Search and Surveillance Bill

45—1

Interim report of the Justice and Electoral Committee

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Search and Surveillance Bill

Recommendation

The Justice and Electoral Committee is considering the Search and Surveillance Bill and recommends that the House take note of its interim report.

Introduction

The purpose of the bill is to reform the laws relating to search and surveillance powers, to provide a coherent and consistent framework for the search and surveillance powers that can be exercised by the police and by non-police enforcement officers. The bill is intended to clarify the nature and scope of search and surveillance powers, to make them more comprehensible and accessible for those exercising them and for those who are subject to them.

The bill is largely based on a review undertaken by the Law Commission into search and surveillance powers, which culminated in a report published in June 2007. The report made 300 recommendations to clarify, rationalise, and codify the present law's search and surveillance powers for law enforcement agencies. The bill affects a number of enforcement agencies, including the police, and if enacted will make changes to a large number of existing Acts. The bill is also intended to regulate search and surveillance powers arising from new technologies which are in some instances currently unregulated. Because of the complexity and wide scope of the bill, we intend to release the departmental report and other supporting material after making this interim report, and to call for further written submissions. The main amendments that we are considering are summarised below.

Structure of the bill

The bill would amend 69 other Acts. We think the bill could be structured more clearly, in order to make it more accessible and help New Zealanders to determine which powers do and do not apply to non-police State agencies. We are considering recommending the bill be amended to clarify how Part 3 (surveillance devices, residual warrants, and production orders) and Part 4 (search and inspection powers) apply to powers conferred under other Acts.

Recognition of human rights

We are considering recommending the addition of a purpose clause to clarify the relationship between the bill and the New Zealand Bill of Rights Act 1990. We believe it is important to ensure that law enforcement agencies' powers are balanced by a recognition of established human rights legislation.

Examination orders

The bill as introduced makes provision for examination orders against people in relation to the committing of any imprisonable offence. Concern has been raised that the orders would be too easy to obtain. We are considering recommending a number of amendments to raise the threshold and strengthen monitoring requirements for examination orders. They would result in

- raising the threshold for applications in the business context to offences carrying a maximum sentence of at least five years' imprisonment, clause 32(a)
- raising the threshold for applications involving serious or complex fraud in a non-business context to offences carrying a maximum sentence of at least seven years' imprisonment, clause 34(a)(i))
- aligning the definition of an "organised criminal group" in clause 34(a)(ii) with that in the Crimes Act 1961, which is narrower
- restricting the making of examination order applications to police officers holding the rank of Inspector or higher
- restricting the approval of the making of examination order applications to police officers holding the rank of District Commander or higher
- restricting who can make an examination order to a judge
- imposing reporting regimes on police officers questioning people under examination orders and through the Police's annual report to Parliament.

Reporting requirements

Clauses 162–164 set out a number of reporting requirements for agencies using the powers in the bill. These are intended to help both Parliament and the relevant agencies to assess whether the powers are being used appropriately and providing useful information for the purposes of law enforcement. Concern has been expressed about the feasibility of some of these requirements. We are considering recommending a number of amendments to ensure that reporting requirements are realistic. These proposals include amending

- clause 163(1)(c), to simplify reporting of the use of warrantless surveillance devices, so that the report need only specify the numbers of times each type of surveillance device was used for fewer than 24 hours, between 24 and 48 hours, or between 48 and 72 hours
- clause 164(f), to require less specific reporting of the nature of a device, technique, procedure, or an activity authorised by a residual warrant
- clauses 163(1)(e) and 164(h), to remove the requirement to report the number of occasions that criminal proceedings are not brought within 90 days of the use of a surveillance device or the exercising of a residual warrant
- clauses 163(1)(d) and 164(g), to make it clear what must be reported as to how information obtained through warrantless searches or the use of surveillance powers contributed towards laying charges

- confining the warrantless powers which police are required to report on to those set out in Part 2 and Part 3 of the bill.

Surveillance device regime

We are aware of concerns about powers the bill proposes for the use of surveillance devices, particularly regarding surveillance carried out by entering private property and using audio recording devices. We also recognise concern about agencies other than the Police conducting surveillance operations. We are considering recommending a number of changes to the surveillance device regime:

- restricting the use of audio surveillance to agencies authorised by Order in Council, on the recommendation of the Minister of Justice following consultation with the Minister of Police, and deemed to have the appropriate technical ability and processes
- restricting audio surveillance to the investigation of offences punishable by seven years' imprisonment or more or offences under the Arms Act 1983 (namely offences under sections 44, 45, 50, 51, 54, and 55)
- restricting surveillance (other than the use of tracking devices) which requires entering private property to the investigation of offences punishable by seven years' imprisonment or more
- restricting the use of visual surveillance which requires entering private property to the investigation of offences punishable by seven years' imprisonment or more or offences under the Arms Act 1983 (namely offences under sections 44, 45, 50, 51, 54, and 55)
- restricting the use of visual surveillance which requires entering private property to agencies authorised by Order in Council, on the recommendation of the Minister of Justice following consultation with the Minister of Police, and deemed to have the appropriate technical ability and processes
- requiring the destruction of raw surveillance data which does not constitute evidential material and does not have any investigative value.

Residual warrants

We are concerned that the residual warrant provisions may be unclear and too wide-ranging. Concern was raised that the regime would create a category of surveillance techniques that are not subject to regulation. We are considering recommending that the bill be amended to clarify and replace the residual warrant regime with a declaratory order regime with a narrower purpose.

Issuing officers

As introduced the bill allows the Attorney-General to authorise "any person" to act as an issuing officer of warrants. We are concerned that this might allow enforcement officers to be authorised as issuing officers, which would remove independent oversight from the issuing of warrants. Independent oversight is the main protection that the warrant system is intended to provide. We are considering recommending that clause 106(1) be changed to ensure that issuing officers cannot also be employees of enforcement agencies.

Detention of persons

Clauses 114, 110(d), and 108(d) would allow any person carrying out a search, both with or without a search warrant, to detain any person already present at or who may arrive at the scene while the search is in progress. The detention is limited to what is considered reasonable and/or for the duration of the search. We are aware of concerns that this power might be unreasonable when applied by regulatory agencies exercising search powers. We are considering whether to recommend placing limitations on the power to detain people while executing a search warrant.

Appendix A

Committee procedure

The Search and Surveillance Bill was referred to us on 4 August 2009. The closing date for submissions was 18 September 2009. We received and considered 48 submissions from interested groups and individuals. We heard 24 submissions.

We received advice from the Ministry of Justice and the Law Commission.

Committee members

Chester Borrows (Chairperson)
Jacinda Ardern
Kanwaljit Singh Bakshi
Simon Bridges
Dr Kennedy Graham
Hekia Parata
Hon David Parker
Lynne Pillay
Paul Quinn

Appendix B

Law Commission advice on general provisions relating to the exercise of search and inspection powers

Subpart/provision	Comparison with current law
Subpart 1 – Consent searches	
Sets out rules about the circumstances in which consent to search may be sought and manner in which consent is given	No new power. Significant restriction of current law where no such parameters exist.
Subpart 2 – Search warrants	
Sets out rules relating to applications for and issue of search warrants.	No new power. Procedural in nature only.
Subpart 3 – Carrying out search powers	
Section 107 – application of subpart 3	No power conferred.
Section 108 – how search powers are exercised	Apart from (d), (i) and (j) these things probably apply to all agencies already. (d) and requires further restriction. (i) and (j) probably apply to most agencies and if they do not it is more likely an accident of drafting than a deliberate policy choice.
Section 109 – permits seizure of items of uncertain status	Not new. Almost certainly permitted now (e.g. Police taking of forensic samples for testing). Alternative would be more intrusive.
Section 110 – powers of assistants	Not new apart from (2)(d), (2)(h) and (2)(i) – these correspond to section 108(d), (i) and (j) which apply in relation to the person carrying out the search.
Section 111 – limitations on the exercise of powers under sections 108 and 110	No power conferred. Rather, spells out how powers may be limited.
Section 112 – securing the place, vehicle or thing to be searched	Not new.
Section 113 – powers to secure place, vehicle or thing prior to search warrant being issued	New. Query whether this should be limited in any way?
Section 114 – powers to detain people incidental to powers to search vehicles and places	Requires further restriction in relation to some non-police agencies.
Section 115 – powers to search people incidental to search of place or vehicle	Requires further restriction in relation to some non-police agencies.
Section 116 – powers to search people and vehicles when suspect pursued	Law currently unclear. Possible extension of power.

Section 117 – powers to stop a vehicle for the purpose of searching the vehicle	Not new (but possible issue regarding current wording).
Section 118 – moving a vehicle for the purposes of search, safekeeping, or road safety	Law currently unclear, but a power has been recognised in some circumstances.
Section 119 – seizure of items in plain view	New but reflects law in comparable jurisdictions, including UK and Canada.
Section 120 – rules applying to searches of persons	No power conferred. Rather, spells out procedural requirements.
Section 121 – requires agencies to issue guidelines about the use of strip searching	No power conferred. Rather, spells out administrative/procedural requirements for agencies which conduct strip searches.
Section 122 – entry to places where there is a search warrant authorizing search of a vehicle located there	Not new.
Section 123 – powers to require particulars of passengers in vehicles stopped or searched	Reflects section 314C of the Crimes Act – however, that currently applies to Police only. May require further restriction.
Section 124 – rules applying when a vehicle is stopped	No power conferred. Rather, spells out procedural requirements.
Section 125 – duties of persons with knowledge of a computer/computer network/other data storage device to assist with access	Reflects section 198B of the Summary Proceedings Act but extended to warrantless searches and inspections also.
Section 126 – identification and notice requirements applying to enforcement officers exercising search powers	No power conferred. Rather, spells out procedural requirements.
Section 127 – inventories of items seized	No power conferred. Rather, spells out procedural requirements.
Subpart 4 – Privilege and confidentiality	
Rules regarding the recognition of and protection of privilege, including procedural provisions	Far greater protections than at present.
Subpart 5 – Procedures applying to seized or produced materials	
Rules regarding seized and produced items, including the rights of owners and procedures to enforce these.	Far greater protections than at present.
Subpart 6 – Immunities	
Immunities of issuing officers, persons applying for warrants and exercising powers, and the Crown.	Expands immunity of issuing officers, addresses deficiencies in immunities of enforcement officers, and provides for the Crown to enjoy the immunities of enforcement officers.

Subpart 7 – Reporting	
Imposes reporting requirements in relation to the exercise of warrantless search powers, the use of surveillance devices, and the execution of residual warrants.	While some reporting obligations currently exist in relation to Police use of audio interception (under both the Crimes Act and Misuse of Drugs Amendment Act), this will expand the obligations on enforcement agencies.

Appendix C

Law Commission advice on Police powers

Proposed power	Existing statutory/common law position	How the Bill changes the current law
Clause 6 – issuing officer may issue search warrant to a constable if reasonable grounds to: • Suspect an offence punishable by imprisonment; and • Believe that proposed search will find evidential material.	Section 198 Summary Proceedings Act – judicial officer may issue search warrant if reasonable grounds to believe there is evidence of an imprisonable offence on premises to be searched.	No substantive change
Clause 7 – warrantless entry to vehicle or place to arrest person if reasonable grounds to: • Suspect the person is unlawfully at large; and • Believe that the person is there.	Section 22 Summary Proceedings Act – warrantless entry to arrest a person where: • Arrest warrant for the person; and • Reasonable grounds to believe the person is on the premises.	No substantive change
Clause 8 – warrantless entry to arrest person if reasonable grounds to: • Suspect they have committed an imprisonable offence for which they can be arrested without warrant; and • Believe the person is in the place and • Suspect that if entry is not effected immediately the person will leave the place or evidential material will be destroyed.	Section 317 Crimes Act – warrantless entry to arrest person if: • Constable has found person committing an imprisonable offence and is in fresh pursuit of the person; or • Good cause to suspect the person has committed an offence for which the constable may arrest the person without warrant on the premises.	Expands the circumstances in which the power may be exercised by no longer requiring the constable to be in fresh pursuit; but also Limits the power through addition of requirement for reasonable grounds to suspect immediate action is required.

Clause 9 – warrantless power to stop vehicle to arrest person if reasonable grounds to: • Suspect the person is unlawfully at large; or • Suspect the person has committed an imprisonable offence; and there are reasonable grounds to believe that the person is in the vehicle.	Section 317A Crimes Act – warrantless power to stop a vehicle to arrest a person if reasonable grounds to: • Suspect the person is unlawfully at large; or • Suspect the person has committed an imprisonable offence; and there are reasonable grounds to suspect that the person is in the vehicle.	No substantive change
Clause 10 – when vehicle is stopped pursuant to clause 9, warrantless power to search the vehicle to: • Locate the person for which the vehicle was stopped; or • Find evidential material in relation to the offence for which the vehicle was stopped under clause 9 if the person has been arrested or is seen fleeing from the vehicle.	At common law – a constable may search a vehicle after a person in, or who has alighted from, the vehicle has been arrested. However, scope is somewhat unclear.	No expansion intended. Clarifies law that is currently uncertain.
Clauses 11 - 13 – warrantless searches of persons to be locked up in Police custody, including power to take any money or other property found during the search.	Sections 37 - 39 Policing Act 2008	No substantive change

Clause 14 – Warrantless power to enter a place or vehicle and take such action as is reasonably believed necessary where reasonable grounds to suspect: • An offence that would be likely to cause injury to any person or serious damage to, or loss of, property; or • A risk to life or safety of any person requiring an emergency response.	Section 317(2) Crimes Act confers a warrantless power of entry to premises in order to prevent commission of any offence likely to cause immediate and serious injury to any person or property. At common law any person may enter premises on grounds of necessity where reasonable grounds to believe it is necessary to: • Preserve human life; • Prevent serious physical harm to a person; or • Render assistance to someone who has suffered serious physical harm.	Codifies common law rights and duties of police officers in relation to necessity. Lowers threshold for entry in order to respond to offending likely to cause injury from that offending likely to cause *serious* injury to offending likely to cause injury.
Clause 15 – warrantless power of entry to prevent loss of evidential material if reasonable grounds to: • Believe evidential material is in the place; • Suspect that evidential material relates to an offence punishable by 14 years imprisonment or more; and • Suspect that if entry is delayed, the evidential material will be lost.	No equivalent power.	Entirely new power – limited to most serious offences.
Clause 16 – warrantless power to search a person in public place if reasonable grounds to believe that person is in possession of evidence of an offence punishable by 14 years imprisonment or more.	No equivalent power.	Entirely new power – limited to most serious offences.
Clause 17 - warrantless power to search a vehicle in public place if reasonable grounds to believe that evidence of an offence punishable by 14 years imprisonment or more is in the vehicle.	No equivalent power.	Entirely new power – limited to most serious offences.

Clause 18(1)-(2) – warrantless power to enter place/vehicle and search a person and anything in their possession/under their control where reasonable grounds to suspect the person is carrying arms or has arms under their control and is: • In breach of the Arms Act 1983; or • By reason of their physical/mental condition, incapable of having proper control of the arms or may kill or cause bodily harm; or • The subject of a protection order under the Domestic Violence Act 1995 or there are grounds for an application for such an order against the person.	Sections 60 and 60A Arms Act 1983.	No substantive change.
Clause 18(3)-(4) – warrantless power to enter and search a place/vehicle where reasonable grounds to suspect there are arms in the place/vehicle: • In respect of which an indictable offence or an offence against the Arms Act has been, is being, or is about to be committed; or • That may be evidence of such an offence.	Section 61 Arms Act 1983.	No substantive change.

Clause 19 – warrantless power to search place/vehicle where reasonable grounds to: • Believe there is specified controlled drug/precursor substance; and • Suspect that in or on place/vehicle there is/has been/is about to be an offence against the Misuse of Drugs Act 1975; and • Believe that if entry and search is delayed evidence of that suspected offending will be destroyed, concealed or damaged.	Section 18(2) Misuse of Drugs Act 1975. At common law, the Court of Appeal has held that the warrantless power in section 18(2) may only be exercised where there are reasonable grounds to believe that immediate action is required.	Inclusion of requirement for reasonable grounds to believe that immediate action in clause 19 makes this requirement clear on the face of the statutory provision.
Clause 20 – warrantless power to search any person found in or on the place/vehicle where a clause 19 search is being conducted.	Section 18(2) Misuse of Drugs Act 1975.	No substantive change.
Clause 21 – warrantless power to search a person where reasonable grounds to: • Believe that the person is in possession of a specified controlled drug/precursor substance; • Suspect an offence against the Misuse of Drugs Act 1975.	Section 18(3) Misuse of Drugs Act 1975.	No substantive change.

Clauses 22 and 23 – warrantless power to require internal search of person where: • Person has been arrested for offence against section 6, 7, or 11 of Misuse of Drugs Act; and • Reasonable grounds to believe the person has secreted in their body: • Evidence of the offence with which the person is charged; or • Property, possession of which constitutes an offence against section 6, 7, or 11 of the Misuse of Drugs Act.	Section 18A Misuse of Drugs Act 1975.	No substantive change.
Clause 25 – warrantless power to search person where reasonable grounds to suspect person committing an offence against section 202A(4)(a) Crimes Act 1961 (possession of knives, offensive weapons and disabling substances), including power to seize any knife, offensive weapon, disabling substance.	Section 202B(1)(a) Crimes Act 1961.	Threshold lowered from reasonable grounds to believe: • an offence against section 202A(4)(a); and • that the vehicle contains a knife, offensive weapon, or disabling substance to reasonable grounds to suspect these things – for the purposes of consistency with similar search powers in relation to arms.
Clause 26 – warrantless power to search a vehicle where reasonable grounds to suspect a person in the vehicle or who has alighted from the vehicle is committing an offence against section 202A(4)(a) Crimes Act 1961 (possession of knives, offensive weapons and disabling substances), including power to seize any knife, offensive weapon, disabling substance.	Section 202B(1)(b) Crimes Act 1961	Threshold lowered from reasonable grounds to believe an offence against section 202A(4)(a) to reasonable grounds to suspect such an offence – for the purposes of consistency with similar search powers in relation to arms.

Clause 27 – warrantless power to search vehicle where reasonable grounds to believe it contains stolen property.	Section 225 Crimes Act 1961.	Narrows the power by excluding property obtained by a "crime involving dishonesty".
Clauses 28-30 – warrantless power to authorise establishment of a road block for purpose of arresting a person where reasonable grounds to: • Believe the person in question is in the vehicle; and • Suspect that the person has committed an offence punishable by imprisonment or is unlawfully at large; and • Suspect that the vehicle will travel past the place where it is proposed a road block be established. (Power may only be exercised by senior police officer who is satisfied that, as far as reasonably practicable, the safety of all road users will be ensured in the area in which it is proposed a road block be established.)	Section 317B Crimes Act 1961.	Narrowed by the requirement for reasonable grounds to believe the person in question is in the vehicle (currently only reasonable grounds to suspect). Broadened by extension to all offences punishable by imprisonment (currently limited to offences punishable by 7 years imprisonment or more).

Clauses 31 – 40 – examination orders. A Judge may make an examination order in the business context if: • Reasonable grounds to suspect any imprisonable offence; • Reasonable grounds to believe the person has information that is evidence; • Reasonable grounds to believe the person acquired that information in a business context; • The person has been given an opportunity to provide the information but has declined to do so; and • It is reasonable to do so having regard to the nature and seriousness of the offending, the nature of the information, the relationship between the person and the suspect, and any alternative ways of obtaining the information. *(continues over page)*	No equivalent power.	Entirely new power for Police (reflecting what is currently available to SFO, although the provisions in the Bill impose greater safeguards than the Serious Fraud Office Act)

A Judge may make an examination order in the non-business context if:

- Reasonable grounds to suspect an imprisonable offence involving serious or complex fraud or committed in the context of organised crime;
- Reasonable grounds to believe the person has information that is evidence;
- Reasonable grounds to believe the person acquired that information in a non-business context;
- The person has been given an opportunity to provide the information but has declined to do so; and
- It is reasonable to do so having regard to the nature and seriousness of the offending, the nature of the information, the relationship between the person and the suspect, and any alternative ways of obtaining the information.

Note: It is proposed that the scope of the surveillance device warrant regime be limited in the following ways:

- An application for an interception warrant may only be made by a constable or an enforcement officer employed by an law enforcement agency that the Attorney-General has approved to carry out interception. Approvals by the Attorney-General would be on the basis of specific statutory criteria relating to the agency's technical capability and procedural measures to ensure the integrity of any information obtained

Appendix D

Law Commission advice on enforcement officers' powers

Proposed power	Existing statutory/common law position	How the Bill changes the current law
Surveillance device warrants authorising the use of interception, tracking or visual surveillance devices may be issued where there are reasonable grounds to: • Suspect an offence in respect of which this Act or a relevant enactment authorizes an enforcement officer to apply for a search warrant; and • Believe that the proposed use of the surveillance device will obtain evidential material. Windfall evidence is admissible if it relates to an offence which authorises an enforcement officer to apply for a surveillance device warrant.	Audio interception: currently tightly regulated in the Crimes Act and the Misuse of Drugs Act. Limited to Police and available in respect of: • specified offences (defined in section 312A of the Crimes Act); • terrorist offences; • serious violent offences; • drug dealing offences; and • prescribed cannabis offences. Windfall evidence is only admissible if it relates to one of the above offences May only be issued: • where there are reasonable grounds to believe one of the above offences has been, is being, or will be committed;	Bill would expand the number of agencies which may apply for interception warrants and the range of offences in relation to which it may be used. No longer an order of last resort. Increased availability of windfall evidence. Ability to undertake warrantless surveillance, rather than pursuant to an emergency permit from a Judge. Data obtained from interception is only destroyed on order by the Judge rather than automatically.

Intercepted data is only destroyed where a Judge makes an order to do so. Warrantless surveillance of up to 72 hours in limited circumstances (relating to serious offending, or where public safety is at issue) where an enforcement officer is entitled to apply for a surveillance device warrant but it is impracticable to do so in the circumstances.	• where there are reasonable grounds to believe proposed use of the device will obtain evidence of the offending; and • if other investigative procedures or techniques have been tried or failed, or are unlikely to succeed, or are impractical to use due to the urgency of the case. Intercepted data must be destroyed if it does not relate to any of the above offences. Intercepted data that relates to one of the above offences must be destroyed as soon as it appears no proceedings, or no other proceedings, will be taken where the information is likely to be required in evidence. Judge may issue an emergency permit (orally or in writing) for 48 hours to investigate specified offences or serious violent offences if the interception needs to begin before a warrant could with all practical diligence be obtained.] offences punishable by 10 or more years imprisonment only.	

	Visual surveillance involving trespass: not currently permitted.	An expansion to all agencies that currently have power to obtain search warrant.
	Visual surveillance not involving trespass: currently not regulated at all.	Significantly limits for all agencies subject to the Bill as they will only be able to undertake when they meet the threshold for obtaining warrant or undertaking emergency warrantless surveillance.
	Tracking: currently regulated in Summary Proceedings Act and limited to Police and Customs. Warrant may be issued where there are reasonable grounds to: • suspect an offence; and • suspect that information relevant to the offence will be obtained through use of the tracking device Warrantless use of tracking device for 72 hours where it is not reasonably practicable to obtain a warrant, and there are reasonable grounds to believe that a Judge would issue a warrant if time permitted	Bill expands the range of agencies who may apply to use tracking devices and who may undertake warrantless surveillance.

Residual warrants may be issued by a Judge where there are reasonable grounds to: • Suspect an offence in respect of which this Act or a relevant enactment authorizes an enforcement officer to apply for a search warrant; and • Believe that the proposed use of a device (other than a surveillance device), technique, procedure or activity would obtain evidential material.	No equivalent.	This is <u>not</u> a power as it does not authorise an enforcement officer to do anything that is unlawful. Rather, it provides a mechanism by which an officer may test the reasonableness of a novel investigative technique prior to employing that technique to obtain evidence. So, no expansion of current powers.
Production orders may be made by an issuing officer where there are reasonable grounds to: • Suspect an offence in respect of which this Act or a relevant enactment authorizes an enforcement officer to apply for a search warrant; and • Believe that the documents sought by the order are evidence and that those documents are in the possession or control of the person against whom the order is sought, or will come into that person's possession or under their control while the order is in force.	No statutory equivalent at present.	Effectively not a new power, but an alternative and less intrusive means of exercising an existing search power. Reflects current practice of Police and other enforcement agencies regarding the execution of search warrants in circumstances where a less intrusive approach is appropriate.

Sections 78 – 79 – Police and Customs officers have the power to detain and search any person involved in a delivery under section 12, and are empowered to enter and search any building, craft, carriage, vehicle, premises, or place in order to carry out the search of the person where the officer believes on reasonable grounds that the person is in possession of a controlled drug, a precursor substance, a package in which a Customs officer has replaced any drug or precursor substance, or evidence of the commission of an offence under sections 6(1)(a) or 12AB of the Misuse of Drugs Act. Any such item may be seized.	Section 12A Misuse of Drugs Amendment Act 1978 provides for the power to search persons and the power of entry. Section 12B authorizes the seizure of drugs, precursors, controlled delivery packages, and evidence found in any such search.	Expands the power in section 12A which currently authorizes entry to search the person but no power to search the premises, vehicle etc. No change.
Sections 80 – 86 provide for powers incidental to arrest and detention. Any person who has exercised a power of arrest/detention under this Act or any other (except Armed Forces Discipline Act, Defence Act and regulations made under either of those Acts) has the following powers • Entry without warrant to search for and seize evidence of the offence for which the person was arrested where reasonable grounds to believe that evidence is in the place and that if entry is delayed in order to get a warrant that evidence will be concealed, destroyed or damaged.	Case law has recognised powers to search persons, places and vehicles incidental to arrest. However, there is a great deal of uncertainty around the existence and scope of such powers and they are not subject to defined limits. There has been judicial observation that legislative clarification would be useful.	No substantive expansion intended. Clarifies law that is currently uncertain and provides clearly defined limits to the powers.

• Power to enter and search a vehicle where officer has arrested a person and has reasonable grounds to believe that evidence of the offence for which the person was arrested is in the vehicle. • Rub-down search of arrested or detained person to ensure the person is not carrying anything that may harm any person or which may facilitate their escape. • Warrantless search of an arrested/detained person where there is reasonable grounds to believe the person has anything that may be used to harm anyone or may be used to facilitate the person's escape or is evidence of the offence for which the person has been arrested/detained.	

Note: It is proposed that the scope of the surveillance device warrant regime be limited in the following ways:

- Visual surveillance involving a trespass and interception be limited to the investigation of offences punishable by more than seven years imprisonment or offences under the Arms Act 1983 (namely offences under sections 44, 45, 50, 51, 54 and 55) . This would significantly limit the scope for non-Police enforcement officers to obtain warrants authorising such surveillance.

- An application for an interception warrant may only be made by a constable or an enforcement officer employed by an law enforcement agency that the Attorney-General has approved to carry out interception. Approvals by the Attorney-General would be on the basis of specific statutory criteria relating to the agency's technical capability and procedural measures to ensure the integrity of any information obtained.

Appendix E

Summary Departmental Report

SEARCH AND SURVEILLANCE BILL

Crime Prevention and Criminal Justice Group

August 2010

Contents

Introduction

1. The Justice and Electoral Committee (the Committee) requested that the Ministry of Justice and the Law Commission provide a report that responds to the key concerns of submitters and the public regarding the Search and Surveillance Bill (the Bill).

2. There have been a variety of concerns raised in public and by submitters on the Bill, as introduced in Parliament on 2 July 2009. The concerns were primarily based on the perceived erosion of human rights and the widening of non-Police powers.

3. A number of recommendations seek to allay submitters' and public anxiety about the Bill. This report identifies the most pressing concerns raised by submitters, and sets out the proposals intended to address these concerns. Comment and recommendations relating to the other concerns raised by submitters are contained in the full Departmental Report.

4. Other concerns raised are based on a misunderstanding of the Bill's provisions and how they are intended to work in practice. Some of this misunderstanding arises from the complexity of the Bill. This report therefore also sets out proposals to make the Bill more accessible and easily comprehensible, and also contains a fuller explanation of the regimes contained in the Bill, and how they will operate.

Human rights

5. Perhaps the largest criticism of the Bill to date is that it erodes civil liberties and does not give sufficient weight to human rights. In particular, the majority of submitters are concerned that the Bill infringes on citizens' privacy rights, and the right to be secure against unreasonable search and seizure.

Human rights generally

6. Firstly, it must be noted that the terms "human rights" and "civil liberties" encompass a wide range of rights. As submitters have identified, there are rights to be secure against unreasonable search and seizure, and to privacy. However, there are other rights that must be considered and balanced against this right - for instance, the right to property, and security of person and property. These rights also require recognition through law enforcement tools that allow law enforcement to investigate crime effectively.

7. The Bill seeks to ensure that these law enforcement tools are consistent with human rights values. The law in the area of search, seizure, and surveillance has developed in a piecemeal and ad hoc manner. This has resulted in inconsistency and uncertainty in the law. Accordingly, the Bill is the culmination of a first principles approach to this area, and sets out powers of search, seizure, and surveillance that are appropriate and desirable from both law enforcement and human rights viewpoints.

8. This approach has the considerable benefit of enhanced certainty and clarity in the law. This makes it much easier for both people conducting searches and those subject to searches to determine *when* a search may be undertaken, *how* it may be undertaken, and by *whom*.

9. Secondly, the Bill identifies areas where human rights are currently inadequately protected, and seeks to provide this protection. For instance, visual surveillance (that does not involve a trespass onto private property) is not currently subject to regulation. The Bill remedies this by bringing visual surveillance within the surveillance device regime: limiting its use, requiring a warrant in certain circumstances, and imposing a reporting regime.

10. However, it is desirable that the Bill be more explicit about the importance of human rights values. The Bill should therefore contain a purpose clause that recognises the importance of human rights values in the law enforcement context.

Right to be secure against unreasonable search and seizure

11. The right to be secure from unreasonable search and seizure is enshrined in section 21 of the New Zealand Bill of Rights Act 1990 (NZBORA), which provides that:

> Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

12. The NZBORA applies to all acts done by the legislative, executive and judicial branches of government pursuant to Acts it amends and therefore applies to searches carried out by enforcement and regulatory agencies (eg, Police, local authorities, and agencies such as the Pork Industry Board) under those Acts. This means that every search conducted under the Bill is subject to the right to be secure against unreasonable search and seizure.

13. The Bill therefore does not infringe on the right to be secure against unreasonable search or seizure, as the powers in the Bill must be interpreted in a manner that is consistent with this right. That is, the Bill only authorises search, surveillance, and seizure that complies with NZBORA.

14. It is for this reason that the Crown Law Office concluded in its advice to the Attorney-General (the advice), that the Search and Surveillance Bill is consistent with NZBORA. The advice notes that:[1]

- The requirement to obtain warrants provides a safeguard as warrants should only be issued after an assessment by an issuing officer that the activity does not constitute an unreasonable search and seizure.

- The Bill provides for warrantless searches in limited circumstances, such as where it is in the interests of public safety to act immediately, or for the purposes of a regulatory inspection to ensure compliance with a particular Act.

Recommendation

15. The Ministry and the Law Commission recommend that the following purpose clause be inserted into the Bill to demonstrate explicitly that the Bill recognises the importance of human rights values:

- The purpose of this Act is to facilitate the monitoring of compliance with the law and the investigation and prosecution of offences in a manner that is consistent with human rights values by:

  - modernising the law of search, seizure, and surveillance to take into account advances in technologies and to allow for future technological developments; and

  - providing rules that recognise the importance of the rights and entitlements

[1] Advice to the Attorney-General: Search and Surveillance (45-1): Consistency with the New Zealand Bill of Rights Act at [11]-[21].

affirmed in other enactments, including the New Zealand Bill of Rights Act 1990, the Privacy Act 1993, and the Evidence Act 2006; and

- ensuring investigative tools are effective and adequate for law enforcement needs.

Effect on political activism

16. A large number of submitters are concerned that the Bill is a threat to legitimate political activities. Submitters are concerned that the powers in the Bill will be used to suppress activists and their legitimate protest activities. This, submitters fear, will have a "chilling effect" on citizens exercising their civil and democratic rights.

17. The concerns seem to take two forms:

- that the Bill will permit widespread surveillance of activists and protesters, enabling the state to gather intelligence on participants even when they have not engaged in criminal activity; and

- that the thresholds for exercising a number of powers in the Bill (eg, conducting surveillance or obtaining an examination order or residual warrant) are so low they would capture legitimate political activity.

Surveillance of activists and protesters

18. The right to protest is an important democratic right, and engages the rights to freedom of thought, expression, peaceful assembly, association and movement. These rights are justly regarded as important in a democratic society, and have been enshrined in NZBORA.

19. The Bill does not permit surveillance for the purpose of gathering intelligence on people engaging in political protest. It has never been intended that the Bill authorise surveillance solely for intelligence gathering purposes, and we do not believe that the current drafting does so.

20. For this reason, searches, surveillance, production orders, examination orders, and residual warrants are available only where there are reasonable grounds to suspect that an offence has been, is being, or will be committed. Law enforcement powers in the Bill are strictly limited to the *investigation of offending*. They cannot be solely used for general intelligence gathering. The use of the Bill's powers must relate to suspected criminal activity.

21. The Bill does not allow Police to intercept a known activist's phone calls merely because that activist is engaged in legitimate political activity. To obtain a warrant, the Police must demonstrate that there are reasonable grounds (an objective standard) to suspect that the activist has engaged in criminal activity. The connection between suspicion of offending and the Bill's powers is crucial. Without the former, enforcement officers cannot engage the latter.

Threshold of reasonable grounds to suspect an imprisonable offence is too low

22. Some protest activities may involve low-level offending such as trespass, disorderly behaviour, or unlawful assembly. Such offences are imprisonable offences. Submitters are therefore concerned that such low-level offending reaches the threshold of "reasonable

grounds to suspect an offence punishable by imprisonment", allowing enforcement officers to question, or conduct surveillance of, those involved in such activities.

23. One of the conditions for making an examination order is that there are reasonable grounds to suspect an offence punishable by imprisonment. One of the conditions for issuing a surveillance device warrant or a production order is that there are reasonable grounds to suspect an offence for which the applicant may apply for a search warrant. For Police, this includes all offences punishable by imprisonment (see clause 6).

24. Some submitters have expressed concern that enforcement officers will be able to conduct surveillance if they merely suspect a person of committing a relevant offence.

25. However, the requirement of reasonable grounds to suspect a person has committed, is committing, or will commit a relevant offence is an *objective* standard. An enforcement officer's subjective suspicion that a person has committed, is committing, or will commit a relevant offence will not be enough to obtain a search warrant, a surveillance device warrant, a production order, or (in the case of Police) an examination order. The warrant or order will only be granted if the enforcement officer can satisfy *an issuing officer or a judge* that this objective threshold has been met. Nor is this the only threshold that must be met – there must be reasonable grounds to believe that the proposed activity will obtain evidential material.

26. There are recommendations elsewhere in this report to raise the threshold for visual surveillance involving entry onto private property, audio surveillance, and examination orders from an imprisonable offence to offences carrying 5 or 7 years' imprisonment. This will mean such powers are not available to investigate offending such as trespass, disorderly behaviour, or unlawful assembly.

Bill difficult to understand

27. A number of submitters find the Bill difficult to understand. They claim that the lack of clarity and accessibility is a significant obstacle to informed debate and transparency of the law. For instance, they claim that it is not immediately apparent that the powers in Part 3 are widely available to enforcement officers. This view is also reflected in submitters' concerns over the complex definition of "relevant enactment".

28. Some oral submissions also criticised the complexity of the Bill, and the difficulties in understanding it.

29. One submitter suggests that the Bill be recast, using either a "tool box approach", where different regulatory agencies are allocated different tools, or a graduated structure such as that found in the Crown Entities Act 2004. In such a structure, the Bill would put core powers (eg, search and production order powers) into certain categories, some of which may exist in multiple categories. A table could then identify the category that each agency is in, and therefore the powers it has. Other submitters support this approach.

30. The Bill has been described, rightly so, as a highly ambitious one. It amends a large number of statutes (59) which create search and seizure powers for law enforcement purposes or for law enforcement and regulatory purposes (see subpart 1 of Part 5). Subpart 2 amends 10 statutes which create search and seizure powers used solely for regulatory purposes. The nature of the amendments to these separate Acts vary considerably in size and scope. The process of producing these amendments has involved extensive negotiation with many of the departments and other agencies that administer the relevant legislation.

31. A consideration which is not fully addressed or appreciated in the submissions outlined in paragraphs 27 to 28 is that, with a variety of exceptions and qualifications, the Bill aims to apply certain provisions of Part 4 to powers of search and seizure already conferred by the other enactments amended by subparts 1 and 2 of Part 5. The Bill does not, by and large, seek to replace existing inspection, search and seizure powers conferred by those Acts with new tailor-made powers. Rather the primary focus is on codifying, modifying, and reforming the procedures that apply in respect of existing powers of inspection, search and seizure.

32. For these reasons, to provide a "tool box approach" by allocating particular powers to particular agencies misunderstands the scope and purpose of the Bill. Redefining existing powers of inspection, search and seizure conferred by the multiplicity of Acts amended by subparts 1 and 2 of Part 5 was never envisaged in the Law Commission's report, and was outside the scope of the project. Such a task would, if at all achievable, require the application of extended resources over many years.

33. For the reasons set out above the Bill is and will continue to be complex in nature. This is simply unavoidable given the nature of the project. It is not, however, possible to adopt what is described as a "tool box approach" without either—

- fundamentally enlarging the scope of the project to include a wholesale review of substantive powers of investigation, search and seizure conferred on diverse law enforcement officials by the Acts amended in subparts 1 and 2 of Part 5 (which is quite impractical); or

- altering the application of Part 4 to the enactments amended in such a substantial way that they will be unacceptable to the agencies that administer those enactments (and their responsible Ministers) without further extensive consultation and negotiation.

34. However, we agree that the Bill could be made somewhat more accessible and easy to understand.

35. Currently, the definitions of "relevant enactment" and "enforcement officer", along with the specific amendments to other Acts in Part 5, are the mechanism by which the Bill is applied to other Acts. The definition and Part 5 are therefore central to understanding the application of Parts 3 and 4 of the Bill to non-Police agencies. The definition of "relevant enactment" effectively provides that:

- In Part 4, a reference to "relevant enactment" means:

  - an enactment to which Part 4 in its entirety is expressly applied; or

  - an enactment to which that particular provision in Part 4 is expressly applied.

- Elsewhere in the Bill, a reference to "relevant enactment" means enactments to which Part 4 is expressly applied (either in its entirety or parts thereof).

36. The definition is complex as it is required to do several things:

- Firstly, the definition is used to apply either:

- a provision in Part 4;
- the subpart which that provision forms part of; or
- all of Part 4

to a search power in an Act amended in Part 5.

- Secondly, the definition provides that if Part 4 (either in its entirety or parts thereof) is applied to a search power in an Act amended to that effect in Part 5, it does not apply to other search powers in that Act (that are not so amended).

- Thirdly, the definition provides that if only certain provisions in Part 4 are applied to a search power in an Act amended in Part 5, the rest of Part 4 does not apply to that search power.

37. Using a definition of "relevant enactment" to achieve the above functions has the advantage of reducing the need for a duplication of statutory provisions and the amount of subsequent amendment when new legislation is subsequently enacted. However, it has the significant disadvantage, in comparison with the approach adopted in the Search and Surveillance Powers Bill 2008, of a loss of accessibility to the law by members of the public without careful study. The Search and Surveillance Powers Bill 2008 contained a Schedule listing the provisions in Acts amended by the Bill and the particular provisions of Part 4 of the Bill that were being applied to the powers listed in those enactments. Given the tenor of the submissions we recommend a return to a modified and expanded version of the approach adopted in the Schedule to the Search and Surveillance Powers Bill 2008, as described below.

Recommendation

38. The Ministry and the Law Commission recommend:

- inserting a Schedule into the Bill summarising the provisions of Part 4 that are applied by the Acts in Part 5 with the following column headings:

Column 1 **Act**	Column 2 **Section**	Column 3 **Brief description of power**	Column 4 **Which provisions in Part 4 apply**

- making various technical amendments to ensure that Part 4 is only applied to the Acts amended in Part 5 to the extent intended.

Bill contains insufficient safeguards

39. A number of submitters are concerned that the Bill does not contain sufficient safeguards. One submitter regards the protections in the Privacy Act 1993 and the Official Information Act 1982 as inadequate.

40. A number of oral submitters stated that they do not think the safeguards will be effective, as many vulnerable members of society do not know their rights, and do not have the means to pursue avenues of redress.

41. The Bill contains a number of safeguards against the abuse of powers. These take the form of:

- Generally requiring prior judicial approval (by means of a warrant) for any law enforcement power, unless there are public policy reasons for the power to be carried out immediately.
- Detailed reporting requirements to issuing officers or judges, within the agency exercising the power, and to Parliament.
- Thresholds that must be met before powers may be exercised.

Prior judicial authorisation

42. Generally, the Bill requires prior judicial authorisation before the exercise of any law enforcement power. This has two key advantages: the officer seeking to utilise the power must articulate why they believe the conditions for exercising the power are met; and a neutral third party provides oversight of the power.

43. This judicial authorisation is provided by judges and issuing officers, created under clause 106. This clause allows the Attorney-General to authorise suitably skilled and experienced people to be issuing officers.

44. It is expected that specialised issuing officers with the training and skills necessary to objectively scrutinise search warrant and production order applications will reduce the number of defective or inadequate applications and warrants or orders. Issuing officers' training will ensure that the issuing of search warrants and production orders is not merely a rubber-stamping exercise, and that such applications will be subject to rigorous independent consideration.

45. In certain circumstances, there are strong public policy grounds for allowing the immediate use of powers (eg, where the safety of any person is at stake, or to avert an emergency). However, such powers are exceptional and can be used only in the limited circumstances that are specified in the Bill.

Threshold requirements

46. The powers provided in the Bill are available only where an enforcement officer can demonstrate that the thresholds attaching to those powers have been met. These thresholds are built into provisions conferring powers. Generally, a power may be exercised in the Bill if there are:

- reasonable grounds to suspect relevant offending; and
- reasonable grounds to believe that exercising the power will obtain evidential material of the offending.

47. These thresholds help to ensure that powers are only exercised where it is justified to do so. Thresholds are applied to both warrantless powers and powers exercised pursuant to warrant.

Detailed reporting requirements

48. The Bill contains a number of detailed reporting requirements.

- The first is reporting to an issuing officer or a judge. Under the search warrant regime, an issuing officer may require an enforcement officer to submit a search warrant report to enable the issuing officer to assess the manner in which the search was carried out (clause 102). In recognition of the novel nature of the surveillance device regime, a report to the judge who issued the warrant is required in every case (clauses 53, 54, and 66).
- The second is a requirement for any person who exercises a warrantless power to provide a written report to a delegate of the Chief Executive within that person's agency. This report must be provided as soon as practicable after the exercise of the power (clause 162).
- The third are the Parliamentary reporting requirements contained in clauses 162-164. These require the Chief Executive of agencies to provide in their annual report to Parliament details on the use of warrantless search powers, surveillance powers, or activities undertaken under a declaratory order (residual warrants in the Bill as introduced; recommendations relating to residual warrants (including that they be recast as declaratory orders) are outlined below at paragraphs 133-145).

A five year review

49. In addition to the safeguards of prior judicial approval, detailed reporting, and threshold requirements, the Bill provides for a comprehensive review of the Bill approximately five years after enactment. This recognises the significant changes in the area of search and surveillance that are effected by the Bill. At this time, the Law Commission and the Ministry of Justice must jointly provide a report to the Minister of Justice:

- assessing the operation of the Bill;
- recommending the repeal of any provisions, if this is desirable; and
- recommending any amendments.

50. This provides an opportunity to review the Bill as a whole as well as the new powers contained within it to determine whether the Bill effectively protects the rights of individuals as well as meeting the operational needs of law enforcement and regulatory agencies.

Examination orders

51. Currently, there is no general power for Police to require a person to answer questions. Although Police may question a large number of people in the course of an investigation, they are not required to answer. However, many citizens choose to do so, in the interests of helping Police investigate crime in the community. This voluntary community cooperation is an important aspect of policing in New Zealand.

52. However, there are situations where a member of the public is willing to assist with Police investigations, but feels unable to do so because of their professional or fiduciary obligations. For instance, the Police may wish to determine how a drug dealer is accounting for their profits. Although Police may be able to obtain financial information relating to these profits via a search warrant or a production order, this may not be comprehensible without someone explaining the details.

53. Police may therefore request the assistance of an (innocent) accountant who carried out the transactions. Although the accountant may be willing to assist by answering questions, they may refuse to do so because of possible adverse legal and ethical repercussions from a breach of their professional and fiduciary obligations towards their client. Examination orders protect such people from criminal and civil liability for providing this assistance to the Police.

54. Examination orders are included in the Bill as a Police-only power. An examination order requires a person to attend before a Police officer to answer questions. The Bill currently provides that examination orders are available for information that is obtained:

- in a business context (eg, accountant) in relation to investigations of an imprisonable offence;
- in a non-business context (eg, sports club) in relation to investigations of an imprisonable offence:
    - that is serious or complex fraud; and

- that are committed wholly or partly because of participation in a continuing association of 3 or more persons having as its object, or as 1 of its objects, a continuing course of criminal conduct.

Examination orders erode the right to silence and are too widely available

55. Submitters have expressed concern that examination orders erode the right to silence.

56. The "right to silence" (in the context of a criminal investigation) encompasses a range of rights, which can be asserted at different times by different persons during the investigation and prosecution of crime: a general right to refuse to answer questions; the right of a suspect to refuse to answer questions on being arrested or detained (section 23(4) of NZBORA); and the right not to be compelled to be a witness or confess to guilt at trial (section 25(d) of NZBORA).

