliamentary commissioner for security the missing key?" (2022) 18(1) *Policy Quarterly* 59 contains a helpful review of some issues of public concern that have arisen over the years. There is also Nicky Hager *Secret Power* (Craig Potton Publishing, Nelson, 1996).

- The methods of surveillance used by the Special Branch of the Police before the formation of the NZSIS appear to have been primitive, incompetent and unfair, causing lasting damage to the lives of those who were subject to surveillance. Nicola Saker, in an article in *North & South*, demonstrates how a group of friends ended up being subject to life-long surveillance in circumstances that clearly amounted to constitutional impropriety and an abuse of power that seriously damaged the careers of some of them.<sup>106</sup>
- The trial in 1975 of Dr William Ball Sutch, a retired public servant and diplomat.<sup>107</sup> He was charged under s 3 of the Official Secrets Act 1951. The New Zealand Security Intelligence Service Act 1969 in its definition section characterised as "espionage" any breach of the Official Secrets Act 1951. He was acquitted by a jury.
- A 1976 report by the Chief Ombudsman Sir Guy Powles that the NZSIS had exceeded its powers in the investigation of Dr Sutch.<sup>108</sup> It had entered his office at night, installed a listening device and tapped his telephone, actions it was not then lawfully allowed to undertake.
- Operation Eight was the result of an investigation by police of a group of people engaged in allegedly military style activities (which included the use of firearms) in Te Urewera. The investigation lasted 18 months and led the Police Commissioner to believe that the threat to public safety justified bringing charges under the Terrorism Suppression Act 2002. The police had received intelligence from the NZSIS.<sup>109</sup> The police surveillance operation was conducted in 2008–2009.
- The inquiry into the GCSB's unlawful surveillance of Kim Dotcom in 2012 that led to findings that the GCSB had serious shortcomings in its performance. The inquiry was conducted by Rebecca Kitteridge, then the Secretary of Cabinet, now the Director of the NZSIS. It was caused by the discovery in 2012 of an unlawful intercept. The review found serious failings in many important respects at the Bureau and made 80 recommendations for change. These appear to have been implemented and what was found indicated the administration was problematic.<sup>110</sup>
- In 2015, Clifford J decided that a search warrant issued by the District Court in September 2014, allowing the police to search the home of Nicky Hager, an investigative journalist with

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106 Nicola Saker "The Forever Files" *North & South* (online ed, New Zealand, May 2022).

107 *R v Sutch* [1975] 2 NZLR 1 (SC).

108 Powles report, above n 72.

109 Two extensive and adverse reports on police, the legality of police actions and the breaches of human rights were conducted by the Independent Police Conduct Authority and the Human Rights Commission: Human Rights Commission *Operation Eight: A human rights analysis* (December 2013); and Independent Police Conduct Authority *Report on Operation Eight* (May 2013).

110 Rebecca Kitteridge *Review of Compliance at the Government Communications Security Bureau* (March 2013).

special interests in the intelligence agencies, the military, police, integrity in government, transparency, freedom of information and respect for human rights, was unlawful.<sup>111</sup> Hager had written the book *Dirty Politics*. It relied on what was allegedly hacked information, which he had been provided from the website of the blogger Cameron Slater. Hager was intent on protecting his journalistic sources. In a lengthy judgment, the Judge held the warrant was fundamentally unlawful. And the fundamental failure by the police to disclose relevant information was also unlawful. In 2018, it was reported that the police had paid damages for the breach of Hager's rights.<sup>112</sup>

- The terrorist attack in Christchurch resulting in the death and injury of many Muslims at worship in two mosques. This led to a Royal Commission that made important recommendations in 2020 about the performance of the intelligence agencies in respect of those matters.<sup>113</sup> The Government accepted all recommendations in principle. That will require changes in the agencies. The most significant recommendation was the creation of a new national intelligence and security agency that is now being considered by the Department of the Prime Minister and Cabinet. The current cross-agency governance and leadership arrangements were found not to be working. There was no minister responsible and accountable for counter-terrorism. The establishment of a new national intelligence and security agency with its roles and functions set out in new legislation was recommended.<sup>114</sup> The recommended change would provide much better accountability than exists currently.

The point is that despite the comprehensive review of the intelligence agencies resulting in the 2017 Act, the situation is not stable. More changes must be made. The agencies remain under continuing public scrutiny and pressure to meet demands for greater transparency and public engagement. The record has blemishes and New Zealand needs to do better.