57. The privilege against self-incrimination, as set out in section 60 of the Evidence Act 2006, is preserved in the context of examination orders in clause 132. A person who is subject to an examination order may therefore refuse to answer questions if they believe their answer is likely to incriminate them. If the Police dispute the validity of this claim of privilege, they may apply to a District Court Judge for an order as to its validity.

58. Any intrusion on the rights found in sections 23(4) and 25(d) of NZBORA, by compelling a person to provide information, must be justified on policy grounds. Examination orders are a useful and justifiable tool for Police to investigate specific types of serious offending. For instance, investigations of offences involving complex financial transactions benefit from a power that requires a person to assist by answering questions to unravel documents relating to these transactions.

59. However, we agree that examination orders should be strictly confined in the Bill and that the threshold for their use is too low. They should be further limited:

- for information acquired in the business context, to offences punishable by 5 years' imprisonment or more;
- for information acquired in the non-business context, to offences:
  - involving serious or complex fraud punishable by 7 years' imprisonment or more; and
  - committed wholly or partly by an "organised criminal group", as defined by section 98A(2) of the Crimes Act 1961.

60. A threshold of 7 years' imprisonment for examination orders relating to serious or complex fraud was identified as appropriate because this is the maximum penalty for many of those types of offences. For instance, engaging in money laundering, dishonestly taking or using a document, obtaining a benefit or causing loss by deception, and accessing a computer system

to dishonestly obtain a benefit or cause a loss, all have maximum penalties of 7 years' imprisonment.[2]

Application process for examination orders

61. Examination orders are not expected to be used as an alternative to standard Police investigating methods. To ensure this is the case, the application process should be limited to specified senior officers.

62. Currently, clauses 31(1) and 33(1) provide that only the Commissioner of Police may make an application for an examination order. However, under section 17 of the Policing Act 2008, the Commissioner may delegate any of their powers, functions, or duties to any other person. It is recommended that:

- only officers with the level of position of Inspector or above may *make* an application for an examination order; and

- only 1 of the 12 District Commanders (but not anyone acting as a District Commander) or above may *approve* an application, prior to it being submitted to a judge.

63. This will mean that approval is generally given by the senior officer in the Police District in which the examination is sought, thus ensuring that the process is a practical one, grounded in knowledge about offending in that district. A District Commander is a very senior position within Police, ensuring that the decision as to whether an examination order is a proportionate and appropriate response is made by someone with significant experience. Limiting the personnel who may make and approve such applications guards against their routine use in Police investigations.

There should be a reporting regime for examination orders

64. A submitter suggests that there should be a compulsory reporting regime, similar to that required for surveillance device and residual warrants.

65. We agree and recommend that a compulsory reporting regime for examination orders be included in the Bill.

Who can make an examination order

66. A submitter suggests that examination orders should only be issued by a High Court Judge (as opposed to a District Court Judge).

67. District Court Judges are competent judicial officers, capable of assessing the appropriateness of an examination order, having regard to the considerations outlined in clause 36(b) (ie, the reasonableness of making an order considering the nature and seriousness of the suspected offending, the nature of the information sought, the relationship between the person to be examined and the suspect, and any alternative ways of obtaining the information).

[2] Sections 243, 228, 241, 249 of the Crimes Act 1961. Other provisions in the Crimes Act which could constitute fraud and carry a maximum penalty of 7 years' imprisonment include receiving stolen property (section 246), and criminal breach of trust (section 229).

Recommendations

Limiting the availability of examination orders

68. The Ministry and the Law Commission recommend that examination orders be limited:

- for information acquired in the business context, to offences punishable by 5 years' imprisonment or more;
- for information acquired in the non-business context, to offences:
  - involving serious or complex fraud punishable by 7 years' imprisonment or more; and
  - committed wholly or partly by an organised criminal group, as defined by section 98A(2) of the Crimes Act 1961.

Limiting the application process for examination orders

69. The Ministry and the Law Commission recommend that clauses 31(1) and 33(1) be amended so that:

- only officers with the level of position of Inspector or above may make an application for an examination order; and
- only 1 of the 12 District Commanders (but not anyone acting as a District Commander) or above may approve an application for an examination order prior to it being submitted to a judge.

Reporting regime for examination orders

70. The Ministry and the Law Commission recommend inserting a new clause into the examination order regime so that a constable who undertakes questioning pursuant to an examination order must provide a report to the judge who made the order, or (if that judge is unable to act) to a judge of the same court as the judge who made the order. The report must contain the following information:

- whether the questioning resulted in obtaining evidential material;
- whether any criminal proceedings have been brought or are under consideration as a result of evidential material obtained by means of the examination; and
- any other information stated in the order as being required for inclusion in the examination order report.

71. The Ministry and the Law Commission recommend that clause 37 be amended so that an examination order contains a condition that an examination order report be provided to the judge who issued the order, or (if that judge is unable to act) to a judge of the same court as the judge who made the order.

72. The Ministry and the Law Commission recommend requiring the Commissioner of Police to report on examination orders in the Police's annual report with the following information:

- the number of applications for an examination order that are granted or refused in the period covered by the report; and

- the number of people charged in the period covered by the report where an examination order made a significant contribution to the obtaining of evidential material for the proceeding.

Extension of Police powers to other agencies

73. There are considerable concerns that the Bill expands the powers of other agencies (such as local authorities or the Pork Industry Board) by giving them powers that currently only the Police have.

74. This concern has two aspects:

- Non-Police agencies having the power to use surveillance devices and production orders (contained in Part 3 of the Bill); and
- what non-Police agencies can do when they are executing a search (contained in Part 4 of the Bill).

75. Before analysing submitters' concerns, we need to provide an overview of Parts 3 and 4 and what they do.

Part 3 – Surveillance device warrants, residual warrants, and production orders

76. Part 3 contains the surveillance device warrant, residual warrant and production order regimes. The term "surveillance device" incorporates visual surveillance devices, audio surveillance (interception) devices, and tracking devices.

77. This Part provides enforcement officers with alternatives to searches in order to obtain evidential material. Where an enforcement officer may apply for a search warrant, Part 3 provides that they will also be able to apply for a surveillance device warrant, residual warrant, and a production order.

78. Currently:

- Production orders are available to certain agencies in specific contexts (eg, the Commerce Commission under the Commerce Act 1986, the Serious Fraud Office under the Serious Fraud Office Act 1990, and the Police under the Criminal Proceeds (Recovery) Act 2009).
- Interception devices may only be used by Police in relation to specified crimes in Part 11A of the Crimes Act 1961 and the Misuse of Drugs Amendment Act 1978. These generally relate to serious violent offences, offences committed by organised criminal groups, terrorist offences, and drug dealing offences.
- Tracking devices may be used by Customs and Police for all offences. This power is contained in sections 200A-200P of the Summary Proceedings Act 1957.
- The use of visual surveillance devices that do not involve a trespass onto private property is currently unregulated.

79. Expanding these techniques to agencies other than Police therefore provides them with new powers.

Part 4 – General provisions in relation to search and inspection powers

80. Part 4 relates to the exercise of search powers. If an enforcement officer can conduct a search (whether for regulatory or law enforcement purposes), this Part specifies what they may do when conducting this search. This Part therefore does not contain any new *independent* powers. Rather, it contains *ancillary* powers that attach to existing powers of search (eg, the power to copy relevant documents while conducting searches).

81. To summarise, Part 3 contains the provisions relating to surveillance device warrants, residual warrants, and production orders. These are powers that most agencies currently do not have. Part 4 sets out what an agency may do when exercising one of their pre-existing search powers. Part 4 therefore does not contain any independent new powers, but sets out some ancillary powers.

82. Having provided a broad overview of these powers, the following sections analyse submitters' concerns about these different Parts, and provides the departmental response to them.

Part 3 – Surveillance devices

83. A major concern with submitters and the public is the ability of non-Police agencies to conduct surveillance. In particular, there is concern that local authorities and employers will be able to install surveillance cameras in private homes. Examples provided in the media include the ability of local authorities to install surveillance (either visual or audio) devices in people's homes because of a failure to pay rates.

84. Such concerns are misconceived. There are a number of safeguards to ensure that surveillance devices as a law enforcement tool are used appropriately:

- There must be reasonable grounds to suspect *offending* for which the applicant may apply for a search warrant.

- There must be reasonable grounds to believe that the proposed surveillance will obtain evidential material for that offending.

85. Applications must therefore be in relation to an offence for which an enforcement officer may apply for a search warrant *and* the applicant must satisfy a judge that the proposed surveillance will obtain evidential material of that offence. The link between the suspected offence and the evidential material is an important one. For example, if the Police have reasonable grounds to suspect someone of possession of a class C drug, they can only put that person under surveillance *in order to obtain evidential material of the offence of possession.* They cannot put that person under surveillance solely to obtain evidential material of a more serious offence (eg, participation in an organised criminal group).

86. Importantly, the Bill only authorises the use of surveillance devices to investigate offences. It does not authorise the use of surveillance devices for regulatory purposes, such as ensuring payment of rates.

87. That a judge must be satisfied that there are reasonable grounds to believe that the proposed surveillance will obtain evidential material is a significant limit. Some offences, by their nature, will rarely be amenable to surveillance as a means to obtain evidential material. Further, the applicant must provide the judge with information that demonstrates the likelihood, to the high standard of reasonable grounds to believe, that evidential material will be obtained.

88. Merely hoping that surveillance *may* obtain evidential material will not be enough. The applicant must satisfy a judge that there are reasonable grounds to believe (an *objective* standard) the proposed surveillance will obtain evidential material for the suspected offence.

89. Further, in deciding whether to issue warrants, judges are required to consider whether the proposed surveillance is consistent with the right to be free from unreasonable search and seizure under section 21 of NZBORA. Considerations of proportionality (eg, is the proposed surveillance being used to investigate relatively minor offending) are relevant to this assessment.

90. However, we agree that the Bill makes the use of surveillance devices too readily available to non-Police agencies, particularly audio surveillance devices or where installation of the device involves trespass onto private property. We therefore recommend further limiting their availability. Such surveillance should be limited to where there are reasonable grounds to suspect an offence punishable by 7 years' imprisonment or more and certain offences in the Arms Act 1983, as these raise acute public safety concerns and involve serious offending.

91. Tracking devices do not need to be similarly limited. The installation of a tracking device involves a transitory entry. The information obtained from the device is significantly more limited than that obtained by visual and audio surveillance; a tracking device can inform an agency of where the device is, and whether an item has been tampered with. The privacy intrusion engendered by use of a tracking device is therefore significantly lower than for an audio or visual surveillance device.

Training and techniques of non-Police agencies to undertake surveillance

92. Surveillance methods (audio surveillance and installing a visual surveillance device on private property) pose unique challenges. The smooth running of such surveillance operations requires considerable expertise and sophisticated equipment. Police have acquired both the expertise and equipment to undertake such surveillance, and have also developed training and procedures to ensure such surveillance operations are effective, and that the material obtained can be presented in court.

93. Other agencies, however, do not currently have the experience and training to carry out such surveillance. If these non-Police agencies were to undertake such surveillance in an inappropriate or ineffective way, it could damage the reputation of this surveillance as a law enforcement tool.

94. It is recommended that agencies must be approved to conduct both visual surveillance involving entry onto private property and audio surveillance. This ensures that such surveillance is conducted in an appropriate and safe manner by agencies with the necessary expertise and training. The proportionality of using surveillance for the types of offences that the agency investigates will be a relevant consideration in the decision of whether authorisation should be granted.

95. For the same reasons as provided above, it is not proposed to similarly limit the use of tracking devices.

Surveillance data

96. Large scale surveillance operations involve the collection of a vast amount of raw data, much of which will be irrelevant. Some of this raw data will relate to the actions of innocent people. For instance, a surveillance operation targeting the entry and exit of people from known gang headquarters will record the actions of innocent parties (eg, the postman or people simply walking past the property) or communications made by a suspect that have no

relevance to the suspected offending. This raises concerns about the privacy rights of these people.

97. There should therefore be a destruction regime for raw surveillance data that does not have investigative value. In this context, raw surveillance data includes actual audio and visual footage. This would not include general information generated in the course of an investigation such as job sheets or surveillance logs.

98. This protects the privacy interests of all persons who become subject to surveillance operations (whether a suspect or not), while allowing law enforcement agencies to retain information that is truly useful to their investigations.

Recommendations

Visual surveillance involving entry onto private property and audio surveillance

99. The Ministry and the Law Commission recommend limiting audio surveillance and visual surveillance involving entry onto private property to the investigation of:

- offences punishable by 7 years' imprisonment or more; and
- offences against sections 44, 45, 50, 51, 54, or 55 of the Arms Act 1983.

Surveillance for non-Police agencies

100. The Ministry and the Law Commission recommend that only Police officers and enforcement officers employed by an authorised agency may apply for a surveillance device warrant to:

- install a visual surveillance device on private property; or
- carry out audio surveillance.

101. The Ministry and the Law Commission recommend that the Order in Council approval process to become an authorised agency contain the following features:

- The Order in Council may only be made on the recommendation of the Minister of Justice after consultation with the Minister of Police.
- The Minister of Justice may recommend that an agency be approved to carry out either audio surveillance, or visual surveillance involving entry onto private property, or both.

101.1. The Minister of Justice may only recommend that an agency be approved to carry out visual trespass surveillance if satisfied that it is appropriate for the agency to carry out visual trespass surveillance, and:

- the agency has the technical capability to carry out visual trespass surveillance; and
- the agency has the policies and procedures in place so that the visual trespass surveillance can be carried out in a manner that ensures the safety of the people involved in the surveillance.

- The Minister of Justice may only recommend that an agency be approved to use interception devices if satisfied that it is appropriate for the agency to use interception devices, and that the agency has:
  - the technical capability to intercept private communications in a manner that ensures the reliability of any information obtained;
  - policies and procedures in place to ensure that the integrity of any information obtained through the use of an interception device is preserved; and
  - the expertise to:
    - extract evidential material from information obtained through the use of an interception device in a form that can be used in a criminal proceeding; and
    - to ensure that any evidential material obtained through the use of an interception device is presented in an appropriate manner, when the agency intends to proceed with a prosecution.
- The approval may be subject to any conditions considered appropriate, and may be revoked at any time.

Surveillance data

102. The Ministry and the Law Commission recommend the inclusion of a regime for raw surveillance data (including actual visual and audio recordings and full or substantial parts of transcripts of audio recordings) clarifying that raw surveillance data may only be retained in the following situations:

- Proceedings have commenced in relation to an offence for which the raw surveillance data was collected and have not concluded (including the expiry of any appeal periods).
- Raw surveillance data is required for an ongoing investigation. This data may be retained for a maximum of 3 years. The agency that holds the data may apply to a judge for an order allowing it to retain the data for an extended period that does not exceed 2 years. A judge may make this order if satisfied that the raw surveillance data

is required for that ongoing investigation

- A judge has made an order (following an application from an agency holding raw surveillance data) allowing the agency to retain excerpts from raw surveillance data where there are reasonable grounds to believe that the excerpts may be required for a future investigation.

103. The Ministry and the Law Commission recommend that information that is extracted from raw surveillance data, but does not itself constitute raw surveillance data, may be retained where there are reasonable grounds to suspect that the information may be relevant to an ongoing or future investigation.

Part 3 – Production orders

104. There has been considerable concern about production orders. A production order requires a person to produce information or documents (either on a single or multiple occasions). They are available where an enforcement officer may apply for a search warrant to obtain the information/documents. Submitters are concerned that this is an intrusion into the privilege against self-incrimination, as a production order may require a person to produce self-incriminating documents.

105. The production order process reflects a common practice of Police when executing search warrants against people who are willing to assist. The Courts have held that a search warrant can be executed by Police sending a copy of the warrant to the occupier, and for that organisation to provide the documents sought. This avoids the need for Police to enter the premises and to intrude on and disrupt businesses/occupiers. The production order regime puts this process on a more formal footing.

106. For instance, if Police suspect a person of committing drug dealing offences, important evidential material could be obtained by examining the suspect's bank accounts for suspicious transactions. Rather than obtaining a search warrant against the suspect (who may have destroyed such records in any case), the Police may choose to obtain a production order against the suspect's bank and the bank can then locate the information itself at its own convenience.

107. Production orders have therefore been made available on the same basis as search warrants, as they are a less intrusive alternative to them.

108. In order to obtain a production order, an applicant must describe the documents sought. The applicant must also satisfy a judge that there are reasonable grounds to believe that such documents constitute evidential material.

109. It is unlikely that production orders will be sought against unwilling occupiers, as this may encourage them to destroy the documents sought. If enforcement officers do not believe that an occupier will cooperate, it is likely that they will obtain a search warrant instead.

Privilege against self-incrimination

110. The privilege against self-incrimination is expressly preserved in clause 132. This means that a person may refuse to comply with a production order if they believe that compliance would incriminate them. A person cannot be prosecuted for failing to comply with a production order for refusing to provide information/documents on this basis.

111. The assertion of privilege in this context is based on section 60 of the Evidence Act 2006. However, contrary to submitters' assertions, a person wishing to claim this privilege does not need to cite section 60 in order to claim the privilege. A simple statement that they are claiming the privilege against self-incrimination (or words to that effect) will suffice.

112. If the enforcement officer executing the production order disputes the privilege claim, the Bill provides a detailed procedure for a court to assess this claim.

Privacy Commissioner's concerns about production orders

113. The Privacy Commissioner makes a number of suggestions for production orders:

- Reporting requirements – enforcement officers should be required to report to issuing officers on how a production order has been carried out, and agencies should be required to report on the use of production orders to Parliament
- Notification – subjects of production orders should be told that a production order has been made, and the information/documents that were produced under the order.
- Specification – a production order against network operators should specify the type of telecommunication it covers.

114. In response to the Privacy Commissioner's first suggestion, the execution of a production order, as opposed to a search warrant, an examination order or a surveillance device warrant, is a simple process. The production order itself, or a copy of it, is given to the person against whom it is directed. That person then retrieves the information and provides it to the enforcement officer (or they may refuse to do so because the items are privileged).

115. In receiving reports on searches, surveillance, and examination orders, issuing officers and judges are provided with useful information about *how* such warrants/orders were carried out, and whether they resulted in material of investigative or evidential value. For instance, an issuing officer may require a search warrant report to be made under clause 102. This search warrant report may reveal that enforcement officers executed a search at 4am in the morning, for no good reason. These reporting requirements allow issuing officers / judges to assess the reasonableness of *enforcement officer's* actions in executing a warrant or order. This recognises that enforcement officers may execute orders or warrants in a manner that is unreasonable, or act outside its scope.

116. By contrast, the enforcement officer's role in executing a production order is minimal. It is the subject who retrieves and copies the relevant documents/information. Requiring an enforcement officer to provide a report on how they executed a production order will therefore only provide an issuing officer with the date and time that the production order was given to the subject, and the documents that were provided. Reporting on the execution of a production order will not provide any useful information that cannot be gleaned from the production order itself.

117. In response to the Privacy Commissioner's concern about notification, in the course of an investigation, enforcement officers may seek documents that are not held by the person who is under investigation.

118. In the example above at paragraph 106, Police could equally obtain a search warrant against the bank to obtain information about the suspect's bank accounts. In executing this search warrant, the Police do not have any obligation to inform the suspect about the fact that this

search warrant was executed, or what documents were seized (either currently or under the Bill). It would therefore be anomalous to require such notification in relation to production orders. In such a situation, as the Privacy Commissioner correctly identifies, the suspect may not be aware that documents have been produced under a production order in relation to his or her affairs.

119. Lastly, in response to the Privacy Commissioner's specificity concern, the production order must set out the documents required to be given. As production orders are effectively executed by the subject of the production order, they will need to be specific about what documents need to be produced. This applies to production orders seeking all kinds of information, including telecommunications.

Production of telecommunications information

120. Production orders have a monitoring aspect – subjects can be required to provide documents that "come into the possession or under the control of [the] person while the order is in force". The definition of "document" in this context, includes call content (eg, what is said during a phone call). Further, the definition of "document" includes "call-related data". "Call-related data" means information for which a network operator has an "interception capability". There is concern that:

- the reference to "interception capability" in the definition of "call-related data" could require it to establish and maintain interception capability for every agency that may obtain a production order (ie, a network operator could be required to set up a complex and expensive system to enable it to intercept communications for every agency that can obtain a production order); and

- it could receive a production order, valid for a month, requiring it to provide the content of calls over that period.

121. The reference to "interception capability" should be removed as the production order regime covers *stored* documents and information, not information that is intercepted.

122. As discussed above, the production order regime is an alternative to a search warrant. The purpose of the monitoring component of the production order is best illustrated by way of example. To take the example discussed above of the bank accounts of a person suspected of drug dealing, such investigations can be large and may be ongoing at the time a production order is obtained. Therefore, not only do the Police seek current and past transaction details of the suspect's bank accounts, they are also interested in the suspect's future transactions. Accordingly, the production order may require the bank to provide information about the suspect's bank accounts for the period of the order (a maximum period of 30 days – clause 74).

123. The monitoring aspect of the production order *is not* intended to require a person or organisation to provide information that it would not ordinarily keep. Nor is it intended to require network operators to provide call content on a real-time basis in a manner that bypasses the surveillance device regime.

124. Clause 68 should be amended to clarify that a document does not include anything which a network operator does not have storage capability for, or does not store in the normal course of its business.

Recommendation

125. The Ministry and the Law Commission recommend deleting the reference to "interception capability" in the definition of "document" in clause 68, and clarifying that it does not include anything which a network operator does not have storage capability for, or does not store in the normal course of its business.

Part 3 – Residual warrants

126. Submitters are concerned about the purpose and scope of residual warrants. The purpose of the regime is to provide enforcement officers with the opportunity to obtain a judicial view on the legality and reasonableness of a new technique, activity, or device, prior to using it. It is therefore an optional regime that an enforcement officer may choose to utilise, as obtaining a warrant provides a measure of comfort that evidential material obtained in using the new device, technique or procedure is likely to be admissible.

127. Currently, the reasonableness or legality of the use of new techniques, activities, or devices can only be judicially tested *after* their use. This generally takes the form of admissibility challenges under NZBORA and/or the Evidence Act 2006.

128. However, when a new technique, activity or device (eg, a heat sensing device) has been discovered or developed, a mechanism for determining reasonableness and legality *prior* to using it for law enforcement purposes is desirable. Obtaining a prior judicial view means an enforcement officer can be confident that evidence obtained from using the new technique, activity, or device is likely to be admissible in any subsequent criminal proceedings.

129. People subjected to novel techniques, activities, and devices also benefit from such a procedure. Encouraging law enforcement to obtain a judicial view as to legality and reasonableness prior to engaging in novel activity better protects privacy rights. It may prevent privacy intrusions from occurring in the first place, rather than providing a remedy after the intrusion has already occurred.

130. The residual warrant regime recognises that just because an activity, technique, device or procedure is not generally illegal, does not mean that its use as a law enforcement tool will be reasonable under NZBORA.

131. To take an example, a device that "smells" drugs may be developed. A Police officer may be able to stand on a public street, point it at private premises suspected of manufacturing P, and obtain a reading that there are drugs on that property. As the "smelling device" does not require the officer to enter onto private property, or interfere with a person's property rights, there is no law that categorically prevents them from using it.

132. The use of a "smelling device" is therefore not generally *illegal*. However, use of the "smelling device" for law enforcement purposes may still constitute an unreasonable search and seizure under section 21 of NZBORA.

133. The above example demonstrates the shifting nature of the right to be free from unreasonable search and seizure. Where previously this focused on the physical (eg, a search involves entry onto someone's property, or a physical search of a person), developing technology means recognition of such rights requires consideration of the intangible. Law enforcement activity that does not intrude into citizens' areas of physical control (eg, car, body, or home) may still engage the right to be free from unreasonable search and seizure.

134. The regime therefore provides a process for law enforcement officers to determine whether their proposed activity is likely to be deemed reasonable under NZBORA. The regime is not intended to authorise techniques, activities or devices that would otherwise be unlawful or unreasonable. That is, it was not intended that enforcement officers would obtain residual warrants in order to do something. It merely provided them with the opportunity to confirm that what they intend to do is lawful and reasonable.

135. The regime currently uses the language of "warrants" and "authorisation", which suggests it is empowering a law enforcement officer to do something. Similarly, the regime's provisions mirror those of the surveillance device regime, when the two regimes are qualitatively different. Whether use of a surveillance device for law enforcement purposes is lawful is determined by whether a warrant has been obtained, or the conditions for warrantless use in the Bill met, and whether the surveillance conducted was within scope. By way of contrast, the legality and reasonableness of a new technique, device, activity, or procedure under the residual warrant regime is independent of whether a "residual warrant" is obtained.

136. In order to clarify the intention of the regime, it should be recast as a "declaratory order" regime. The regime will make it clear that a declaratory order does not authorise an activity, technique or device that would otherwise be unlawful or unreasonable. The order merely provides judicial clarification that the activity, technique, or device is currently lawful and reasonable.

Recommendation

137. The Ministry and the Law Commission recommend that the residual warrant regime be recast as a "declaratory order" regime that clarifies that it does not authorise activities, techniques or devices that are not otherwise lawful and reasonable.

Part 4 – General provisions in relation to search and inspection powers

Application of Part 4 to non-Police agencies

138. There has been considerable concern about the wholesale application of Part 4 to non-Police agencies, and that this approach provides non-Police agencies with greater powers than is appropriate.

139. As stated above, Part 4 does not contain any new independent powers (ie, it does not authorise agencies to conduct a search). However, if an agency has a pre-existing search power, Part 4 clarifies what they may do when conducting that search. Part 4 therefore clarifies the ambit or scope of existing search powers.

140. Whether Part 4 expands or confines (or merely codifies) the ambit of an agency's search power turns on how that search power has been previously interpreted by the courts. For example, the legislative provision that provides a power of search may not specify that the agency may search computers. This does not mean that there is no power to search computers; it depends on whether courts have interpreted the search power in question to authorise searching computers.

141. Part 4 is intended to provide enhanced certainty and clarity in the law relating to search powers. Further, applying generic provisions provides greater consistency between agencies in how search powers may be exercised, and certainty as to the nature and extent of existing search powers and procedures. As noted at paragraph 31, Part 4 generally attempts to codify,

modify, and reform existing powers of inspection, search, and seizure, rather than confer new tailor-made powers.

Application of Part 4 to regulatory powers

142. There has also been concern that the wholesale application of Part 4 to regulatory inspection powers is an unwarranted extension of present regulatory powers.

143. Regulatory powers are not necessarily less intrusive in nature or scope than law enforcement powers, although sometimes they are limited to particular purposes. Indeed, there are a number of regulatory search or inspection powers across the statute book with a broadly cast power to enter and search and, unlike law enforcement powers (which are limited by a threshold of belief or suspicion that an offence or a breach of the statute has occurred), not confined by any purpose for the search.

144. Further, one of the major issues which emerged when the amendments currently located in subpart 1 of Part 5 were initially drafted was the difficulty of disentangling regulatory search and seizure regimes from powers conferred for law enforcement purposes. Many of these provisions were linked textually in the individual Acts being amended.

145. Many of the agencies involved in discussion indicated that they did not want to introduce two sets of new enforcement regimes; one for regulatory inspection and an entirely different one for law enforcement. The general view of those agencies consulted supported a standardised regime, so far as possible between searching for regulatory purposes and searching for law enforcement purposes. The complications involved in training law enforcement officers for two different regimes (one for regulatory search and one for law enforcement purposes) and the likelihood of error or confusion, provide a highly practical argument for standardisation of the processes to be adopted (to the greatest extent feasible).

Plain view seizures

146. A number of submitters are concerned that clause 119, which concerns plain view seizures, will allow enforcement officers to conduct "fishing expeditions" to obtain evidential material. Specifically, that enforcement officers will obtain a search warrant to search a person's home for a specific offence in order to search for evidential material of other (potentially more serious) offending.

147. An enforcement officer exercising a search power for law enforcement purposes is only authorised to search for specific items (ie, evidential material of suspected offending). The search is limited to where these items might be found. Likewise, when exercising a regulatory search power, the search must still be directly related to the purpose of inspection.

148. Clause 119 does not authorise searches which are wider than that allowable under the authorising search power. That is, clause 119 does not affect the ambit of the search itself (ie, *what* may be searched); it does, however, widen the ambit of what may be *seized* during a search.

149. Courts have already considered the status of searches for dual purposes. In relation to search warrants, the Court of Appeal in *R v Williams* [2007] 3 NZLR 207 held that it is lawful to execute a search warrant for a dual purpose, even where there are insufficient grounds for applying for a warrant for one of those purposes, *so long as the search is not wider than that allowable in relation to the purpose for which the warrant was obtained.*

150. We believe that the ability to seize items in plain view is justified. A search cannot be greater than that required for the purpose for which it is conducted; clause 119 therefore does not

mandate a greater level of intrusion into privacy than the authorising search power. Accordingly, clause 119 only allows an enforcement officer to seize items which are self-evidently incriminating (ie, the enforcement officer must have reasonable grounds to believe the item can be seized without further examining the item). For instance, if Police are searching a known gang member's dwelling for a stolen car, they cannot also search that person's bedroom for drugs.

151. Further, the protection afforded by section 21 of NZBORA, and the prospect that material seized outside the scope of the search power will be rendered inadmissible, will help ensure that plain view seizures are appropriate.

Power to detain people

152. Clauses 108(d), 110(2)(d), and 114 allows enforcement officers who are exercising a search power to detain a person at the place being searched (or who arrives at the search premises). The purpose of the power is to allow enforcement officers to assess whether the person detained could assist the investigation.

153. Detaining people is a significant intrusion into a person's freedom of movement. Further, detaining people requires appropriate training and understanding of the rights in NZBORA relating to arrested or detained persons. This power should be limited to enforcement officers exercising a search power to investigate offending for which they have a related power to arrest.[3]

Recommendation

154. The Ministry and the Law Commission recommend:

- making clauses 108(d), 110(2)(d), and 114 subject to a new subclause in clause 111 so that the power to detain a person while conducting a search is limited to people exercising a search power to investigate offending for which they have a related power to arrest;
- inserting specific provisions in the legislation amended in subparts 1 and 2 of Part 5 of the Bill to exclude those clauses from applying to search powers for which there is no related power of arrest where this is determined to be appropriate following further consideration by the Ministry and the Law Commission.

Computer searches

155. The Bill treats searches of computers and other data storage devices in the same way as searches of tangible items. There is therefore no specific search regime for computer searches. Of particular importance are:

- Clause 108(i): This allows any person exercising a search power to access and copy intangible material from computers and other data storage devices located at or accessible from the place, vehicle, or other thing being searched.

[3] Enforcement officers with this power include: Police Officers, Department of Conservation Officers, Fisheries Officers and Customs Officers.

- Clause 108(j): This allows any person exercising a search power to use any reasonable measures to:
    - gain access to any computer or other data storage device that is at the place, vehicle, or other thing being searched, or that can be accessed from such computers or data storage devices; and
    - create a forensic copy (clone) of any material in such a computer or data storage device.
- Clauses 110(2)(h) and (j) contain equivalent provisions relating to people who are assisting a person exercising a search power.

Computer searches should require explicit authorisation in a warrant that outlines information that is sought from the computer

156. A number of submitters believe that computer searches are quite different from physical searches because of the amount and type of information stored on them (which can include highly personal information). Submitters are concerned that computer searches, along with the ability to seize items in plain view, will allow enforcement agencies to trawl through a large amount of material on computers.

157. Submitters therefore recommend that computer searches should only be allowed if explicitly authorised in a search warrant. This authorisation should be granted only where there are reasonable grounds to believe that the material sought by the search warrant is contained on a computer or data storage device. One submitter recommends requiring warrants to specify the information that is expected to be on the computer or data storage device.

158. The Bill has been drafted to be technology neutral. The response to concerns about plain view seizures (both of tangible and intangible items) under clause 119 has been provided above. The same safeguards that apply in that context (that the search does not affect the ambit of the search and section 21 of NZBORA) will also apply to computer searches.

159. Significant case law requires both search warrants and search warrant applications to be as "specific as the circumstances allow"[4] about what may be searched, and what may be seized. This requirement applies to both searches of tangible and intangible items (such as material on computers or data storage devices).

160. Part 4 only authorises actions for the purposes of the search. A search warrant or search power does not mean a searcher has an unrestricted power of search. Searches are limited to areas and things where what is being searched for may reasonably be located. For instance, if a warrant authorises a search for stolen televisions, it will not authorise a searcher to search a desk in a bedroom.

161. This applies equally to computer searches. First, a computer may be searched only if what is being searched for could reasonably be located on that computer. Second, that search must be limited (through the use of appropriate search terms) to parts of the computer where the documents sought could reasonably be located.

162. It is therefore not necessary to only allow searchers to search computers where explicitly authorised to do so in a search warrant. In addition to the above:

[4] *R v Williams* [2007] 3 NZLR 207 (CA).

- Use of computers and other technology is widespread; an explicit authorisation to search computers would therefore be cumbersome and inefficient.

- Enforcement officers will often not know in advance whether evidential material is in electronic or hard copy form.

- If it is more difficult for searchers to search electronic data than hard copy data, this would create incentives for offenders to conduct or record criminal activity electronically.

The authorisation of remote access or "hacking".

163. A remote search is a search of a data storage facility that is not located at the place being searched. The Bill authorises remote searching in two situations:

- When searching a place pursuant to a warrant or a warrantless power, to access material on computers or data storage facilities that are not at the place being searched, but are legally accessible from a computer (or data storage device) that is at the place being searched.

- To access electronic data that does not have a physical place that may be searched (eg, web-based email which the holder of the account accesses from various internet cafes). A warrant *must* be obtained to conduct this type of search.

164. The Bill therefore does not authorise "hacking" into people's computer. The Bill only allows remote access from the place being searched, unless there is no physical search location that may be searched to access that data. Where there is a computer located at a physical location that can be searched, the search must occur at the physical location of the computer, or from a physical location from which the lawful user of the computer may lawfully access the data.

165. However, there is concern about the ability to search data that is "accessible from" a computer contained in paragraphs (i) and (j) in clauses 108 and 110(2).

166. The use of the term "accessible from" may be overly broad, and permit access to a larger repository of information than intended. The provisions were intended to ensure that enforcement officers could search computers that are connected by a network, and information that a company stores on servers that are not located at the search premises.

167. Clauses 108(i) and (j), and 110(2)(h) and (j) should be amended to allow searchers and their assistants to search a "computer system". The definition of "computer system" in section 248 of the Crimes Act 1961 should be adopted. Section 248 provides that:

computer system –

(a) means-

(i) a computer; or

(ii) 2 or more interconnected computers; or

(iii) any communication links between computers or to remote terminals or another device; or

(iv) 2 or more interconnected computers combined with any telecommunication links between computers or to remote terminals or any other device; and

(b) includes any part of the items described in paragraph (a) and all related input, output, processing, storage, software, or communication facilities, and stored data.

168. The definition of "thing seized" in clause 3, clause 125 and clause 154(1) should also be amended by replacing the word "computer" with "computer system" (along with other technical changes to reflect the amendments to clauses 108 and 110).

169. It is recommended that the situations in which computer systems may be searched be clarified in the Bill.

There should be notification where computers or internet storage devices are searched remotely

170. One submitter suggests that if computers or internet storage devices are searched, the owner of the same should be notified of this fact. Further, the owner should be provided with a full list of the items copied.

171. Clause 126(4)-(5) sets out the notice requirements for an enforcement officer who conducts a search when no-one is present at the place being searched. This requires a searcher to provide the occupier with a copy of the authority for the search power and an inventory of any "thing seized".

172. We agree that notification should be necessary where a computer or internet data storage device has been searched. For instance, where a web-based email address is searched (which has no physical location that can be searched), an electronic message should be sent to the email address to notify the email address owner that it has been searched. The language used in clause 126(4)-(5) has an element of physicality to it which is problematic for remote searches. The Bill should be amended to make it clear that the notification requirements in clause 126(4)-(5) apply to remote searches.

173. However, we do not agree that a copy of the items that have been copied or printed should be provided to the owner of a computer or internet data storage device. The purpose of the inventory requirement in clause 126 is to let an occupier know that their premises have been entered and searched, and itemise what has been taken. If the owner of any seized item wished to exercise their property rights, they may do so in accordance with subpart 5 of Part 4. It is for this reason that things that are generated by enforcement officers (eg, photographs, drawings, copies of documents, forensic copies of computers) do not need to be itemised in the inventory required under clause 126. This is true for both searches of physical premises and computer searches.

Duty to assist access infringes privilege against self-incrimination

174. A number of submitters are concerned that clause 125 requires a person with knowledge of a computer or computer network to provide access information and other reasonable assistance to allow a searcher to access electronic data.

175. Clause 125(3) provides that this clause does not require a person to provide information that tends to incriminate that person. However, this is modified by subclauses (4) and (5) which requires a person to provide information and assistance that, although not incriminating in itself, allows access to data that may contain information that tends to be incriminating.

176. This duty to assist access is currently found in section 198B of the Summary Proceedings Act 1957. The effect of these clauses is that a person can be required to, for instance, provide a password to a computer, even if that computer contains information that tends to incriminate that person.

177. The rationale for this is the fact that access information, in and of itself, does not impinge on the privilege against self-incrimination. The access information does not, in itself, constitute self-incriminating material, and will not be evidence of an offence.

178. Further, there are detailed procedures regarding potentially privileged material. Under clause 135 a person may prevent the search of a computer by claiming the privilege against self-incrimination (see also clause 139(c)). If the privilege is claimed, the searcher may not search the data stored on the computer unless the claim of privilege is withdrawn, or a court directs that it may be searched.

179. The provisions relating to the search and seizure of potentially privileged materials provide an adequate safeguard for the privilege against self-incrimination.

Return of computers

180. Some submitters note that clauses 109 and 119 allow the seizure of computers. They note that such seizure can cripple a business and suggest that enforcement officers should be required to return computers as soon as the required information has been obtained and within strict time limits, with a power to apply to the court for return.

181. The provisions relating to seized items in subpart 5 of Part 4 apply to computers and other data storage devices that are seized. This includes a requirement to return seized items unless they are required for evidential purposes, and provides an adequate procedure for a person to apply for access to, or return of a seized item.

Recommendations

182. The Ministry and the Law Commission recommend amending clauses 108(i) and (j) and 110(2)(h) and (j) so that searchers and their assistants may search a "computer system" as defined in section 248 of the Crimes Act 1961. The Ministry and the Law Commission also recommend making consequential technical amendments to clause 125 and clause 154(1).

183. The Ministry and the Law Commission recommend clarifying that a person may only access and copy data from a computer system (and other data storage devices) where:

- the computer system, or part of the computer system, is located at the place being searched; or
- the computer system does not have a physical location that may be searched, and the enforcement officer has obtained a warrant to search the computer system.

184. The Ministry and the Law Commission recommend that a new clause 126A be inserted to clarify that the notice requirements contained in clause 126(4) and (5) apply to remote searches of internet data storage facilities.

Privilege

185. The Bill recognises several privileges which apply to searches, seizures and surveillance conducted under the Bill, and specifies specific procedures for determining how material subject to such privileges should be treated.

186. Clause 100 provides that an issuing officer cannot issue a warrant to seize something held by a lawyer that is legally privileged unless the application indicates that the thing was made for:

- a dishonest purpose; or
- for the purpose of planning to commit an offence.

187. Clauses 135-140 set out the procedures for things in respect of which privilege has been claimed. Clause 135 allows a privilege-holder to prevent a search or require the return of any item on the basis of that privilege. Clause 136 prescribes the procedure for searches of lawyers' premises, and clause 137 likewise prescribes the procedure for searches of professional material held by a minister of religion, medical practitioner, or clinical psychologist.

188. Under these clauses, search warrants at these premises must not be executed unless the lawyer, minister of religion, medical practitioner, clinical psychologist, or their representative, is present. These people may claim privilege on behalf of parishioners, patients, or clients.

189. Submitters have three main concerns in relation to privilege:

- An issuing officer should uphold a claim to privilege pending a court determination on the privilege claim. Submitters are concerned that determining privilege after material has been viewed by an enforcement officer diminishes the value of the privilege.
- The threshold of "indicates" for disallowing privilege is too low, and should be replaced by a "prima facie case", consistent with the threshold in section 67 of the Evidence Act 2006 (which sets out situations where a judge may disallow privilege).
- The privilege should still apply if the dishonest purpose is held by someone who is not the privilege holder.

190. Clause 135 permits a person who has a privilege recognised under the Bill to prevent the search of any communication or information. Therefore, where a search warrant has been issued in respect of legally privileged material, the person to whom the privilege belongs may prevent the search. Once that occurs, the procedures set out in clauses 138-140 apply. This means that an enforcement officer will not be able to view the potentially privileged material pending determination of the privilege claim.

191. We agree that the threshold of "indicates" should be increased to a *prima facie case* for consistency with section 67 of the Evidence Act. Clause 49, the equivalent provision relating to the issue of surveillance device warrants, should likewise be amended.

192. We do not agree that the ability to issue a search warrant to seize privileged material because of a dishonest purpose held by someone other than the privilege-holder is of concern. For example, if a person were seeking advice about how another person could commit an offence, it is difficult to see why such a communication should be protected by privilege, even if the person obtaining the advice (and therefore holding the privilege) did not personally have the dishonest purpose.

Rights of journalists and media

193. Clause 130 recognises the rights of a journalist to protect certain sources in the context of the Bill. The right is based on section 68 of the Evidence Act 2006.

194. Section 68 provides that:

- A journalist and his or her employer cannot be compelled (except by court order) to disclose an informant's identity where the journalist has promised the informant not to disclose this information.
- However, a party to a civil or criminal proceeding may apply for a court order for disclosure. A court may order disclosure if the public interest in disclosure outweighs:
  - any adverse effect of disclosure on the informant or any other person; and
  - the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

195. The right of a journalist to protect an informant's identity is therefore a qualified right, as public interest grounds may prevail over the privilege.

196. Clause 130(2) provides that the privileges recognised in that clause do not apply in respect of communications made for a dishonest purpose, or to enable someone to commit an offence.

197. Clause 135 provides that a person with a recognised privilege may prevent a search.

198. One submitter suggests the qualified protection in section 68 of the Evidence Act 2006 is insufficient. The submitter suggests that there should be a presumption that journalists' sources are protected unless the criteria in clause 130(2) are satisfied.

199. Another submitter recognises the right of media to prevent a search in clause 135, but recommends that this protection should occur earlier in the process (ie, when search warrants are issued). Further, the submitter suggests that the guidelines provided by the Court of Appeal in *TVNZ v Attorney-General* [1995] 2 NZLR 641 for issuing media search warrants be codified in the Bill.

200. The protections provided by subpart 4 are sufficient and adequate. Clause 139(c) specifically provides that, where a person claims a privilege recognised in subpart 4 in relation to an item, that item must not be searched unless the claim of privilege is withdrawn or a court has ruled that the item may be searched.

201. *TVNZ v Attorney-General* provides the following general guidelines as to the issuing of media search warrants:

- search warrants should not be used for trivial or truly minor cases;
- as far as possible, warrants should not be granted or executed so as to impair the public dissemination of news;
- if there is substantial risk that it will result in the "drying-up" of confidential sources of information for the media, a warrant should be granted or executed only in exceptional circumstances where it is truly essential in the interests of justice;
- warrants should be executed considerately and in a manner that minimises the disruption caused to the business of a media organisation;

- consideration should be given to whether the evidential material sought will have a direct and important place in the determination of the issues before the court.

202. We do not agree that the principles in *TVNZ v Attorney-General* need to be codified in the Bill as the submitter suggests. It is expected that these general common law principles will continue to apply to media search warrants. Further, it is problematic to include detailed conditions on why a search warrant should be issued in respect of media premises, but not the other premises that may create information of a confidential nature.

Recommendation

203. The Ministry and the Law Commission recommend replacing "indicates" in clause 100 with "prima facie case". Clause 49 (which is the parallel clause for surveillance device warrants) and clause 130 (which relates to recognition of privilege) should be likewise amended.

Appendix F

Suggested amendments.

Hon Simon Power

Search and Surveillance Bill

Government Bill

Contents

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Search and Surveillance Act 2009.

2 Commencement

(1) This Act comes into force on a date appointed by the Governor-General by Order in Council, and 1 or more Orders in Council may be made bringing different provisions into force on different dates.

(2) To the extent that it is not previously brought into force under subsection (1), the rest of this Act comes into force on 1 April ~~2011~~ 2012.

Part 1
General provisions

3 Interpretation

In this Act, unless the context otherwise requires,—

arms means any firearm, airgun, pistol, restricted weapon, imitation firearm, or explosive (as those terms are defined in section 2 of the Arms Act 1983), or any ammunition

business context, in relation to the acquisition of any information by a person, means the acquisition of the information in the person's capacity as—

(a) a provider of professional services or professional advice in relation to a person who is being investigated, or 1 or more of whose transactions are being investigated, in respect of an offence; or

(b) a director, manager, officer, trustee, or employee of an entity that is being investigated, or 1 or more of whose transactions are being investigated, in respect of an offence

chief executive—

(a) means the chief executive (however described) of any department of State, Crown entity, local authority, or other body that employs or engages enforcement officers as part of its functions; and

(b) includes the Commissioner

Commissioner means the Commissioner of Police

computer system has the same meaning as in section 248 of the Crimes Act 1961

constable has the same meaning as in section 4 of the Policing Act 2008

controlled drug has the same meaning as in section 2 of the Misuse of Drugs Act 1975

Crown entity has the same meaning as in section 7(1) of the Crown Entities Act 2004

Customs officer has the meaning given to it in section 2(1) of the Customs and Excise Act 1996

District Court Judge means a Judge appointed under the District Courts Act 1947

enforcement officer, except in Parts 4 and 5,—

(a) means any of the following persons:
  (i) a constable:
  (ii) any person authorised by this Act or ~~any relevant enactment~~ an enactment specified in column 2 of the Schedule to exercise a power of entry, search, or seizure; but

(b) does not include any person referred to in paragraph (a)(ii) in relation to the exercise by that person of any power of entry, search, or seizure under any enactment that is not—
  (i) part of this Act; or
  (ii) ~~a relevant enactment~~an enactment specified in column 2 of the Schedule

equipment includes fingerprint powder and any chemical or other substance used for law enforcement purposes

evidential material, in relation to a particular offence, means evidence or any other item, tangible or intangible, of relevance to the investigation of the offence

examination order means an examination order made under section 36

informant has the same meaning as in section 6(1) of the Criminal Disclosure Act 2008

intercept, in relation to a private communication, includes hear, listen to, record, monitor, acquire, or receive the communication either—

(a) while it is taking place; or

(b) while it is in transit

interception device—

(a) means any electronic, mechanical, electromagnetic, optical, or electro-optical instrument, apparatus, equipment, or other device that is used or is capable of being used to intercept or record a private communication (including a telecommunication); but

(b) does not include a hearing aid or similar device used to correct subnormal hearing of the user to no better than normal hearing

issuing officer means—

(a) a Judge:

(b) a person, such as a Justice of the Peace, Community Magistrate, Registrar, or Deputy Registrar, who is for the time being authorised to act as an issuing officer under section 106

Judge means a District Court Judge or a Judge of the High Court

law enforcement agency means any department of State, Crown entity, local authority, or other body that employs or engages enforcement officers as part of its functions

local authority means a local authority within the meaning of section 5(1) of the Local Government Act 2002

medical practitioner means a health practitioner who is, or is deemed to be, registered with the Medical Council of New Zealand continued by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of medicine

non-business context means a context other than a business context

non-private premises means premises, or part of a premises, to which members of the public are frequently permitted to have access, and includes any part of a hospital, bus station, railway station, airport, or shop

nurse means a health practitioner who is, or is deemed to be, registered with the Nursing Council of New Zealand continued by section 114(1)(a) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of nursing whose scope of practice permits the performance of general nursing functions

Police article has the same meaning as in section 4 of the Policing Act 2008

Police bail has the same meaning as in Part 2 of the Bail Act 2000

Police employee has the same meaning as in section 4 of the Policing Act 2008

Police uniform has the same meaning as in section 4 of the Policing Act 2008

precursor substance has the same meaning as in section 2(1) of the Misuse of Drugs Act 1975

private activity means activity that, in the circumstances, any 1 or more of the participants in it ought reasonably to expect is observed~~, intercepted,~~ or recorded by no one except the participants

private communication—

(a) means a communication (whether in oral or written form, or in the form of a telecommunication, or otherwise) made under circumstances that may reasonably be taken to indicate that any party to the communication desires it to be confined to the parties to the communication; but

(b) does not include a communication of that kind occurring in circumstances in which any party to the communication ought reasonably to expect that the communication may be intercepted by some other person without having the express or implied consent of any party to do so

private premises means a private dwellinghouse, a marae, and any other premises that are not within the definition of non-private premises

production order means a production order made under section 72

raw surveillance data—

(a) means actual video recordings or actual audio recordings; and

(b) includes full transcripts, or substantial parts of transcripts, of audio recordings

relevant enactment,—

(a) in relation to a provision in Part 4 of this Act,—

(i) means—

(A) an enactment that is not part of this Act but in respect of which all of Part 4 is expressly applied; or

(B) an enactment that is not part of this Act but in respect of which that particular provision in Part 4 or the subpart that the provision forms part of is expressly applied; but

(ii) does not include any section or subsection in an Act, or regulation or subclause in regulations, as the case requires; unless all of Part 4 or the subpart that the provision forms part of or the particular provision in Part 4 is expressly applied in respect of that section or subsection or regulation or subclause, as the case requires; and

(b) in relation to any other provision in this Act,—

(i) means an enactment that is not part of this Act but in respect of which Part 4 of this Act or any subpart or provision in Part 4 is expressly applied; but

(ii) does not include any section or subsection in an Act or regulation or subclause in regulations, as the case requires; unless Part 4 or any subpart or any provision of Part 4 is expressly applied in respect of that section or subsection or regulation or subclause, as the case requires

road block means any form of barrier or obstruction preventing or limiting the passage of vehicles

rub-down search means a search described in sections 83(2), 84, and 85

~~**strip search** means a search where the person conducting the search may require the person being searched to remove, raise, lower, or open all or any of the clothing of the person being searched~~

strip search means a search where the person conducting the search may require the person being searched to undress, or remove, raise, lower, or open any item or items of clothing so that the genitals, buttocks, or (in the case of a female) breasts are—

(a) uncovered; or

(b) covered only by underclothing

surveillance device means a device that is any 1 or more of the following kinds of devices:

(a) an interception device:

(b) a tracking device:

(c) a visual surveillance device

thing seized does not include anything made or generated by a person exercising a search or surveillance power (for example, photographs, drawings, or audio or video recordings made by or on behalf of that person, or a forensic copy of a computer hard drive)

tracking device means a device that, when installed in or on a thing, may be used to help ascertain, by electronic or other means, either or both of the following:

(a) the location of that thing or a person in possession of that thing:

(b) whether a thing has been opened, tampered with, or in some other way dealt with

trespass surveillance means surveillance that involves trespass onto private property

unique identifier, in relation to an enforcement officer, means an identifier, used to identify the officer, that is not his or her name and that—

(a) is assigned to him or her by the law enforcement agency that employs or engages him or her for the purposes of its operations; and

(b) uniquely identifies him or her in relation to the law enforcement agency

unlawfully at large, in relation to a person, means that he or she is any 1 or more of the following:

(a) a person for whose arrest a warrant is in force (unless no other warrant is in force except a warrant or warrants issued under Part 3 of the Summary Proceedings Act 1957 or sections 19B to 19D of the Crimes Act 1961):

(b) unlawfully at large within the meaning of the Corrections Act 2004 or the Parole Act 2002:

(c) a prison breaker within the meaning of section 119 of the Crimes Act 1961:

(d) an escapee from lawful custody within the meaning of section 120 of the Crimes Act 1961:

(e) a special patient or restricted patient within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992 who has escaped or failed to return on the expiry or cancellation of a period of leave:

(f) a care recipient or special care recipient within the meaning of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 who has escaped or failed to return on the expiry or cancellation of a period of leave:

(g) a young person within the meaning of the Children, Young Persons, and Their Families Act 1989 who is subject to an order made under section 311(1) of that Act and who is absconding from the custody of the chief executive (as defined in that Act)

vehicle means any conveyance that is capable of being moved under a person's control, whether or not the conveyance is used for the carriage of persons or goods, and includes a motor vehicle, aircraft, train, ship, or bicycle

visual surveillance device—

(a) means any electronic, mechanical, electromagnetic, optical, or electro-optical instrument, apparatus, equipment, or other device that is used or is capable of being used to observe, or to observe and record, a private activity; but

(b) does not include spectacles, contact lenses, or a similar device used to correct subnormal vision of the user to no better than normal vision

visual trespass surveillance means trespass surveillance involving the use of a visual surveillance device.

4 Act binds the Crown

This Act binds the Crown.

4A Purpose

The purpose of this Act is to facilitate the monitoring of compliance with the law and the investigation and prosecution of offences in a manner that is consistent with human rights values by—

(a) modernising the law of search, seizure, and surveillance to take into account advances in technologies and to allow for future technological developments; and

(b) providing rules that recognise the importance of the rights and entitlements affirmed in other enactments, including the New Zealand Bill of Rights Act 1990, the Privacy Act 1993, and the Evidence Act 2006; and

(c) ensuring investigative tools are effective and adequate for law enforcement needs.

Part 2
Police powers

Subpart 1—Rules about internal searches and search warrant powers in relation to places, vehicles, and other things

5 Internal searches generally prohibited

(1) A constable must not conduct an internal search of any part of the body of any person, except for, with the person's consent, searching the person's mouth.

(2) A constable must not require any other person to conduct an internal search of any part of the body of any person, except as provided in section 22 (which relates to internal searches in some circumstances of people under arrest for offences against the Misuse of Drugs Act 1975).

(3) This section does not limit or affect sections 13A to 13M of the Misuse of Drugs Amendment Act 1978.

6 Issuing officer may issue search warrant

An issuing officer may issue a search warrant, in relation to a place, vehicle, or other thing, on application by a constable if the issuing officer is satisfied that there are reasonable grounds—

(a) to suspect that an offence specified in the application and punishable by imprisonment has been committed, or is being committed, or will be committed; and

(b) to believe that the search will find evidential material in respect of the offence in the place, vehicle, or other thing specified in the application.

Subpart 2—Warrantless powers to enter and search when effecting arrest

7 Entry without warrant to arrest person unlawfully at large

A constable may enter a place or vehicle without warrant to search for and arrest a person if the constable has reasonable grounds—

(a) to suspect that a person is unlawfully at large; and

(b) to believe that the person is there.

8 Entry without warrant to avoid loss of offender or evidential material

(1) In the circumstances set out in subsection (2), a constable may—

(a) enter a place or vehicle without a warrant; and

(b) arrest a person that the constable suspects has committed the offence.

(2) The circumstances are that the constable has reasonable grounds—

(a) to suspect that the person has committed an offence that is punishable by imprisonment and for which he or she may be arrested without warrant; and

(b) to believe that the person is there; and

(c) to suspect that, if entry is not effected immediately, either or both of the following may occur:

(i) the person will leave there to avoid arrest:

(ii) evidential material relating to the offence for which the person is to be arrested will be destroyed, concealed, altered, or damaged.

Stopping vehicle without warrant to effect arrest

9 Stopping vehicle to find persons unlawfully at large or who have committed certain offences

A constable may stop a vehicle without a warrant to arrest a person if the constable has reasonable grounds—

(a) to suspect that a person—
  (i) is unlawfully at large; or
  (ii) has committed an offence punishable by imprisonment; and

(b) to believe that the person is in or on the vehicle.

10 Powers and duties of constable after vehicle stopped

(1) A constable exercising the stopping power under section 9 may do any 1 or more of the following:

(aa) require any person in or on the vehicle to supply all or any of his or her name, address, other contact details, and date of birth:

(a) search the vehicle to locate the person referred to in section 9, if the constable has reasonable grounds to believe that the person is in or on the vehicle:

(b) search the vehicle to locate property that is evidential material in relation to any offence in respect of which the vehicle was stopped under section 9, if the person referred to in section 9—
  (i) has been arrested; or
  (ii) is seen fleeing from the vehicle before he or she can be arrested.

(2) Before conducting a search under a power conferred by subsection (1)(b), a constable must tell the driver the object of the proposed search, if the driver is not the person referred to in section 9.

Subpart 3—Warrantless searches of people who are to be locked up in Police custody

11 Warrantless searches of people who are to be locked up in Police custody

(1) This section applies to any person who—

(a) has been taken into lawful custody; and

(b) is—

(i) at a Police station; or

(ii) in other premises, or about to be placed in a vehicle, being used for Police purposes; and

(c) is to be locked up (whether pending a decision as to bail under section 21 of the Bail Act 2000, or in any other circumstances).

(2) A constable, or a searcher used in accordance with section 12, may conduct a search of a person to whom this section applies.

(3) A constable or searcher may take from the person any money or other property found during the search.

Compare: 2008 No 72 s 37

12 Searchers

(1) A Police employee in charge of a person to whom section 11 applies may use a searcher to conduct a search of the person under section 11 if the use of that searcher is necessary to enable the search of the person in custody to be carried out—

(a) by someone of the same sex as the person to be searched; or

(b) within a reasonable time of the person being taken into custody.

(2) The Police employee in charge of a person who is taken into lawful custody and is to be locked up must be satisfied that a searcher used under this section has received appropriate training before that searcher conducts a search under section 11.

(3) The searcher must carry out the search as if he or she were a Police employee.

Compare: 2008 No 72 s 38

13 Property taken from people locked up in Police custody

(1) All money and every item of property taken from a person under section 11 must be returned to him or her when he or she is released from custody, except for the following:

(a) any money or property that, in the opinion of a constable, may need to be given in evidence in proceedings arising out of a charge brought against the person:

(b) any money or property whose possession may, in the opinion of a constable, constitute an offence.

(2) Despite subsection (1), when a person described in section 11(1) is released from Police custody and is placed in the custody of another person, all money and every item of property taken from him or her under section 11 (other than money or property of a kind described in subsection (1)(a) or (b)) must, if practicable, be delivered—

(a) to the person into whose custody he or she is released; or

(b) to the person in charge of the facility, if he or she is being released from Police custody in order to be held in custody in the facility.

(3) Subsection (1) is subject to an order made under—

(a) section 40 of the Policing Act 2008; or

(b) section 404 of the Crimes Act 1961.

Compare: 2008 No 72 s 39

Subpart 4—Warrantless powers of entry in urgent circumstances

14 Warrantless entry to prevent offence or respond to risk to life or safety

(1) A constable who has reasonable grounds to suspect that any 1 or more of the circumstances in subsection (2) exist in relation to a place or vehicle may—

(a) enter the place or vehicle without a warrant; and

(b) take any action that he or she has reasonable grounds to believe is necessary to prevent the offending from being committed or continuing, or to avert the emergency.

(2) The circumstances are as follows:

(a) an offence is being committed, or is about to be committed, that would be likely to cause injury to any person, or serious damage to, or loss of, any property:

(b) there is risk to the life or safety of any person that requires an emergency response.

Subpart 5—Warrantless powers for evidential material relating to serious offences

15 Entry without warrant to find and avoid loss of evidential material relating to certain offences

A constable may enter and search a place without a warrant if he or she has reasonable grounds—

(a) to believe that evidential material is in that place; and

(b) to suspect—

(i) that the evidential material relates to an offence, punishable by imprisonment for a term of 14 years or more, that has been committed, or is being committed, or is about to be committed; and

(ii) that, if entry is delayed in order to obtain a search warrant, the evidential material will be destroyed, concealed, altered, or damaged.

16 Searching people in public place without warrant for evidential material relating to certain offences

A constable may search a person without a warrant in a public place if the constable has reasonable grounds to believe that the person is in possession of evidential material relating to an offence punishable by imprisonment for a term of 14 years or more.

17 Warrantless entry and search of vehicle for evidential material relating to certain offences

A constable may, without a warrant, enter and search a vehicle that is in a public place if he or she has reasonable grounds to believe that evidential material relating to an offence punishable by imprisonment for a term of 14 years or more is in the vehicle.

Subpart 6—Warrantless powers in relation to arms offences

18 Warrantless searches associated with arms

(1) A constable who has reasonable grounds to suspect that any 1 or more of the circumstances in subsection (2) exist in relation to a person may, without a warrant, do any or all of the following:

(a) search the person:

(b) search any thing in the person's possession or under his or her control (including a vehicle):

(c) enter a place or vehicle to carry out any activity under paragraph (a) or (b):

(d) seize and detain any arms found.

(2) The circumstances are that the person is carrying arms, or is in possession of them, or has them under his or her control, and—

(a) he or she is in breach of the Arms Act 1983; or

(b) he or she, by reason of his or her physical or mental condition (however caused),—

(i) is incapable of having proper control of the arms; or

(ii) may kill or cause bodily injury to any person; or

(c) that, under the Domestic Violence Act 1995,—

(i) a protection order is in force against the person; or

(ii) there are grounds to make an application against him or her for a protection order.

(3) A constable may, without a warrant, enter a place or vehicle, search it, seize any arms found there, and detain the arms if he or she has reasonable grounds to suspect that there are arms in the place or vehicle—

(a) in respect of which an indictable offence or an offence against the Arms Act 1983 has been committed, or is being committed, or is about to be committed; or

(b) that may be evidential material in relation to an indictable offence or an offence against the Arms Act 1983.

Subpart 7—Police powers in relation to Misuse of Drugs Act 1975 offences

19 Warrantless search of places and vehicles in relation to some Misuse of Drugs Act 1975 offences

A constable may enter and search a place or vehicle without a warrant if he or she has reasonable grounds—

(a) to believe that it is not practicable to obtain a warrant and that in or on the place or vehicle there is—

(i) a controlled drug specified or described in Schedule 1 of the Misuse of Drugs Act 1975; or

(ii) a controlled drug specified or described in Part 1 of Schedule 2 of the Misuse of Drugs Act 1975; or

(iii) a controlled drug specified or described in Part 1 of Schedule 3 of the Misuse of Drugs Act 1975; or

(iv) a precursor substance specified or described in Part 3 of Schedule 4 of the Misuse of Drugs Act 1975; and

(b) to suspect that in or on the place or vehicle an offence against the Misuse of Drugs Act 1975 has been committed, or is being committed, or is about to be committed, in respect of that controlled drug or precursor substance; and

(c) to believe that, if the entry and search is not carried out immediately, evidential material relating to the suspected offence will be destroyed, concealed, altered, or damaged.

20 Warrantless searches of people found in or on places or vehicles

A constable conducting a search of a place or vehicle under section 19 may, without a warrant, search any person found in or on the place or vehicle.

21 Warrantless power to search and detain a person, and seize controlled drugs and precursor substances if offence suspected against Misuse of Drugs Act 1975

(1) A constable may, in the circumstances set out in subsection (2), do any or all of the following without a warrant:
- (a) search a person:
- (b) ~~take possession of~~ seize any controlled drug or precursor substance found during the search.

(2) The circumstances are that the constable has reasonable grounds—
- (a) to believe that the person is in possession of—
  - (i) a controlled drug specified or described in Schedule 1 of the Misuse of Drugs Act 1975; or
  - (ii) a controlled drug specified or described in Part 1 of Schedule 2 of the Misuse of Drugs Act 1975; or
  - (iii) a controlled drug specified or described in Part 1 of Schedule 3 of the Misuse of Drugs Act 1975; or
  - (iv) a precursor substance specified or described in Part 3 of Schedule 4 of the Misuse of Drugs Act 1975; and
- (b) to suspect that an offence against the Misuse of Drugs Act 1975 has been committed, is being committed, or is about to be committed, in respect of that controlled drug or precursor substance.

(3) This section does not—
- (a) limit section 19 or 20; or
- (b) authorise a constable to enter or search a place or vehicle except in accordance with those sections.

22 Internal search of person under arrest for offence against section 6 or 7 or 11 of Misuse of Drugs Act 1975

(1) In the circumstances set out in subsection (2), a constable may require a person to permit a medical practitioner, nominated for the purpose by the constable, to conduct an internal examination of any part of the person's body by means of—
- (a) an X-ray machine or other similar device; or

(b) a manual or visual examination (whether or not facilitated by any instrument or device) through any body orifice.

(2) The circumstances are that—

(a) the person is under arrest for an offence against section 6 or 7 or 11 of the Misuse of Drugs Act 1975; and

(b) the constable has reasonable grounds to believe that the person has secreted within his or her body any property—

(i) that may be evidence of the offence with which the person is charged; or

(ii) the possession of which by the person constitutes any other offence against section 6 or 7 or 11 of the Misuse of Drugs Act 1975.

(3) A medical practitioner must not conduct an internal examination if he or she—

(a) considers that to do so may be prejudicial to the person's health; or

(b) is satisfied that the person is not prepared to permit an internal examination to be conducted.

(4) This section does not limit or affect sections 13A to 13M of the Misuse of Drugs Amendment Act 1978.

23 Effect of not permitting internal search under section 22 on bail application

(1) In the circumstances set out in subsection (2), a court may decline to consider a bail application by a person, and may order that the person continue to be detained in Police custody, until the earlier of the following occurs:

(a) the expiry of 2 days after the day on which the person was required under section 22(1) to permit an internal examination by a medical practitioner:

(b) the person permits the examination to be conducted.

(2) The circumstances are that—

(a) the person fails to permit an internal examination to be conducted under section 22; and

(b) the court is satisfied that the requirement under section 22(1) was properly made on reasonable grounds.

(3) Nothing in subsection (1) limits a court's discretion to refuse bail.

(4) This section overrides any contrary provisions about bail in any of the following:
- (a) the Bail Act 2000:
- (b) the Misuse of Drugs Act 1975:
- (c) the Summary Proceedings Act 1957.

Subpart 8—Warrantless powers in relation to offences against section 202A of Crimes Act 1961

24 Meaning of disabling substance and offensive weapon in this subpart

In this subpart,—

disabling substance means any anaesthetising or other substance produced to use for disabling a person, or intended for such use by the person who has it with him or her

offensive weapon means any article made or altered to use for causing bodily injury, or intended for such use by the person who has it with him or her.

25 Searching people in public places without search warrant if offence against section 202A of Crimes Act 1961 suspected

A constable who has reasonable grounds to suspect that a person is committing an offence against section 202A(4)(a) of the Crimes Act 1961 (which relates to possession of knives, offensive weapons, and disabling substances) may, without a warrant,—

- (a) stop the person and—
  - (i) search him or her; and
  - (ii) search any thing that he or she has with him or her that the constable has reasonable grounds to believe contains a knife, offensive weapon, or disabling substance; and
- (b) ~~take possession of~~ seize any knife, offensive weapon, or disabling substance found.

26 Stopping and searching vehicles without warrant if offence against section 202A of Crimes Act 1961 suspected

(1) A constable who has reasonable grounds to suspect that the circumstances in subsection (2) exist in relation to a vehicle may—

(a) stop and search the vehicle; and

(b) detain it for as long as is reasonably necessary to conduct the search; and

(c) ~~take possession of~~ seize any knife, offensive weapon, or disabling substance found.

(2) The circumstances are that—

(a) a person travelling in the vehicle or who has alighted from it is committing an offence against section 202A(4)(a) of the Crimes Act 1961 (which relates to possession of knives, offensive weapons, and disabling substances); and

(b) the vehicle contains a knife, offensive weapon, or disabling substance.

Subpart 9—Warrantless search of vehicle for stolen property

27 Power to search vehicles without warrant for stolen property

A constable who has reasonable grounds to believe that any stolen property is in or on any vehicle may search it without a warrant.

Subpart 10—~~Other powers related to search of vehicles~~ Warrantless powers relating to road blocks

~~*Warrantless powers relating to road blocks and road closures*~~

28 Obtaining authorisation for warrantless road block

~~(1) This section applies to a senior constable in the circumstances set out in subsection (2) who is satisfied that, as far as is reasonably practicable, the safety of all road users will be ensured~~

~~in the area in which it is proposed that a road block be established.~~

~~(2) The circumstances are that the senior constable has reasonable grounds—~~

~~(a) to believe that in or on a vehicle there is a person who the constable has reasonable grounds to suspect—~~

~~(i) has committed an offence punishable by a term of imprisonment; or~~

~~(ii) is unlawfully at large; and~~

~~(b) to suspect that the vehicle will travel past the place where it is proposed that the road block be established.~~

~~(3) A senior constable to whom this section applies may authorise the establishment of a road block for the purpose of arresting the person.~~

(1) A senior constable may authorise the establishment of a road block for the purpose of arresting a person in the circumstances set out in subsection (2).

(2) The circumstances are that the senior constable—

(a) has reasonable grounds to believe that in or on a vehicle there is a person who the constable has reasonable grounds to suspect—

(i) has committed an offence punishable by a term of imprisonment; or

(ii) is unlawfully at large; and

(b) has reasonable grounds to suspect that the vehicle will travel past the place where it is proposed that the road block be established; and

(c) is satisfied that, as far as is reasonably practicable, the safety of all road users will be ensured in the area in which it is proposed that the road block be established.

(4) An authorisation may be granted under this section orally or in writing.

~~(5) For the purposes of this section, a person is not unlawfully at large if the only warrant for his or her arrest that is in force is a warrant issued under Part 3 of the Summary Proceedings Act 1957.~~

(6) In this section, **senior constable** means a constable who holds a level of position of sergeant or higher, and includes any constable who is acting in any such rank.

29 Duration and record of warrantless road block authorisation

(1) An authorisation under section 28—

(a) is valid for an initial period not exceeding 24 hours specified by the person giving the authorisation; and

(b) may be renewed from time to time by a District Court Judge for a single further period not exceeding 24 hours specified in writing by the Judge.

(2) The person giving the authorisation must keep or cause to be kept a written record of the following matters:

(a) the location of the road block that was authorised:

(b) the period or periods for which the authorisation was granted or renewed:

(c) the grounds on which the authorisation was granted or renewed.

30 Authorised road blocks implemented without warrant

Any constable may do any or all of the following when a road block is authorised under section 28:

(a) establish a road block at the place specified in the authorisation:

(b) stop vehicles at or in the vicinity of the road block:

(c) require any person in or on any vehicle stopped by the road block to state any or all of his or her name, address, and date of birth:

(d) search the vehicle for the purpose of locating a person referred to in section 28(2)(a)(i) or (ii), if the constable or any other constable has reasonable grounds to believe that the person is in or on the vehicle:

(e) require that the vehicle remain stopped for as long as is reasonably necessary to enable a constable to exercise any powers conferred by this section, regardless of whether the powers are exercised in respect of—

(i) the vehicle; or

(ii) the occupants of the vehicle.

Subpart 11—Examination orders

Examination orders in business contexts

31 ~~Commissioner~~ Inspector or more senior officermay apply for examination order in business context

~~(1) The Commissioner may apply to a Judge for an examination order against a person in a business context if the Commissioner is satisfied that the conditions specified in section 32 are met in respect of the person.~~

(1) A constable who is of or above the level of position of inspector may apply to a Judge for an examination order against a person in a business context if—

(a) the constable is satisfied that the conditions specified in section 32 are met in respect of the person; and

(b) the making of the application is approved by—

(i) a Deputy Commissioner; or

(ii) an Assistant Commissioner; or

(iii) the District Commander (other than an acting District Commander) of the Police district in which the constable is stationed.

(2) An application made under this section must be made in writing, and must set out the following particulars:

(a) the name of the applicant:

(b) a description of the offence that it is suspected has been committed, is being committed, or will be committed:

(c) the facts relied on to show reasonable grounds to suspect that an offence has been committed, or is being committed, or will be committed:

(d) a description of the information sought to be obtained by the examination order:

(e) the facts relied on to show reasonable grounds to believe that the person against whom the order is sought has the information:

(f) the facts that indicate that the person against whom the order is sought acquired the information in respect of which the order is sought in a business context:

(g) the facts that indicate that the person against whom the order is sought has been given a reasonable opportunity

by a constable to provide the information but has not done so.

32 Conditions for making examination order in business context

The conditions for making an examination order in a business context against a person are that—

(a) there are reasonable grounds to suspect that an offence punishable by imprisonment for a term of 5 years or more has been committed, or is being committed, or will be committed; and

(b) there are reasonable grounds to believe that the person sought to be examined has information that constitutes evidential material in respect of the offence; and

(c) there are reasonable grounds to believe that the person sought to be examined acquired the information in respect of which the order is sought in a business context; and

(d) the person has been given a reasonable opportunity by a constable to provide that information and has not done so.

Examination orders in contexts other than those of business

33 ~~Commissioner~~ Inspector or more senior officer may apply for examination order in non-business context

~~(1) The Commissioner may apply to a Judge for an examination order against a person in a non-business context if the Commissioner is satisfied that the conditions specified in section 34 are met in respect of the person.~~

(1) A constable who is of or above the level of position of inspector may apply to a Judge for an examination order against a person in a non-business context if—

(a) the constable is satisfied that the conditions specified in section 34 are met in respect of the person; and

(b) the making of the application is approved by—

(i) a Deputy Commissioner; or

(ii) an Assistant Commissioner; or

(iii) the District Commander (other than an acting District Commander) of the Police district in which the constable is stationed.

(2) An application made under this section must be made in writing, and must set out the following particulars:

(a) the name of the applicant:

(b) a description of the offence that it is suspected has been committed, is being committed, or will be committed:

(c) the facts relied on to show reasonable grounds to suspect that an offence has been committed, or is being committed, or will be committed:

(d) a description of the information sought to be obtained by the examination order:

(e) the facts relied on to show reasonable grounds to believe that the person against whom the order is sought has the information:

(f) the facts that indicate that the person against whom the order is sought acquired the information in respect of which the order is sought in a non-business context:

(g) the facts that indicate that the person against whom the order is sought has been given a reasonable opportunity by a constable to provide the information but has not done so.

34 Conditions for making examination order in non-business context

The conditions for making an examination order in a non-business context against a person are that—

(a) there are reasonable grounds to suspect that an offence punishable by imprisonment has been committed, or is being committed, or will be committed, and the offence—

~~(i)~~ ~~is serious or complex fraud; or~~

~~(ii)~~ ~~has been committed, or is being committed, or will be committed wholly or partly because of participation in a continuing association of 3 or more persons having as its object, or as 1 of its objects, a continuing course of criminal conduct; and~~

(i) involves serious or complex fraud that is punishable by imprisonment for a term of 7 years or more; or

(ii) has been committed, or is being committed, or will be committed wholly or partly by an organised criminal group as defined in section 98A(2) of the Crimes Act 1961; and

(b) there are reasonable grounds to believe that the person sought to be examined has information that constitutes evidential material in respect of the offence; and

(c) there are reasonable grounds to believe that the person sought to be examined acquired the information in respect of which the order is sought in a non-business context; and

(d) the person has been given a reasonable opportunity by a constable to provide that information and has not done so.

Other provisions that apply to examination order applications

35 Other provisions that apply to examination order applications

(1) The provisions in subsection (2) apply to any application for an examination order as if—

(a) any reference in those provisions to a search warrant were a reference to an examination order; and

(b) any reference in those provisions to an issuing officer were a reference to a Judge; and

(c) any reference in those provisions to a District Court were a reference to a District Court or a High Court, as the case may be.

(2) The provisions are—

(a) section 96(2) (relating to requirements for further information); and

(b) section 97 (relating to verification of application); and

(c) section 98(1), (2) and (4) (relating to mode of application); and

(d) section 99 (relating to retention of documents).

Making examination orders and contents of examination orders

36 Judge may make examination order

A Judge may, on an application made under section 31 or 33, make an examination order against a person if the Judge is satisfied that—

(a) the conditions specified in section 32 or 34, as the case may be, are met in respect of the person; and

(b) it is reasonable to subject the person to compulsory examination, having regard to the nature and seriousness of the suspected offending, the nature of the information sought, the relationship between the person to be examined and the suspect, and any alternative ways of obtaining the information.

37 Form and content of examination order

(1) An examination order made under section 36 must be in the prescribed form and must require the person against whom it is made—

(a) to attend before the Commissioner or a delegate of the Commissioner; and

(b) to answer any questions that are relevant to the information in respect of which the order was made.

(2) The examination order must set out the following:

(a) the name of the person required to comply with the order:

(b) the grounds on which the order is made:

(c) the nature of the questions that the person is to be asked, being questions that are relevant to the information in respect of which the order was made:

(d) if the examination is to be conducted by a delegate of the Commissioner, the name of the delegate:

(da) a condition that, in accordance with section 40A, an examination order report must be provided within 1 month after the completion of the examination conducted under the order to the Judge who made the order or, if that Judge is unable to act, to a Judge of the same court as the Judge who made the order:

(db) any requirement that the Judge making the order considers reasonable for inclusion of specified information in the examination order report provided under section 40A:

(e) where the examination is to take place:

(f) when the examination is to be fixed.

Other provisions relating to examination orders

38 Presence of lawyer

A person against whom an examination order is made must, before being required to appear before the Commissioner or the Commissioner's delegate, be given a reasonable opportunity to arrange for a lawyer to accompany him or her.

39 Duration of examination order

An examination order is in force for the period specified in the order (not exceeding 30 days after the date on which the order is made).

40 Other provisions that apply to examination orders

Section 103 (relating to the transmission of search warrants) and section 105 (relating to when a search warrant is invalid) apply to examination orders as if—

(a) any reference in those provisions to a warrant or search warrant were a reference to an examination order; and

(b) any reference in those provisions to an issuing officer were a reference to the Judge issuing an examination order.

Examination order reports

40A Examination order reports

(1) The Commissioner or the delegate of the Commissioner, as the case may be, who conducts an examination authorised by an examination order must provide an examination order report within 1 month after the completion of the examination conducted under the order, as specified in the order, to the Judge

who made the order or, if that Judge is unable to act, to a Judge of the same court as the Judge who made the order.

(2) The examination order report must contain the following information:

(a) whether the examination resulted in obtaining evidential material:

(b) whether any criminal proceedings have been brought or are under consideration as a result of evidential material obtained by means of the examination:

(c) any other information stated in the order as being required for inclusion in the examination order report.

Subpart 12—Other matters

41 Common law defence of necessity for people other than constables not affected by this Part

Nothing in this Part affects the common law defence of necessity as it applies to persons who are not constables.

Part 3
Enforcement officers' powers and orders

Subpart 1—Surveillance device warrants and ~~residual warrants~~ declaratory orders

42AA Restrictions on some trespass surveillance and use of interception device

(1) Nothing in this subpart authorises any enforcement officer to undertake trespass surveillance (other than by means of a tracking device) except in order to obtain evidential material in relation to an offence—

(a) that is punishable by a term of imprisonment of 7 years or more; or

(b) against section 44, 45, 50, 51, 54, or 55 of the Arms Act 1983.

(2) Nothing in this subpart authorises any enforcement officer to use an interception device except in order to obtain evidential material in relation to an offence—

(a) that is punishable by a term of imprisonment of 7 years or more; or

(b) against section 44, 45, 50, 51, 54, or 55 of the Arms Act 1983.

Surveillance device warrants

42 Activities for which surveillance device warrant required

Except as provided in sections 43 and 44, an enforcement officer who wishes to undertake any 1 or more of the following activities must obtain a surveillance device warrant:

(a) use of an interception device to intercept a private communication:

(b) use of a tracking device:

(c) observation of private activity in private premises, and any recording of that observation, by means of a visual surveillance device:

(ca) use of a surveillance device that involves trespass onto private property:

(d) observation of private activity in the curtilage of private premises, and any recording of that observation, if any part of the observation or recording is by means of a visual surveillance device, and the duration of the observation, for the purposes of a single investigation, or a connected series of investigations, exceeds—

(i) 3 hours in any 24-hour period; or

(ii) 8 hours in total.

43 Some activities that do not require warrant under this subpart

(1) No warrant under this subpart is required by an enforcement officer in any 1 or more of the following circumstances:

(a) the enforcement officer lawfully—

(i) entering private premises; and

(ii) recording what he or she observes or hears there:

(b) covert audio recording of a voluntary oral communication between 2 or more persons made with the consent of at least 1 of them:

(c) activities that are carried out—

(i) in a place or vehicle that the enforcement officer enters lawfully; and

(ii) by means of the enforcement officer's unaided sense of smell:

(d) activities carried out by the enforcement officer's use of his or her unaided visual observation or unaided sense of hearing:

~~(c) activities carried out under the authority of an interception warrant issued under section 4A(1) or (2) of the New Zealand Security Intelligence Service Act 1969:~~

(e) activities carried out under the authority of an interception warrant issued under—

(i) section 4A(1) or (2) of the New Zealand Security Intelligence Service Act 1969; or

(ii) section 17 of the Government Communications Security Bureau Act 2003:

(f) activities carried out by the enforcement officer's use of a surveillance device, if that use is authorised under any enactment other than this Act.

(1A) Subsection (1)(b) does not prevent an enforcement officer from applying for a warrant authorising covert audio recording in the circumstances set out in subsection (1)(b).

(2) In this section,—

unaided sense of hearing means unaided except by a hearing aid or similar device used to correct subnormal hearing of the user to no better than normal hearing

unaided visual observation means unaided except for the use of spectacles, contact lenses, or a similar device used to correct subnormal vision of the user to no better than normal vision.

(3) This section is subject to section 42AA.

44 Surveillance device warrant need not be obtained for use of surveillance device in some situations of emergency or urgency

(1) An enforcement officer who is in any 1 or more of the situations set out in subsection (2) may use a surveillance device intermittently or continuously for a period not exceeding 72 hours in total without obtaining a surveillance device warrant, if—

(a) he or she is entitled to apply for a surveillance device warrant in relation to those situations; but

(b) obtaining a surveillance device warrant within the time in which it is proposed to undertake the surveillance is impracticable in the circumstances.

(2) The situations are as follows:

(a) the enforcement officer has reasonable grounds—

(i) to suspect that an offence punishable by a term of imprisonment of 14 years or more has been, is being, or is about to be committed; and

(ii) to believe that use of the surveillance device would obtain evidential material in relation to the offence:

(b) the enforcement officer has reasonable grounds—

(i) to suspect that any 1 or more of the circumstances set out in section 14(2) exist; and

(ii) to believe that use of the surveillance device is necessary to prevent the offending from being committed or continuing, or to avert the emergency:

(c) the enforcement officer has reasonable grounds—

(i) to suspect that any 1 or more of the circumstances set out in section 18(2) exist; and

(ii) to believe that use of the surveillance device is necessary to facilitate the seizure of the arms:

(d) the enforcement officer has reasonable grounds—

(i) to suspect that an indictable offence in relation to arms or an offence against the Arms Act 1983 has been committed, or is being committed, or is about to be committed; and

(ii) to believe that use of the surveillance device would obtain evidential material in relation to the offence:

(e) the enforcement officer has reasonable grounds—

(i) to suspect that an offence has been committed, or is being committed, or is about to be committed in relation to a controlled drug specified or described in Schedule 1, Part 1 of Schedule 2, or Part 1 of Schedule 3 of the Misuse of Drugs Act

1975, or to a precursor substance specified or described in Part 3 of Schedule 4 of that Act; and

(ii) to believe that use of the surveillance device would obtain evidential material in relation to the offence:

(f) the enforcement officer has reasonable grounds—

(i) to suspect that a person is in possession of any 1 or more of the things described in section 79(2)(a) to (d); and

(ii) to believe that use of the surveillance device is necessary to facilitate the thing's seizure.

(3) This section is subject to section 42AA.

Application for surveillance device warrant

45 Application for surveillance device warrant

(1) An application for a surveillance device warrant may be made only by an enforcement officer, and must contain, in reasonable detail, the following particulars:

(a) the name of the applicant:

(b) the provision authorising the making of an application for a search warrant in respect of the suspected offence:

(c) the grounds on which the application is made:

(d) the suspected offence in relation to which the surveillance device warrant is sought:

(e) the type of surveillance device to be used:

(f) the name, address, or other description of the person, place, vehicle, or other thing that is the object of the proposed surveillance:

(g) a description of the evidential material believed to be able to be obtained by use of the surveillance device:

(h) the period for which the warrant is sought.

(2) If the enforcement officer cannot provide all the information required under subsection (1)(f) and (g), the application must instead state the circumstances in which the surveillance is proposed to be undertaken in enough detail to identify the parameters of, and objectives to be achieved by, the proposed use of the surveillance device.

(3) The applicant must disclose in the application—

(a) the details of any other applications for a search warrant~~,~~ or a surveillance device warrant~~, or a residual warrant~~ that the applicant knows to have been made within the previous 3 months in respect of the person, place, vehicle, or other thing proposed as the object of the surveillance; and

(b) the result of that application or those applications.

(4) The applicant must, before making an application for a surveillance device warrant, make reasonable inquiries within the agency in which the applicant is employed or engaged for the purpose of complying with subsection (3).

(5) Despite subsection (1), an application for a surveillance device warrant seeking authority to use visual trespass surveillance or an interception device may only be made by—

(a) a constable; or

(b) an enforcement officer employed or engaged by a law enforcement agency that has been approved by an Order in Council made under section 45A.

45A Approval of law enforcement agencies other than the Police to carry out visual trespass surveillance and use interception devices

(1) The Governor-General may, by Order in Council made on the recommendation of the Minister of Justice, approve a law enforcement agency other than the Police to do either or both of the following:

(a) to carry out visual trespass surveillance:

(b) to use interception devices.

(2) The Minister of Justice may recommend the making of an Order in Council under subsection (1)(a), following consultation with the Minister of Police, if he or she is satisfied that it is appropriate for the agency to carry out visual trespass surveillance, and that the agency has the technical capability, and the policies and procedures in place, so that the surveillance can be carried out in a manner that ensures the safety of the people involved in the surveillance.

(3) The Minister of Justice may recommend the making of an Order in Council under subsection (1)(b), following consultation with the Minister of Police, if he or she is satisfied that it

is appropriate for the agency to use interception devices, and that the agency has—

(a) the technical capability to intercept private communications in a manner that ensures the reliability of any information obtained through the use of an interception device; and

(b) policies and procedures in place to ensure that the integrity of any information obtained through the use of an interception device is preserved; and

(c) the expertise—

(i) to extract evidential material from information obtained through the use of an interception device in a form that can be used in a criminal proceeding; and

(ii) to ensure that any evidential material obtained through the use of an interception device is presented to the court in an appropriate manner, when the agency intends to proceed with a prosecution.

~~46~~ ~~Conditions for issuing surveillance device warrant~~

~~The conditions for issuing a surveillance device warrant are that there are reasonable grounds—~~

~~(a) to suspect that an offence has been committed, or is being committed, or will be committed in respect of which this Act or any relevant enactment authorises an enforcement officer to apply for a search warrant; and~~

~~(b) to believe that the proposed use of the surveillance device will obtain information that is evidential material in respect of the offence.~~

46 Conditions for issuing surveillance device warrant

The conditions for issuing a surveillance device warrant are that—

(a) there are reasonable grounds—

(i) to suspect that an offence has been committed, or is being committed, or will be committed in respect of which this Act or any enactment specified in column 2 of the Schedule authorises

the enforcement officer to apply for a warrant to enter premises for the purpose of obtaining evidence about the suspected offence; and

(ii) to believe that the proposed use of the surveillance device will obtain information that is evidential material in respect of the offence; and

(b) the restrictions in section 42AA do not prevent the issuing of a surveillance device warrant in the circumstances.

47 Other provisions that apply to surveillance device warrant applications

(1) The provisions in subsection (2) apply to any application for a surveillance device warrant as if—

(a) any reference in those provisions to a search warrant were a reference to a surveillance device warrant; and

(b) any reference in those provisions to an issuing officer were a reference to a Judge; and

(c) any reference in those provisions to a District Court were a reference to a District Court or a High Court, as the case may be.

(2) The provisions are—

(a) section 96(2) (relating to requirements for further information); and

(b) section 97 (relating to verification of application); and

(c) section 98 (relating to mode of application); and

(d) section 99 (relating to retention of documents).

Issuing of surveillance device warrant

48 Who may issue surveillance device warrant

A surveillance device warrant may be issued by a Judge, on application under section 45, if he or she is satisfied that the conditions set out in section 46 are met.

49 Restrictions on issue of surveillance device warrant

A Judge must not issue a surveillance device warrant that ~~would permit~~ is primarily intended to facilitate surveillance or recording of activity between a lawyer and his or her client

that is communication of a kind to which legal professional privilege normally applies unless the Judge is satisfied that ~~the information provided by the applicant indicates~~ there is a prima facie case that the communication is to be made or received—

(a) for a dishonest purpose; or

(b) for the purpose of planning to commit or committing an offence.

50 Form and content of surveillance device warrant

(1) Every surveillance device warrant must—

(a) be in the prescribed form; and

(b) be directed to every enforcement officer who has authority to carry out the activities authorised by the surveillance device warrant; and

(c) specify a period, of no more than 60 days after the date on which the warrant is issued, for which it is in force; and

~~(d) contain a condition that, in accordance with section 53, a surveillance device warrant report must be provided to a Judge of the same court as the Judge who issues the warrant within 1 month after the expiry of the period for which it is in force; and~~

(d) contain a condition that, in accordance with section 53, a surveillance device warrant report must be provided within 1 month after the expiry of the period for which the warrant is in force to the Judge who issues the warrant or, if that Judge is unable to act, to a Judge of the same court as the Judge who issues the warrant; and

(e) contain a condition that the enforcement officer carrying out the activities authorised by the warrant must not use any communication obtained under the authority of the warrant unless the privilege is waived or its use is authorised by a Judge, if he or she has reasonable grounds to believe that the communication may be subject to a privilege specified in section 130.

(2) A surveillance device warrant may be subject to any other conditions specified in the warrant that the Judge issuing it consid-

ers reasonable, including a requirement for inclusion of specified information in the surveillance device warrant report provided under section 53.

(3) Every surveillance device warrant must also contain, in reasonable detail, the following particulars:

(a) the name of the Judge issuing the warrant and the date of issue:

(b) the provision authorising the making of an application for a search warrant in respect of the suspected offence:

(c) the type of surveillance device the use of which the warrant authorises:

(d) the name, address, or other description of the person, place, vehicle, or other thing that is the object of the proposed surveillance:

(e) the evidential material relating to the suspected offence that may be obtained by use of the surveillance device:

(f) that an enforcement officer carrying out the activities authorised by the warrant may use any assistance that is reasonable in the circumstances:

(fa) that an enforcement officer who, while carrying out the activities authorised by the warrant, obtains the content of a telecommunication may direct the relevant network operator to provide call associated data (as defined in section 3(1) of the Telecommunications (Interception Capability) Act 2004) that is—

(i) a document within the meaning of section 68; and

(ii) related to that telecommunication:

(g) that, subject to section 42AA, an enforcement officer carrying out the activities authorised by the warrant may do any or all of the following, using any force that is reasonable in the circumstances to do so, in order to install, maintain, or remove the surveillance device, or to access and use electricity to power the surveillance device:

(i) enter any premises, area, or vehicle specified in the warrant:

(ii) break open or interfere with any vehicle or other thing:

(iii) temporarily remove any vehicle or other thing from any place where it is found and return it to that place.

(4) Despite subsection (3)(d) and (e), if the Judge has not been provided in the application, or otherwise, with the information specified in those provisions because the applicant is unable to provide it, the warrant must instead state the details (as provided under section 47(2) or otherwise) of the circumstances in which the surveillance is to be undertaken in enough detail to identify the parameters of, and objectives to be achieved by, the use of the surveillance device.