The security intelligence services and their legal architecture have grown exponentially in size, influence and functions in a relatively short time, since the NZSIS was formally established in 1956.<sup>115</sup> Up until then, a Special Branch of the Police carried out many of the functions. There was no legislation establishing or regulating the security agencies until 1969, when the New Zealand Security Intelligence Service Act 1969 was passed. The first Act was a rudimentary affair of only 24

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111 *Hager v Attorney-General* [2015] NZHC 3268, [2016] 2 NZLR 523.

112 David Fisher "Police pay Nicky Hager 'substantial damages' for unlawful search of his home in hunt for Dirty Politics Hacker" *New Zealand Herald* (online ed, New Zealand, 12 June 2018).

113 *Ko tō tatou kāinga tēnei: Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (December 2020).

114 At 731.

115 Department of the Prime Minister and Cabinet *Securing our Nation's Safety: How New Zealand manages its security and intelligence agencies* (1 December 2000).

sections, yet it attracted considerable controversy.<sup>116</sup> There was adverse publicity for the service, marches and demonstrations, with some unfortunate statements from the Director, Brigadier Gilbert. The GCSB has its origin in signals intelligence in the Second World War and was run out of the Defence Force to begin with.

Later, terrorism events overseas created more activities for the security agencies, and the attacks on the Twin Towers in New York and the Pentagon on 11 September 2001 led to the passage of the Terrorism Suppression Act 2002. That Act has had its own complications; it was used unsuccessfully in Operation Eight. The Solicitor-General did not approve the prosecution, as was required under the 2002 Act.<sup>117</sup> There can be little doubt that the threats to security have increased since 1956, and the legislation, the size of the agencies and their range of activities have expanded to try and meet the threats.

New Zealand is a member of the Five Eyes, an intelligence arrangement comprising Australia, Canada, New Zealand, the United Kingdom and the United States.<sup>118</sup> There exists a multilateral agreement for cooperation in signals intelligence.<sup>119</sup> New Zealand is the smallest and least powerful member but secures a great deal of useful information to guard against terror threats that may occur here. It has been said that New Zealand contributes three pieces of intelligence to the partners compared with every 100 it receives. It would not be wise to disturb those arrangements because New Zealand by itself lacks the resources to analyse all the international risks. It should be noted that the Hon Andrew Little has made it clear that New Zealand pulls its weight in the Five Eyes system.<sup>120</sup> Based on my own ministerial experience with the agencies and as a member of the inquiry into Operation Burnham, I believe it is clear the agencies do essential work in the public interest. The case for retaining them is overwhelming. The law, however, needs to be fit for purpose.

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116 Les H Atkins "The Parliamentary Process and the New Zealand Security Intelligence Service: The Passage of the Security Intelligence Service Act 1969" in Stephen Levine (ed) *New Zealand Politics: A Reader* (Cheshire Publishing, Melbourne, 1975) 384.

117 David Collins "Media Statement: Solicitor-General – Decision of the Solicitor-General in Relation to the Prosecution of People under the Terrorism Suppression Act 2002 ('Operation 8')" (press release, 8 November 2007).

118 Parliamentary Service *Oversight of Intelligence Agencies: A Comparison of the 'Five Eyes' Nations* (Parliamentary Library Research Paper 2017/05, December 2017).

119 Government Communications Security Bureau "UKUSA partners" <[www.gcsb.govt.nz](http://www.gcsb.govt.nz)>. This is the agreement for signals intelligence known as the "Five Eyes".

120 Andrew Little, Minister Responsible for the GCSB and NZSIS "Intelligence and Security in our changing World" (speech to Victoria University of Wellington, Centre for Strategic Studies, Wellington, 4 November 2021).

In 2017, Rebecca Kitteridge, Director-General of Security of the NZSIS, explained how the approach had changed and in particular how the "social contract" with the community had changed.<sup>121</sup> The complete speech is worthy of close attention. In 2021, the Hon Andrew Little, the Minister responsible for NZSIS and the GCSB, as well as the coordinating Minister for the Government's response to the Royal Commission's report on the terrorist attack in Christchurch, made a long and detailed speech outlining the approaches that were now being taken.<sup>122</sup> It advanced matters beyond the Kitteridge speech. It called for a robust and mature conversation on national security. It argued for a broad approach to threats to physical and economic security, and social institutions against forces that would do New Zealand harm. The threats are both foreign and domestic. He listed some of the successes the agencies had achieved:<sup>123</sup>

- Security intelligence investigations have seen potential terrorists identified and imprisoned or put on a different path.
- Intelligence collected by our agencies have disrupted terrorist attack planning overseas.
- International drug smuggling syndicates have been busted for trafficking drugs with the help of signals intelligence.
- The activities of an individual with links to a foreign intelligence agency and who was covertly attempting to form relationships with New Zealanders holding senior and influential positions were disrupted.
- People have been removed from trusted positions based on intelligence of the proven insider threat they posed.
- Serious harm to strategically significant organisations in New Zealand has been averted because of the CORTEX malware detection and disruption service.
- And ... some of New Zealand's most valuable intellectual property has been protected because of the security best practices the agencies have helped other organisations to implement.