(5) Despite subsection (1)(c), a Judge may issue a further surveillance device warrant in respect of the same suspected offence in regard to which the Judge, or another Judge, has previously issued a surveillance device warrant.

Carrying out authorised surveillance activities and evidential material relevant to other offences

51 Carrying out authorised surveillance activities ~~and~~ ~~evidential material relevant to other offences~~

(1) A surveillance device warrant allows the following persons to carry out the activities authorised by it:

(a) any or all of the persons to whom it is directed:

(b) any assistant—

(i) who is called upon by a person specified in paragraph (a) to help him or her to carry out the activities; and

(ii) who, at all times that he or she is carrying out activities authorised by the warrant, remains under the supervision of a person specified in paragraph (a).

~~(2) Subsection (3) applies if, in the course of carrying out activities authorised by a surveillance device warrant or while lawfully using a surveillance device in relation to an offence, a person obtains any evidential material in relation to an offence—~~

~~(a) that is not the offence in respect of which the warrant was issued or in respect of which the surveillance device was lawfully put into use, as the case requires; but~~

~~(b) in respect of which a surveillance device warrant could have been issued or a surveillance device could have been lawfully used.~~

~~(3) The evidential material referred to in subsection (2) is not inadmissible in criminal proceedings by reason only that the surveillance device warrant that authorised the activity that obtained the material was issued in respect of a different offence or, as the case requires, that the material was obtained from the use of a surveillance device that was put into use in respect of a different offence.~~

51A Admissibility of evidential material relevant to other offences

(1) Subsection (2) applies if, in the course of carrying out activities authorised by a surveillance device warrant or while lawfully using a surveillance device in relation to an offence, a person obtains any evidential material in relation to an offence—

(a) that is not the offence in respect of which the warrant was issued or in respect of which the surveillance device was lawfully put into use, as the case requires; but

(b) in respect of which a surveillance device warrant could have been issued or a surveillance device could have been lawfully used.

(2) The evidential material referred to in subsection (1) is not inadmissible in criminal proceedings by reason only that the surveillance device warrant that authorised the activity that obtained the material was issued in respect of a different offence or, as the case requires, that the material was obtained from the use of a surveillance device that was put into use in respect of a different offence.

Other provisions applying to surveillance device warrants

52 Other provisions that apply to surveillance device warrants

Section 103 (relating to the transmission of search warrants) and section 105 (relating to when a search warrant is invalid) apply to surveillance device warrants as if—

(a) any reference in those provisions to a warrant or search warrant were a reference to a surveillance device warrant; and

(b) any reference in those provisions to an issuing officer were a reference to the Judge issuing a surveillance device warrant.

Surveillance device warrant reports

53 Surveillance device warrant report

(1) A person who carries out the activities authorised by a surveillance device warrant must provide a surveillance device warrant report within 1 month after the expiry of the period for which the warrant is in force, as specified in the warrant, to the Judge who issued the warrant or, if that Judge is unable to act, to a Judge of the same court as the Judge who issued the warrant.

(2) The surveillance device warrant report must contain the following information:

(a) whether carrying out the activities authorised by the surveillance device warrant resulted in obtaining evidential material:

(ab) whether or not the evidential material obtained as a result of carrying out the activities authorised by the warrant was evidential material specified in the warrant in accordance with section 50(3)(e):

(b) the circumstances in which the surveillance device was used:

(ba) whether any criminal proceedings have been brought or are under consideration as a result of evidential material obtained under the warrant:

(c) any other information stated in the warrant as being required for inclusion in the surveillance device warrant report.

54 Report on use of surveillance device in situation of urgency or emergency

(1) An enforcement officer who uses a surveillance device under the authority of section 44 must provide a report to a Judge within 1 month after the date of the last day of any period of 72 hours or less over which the surveillance device was used.

(2) The report made under subsection (1) must contain the following information:

(a) whether the use of the surveillance device resulted in—

(i) obtaining evidential material of the relevant offence (in the case of use of a surveillance device in a situation set out in section 44(2)(a), (d), or (e)); or

(ii) preventing the offending from being committed or continuing, or averting the emergency (in the case of use of a surveillance device in a situation set out in section 44(2)(b)); or

(iii) facilitating the seizure of the arms (in the case of use of a surveillance device in a situation set out in section 44(2)(c)); and

(b) the circumstances in which the surveillance device was used.

(3) A Judge who receives a report under subsection (1) may require the enforcement officer who used the surveillance device to supply further information regarding the circumstances surrounding the use of the surveillance device.

55 Actions on receipt of surveillance device warrant report

(1) A Judge receiving a surveillance device warrant report under section 53 may do any 1 or more of the following:

(a) give directions as to the destruction or retention of the material obtained as a result of the surveillance:

(b) if he or she considers that the surveillance activities carried out were in breach of any of the conditions of the warrant's issue, or of any applicable statutory provision,

report on the breach to the chief executive of the relevant agency:

(c) order that the subject of the surveillance be notified.

(2) The Judge must not make an order under subsection (1)(c) unless he or she is satisfied ~~that—~~

(a) that the circumstances set out in subsection (3) exist; and

(b) ~~the warrant—~~ that—

(i) the warrant should not have been issued; or

(ii) there has been a serious breach of any of the conditions of its issue, or of any applicable statutory provision.

(3) The circumstances are that the public interest in notification outweighs any potential prejudice to any 1 or more of the following:

(a) any investigation by the law enforcement agency:

(b) the safety of informants or undercover officers:

(c) the supply of information to the law enforcement agency:

(d) any international relationships of the law enforcement agency.

56 Actions on receipt of report on use of surveillance device in situation of urgency or emergency

(1) A Judge receiving a ~~surveillance device warrant~~ report under section 54 may do any 1 or more of the following:

(a) give directions as to the destruction or retention of the material obtained as a result of the use of the surveillance device:

(b) if he or she considers that the use of the surveillance device was not authorised under section 44, report accordingly to the chief executive of the relevant agency:

(c) order that the subject of the surveillance be notified.

(2) The Judge must not make an order under subsection (1)(c) unless he or she is satisfied that—

(a) the circumstances set out in subsection (3) exist; and

(b) use of the surveillance device was a serious breach of the criteria set out in section 44.

(3) The circumstances are that the public interest in notification outweighs any potential prejudice to any 1 or more of the following:

(a) any investigation by the law enforcement agency:

(b) the safety of informants or undercover officers:

(c) the supply of information to the law enforcement agency:

(d) any international relationships of the law enforcement agency.

Retention and destruction of raw surveillance data, excerpts, and other information obtained

56A Retention of raw surveillance data, excerpts, and information obtained

(1) Raw surveillance data may be retained by the law enforcement agency that collected it—

(a) until the conclusion of criminal proceedings in relation to an offence in respect of which the data was collected, including the later of—

(i) the conclusion of any appeal proceedings brought in relation to the offence; or

(ii) the expiry of any period for bringing such an appeal; or

(b) until the later of a maximum period of 3 years, or any further period specified in an order made under subsection (2), if—

(i) no criminal proceedings have commenced in relation to any offence in respect of which the data was collected; but

(ii) the data is required for an ongoing investigation by the agency.

(2) A Judge may make an order extending by no more than a further 2 years the period for which raw surveillance data may be retained by the agency in the circumstances in subsection (1)(b)(i) and (ii) if—

(a) the agency applies for the order before the expiry of the initial 3-year period; and

(b) the Judge is satisfied that the data is required for that ongoing investigation.

(3) Excerpts from raw surveillance data may be retained by the law enforcement agency that collected it in accordance with an order made by a Judge on application by the agency.

(4) A Judge may make an order under subsection (3) if—

(a) the law enforcement agency that collected the raw surveillance data applies for the order; and

(b) the Judge is satisfied that the excerpts may be required for a future investigation.

(5) Information that is obtained from raw surveillance data but that does not itself constitute raw surveillance data may be retained by the law enforcement agency that collected it if there are reasonable grounds to suspect that the information may be relevant to an ongoing or future investigation by the agency.

(6) This section is subject to—

(a) any direction given under section 55(1)(a) or 56(1)(a); and

(b) any enactment requiring the retention of information that is part of a court record.

56B Disposal of raw surveillance data, excerpts, and information obtained

A law enforcement agency must ensure that any raw surveillance data, excerpts from raw surveillance data, and information obtained from it that is not itself raw surveillance data, and that is not retained in accordance with section 56A or as part of a court record, is deleted or erased.

~~*Residual warrants*~~

~~**57 Residual warrant required for some other interferences with privacy**~~

~~A law enforcement agency must obtain a residual warrant if, in order to obtain evidential material relating to an offence, the agency wishes to use a device (other than a surveillance device as defined in section 3), or a technique, procedure, or activity that may constitute an intrusion into the reasonable expectation of privacy of any person.~~

Application for residual warrant

58 Application for residual warrant

(1) An application for a residual warrant may be made only by an enforcement officer, and must contain, in reasonable detail, the following particulars:

(a) the name of the applicant:

(b) the provision authorising the making of an application for a search warrant in respect of the offence:

(c) the grounds on which the application is made:

(d) the suspected offence in relation to which the residual warrant is sought:

(e) a description of the device, technique, procedure, or activity to be used or undertaken, with enough detail to enable the Judge to understand what is proposed to be used or undertaken:

(f) the name, address, or other description of the person, place, vehicle, or other thing that is the object of the proposed use of the device, technique, procedure, or activity:

(g) a description of the evidential material believed to be able to be obtained by the proposed use:

(h) the period for which the warrant is sought.

(2) If the enforcement officer cannot provide all the information required under subsection (1)(f) and (g), the application must instead state the circumstances in which the use of the device, technique, procedure, or activity is proposed to be undertaken in enough detail to identify the parameters of, and objectives to be achieved by, the proposed use.

(3) The applicant must disclose in the application—

(a) the details of any other applications for a search warrant, a surveillance device warrant, or a residual warrant, that the applicant knows to have been made within the previous 3 months in respect of the person, place, vehicle, or other thing proposed as the object of the proposed use of the device, technique, procedure, or activity; and

(b) the result of that application or those applications.

(4) The applicant must, before making an application for a residual warrant, make reasonable inquiries within the agency

in which the applicant is employed or engaged for the purpose of complying with subsection (3).

59 Conditions for issuing residual warrant

The conditions for issuing a residual warrant are that there are reasonable grounds—

(a) to suspect that an offence has been committed, or is being committed, or will be committed in respect of which this Act or any relevant enactment authorises an enforcement officer to apply for a search warrant; and

(b) to believe that the proposed use of the device (other than a surveillance device as defined in section 3), technique, procedure, or activity in respect of which the residual warrant is sought would obtain information that is evidential material in respect of the offence.

60 Other provisions that apply to residual warrant applications

(1) The provisions in subsection (2) apply to any application for a residual warrant as if—

(a) any reference in those provisions to a search warrant were a reference to a residual warrant; and

(b) any reference in those provisions to an issuing officer were a reference to a Judge; and

(c) any reference in those provisions to a District Court were a reference to a District Court or a High Court, as the case may be.

(2) The provisions are—

(a) section 96(2) (relating to requirements for further information); and

(b) section 97 (relating to verification of application); and

(c) section 98 (relating to mode of application); and

(d) section 99 (relating to retention of documents).

Issuing of residual warrants

61 Who may issue residual warrant

A residual warrant may be issued by a Judge, on application under section 58, if he or she is satisfied that—

(a) the conditions set out in section 59 are met; and

(b) there is no enactment other than this subpart of this Act that expressly authorises the obtaining of the evidential material in respect of which the residual warrant is sought.

62 Restrictions on issue of residual warrant

A Judge must not issue a residual warrant that would permit surveillance or recording of activity between a lawyer and his or her client that is communication of a kind to which legal professional privilege normally applies unless the Judge is satisfied that the information provided by the applicant indicates that the communication is to be made, received, completed, or prepared—

(a) for a dishonest purpose; or

(b) for the purpose of planning or committing an offence.

63 Form and content of residual warrant

(1) Every residual warrant must—

(a) be in the prescribed form; and

(b) be directed to every enforcement officer who has authority to carry out the activities authorised by the warrant; and

(c) specify a period, of no more than 60 days after the date on which the warrant is issued, for which it is in force; and

(d) contain a condition that, in accordance with section 66, a residual warrant report must be provided to a Judge of the same court as the Judge who issues the warrant within 1 month after the expiry of the period for which it is in force; and

(e) contain a condition that the enforcement officer carrying out the activities authorised by the warrant must not use any communication obtained under the authority of the warrant unless the privilege is waived or its use is authorised by a Judge, if he or she has reasonable grounds to believe that the communication may be subject to a privilege specified in section 130.

(2) A residual warrant may be subject to any other conditions specified in the warrant that the Judge issuing it considers reasonable, including a requirement for inclusion of specified information in the residual warrant report provided under section 66.

(3) Every residual warrant must also contain, in reasonable detail, the following particulars:

(a) the name of the Judge issuing the warrant and the date of issue:

(b) the provision authorising the making of an application for a search warrant in respect of the suspected offence:

(c) a description of the device, technique, procedure, or activity to be used or undertaken that the warrant authorises, with enough detail to enable the enforcement officer using the device, technique, or procedure, or carrying out the activity authorised by the warrant, to understand what is authorised to be used or undertaken:

(d) the name, address, or other description of the person, place, vehicle, or other thing that is the object of the proposed use of the device, technique, procedure, or activity:

(e) the evidential material relating to the suspected offence that may be obtained by the proposed use:

(f) that an enforcement officer carrying out the activities authorised by the warrant may use any assistance that is reasonable in the circumstances:

(g) that an enforcement officer carrying out the activities authorised by the warrant may do any or all of the following, using any force that is reasonable in the circumstances to do so, in order to install, maintain, or remove a device the use of which is authorised by the warrant, or to access and use electricity to power the device:

(i) enter onto any premises, area, or vehicle specified in the warrant:

(ii) break open or interfere with any vehicle or other thing:

(iii) temporarily remove any vehicle or other thing from any place where it is found and return it to that place.

(4) Despite subsection (3)(d) and (e), if the Judge has not been provided in the application, or otherwise, with the information specified in those provisions because the applicant is unable to provide it, the warrant must instead state the details (as provided under section 58(2) or otherwise) of the circumstances in which the use of the device, technique, procedure, or activity is to be undertaken in enough detail to identify the parameters of, and objectives to be achieved by, the use of the device, technique, procedure, or activity.

(5) Despite subsection (1)(e), a Judge may issue a further residual warrant in respect of the same suspected offence in regard to which the Judge, or another Judge, has previously issued a residual warrant.

Carrying out activities authorised by residual warrants

64 Carrying out activities authorised by residual warrant

A residual warrant allows the following persons to carry out the activities authorised by it:

(a) any or all of the persons to whom it is directed:

(b) any assistant—

(i) who is called upon by a person specified in paragraph (a) to help him or her to carry out the activities; and

(ii) who, at all times that he or she is carrying out activities authorised by the warrant, remains under the supervision of a person specified in paragraph (a).

Other provisions that apply to residual warrants

65 Other provisions that apply to residual warrants

Section 103 (relating to the transmission of search warrants) and section 105 (relating to when a search warrant is invalid) apply to residual warrants as if—

(a) any reference in those provisions to a warrant or search warrant were a reference to a residual warrant; and

(b) any reference in those provisions to an issuing officer were a reference to the Judge issuing a residual warrant.

Residual warrant reports

66 Residual warrant report

(1) A person who carries out the activities authorised by a residual warrant must provide a residual warrant report within 1 month after the expiry of the period for which the warrant is in force, as specified in the warrant, to a Judge of the same court as the Judge who issued the warrant.

(2) The residual warrant report must contain the following information:

(a) whether carrying out the activities authorised by the residual warrant resulted in obtaining evidential material:

(b) the circumstances in which the device, technique, procedure, or activity that the warrant authorised was used:

(c) any other information stated in the warrant as being required for inclusion in the residual warrant report.

67 Actions on receipt of report

(1) A Judge receiving a residual warrant report under `section 66` may do any 1 or more of the following:

(a) give directions as to the destruction or retention of the material obtained as a result of the use of the device, technique, procedure, or activity:

(b) if he or she considers that the activities carried out were in breach of any of the conditions of the warrant's issue, or of any applicable statutory provision, report on the breach to the chief executive of the relevant agency:

(c) order that the subject of the device, technique, procedure, or activity be notified.

(2) The Judge must not make an order under `subsection (1)(c)` unless he or she is satisfied that the circumstances set out in `subsection (3)` exist and—

(a) the warrant should not have been issued; or

(b) there has been a serious breach of any of the conditions of its issue, or of any applicable statutory provision.

(3) The circumstances are that the public interest in notification outweighs any potential prejudice to any 1 or more of the following:

(a) any investigation by the law enforcement agency:

~~(b) the safety of informants or undercover officers:~~

~~(c) the supply of information to the law enforcement agency:~~

~~(d) any international relationships of the law enforcement agency.~~

Declaratory orders

57 What is a declaratory order

A declaratory order is a statement by a Judge that he or she is satisfied that the use of a device, technique, or procedure, or the carrying out of an activity, specified in the order is, in the circumstances of the use or the carrying out of the activity specified in the order, reasonable and lawful.

Applying for declaratory order

58 When to obtain declaratory order

(1) An enforcement officer may apply for a declaratory order in the circumstances set out in subsection (2).

(2) The circumstances are that—

(a) the enforcement officer wishes to use a device, technique, or procedure, or to carry out an activity, that is not specifically authorised by another statutory regime; and

(b) the use of the device, technique, or procedure, or the carrying out of the activity, may constitute an intrusion into the reasonable expectation of privacy of any other person.

59 Application for declaratory order

(1) An application for a declaratory order may be made only by an enforcement officer, and must contain, in reasonable detail, the following particulars:

(a) the name of the applicant:

(b) the grounds on which the application is made:

(c) a description of the device, technique, procedure, or activity to be used or undertaken, with enough detail to enable the Judge to understand what is proposed to be used or undertaken:

(d) the name, address, or other description of the person, place, vehicle, or other thing that is the object of the proposed use of the device, technique, procedure, or activity.

(2) If the enforcement officer cannot provide all the information required under subsection (1)(d), the application must instead state the circumstances in which the use of the device, technique, procedure, or activity is proposed to be undertaken in enough detail to identify the parameters of, and objectives to be achieved by, the proposed use.

Making declaratory order

60 Who may make declaratory order

A Judge may make a declaratory order if he or she is satisfied that the use of a device, technique, or procedure, or the carrying out of an activity, in the circumstances of the proposed use or carrying out of the activity, is reasonable and lawful.

61 Form and content of declaratory order

(1) Every declaratory order must be in the prescribed form.

(2) Every declaratory order must also contain, in reasonable detail, the following particulars:

(a) the name of the Judge making the order and the date the order is made:

(b) a description of the device, technique, procedure, or activity to be used or undertaken that the order relates to, and the circumstances covered by the order, with enough detail to enable the enforcement officer using the device, technique, or procedure, or carrying out the activity to which the order relates, to understand what is covered by the order:

(c) the name, address, or other description of the person, place, vehicle, or other thing that is the object of the proposed use of the device, technique, procedure, or activity.

(3) Despite subsection (2)(c), if the Judge has not been provided in the application, or otherwise, with the information specified in that provision because the applicant is unable to provide

it, the order must instead state the details (as provided under section 59(2) or otherwise) of the circumstances in which the use of the device, technique, procedure, or activity is to be undertaken in enough detail to identify the parameters of, and objectives to be achieved by, the use of the device, technique, procedure, or activity.

Subpart 2—Production ~~and monitoring~~ orders

68 Interpretation

In this subpart,—

call associated data and **network operator** have the same meanings as in section 3(1) of the Telecommunications (Interception Capability) Act 2004

~~**call-related information**, in relation to a telecommunication, means any of the following in respect of which a network operator has an interception capability at the time an application is made under section 69 for a production order against that network operator:~~

~~(a) information that is generated as a result of the making of the telecommunication (whether or not the telecommunication is sent or received successfully), and that identifies the origin, direction, destination, or termination of the telecommunication, and includes—~~

~~(i) the number from which the telecommunication originates; and~~

~~(ii) the number to which the telecommunication is sent; and~~

~~(iii) if the telecommunication is diverted from one number to another number, those numbers; and~~

~~(iv) the time at which the telecommunication is sent; and~~

~~(v) the duration of the telecommunication; and~~

~~(vi) if the telecommunication is generated from a mobile telephone, the point at which the telecommunication first enters a network:~~

~~(b) the content of the telecommunication~~

~~**document** includes call-related information~~

document includes call associated data and the content of telecommunications in respect of which, at the time an application is made under section 69 for a production order against a network operator, the network operator has storage capability for, and stores in the normal course of its business, that data and content.

~~**interception capability**, **network operator**, and **number** have the same meanings as in section 3(1) of the Telecommunications (Interception Capability) Act 2004.~~

69 Enforcement officer may apply for production order

(1) An enforcement officer who may apply for a search warrant to obtain documents may apply to an issuing officer for a production order against a person in respect of those documents if the enforcement officer is satisfied that the conditions, specified in section 70, for making the order against the person are met.

(2) An application under this section must be in writing and must set out the following particulars:

(a) the name of the applicant:

(ab) the provision authorising the making of an application for a search warrant in respect of the suspected offence:

(b) a description of the offence that it is suspected has been committed, is being committed, or will be committed:

(c) the facts relied on to show reasonable grounds to suspect that an offence has been committed, or is being committed, or will be committed:

(d) a description of the documents for which production is sought:

(e) the facts relied on to show reasonable grounds to believe the documents sought are in the possession or under the control of the person against whom the order is sought:

(f) whether the person against whom the order is made should be required to produce,—

(i) on 1 occasion only, those documents for which production is sought that are in his or her possession or under his or her control when the order is made; or

(ii) on an ongoing basis, those documents for which production is sought that are in his or her posses-

sion or under his or her control at the time the order is made, and those documents for which production is sought and that come into his or her possession or come under his or her control at any time while the order is in force.

70 Conditions for making production order

The conditions for making a production order are that there are reasonable grounds—

(a) to suspect that an offence has been committed, or is being committed, or will be committed (being an offence in respect of which this Act or any ~~relevant~~ enactment specified in column 2 of the Schedule authorises an enforcement officer to apply for a search warrant); and

(b) to believe that the documents sought by the proposed order—

(i) constitute evidential material in respect of the offence; and

(ii) are in the possession or under the control of the person against whom the order is sought, or will come into his or her possession or under his or her control while the order is in force.

71 Other provisions that apply to production order applications

(1) The provisions in subsection (2) apply to any application for a production order as if any reference in those provisions to a warrant or search warrant were a reference to a production order.

(2) The provisions are—

(a) section 96(2) (relating to requirements for further information); and

(b) section 97 (relating to verification of application); and

(c) section 98 (relating to mode of application); and

(d) section 99 (relating to retention of documents).

72 Issuing officer may make production order

An issuing officer may make a production order against a person if satisfied, on an application made under section 69, that

the conditions, specified in section 70, for making the order are met.

73 Form and content of production order

(1) A production order must be in the prescribed form and must require the person against whom it is made (**person A**)—

(a) to give the enforcement officer who applied for the order, or a person identified in the order, any documents described in the order that are in the possession or under the control of person A, and, if section 69(2)(f)(ii) applies to the order, documents described in the order that come into the possession or under the control of person A while the order is in force; and

(b) if any of those documents are not, or are no longer, in the possession or under the control of person A, to disclose, to the best of person A's knowledge or belief, the location of those documents to the enforcement officer who applied for the order or to the person identified in the order.

(2) The production order must set out the following:

(a) the name of person A:

(b) the grounds on which the order is made:

(c) the documents required to be given:

(d) whether the documents must be produced on 1 occasion only, or whether they are required to be produced on an ongoing basis for the duration of the entire order:

(e) the time by which, and the way in which, the documents must be produced.

(3) The production order may describe the documents required to be given by reference to a class or category of document.

(4) If the production order is made against a body corporate or an unincorporated body, the order may specify an individual (whether by name or by reference to a position held in the body) who is to comply with the order as the body's representative.

74 Duration of production order

A production order is in force for the period specified in the order (not exceeding 30 days after the date on which the order is made).

75 Other provisions applying to production orders

Section 103 (relating to the transmission of search warrants) and section 105 (relating to when a search warrant is invalid) apply to production orders as if any reference in those provisions to a warrant or search warrant were a reference to a production order.

76 Documents produced under production order

When any document is produced in compliance with a production order, the enforcement officer who applied for the order may do any 1 or more of the following things:

(a) retain the original document produced if it is relevant to the investigation:

(b) take copies of the document, or of extracts from the document:

(c) if necessary, require the person producing the document to reproduce, or to assist any person nominated by the chief executive or a delegate of the chief executive to reproduce, in usable form, any information recorded or stored in the document.

77 Copy of retained document to be given

An enforcement officer who, in accordance with section 76(a), retains an original document that is produced in compliance with a production order must, as soon as practicable after the document is produced, take a copy of the document and give the copy to the person who produced the original document in compliance with the production order.

Subpart 3—Police and Customs officer powers to search in relation to delivery under

section 12 of Misuse of Drugs Amendment Act 1978

78 Meaning of terms used in this subpart

In this subpart, unless the context otherwise requires, **craft**, **package**, and **vehicle** have the same meanings as in section 2(1) of the Customs and Excise Act 1996.

79 Searches of persons, places, and vehicles relating to deliveries under section 12 of Misuse of Drugs Amendment Act 1978

(1) In the circumstances set out in subsection (2), a constable or a Customs officer may, during the course of a delivery in relation to which a Customs officer has exercised his or her powers under section 12 of the Misuse of Drugs Amendment Act 1978, do any or all of the following without a warrant:

(a) search a person involved in a delivery under section 12 of the Misuse of Drugs Amendment Act 1978:

(b) enter and search any place, craft, or vehicle:

(c) seize anything that he or she has reasonable grounds to believe is a thing described in any of paragraphs (a) to (d) of subsection (2).

(2) The circumstances are that the constable or the Customs officer has reasonable grounds to believe that the person is in possession of, or the place, craft, or vehicle contains, any 1 or more of the following:

(a) a controlled drug:

(b) a precursor substance:

(c) a package in relation to which the Customs officer has replaced all or a portion of any controlled drug or precursor substance:

(d) evidential material in relation to the commission of an offence under section 6(1)(a) or 12AB of the Misuse of Drugs Act 1975.

Subpart 4—Warrantless powers of entry and search incidental to arrest or detention

80 Application of this subpart

This subpart applies to any person who has exercised a power of arrest or detention, or both, by or under this Act or any other enactment, other than—

(a) the Armed Forces Discipline Act 1971; or

(b) the Defence Act 1990; or

(c) any regulations made under either of those Acts.

81 Entry without warrant after arrest

(1) A person to whom this subpart applies who has arrested a person and has reasonable grounds to believe that the circumstances in subsection (2) exist in a place may enter it without a warrant to search for and seize any evidential material relating to the offence for which the person was arrested.

(2) The circumstances are—

(a) that evidential material relating to the offence for which the person was arrested is in that place; and

(b) that, if entry is delayed in order to obtain a search warrant, evidential material relating to the offence for which the person was arrested will be destroyed, concealed, or damaged.

82 Warrantless entry and search of vehicle after arrest

A person to whom this subpart applies who has arrested a person and who has reasonable grounds to believe that evidential material relating to the offence for which the person was arrested is in a vehicle may enter and search it without a warrant.

83 Rub-down search of arrested or detained person

(1) A person to whom this subpart applies may carry out a rub-down search of a person, in accordance with this section, when the person is arrested, or detained under a statutory power of detention, in order to ensure that the person is not carrying anything that may be used—

(a) to harm any person; or

(b) to facilitate the person's escape.

(2) For the purposes of this section and sections 84 and 85, a **rub-down search** means a search of a clothed person in which the person conducting the search may do any or all of the following:

(a) run or pat his or her hand over the body of the person being searched, whether outside or inside the clothing (other than the underclothing) of that person:

(b) insert his or her hand inside any pocket or pouch in the clothing (other than the underclothing) of the person being searched:

(c) for the purpose of permitting a visual inspection, require the person being searched to do any or all of the following:

(i) open his or her mouth:

(ii) display the palms of his or her hands:

(iii) display the soles of his or her feet:

(iv) lift or rub his or her hair.

84 Things that can be done to facilitate rub-down search

(1) For the purpose of facilitating any of the actions referred to in any of paragraphs (a) to (c) of section 83(2), the person conducting a rub-down search may require the person being searched—

(a) to remove, raise, lower, or open any outer clothing (including (without limitation) any coat, jacket, jumper, or cardigan) being worn by the person being searched, except where that person has no other clothing, or only underclothing, under that outer clothing; and

(b) to remove any head covering, gloves, or footwear (including socks or stockings) being worn by that person.

(2) A rub-down search of a person may include searching—

(a) any item carried by, or in the possession of, the person; and

(b) any outer clothing removed, raised, lowered, or opened for the purposes of the search; and

(c) any head covering, gloves, or footwear (including socks or stockings) removed for the purposes of the search.

85 Rub-down search may include visual examination

A rub-down search may include a visual examination (whether or not facilitated by any instrument or device designed to illuminate or magnify) of the mouth, nose, and ears, but must not include the insertion of any instrument, device, or thing into any of those orifices.

86 Warrantless search of arrested or detained person

(1) A person to whom this subpart applies may, in the circumstances set out in subsection (2), carry out a search of a person.

(2) The circumstances are that the person to whom this subpart applies has reasonable grounds to believe that there is anything on or carried by a person who is arrested or detained under a statutory power of detention that—

(a) may be used to harm any person; or

(b) may be used to facilitate the person's escape; or

(c) is evidential material relating to the offence in respect of which the arrest is made or the person is detained.

Part 4
General provisions in relation to search and inspection powers

Subpart 1—Application of rules in Part 4, and consent searches

Application of rules

87AA General application rules

(1) This Part applies, to the extent and in the manner provided by Part 2, Part 3, and this Part,—

(a) in respect of—

(i) powers conferred on the Police by Part 2; and

(ii) search warrants and examination orders applied for, issued, or made under that Part; and

(b) in respect of—

(i) powers conferred on enforcement officers by Part 3; and

(ii) surveillance device warrants, declaratory orders, and production orders applied for, issued, or made under that Part; and

(c) in respect of any other matter provided for in Part 2, or Part 3, or this Part.

(2) This Part also applies in respect of powers conferred by enactments listed in column 2 of the Schedule, to the extent and in the manner—

(a) identified in column 4 of the Schedule; and

(b) set out in subparts 1 and 2 of Part 5.

(3) If any provision in subparts 1 to 5 of this Part applies in respect of a power conferred by an enactment listed in column 2 of the Schedule, then subparts 6 to 8 of this Part also apply in relation to that power, to the extent and in the manner identified in those subparts.

(4) Except to the extent provided in subsections (2) and (3), Part 5, and the Schedule, this Part does not apply in respect of—

(a) a search warrant, search, inspection, examination, production order, examination order, or any other warrant or order made, executed, or carried out, as the case requires, under any other Act or regulations made under any other Act; or

(b) surveillance of any kind conducted under any other Act or regulations made under any other Act.

87AB Relationship between Part 4 and Part 5

The way in which the provisions of Part 4 are applied to the Acts amended by Part 5 is set out in the Schedule.

87AC Interpretation

(1) In this Part, unless the context otherwise requires,—

enforcement officer in relation to any provision in this Part—

(a) means any of the following persons:

(i) a constable:

(ii) any person authorised by this Act or by any enactment specified in column 2 of the Schedule

to which that provision is applied to exercise a power of entry, search, or seizure; but

(b) does not include any person referred to in paragraph (a)(ii) in relation to the exercise by that person of any entry, search, or seizure under any enactment that is not—

(i) part of this Act; and

(ii) an enactment to which that provision is applied

remote access search means a search of a thing such as an Internet data storage facility that does not have a physical address that a person can enter and search

search power in relation to any provision in this Part means—

(a) every search warrant issued under this Act or an enactment set out in column 2 of the Schedule to which that provision is applied; and

(b) every power conferred under this Act or an enactment set out in column 2 of the Schedule to which that provision is applied to enter and search, or enter and inspect or examine (without warrant), any place, vehicle, or other thing.

(2) If any provision in this Part applies (because of the operation of Part 5 and the Schedule) in respect of any warrant that would enable entry and inspection, or entry and examination, every reference in that provision to a search must, in relation to that warrant and its execution, be read instead, as the case requires, as a reference to an inspection, or an examination, or a power of inspection, or a power of examination.

(3) If any provision in this Part applies (because of the operation of Part 5 and the Schedule) in respect of a power to enter and inspect a place, vehicle, or thing, or to enter and examine a place, vehicle, or thing, every reference in this Part to a search must, in relation to that power, be read instead, as the case requires, as a reference to an inspection, or a power of inspection, or an examination, or a power of examination.

(4) Subsection (3) does not limit subsection (2).

87 Application of rules in relation to enforcement officers and transfer of things between law enforcement agencies, etc

(1) Any duty imposed on an enforcement officer under this Part may be carried out instead by an enforcement officer employed or engaged by the same law enforcement agency as the other enforcement officer.

(2) Subsection (3) applies if any thing is seized by or produced to a person employed or engaged by any law enforcement agency and the thing is then transferred to another law enforcement agency for the purposes of investigation, prosecution, or forfeiture.

(3) If this subsection applies, the obligations imposed by this Part on any law enforcement agency or any enforcement officer engaged by that agency must, after the transfer of the thing referred to in subsection (2), be carried out by the law enforcement agency to which the thing is transferred or an enforcement officer employed by that agency.

(4) Subsection (3) is subject to any contrary provisions in any other enactment.

Consent searches

88 Application of rules about consent searches

Sections 89 to 92 apply in respect of consent searches undertaken by an enforcement officer in circumstances where a power of search by an enforcement officer to which this Part applies or any provisions of this Part apply (whether a warrantless power or a power able to be conferred by a search warrant) could be exercised if the officer held a particular belief or suspicion.

89 Purposes for which consent search may be undertaken

An enforcement officer may ask a person to consent to undergo a search or to consent to a search being made of a place, vehicle, or other thing apparently in the control of the person, if the enforcement officer wishes to conduct the search for 1 or more of the following purposes:

(a) to prevent the commission of an offence:

(b) to protect life or property, or to prevent injury or harm:
(c) to investigate whether an offence has been committed:
(d) any purpose in respect of which the enforcement officer could exercise a power of search conferred by an enactment, if he or she held a particular belief or suspicion specified in the enactment.

90 Advice that must be given before consent search undertaken

Before conducting a search by consent, the enforcement officer who proposes to conduct it must—

(a) determine that the search is for a purpose authorised by section 89; and
(b) advise the person from whom consent is sought of the reason for the proposed search; and
(c) advise the person that he or she may either consent to the search or refuse to consent to the search.

91 Circumstances where search by consent unlawful

A search by consent is unlawful if—

(a) it is not for a purpose set out in section 89; or
(b) the enforcement officer fails to comply with section 90(a), (b), or (c); or
(c) the search is undertaken in reliance on a consent given by a person who does not have authority to give that consent.

92 Ability of persons under 14 years to consent to searches of places, vehicles, or other things

(1) A person under 14 years of age is unable to consent to the search of a place, vehicle, or other thing.

(2) Subsection (1) does not apply to a person under 14 years of age who is found driving a vehicle with no passenger of or over the age of 14 years with authority to consent to the search of the vehicle.

93 Exceptions to consent search rules

Sections 89 to 92 do not—

(a) apply to a search conducted as a condition of entry to any public or private place; or
(b) apply to a search conducted in accordance with a power conferred by an enactment; or
(c) affect the rule of law relating to the implied licence to enter property.

Subpart 2—Search warrants

94 Application of sections 95 to 99

(1) The provisions of sections 95 to 99 apply in respect of every warrant applied for, or issued, under this Act or any ~~relevant~~ enactment specified in column 2 of the Schedule to which those sections are applied that would enable entry, or entry and search, or entry and inspection, or entry and examination, of any land, premises, place, vehicle, or other thing (a **search warrant**).

~~(2) If sections 95 to 99 apply in respect of any warrant that would enable entry and inspection, or entry and examination, every reference in those sections to a search must be read instead, as the case requires, as a reference to an inspection, or an examination, or a power of inspection, or a power of examination.~~

95 Interpretation

In this subpart, unless the context otherwise requires,—

applicant, in relation to any provision in this subpart, means any of the following persons:

(a) a constable:
(b) any other person authorised to apply for a search warrant by this Act or any ~~relevant enactment~~ enactment specified in column 2 of the Schedule to which that provision applies ~~to apply for a search warrant~~

thing includes an intangible thing (for example, an email address or access information to an Internet data storage facility).

Application for search warrant

96 Application for search warrant

(1) An application for a search warrant must contain, in reasonable detail, the following particulars:

(a) the name of the applicant:

(b) the provision authorising the making of the application:

(c) the grounds on which the application is made (including the reasons why the legal requirements for issuing the warrant are believed by the applicant to be satisfied):

(d) the address or other description of the place, vehicle, or other thing proposed to be entered, or entered and searched, inspected, or examined:

(e) a description of the item or items or other evidential material believed to be in or on or part of the place, vehicle, or other thing that are sought by the applicant:

(f) the period for which the warrant is sought:

(g) if the applicant wants to be able to execute the warrant on more than 1 occasion, the grounds on which execution on more than 1 occasion is believed to be necessary.

(2) The issuing officer—

(a) may require the applicant to supply further information concerning the grounds on which the search warrant is sought; but

(b) must not, in any circumstances, require the applicant to disclose the name, address, or any other identifying detail of an informant unless, and only to the extent that, such information is necessary for the issuing officer to assess either or both of the following:

(i) the credibility of the informant:

(ii) whether there is a proper basis for issuing the warrant.

(3) The applicant must disclose in the application—

(a) details of any other application for a search warrant that the applicant knows to have been made within the previous 3 months in respect of the place, vehicle, or other thing proposed to be searched; and

(b) the result of that application or those applications.

(4) The applicant must, before making an application for a search warrant, make reasonable inquiries within the law enforce-

ment agency in which the applicant is employed or engaged, for the purpose of complying with subsection (3).

(5) The issuing officer may authorise the search warrant to be executed on more than 1 occasion during the period in which the warrant is in force if he or she is satisfied that this is required for the purposes for which the warrant is being issued.

97 Application must be verified

An application for a search warrant must contain or be accompanied by a statement by the applicant confirming the truth and accuracy of the contents of the application.

98 Mode of application for search warrant

(1) An application for a search warrant—

(a) must be in writing, unless subsection (3) applies; and

(b) may be transmitted to the issuing officer electronically.

(2) The applicant must appear in person before, or communicate orally with, the issuing officer, unless subsection (4) applies.

(3) An issuing officer may allow an application for a search warrant to be made orally (for example, by telephone call) or by personal appearance and excuse the applicant from putting all or any part of the application (including any required material) in writing if—

(a) the issuing officer is satisfied that the delay that would be caused by requiring an applicant to put all or any part of the application (including any required material) in writing would compromise the effectiveness of the search; and

(b) the issuing officer is satisfied that the question of whether the warrant should be issued can properly be determined on the basis of an oral communication or a personal appearance (together with the material described in paragraph (c)); and

(c) the information required by section 96(1) to (3) is supplied (whether orally, or partly orally and partly in writing) to the issuing officer.

(4) An issuing officer may allow an application for a search warrant to be made without either an appearance in person or an oral communication with the issuing officer if—

(a) the issuing officer is satisfied that the question of whether the search warrant should be issued can properly be determined on the basis of any written communication by the applicant (including the material described in paragraph (b)); and

(b) the information required by section 96(1) to (3) has been supplied to the issuing officer; and

(c) the issuing officer is satisfied that there is no need to ask any questions of, or seek any further information from, the applicant.

(5) An issuing officer who allows an application for a search warrant to be made under subsection (3) must record the grounds for the application as soon as practicable.

99 Retention of documents

(1) A copy (whether in electronic form or otherwise) of every written application for a search warrant, or (in the case of an oral application) the record of the application made by the issuing officer, must be retained under the control of the Registrar of the District Court at which, or under the control of the Registrar of the District Court that is closest to the place at which, the application was made, until,—

(a) in a case where a search warrant is issued, the completion of any proceedings in respect of which the validity of the warrant may be in issue; or

(b) in any other case, the expiry of 2 years after the records were first retained under the control of the Registrar of a District Court.

(2) An applicant to whom a search warrant is issued must retain (whether in electronic form or otherwise) the warrant, a copy of the application (if made in written form), all documents tendered by the applicant in support of the application, and a copy of any search warrant report referred to in section 102 required to be prepared, until,—

(a) in the case of a warrant that is executed, the completion of any proceedings in respect of which the validity of the warrant may be in issue; or

(b) in any other case, the destruction or transfer of the warrant and other documents is required by the Public Records Act 2005 or any other enactment or rule of law.

Issuing of search warrant

100 Restrictions on issue of search warrant

An issuing officer must not issue a warrant to seize any thing held by a lawyer that is a communication of a kind to which legal professional privilege normally applies unless the issuing officer is satisfied that ~~the information provided by the applicant indicates~~ there is a prima facie case that the thing was made, or received, ~~completed,~~ or compiled, or prepared—

(a) for a dishonest purpose; or

(b) for the purpose of planning to commit or committing an offence.

101 Form and content of search warrant

(1) Every search warrant issued must be in the prescribed form.

(2) Every search warrant issued must be directed to every enforcement officer who has authority to execute the warrant.

(3) A search warrant may be—

(a) executed by—

(i) any or all of the persons to whom it is directed; or

(ii) any constable (whether or not the warrant is directed to that constable or to every constable):

(b) subject to any conditions specified in the warrant that the issuing officer considers reasonable, including (without limitation)—

(i) any restriction on the time of execution that is reasonable:

(ii) a condition that the occupier or person in charge of a place must provide reasonable assistance to a person executing the warrant if, in the absence

of such assistance, it would not be practical to execute the warrant without undue delay:

(c) executed only once, unless execution on more than 1 occasion has been authorised.

(4) Every search warrant must contain, in reasonable detail, the following particulars:

(a) the name or other individual designation of the issuing officer and the date of issue:

(b) the provision~~s~~ or provisions authorising the issue of the warrant (including, where relevant, the suspected offence or offences):

(c) that the person executing the warrant may use any assistance that is reasonable in the circumstances:

(d) that any person authorised to do so may execute the warrant:

(e) that the person executing the warrant may use any force, if authorised by this Act or any other enactment, that is reasonable in the circumstances to enter or break open or access any area within the place, vehicle, or other thing being searched, or the thing found:

(f) the address or description of the place, vehicle, or other thing that may be entered, or entered and searched, inspected, or examined:

(g) a description of what may be seized:

(h) the period during which the warrant may be executed, being—

(i) a period specified by the issuing officer not exceeding 14 days from the date of issue; or

(ii) if the issuing officer is satisfied that a period of longer than 14 days is necessary for execution, a period specified by the issuing officer not exceeding 30 days from the date of issue:

(i) any conditions specified by the issuing officer under subsection (3)(b):

(j) if the warrant may be executed on more than 1 occasion, the number of times that the warrant may be executed:

(k) if the warrant is intended to authorise ~~the~~ a remote access ~~and~~ search ~~of things such as Internet data storage facilities that are~~ (eg, a search of a thing such as an Inter-

net data storage facility that is not situated at a physical location ~~that can be searched,~~) the access information that identifies the thing to be searched remotely:

(l) an explanation of the availability of relevant privileges and an outline of how any of those privileges may be claimed:

(m) a statement that,—

(i) in the case of a search under a search warrant issued in relation to offences under the Misuse of Drugs Act 1975, any person found in the place or vehicle to be searched may also be searched; or

(ii) in the case of any other search authorised by this Act or any ~~relevant~~ enactment specified in column 2 of the Schedule to which this section applies, any person found in the place or vehicle to be searched may be searched if there are reasonable grounds to believe that ~~the~~ an item being searched for is on that person.

(4A) A search warrant may authorise the search of more than 1 place, vehicle, or thing.

(4B) An issuing officer may not issue a search warrant authorising the remote access and search of a thing such as an Internet data storage facility, unless he or she is satisfied that the thing is not located at a physical address that a person can enter and search.

(5) A person is not required, as a consequence of a condition imposed under subsection (3)(b)(ii), to give any information tending to incriminate the person.

102 Issuing officer may require search warrant report

(1) An issuing officer may impose a condition under section 101(3)(b) requiring the employer of any person to whom a search warrant is issued to provide that issuing officer with a search warrant report within a specified period.

(2) A search warrant report must contain the following information:

(a) whether the search warrant was executed:

(b) whether the execution of the search warrant resulted in the seizure of evidential material, and, if so, whether that material was material—
  (i) specified in the search warrant; or
  (ii) seized under section 119; or
  (iii) some of which was specified in the warrant and some of which was seized under section 119:
(c) whether any other powers exercised in conjunction with the execution of the warrant resulted in the seizure of evidential material:
(d) whether any criminal proceedings have been brought, or are under consideration, that relate to the evidential material seized.

103 Transmission of search warrant

If it is not possible or practicable for the person charged with executing the warrant to have it in his or her possession at the time of execution, one of the following documents (which is deemed for all legal purposes to constitute the warrant) may be executed:

(a) a facsimile, or a print-out of an electronically generated copy, of a warrant issued by the issuing officer:
(b) a copy made by the person to whom the warrant is directed, at the direction of the issuing officer and endorsed to that effect.

104 When search warrant executed

A search warrant is executed when the person executing the warrant and any person assisting in the execution of the warrant—

(a) has seized all the items specified in the warrant; or
(b) leaves the place, vehicle, or other thing being searched and does not return within 4 hours.

105 When search warrant invalid

(1) A search warrant is invalid—
  (a) if, having regard to the information contained in the application, the grounds or conditions for lawful issue of a warrant set out in section 6 or, if applicable, the ~~rele-~~

~~vant~~ enactment specified in column 2 of the Schedule to which this section applies were not satisfied at the time the search warrant was issued:

(b) if the warrant contains a defect, irregularity, omission, or want of form that is likely to mislead anyone executing or affected by the warrant as to its purpose or scope.

(2) If a warrant is invalid under this section, section 204 of the Summary Proceedings Act 1957 does not apply to that warrant.

106 Authorisation of issuing officers

(1) The Attorney-General may authorise any Justice of the Peace, Community Magistrate, Registrar, Deputy Registrar, or other person to act as an issuing officer for a term, not exceeding 3 years, specified in the notice of authorisation.

(1A) The Attorney-General may not authorise an enforcement officer to act as an issuing officer.

(2) The Attorney-General may not authorise any Justice of the Peace, Community Magistrate, Registrar, Deputy Registrar, or other person to act as an issuing officer unless the Attorney-General is satisfied that the person has sufficient knowledge, skill, and experience to act as an issuing officer.

(3) The Attorney-General may from time to time renew an authorisation granted under subsection (1) for a further term not exceeding 3 years specified in the notice of renewal.

(4) The Attorney-General must remove an issuing officer, other than a Judge, from office—

(a) for neglect of duty, inability to perform the duties of office, bankruptcy, or misconduct, proved to the satisfaction of the Attorney-General; or

(b) if he or she becomes an enforcement officer.

(5) Any issuing officer (other than a Judge) may at any time resign the office of issuing officer by notice in writing addressed to the Attorney-General.

Subpart 3—Carrying out search powers

~~107~~ ~~Application~~

~~(1)~~ ~~For the purposes of this subpart, **search power** means—~~

~~(a) every search warrant issued under this Act or any relevant enactment; and~~

~~(b) every power conferred under this Act or any relevant enactment to enter and search, or enter and inspect or examine (without warrant), any place, vehicle, or other thing.~~

~~(2) If this subpart applies in respect of a power conferred by this Act or a relevant enactment to enter and inspect a place, vehicle, or thing, or to enter and examine a place, vehicle, or thing, every reference in this subpart to a search must be read instead, as the case requires, as a reference to an inspection, or a power of inspection, or an examination, or a power of examination.~~

108 Search powers

Every search power authorises the person exercising it—

(a) to enter and search the place, vehicle, or other thing that the person is authorised to enter and search, and any item or items found in that place or vehicle or thing, at any time that is reasonable in the circumstances:

(b) to request any person to assist with the entry and search (including, without limitation, a member of a hapū or an iwi if the place to be entered is of cultural or spiritual significance to that hapū or iwi):

(c) to use any force that is reasonable for the purposes of the entry and search and the seizure of any item authorised by the search power to be seized:

(d) if and only if section 111(2) applies to the person exercising the power, to detain any person who is at the place or in the vehicle or other thing being searched, or who arrives there while the search is being undertaken, for a reasonable period (using reasonable force if necessary), to enable the person exercising the power to determine whether the person is connected with the object of the search:

(e) to seize any thing authorised to be seized:

(f) to bring and use in or on the place, vehicle, or other thing searched any equipment, to use any equipment found on the place, vehicle, or other thing, and to extract

any electricity from the place, vehicle, or other thing to operate the equipment that it is reasonable to use in the circumstances, for the purposes of carrying out the entry and search:

(g) to bring and use in or on the place, vehicle, or other thing searched a dog (being a dog that is trained to undertake searching for law enforcement purposes and that is under the control of its usual handler):

(h) to copy any document, or part of a document, that may lawfully be seized:

(i) to access and copy intangible material from ~~computers and~~ a computer system or other data storage device~~s~~ located ~~or accessible from~~ (in whole or in part) at the place, vehicle, or other thing searched (including copying by means of previewing, cloning, or other forensic methods either before or after removal for examination):

(j) to use any reasonable measures to—

(i) gain access to any computer system or other data storage device ~~that is~~ located (in whole or in part) at the place or in the vehicle or other thing to be searched~~, or that can be accessed from a computer or other data storage device that is at that place or in that vehicle or other thing~~; and

(ii) create a forensic copy of any material in such a computer system or other data storage device:

(k) to take photographs, sound and video recordings, and drawings of the place, vehicle, or other thing searched, and of any thing found in that place, vehicle, or other thing, if the person exercising the power has reasonable grounds to believe that the photographs or sound or video recordings or drawings may be relevant to the purposes of the entry and search.

108A Remote access search of thing authorised by warrant

Every person executing a search warrant authorising a remote access search may—

(a) access and copy intangible material from the thing being searched (including copying by means of previewing, cloning, or other forensic methods); and

(b) use reasonable measures to—

(i) gain access to the thing; and

(ii) create a forensic copy of material in the thing.

109 Items of uncertain status may be seized

If a person exercising a search power is uncertain whether any item found may lawfully be seized, and it is not reasonably practicable to determine whether that item can be seized at the place or vehicle where the search takes place, the person exercising the search power may remove the item for the purpose of examination or analysis to determine whether it may be lawfully seized.

110 Powers of persons called to assist

(1) Every person called on to assist a person exercising a search power is subject to the control of the person with overall responsibility for exercising that power.

(2) Every person called on to assist a person exercising a search power may—

(a) enter the place, vehicle, or other thing to be searched:

(b) while under the direction of the person exercising the power, use reasonable force in respect of any property for the purposes of carrying out the entry and search and any lawful seizure:

(c) search areas within the place, vehicle, or other thing that the person exercising the power has determined may lawfully be searched:

(d) if and only if section 111(2) applies to the person exercising the power, detain any person who is at the place or in the vehicle or other thing being searched, or who arrives there while the search is being undertaken (using reasonable force if necessary), to enable the person exercising the power to determine whether the person is connected with the object of the search:

(e) seize any thing that may lawfully be seized:

(f) take photographs, sound and video recordings, and drawings of the place, vehicle, or other thing, and things found in the place, vehicle, or other thing, if the person exercising the power has determined that those things may be lawfully taken:

(g) bring into or onto the place, vehicle, or other thing and use any equipment, make use of any equipment found on the place or in the vehicle or other thing, or extract electricity from the place, vehicle, or other thing for the purposes of operating the equipment that the person exercising the power has determined may be lawfully used:

(ga) bring in and use in or on the place, vehicle, or other thing searched a dog (being a dog that is trained to undertake searching for law enforcement purposes and that is under the control of its usual handler):

(h) access and copy intangible material from ~~computers and~~ a computer system or other data storage devic~~es~~ located (in whole or in part) at ~~or accessible from~~ the place, vehicle, or other thing searched (including copying by means of previewing, cloning, or other forensic methods either before or after removal for examination):

(i) copy any document, or part of a document, that the person exercising the power has determined may be lawfully copied:

(j) use any reasonable measures to—

(i) gain access to any computer system or other data storage device that is located (in whole or in part) at the place or in the vehicle or other thing to be searched~~, or that can be accessed from a computer or other data storage device that is at that place or in that vehicle or other thing~~; and

(ii) create a forensic copy of any material in such a computer system or other data storage device.

(3) If a constable is assisting another person exercising the search power, that constable may, without any direction or supervision by the person he or she is assisting, exercise any power ordinarily exercisable by that constable.

(4) The person exercising the search power must—

(a) accompany any assistant on the first occasion when the assistant enters the place, vehicle, or other thing to be searched; and

(b) provide such other supervision of any assistant as is reasonable in the circumstances.

(5) Subsection (4) does not apply if the assistant is a constable.

110A Powers of persons called to assist remote access search

Every person called on to assist a person executing a search warrant authorising a remote access search—

(a) access and copy intangible material from the thing being searched (including copying by means of previewing, cloning, or other forensic methods); and

(b) use reasonable measures to—

(i) gain access to the thing; and

(ii) create a forensic copy of material in the thing.

111 Limitation on exercise of powers

(1) The powers conferred by sections 108 to 110A are subject to—

(a) any conditions imposed under section 101(3)(b) by an issuing officer who issues a search warrant:

(b) subpart 4 of this Part (which relates to privilege and confidentiality).

(2) The powers conferred by sections 108(d), 110(2)(d), and 114(1) to detain a person may only be exercised by a person who has power to arrest the person to be detained—

(a) for a suspected offence to which the search relates; or

(b) for a suspected offence to which evidential material that is discovered in the course of the search relates.

Giving directions

112 Securing place, vehicle, or other thing to be searched

(1) The person carrying out a search may, in a manner and for a duration that is reasonable for the purposes of carrying out the search,—

(a) secure the place, vehicle, or other thing searched, any area within that place, vehicle, or other thing, or any thing found within that place, vehicle, or other thing:

(b) exclude any person from the place, vehicle, or other thing searched, or from any area within the place, vehicle, or other thing, or give any other reasonable direction to such a person, if the person carrying out the search has reasonable grounds to believe that the person will obstruct or hinder the exercise of any power under this subsection.

(2) A person who exercises any power under subsection (1) must, on the request of any person affected by the exercise of the power,—

(a) identify himself or herself; and

(b) advise the person affected of the reason and authority for the exercise of the power.

Establishing search scene

113 Special powers where application for search warrant pending

(1) If an application for a search warrant is about to be made or has been made and has not yet been granted or refused by an issuing officer, an enforcement officer present at the place or vehicle that is or is to be the subject of the application may, if authorised by subsection (1A),—

(a) enter and secure the place, vehicle, or other thing in respect of which authorisation to enter and search is being sought, and secure any item or items found at that place or in that vehicle or other thing, at any time that is reasonable in the circumstances:

(b) ~~request~~direct any person to assist with the entry and securing of the place or vehicle or other thing or the securing of items in it (including, without limitation, a member of a hapū or an iwi if the place to be entered is of cultural or spiritual significance to that hapū or iwi).

(1A) The powers conferred by subsection (1) may be exercised if the enforcement officer has reasonable grounds to believe that evidential material may be destroyed, concealed, altered,

damaged, or removed before a decision is taken to grant or refuse the issue of a search warrant.

(2) The powers conferred by subsection (1) may be exercised until the first of the following occurs:
- (a) the expiry of 6 hours from when the power is first exercised:
- (b) the warrant is available for execution at that place or vehicle or in respect of that other thing:
- (c) the application for a search warrant is refused.

(3) A person who exercises any power under subsection (1) must, on the request of any person affected by the exercise of the power,—
- (a) identify himself or herself; and
- (b) advise the person affected of the reason and authority for the exercise of the power.

Detention of person at search scene

114 Powers of detention incidental to powers to search places and vehicles

(1) If any constable or other person (being a person to whom section 111(2) applies) exercises a search power in relation to a place or vehicle, that constable or other person may, for the purposes of determining whether there is any connection between a person at the place or in the vehicle and the object of the search, detain any person—
- (a) who is at the place or in the vehicle at the commencement of the search; or
- (b) who arrives at the place or stops at, or enters, or tries to enter, the vehicle while the search is being carried out.

(2) A person may be detained under subsection (1) for any period that is reasonable, but not for longer than the duration of the search.

(3) A detention of any person commences under subsection (1) when the constable or other person exercising the search power directs that person to remain at the place or in the vehicle and ends when that person is told by the constable or other person exercising the search power that he or she is free to leave the place or vehicle.

(4) Reasonable force may be used for the purpose of effecting and continuing any detention under subsection (1).

(5) This section does not limit the powers conferred by section 108(d) or 110(2)(d).

Powers of search incidental to powers of arrest

115 Powers of search incidental to power of arrest

(1) If any person who may exercise a power of arrest is searching a place or vehicle, he or she may search any person found at the place or in the vehicle, or who arrives at the place or stops at, or enters, or tries to enter the vehicle, if the person conducting the search has reasonable grounds to believe that evidential material that is the object of the search is on that person.

(2) If any person who may exercise a power of arrest is searching a place or vehicle, he or she may search any person found at the place or in the vehicle, or who arrives at the place or stops at, or enters, or tries to enter the vehicle, if the person conducting the search—

(a) has reasonable grounds to suspect that the person is in possession of a dangerous item that poses a threat to safety; and

(b) believes that immediate action is needed to address that threat.

(3) If any item referred to in subsection (2)(a) is seized, it must, unless possession of the item constitutes an offence, be returned to the person from whom it was taken either—

(a) once the search has been completed; or

(b) when the person who conducted the search is satisfied that there is no longer any threat to safety.

116 Powers of search when suspect pursued

(1) If any person who may exercise a power of arrest intends to conduct a search of a person or vehicle, but that person or vehicle leaves before the search is undertaken or completed, the person who intended to conduct the search may,—

(a) on apprehending the person or vehicle, search the person or vehicle; and

(b) enter private property for the purpose of apprehending the person or vehicle.

(2) A person may not exercise the powers conferred by subsection (1)(a) or (b) unless—

(a) the person was freshly pursuing the person to be searched from the location of the intended search, when the person was apprehended; and

(b) the person intending to conduct the search has reasonable grounds to believe that relevant evidential material is still on the person who is to be searched, or in the vehicle.

Stopping vehicles with or without warrant for purposes of search

117 Stopping vehicles with or without warrant for purposes of search

(1) An enforcement officer may stop a vehicle to conduct a search under a power to search without a warrant conferred on that officer by this Act or any ~~relevant~~ enactment specified in column 2 of the Schedule to which this section applies if he or she is satisfied that he or she has grounds to search the vehicle.

(2) An enforcement officer may stop a vehicle to conduct a search under a power to search with a warrant issued under this Act or any ~~relevant~~ enactment specified in column 2 of the Schedule to which this section applies if he or she is satisfied that the warrant has been issued and is in force.

Moving vehicle for safekeeping and other purposes

118 Moving vehicle for purpose of search, safekeeping, or road safety

An enforcement officer may move a vehicle to another place if he or she finds or stops the vehicle and he or she—

(a) has lawful authority to search the vehicle, but it is impracticable to do so at that place; or

(b) has reasonable grounds to believe that it is necessary to move the vehicle for safekeeping or for road safety purposes.

Seizure of items in plain view

119 Seizure of items in plain view

(1) An enforcement officer who exercises a search power or who is lawfully in any place as part of his or her duties may seize any item or items that he or she, or any person assisting him or her, finds in the course of carrying out the search or as a result of observations at that place, if the enforcement officer has reasonable grounds to believe that he or she could have seized the item or items under—

(a) any search warrant that could have been obtained by him or her under this Act or any other enactment; or

(b) any other search power exercisable by him or her under this Act or any other enactment.

(2) If an enforcement officer seizes any item or items under subclause (1), in circumstances where he or she is not already exercising a search power, the enforcement officer may exercise any applicable power conferred by section 108 in relation to the seizure of the item or items.

Search of persons

120 Special rules about searching persons

(1) If a person exercises a power to search a person, the person exercising the power—

(a) must identify himself or herself either by name or unique identifier; and

(b) must advise the person to be searched of the authority and reason for the search, unless it is impracticable to do so in the circumstances; and

(c) may detain the person to enable the search to be carried out (whether at the place of initial detention or while the person is travelling to or is at any other place where the search is carried out), but only for as long as is necessary to achieve that purpose; and

(d) may use any force that is reasonable for the purposes of the search; and

(e) may in conducting the search use any equipment or aid to facilitate the search, if it is used in a way that—

(i) involves no or minimal contact; and

(ii) is reasonable in the circumstances; and

(f) may, if he or she considers that either or both of the following are in the interests of the person to be searched, request:

(i) the assistance of a medical practitioner or nurse:

(ii) the assistance of a parent, guardian, or other person for the time being responsible for the day-to-day care of the person to be searched; and

(g) if the search is to be a strip search, may request the assistance of another enforcement officer (whether or not employed or engaged in the same or a different law enforcement agency) who is—

(i) authorised under any other enactment to conduct strip searches; and

(ii) of the same sex as the person to be searched; and

(h) may search any item that—

(i) the person is wearing or carrying; or

(ii) is in the person's physical possession or immediate control.

(2) If a person exercises a power to search a person, or searches a person with his or her consent, the person exercising the power must ensure that an inventory of any items seized as a result of the search is prepared promptly and a copy is given to the person searched.

(3) Subsection (2) does not apply in respect of a search conducted under section 20.

(4) Nothing in subsection (1)(e) permits a person carrying out a rub-down search under sections 83 to 85 (rub-down search of arrested or detained person) to carry out a more intrusive search than is described in those sections.

121 Guidelines and rules about use of strip searching

(1) The chief executive of a law enforcement agency that employs persons who may exercise a power, under an enactment, to search the person must issue guidelines to those employees concerning the circumstances (if any) under which a strip search may be conducted by any of those employees.

(1A) The chief executive of a law enforcement agency who issues guidelines under subsection (1) must ensure that a copy of

those guidelines is publicly available on the agency's Internet site.

(2) A search of the person is not unlawful by reason only of failure by the person conducting the search to comply with a guideline issued under subsection (1).

(3) A strip search may be carried out only by a person of the same sex as the person to be searched, and no strip search may be carried out in view of any person who is not of the same sex as the person to be searched.

Search warrants to enter and search vehicles

122 Search warrants to enter and search vehicles

If a search warrant is issued authorising the entry and search of a vehicle, the person executing the warrant may enter any place where the person has reasonable grounds to believe that the vehicle is, for the purpose of locating it and searching it.

~~*Provision of particulars and other information*~~

~~**123 Power to require particulars**~~

~~If a person exercises a power to stop or search a vehicle, the person exercising the power may require—~~

~~(a) any or all persons in the vehicle to supply their name, address, date of birth, and other contact details:~~

~~(b) the vehicle to remain stopped for as long as is reasonably necessary to undertake the search.~~

Duty to remain stopped

123 Duty to remain stopped

If an enforcement officer exercises a power to stop or search a vehicle, the enforcement officer may require the vehicle to remain stopped for as long as is reasonably necessary to undertake the search.

Duty to provide information

124 Duty to provide information

If ~~a person~~ an enforcement officer exercises a power to stop a vehicle, ~~that person~~ he or she must, immediately after stopping the vehicle,—

(a) identify himself or herself to the driver of the vehicle, either by name or unique identifier; and

(b) inform the driver of the person's authority to stop the vehicle; and

(c) if not in Police uniform, produce evidence of his or her identity, if the driver requests proof of identity.

Computer system searches

125 Duty of persons with knowledge of computer ~~or computer network~~ system or other data storage devices to assist access

(1) A person exercising a search power at any place or vehicle or in respect of any other thing may require a specified person to provide access information and other information or assistance that is reasonable and necessary to allow the person exercising the search power to access data held in~~, or accessible from,~~—

(a) a computer system that is located (in whole or in part) at the place or in the vehicle or other thing being searched:

(b) any other data storage device that is located (in whole or in part) at the place or in the vehicle or other thing being searched.

(2) In this section,—

access information includes access codes, passwords, and encryption keys, and any related information that enables access to a computer system or other data storage device

specified person is a person who—

(a) is the owner or lessee of the computer system or other data storage device, or is in possession or control of the computer system or other data storage device, an employee of any of the above, or any service provider who provides service to the above and holds access information; and

(b) has relevant knowledge of—

~~(i) the computer or a computer network of which the computer or other data storage device forms a part; or~~

(i) the computer system or other data storage device; or

(ii) measures applied to protect data held in, or accessible from, the computer system or other data storage device.

(3) A specified person may not be required under subsection (1) to give any information tending to incriminate the person.

(4) Subsection (3) does not prevent a person exercising a search power from requiring a specified person to provide information that—

(a) is reasonable and necessary to allow the person exercising the search power to access data held in, or accessible from, a computer system or other data storage device that—

(i) is at the premises or in the place, vehicle, or other thing to be searched; and

(ii) contains or may contain information tending to incriminate the specified person; but

(b) does not itself tend to incriminate the specified person.

(5) Subsection (3) does not prevent a person exercising a search power from requiring a specified person to provide assistance that is reasonable and necessary to allow the person exercising the search power to access data held in, or accessible from, a computer system or other data storage device that—

(a) is at the premises or in the place, vehicle, or other thing concerned; and

(b) contains or may contain information tending to incriminate the specified person.

(6) Subsections (1), (4), and (5) are subject to subpart 4 of Part 4 (which relates to privilege and confidentiality).

Identification and notice

126 Identification and notice requirements for person exercising search power (other than remote access search)

(1) A person exercising a search power (other than a **remote access search** within the meaning of section 126A) must,—

(a) before initial entry into or onto the place or vehicle or other thing to be searched,—

(i) announce his or her intention to enter and search the place, vehicle, or other thing under a statutory power; and

(ii) identify himself or herself; and

(b) before or on initial entry into or onto the place or vehicle, or other thing to be searched,—

(i) give the occupier of the place or the person in charge of the vehicle or other thing a copy of the search warrant or advice about the enactment (the **authority**) that authorises him or her to conduct the entry and search; and

(ii) produce to the occupier of the place or any person in charge of the vehicle or other thing evidence of his or her identity (which may include details of a unique identifier instead of a name).

(2) The person exercising the search power is not required to comply with subsection (1) if he or she has reasonable grounds to believe that—

(a) no person is lawfully present in or on the place, vehicle, or other thing to be searched; or

(b) compliance with subsection (1)(a) would—

(i) endanger the safety of any person; or

(ii) prejudice the successful exercise of the entry and search power; or

(iii) prejudice ongoing investigations.

(3) The person exercising the search power may use reasonable force in order to effect entry into or onto the place, vehicle, or other thing if—

(a) subsection (2) applies; or

(b) following a request, the person present refuses entry or does not allow entry within a reasonable time.

(4) If the occupier of a place is not present at any time during the search, or no person is in charge of the vehicle or other thing during the search, the person carrying out the search must,—

(a) on completion of the search, leave a copy of the authority referred to in subsection (1)(b)(i) and the notice referred to in subsection (5) in a prominent position at the place, or in or on the vehicle, or other thing; or

(b) if this is not reasonably practicable, provide the copy of the authority referred to in subsection (1)(b)(i) and the notice referred to in subsection (5) to the occupier of the place or the owner of the vehicle or other thing no later than 7 days after the exercise of the power.

(5) The notice required by subsection (4) is a written notice containing the following particulars:

(a) the date and time of the commencement and completion of the search:

(b) the name or unique identifier of the person who had overall responsibility for that search:

(c) the address of the office to which inquiries should be made:

(d) if nothing is seized, the fact that nothing was seized:

(e) if anything was seized, the fact that seizure occurred and (if an inventory is not provided at the same time under sections 127 to 129) that an inventory of the things seized will be provided to the occupier of the place or person in charge of the vehicle or other thing no later than 7 days after the seizure.

(6) For the purposes of this section and sections 127 to 129,—

(a) the following persons may not be treated as the occupier of the place or the person in charge of a vehicle or other thing:

(i) any person who is under 14 years of age (unless section 92(2) applies to that person):

(ii) any person who the person executing the warrant has reasonable grounds to believe is not the occupier of the place or person in charge of the vehicle or other thing:

(b) every reference to a copy of the authority referred to in subsection (1)(b)(i) means, in a case where a search

is undertaken without a search warrant, written advice about the enactment that authorises the search.

(7) Subsections (4) and (5) are subject to sections 128 and 129.

(8) This section does not apply to a remote access search (within the meaning of section 126A).

126A Identifications and notice requirements for remote access search

(1) A person who conducts a remote access search must, on completion of the search, send an electronic message to the email address of the thing searched—

(a) attaching a copy of the search warrant; and

(b) setting out the following particulars:

(i) the date and time of the commencement and completion of the search:

(ii) the name and unique identifier of the person who had overall responsibility for that search:

(iii) the address of the office to which inquiries should be made.

(2) If the person conducting the search is unable to deliver the electronic message required by subsection (1) (or it is returned undelivered), the person must take all reasonable steps to identify the user of the thing searched and to send the information referred to in subsection (1)(a) and (b) to that person.

127 Inventory of items seized

(1) The person who carries out a search must, at the time he or she seizes any thing, or as soon as practicable after the seizure of any thing, and in any case not later than 7 days after that seizure, provide to the occupier of the place, or the person in charge of the vehicle or other thing, from where the seizure took place, and to every other person who the person who carried out the search has reason to believe is the owner of the thing that was seized,—

(a) written notice specifying what was seized; and

(b) a copy of the authority referred to in section 126(1)(b)(i).

(2) A written notice referred to in subsection (1)(a)—

(a) must contain information about the extent to which a person from whom a thing was seized or the owner of the thing has a right to apply—

(i) to have access to the thing; or

(ii) to have access to any document relating to the application for a search warrant or the exercise of any other search power that led to the seizure; and

(b) must contain information about the right to bring a claim that any privileged or confidential information has been seized; but

(c) need not be provided to the occupier of the place or person in charge of the vehicle or other thing from which the seizure took place, if the person who carries out the search is satisfied that none of the items seized are owned by that person.

(3) If the occupier or person in charge of the vehicle or other thing is not present at the time of seizure, a written notice referred to in subsection (1)(a) and a copy of the authority referred to in section 126(1)(b)(i) may be provided to that person by leaving the notice in a prominent position at the place, or in or on the vehicle, or other thing.

(4) Subsection (1) is subject to subsections (2) and (3).

(5) This section is subject to sections 128 and 129.

128 Compliance with certain provisions may be deferred in certain circumstances

(1) A person exercising a search power may apply to a District Court Judge for a postponement of the obligation to comply with section 126(4) or (5) or 127 on the grounds that compliance would—

(a) endanger the safety of any person; or

(b) prejudice ongoing investigations.

(2) An application may be made under subsection (1),—

(a) in the case of an entry and search power that is a search warrant, at the time of the initial application or until the expiry of 7 days after the warrant is finally executed; or

(b) in the case of any other entry and search power, until the expiry of 7 days after the search power is exercised.

(3) On an application under subsection (1), the District Court Judge may postpone for a specified period not exceeding 12 months the obligation to comply with section 126(4) or (5) or 127, if the Judge is satisfied there are reasonable grounds for believing that compliance would—

(a) endanger the safety of any person; or

(b) prejudice ongoing investigations.

129 Further postponement of, or dispensation from, obligation to comply with certain provisions

(1) A person who has obtained an order under section 128(3) may, before the expiry of that order, apply to a District Court Judge for a further postponement of, or dispensation from, the obligation to comply with section 126(4) or (5) or 127 on the grounds that compliance would—

(a) endanger the safety of any person; or

(b) prejudice ongoing investigations.

(2) An application for a further postponement may only be made on 1 occasion.

(3) On an application under subsection (1), the District Court Judge may postpone for a further specified period not exceeding 12 months, or order a permanent dispensation from, the obligation to comply with section 126(4) or (5) or 127 if the Judge is satisfied that compliance would—

(a) endanger the safety of any person; or

(b) prejudice ongoing investigations.

(4) A District Court Judge may not grant, under subsection (3), any postponement of, or dispensation from, an obligation in respect of any thing that has been seized, unless the thing seized is—

(a) a copy or clone of any information taken or made; or

(b) a thing the possession of which by the person from whom it was seized is unlawful under New Zealand law (for example, a controlled drug that is found in the possession of a member of the public in circumstances in which possession by the person of the controlled drug is an offence against the Misuse of Drugs Act 1975).

Subpart 4—Privilege and confidentiality

General

130 Recognition of privilege

(1) The following privileges are recognised for the purposes of this subpart:

(a) legal professional privilege, to the extent that (under section 53(5) of the Evidence Act 2006) it forms part of the general law:

(b) privilege for communication with legal advisers (as described in section 54 of the Evidence Act 2006):

(c) privilege for preparatory material to proceedings (as described in section 56 of the Evidence Act 2006):

(d) privilege for settlement negotiations or mediation (as described in section 57 of the Evidence Act 2006):

(e) privilege for communication with ministers of religion (as described in section 58 of the Evidence Act 2006):

(f) privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists (as described in section 59 of the Evidence Act 2006):

(g) to the extent provided in section 132, and only to that extent, any privilege against self-incrimination (as described in section 60 of the Evidence Act 2006):

(h) privilege for informers (as described in section 64 of the Evidence Act 2006):

(i) the rights conferred on a journalist under section 68 of the Evidence Act 2006 to protect certain sources.

(2) For the purposes of this subpart, no privilege applies in respect of any communication or information if there is a prima facie case that the communication or information is made or received, or compiled or prepared,—

(a) for a dishonest purpose; or

(b) to enable or aid any person to commit or plan to commit what the person claiming the privilege knew, or ought reasonably to have known, to be an offence.

131 Lawyers trust accounts

(1) Subsection (2) applies to documents that are books of account or accounting records kept—

(a) by a solicitor in relation to any trust account money that is subject to section 112 of the Lawyers and Conveyancers Act 2006; or

(b) by a nominee company that—

(i) is subject to practice rules made by the Council of the New Zealand Law Society under section 96 of the Lawyers and Conveyancers Act 2006; and

(ii) is operated by a barrister and solicitor or an incorporated law firm as a nominee in respect of securities and documents of title held for clients.

(2) The application by section 130 of this Act of section 54 of the Evidence Act 2006 (which relates to the privilege for communications with legal advisers) does not prevent, limit, or affect—

(a) the making of a production order, issuing of a search warrant, or exercise of any other search power in respect of a document to which this subsection applies; or

(b) the obligation to comply with that production order, search warrant, or other search power in respect of a document to which this subsection applies; or

(c) the admissibility, in a criminal proceeding for an offence described in the production order or search warrant or for an offence in respect of which any other search power was exercised, of any evidence that relates to the contents of a document obtained under the production order or search warrant, or as the result of the exercise of any other search power.

Examination orders and production orders

132 Privilege against self-incrimination

(1) An examination order or a production order does not affect the privilege against self-incrimination that an individual may have under section 60 of the Evidence Act 2006.

(2) Any assertion of a privilege against self-incrimination must be based on section 60 of the Evidence Act 2006.

(3) If any individual refuses to produce any information or document or to answer any question on the ground that it is a privileged communication under section 60 of the Evidence Act 2006, the Commissioner or other enforcement officer concerned may apply to a District Court Judge for an order determining whether or not the claim of privilege is valid.

(4) For the purposes of determining any application referred to in subsection (3), the individual must offer sufficient evidence to enable the District Court Judge to assess whether self-incrimination is reasonably likely if the individual produced the information or the document or answered the question.

(5) Section 63 of the Evidence Act 2006 does not apply to an examination order or to a production order.

133 Other privileges

(1) If a person against whom an examination order or production order is made could, in a criminal proceeding, assert a privilege recognised for the purposes of this subpart, the person is taken to have the same privilege in respect of either order.

(2) If any person refuses to disclose any information on the ground that it is privileged under this section, the Commissioner or other enforcement officer concerned may apply to a District Court Judge for an order determining whether or not the claim of privilege is valid.

(3) For the purpose of determining any application, the District Court Judge may require the information or document to be produced to him or her.

(4) A District Court Judge ~~may~~ must, on the application of the Commissioner or other enforcement officer, disallow a privilege claim under this section if the Judge is satisfied that the claim to privilege would, under section 67(1) of the Evidence Act 2006, be disallowed in a proceeding.

Surveillance

134 Effect of privilege on surveillance conducted under this Act

(1) A person who has a privilege recognised by this subpart has the right—

(a) to prevent, to the extent that it is reasonably practicable to do so, the surveillance under this Act of any communication or information to which the privilege would apply if it were sought to be disclosed in a proceeding:

(b) to require the destruction of any record of any such communication or information, to the extent that this can be achieved without destruction of any record of any other communication or information.

(2) A person who is undertaking surveillance authorised by this Act (whether under a surveillance device warrant or otherwise) must—

(a) take all reasonable steps to prevent the interception of any communication or information to which a privilege recognised by this subpart would apply if the communication or information were sought to be disclosed in a proceeding:

(b) destroy any record of a communication or information made as a consequence of the surveillance to which a privilege recognised by this subpart would apply if the communication or information were sought to be disclosed in a proceeding, unless that is impossible or impracticable without destroying a record of information to which such a privilege does not apply.

(3) A person undertaking surveillance under this Act who is uncertain about whether this section applies to any information or communication or record of a communication or information may apply to a District Court Judge for an order determining whether—

(a) the communication or information can be the subject of surveillance; and

(b) any record of such communication or information is required to be destroyed under this section.

(4) For the purposes of determining any application the District Court Judge may require the record of the information or communication to be produced to him or her.

(5) If evidence of any communication or information recorded as a consequence of surveillance under this Act is evidence to which a privilege recognised under this subpart applies, that evidence is not admissible in any proceedings except—

(a) with the consent of the person entitled to waive that privilege; and

(b) if the court agrees to admit it.

Search warrants and other search powers

135 Effect of privilege on search warrants and search powers

A person who has a privilege recognised by this subpart has the right, in accordance with sections 136 to 141,—

(a) to prevent the search under this Act of any communication or information to which the privilege would apply if it were sought to be disclosed in a proceeding:

(b) to require the return of any such communication or information to the person if it is seized or secured by a person exercising a search power pending determination of the claim to privilege.

136 Search warrants that extend to lawyers' premises or material held by lawyers

(1) This section applies to the execution of a search warrant that authorises the search of materials held by a lawyer relating to a client.

(2) If this section applies, the search warrant may not be executed unless—

(a) the lawyer is present; or

(b) a representative of the lawyer is present.

(3) If the person who is to execute the search warrant is unable to contact the lawyer or his or her representative, that person must instead contact the New Zealand Law Society and request that a person be appointed by the Society to represent the interests of the clients of the lawyer in relation to the search.

(4) Before executing the search warrant, the person who is to execute it must give the lawyer or his or her representative, or any person appointed by the New Zealand Law Society under subsection (3),—

(a) the opportunity to claim privilege on behalf of the lawyer's client; or

(b) the opportunity to make an interim claim of privilege if instructions have not been obtained from the client.

137 Search warrant extending to certain other privileged materials

(1) This section applies to the execution of a search warrant that authorises the search of professional material held by a minister of religion, medical practitioner, or clinical psychologist.

(2) If this section applies, the search warrant may not be executed unless—

(a) the minister of religion, medical practitioner, or clinical psychologist is present; or

(b) a representative of that person is present.

(3) If the person who is to execute the search warrant is unable to contact the minister of religion, medical practitioner, or clinical psychologist, or his or her representative, that person must instead contact the church or professional body to whom the minister, medical practitioner, or clinical psychologist belongs and request the church or body to appoint a person to represent the interests of the parishioners, patients, or clients of the minister, medical practitioner or clinical psychologist, in relation to the search.

(4) Before executing the search warrant, the person executing it must give the minister of religion, medical practitioner, or clinical psychologist, or his or her personal representative, or the person appointed by the church or professional body under subsection (3),—

(a) the opportunity to claim privilege on behalf of parishioners, patients, or clients of the minister of religion, medical practitioner, or clinical psychologist; or

(b) the opportunity to make an interim claim of privilege if the minister, medical practitioner, or clinical psychologist, or his or her representative or person appointed

under subsection (3) is unable to immediately contact the parishioner, patient, or client.

138 Searches otherwise affecting privileged materials

(1) This section applies if—

(a) a person executes a search warrant~~;~~ ~~or~~ or exercises a search power; and

(b) ~~a person exercising a search power~~ he or she has reasonable grounds to believe that any thing discovered in the search may be the subject of a privilege recognised by this subpart.

(2) If this section applies, the person responsible for executing the search warrant or other person exercising the search power—

(a) must provide any person who he or she believes may be able to claim a privilege recognised by this subpart a reasonable opportunity to claim it; and

(b) may, if the person executing the search warrant or exercising the other search power is unable to identify or contact a person who may be able to claim a privilege, or that person's lawyer, within a reasonable period,—

(i) apply to the District Court for a determination as to the status of the thing; and

(ii) do any thing necessary to enable that court to make that determination.

139 Interim steps pending resolution of privilege claim

If a person executing a search warrant or exercising a search power is ~~prohibited under section 135, 136, 137, or 138 from searching any thing~~ unable, under section 135, 136, 137 or 138 to search a thing (whether as a result of the requirements of any of those provisions, or because of a claim of privilege made in respect of the thing, or for any other reason), the person—

(a) may—

(i) secure the thing; and

(ii) if the thing is intangible (for example, computer data), secure the thing by making a forensic copy; and

(iii) deliver the thing, or a copy of it, to the District Court, to enable the determination of a claim to privilege; and

(b) must supply the lawyer or other person who may or does claim privilege with a copy of, or access to, the secured thing; and

(c) must not search the thing secured, unless no claim of privilege is made, or a claim of privilege is withdrawn, or the search is in accordance with the directions of the court determining the claim of privilege.

140 Claims for privilege for things seized or sought to be seized

Any person who wishes to claim privilege in respect of any thing seized or sought to be seized by a person executing a search warrant or exercising a search power—

(a) must provide the person responsible for executing the search warrant or exercising the other search power with a particularised list of the things in respect of which the privilege is claimed, as soon as practicable after being provided with the opportunity to claim privilege or being advised that a search is to be, or is being, or has been conducted, as the case requires; and

(b) if the thing or things in respect of which the privilege is claimed cannot be adequately particularised in accordance with paragraph (a), may apply to a District Court for directions or relief (with a copy of the thing provided under section 139(b)).

Admission of evidence generally

141 Admission of evidence

(1) If a District Court upholds a claim to privilege under section 132, 133, 134, 138, 139, or 140 in respect of any communication or information, the communication or information to which the privilege applies is not admissible in any proceedings arising from, or related to, the execution of the search warrant or exercise of the other search power or surveillance power or the carrying out of the examination order or production order, as the case requires.

(2) Subject to subsection (1), this subpart does not limit or affect the admissibility of any evidence, or the discretion of any court to admit or refuse to admit any evidence, in any proceedings.

Subpart 5—Procedures applying to seized or produced materials

142 Disposal of things seized or produced

(1) If any thing is produced under a production order or is seized under a search warrant or under a search power conferred by this Act or ~~a relevant enactment~~ an enactment specified in column 2 of the Schedule to which this section applies, it must be dealt with in accordance with this subpart.

(2) However, this subpart is subject to—

(a) section 13 (which deals with property taken from people locked up in Police custody); and

(b) subpart 4 of Part 4 (which relates to privilege and confidentiality); and

(c) any other enactment.

143 Certain things must be returned

(1) A thing seized or produced must, if it is not required for investigative or evidential purposes, or unless it is liable to forfeiture to the Crown or any other person (whether by operation of law or by order of a court or otherwise), be—

(a) returned to its owner or to the person entitled to possession; or

(b) made the subject of an application under section 147; or

(c) disposed of under section 153 or 154(1); or

(d) destroyed if—

(i) it is perishable and has become rotten or has otherwise deteriorated; or

(ii) it is perishable and is likely to become rotten or perish before it can be dealt with under any of paragraphs (a) to (c) or section 156; or

(iii) it is likely to pose a risk to public health.

(2) Subsection (1)—

(a) does not affect the rights of retention conferred by section 154(2) or 155(1); and
(b) is subject to section 156.

144 Custody of things seized or produced

(1) The seized or produced thing may, if it is required for investigative or evidential purposes, or it is liable to forfeiture to the Crown or any other person (whether by operation of law or by order of a court or otherwise), be held in the custody of the person who exercised the search power or that person's employer or another person acting on behalf of that person or any other person to whom the thing is transferred in accordance with section 87(2) (except while it is being used in evidence or is in the custody of any court) until the first of the following occurs:
(a) a decision is made not to bring proceedings for an offence in respect of which the thing was seized or produced:
(b) the thing is forfeited to the Crown or any other person under any enactment (whether by operation of law or by order of a court or otherwise):
(c) the thing is released under section 151 or 152:
(d) if proceedings for an offence have not been commenced before the date that is 6 months after the thing was seized or produced and a request has been made for the return of the thing, that date or the expiration of a later time ordered by a court under section 146:
(e) in any case where proceedings are brought,—
(i) the withdrawal or dismissal of the proceedings; or
(ii) subject to sections 149 and 152, the completion of the proceedings:
(f) the seized or produced thing is disposed of under section 153.

(2) Once the relevant event stated in subsection (1)(a) to (e) occurs, the person in whose custody the property is must immediately release the thing in his or her custody,—
(a) in the case of a subsection (1)(a), (d), or (e) event, to the owner or to a person entitled to possession; or

(b) in the case of any other event, in the manner required by this Act.

(3) However, if the thing is seized or produced in relation to more than 1 alleged offence, the person in whose custody the property is need not release the property until the first of the events described in subsection (1) has occurred in relation to each and every alleged offence.

(4) This section is subject to sections 146 and 156.

145 Copies of things seized or produced

If a photograph or a copy of a seized or produced thing will be adequate for investigative or evidential purposes, the person who exercised the search power, or that person's employer or another person acting on behalf of that person, may, at his or her discretion, return the thing to the owner or to a person entitled to possession.

146 Extension of time for holding thing seized or produced

(1) If any person who seizes any thing, or to whom any thing is produced, or any other enforcement officer to whom the thing is transferred, wishes to hold it for a period exceeding 6 months in circumstances where no proceedings for an offence in respect of which the thing is relevant have yet been brought and a request has been made for the return of the thing, the person may apply to the District Court for an extension of the time during which the thing may be held.

(2) On an application under subsection (1) the District Court may—

(a) order an extension of time be granted to a specified date, to enable a determination to be made whether proceedings should be brought; or

(b) decline to order an extension of time.

147 Disputed ownership of thing seized or produced

(1) If a thing seized or produced is not to be produced in evidence but there is a dispute about its ownership, or it is perishable, or for any reason the person in whose custody it is is uncertain as to to whom the thing should be returned (for example, because

it is unclaimed), the person in whose custody the thing is may apply to the District Court for directions as to the ownership or holding of the property.

(2) On an application under subsection (1), the District Court may—

(a) order that the thing be destroyed or, if any other enactment so authorises, forfeited to the Crown:

(b) order that the thing be delivered to the person appearing to the court to be its owner entitled to possession of it:

(c) if the owner or person entitled to possession cannot be found, make any order with respect to its possession or sale the court thinks fit.

(3) If, after the making of an order under subsection (2) in relation to any property, an action is commenced against a Police employee or other enforcement officer or the Crown or any law enforcement agency for the recovery of the thing or its value, the order and the delivery of the thing in accordance with the order may be given and must be received in evidence in bar of the action.

(4) However, no such order or delivery affects the right of any persons entitled by law to possession of the thing to recover the thing from any person or body (other than a person or body referred to in subsection (3)).

148 Seized or produced property forfeit to Crown if ownership not established

(1) A thing that is seized or produced is forfeited to the Crown if—

(a) the owner or person entitled to possession of the thing is not established within 60 days after the date on which the thing was seized or produced; and

(b) the thing—

(i) is not, at the expiry of that period, still required for investigative or evidential purposes; and

(ii) has not been disposed of or sold by order of the court within that period.

(2) For the purpose of trying to establish ownership of any thing to which this section applies, the person who has custody of the thing must (unless it is impossible or impracticable to make

contact) advise the following people of the effect of this section:

(a) any person who produced the thing or from whom the thing was seized:

(b) the occupier or owner of the place or vehicle where the thing was before it was produced or seized:

(c) any other person who, in the opinion of the person in whose custody the thing is, may be affected by the forfeiture of the thing.

Rights of owners and others in relation to things seized or produced

149 Application for release of or access to things seized or produced

(1) The persons described in subsection (2) may apply, by written notice, to the person in whose custody the seized or produced thing is for the release of or access to it at any time before proceedings are brought for an alleged offence in respect of which the thing was seized or produced.

(2) The persons are as follows:

(a) the person who produced the thing or from whom the thing was seized:

(b) the owner or person entitled to possession of the seized or produced thing:

(c) any person with a legal or equitable interest in the seized or produced thing.

(3) The person in whose custody the seized or produced thing is may release the thing to the applicant or provide reasonable access to it.

(4) A person who receives an application for release of a thing, or access to it, may refuse that application on the ground that release of the thing or, as the case requires, access to it, is likely to prejudice the maintenance of the law.

(5) A release or provision of access to a thing may be—

(a) unconditional; or

(b) under bond for a sum (with or without sureties), and on conditions, acceptable to the person in whose custody the thing was.

(6) If any person refuses an application under subsection (1), he or she must inform the applicant of the decision in writing.

150 Failure to comply with bond or conditions

(1) If a person to whom a seized or produced thing is released or who is given access to it under section 149 fails to comply with any bond, surety, or condition imposed under subsection (5)(b) of that section,—

(a) the thing may be seized again, or required to be produced, or the ability to access the thing ended at the direction of the person who released it or provided access to it; and

(b) the person who released it or provided access to it may apply to the District Court for an order for estreat of the bond.

(2) If any person applies for an order for estreat of the bond, the Registrar of the District Court must—

(a) fix a time and place for the hearing of the application; and

(b) not less than 7 days before the time fixed, cause to be served on every person bound by the bond a notice of the time and place for the hearing.

(3) If the District Court is satisfied that a condition of the bond has not been complied with, the court may make an order to estreat the bond—

(a) in the amount that it thinks fit; and

(b) to any person bound by the bond on whom notice is proved to have been served under subsection (2).

(4) An amount payable under subsection (3) is recoverable as if it were a fine.

151 Application to District Court for access to thing seized or produced

(1) A person described in section 149(2) may apply to the District Court for access to any thing seized by a person exercising a search power or produced to any person under a production order if the person has made an application under section 149 and it—

(a) has been refused; or

(b) has been granted, but subject to conditions that the applicant does not accept.

(2) The District Court may either—

(a) grant the application; or

(b) refuse it on the ground that allowing the person to have access to the thing or varying or cancelling the conditions concerned is likely to prejudice the maintenance of the law.

(3) The District Court may require sureties and impose conditions if it grants an application under subsection (2), and sections 149 and 150 apply with any necessary modifications.