To avoid harms, the threats must be evaluated, stated the Minister. Relationships with trusted partners are essential. In the New Zealand context, social cohesion was stressed by the Minister as an essential ingredient: "societies that are polarised around political, social, cultural, environmental, economic, ethnic or religious differences will more likely see radicalising ideologies develop and flourish".<sup>124</sup>

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121 Rebecca Kitteridge "Letting in the Light – Increasing Transparency in the New Zealand Intelligence Community" (speech to Transparency International NZ AGM, Wellington, 30 October 2017) at 4.

122 Little, above n 120.

123 Little, above n 120.

124 Little, above n 120.

The Government's key objectives were set out by the Minister. The Minister also articulated the Government's National Security and Intelligence Priorities that go beyond counter-terrorism and include dealing with:<sup>125</sup>

- foreign interference and espionage;
- protecting the country's information and information systems from cyber attacks;
- providing support to military operations;
- geostrategic competition, including in our own region; and
- the pandemic response.

Significant change and developments of the intelligence system are on the way, notwithstanding the 2017 legislation.

## ***XI THE RISKS TO AN OPEN SOCIETY***

There are inherent contradictions between the values of an open and democratic society and the activities of the agencies. As the Second World War recedes from memory, it is useful to reflect on the values articulated by the defenders of openness. One of the best scholarly defences of the open society was written by Viennese scholar Karl R Popper at Canterbury University College during the Second World War, where he had fled on account of the rise of the Nazis.

Ancient Greece, as the birthplace of Western democracy, Popper believed was the beginning "of the transition from the closed to the open society".<sup>126</sup> The breakdown of the old order was caused by the rise in sea communications. Two famous philosophers, Plato and his student Aristotle, developed dramatically different views. Plato believed that the ideal political community would be governed by a meritocratic system, where leaders are selected based on merit. For Plato, merit was defined as possessing and being driven by wisdom, or a "love of learning and philosophy", and hence his ideal political community would be governed essentially by "philosopher kings".<sup>127</sup> These leaders would be carefully educated and brought up so that they would be wise, objective and personally disinterested and would work together to serve the greater good of the collective. Plato believed that "uneducated people who have no experience of true reality will never adequately govern a city". His basic premise was that the wisest and most educated people should be those making decisions.

Aristotle was unconvinced by the idealism of Plato's state. It is one thing to say that the state should strive to produce a just and harmonious society and another thing entirely to provide measures

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125 Little, above n 120.

126 Karl R Popper *The Open Society and its Enemies: The Spell of Plato* (Harper and Row, New York, 1963) at 175. The book was first published in the United Kingdom in 1945. It was in two volumes. The second volume is entitled *Hegel, Marx and the Aftermath*.

127 Plato *The Republic of Plato* (FM Cornford (translator and ed), Clarendon Press, Oxford, 1955). Compare with Aristotle *The Politics of Aristotle* (Ernest Barker (translator), Clarendon Press, Oxford, 1957).

that make it happen. Plato's idealism provides very few safeguards to combat the fickleness of human nature. Aristotle thought that politics should be studied as a science. Theory was only one aspect—the mechanisms by which power was exercised were of predominant importance to Aristotle.

Popper argued that Plato was in favour of totalitarianism, a closed society. The tribe is everything and the individual nothing.<sup>128</sup> The rise of civilisation, he said, is a response to the breakdown of a closed society. "The new faith of the open society, the faith in man, in egalitarian justice, and in human reason, was perhaps beginning to take shape".<sup>129</sup> The rise of philosophy, he argued, was a response to the the breakdown of a closed society and its "magical powers":<sup>130</sup>

The more we try to return to the heroic age of tribalism, the more surely do we arrive at the Inquisition, at the Secret Police, and at a romanticized gangsterism. Beginning with the oppression of reason and truth, we must end with the most brutal and violent destruction of all that is human.

Marx was wrong; it is not possible to predict the future from looking at history.<sup>131</sup> Thinking about intelligence operations, secrecy and surveillance, where do the justifiable limits of intrusion upon an open society stop? How should the balance be drawn? Democracy is a fragile form of government. It is easily lost and can degenerate into oligarchy.

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128 Popper, above n 126, at 170.

129 At 188.

130 At 200.

131 Karl Popper *The Poverty of Historicism* (Routledge Classics, London, 1957).