152 Application to District Court for release of thing seized or produced

(1) A person described in section 149(2) may apply to the District Court for the release of any thing seized by a person exercising a search power or produced to a person under a production order.

(2) The court may release the thing to the applicant if it is satisfied that it would be contrary to the interests of justice for the item to be retained in custody, having regard to—

(a) the gravity of the alleged offence:

(b) any loss or damage to the applicant that is caused or likely to be caused by not returning the thing:

(c) the likely evidential value of the thing, having regard to any other evidence held by the law enforcement agency that employed or engaged the person who seized the thing or to whom the thing was produced:

(d) whether the evidential value of the thing can be adequately preserved by means other than by keeping it.

(3) A court may require sureties and impose conditions on a release under subsection (2), and sections 149 and 150 apply with any necessary modifications.

(4) This section is subject to any enactment that requires an amount of any kind to be paid before any seized thing may be returned.

153 Disposal of unlawful items

(1) Subsection (2) applies if a thing is seized or produced, the possession of which by the person from whom it was seized is unlawful under New Zealand law (for example, a controlled drug that is found in the possession of a member of the public in circumstances in which possession by the person of the controlled drug is an offence against the Misuse of Drugs Act 1975), and—

(a) there is no mechanism provided for disposing of the thing or it has not been disposed of under any other enactment; and

(b) no order has been made by a court as to its disposal.

(2) If this subsection applies, the person who seized the thing or to whom the thing was produced may destroy it if—

(a) notice is given to the person from whom the thing was seized or who was required to produce the thing, and that person either—

(i) consents to its destruction; or

(ii) does not within 30 working days object to its destruction; or

(b) the person to whom notice would otherwise be given under paragraph (a) cannot be located after reasonable inquiries have been made; or

(c) in a case where a person objects to the destruction of the thing within 30 working days of receiving a notice under paragraph (a) and any person applies to a court to determine the status of the thing, the court is satisfied that the possession of the thing by the person from whom it was seized or who was required to produce it is unlawful under New Zealand law.

154 Disposal of forensic copies

(1) A person who makes a forensic copy of any data held in a computer system or other data storage device must, if he or she determines that the data does not contain any evidential material, ensure that the forensic copy and any copies made from that copy are deleted, erased, or otherwise destroyed in a way that prevents retrieval of the copy or copies by any method.

(2) However, if an examination of the data contains a mixture of data that is evidential material and data that is not evidential material,—

(a) the forensic copy of the data and any copies made of that copy may be retained in their entirety; and

(b) that forensic copy and any copies made of that copy may continue to be searched, if such a search was authorised by the search power under which the data was seized and copied.

155 Other copies and generated material may be retained

(1) Any thing made or generated by a person exercising a search or surveillance power (for example, photographs or audio or video recordings or copies of things) may be retained as part of the permanent records of the employer of the person who exercises the search or surveillance power.

(2) Subsection (1) is subject to section 56A, section 130, and any other enactment or rule of law.

156 Application to District Court to dispose of seized property

(1) Any person who seizes any thing, or to whom any thing is produced, or any other enforcement officer to whom the thing is transferred, may apply to a District Court for an order that the thing be disposed of (by sale or otherwise) in the manner, and at a time, that the court may direct if,—

(a) in the applicant's opinion,—

(i) the thing concerned is perishable or likely to deteriorate; or

(ii) the cost of holding the thing is unreasonable having regard to its market value; and

(b) he or she has made reasonable efforts to advise the people described in section 149(2) of the intended application.

(2) The court may grant the order if it is satisfied that—

(a) the thing is perishable or likely to deteriorate; or

(b) the cost to the applicant or his or her employer, or to any other person to whom the thing might be transferred, of holding it is unreasonable having regard to its market value.

(3) The applicant or his or her employer must hold in custody any proceeds received from carrying out the order (less any deductions permitted under subsection (4)) as if the proceeds were the seized property, and section 144(1) applies accordingly, with any necessary modifications.

(4) The deductions referred to in subsection (3) are, in a case in which the court orders that the thing be disposed of by sale, the costs of sale and any sums required to be paid to a security holder or other person as a condition of the order for sale.

(5) If the court refuses the order, the applicant or his or her employer or another person to whom the thing is transferred must continue to hold the thing until it is released in accordance with section 144(2).

Subpart 6—Immunities

157 Immunities of issuing officer

An issuing officer who is not a Judge has the same immunities as a District Court Judge.

158 Immunities in relation to the obtaining or execution of orders and warrants

Every person is immune from civil or criminal liability—

(a) for any act done in good faith in order to obtain an examination order, a production order, a search warrant, a surveillance device warrant, a ~~residual warrant~~ declaratory order, or other order referred to in this Act:

(ab) for any act done in good faith that is covered by a declaratory order:

(b) for any act done in good faith in relation to the execution of an examination order, a production order, a search warrant, a surveillance device warrant, ~~a residual warrant,~~ or other order referred to in this Act, if the execution is carried out in a reasonable manner.

159 Other immunities in relation to the exercise of entry, search, or surveillance powers

(1) Every person is immune from civil and criminal liability for any act done in good faith in order to exercise an entry power, a search power, or a surveillance power if—

(a) the power is exercised by that person in a reasonable manner; and

(b) the person believes on reasonable grounds that the preconditions for the exercise of that power have been satisfied.

(2) Every person is immune from civil and criminal liability for any act done in good faith and in a reasonable manner in order to assist a person to exercise an entry power, a search power, or a surveillance power, or in order to examine or analyse any thing that is seized.

(3) In any civil proceeding in which a person asserts that he or she has an immunity under this section, the onus is on that person to prove those facts necessary to establish the basis of the claim.

160 Immunity of the Crown

If any person is immune from civil liability under any of sections 157 to 159 in respect of anything done or omitted to be done, the Crown is also immune from civil liability in tort in respect of that person's conduct.

161 Relationship between sections 157 to 160 and other enactments

If there is any inconsistency between any of sections 157 to 160 and the provisions of any other enactment conferring, regulating, or limiting a privilege or immunity, sections 157 to 160 prevail.

Subpart 7—Reporting

162 Reporting of exercise of powers within law enforcement agency

(1AA) Any constable who exercises a warrantless entry power, search power, or surveillance power conferred by Part 2 or

3 of this Act must provide a written report on the exercise of that power to the Commissioner or a police employee designated to receive reports of that kind by the Commissioner as soon as practicable after the exercise of the power.

(1) Any person (other than a constable) who exercises a warrantless entry power, search power, or surveillance power conferred by this Act or by ~~a relevant enactment~~ an enactment specified in column 2 of the Schedule must provide a written report on the exercise of that power to an employee designated to receive reports of that kind by the chief executive of the law enforcement agency concerned as soon as is practicable after the exercise of the power.

(2) A report referred to in subsection (1AA) or (1) must—
- (a) contain a short summary of the circumstances surrounding the exercise of the power, and the reason or reasons why the power needed to be exercised:
- (b) state whether any evidential material was seized or obtained as a result of the exercise of the power:
- (c) state whether any criminal proceedings have been brought or are being considered as a consequence of the seizure of that evidential material.

(3) This section does not require the provision of any report in respect of—
- (a) a rub-down search of a person that is undertaken in conjunction with their arrest or detention under any enactment:
- (b) any search of a person in lawful custody carried out under section 11 or under the Corrections Act 2004:
- (c) the exercise of any power of entry that does not also confer a power of search:
- (d) a search undertaken by consent.

162A Annual reporting of search and surveillance powers by Commissioner

(1) The Commissioner must include in every annual report prepared by the chief executive for the purposes of section 39 of the Public Finance Act 1989—
- (a) the number of occasions on which entry or search powers under Part 2 or Part 3 of this Act were

exercised without a warrant in the period covered by the report:

(b) the number of occasions on which warrantless surveillance powers under Part 3 of this Act were exercised in the period covered by the report that involved the use of a surveillance device:

(ba) the number of applications for an examination order that were granted or refused in the period covered by the report:

(c) in respect of each kind of surveillance device used without a warrant under Part 3 of this Act in the period covered by the report, the numbers of that kind of device used—

(i) for a period of 24 hours or less:

(ii) for a period of more than 24 hours but no more than 48 hours:

(iii) for a period of more than 48 hours but no more than 72 hours:

(d) the number of persons charged in criminal proceedings where the collection of evidential material relevant to those proceedings was significantly assisted by the exercise of a warrantless search or surveillance power, or by an examination conducted under an examination order, in the period covered by the report:

(e) the matters set out in section 164 in relation to surveillance device warrants and declaratory orders.

(2) This section does not require the Commissioner to include in any annual report information about—

(a) a rub-down search of a person that is undertaken in conjunction with their arrest or detention under any enactment:

(b) any search of a person in lawful custody undertaken under section 11 or under the Corrections Act 2004:

(c) the exercise of any power of entry that does not also confer a power of search:

(d) a search undertaken by consent:

(e) any prescribed search or surveillance, or search or surveillance of a prescribed kind, in any prescribed area or an area of a prescribed kind.

(3) In this section, and sections 163 and 164, **kind of surveillance device** means—

(a) an interception device:

(b) a visual surveillance device:

(c) a tracking device.

163 Annual reporting of search and surveillance powers by agencies other than Police

(1) The chief executive of a law enforcement agency (other than the Police) that employs or engages persons who may exercise an entry power, a search power, or a surveillance power conferred by this Act or by ~~a relevant enactment~~ an enactment specified in column 2 of the Schedule must include in every annual report prepared by the chief executive for the purposes of section 39 of the Public Finance Act 1989 or any other applicable enactment requiring an annual report to Parliament—

(a) the number of occasions on which entry or search powers were exercised without a warrant in the period covered by the report:

(b) the number of occasions on which warrantless surveillance powers were exercised in the period covered by the report that involved the use of a surveillance device:

(c) in respect of each kind of surveillance device used without a warrant in the period covered by the report, the numbers of that kind of device used—

(i) for a period of ~~6~~ 24 hours or less:

(ii) for a period of more than ~~6~~ 24 hours but no more than ~~12~~ 48 hours:

(iii) for a period of more than ~~12~~ 48 hours but no more than ~~24~~ 72 hours:

~~(iv) for a period of more than 24 hours but no more than 48 hours:~~

~~(v) for a period of more than 48 hours but no more that 72 hours:~~

~~(vi) for a period of more than 72 hours:~~

~~(d) the number of criminal proceedings commenced in respect of which evidential material relevant to those proceedings was obtained directly or indirectly from the exercise of a warrantless search or surveillance power~~

~~in the period covered by the report, and the number of such proceedings resulting in a conviction:~~

(d) the number of persons charged in criminal proceedings where the collection of evidential material relevant to those proceedings was significantly assisted by the exercise of a warrantless search or surveillance power in the period covered by the report:

~~(c) the number of occasions on which warrantless search or surveillance powers were exercised in the period covered by the report that did not lead to the bringing of criminal proceedings within 90 days of the exercise of the power:~~

(f) the matters set out in section 164 in relation to surveillance device warrants and ~~residual warrants~~ declaratory orders.

(2) This section does not require a chief executive to include in any annual report information about—

(a) a rub-down search of a person that is undertaken in conjunction with their arrest or detention under any enactment:

(b) any search of a person in lawful custody undertaken under section 11 or under the Corrections Act 2004:

(c) the exercise of any power of entry that does not also confer a power of search:

(d) a search undertaken by consent:

(e) any prescribed search or surveillance, or search or surveillance of a prescribed kind, in any prescribed area or an area of a prescribed kind.

~~(3) In this section and section 164, **kind of surveillance device** means—~~

~~(a) an interception device:~~

~~(b) a visual surveillance device:~~

~~(c) a tracking device.~~

164 Information to be included in report on surveillance device warrants and ~~residual warrants~~ declaratory orders

The information required to be included in an annual report by section 162A(1)(e) or 163(1)(f) is the following:

(a) the number of applications for surveillance device warrants and ~~residual warrants~~ declaratory orders granted or refused in the period covered by the report:

(b) the number of surveillance device warrants granted in the period covered by the report that authorised the use of a surveillance device, and the number in respect of each kind of surveillance device:

(c) the number of ~~residual warrants granted~~ declaratory orders made in the period covered by the report that ~~authorised~~ related to the use of a device, technique, procedure, or activity, and the number in respect of each device, technique, procedure, or activity:

(d) the number of surveillance device warrants ~~and residual warrants~~ granted during the period covered by the report that authorised entry into private premises:

(e) in respect of each kind of surveillance device authorised by a surveillance device warrant issued during the period covered by the report, the numbers of that kind of device used—

(i) for a period of no more than 24 hours:

(ii) for a period of more than 24 hours but no more than 3 days:

(iii) for a period of more than 3 days but no more than 7 days:

(iv) for a period of more than 7 days but no more than 21 days:

(v) for a period of more than 21 days but no more than 60 days:

(f) in respect of each ~~residual warrant issued~~ declaratory order made during the period covered by the report, ~~the type of~~ a general description of the nature of the device, technique, procedure, or activity ~~authorised~~ covered by the order:

~~(g) the number of criminal proceedings commenced in respect of which evidential material relevant to those proceedings was obtained directly or indirectly from carrying out activities under the authority of a surveillance device warrant or a residual warrant issued in the period~~

~~covered by the report, and the number of such proceedings resulting in a conviction:~~

(g) the number of persons charged in criminal proceedings where the collection of evidential material relevant to those proceedings was significantly assisted by carrying out activities under the authority of a surveillance device warrant or covered by a declaratory order issued in the period covered by the report:

~~(h) the number of occasions on which activities that were carried out under the authority of a surveillance device warrant or a residual warrant in the period covered by the report did not lead to the bringing of criminal proceedings within 90 days of those activities:~~

(i) if a Judge has reported to the chief executive under section 55, 56, or 67 about a breach of any of the conditions of the issue of a surveillance device warrant ~~or residual warrant~~, or use of a surveillance device not authorised under section 44, the number of those reports and the details of the breaches or the lack of authorisation reported.

Subpart 8—Offences

165 Failing to comply with examination order

(1) Every person commits an offence if he or she, without reasonable excuse, fails to comply with an examination order.

(2) Every person who commits an offence against subsection (1) is liable on indictment,—

(a) in the case of an individual, to imprisonment for a term not exceeding 1 year:

(b) in the case of a body corporate, to a fine not exceeding $40,000.

166 Failing to comply with production order

(1) Every person commits an offence if he or she, without reasonable excuse, fails to comply with a production order.

(2) Every person who commits an offence against subsection (1) is liable on indictment,—

(a) in the case of an individual, to imprisonment for a term not exceeding 1 year:
(b) in the case of a body corporate, to a fine not exceeding $40,000.

167 False application for examination order, production order, search warrant, surveillance device warrant, or ~~residual warrant~~ declaratory order

Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 1 year who makes an application for an examination order, production order, search warrant, surveillance device warrant, or ~~residual warrant~~ declaratory order that contains any assertion or other statement known by the person to be false.

168 Leaving search location in breach of direction

Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months who, without reasonable excuse,—

(a) fails to comply with a direction under section 113(1) (special powers where application for search warrant pending); or
(b) leaves any place or vehicle at which he or she is detained under section 114(1).

169 Offences relating to stopping vehicles

(1) Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months who—

(a) fails to stop as soon as practicable when required to do so by an enforcement officer exercising a power to stop or search a vehicle; and
(b) knows or ought reasonably to know that the person exercising the power is an enforcement officer.

(1A) Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months who—

(a) fails to comply with a requirement made by a constable under section 10(1)(aa); and

(b) knows or ought reasonably to know that the person imposing the requirement is a constable.

(2) Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months who—

(a) fails to comply with a requirement made by an enforcement officer under section 123; and

(b) knows or ought reasonably to know that the person imposing the requirement is an enforcement officer.

(3) Any constable may arrest without warrant any person who the constable has reasonable grounds to suspect has committed an offence against subsection (1) or (2).

170 Offence of failing to carry out obligations in relation to computer system search

Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months who fails, without reasonable excuse, to assist a person exercising a search power when requested to do so under section 125(1).

171 Offence to disclose information acquired through search or surveillance

(1) No person who, as a consequence of ~~exercising a search or surveillance power or as a consequence of assisting another person to exercise a power or carry out an activity of that kind~~ any thing specified in subsection (1A), acquires information about any person may knowingly disclose the substance, meaning, or purport of that information, or any part of that information, otherwise than in the performance of that person's duty.

(1A) The things referred to in subsection (1) are—

(a) the exercise of a search or surveillance power:

(b) an examination order:

(c) a production order:

(d) the use of a device, technique, or procedure, or the carrying out of an activity specified in a declaratory order.

(2) Every person who acts in contravention of subsection (1) commits an offence and is liable on summary conviction,—

(a) in the case of an individual, to a term of imprisonment not exceeding 6 months:

(b) in the case of a body corporate, to a fine not exceeding $100,000.

Subpart 9—Miscellaneous

172 Effect of proceedings

(1) This section applies when any proceeding has been commenced in any court in respect of—

(a) the exercise of any power conferred by this Act or any ~~relevant~~ enactment specified in column 2 of this Schedule to which this section applies; or

(b) the discharge of any duty imposed by this Act or any ~~relevant~~ enactment specified in column 2 of this Schedule to which this section applies; or

(c) the use for investigative purposes of any evidential material obtained from the execution of a power or discharge of a duty imposed by this Act or any ~~relevant~~ enactment specified in column 2 of this Schedule to which this section applies.

(2) Until a final decision in relation to the proceeding is given, unless an interim order made under subsection (3) is in force,—

(a) the power or duty to which the proceeding relates may be, or may continue to be, exercised or discharged as if the proceeding had not been commenced, and no person is excused from fulfilling any obligation under this Act or any other enactment by reason of that proceeding; and

(b) any evidential material obtained from the execution of the power or discharge of the duty to which the proceeding relates may be, or may continue to be, used for investigative purposes.

(3) ~~Subsection (2) has effect despite any interim order made in the proceeding unless~~ An interim order may be made by the High Court overriding the effect of subsection (2) but only if the High Court is satisfied that—

(a) the applicant has established a prima facie case that the warrant or order in question is unlawful; and

(b) the applicant would suffer substantial harm from the exercise or discharge of the power or duty; and

(c) if the power or duty is exercised or discharged before a final decision is made in the proceeding, none of the remedies specified in subsection (4), or any combination of those remedies, could subsequently provide an adequate remedy for that harm; and

(d) the terms of that order do not unduly hinder or restrict the investigation or prosecution.

(4) The remedies are as follows:

(a) any remedy that the court may grant in making a final decision in relation to the proceeding (for example, a declaration):

(b) any damages that the applicant may be able to claim in concurrent or subsequent proceedings:

(c) any opportunity that the applicant may have, as defendant in a criminal proceeding, to challenge the admissibility of any evidence obtained as a result of the exercise or discharge of the power or duty.

(5) An interim order ~~that overrides subsection (3) because paragraphs (a) to (d) of that subsection apply~~ made under subsection (3)—

(a) ceases to have effect on—

(i) a date specified in that order; or

(ii) any date subsequently specified by the High Court on being satisfied that paragraphs (a) to (d) of subsection (3) ~~apply to the interim order~~ continue to apply; and

(b) may be extended or renewed (whether before, on, or after its expiry) by the High Court, but only if the High Court is satisfied that paragraphs (a) to (d) of subsection (3) continue to apply.

173 Service of orders and notices

(1) Where an order or notice is to be given to a person for the purposes of this Act, it may be given—

(a) by delivering it personally to the person; or

(b) by delivering it at the usual or last known place of residence or business of the person, including by fax or by electronic mail; or

(c) by sending it by prepaid post addressed to the person at the usual or last known place of residence or business of the person.

(2) Where an order or notice is to be served on a corporation for the purposes of this subpart, service on an officer of the corporation, or on the registered office of the corporation, in accordance with subsection (1) is deemed to be service on the corporation.

(3) Where an order or notice is to be served on a partnership for the purposes of this subpart, service on any one of the partners in accordance with subsection (1) or (2) is deemed to be service on the partnership.

(4) Where an order or notice is sent by post to a person in accordance with subsection (1)(c), the order or notice is deemed, in the absence of proof to the contrary, to have been given on the third day after the day on which it was posted.

(5) This section is subject to any other section of this Act that makes different provision for the service of orders or notices.

Compare: 1990 No 51 s 52

~~174~~ ~~Application of certain provisions~~

~~If any subpart or provision of this Part is applied by another enactment in respect of the exercise of a power under that enactment, then irrespective of whether subpart 6 or 8 of this Part of this Act is expressly applied,—~~

~~(a) subpart 6 (immunities) applies, in respect of the exercise of the power; and~~

~~(b) subpart 8 (offences) applies, in respect of any act or omission involved in the exercise of the power.~~

Part 5
Amendments, repeals, and miscellaneous provisions

Subpart 1—Amendments to search and seizure powers in other enactments (and to

related provisions) used for law enforcement purposes or for law enforcement and regulatory purposes

Amendments to Agricultural Compounds and Veterinary Medicines Act 1997

175 Amendments to Agricultural Compounds and Veterinary Medicines Act 1997

Sections 176 to 179 amend the Agricultural Compounds and Veterinary Medicines Act 1997.

176 Powers of entry for inspection

(1) Section 64(2)(c) is amended by omitting ", and remove any documents or other records including records in an electronic form from the place for the purpose of copying such documents or records".

(2) Section 64 is amended by repealing subsections (3) and (4) and substituting the following subsection:

"(3) The provisions of Part 4 of the Search and Surveillance Act 2009 (except sections 108(d), 110(2)(d), 114, and 115) apply."

177 Issue of search warrants

(1) Section 69(1) is amended by—

(a) omitting "Any District Court Judge or Justice of the Peace or any Registrar who is satisfied, on application in writing made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who is satisfied, on an application made in the manner provided in subpart 2 of Part 4 of the Search and Surveillance Act 2009"; and

(b) omitting "in the form set out in Schedule 1".

(2) Section 69(1) is amended by inserting the following paragraph after paragraph (b):

"(ba) any trade name product or agricultural compound manufactured or imported in breach of the provisions of this Act:".

(3) Section 69(1)(c) is amended by omitting "paragraph (a) or paragraph (b)" and substituting "paragraph (a), (b), or (ba)".

(4) Section 69 is amended by repealing subsections (2) to (4) and substituting the following subsection:

"(2) Subject to section 70, the provisions of Part 4 of the Search and Surveillance Act 2009 apply."

178 Power of entry with warrant

Section 70 is amended by repealing subsections (1) to (4) and substituting the following subsection:

"(1) Without limiting the powers conferred by any warrant issued under section 69(1), and subject to any conditions imposed by the issuing officer, every warrant issued under that section authorises the constable or the ACVM officer who is executing it, and any person called on by that constable or ACVM officer to assist, to seize and detain any trade name product or agricultural compound that—

"(a) is a risk to public health, agricultural security, trade in or market access for primary produce, or the welfare of animals, or that may breach domestic food residue standards; and

"(b) appears to an ACVM officer, who has made such inquiries as appear reasonable in the circumstances, to have been abandoned or have no apparent or readily identifiable owner."

179 Disposal of property seized

(1) Section 71(1) is amended by omitting "Except as provided in subsection (2) of this section, section 199 of the Summary Proceedings Act 1957" and substituting "Subject to subsection (3), subpart 5 of Part 4 of the Search and Surveillance Act 2009".

(2) Section 71(2) is repealed.

(3) Section 71(3) is amended by omitting "70(1)(f)(ii)" and substituting "70(1)".

(4) Section 71 is amended by adding the following subsection:

"(4) If any person is convicted of an offence to which the seized property relates, the court may if it thinks fit order that the

item be disposed of as the court directs at the expense of the convicted person, and may order that the person pay any reasonable costs incurred by the Commissioner of Police or the Director-General."

Amendments to Animal Products Act 1999

180 Amendments to Animal Products Act 1999

Sections 181 to 184 amend the Animal Products Act 1999.

181 Power of entry

(1) Section 87(2) is amended by omitting ", at any reasonable time,".

(2) Section 87 is amended by repealing subsection (3).

(3) Section 87(4) is amended by omitting ", at any time that is reasonable in the circumstances".

(4) Section 87 is amended by repealing subsections (5) and (6) and substituting the following subsection:

"(5) The provisions of subpart 3 of Part 4 of the Search and Surveillance Act 2009 apply in respect of the exercise of any powers under this section."

182 Power to examine, etc

(1) Section 88 is amended by repealing subsection (2) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 (other than sections 108(d), 110(2)(d), 114, and 115) apply in respect of the exercise of powers under subsection (1)(a) or (b)."

(2) Section 88(3) is amended by inserting "(other than under subsection (1)(a) or (b))" after "this section".

183 New section 91A inserted

The following section is inserted after section 91:

"**91A Disposal of seized animals prior to commencement or determination of proceedings**

"(1) This section applies if—

"(a) a live animal is or live animals are seized by a constable or an animal product officer under the authority of a search warrant issued under section 94; and

"(b) either—

"(i) proceedings for an offence involving that animal or those animals—

"(A) have been commenced but not yet determined; or

"(B) have not yet been commenced but are intended to be commenced within a reasonable period; or

"(ii) the owner of that animal or animals cannot be located.

"(2) If this section applies, a District Court, on its own motion or on an application by a constable or an animal product officer, may make an order authorising—

"(a) the sale of the animal or animals; or

"(b) the placement of the animal or animals with another person; or

"(c) the destruction, slaughter, and processing of the animal or animals for animal products for sale, or other disposal of the animal or animals.

"(3) The District Court—

"(a) must, before making an order under subsection (2), give the owner of the animal or animals, if known and able to be contacted, an opportunity to be heard; and

"(b) may make an order under subsection (2) if it is satisfied that there are good reasons for making that order; and

"(c) may, when making the order, impose conditions (whether relating to the payment of any security holder in the animal or animals or otherwise).

"(4) In determining whether to make any order referred to in subsection (2), the court must have regard to the following matters:

"(a) whether the owner of the animal or animals has been identified, and if not, the steps that have been taken to identify and contact that person:

"(b) the number of animals involved:

"(c) the cost of continuing to hold the animal or animals:
"(d) the physical state of the animal or animals:
"(e) whether it is reasonable or practicable for the animal or animals to be placed elsewhere:
"(f) whether it is reasonable or practicable for the Ministry to retain possession of and care for the animal or animals until the determination of the proceedings relating to the animal or animals:
"(g) whether any person will suffer material loss, and the extent of that loss, if the animal or animals are or are not sold:
"(h) the fitness for purpose of any animal products derived from the seized animal or animals:
"(i) any other matters the court considers relevant.

"(5) If an animal is or animals are sold under an order made under subsection (2)(a) or animal products are sold under an order made under subsection (2)(c), the proceeds of sale (if any) must be held by the Ministry (after deducting (in order) the costs of transport and processing, the cost of sale, any sums required to be paid to a security holder or other person under a condition of the order for sale, and any costs incurred by the Crown in caring for the animal or animals or providing veterinary treatment to that animal or those animals).

"(6) The Ministry must, unless the proceeds of sale are otherwise forfeited to the Crown or the owner of the animal or animals is unknown or cannot be contacted, pay the proceeds of sale to that owner as soon as practicable—
"(a) after the determination of the proceedings for an offence involving that animal or those animals; or
"(b) after a decision is taken not to commence any such proceedings."

184 Other amendments to Animal Products Act 1999

(1) Section 92 is repealed.

(2) Section 94(1) is amended by—
(a) omitting "Any District Court Judge, Community Magistrate, Justice of the Peace, or Registrar may issue a search warrant in the form set out in the Schedule" and substituting "An issuing officer (within the mean-

ing of section 3 of the Search and Surveillance Act 2009) may issue a search warrant"; and

(b) omitting "on application in writing made on oath" and substituting "on an application made in the manner provided in subpart 2 of Part 4 of the Search and Surveillance Act 2009 by an animal products officer or a constable".

(3) Section 94 is amended by repealing subsections (2) and (3) and substituting the following subsection:

"(2) Subject to section 95, the provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(4) Section 95 is amended by repealing subsection (1) and substituting the following subsections:

"(1) Without limiting the powers conferred by any search warrant issued under section 94(1), every warrant issued under that section authorises the constable or animal products officer who is executing it, and any person called on by that constable or officer to assist, to exercise—

"(a) all of the powers of an animal product officer under sections 88 to 91; or

"(b) only such of those powers as are specified in the warrant.

"(1A) To avoid doubt, Part 4 of the Search and Surveillance Act 2009 does not apply in respect of any exercise of a power under sections 89 to 91 as a consequence of subsection (1) of this section."

(5) Section 96 is amended by repealing subsections (1) to (3).

(6) Section 97 is amended by—

(a) omitting "Section 199 of the Summary Proceedings Act 1957" and substituting "Subpart 5 of Part 4 of the Search and Surveillance Act 2009"; and

(b) repealing paragraphs (a) to (c).

(7) The Schedule is repealed.

Amendments to Animal Welfare Act 1999

185 Amendments to Animal Welfare Act 1999

Sections 186 to 189 amend the Animal Welfare Act 1999.

186 Amendments to sections 130 to 136

(1) Section 130(1)(a) is amended by inserting "(including, if necessary, destroying or arranging for the destruction of the animal)" after "animal".

(2) Section 130(1)(b) is amended by adding "(including, if necessary, destroying or arranging for the destruction of the animal)".

(3) Section 131(1) is amended by omitting "District Court Judge or Justice or Community Magistrate or any Registrar (not being a member of the police) who, on an application in writing made on oath" and substituting "issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on an application made in the manner provided in subpart 2 of Part 4 of that Act".

(4) Section 131 is amended by repealing subsection (3) and substituting the following subsections:

"(3) The provisions of Part 4 of the Search and Surveillance Act 2009 apply, subject to subsection (4) and sections 133(2) and (4), 136, and 136A.

"(4) Despite subsection (3), sections 108(d), 110(2)(d), 114, and 115 of the Search and Surveillance Act 2009 apply only in respect of a warrant issued to a named constable or to every constable."

(5) Sections 132, 133(1), (3), and (5), 134, and 135 are repealed.

(5A) Section 133(4) is amended by inserting "(including, if necessary, destroying or arranging for the destruction of the animal)" after "suffering of the animal".

(6) Section 136(1) is amended by omitting "subsections (2) and (3), section 199 of the Summary Proceedings Act 1957" and substituting "subsections (2) and (3) and section 136A, subpart 5 of Part 4 of the Search and Surveillance Act 2009".

(7) Section 136 is amended by repealing subsection (2) and substituting the following subsection:

"(2) Despite anything in subpart 5 of Part 4 of the Search and Surveillance Act 2009, a constable or an inspector who has custody of an animal may place that animal in the care of any other person."

(8) Section 136(3) is amended by omitting "section 199(3) of the Summary Proceedings Act 1957" and substituting "section 147(2)(c) of the Search and Surveillance Act 2009".

187 New section 136A inserted

The following section is inserted after section 136:

"**136A Disposal of animals seized or taken into custody prior to commencement or determination of proceedings**

"(1) This section applies if—

"(a) 1 or more animals are seized by a constable or an inspector, under the authority of a search warrant issued under section 131, or are taken into possession by an inspector under section 127(5) or a constable under section 137(1); and

"(b) either—

"(i) proceedings for an offence involving that animal or those animals—

"(A) have been commenced but not yet determined; or

"(B) have not yet been commenced but are intended to be commenced within a reasonable period; or

"(ii) the owner of that animal or those animals cannot be located.

"(2) If this section applies, a District Court, on its own motion, or on an application by a constable or inspector, may make an order authorising—

"(a) the sale of the animal or animals; or

"(b) the placement of the animal or animals with another person; or

"(c) the destruction or other disposal of the animal or animals; or

"(d) the dehorning or performance of other surgical procedures on the animal or animals.

"(3) The District Court—

"(a) must, before making an order under subsection (2), give the owner of the animal or animals, if known and able to be contacted, an opportunity to be heard; and

"(b) may make an order under subsection (2) if it is satisfied that there are good reasons for making that order; and

"(c) may, when making the order, impose conditions (whether relating to the payment of any security holder in the animal or animals or otherwise).

"(4) In determining whether to make any order referred to in subsection (3), the court must have regard to the following matters:

"(a) whether the owner of the animal or animals has been identified, and if not, the steps that have been taken to identify and contact that person:

"(b) the number of animals involved:

"(c) whether the animal or animals are being kept for economic purposes or for companionship:

"(d) the cost of continuing to hold the animal or animals:

"(e) the physical state of the animal or animals:

"(f) whether it is reasonable or practicable for the animal or animals to be placed elsewhere:

"(g) whether it is reasonable or practicable for the Ministry or an approved organisation to retain possession of and care for the animal or animals until the determination of the proceedings relating to the animal or animals:

"(h) whether any person will suffer material or other loss and the extent of that loss, if the animal or animals are sold:

"(i) any other matters the court considers relevant.

"(5) If an animal is sold under the authority of an order under subsection (2)(a), the proceeds of sale (if any) must be held by the Ministry or an approved organisation (after deducting (in order) the costs of sale, any sums required to be paid to a security holder or other person under a condition of the order for sale, and any costs incurred by the Crown or approved organisation in caring for the animal or animals or providing veterinary treatment to that animal or those animals).

"(6) The Ministry or approved organisation referred to in subsection (5) must, unless the proceeds of sale are forfeited to the Crown under section 172(1) or the owner of the animal is unknown or cannot be contacted, pay the proceeds of sale to that owner as soon as practicable—

"(a) after the determination of the proceedings for an offence involving that animal; or

"(b) after a decision is taken not to commence any such proceedings."

188 Vehicle, aircraft, ship, or animal may be detained

(1) Section 137 is amended by repealing subsections (1) and (2) and substituting the following subsection:

"(1) If a constable arrests a person for an offence against section 22(2), 23(1) or (2), or 40(1) and the person is for the time being in charge of a vehicle, aircraft, or ship, or an animal, the constable may—

"(a) take possession of the vehicle, aircraft, or ship, or the animal, or both, and may take that vehicle, aircraft, or ship, or take that animal, or both, as the case may be, to another place; and

"(b) detain that vehicle, aircraft, or ship, or that animal, or both, at a place chosen by the constable for a period that is reasonably necessary to—

"(i) conduct a search of the vehicle, aircraft, or ship, or animal, or both, under another provision in this Act or under any other enactment that authorises such a search; or

"(ii) provide humane treatment for any animal that is moved."

(2) Section 137(3) is amended by omitting "subsections (1) and (2)" and substituting "subsection (1)".

189 Power of court to order certain animals be forfeited to the Crown

Section 172 is amended by repealing subsection (1) and substituting the following subsection:

"(1) If the owner of an animal is convicted of an offence against this Act in respect of that animal, the court may,—

"(a) if it thinks it desirable for the protection of the animal (in addition to or in substitution for any other penalty), order that the animal be forfeited to the Crown or to an approved organisation:

"(b) if it thinks it desirable (in addition to or in substitution for any other penalty), order that any proceeds of sale of the animal retained under section 136A be forfeited to the Crown."

Amendment to Antarctic Marine Living Resources Act 1981

190 Amendment to Antarctic Marine Living Resources Act 1981

(1) This section amends the Antarctic Marine Living Resources Act 1981.

(2) Section 9 is amended by repealing subsections (3) to (5) and substituting the following subsection:

"(3) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

Amendments to Antarctica (Environmental Protection) Act 1994

191 Amendments to Antarctica (Environmental Protection) Act 1994

(1) This section amends the Antarctica (Environmental Protection) Act 1994.

(2) Section 42(1) is amended by—

(a) omitting "a District Court Judge, a duly authorised Justice, a Community Magistrate, or a Registrar (not being a member of the Police), who, on application made" and substituting "an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on an application made in the manner provided in subpart 2 of Part 4 of that Act"; and

(b) omitting ", unconditionally or subject to conditions, a warrant authorising the entry and search of the area, at any time on one occasion within 14 days of the issue of the warrant (or within such further time as may be specified in the warrant)" and substituting "a warrant authorising the entry and search of the area".

(3) Section 42 is amended by repealing subsections (2) to (4) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(4) Section 43 is amended by inserting the following subsection after subsection (1):

"(1A) Subject to subsection (2), the provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(5) Section 44 is amended by omitting "any of sections 41 to 43" and substituting "section 41".

Amendments to Aviation Crimes Act 1972

192 Amendments to Aviation Crimes Act 1972

(1) This section amends the Aviation Crimes Act 1972.

(2) Section 13(1)(b) is amended by adding "and that a search of the first-mentioned person will disclose evidential material about that offence,".

(3) Section 13 is amended by repealing subsections (3) and (4) and substituting the following subsection:

"(4) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

Amendments to Biosecurity Act 1993

193 Amendments to Biosecurity Act 1993

(1) This section amends the Biosecurity Act 1993.

(2) Section 110(1) is amended by omitting "A District Court Judge, a Justice of the Peace, a Community Magistrate, or a Registrar (not being a member of the police) may, on the written application of an inspector or authorised person made on oath," and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) may, on an application (made in the manner provided by subpart 2 of Part 4 of that Act) by an inspector or authorised person,".

(3) Section 110(2) is amended by omitting "Judge, Justice, Magistrate, or Registrar" and substituting "issuing officer".

(4) Section 111(1) is amended by omitting "a District Court Judge, a Justice of the Peace, a Community Magistrate, or a Registrar (not being a member of the Police), who, on the written appli-

cation (made on oath) of" and substituting "an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on an application (made in the manner provided by subpart 2 of Part 4 of that Act) by".

(5) Section 112(1)(a)(ii) is amended by inserting "or copy of the warrant" after "warrant" in each place where it appears.

(6) Section 118(2) is amended by omitting "Section 199 of the Summary Proceedings Act 1957" and substituting "Subpart 5 of Part 4 of the Search and Surveillance Act 2009".

Amendment to Boxing and Wrestling Act 1981

194 Amendment to Boxing and Wrestling Act 1981

Section 195 amends the Boxing and Wrestling Act 1981.

195 New section 9 substituted

Section 9 is repealed and the following section substituted:

"**9 Search warrants**

"(1) An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) may issue a search warrant if, on an application made by a constable in the manner provided in subpart 2 of Part 4 of that Act, he or she is satisfied that there are reasonable grounds for believing that on any premises a contest is being conducted in breach of this Act or any regulations made under it.

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

Amendments to Children, Young Persons, and Their Families Act 1989

196 Amendments to Children, Young Persons, and Their Families Act 1989

Sections 197 ~~and~~ to 198 amend the Children, Young Persons, and Their Families Act 1989.

197 Amendments to Parts 1 to 9 of Children, Young Persons, and Their Families Act 1989

(1) Section 39(1) is amended by omitting "any Justice or any Community Magistrate or any Registrar (not being a member of the police) who, on application in writing made on oath" and substituting "any issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on application in writing verified in accordance with section 97 of that Act".

(2) Section 40(1) is amended by omitting "any Justice or any Community Magistrate or any Registrar (not being a member of the police), may, on application in writing made on oath" and substituting "any issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) may, on application in writing verified in accordance with section 97 of that Act".

(3) Section 386(1) is amended by omitting "Any Judge or Justice or Community Magistrate or any Registrar (not being a member of the police) who, on application in writing made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on application in writing verified in accordance with section 97 of that Act".

197A Amendments to Part 10 of Children, Young Persons, and Their Families Act 1989

(1) Section 445A is amended by—

(a) omitting "section 39 or section 40 or"; and

(b) omitting "or section 386 of this Act".

(2) Section 445B(2) is amended by omitting "section 39, 40, 122, 157(2), 205(2)(b), or 386" and substituting "section 122, 157(2), or 205(2)(b)".

~~198 New section 445A substituted~~

~~Sections 445A to 445C are repealed and The following section is substituted:~~

~~"445A Certain provisions of the Search and Surveillance Act 2009 apply to some warrants~~

~~Sections 99 and 103 of the Search and Surveillance Act 2009 apply, with any necessary modifications, in respect of any warrant applied for or issued under section 39, 40, or 386."~~

198 New section 445D inserted

The following section is inserted after section 445C:

"**445D Certain provisions of the Search and Surveillance Act 2009 apply to some warrants**

Sections 99 and 103 of the Search and Surveillance Act 2009 apply, with any necessary modifications, in respect of any warrant applied for or issued under section 39, 40, or 386."

Amendments to Civil Aviation Act 1990

199 Amendments to Civil Aviation Act 1990

(1) This section amends the Civil Aviation Act 1990.

(2) Section 24(4) is amended by omitting "a judicial officer on written application on oath which shall not be granted unless the judicial officer" and substituting "an issuing officer on application in the manner provided for an application for a search warrant in subpart 2 of Part 4 of the Search and Surveillance Act 2009, which must not be granted unless the issuing officer".

(3) Section 24 is amended by repealing subsection (5) and substituting the following subsection:

"(5) Subject to subsections (6) and (7), subparts 2 and 3 of Part 4 of the Search and Surveillance Act 2009 apply in relation to the issue of a warrant under subsection (4) and its execution."

Amendments to Commodity Levies Act 1990

200 Amendments to Commodity Levies Act 1990

(1) This section amends the Commodity Levies Act 1990.

(2) Section 19(1) is amended by—

(a) omitting "A District Court Judge, a Justice, a Community Magistrate, or a Court Registrar (not being a constable) who, on an application in writing made on oath"

and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on an application made in the manner provided in subpart 2 of Part 4 of that Act"; and

(b) omitting "in the form set out in the Schedule to this Act".

(3) Section 19 is amended by repealing subsection (2) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 (except sections 108(d), 110(2)(d), 114, and 115) apply."

(4) Sections 20 to 22 are repealed.

Amendments to Conservation Act 1987

201 Amendments to Conservation Act 1987

(1) This section amends the Conservation Act 1987.

(2) Section 40(4A) and (4B) are repealed.

(3) Section 40 is amended by adding the following subsection:

"(7) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(4) Section 46 is amended by repealing subsections (1), (2), and (4).

Amendments to Customs and Excise Act 1996

202 Amendments to Customs and Excise Act 1996

Sections 203 to 211 amend the Customs and Excise Act 1996.

203 Amendments to sections 139 to 141 of Customs and Excise Act 1996

(1) Section 139 is amended by adding the following subsections:

"(5) The provisions of Part 4 of the Search and Surveillance Act 2009 apply in respect of the power conferred by subsection (1)(d).

"(6) Despite subsection (5), sections 120(2), 126(5)(e), and 127, and subparts 5 and 7 of Part 4 of the Search and

Surveillance Act 2009 do not apply to any goods forfeit to the Crown under section 225 of this Act."

(2) Section 140(2) is amended by omitting "subsection (1)" and substituting "subsection (1)(a) to (c)".

(3) Section 140 is amended by adding the following subsections:

"(3) The provisions of Part 4 of the Search and Surveillance Act 2009 apply in respect of the power conferred by subsection (1)(d).

"(4) Despite subsection (3), sections 120(2), 126(5)(e), and 127, and subparts 5 and 7 of Part 4 of the Search and Surveillance Act 2009 do not apply to any goods forfeit to the Crown under section 225 of this Act."

(4) Section 141 is amended by omitting "section 139 or section 140" and substituting "section 139(1)(a) to (c) or 140(1)(a) to (c)".

204 Searching vehicles

Section 144 is amended by adding the following subsections:

"(~~5~~6) The provisions of Part 4 of the Search and Surveillance Act 2009 apply in respect of a search undertaken under this section.

"(~~6~~7) Despite subsection (5), sections 120(2), 126(5)(e), and 127, and subparts 5 and 7 of Part 4 of the Search and Surveillance Act 2009 do not apply to any goods forfeit to the Crown under section 225 of this Act."

205 Amendments to sections 149A to 149D of Customs and Excise Act 1996

(1) Section 149A(3) is amended by omitting "149D" and substituting "149C".

(2) Section 149B(4) to (6) are repealed.

(3) Section 149B is amended by adding the following subsections:

"(8) The provisions of Part 4 of the Search and Surveillance Act 2009 apply in respect of the powers conferred by this section.

"(9) Despite subsection (8), sections 120(2), 126(5)(e), and 127, and subparts 5 and 7 of Part 4 of the Search and

Surveillance Act 2009 do not apply to any goods forfeit to the Crown under section 225 of this Act."

(4) Section 149BA(1) is amended by omitting "believe" and substituting "suspect".

(5) Section 149BA(3) is repealed.

(6) Section 149BA is amended by repealing subsection (5) and substituting the following subsections:

"(5) The provisions of Part 4 of the Search and Surveillance Act 2009 apply in respect of the powers conferred by this section.

"(6) Despite subsection (5), sections 120(2), 126(5)(e), and 127, and subparts 5 and 7 of Part 4 of the Search and Surveillance Act 2009 do not apply to any goods forfeit to the Crown under section 225 of this Act."

(7) Section 149C is amended by repealing subsection (2) and substituting the following subsections:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply in respect of the powers conferred by this section.

"(3) Despite subsection (2), sections 120(2), 126(5)(e), and 127, and subparts 5 and 7 of Part 4 of the Search and Surveillance Act 2009 do not apply to any goods forfeit to the Crown under section 225 of this Act."

(8) Section 149D is repealed.

206 Examination of goods no longer subject to control of Customs

Section 152 is amended by inserting the following subsections after subsection (3):

"(3A) The provisions of Part 4 of the Search and Surveillance Act 2009 apply in respect of the powers conferred by this section.

"(3B) Despite subsection (3A), sections 120(2), 126(5)(e), and 127, and subparts 5 and 7 of Part 4 of the Search and Surveillance Act 2009 do not apply to any goods forfeit to the Crown under section 225 of this Act."

207 Amendments to sections 165 to 167 of Customs and Excise Act 1996

(1) The heading to section 165 is amended by omitting "**search**" and substituting "**inspection**".

(2) Section 165(1) is amended by omitting "search," in each place where it appears.

(3) The heading to section 166 is amended by omitting "**search**" and substituting "**inspection**".

(4) Section 166(1) is amended by omitting "search," in each place where it appears.

(5) Section 167(1) is amended by omitting "A District Court Judge, Justice of the Peace, Community Magistrate, or Registrar (not being a constable) may issue a search warrant in the prescribed form if he or she is satisfied, on an application by a Customs officer in writing made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) may issue a search warrant if he or she is satisfied, on an application by a Customs officer made in the manner provided in subpart 2 of Part 4 of that Act".

(6) Section 167 is amended by repealing subsections (2) to (4) and substituting the following subsections:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply.

"(3) Despite subsection (2), sections 120(2), 126(5)(e), and 127, and subparts 5 and 7 of Part 4 of the Search and Surveillance Act 2009 do not apply to any goods forfeit to the Crown under section 225 of this Act."

208 Amendments to section 172 and repeal of sections 168 to 171 and 173 of Customs and Excise Act 1996

(1) Sections 168 to 171 and 173 are repealed.

(2) Section 172(1) is amended by inserting "(other than a power of search to which Part 4 of the Search and Surveillance Act 2009 applies)" after "conferred by this Act".

(3) Section 172(2) is amended by omitting "or 171".

209 Seizure and detention of goods suspected to be certain risk goods or evidence of commission of certain offences

(1AA) The heading to section 175C is amended by inserting "**or documents**" after "**of goods**".

(1) Section 175C(1) is amended by inserting "or documents" after "goods" in the second place where it appears.

(2) Section 175C(2) to (4) are amended by inserting "or documents" after "goods" in each place where it appears.

(3) Section 175C is amended by repealing subsection (5) and substituting the following subsection:

"(5) Subpart 5 of Part 4 of the Search and Surveillance Act 2009 applies with any necessary modifications to goods or documents detained under subsection (1)."

210 New section 175D inserted

The following section is inserted after section 175C:

"**175D Seizure and detention of certain drugs and objectionable publications**

"(1) A Customs officer may seize and detain goods or documents that are presented or located in the course of exercising any power of inspection, search, or examination under this Act, if he or she has cause to suspect on reasonable grounds that the goods or documents are evidence of the commission of 1 or more offences under 1 or more of the following enactments:

"(a) section 6, 7, 12A, 13, or 22 of the Misuse of Drugs Act 1975:

"(b) section 123, 124, 131, or 131A of the Films, Videos, and Publications Classification Act 1993.

"(2) A Customs officer who detains goods or documents under subsection (1) may, if the appropriate person specified in subsection (3) agrees, do any of the following:

"(a) deliver the goods or documents into the custody of that person:

"(b) retain the goods or documents pending further investigation:

"(c) treat the goods or documents as forfeited within the meaning of this Act.

"(3) The appropriate person referred to in subsection (2) is,—

"(a) if the Customs officer believes that subsection (1)(a) applies, a constable; or

"(b) if the Customs officer believes that subsection (1)(b) applies, an Inspector of Publications within the meaning of the Films, Videos, and Publications Classification Act 1993.

"(4) Once goods or documents have been delivered to a person under subsection (2)(a), responsibility for those goods or documents passes to that person.

"(5) The provisions of Part 4 of the Search and Surveillance Act 2009 apply in respect of the powers conferred by this section.

"(6) Despite subsection (5), sections 120(2), 126(5)(e), and 127, and subparts 5 and 7 of Part 4 of the Search and Surveillance Act 2009 do not apply to any forfeited goods (within the meaning of this Act)."

211 Amendments to Part 17 of Customs and Excise Act 1996

(1) Section 286(1)(aa) is repealed.

(2) Section 305A(1) is amended by omitting "167, and 171" and substituting "and 167".

Amendments to Dairy Industry Restructuring Act 2001

212 Amendments to Dairy Industry Restructuring Act 2001

(1) This section amends the Dairy Industry Restructuring Act 2001.

(2) Section 29C is amended by omitting "29L" and substituting "29H".

(3) Section 29D is amended by omitting "29L" and substituting "29H".

(4) Section 29I(1) is amended by—

(a) omitting "A District Court Judge, Community Magistrate, Justice of the Peace, or Registrar may issue a search warrant in the form set out in Schedule 5D" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) may issue a search warrant"; and

(b) omitting "in writing made on oath" and substituting "made in the manner provided in subpart 2 of Part 4 of the Search and Surveillance Act 2009".

(5) Section 29I is amended by repealing subsections (2) and (3) and substituting the following subsections:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply.

"(3) Despite subsection (2), sections 108(d), 110(2)(d), 114, and 115 of the Search and Surveillance Act 2009 apply only in respect of a warrant issued to a named constable or to every constable."

(6) Sections 29J to 29L are repealed.

(7) Section 145(j) is amended by omitting "sections 98B to 98G" and substituting "section 98G".

Amendments to Dog Control Act 1996

213 Amendments to Dog Control Act 1996

Sections 214 and 215 amend the Dog Control Act 1996.

214 Power of entry

(1) Section 14(3)(a) is amended by omitting "a District Court Judge on written application on oath" and substituting "an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) on application by a dog control officer in the manner provided in subpart 2 of Part 4 of the Search and Surveillance Act 2009".

(2) Section 14 is amended by adding the following subsection:

"(5) The provisions of Part 4 of the Search and Surveillance Act 2009 (except subpart 5) apply."

215 Other amendments to Dog Control Act 1996

(1) Section 56(3) is amended by omitting paragraph (a) and substituting the following paragraph:

"(a) he or she is authorised to enter by a warrant issued by an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) made on application by the dog ranger or dog control officer in the

manner provided for an application for a search warrant in subpart 2 of Part 4 of the Search and Surveillance Act 2009; and".

(2) Section 56 is amended by inserting the following subsection after subsection (3):

"(3A) None of the following persons may act as an issuing officer under this section:

"(a) the mayor or any elected member of the local authority that employs or engages the dog ranger or dog control officer; or

"(b) any employee of the local authority that employs or engages the dog ranger or dog control officer."

(3) Section 57(6)(b) is amended by omitting "he or she is authorised in writing to do so by a Justice, who must not grant an authority unless the Justice" and substituting "he or she is authorised to enter by a warrant issued by an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009), made on application by the dog ranger or dog control officer in the manner provided for an application for a search warrant in subpart 2 of Part 4 of the Search and Surveillance Act 2009, who must not issue a warrant unless the issuing officer".

(4) Section 57 is amended by inserting the following subsection after subsection (6):

"(6A) None of the following persons may act as an issuing officer under this section:

"(a) the mayor or any elected member of the local authority that employs or engages the dog ranger or dog control officer; or

"(b) any employee of the local authority that employs or engages the dog ranger or dog control officer."

Amendments to Driftnet Prohibition Act 1991

216 Amendments to Driftnet Prohibition Act 1991

Sections 217 to 220 amend the Driftnet Prohibition Act 1991.

217 Powers of search

Section 13 is amended by inserting the following subsection after subsection (3):

"(3A) The provisions of subparts 3 to 6 of Part 4 (other than sections 108(d), 110(2)(d), 114, and 115) and section 172 of the Search and Surveillance Act 2009 apply."

218 New section 16 substituted

Section 16 is repealed and the following section substituted:

"**16 Custody of property seized**

All property seized under section 15 must be dealt with under subpart 5 of Part 4 of the Search and Surveillance Act 2009."

219 Sections 17 to 22 repealed

Sections 17 to 22 are repealed.

220 Section 24 repealed

Section 24 is repealed.

Amendments to Employment Relations Act 2000

221 Amendments to Employment Relations Act 2000

(1) This section amends the Employment Relations Act 2000.

(2) Section 231 is amended by omitting "on oath," and substituting "in the manner provided for an application for a search warrant in subpart 2 of Part 4 of the Search and Surveillance Act 2009,".

(3) Section 231 is amended by adding the following subsection as subsection (2):

"(2) When making an application under subsection (1), references in subpart 2 of Part 4 of the Search and Surveillance Act 2009 to an issuing officer are to be treated as references to a Judge."

Amendments to Extradition Act 1999

222 Amendments to Extradition Act 1999

(1) This section amends the Extradition Act 1999.

(2) Section 82 is amended by repealing subsection (3) and substituting the following subsection:

"(3) Nothing in this section limits or affects any power under section 11 of the Search and Surveillance Act 2009."

(3) Section 83(2) is amended by omitting "A District Court Judge who, on application in writing made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on an application made in the manner provided in subpart 2 of Part 4 of that Act".

(4) Section 83 is amended by adding the following subsection:

"(4) The provisions of Part 4 of the Search and Surveillance Act 2009 (except subpart 5) apply."

(5) Sections 84 to 88 are repealed.

Amendments to Films, Videos, and Publications Classification Act 1993

223 Amendments to Films, Videos, and Publications Classification Act 1993

Sections 224 and 225 amend the Films, Videos, and Publications Classification Act 1993.

224 Amendments to Part 7 of Films, Videos, and Publications Classification Act 1993

(1) Section 109 is amended by omitting "A District Court Judge, Justice, or Community Magistrate, or a Registrar (not being a member of the police) may, on application in writing made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) may, on an application in the manner provided in subpart 2 of Part 4 of that Act".

(2) Section 109A(1) is amended by omitting "~~A District Court Judge~~ may, on application in writing made on oath" and substituting "~~An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009)~~ may, on an application made in the manner provided in subpart 2 of Part 4 of ~~that Act~~ the Search and Surveillance Act 2009".

(3) Section 109B is amended by omitting "A Justice, Community Magistrate, or Registrar (not being a member of the police) may, on an application in writing made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) may, on an application made in the manner provided in subpart 2 of Part 4 of that Act".

(4) Section 118 is repealed.

225 New section 110 substituted

Sections 110 to 114 are repealed and the following section is substituted:

"**110 Application of Part 4 of Search and Surveillance Act 2009**

"(1) The provisions of Part 4 of the Search and Surveillance Act 2009 apply in respect of any search warrant issued under section 109, 109A, or 109B.

"(2) This section is subject to sections 115 to 117."

Amendments to Financial Transactions Reporting Act 1996

226 Amendments to Financial Transactions Reporting Act 1996

(1) This section amends the Financial Transactions Reporting Act 1996.

(2) Section 38 is amended by repealing subsections (2) to (5) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(3) Section 44 is amended by omitting "Any District Court Judge, Justice, or Community Magistrate, or any Registrar (not being a member of the Police), who, on application in writing made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on an application made in the manner provided in subpart 2 of Part 4 of that Act".

(4) Section 44 is amended by adding the following subsection as subsection (2):

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(5) Sections 45 to 51 are repealed.

Amendments to Fisheries Act 1996

227 Amendments to Fisheries Act 1996

Sections 228 to 230 amend the Fisheries Act 1996.

228 New sections 199 and 199A substituted

Section 199 is repealed and the following sections are substituted:

"**199 Powers of entry and examination for regulatory purposes**

"(1) In the course of the enforcement and administration of this Act, a fishery officer may, at any reasonable time,—

"(a) examine any vessel, vehicle, premises, or other place (by stopping or opening the thing or place, as the case requires, where necessary) and—

"(i) examine any fish, aquatic life, or seaweed in that thing or at that place; or

"(ii) examine any accounts, records, returns, or other documents in that thing or at that place that may be relevant to monitoring for compliance with this Act or any regulations made under this Act; or

"(iii) examine any record, authority, approval, permission, licence, or authority in that thing or at that place that may be relevant to monitoring for compliance with this Act or any regulations made under this Act; or

"(iv) examine any article, gear, container, apparatus, device, or thing relating to the taking, sale, purchase, farming, or possession of any fish, aquatic life, or seaweed that is in that thing or at that place:

"(b) for the purposes of exercising any power conferred by paragraph (a), enter or pass across any land:

"(c) stop any person and examine any thing referred to in paragraph (a)(i) to (iv) that is in the possession of that person:

"(d) for the purposes of any examination under paragraph (a) or (c),—

"(i) open or direct any person to open any thing that may be examined; and

"(ii) take any sample of a thing that may be examined, for forensic or other scientific testing.

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 (other than subpart 2 and section 115) apply.

"(3) A fishery officer may detain any vessel, vehicle, conveyance of any kind, parcel, package, record, document, article, gear, apparatus, device, container, fish, aquatic life, seaweed, or thing for any period that is reasonably necessary to enable the fishery officer to carry out an examination under this section.

"**199A Powers of entry and search for law enforcement purposes**

"(1) Subsection (2) applies to a fishery officer if he or she believes, on reasonable grounds, that there may be concealed or located or held in any vessel, vehicle, conveyance of any kind, premises, place, parcel, package, record, or thing—

"(a) any fish, aquatic life, or seaweed taken or thing used or intended to be used in contravention of this Act; or

"(b) any article, record, document, or thing that there is reasonable ground to believe will be evidence as to the commission of an offence against this Act.

"(2) If this subsection applies to a fishery officer, then, for the purpose of enforcing this Act, that officer may—

"(a) enter, examine, and search any such premises or place, or any such vessel, vehicle, or conveyance of any kind (by stopping or opening the thing or place, as the case requires, where necessary); and

"(b) examine and search (by opening the thing where necessary) any such parcel, package, record, or thing; and

"(c) for the purposes of exercising any power conferred by paragraph (a), enter or pass across any land.

"(3) A fishery officer may detain any vessel, vehicle, conveyance of any kind, parcel, package, record, document, article, gear, apparatus, device, container, fish, aquatic life, seaweed, or thing for such period as is reasonably necessary to enable the fishery officer to carry out an examination or search under this section.

"(4) The provisions of Part 4 of the Search and Surveillance Act 2009 (other than subpart 2) apply."

229 Amendments to sections 200 to 207 of Fisheries Act 1996

(1) Section 200(1) is amended by omitting "a Justice, Community Magistrate, District Court Judge, or Registrar of a District Court" and substituting "an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009)".

(2) Section 200 is amended by repealing subsection (2) and substituting the following subsection:

"(2) An application for authorisation must be made by a fishery officer in the manner provided for an application for a search warrant under subpart 2 of Part 4 of the Search and Surveillance Act 2009."

(3) Section 200(3) is amended by omitting "A Justice, Community Magistrate, District Court Judge, or Registrar of a District Court" and substituting "An issuing officer".

(4) Section 200 is amended by repealing subsection (4).

(5) Section 205 is amended by omitting "as may be reasonably necessary" and substituting "as is necessary".

(6) Section 206(2) is amended by—

(a) omitting "section 198A of the Summary Proceedings Act 1957" and substituting "section 131 of the Search and Surveillance Act 2009"; and

(b) omitting "section 198A of that Act" and substituting "section 131 of that Act".

(7) Section 207 is amended by repealing subsection (2) and substituting the following subsection:

"(2) Subject to section 212, any property seized under subsection (1) must be dealt with in accordance with subpart 5 of Part 4 of the Search and Surveillance Act 2009."

(8) Section 207(3) is amended by—

(a) omitting "section 198A of the Summary Proceedings Act 1957" and substituting "section 131 of the Search and Surveillance Act 2009"; and

(b) omitting "section 198A of that Act" and substituting "section 131 of that Act".

(9) Section 207(4) is repealed.

230 Amendments to sections 208 to 220 of Fisheries Act 1996

(1) Sections 208 to 211 are repealed.

(2) Section 212 is amended by inserting "and the thing is liable to be forfeited under this Act if the owner is convicted," after "otherwise perish,".

(3) Section 213(1) is amended by inserting "or 199A" after "199".

(4) Section 217 is amended by adding the following subsection as subsection (2):

"(2) Subsection (1) is subject to the provisions of subpart 3 of Part 4 of the Search and Surveillance Act 2009 (where applied by this Act)."

(5) Section 218 is amended by adding the following subsection as subsection (2):

"(2) Subsection (1) is subject to the provisions of subpart 3 of Part 4 of the Search and Surveillance Act 2009 (where applied by this Act)."

(6) Section 220 is amended by adding the following subsection:

"(5) This section is subject to sections 157 to ~~160~~ 161 of the Search and Surveillance Act 2009 (where applied by this Act)."

Amendments to Food Act 1981

231 Amendments to Food Act 1981

(1) This section amends the Food Act 1981.

(2) Section 12 is amended by inserting the following subsection after subsection (2):

"(2A) Subject to sections 14 and 16, the provisions of Part 4 of the Search and Surveillance Act 2009 (other than sections 120(2), 126(5)(e), and 127, and subparts 5 and 7) apply

in respect of any seizure and detention under subsection (2)(i) or (j)."

(3) Section 13 is amended by inserting the following subsection after subsection (1):

"(1A) Subject to sections 14 and 16, the provisions of Part 4 of the Search and Surveillance Act 2009 (other than sections 120(2), 126(5)(e), and 127, and subparts 5 and 7) apply in respect of any seizure ~~or~~ and detention under subsection (1)(d)."

(4) Section 14(4)(a) is amended by omitting "employed by the Ministry".

(5) Section 15A is amended by omitting "section 198 of the Summary Proceedings Act 1957" and substituting "section 6 of the Search and Surveillance Act 2009".

(6) Section 15A is amended by adding the following subsections as subsections (2) and (3):

"(2) For the purposes of section 95 of the Search and Surveillance Act 2009, an officer is a person authorised to apply for a search warrant.

"(3) An officer may exercise the powers of a constable to apply for a search warrant under section 6 of the Search and Surveillance Act 2009, in relation to the offences referred to in subsection (1)."

Amendments to Gambling Act 2003

232 Amendments to Gambling Act 2003

(1) This section amends the Gambling Act 2003.

(2) Section 335 is amended by repealing subsection (3) and substituting the following subsection:

"(3) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(3) Section 335(5) is repealed.

(4) Section 336 is amended by repealing subsection (3) and substituting the following subsection:

"(3) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(5) Section 336(5) is repealed.

(6) Section 337 is repealed.

(7) Section 340 is amended by repealing subsection (2) and substituting the following subsection:

"(2) An application must be made in the manner provided in subpart 2 of Part 4 of the Search and Surveillance Act 2009 to an issuing officer (within the meaning of section 3 of that Act)."

(8) Section 340(3) is amended by omitting "The Judge, Justice, Magistrate, or Registrar" and substituting "The issuing officer".

(9) Section 340 is amended by inserting the following subsection after subsection (3):

"(3A) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(10) Section 340(4) is amended by omitting "sections 341 and" and substituting "section".

(11) Sections 341 to 343 and 345 are repealed.

(12) Section 369(d) is amended by omitting "331, and a search warrant under section 341" and substituting "331".

Amendments to Hazardous Substances and New Organisms Act 1996

233 Amendments to Hazardous Substances and New Organisms Act 1996

(1) This section amends the Hazardous Substances and New Organisms Act 1996.

(2) Section 119(1) is amended by omitting "District Court Judge or Justice of the Peace or Community Magistrate or any Registrar who is satisfied, on application in writing made on oath" and substituting "issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who is satisfied, on an application made in the manner provided in subpart 2 of Part 4 of that Act".

(3) Section 119 is amended by repealing ~~subsections (2)~~ subsections (3) to (8) and substituting the following subsection:

"(~~2~~3) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(4) Section 120 is repealed.

Amendments to Health and Safety in Employment Act 1992

234 Amendments to Health and Safety in Employment Act 1992

(1) This section amends the Health and Safety in Employment Act 1992.

(2) Section 31(3) is amended by omitting "A District Court Judge who, on application made on oath," and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on application made in the manner provided for an application for a search warrant in subpart 2 of Part 4 of that Act,".

Amendments to Health Practitioners Competence Assurance Act 2003

235 Amendments to Health Practitioners Competence Assurance Act 2003

(1) This section amends the Health Practitioners Competence Assurance Act 2003.

(2) Section 10(1) is amended by omitting "section 198 of the Summary Proceedings Act 1957" and substituting "section 6 of the Search and Surveillance Act 2009".

(3) Section 10 is amended by repealing subsection (2) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(4) Section 10(3) is amended by—

(a) omitting "section 199 of the Summary Proceedings Act 1957" and substituting "subpart 5 of Part 4 of the Search and Surveillance Act 2009"; and

(b) omitting from paragraph (a) "section 199 of that Act" and substituting "subpart 5 of Part 4 of that Act".

Amendments to Human Assisted Reproductive Technology Act 2004

236 Amendments to Human Assisted Reproductive Technology Act 2004

(1) This section amends the Human Assisted Reproductive Technology Act 2004.

(2) Section 68 is amended by repealing subsections (2) to (4) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(3) Section 69(2) is amended by omitting "A District Court Judge, a Justice, or a Court Registrar who is not a member of the police, may, on written application made on oath by an authorised person, issue a search warrant in the form set out in Schedule 2" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) may, on an application made in the manner provided in subpart 2 of Part 4 of that Act, issue a search warrant".

(4) Section 69 is amended by repealing subsections (3) to (5) and substituting the following subsection:

"(3) Subject to subsection (6), the provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(5) Sections 70 to 72 and Schedule 2 are repealed.

Amendments to Human Tissue Act 2008

237 Amendments to Human Tissue Act 2008

(1) This section amends the Human Tissue Act 2008.

(2) Section 68 is amended by repealing subsections (2) and (3) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply with any necessary modifications."

(3) Section 69(2) is amended by omitting "A District Court Judge, a Community Magistrate, a Justice, or a Registrar who is not a member of the police may, on a written application made on oath by an authorised person, issue a search warrant in the prescribed form" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act

2009) may, on an application made by an authorised person in the manner provided for an application for a search warrant in subpart 2 of Part 4 of that Act, issue a search warrant".

(4) Section 69 is amended by omitting subsections (3) to (5) and substituting the following subsection:

"(3) The provisions of Part 4 of the Search and Surveillance Act 2009 apply with any necessary modifications."

(5) Sections 70 to 72 and 79 are repealed.

Amendments to Immigration Advisers Licensing Act 2007

238 Amendments to Immigration Advisers Licensing Act 2007

Sections 239 and 240 amend the Immigration Advisers Licensing Act 2007.

239 New sections 56 and 57 substituted

Sections 56 and 57 are repealed and the following sections substituted:

"**56 Purposes of inspection**

The powers in section 57 may be used for 1 or more of the following purposes:

"(a) administering the licensing regime:

"(b) obtaining information in relation to complaints in respect of persons who are or have formerly been licensed to provide immigration advice:

"(c) obtaining information in respect of persons who have applied to be licensed:

"(d) investigating offences under this Act.

"**57 Interpretation powers**

"(1) Any person authorised by the Registrar may, for a purpose set out in section 56,—

"(a) at any reasonable time, enter any premises where the person has good cause to suspect that—

"(i) any licensed immigration adviser or former licensed immigration adviser works or has worked in the past 2 years; or

"(ii) any person who has applied to be licensed as an immigration adviser works; or

"(iii) a person provides immigration advice or contracts or employs a person to provide immigration advice:

"(b) question any licensed immigration adviser, former licensed immigration adviser, or other person at any premises of a kind described in paragraph (a):

"(c) require a person of a kind described in paragraph (a) to produce for inspection relevant documents in that person's possession or under that person's control:

"(d) inspect and take copies of documents referred to in paragraph (c):

"(e) retain documents referred to in paragraph (c), if there are grounds for believing that they are evidence of the commission of an offence.

"(2) If a requirement is made of a person under subsection (1)(c), the person must immediately comply with that requirement.

"(3) If documents are retained under subsection (1)(e), subpart 5 of Part 4 of the Search and Surveillance Act 2009 applies."

240 Other amendments to Immigration Advisers Licensing Act 2007

(1) Section 58 is repealed.

(2) Section 59 is amended by omitting "or 58".

(3) Section 60 is amended by omitting "or 58".

(4) Section 61(1) is amended by omitting "A Judge who, on written application made on oath," and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on an application made in the manner provided for an application for a search warrant in subpart 2 of Part 4 of that Act,".

(5) Section 61 is amended by repealing subsection (2) and substituting the following subsection:

"(2) The provisions of subpart 2 of Part 4 of the Search and Surveillance Act 2009 apply in respect of an entry warrant."

(6) Section 62(3)(c) is amended by omitting "or 58".

(7) Section 69(1) is amended by omitting "or 58" in each place where it appears.

Amendments to International Crimes and International Criminal Court Act 2000

241 Amendments to International Crimes and International Criminal Court Act 2000

(1) This section amends the International Crimes and International Criminal Court Act 2000.

(2) Section 77(3) is amended by omitting "section 37 of the Policing Act 2008" and substituting "section 11 of the Search and Surveillance Act 2009".

(3) Section 102(1) is amended by omitting "a District Court Judge, on an application in writing made on oath or affirmation" and substituting "an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009), on an application made in the manner provided in subpart 2 of Part 4 of that Act".

(4) Section 102 is amended by repealing subsections (2) to (4) and substituting the following subsection:

"(2) The provisions of subparts 1 to 4 and 6 to 8 of Part 4 and sections 154 and 155 of the Search and Surveillance Act 2009 apply."

(5) Sections 103 to 106 are repealed.

(6) The heading to section 107 is amended by omitting "**Notice of execution**" and substituting "**Report to Attorney-General on execution**".

(7) Section 107 is amended by repealing subsection (1).

(8) Section 107(2) is amended by—

(a) omitting "the warrant is executed" and substituting "a warrant issued under section 102 is executed"; and

(b) omitting "subsection (1)" and substituting "section 127 of the Search and Surveillance Act 2009".

(9) Section 107(3) is amended by omitting "the warrant" and substituting "a warrant issued under section 102".

(10) Section 108(4) is amended by omitting "The" and substituting "Subject to section 148 of the Search and Surveillance Act 2009 (which applies with any necessary modifications), the".

(11) Section 108(5) is amended by inserting ", but subject to section 147 of the Search and Surveillance Act 2009 (which applies with any necessary modifications)" after "subsection (4)".

Amendments to International War Crimes Tribunals Act 1995

242 Amendments to International War Crimes Tribunals Act 1995

(1) This section amends the International War Crimes Tribunals Act 1995.

(2) Section 11 is amended by omitting "a Judge" and substituting "an issuing officer".

(3) Section 29 is amended by omitting "a Judge" and substituting "an issuing officer".

(4) Section 48(1) is amended by omitting "Any Judge who, on an application in writing made on oath" and substituting "Any issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on an application made in the manner provided in subpart 2 of Part 4 of that Act".

(5) Section 48(2) is amended by omitting "Any Judge who, on application in writing made on oath under section 29 of this Act by a member of the Police authorised under that section" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on an application made in the manner provided in subpart 2 of Part 4 of that Act by a constable authorised under section 29".

(6) Section 48 is amended by repealing subsection (3) and substituting the following subsection:

"(3) The provisions of subparts 1 to 4 and 6 to 8 of Part 4 and sections 154 and 155 of the Search and Surveillance Act 2009 apply."

(7) Sections 49 to 50A and 51 and 52 are repealed.

(8) Section 53 is amended by omitting "the matters set out in paragraphs (a) to (c) of section 52 of this Act" and substituting

"the date and time of execution of the warrant, the identity of the person who executed the warrant, and the thing or things seized under the warrant".

(9) Section 55(5) is amended by omitting "The" and substituting "Subject to sections 147 and 148 of the Search and Surveillance Act 2009 (which apply with any necessary modifications), the".

(10) Section 55(6) is amended by omitting "If" and substituting "Subject to sections 147 and 148 of the Search and Surveillance Act 2009 (which apply with any necessary modifications), if".

Amendments to Land Transport Act 1998

243 Amendments to Land Transport Act 1998

(1) This section amends the Land Transport Act 1998.

(2) Section 119 is amended by repealing subsection (3) and substituting the following subsection:

"(3) An enforcement officer may, without warrant, enter, by force if necessary, a building or place where a vehicle to which section 96, 96A, or 123 applies is being stored or kept, and seize and impound the vehicle,—

"(a) if—

"(i) an enforcement officer has been freshly pursuing the vehicle; or

"(ii) it is likely that a person was about to remove, conceal, destroy, or dispose of the vehicle; or

"(iii) an enforcement officer believes on reasonable grounds that the vehicle was about to be used in the commission of a crime; and

"(b) if, because of the time of the day or the locality, it was impracticable to obtain a warrant without creating an opportunity for the person to do anything referred to in paragraph (a)(ii) or (iii)."

(3) Section 119(5) is amended by omitting "apply on oath to a District Court Judge" and substituting "apply, in the manner provided for an application for a search warrant in subpart 2 of Part 4 of the Search and Surveillance Act 2009, to an issuing officer (within the meaning of section 3 of that Act),".

(4) Section 119 is amended by repealing subsection (6) and substituting the following subsection:

"(6) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

Amendments to Local Government Act 2002

244 Amendments to Local Government Act 2002

Sections 245 and 246 amend the Local Government Act 2002.

245 Seizure of property from private land

(1) Section 165(1) is amended by omitting "A judicial officer" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009)".

(2) Section 165(2)(a) is amended by omitting "in writing and on oath" and substituting "in the manner provided for an application for a search warrant in subpart 2 of Part 4 of the Search and Surveillance Act 2009".

(3) Section 165(2)(b) is amended by omitting "judicial officer" and substituting "issuing officer".

(4) Section 165 is amended by repealing subsections (3) and (4) and substituting the following subsections:

"(3) None of the following persons may act as an issuing officer under this section:

"(a) the mayor or any elected member of the local authority:

"(b) any employee of the local authority.

"(4) The provisions of Part 4 of the Search and Surveillance Act 2009 apply as if a warrant issued under subsection (1) were a search warrant."

246 Other amendments to Local Government Act 2002

(1) Section 166 is amended by repealing subsections (1) and (2) and substituting the following subsections:

"(1) An enforcement officer executing a warrant issued under section 165(1) must be accompanied by a constable.

"(2) Subsection (1) overrides section ~~165(3)~~ 165(4)."

(2) Section 167(1) is amended by omitting "or section 165".

(3) Section 168(1) is amended by inserting "seized and impounded under section ~~165~~ 164" after "dispose of property".

(4) ~~Section 171(2) is~~ Section 171(2) and (3) are repealed.

(5) Section 172(3)(a) is amended by omitting "a District Court Judge on written application on oath" and substituting "an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) on application made in the manner provided for an application for a search warrant in subpart 2 of Part 4 of that Act".

(6) Section 172 is amended by repealing subsection (4) and substituting the following subsection:

"(4) The provisions of Part 4 of the Search and Surveillance Act 2009 apply in respect of any power of entry under this section, subject to subsection (3)(b)."

(7) Section 173 is amended by repealing subsection (2) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

Amendments to Major Events Management Act 2007

247 Amendments to Major Events Management Act 2007

(1) This section amends the Major Events Management Act 2007.

(2) Section 67(1) is amended by omitting "High Court Judge, District Court Judge, Community Magistrate, Justice of the Peace, or Registrar of a District Court may issue a search warrant for any place, vehicle, or thing if satisfied, on application in writing made on oath" and substituting "issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) may issue a search warrant for any place, vehicle, or thing if satisfied, on application made in the manner provided in subpart 2 of Part 4 of the Search and Surveillance Act 2009".

(3) Section 67 is amended by inserting the following subsection after subsection (1):

"(1A) Despite subsection (1), in addition to satisfying any applicable requirement in subpart 2 of Part 4 of the Search and Surveillance Act 2009,—

"(a) an application under subsection (1) must include details of any thing that is to be searched for and covered; and

"(b) a search warrant issued under subsection (1) must state whether it authorises any thing to be covered and, if so, contain, in reasonable detail, a description of the thing to be covered; and

"(c) a person who executes a warrant and covers any thing must leave in a prominent position or at the place searched or give to the owner or occupier a written notice stating a list of the particulars of the covered thing, and that it may be uncovered in accordance with sections 77 and 78."

(4) Section 67 is amended by repealing subsection (2) and substituting the following subsection:

"(2) Subject to section 68, the provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(5) Section 68 is amended by repealing subsection (1) and substituting the following subsections:

"(1) Without limiting the powers conferred by any warrant issued under section 67(1), and subject to any conditions specified by the issuing officer, every warrant issued under that section authorises a person authorised to execute it to search for and cover any thing that the warrant authorises to be covered.

"(1A) In applying the provisions of Part 4 of the Search and Surveillance Act 2009, any requirement in that Part to provide details or other information in relation to a thing that is seized, is to be taken to include the same requirement in relation to a thing that is covered."

(6) Section 68(2) is amended by omitting "in subsection (1)" and substituting "conferred by a warrant".

(7) Section 68(3) and (4) are repealed.

(8) Sections 69 to 76 are repealed.

Amendments to Marine Mammals Protection Act 1978

248 Amendments to Marine Mammals Protection Act 1978

Sections 249 and 250 amend the Marine Mammals Protection Act 1978.

249 Powers of search

(1) Section 13 is amended by repealing subsection (2) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(2) Section 13(5) is repealed.

250 New section 14 substituted

Section 14 is repealed and the following section substituted:

"**14 Officer may obtain warrant**

"(1) An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) may, on application by an officer made in the manner provided in subpart 2 of Part 4 of that Act, issue a search warrant to an officer named in the warrant authorising the entry and search of any dwellinghouse, place, vehicle, aircraft, or hovercraft if the issuing officer is satisfied that there are reasonable grounds to suspect that—

"(a) any breach of this Act or any regulation made under it has been, is being, or will be committed; or

"(b) preparation has been made to commit a breach of this kind.

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

Amendments to Marine Reserves Act 1971

251 Amendments to Marine Reserves Act 1971

(1) This section amends the Marine Reserves Act 1971.

(2) Section 18 is amended by adding the following subsection:

"(3) The provisions of Part 4 of the Search and Surveillance Act 2009 apply in respect of any entry and search conducted under subsection (1)(d)."

(3) Section 18A is amended by repealing subsection (3) and substituting the following subsection:

"(3) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(4) Sections 18B to 18F are repealed.

Amendments to Maritime Security Act 2004

252 Amendments to Maritime Security Act 2004

(1) This section amends the Maritime Security Act 2004.

(2) Section 51(4) is amended by omitting "A judicial officer who, on written application made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on an application made in the manner provided in subpart 2 of Part 4 of that Act".

(3) Section 51 is amended by inserting the following subsection after subsection (6):

"(6A) Subject to subsections (5) and (6), the provisions of Part 4 of the Search and Surveillance Act 2009 apply in respect of a warrant issued under subsection (4)."

(4) Section 51 is amended by repealing subsection (12).

(5) Section 55(1) is amended by omitting paragraph (b) and substituting the following paragraph:

"(b) the constable has reasonable grounds to suspect that—

"(i) an offence against this Act has been, is being, or will be committed whether by that person or any other person; and

"(ii) a search of the person refusing to consent will disclose evidential material relating to that offence."

Amendments to Maritime Transport Act 1994

253 Amendments to Maritime Transport Act 1994

Sections 254 and 255 amend the Maritime Transport Act 1994.

254 Amendments to Part 30 of Maritime Transport Act 1994

(1) Section 453(2) is amended by—

(a) repealing paragraphs (a) and (b); and

(b) omitting "paragraphs (a) to (c)" and substituting "paragraph (c)".

(2) Section 453(5) is amended by omitting "or subsection (2)".

(3) Sections 456 and 457(1) are repealed.

255 New sections 454 and 455 substituted

Sections 454 and 455 are repealed and the following sections substituted:

"**454 Warrant to inspect dwellinghouse, marae, etc**

"(1) An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on an application made by an authorised person in the manner provided for an application for a search warrant in subpart 2 of Part 4 of that Act, is satisfied that ~~the~~ entry is essential to enable the inspection of a place referred to in section 453(3) to be carried out, may issue a warrant to the authorised person authorising that person to enter the place.

"(2) Part 4 of the Search and Surveillance Act 2009 applies.

"(3) In this section and section 455, **authorised person** means a person authorised by the Director.

"**455 Entry in respect of offences**

"(1) Subject to subsection (2), an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) may issue a warrant to enter and search a place if, on an application made by an authorised person in the manner provided in subpart 2 of Part 4 of that Act, the issuing officer is satisfied that there are reasonable grounds for believing that there is on or in the place (being a place specified in the application) any thing—

"(a) in respect of which an offence against this Act has been or may have been committed; or

"(b) that is or may be evidence of the commission of an offence against this Act; or

"(c) that is intended to be used for the commission of an offence against this Act.

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

Amendments to Meat Board Act 2004

256 Amendments to Meat Board Act 2004

Sections 257 and 258 amend the Meat Board Act 2004.

257 Amendments to Part 3 of Meat Board Act 2004

(1) Section 42(5) is amended by—

(a) omitting "A District Court Judge or a Court Registrar (not being a member of the police), who on an application in writing made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on an application made in the manner provided for an application for a search warrant in subpart 2 of Part 4 of that Act,"; and

(b) omitting "in form 1 in Schedule 3".

(2) Section 42 is amended by repealing subsections (7) and (8) and substituting the following subsections:

"(7) The provisions of Part 4 of the Search and Surveillance Act 2009 apply.

"(8) Despite subsection (7), sections 108(d), 110(2)(d), 114, and 115 of the Search and Surveillance Act 2009 apply only in respect of a warrant issued to a named constable or to every constable."

258 Amendments to Part 4 of Meat Board Act 2004

(1) Section 62(1) is amended by—

(a) omitting "A District Court Judge or a Court Registrar (not being a member of the Police) who, on an application in writing made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on application made in the manner provided for an application for a search warrant in subpart 2 of Part 4 of the Search and Surveillance Act 2009"; and

(b) omitting "in form 2 of Schedule 3".

(2) Section 62(2) is amended by—

(a) omitting "A District Court Judge or a Court Registrar (not being a member of the Police) who, on an application in writing made an oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on application made in the manner provided for an application for

a search warrant in subpart 2 of Part 4 of the Search and Surveillance Act 2009"; and

(b) omitting "in form 3 of Schedule 3".

(3) Section 62 is amended by repealing subsection (3) and substituting the following subsections:

"(3) The provisions of Part 4 of the Search and Surveillance Act 2009 apply.

"(3A) Despite subsection (3), sections 108(d), 110(2)(d), 114, and 115 of the Search and Surveillance Act 2009 apply only in respect of a warrant issued to a named constable or to every constable."

(4) Schedule 3 is repealed.

Amendments to Motor Vehicle Sales Act 2003

259 Amendments to Motor Vehicle Sales Act 2003

(1) This section amends the Motor Vehicle Sales Act 2003.

(2) Section 130(1) is amended by omitting "District Court Judge, Community Magistrate, Justice of the Peace, or Registrar of a District Court may issue a search warrant for any place if satisfied, on application in writing made on oath," and substituting "issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) may issue a search warrant for any place if satisfied, on application made in the manner provided in subpart 2 of Part 4 of the Search and Surveillance Act 2009,".

(3) Section 130 is amended by repealing subsection (2) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(4) Sections 131 to 140 are repealed.

Amendments to National Parks Act 1980

260 Amendments to National Parks Act 1980

(1) This section amends the National Parks Act 1980.

(2) Section 61(2) is repealed.

(3) Section 61(3) is amended by—

(a) omitting "If" and substituting "If, in any case to which paragraph (a) or (b) applies,"; and

(ab) omitting "if in proceedings" and substituting "in proceedings"; and

(b) omitting "then," and substituting "then, despite subpart 5 of Part 4 of the Search and Surveillance Act 2009,"; and

(c) repealing paragraph (c).

(4) Section 61(6) is amended by omitting ", and shall be retained by the Director-General and dealt with under subsection (7) or subsection (8) of this section".

(5) Section 61 is amended by repealing subsections (7) and (8) and substituting the following subsection:

"(7) Subject to subsection (3), the provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(6) Section 65 is amended by repealing subsection (2) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(7) Section 66 is amended by repealing subsections (2) and (3) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

Amendments to Overseas Investment Act 2005

261 Amendments to Overseas Investment Act 2005

(1) This section amends the Overseas Investment Act 2005.

(2) Section 56(2) is amended by omitting "writing and on oath to the Court" and substituting "the manner provided in subpart 2 of Part 4 of the Search and Surveillance Act 2009 to an issuing officer (within the meaning of section 3 of that Act)".

(3) Section 56(3) is amended by omitting "Court" and substituting "issuing officer".

(4) Section 56(4) is amended by omitting "Court" and substituting "issuing officer".

(5) Section 56 is amended by adding the following subsection:

"(5) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(6) Sections 57 to 60 are repealed.

Amendments to Ozone Layer Protection Act 1996

262 Amendments to Ozone Layer Protection Act 1996

Sections 263 to 265 amend the Ozone Layer Protection Act 1996.

263 Search warrants

(1) Section 23(1) is amended by omitting "District Court Judge or Justice or Community Magistrate or any Registrar (not being a constable) who is satisfied, on application in writing made on oath" and substituting "issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who is satisfied, on an application made in the manner provided in subpart 2 of Part 4 of that Act".

(2) Section 23 is amended by repealing ~~subsections (2)~~ subsections (3) to (8) and substituting the following subsection:

"(~~2~~3) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

264 New section 25 substituted

Section 25 is repealed and the following section substituted:

"**25 Retention of property seized**

If any constable or officer seizes any substance or goods under this Act, subpart 5 of Part 4 of the Search and Surveillance Act 2009 applies to that substance or those goods."

265 Return or forfeiture of property seized

(1) The heading to section 26 is amended by omitting "**Return or forfeiture**" and substituting "**Forfeiture**".

(2) Section 26(1) and (2) are repealed.

Amendment to Petroleum Demand Restraint Act 1981

266 Amendment to Petroleum Demand Restraint Act 1981

(1) This section amends the Petroleum Demand Restraint Act 1981.

(2) Section 17(4) is amended by omitting "sections 198 and 199 of the Summary Proceedings Act 1957" and substituting "section 6 and subpart 5 of Part 4 of the Search and Surveillance Act 2009".

Amendments to Pork Industry Board Act 1997

267 Amendments to Pork Industry Board Act 1997

(1) This section amends the Pork Industry Board Act 1997.

(2) Section 44 is amended by inserting the following subsection after subsection (2):

"(2A) The provisions of Part 4 of the Search and Surveillance Act 2009 (except sections 108(d), 110(2)(d), 114, and 115) apply."

(3) Section 45(1) is amended by omitting "A District Court Judge or a Court Registrar (not being a member of the Police)" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009)".

(4) Section 45(2) is amended by omitting "A District Court Judge or a Court Registrar (not being a member of the Police)" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009)".

(5) Section 45 is amended by repealing subsection (3) and substituting the following subsection:

"(3) The provisions of Part 4 of the Search and Surveillance Act 2009 (except sections 108(d), 110(2)(d), 114, and 115) apply."

(6) Sections 46 and 47 and Schedule 3 are repealed.

Amendments to Prostitution Reform Act 2003

268 Amendments to Prostitution Reform Act 2003

(1) This section amends the Prostitution Reform Act 2003.

(2) Section 30(1) is amended by omitting "A District Court Judge, Justice, Community Magistrate, or Registrar of a District Court (who is not a member of the police)" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009)".

(3) Section 30 is amended by repealing subsections (2) and (3) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply as if a warrant referred to in subsection (1) were a search warrant."

(4) Sections 31 to 33 are repealed.

Amendments to Radiation Protection Act 1965

269 Amendments to Radiation Protection Act 1965

(1) This section amends the Radiation Protection Act 1965.

(2) Section 24(2) is amended by omitting—

(a) "If a Justice of the Peace or Community Magistrate is satisfied on oath" and substituting "If an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) is satisfied on an application made in the manner provided in subpart 2 of Part 4 of the Search and Surveillance Act 2009"; and

(b) omitting "Justice or Community Magistrate" and substituting "issuing officer".

(3) Section 24 is amended by repealing subsection (3) and substituting the following subsection:

"(3) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

Amendments to Radiocommunications Act 1989

270 Amendments to Radiocommunications Act 1989

(1) This section amends the Radiocommunications Act 1989.

(2) Section 120(3) is amended by—

(a) omitting "District Court Judge, Justice, or Community Magistrate, or any Court Registrar (not being a constable), is satisfied, on application in writing made on oath" and substituting "issuing officer (within the mean-

ing of section 3 of the Search and Surveillance Act 2009) is satisfied, on application made in the manner provided in subpart 2 of Part 4 of the Search and Surveillance Act 2009"; and

(b) omitting "that District Court Judge, Justice, Community Magistrate, or Court Registrar" and substituting "that issuing officer".

(3) Section 120 is amended by adding the following subsection:

"(4) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(4) Sections 121 to 127 are repealed.

Amendments to Reserve Bank of New Zealand Act 1989

271 Amendments to Reserve Bank of New Zealand Act 1989

Sections 272 and 273 amend the Reserve Bank of New Zealand Act 1989.

272 Amendments to Part 4 of Reserve Bank of New Zealand Act 1989

(1) Section 66I is amended by omitting "A Judge of the High Court may issue a warrant to a person appointed under section 66E(2) if the Judge is satisfied, on application in writing made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009 may issue a warrant to a person appointed under section 66E(2) if the issuing officer is satisfied, on application made in the manner provided in subpart 2 of Part 4 of that Act".

(2) Section 66I is amended by adding the following subclause as subclause (2):

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(3) Section 66J is repealed.

~~(4) Section 106(1) is amended by omitting "A Judge of the High Court who is satisfied, on application in writing made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who is~~

~~satisfied, on application made in the manner provided in subpart 2 of Part 4 of that Act".~~

~~(5) Section 106(2) is amended by omitting "A Judge of the High Court who is satisfied, on application in writing made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who is satisfied, on application made in the manner provided in subpart 2 of Part 4 of that Act".~~

(4) Section 106(1) is amended by—

(a) omitting "A Judge of the High Court who is satisfied, on application in writing made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who is satisfied, on application made in the manner provided in subpart 2 of Part 4 of that Act"; and

(b) omitting ", in terms of section 107 of this Act,".

(5) Section 106(2) is amended by—

(a) omitting "A Judge of the High Court who is satisfied, on application in writing made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who is satisfied, on application made in the manner provided in subpart 2 of Part 4 of that Act"; and

(b) omitting ", in terms of section 107 of this Act,".

(6) Section 106 is amended by repealing subsection (3) and substituting the following subsection:

"(3) Part 4 of the Search and Surveillance Act 2009 applies."

(7) Section 107 is repealed.

273 Amendments to Part 5D of Reserve Bank of New Zealand Act 1989

(1) Section 157ZM(1) is amended by omitting "A Judge of the High Court or a District Court Judge may issue a search warrant in terms of clause 5 of Schedule 4 to a person appointed under section 157ZJ(2)(b) if the Judge" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) may issue a search warrant to a

person appointed under section 157ZJ(2)(b) if the issuing officer".

(2) Section 157ZM is amended by repealing subsection (2) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(3) Section 157ZN(1)(b) is amended by omitting "; and".

(4) Section 157ZN(1)(c) is repealed.

(5) Section 157ZN(3)(b) is repealed.

(6) Section 157ZN(3)(c) is amended by omitting "or a search warrant issued under section 157ZM".

(7) Schedule 4 is repealed.

Amendments to Reserves Act 1977

274 Amendments to Reserves Act 1977

(1) This section amends the Reserves Act 1977.

(2) Section 93 is amended by repealing subsection (5) and substituting the following subsection:

"(5) In this section, **officer** means—

"(a) any ranger or constable; and

"(b) any officer or employee of an administering body who is authorised by that body to exercise the powers of an officer under this Part."

(3) Section 95(1) is amended by omitting ", and shall be retained by the administering body, or by the Commissioner if there is no administering body, pending the trial of that person for the offence in respect of which it was seized".

(4) Section 95(2) is amended by—

(a) omitting "then" and substituting "then, despite subpart 5 of Part 4 of the Search and Surveillance Act 2009,"; and

(b) repealing paragraph (c).

(5) Section 95 is amended by repealing subsection (6) and substituting the following subsections:

"(6) Any firearm, trap, net, or other like object found illegally in the possession of any person in any reserve, and any tool or instrument or other equipment found in the possession of any

person in any reserve and used in committing an offence in the reserve may be seized by any officer (within the meaning of section 93(5)).

"(6A) Subject to subsection (2), the provisions of Part 4 of the Search and Surveillance Act 2009 apply in respect of the seizure of any thing under this section."

(6) Section 100 is amended by repealing subsection (2) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply in respect of any entry, search, or seizure conducted under this section."

Amendments to Resource Management Act 1991

275 Amendments to Resource Management Act 1991

(1) This section amends the Resource Management Act 1991.

(1A) Section 332(3) is amended by omitting "and written authorisation".

(1B) Section 333(3) is amended by omitting "and written authorisation".

(2) Section 334(1) is amended by—

(a) omitting "Any District Court Judge or any duly authorised Justice or any Community Magistrate or Registrar who, on an application in writing made on oath," and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on an application made in the manner provided in subpart 2 of Part 4 of that Act,"; and

(b) omitting "on one occasion within 14 days of the date of issue of the warrant and at any time which is reasonable in the circumstances".

(3) Section 334 is amended by repealing subsections (2) and (3) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

~~(4) Sections 335 and 337 are repealed.~~

(4) The heading to section 335 is amended by omitting "**Content and effect**" and substituting "**Direction and execution**".

(5) Section 335 is amended by repealing subsection (1)(a) and (c), and subsections (2) to (5).

(6) Sections 336 and 337 and the heading above section 336 are repealed.

Amendments to Sale of Liquor Act 1989

276 Amendments to Sale of Liquor Act 1989

(1) This section amends the Sale of Liquor Act 1989.

(2) Section 177(1) is amended by—

(a) omitting "any District Court Judge, Justice, or Community Magistrate, or any Registrar (not being a constable), is satisfied, on application in writing made on oath" and substituting "an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) is satisfied, on an application made by a constable in the manner provided in subpart 2 of Part 4 of that Act"; and

(b) omitting "Judge, Justice, Community Magistrate, or Registrar" and substituting "issuing officer".

(3) Section 177 is amended by repealing subsections (2) to (9) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

Amendment to Social Security Act 1964

277 Amendment to Social Security Act 1964

Section 278 amends the Social Security Act 1964.

278 New section 128A inserted

The following section is inserted after section 128:

"**128A Chief executive may apply for search warrant**

"(1) For the purposes of section 95 of the Search and Surveillance Act 2009, the chief executive is a person authorised to apply for a search warrant.

"(2) The chief executive may exercise the powers of a constable to apply for a search warrant under section 6 of the Search and Surveillance Act 2009, in relation to—

"(a) an offence against this Act; or
"(b) an offence described in Part 10 of the Crimes Act 1961."

Amendments to Tax Administration Act 1994

279 Amendments to Tax Administration Act 1994

(1) This section amends the Tax Administration Act 1994.

(2) Section 16(4) is amended by omitting "A judicial officer who, on written application made on oath" and substituting "An issuing officer who, on application made in the manner provided for an application for a search warrant in subpart 2 of Part 4".

(3) Section 16(5)(c) is amended by omitting "judicial officer" and substituting "issuing officer".

(4) Section 16(7) is amended by omitting the definition of **judicial officer** and substituting the following definition:

"**issuing officer** has the same meaning as in section 3 of the Search and Surveillance Act 2009".

(5) Section 16C(2) is amended by—
(a) omitting "A judicial officer" and substituting "An issuing officer"; and
(b) ~~by~~ omitting "on written application made on oath, the judicial officer" and substituting "on application made in the manner provided for an application for a search warrant in subpart 2 of Part 4 of the Search and Surveillance Act 2009, the issuing officer".

(6) Section 16C is amended by repealing subsection (8) and substituting the following subsection:

"(8) In this section, **issuing officer** has the same meaning as in section 3 of the Search and Surveillance Act 2009."

Amendments to Trade in Endangered Species Act 1989

280 Amendments to Trade in Endangered Species Act 1989

(1) This section amends the Trade in Endangered Species Act 1989.

(2) Section 37(3), (4), and (6) are repealed.

(3) Section 37 is amended by adding the following subsection:

"(8) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(4) Section 38(2) is amended by—

(a) omitting "District Court Judge or Justice of the Peace or Community Magistrate or Registrar of any Court (not being a member of the Police), who, on application by an officer in writing made on oath" and substituting "issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on application made in the manner provided in subpart 2 of Part 4 of that Act"; and

(b) omitting "; and the provisions of subsections (3) to (8) of section 198 of the Summary Proceedings Act 1957 shall apply accordingly".

(5) Section 38 is amended by adding the following subsection:

"(4) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(6) Section 38A is amended by omitting "149C(1) and (2), 149D," and substituting "149C(1) to (3)".

Amendments to Unsolicited Electronic Messages Act 2007

281 Amendments to Unsolicited Electronic Messages Act 2007

(1) This section amends the Unsolicited Electronic Messages Act 2007.

(2) Section 51(1) is amended by ~~adding~~ inserting "in the manner provided in Part 4 of the Search and Surveillance Act 2009" after "may apply".

(3) Section 51(2) is repealed.

(4) Section 51(3) is amended by omitting "in writing and on oath to the District Court" and substituting "to an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009)".

(5) Section 51(4) is amended by omitting "District Court" and substituting "issuing officer".

(5A) Section 51(5) is amended by omitting "District Court" and substituting "issuing officer".

(6) Section 51 is amended by ~~repealing subsection (5) and substituting the following subsection~~ adding the following subsection:

"(~~5~~6) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(7) Sections 52 to 56 and 58(j) are repealed.

Amendments to Wild Animal Control Act 1977

282 Amendments to Wild Animal Control Act 1977

(1) This section amends the Wild Animal Control Act 1977.

(2) Section 12(10) is amended by—

(a) omitting ", on production of his ~~or her~~ warrant of appointment if so required,"; and

(b) omitting from the proviso "under the hand of a District Court Judge" and substituting "in the manner provided in subpart 2 of Part 4 of the Search and Surveillance Act 2009 by an issuing officer (within the meaning of section 3 of that Act)".

(3) Section 12(11) is amended by—

(a) omitting "District Court Judge or Justice of the Peace or Community Magistrate who is satisfied on oath that there is probable cause to suspect" and substituting "issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who is satisfied that there are reasonable grounds to believe"; and

(b) omitting "at such time or times of the day as are mentioned in the warrant, but no such warrant shall continue in force for more than 14 days from the date thereof".

(4) Section 12 is amended by adding the following subsection:

"(13) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(5) Section 13(1) is amended by omitting ", on production of his warrant of appointment if so required,".

(6) Section 13(6) is amended by—

(a) omitting ", on production of his warrant of appointment if so required,"; and

(b) omitting from the proviso "under the hand of a District Court Judge or Justice of the Peace or Community

Magistrate" and substituting "issued by an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009)".

(7) Section 13(7) is amended by—

(a) omitting "District Court Judge or Justice of the Peace or Community Magistrate who is satisfied on oath that there is probable cause to suspect" and substituting "issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who is satisfied that there are reasonable grounds to believe"; and

(b) omitting "at such time or times of the day as are mentioned in the warrant, but no such warrant shall continue in force for more than 14 days from the date thereof".

(8) Section 13 is amended by adding the following subsection:

"(10) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(9) The proviso to section 14(2) is amended by omitting "under the hand of a District Court Judge or Justice of the Peace or Community Magistrate" and substituting "issued by an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009)".

Amendments to Wildlife Act 1953

283 Amendments to Wildlife Act 1953

(1) This section amends the Wildlife Act 1953.

(2) The proviso to section 39(1)(f)~~(iii)~~ is amended by—

(a) omitting "Justice or Community Magistrate who is satisfied on oath that there is probable cause to suspect" and substituting "issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who is satisfied on reasonable grounds"; and

(b) omitting "at such time or times in the day or night as are mentioned in the warrant, but no such warrant shall continue in force for more than 14 days from the date thereof".

(3) Section 39 is amended by adding the following subsection:

"(3) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(4) Section 56A is amended by omitting "149C(1) and (2), 149D," and substituting "149C(1) to (3)".

Amendments to Wine Act 2003

284 Amendments to Wine Act 2003

(1) This section amends the Wine Act 2003.

(2) Section 62(1) is amended by omitting "at any reasonable time".

(3) Section 62(2) is amended by omitting ", at any time that is reasonable in the circumstances".

(4) Section 62 is amended by repealing subsections (3) and (4) and substituting the following subsection:

"(3) The provisions of subpart 3 of Part 4 of the Search and Surveillance Act 2009 apply in respect of the exercise of any powers under this section."

(5) Section 63 is amended by repealing subsection (2) and substituting the following subsection:

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 (other than sections 108(d), 110(2)(d), 114, and 115) apply in respect of the exercise of powers under subsection (1)(a) and (b)."

(6) Section 63(3) is amended by omitting "this section" and substituting "any of paragraphs (c) to (f) of subsection (1)".

(7) Section 65(1) is amended by—

(a) omitting "Any District Court Judge, Community Magistrate, Justice of the Peace, or Registrar may issue a search warrant, in the form set out in Schedule 1" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) may issue a search warrant"; and

(b) omitting "on application in writing made on oath" and substituting "on an application by a constable or a wine officer made in the manner provided in subpart 2 of Part 4 of the Search and Surveillance Act 2009".

(8) Section 65 is amended by repealing subsection~~s~~ (2) ~~and (3)~~ and substituting the following subsection:

"(2) Subject to section 66, the provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(9) Section 66 is amended by repealing subsection (1) and substituting the following subsection:

"(1) Without limiting the powers conferred by any search warrant issued under section 65(1), every warrant issued under that section authorises the constable or wine officer who is executing it, and any person called on by that constable or officer to assist, to exercise—

"(a) all the powers of a wine officer under sections 63 and 64; or

"(b) only such of those powers as are specified in the warrant."

(10) Section 66 is amended by repealing subsections (2) and (4).

(11) Section 67 is amended by repealing subsections (1) to (3).

(12) Section 68 is amended by—

(a) omitting "Section 199 of the Summary Proceedings Act 1957" and substituting "Subpart 5 of Part 4 of the Search and Surveillance Act 2009"; and

(b) repealing paragraphs (a) to (c); and

(c) omitting from paragraph (d) "forfeited to the Crown or".

(13) Schedule 1 is repealed.

Subpart 2—Amendments to search and seizure powers in other enactments (and to related provisions) used for regulatory purposes

Amendments to Anti-Personnel Mines Prohibition Act 1998

285 Amendments to Anti-Personnel Mines Prohibition Act 1998

(1) This section amends the Anti-Personnel Mines Prohibition Act 1998.

(2) Section 22(1) is amended by omitting "A District Court Judge, Justice, Community Magistrate, or Registrar (not being a member of the police), who, on an application," and substituting "An issuing officer (within the meaning of

section 3 of the Search and Surveillance Act 2009) who, on an application made in the manner provided in subpart 2 of Part 4 of the Search and Surveillance Act 2009,".

(3) Section 22(2) is amended by repealing paragraph (b).

(4) Section 22 is amended by repealing subsection (4) and substituting the following subsection:

"(4) The provisions of subparts 2 and 3 of Part 4 of the Search and Surveillance Act 2009 apply."

Amendments to Chemical Weapons (Prohibition) Act 1996

286 Amendments to Chemical Weapons (Prohibition) Act 1996

(1) This section amends the Chemical Weapons (Prohibition) Act 1996.

(2) Section 23(2) is amended by—

(a) omitting "a District Court Judge, duly authorised Justice, a Community Magistrate, or a Registrar (not being a member of the Police)" and substituting "an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009)"; and

(b) omitting ", unconditionally or subject to conditions, a warrant authorising the entry of the place, at any time within 14 days of the issue of the warrant (or within such further time as may be specified in the warrant)" and substituting "a warrant authorising the entry of the place".

(3) Section 23 is amended by adding the following subsection:

"(4) Subject to subsection (3), the provisions of subparts 2 and 3 of Part 4 of the Search and Surveillance Act 2009 apply."

(4) Sections 24 and 25 are repealed.

Amendments to Commerce Act 1986

287 Amendments to Commerce Act 1986

(1) This section amends the Commerce Act 1986.

(2) Section 98A(2) is amended by omitting "A District Court Judge, Justice, or Community Magistrate, or a Court Registrar

(not being a constable) who is satisfied on application made on oath" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who is satisfied, on an application made in the manner provided in subpart 2 of Part 4 of that Act".

(3) Section 98A is amended by repealing subsection (3) and substituting the following subsection:

"(3) The provisions of Part 4 of the Search and Surveillance Act 2009 apply, with any necessary modifications."

(4) Section 98A(4) is amended by adding "of this Act".

(5) Sections 98B to 98F are repealed.

(6) Section 98G is amended by omitting "to 98F" and substituting "and 98A".

Amendment to Credit Contracts and Consumer Finance Act 2003

288 Amendment to Credit Contracts and Consumer Finance Act 2003

(1) This section amends the Credit Contracts and Consumer Finance Act 2003.

(2) Section 113(d) is amended by omitting "98A to 98G" and substituting "98A and 98G".

Amendments to Electricity Act 1992

289 Amendments to Electricity Act 1992

(1) This section amends the Electricity Act 1992.

(2) Section 159(1) is amended by repealing paragraph (e) and substituting the following paragraph:

"(e) entry into a dwellinghouse must be authorised by a warrant issued by an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) on an application made in the manner provided for an application for a search warrant in subpart 2 of Part 4 of the Search and Surveillance Act 2009."

(3) Section 172KD(6) is amended by omitting "by written application made on oath" and substituting "by application made

in the manner provided in subpart 2 of Part 4 of the Search and Surveillance Act 2009".

(4) Section 172KD(7) is amended by omitting "A District Court Judge, Justice, or Community Magistrate, or a Court Registrar (not being a constable)" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009)".

Amendments to Fair Trading Act 1986

290 Amendments to Fair Trading Act 1986

(1) This section amends the Fair Trading Act 1986.

(2) Section 47(2) is amended by—

(a) omitting "A District Court Judge, Justice, Community Magistrate, or Court Registrar (not being a constable)" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009"; and

(b) omitting "on oath" and substituting "in the manner provided for an application for a search warrant in subpart 2 of Part 4 of that Act".

(3) Section 47 is amended by omitting subsection (3) and substituting the following subsection:

"(3) Part 4 of the Search and Surveillance Act 2009 applies."

(4) Sections 47A to 47E are repealed.

Amendments to Forests Act 1949

291 Amendments to Forests Act 1949

(1) This section amends the Forests Act 1949.

(2) Section 67D(1)(e) is amended by omitting "under section 67S" and substituting "in accordance with the provisions of Part 4 of the Search and Surveillance Act 2009".

(3) Section 67R is amended by adding the following subsection as subsection (2):

"(2) The provisions of Part 4 of the Search and Surveillance Act 2009 apply."

(4) Section 67S is repealed.

(5) Section 71B(1) is amended by omitting "subject to the following conditions" and substituting "subject to Part 4 of the Search and Surveillance Act 2009 and to the following conditions".

(6) Section 71B(1)(b) to (d) and (f) are repealed.

(7) Section 71B(1)(e) is amended by omitting "on oath by an authorised person to a District Court Judge, Justice of the Peace, Community Magistrate, or Registrar or Deputy Registrar of any Court" and substituting "in the manner provided for an application for a search warrant in Part 4 of the Search and Surveillance Act 2009 by an authorised person to an issuing officer".

(8) Section 71B(2) is amended by inserting "and the conditions set out in Part 4 of the Search and Surveillance Act 2009 relating to time of entry, notification of intention to enter, and evidence of identification or authorisation to enter," after "that subsection,".

Amendments to Gas Act 1992

292 Amendments to Gas Act 1992

(1) This section amends the Gas Act 1992.

(2) Section 43W(6) is amended by omitting "by written application on oath" and substituting "by application made in the manner provided in subpart 2 of Part 4 of the Search and Surveillance Act 2009".

(3) Section 43W(7) is amended by omitting "A District Court Judge, Justice, or Community Magistrate, or a Court Registrar (not being a constable)" and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009)".

(4) Section 50(1) is amended by repealing paragraph (e) and substituting the following paragraph:

"(e) entry into a dwellinghouse must be authorised by a warrant issued by an issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) on an application made in the manner provided for an application for a search warrant in subpart 2 of Part 4 of the Search and Surveillance Act 2009."

Amendment to International Energy Agreement Act 1976

293 Amendment to International Energy Agreement Act 1976

(1) This section amends the International Energy Agreement Act 1976.

(2) Section 9(3) is amended by omitting "sections 198 and 199 of the Summary Proceedings Act 1957" and substituting "section 6 of the Search and Surveillance Act 2009 and subpart 5 of Part 4 of that Act".

(3) Section 11 is amended by omitting "sections 198 and 199 of the Summary Proceedings Act 1957" and substituting "section 6 of the Search and Surveillance Act 2009 and subpart 5 of Part 4 of that Act".

Amendments to Weights and Measures Act 1987

294 Amendments to Weights and Measures Act 1987

(1) This section amends the Weights and Measures Act 1987.

(2) Section 28(3) is amended—

(a) by omitting "Any District Court Judge, Justice, or Community Magistrate, or any Registrar (not being a constable), who, on an application in writing made on oath," and substituting "An issuing officer (within the meaning of section 3 of the Search and Surveillance Act 2009) who, on an application made in the manner provided for an application for a search warrant in subpart 2 of Part 4 of the Search and Surveillance Act 2009,"; and

(b) by omitting "in the prescribed form".

Subpart 3—Other repeals and amendments

Amendments to Arms Act 1983

295 Arms Act 1983 amended

(1) This section amends the Arms Act 1983.

(2) The heading above section 60 and sections 60 to 61 are repealed.

Amendments to Corrections Act 2004

296 Corrections Act 2004 amended

(1) This section amends the Corrections Act 2004.

(2) Section 23(1) is amended by omitting "314A to 314D of the Crimes Act 1961" and substituting "117, 123, 124, and 169 of the Search and Surveillance Act 2009".

(3) Section 23(3) is amended by repealing paragraph (a) and substituting the following paragraph:

"(a) section 18 of the Misuse of Drugs Act 1975 (which confers powers of search and seizure):".

(4) Section 23(3) is amended by repealing paragraph (d) and substituting the following paragraphs:

"(d) section 22 of the Search and Surveillance Act 2009 (which confers powers in relation to internal searches):

"(e) sections 44 and 45 of the Search and Surveillance Act 2009 (which confer powers in relation to surveillance devices)."

(5) Section 103(2) is amended by—

(a) omitting "or section 18A"; and

(b) adding "or section 22 of the Search and Surveillance Act 2009".

Amendments to Crimes Act 1961

297 Crimes Act 1961 amended

(1) This section amends the Crimes Act 1961.

(2) Section 1(3) is amended by omitting "Part 11A—Obtaining Evidence by Listening to Devices. (Sections 312A to 312Q.)".

(3) Section 2(1) is amended by inserting the following definition in its appropriate alphabetical order:

"**serious violent offence** means any offence—

"(a) that is punishable by a period of imprisonment for a term of 7 years or more; and

"(b) where the conduct constituting the offence involves—

"(i) loss of a person's life or serious risk of loss of a person's life; or

"(ii) serious injury to a person or serious risk of serious injury to a person; or

"(iii) serious damage to property in circumstances endangering the physical safety of any person; or

"(iv) perverting the course of justice, where the purpose of the conduct is to prevent, seriously hinder, or seriously obstruct the detection, investigation, or prosecution of any offence—

"(A) that is punishable by a period of imprisonment for a term of 7 years or more; and

"(B) that involved, involves, or would involve conduct of the kind referred to in any of subparagraphs (i) to (iii)".

(4) Section 98A(2) is amended by omitting "(within the meaning of section 312A(1))" in each place where it appears.

(5) Sections 202B, ~~216F~~ 216F(1)(a) and (b)(ii), 224, and 225, Part 11A, the heading above section 314A, sections 314A to 314D, and sections 317 to 317B are repealed.

(6) Section 216B(2)(b) is amended by repealing subparagraph (i) and substituting the following subparagraph:

"(i) the Search and Surveillance Act 2009; or".

(7) Section 216B(2)(b) is amended by repealing subparagraph (iv).

(8) Section 216B(3) is repealed.

(9) Section 216B(7) is amended by inserting "or of a surveillance device warrant issued under the Search and Surveillance Act 2009" after "interception warrant".

Amendment to District Courts Act 1947

298 District Courts Act 1947 amended

Section 299 amends the District Courts Act 1947.

299 New section 17A substituted

Section 17A is repealed and the following section substituted:

"**17A Sections 117, 123, and 124 of Search and Surveillance Act 2009 inapplicable to bailiffs**

Sections 117, 123, and 124 of the Search and Surveillance Act 2009 (which relate to a general power to stop vehicles) do not apply to any bailiff."

Amendment to Electricity Industry Reform Act 1998

300 Electricity Industry Reform Act 1998 amended

(1) This section amends the Electricity Industry Reform Act 1998.

(2) Section 58(h) is amended by omitting "sections 98B to 98G" and substituting "section 98G".

Amendment to Health Act 1956

301 Health Act 1956 amended

(1) This section amends the Health Act 1956.

(2) Section 71A is amended by repealing subsection (5) and substituting the following subsection:

"(5) Sections 123, 124, and 169 of the Search and Surveillance Act 2009, with any necessary modifications, apply to the powers conferred by subsection (2)(c)."

Amendments to Misuse of Drugs Act 1975

302 Misuse of Drugs Act 1975 amended

Sections 303 and 304 amend the Misuse of Drugs Act 1975.

303 New section 18 substituted

Sections 18 and 18A are repealed and the following section is substituted:

"**18 Seizing and destroying prohibited plants and seeds**

"(1) The following persons may take any or all of the actions described in subsection (2):

"(a) a constable:

"(b) an officer of Customs:

"(c) an officer of the Ministry of Health:

"(d) a Medical Officer of Health:

"(e) an assistant thought to be necessary by any of the persons in paragraphs (a) to (d).

"(2) The actions are to seize and destroy any of the following:

"(a) a prohibited plant that is not being cultivated in accordance with—

"(i) the conditions of a licence granted under this Act; or

"(ii) regulations made under this Act:

"(b) the seed of a prohibited plant that is not in the possession of a person—

"(i) authorised under this Act to cultivate the plant; or

"(ii) permitted by regulations made under this Act to have the seed in his or her possession."

304 Application of Customs and Excise Act 1996

Section 36 is amended by omitting "149C(1) and (2), 149D, 151, 152, 161, 165 to 172" and substituting "149C(1) to (3), 151, 152, 161, 166A to 167".

Amendments to Misuse of Drugs Amendment Act 1978

305 Misuse of Drugs Amendment Act 1978 amended

(1) This section amends the Misuse of Drugs Amendment Act 1978.

(2) Section 10(1) is amended by inserting the following definitions in their appropriate alphabetical order:

"**serious violent offence** means any offence—

"(a) that is punishable by a period of imprisonment for a term of 7 years or more; and

"(b) where the conduct constituting the offence involves—

"(i) loss of a person's life or serious risk of loss of a person's life; or

"(ii) serious injury to a person or serious risk of serious injury to a person; or

"(iii) serious damage to property in circumstances endangering the physical safety of any person; or

"(iv) perverting the course of justice, where the purpose of the conduct is to prevent, seriously hinder, or seriously obstruct the detection, investigation, or prosecution of any offence—

"(A) that is punishable by a period of imprisonment for a term of 7 years or more; and

"(B) that involved, involves, or would involve conduct of the kind referred to in any of subparagraphs (i) to (iii)

"**specified offence** means any of the following offences:

"(a) an offence punishable by a period of imprisonment for a term of 10 years or more:

"(b) an offence against section 116 of the Crimes Act 1961 (which relates to conspiring to defeat justice):

"(c) an offence against section 117 of the Crimes Act 1961 (which relates to corrupting juries and witnesses):

"(d) an offence punishable under section 223(b) of the Crimes Act 1961 (theft of property exceeding $1,000 in value):

"(e) an offence against section 243 of the Crimes Act 1961 (which relates to money laundering):

"(f) an offence punishable under section 247 of the Crimes Act 1961 (which relates to receiving property dishonestly obtained)

"**terrorist offence** means an offence against any of sections 6A to 13E of the Terrorism Suppression Act 2002".

(3) Section 12(1) is amended by inserting the following ~~paragraph~~ paragraphs after paragraph (b):

"(ba) allow the package or goods to be delivered by a person who has agreed to co-operate with Customs; or

"(bb) deliver the package or goods; or".

(4) Sections 12A to 12C, 25, and 26 are repealed.

(5) Section 21(1)(b) is amended by omitting "(as those terms are defined in section 312A of the Crimes Act 1961)".

(6) Section 22(1)(b) is amended by omitting "(as those terms are defined in section 312A of the Crimes Act 1961)".

Amendment to Mutual Assistance in Criminal Matters Act 1992

306 Mutual Assistance in Criminal Matters Act 1992 amended

(1) This section amends the Mutual Assistance in Criminal Matters Act 1992.

(2) Section 46A is amended by omitting "314B to 314D of the Crimes Act 1961 apply with any necessary modifications as if

references in those sections to a statutory search power are" and substituting "117, 123, 124, and 169 of the Search and Surveillance Act 2009 apply with any necessary modifications as if references in those sections to a power to stop or search a vehicle conferred under that Act ~~or any relevant enactment (as defined in section 3 of that Act)~~ were".

Amendments to Policing Act 2008

307 Policing Act 2008 amended

(1) This section amends the Policing Act 2008.

(2) Sections 37 to 39 are repealed.

(3) Clause 1(a) of Schedule 1 is amended by omitting "36, and 37" and substituting "and 36".

(4) Clause 1 of Schedule 1 is amended by inserting the following paragraph after paragraph (a):

"(ab) the powers of a constable under section 11 of the Search and Surveillance Act 2009:".

(5) Clause 4(e) of Schedule 1 is amended by omitting "32, 33, and 37" and substituting "32 and 33".

(6) Clause 4 of Schedule 1 is amended by inserting the following paragraph after paragraph (e):

"(ea) the powers of a constable under section 11 of the Search and Surveillance Act 2009:".

(7) Clause 5 of Schedule 1 is amended by omitting "314B of the Crimes Act 1961" and substituting "117 of the Search and Surveillance Act 2009".

~~*Amendment to Proceeds of Crime Act 1991*~~

~~**308 Proceeds of Crime Act 1991 amended**~~

~~(1) This section amends the Proceeds of Crime Act 1991.~~

~~(2) Section 32A is amended by omitting "314B to 314D of the Crimes Act 1961 apply with any necessary modifications as if references in those sections to a statutory search power are" and substituting "117, 123, 124, and 169 of the Search and Surveillance Act 2009 apply with any necessary modifications as if references in those sections to a power to stop or search~~

~~a vehicle conferred under that Act or any relevant enactment (as defined in section 3 of that Act) were".~~

Amendments to Summary Proceedings Act 1957

309 Summary Proceedings Act 1957 amended

(1) This section amends the Summary Proceedings Act 1957.

(2) Section 3(1)(h) is repealed.

(3) The heading above section 198 and sections 198 to 200 are repealed.

(4) The heading above section 200A and sections 200A to 200P are repealed.

(5) Part 2 of Schedule 1 is amended by inserting the following item after the item relating to the Sales Tax Act 1974:

Search and Surveillance Act 2009	165	Failing to comply with examination order
	166	Failing to comply with production order

Amendment to Telecommunications Act 2001

310 Telecommunications Act 2001 amended

(1) This section amends the Telecommunications Act 2001.

(2) Section 15(g) is amended by omitting "to 98G" and substituting "and 98G".

Amendment to Telecommunications (Interception Capability) Act 2004

311 Telecommunications (Interception Capability) Act 2004 amended

(1) This section amends the Telecommunications (Interception Capability) Act 2004.

(2) Paragraph (a) of the definition of **interception warrant** in section 3(1) is repealed.

Repeal of Telecommunications (Residual Provisions) Act 1987

312 Telecommunications (Residual Provisions) Act 1987 repealed

The Telecommunications (Residual Provisions) Act 1987 (1987 No 116) is repealed.

Subpart 4—Regulation-making powers, transitional provisions, and review provision

313 Regulations

(1) The Governor-General may, by Order in Council, make regulations for any or all of the following purposes:

(a) prescribing the form of an examination order, a surveillance device warrant, ~~residual warrant~~ declaratory order, production order, search warrant, warrant authorising entry to a dwellinghouse or marae, or similar kinds of warrants:

(b) prescribing procedures to be followed for the purposes of making and resolving claims of privilege under subpart 4 of Part 4:

(c) authorising a chief executive to omit from any annual report information about search or surveillance generally, or of a particular kind, or in a particular area, or in an area of a particular kind:

(d) providing for any other matters contemplated by the Act, necessary for its administration, or necessary for giving it full effect.

(2) Regulations made under subsection (1)(a) may do any or all of the following:

(a) prescribe different forms of warrant or order for use under different enactments:

(b) prescribe any form of warrant or order by listing the minimum information requirements to be included:

(c) authorise a chief executive or any other specified person or class of person to authorise variations in the language, provisions, or format of any form of warrant or order in the warrant or order:

(d) authorise a chief executive or any other specified class of person to include additional information in a prescribed form of warrant or order.

Transitional provisions

314 Transitional provision in relation to reporting requirements

For the purposes of section 163, the period to be reported on in the first annual report published after the commencement of ~~this Act~~ that section begins with the commencement of ~~this Act~~ that section and ends with the end of the financial year or other period ordinarily the subject of the report.

315 Transitional provision in relation to sections 198 to 200 of Summary Proceedings Act 1957

(1) Despite their repeal by section 309, sections 198 to 200 of the Summary Proceedings Act 1957 remain in force for the purposes of any enactment that incorporates or refers to any of those provisions.

(2) Subsection (1) does not limit the application of the Interpretation Act 1999.

(3) This section expires on the close of 30 June 2014.

Review provision

316 Review of operation of Act

(1) The Minister of Justice must, not later than 30 June ~~2015~~ 2016, refer to the Law Commission and the Ministry of Justice for consideration the following matters:

(a) the operation of the provisions of this Act since the date of the commencement of this section:

(b) whether those provisions should be retained or repealed:

(c) if they should be retained, whether any amendments to this Act are necessary or desirable.

(2) The Law Commission and the Ministry must report jointly on those matters to the Minister of Justice within 1 year of the date on which the reference occurs.

(3) The Minister of Justice must present a copy of the report provided under this section to the House of Representatives as soon as practicable after receiving it.

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Powers in other enactments to which all or part of Part 4 of Search and Surveillance Act 2008 applies

Note: a number of issues require further consideration; including whether to include references to subpart 1 of Part 4

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Agricultural Compounds and Veterinary Medicines Act 1997	64(1) and (2)	ACVM officer may enter and inspect transitional facility or biosecurity control area	All (except sections 108(d), 110(2)(d), 114, and 115 (which relate to detention and search incidental to power of arrest))
	69(1)	Constable or ACVM officer may obtain and execute search warrant to search for agricultural compounds or biological agents and related objects	All
	71(1)	Constable or ACVM officer may dispose of property seized under search warrant issued under section 69(1) of Agricultural Compounds and Veterinary Medicines Act 1997	*Subpart 5 (which sets out procedures applying to seized or produced materials)
Animal Products Act 1999	87(1) and (2)	Animal product officer may enter place to determine whether person is complying with Animal Products Act 1999 or whether shellfish pose hazard to public health	*Subpart 3 (which relates to carrying out search powers)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	88(1)	Animal product officer may examine things at place entered under section 87(1) or (2) of Animal Products Act 1999	All (except sections 108(d), 110(2)(d), 114, and 115 (which relate to detention and search incidental to power of arrest))
	94(1)	Constable or animal product officer may obtain and execute search warrant to search for evidence of offence against Animal Products Act 1999 or in relation to shellfish contaminants	All
	97	Constable or animal officer may dispose of property seized under search warrant issued under section 94(1) of the Animal Products Act 1999	*Subpart 5 (which sets out procedures applying to seized or produced materials)
Animal Welfare Act 1999	131(1) and (2)	Constable or animal welfare inspector may obtain and execute search warrant to search for evidence of offence against Animal Welfare Act 1999 or to prevent or investigate suffering of animal	All (except that sections 108(d), 110(2)(d), 114, and 115 (which relate to detention and search incidental to power of arrest) apply only to a constable)
	136(1)	Constable or animal welfare inspector may dispose of property seized under search warrant issued under section 131 of Animal Welfare Act 1999 or dispose of any animal taken under section 137 of that Act	*Subpart 5 (which sets out procedures applying to seized or produced materials)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Antarctic Marine Living Resources Act 1981	9(1)	High seas fishery inspector may enter, inspect, and examine vehicle, vessel, aircraft, or hovercraft for evidence of an offence against Antarctic Marine Living Resources Act 1981	All
Antarctica (Environmental Protection) Act 1994	42(1)	Special inspector may obtain and execute search warrant to search for evidence of offence against Antarctica (Environmental Protection) Act 1994	All
	43(1)	Special inspector may search without warrant for evidence of offence against Antarctica (Environmental Protection) Act 1994, in exigent circumstances	All
Anti-Personnel Mines Prohibition Act 1998	22	Anti-personnel mines officer may obtain and execute search warrant to enter and inspect place in order to exercise function conferred by Anti-Personnel Mines Prohibition Act 1998	*Subparts 2 and 3 (which relate to applications for, and issuing of, search warrants, and carrying out search powers, respectively)
Aviation Crimes Act 1972	13(1)	Constable may search person who declines to allow his or her luggage to be searched in circumstances where constable believes crime against Aviation Crimes Act 1972 may have been committed	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Biosecurity Act 1993	110(1)	Inspector or authorised person may obtain and execute search warrant to enter and inspect places for pests, pest agents, unwanted organisms, unauthorised goods, or risk goods, and to check activities carried out under Biosecurity Act 1993	Subpart 2 (which relates to applications for, and issuing of, search warrants)
	111(1)	Inspector or authorised person may obtain, and inspector, authorised person, or constable may execute, search warrant to search for evidence of offence against Biosecurity Act 1993	*Subpart 2 (which relates to applications for, and issuing of, search warrants)
	118(1)	Person exercising power of search conferred by section 111 of Biosecurity Act 1993 may seize things	*Subpart 5 (which sets out procedures applying to seized or produced materials)
Boxing and Wrestling Act 1981	9	Constable may obtain and execute search warrant to obtain evidence of offence against Boxing and Wrestling Act 1981	All
Children, Young Persons, and Their Families Act 1989	39(1) and (3)	Constable or social worker may obtain and execute place of safety warrant authorising search for, and removal of, child at risk of harm	Sections 97 and 103 only (which relate to verification of applications, and transmission of search warrants, respectively)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	40(1) and (4)	On application for order that child is in need of care and protection, constable or social worker may obtain and execute search warrant authorising search for and removal of child	Sections 97 and 103 only (which relate to verification of applications, and transmission of search warrants, respectively)
	386(1)	If child or young person absconds, constable or social worker may obtain and execute search warrant authorising search for and removal and return of child or young person	Sections 97 and 103 only (which relate to verification of applications, and transmission of search warrants, respectively)
Civil Aviation Act 1990	24(4)	Authorised person may obtain and execute warrant to enter dwelling-house or marae for purposes of exercising powers of inspection conferred on Director of Civil Aviation by Civil Aviation Act 1990	*Subparts 2 and 3 (which relate to applications for, and issuing of, search warrants, and carrying out search powers, respectively)
Commerce Act 1986	98A(2)	Authorised employee of Commerce Commission may obtain and execute warrant to search for evidence of offence against most provisions of Commerce Act 1986	All
Commodity Levies Act 1990	19(1)	Constable or designated person may obtain and execute warrant to enter and search for evidence of offence against Commodity Levies Act 1990	All (except sections 108(d), 110(2)(d), 114, and 115 (which relate to detention and search incidental to power of arrest))

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Conservation Act 1987	40(1) and (5)	Warranted officer may seize various things held in contravention of Conservation Act 1987 and exercise other powers; constable or warranted officer may seize thing in respect of which it is believed offence is being committed under Conservation Act 1987	All
Credit Contracts and Consumer Finance Act 2003	113(d)	Powers of the Commerce Commission to search and seize under section 98A to 98G of Commerce Act 1986 are applied to Credit Contracts and Consumer Finance Act 2003 (with any necessary modifications)	All
Customs and Excise Act 1996	139(1)(d)	Customs officer and authorised person may board craft if officer or authorised person has reasonable cause to suspect craft is involved in offence against Customs and Excise Act 1996 or is carrying dutiable, uncustomed, prohibited, or forfeited goods	All (except that sections 120(2), 126(5)(e), and 127 and subparts 5 and 7 of Part 4 do not apply to forfeited goods)
	140	Customs officer and authorised person may search craft if officer or authorised person has reasonable cause to suspect craft is involved in offence against Customs and Excise Act 1996 or is carrying dutiable, uncustomed, prohibited, or forfeited goods	All (except that sections 120(2), 126(5)(e), and 127 and subparts 5 and 7 of Part 4 do not apply to forfeited goods)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	144	Customs officer or, in certain cases, constable, may stop and detain vehicle to search it for various kinds of goods	All (except that sections 120(2), 126(5)(e), and 127 and subparts 5 and 7 of Part 4 do not apply to forfeited goods)
	149B	Customs officer or, in certain cases, constable, may search person if officer or constable has reasonable cause to suspect that certain items are hidden on or about that person and are evidence that the person has committed or is about to commit certain offences against Customs and Excise Act 1996	All (except that sections 120(2), 126(5)(e), and 127 and subparts 5 and 7 of Part 4 do not apply to forfeited goods)
	149BA	Customs officer or constable may search a person for dangerous items if officer or constable has reasonable grounds to believe that items posing threat to safety are on or about the person	All (except that sections 120(2), 126(5)(e), and 127 and subparts 5 and 7 of Part 4 do not apply to forfeited goods)
	149C	Customs officer or constable may seize certain things found during search under section 149B or 149BA of Customs and Excise Act 1996	All (except that sections 120(2), 125(5)(e), and 127 and subparts 5 and 7 of Part 4 do not apply to forfeited goods)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	152	Customs officer may, on direction of chief executive, inspect goods no longer under control of Customs if chief executive has reasonable grounds to suspect goods are goods in respect of which offence has been committed, or that are forfeited to the Crown, under Customs and Excise Act 1996	All (except that sections 120(2), 126(5)(e), and 127 and subparts 5 and 7 of Part 4 do not apply to forfeited goods)
	167(1)	Customs officer may obtain and execute search warrant to enter any place or thing to search for evidence of contravention of Customs and Excise Act 1996 or anything that is unlawfully imported or exported, or is used for the purpose of unlawful exportation or importation of goods	All (except that sections 120(2), 126(5)(e), and 127 and subparts 5 and 7 of Part 4 do not apply to forfeited goods)
	175C	Customs officer may seize or detain goods suspected to be certain risk goods or evidence of commission of certain offences, if those goods are discovered in the course of exercising powers of inspection, search, or examination under Customs and Excise Act 1996	*Subpart 5 (which sets out procedures applying to seized or produced materials)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	175D	Customs officer may seize and detain goods or documents (located in the course of exercising any power of search, inspection, or examination under Customs and Excise Act 1996) that he or she has reasonable cause to suspect are evidence of any of specified list of offences under Misuse of Drugs Act 1975 or Films, Videos, and Publications Classification Act 1993	All (except that sections 120(2), 126(5)(e), and 127 and subparts 5 and 7 of Part 4 do not apply to forfeited goods)
Dairy Industry Restructuring Act 2001	29I(1)	Constable or chief executive of Ministry of Agriculture and Forestry or person authorised by chief executive may obtain and execute search warrant to search for evidence of offence against section 31(3) of Dairy Industry Restructuring Act 2001	All (except that sections 108(d), 110(2)(d), 114, and 115 apply only if constable executes search warrant)
Dog Control Act 1996	14(1) to (3)	Dog control officer who has good cause to suspect that offence against Dog Control Act 1996 or bylaw under that Act is being committed may enter land or premises, and inspect any dog, and if authorised by that Act, seize or take custody of dog (note: warrant must be obtained to enter dwellinghouse)	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	56(3)	Dog ranger or dog control officer may enter dwellinghouse to remove barking dog (following non-compliance with remedial notice) if he or she obtains warrant to enter	*Subpart 2 (which relates to applications for, and issuing of, search warrants)
	57(6)(b)	Dog ranger or dog control officer may enter dwellinghouse to seize dog that has attacked persons or animals if he or she has warrant to enter (note: entry may be without warrant in exigent circumstances)	*Subpart 2 (which relates to applications for, and issuing of, search warrants)
Driftnet Prohibition Act 1991	13(1) and (2)	Enforcement officer may exercise powers of entry and variety of other powers for purposes of enforcing Driftnet Prohibition Act 1991	*Subparts 3 to 6 (other than sections 108(d), 110(2)(d), 114, and 115 (which relate to detention and search incidental to power of arrest) and section 172)
	16	Property seized by enforcement officer under section 15 of Driftnet Prohibition Act 1991 may be held	*Subpart 5 (which sets out procedures applying to seized or produced materials)
Electricity Act 1992	159(1)(e)	Dwellinghouse may be entered under general power of entry conferred by Electricity Act 1992 if warrant authorising entry to that dwelling house is obtained by person exercising power	*Subpart 2 (which relates to applications for, and issuing of, search warrants)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	172KD(6) and (7)	Authorised person may enter and search any place to ascertain if industry participant has breached electricity governance regulations or rules if he or she obtains search warrant	*Subpart 2 (which relates to applications for, and issuing of, search warrants)
Employment Relations Act 2000	231	Labour inspector may enter dwellinghouse with warrant (which may be issued only if a Judge is satisfied that a person is employed there and that a warrant is only practicable means of enabling inspector to gain entry)	*Subpart 2 (which relates to applications for, and issuing of, search warrants (except that power to issue a warrant is limited to a Judge))
Extradition Act 1999	83(2)	Issuing officer may issue search warrant to constable to search for evidence of extradition offence	All (except subpart 5)
Fair Trading Act 1986	47(2)	Authorised employee of Commerce Commission may obtain and execute search warrant to investigate breaches of Fair Trading Act 1986	All
Films, Videos, and Publications Classification Act 1993	109	Constable or inspector may obtain and execute search warrant to search for evidence of offences against Films, Videos, and Publications Classification Act 1993 (other than against sections 126 and 131A)	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	109A(1) and 109B	Constable or inspector may obtain and execute search warrant to search for evidence of offences against section 126 or 131A of Films, Videos, and Publications Classification Act 1993	All
Financial Transactions Reporting Act 1996	38	Customs officer may search and detain person leaving New Zealand with cash if cash report is required and has not been made or report is false, incomplete, incorrect, or misleading	All
	44	Constable may obtain and execute search warrant to search for evidence of offence against Financial Transactions Reporting Act 1996 or any regulations made under that Act	All
Fisheries Act 1996	199(1)	Fishery officer may examine any vessel, vehicle, premises, or other place in the course of enforcement and administration of Fisheries Act 1996	All (except subpart 2 and section 115)
	199A	Fishery officer may enter, examine, and search anything that relates to suspected offence against Fisheries Act 1996	All (except subpart 2)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	200(1)	Fishery officer may enter dwellinghouse or surrounds or Māori reservation (under power conferred elsewhere in Fisheries Act 1996) if authorised to do so by issuing officer	*Subpart 2 (which relates to applications for, and issuing of, search warrants)
	207(1)	Property seized by fishery officer in relation to suspected offence against Fisheries Act 1996 may be held	*Subpart 5 (which sets out procedures applying to seized or produced materials)
	217(1)	Fishery officer or high seas fishery inspector exercising power under Fisheries Act 1996 must identify himself or herself	*Subpart 3 (which relates to carrying out search powers)
	217(2)	Production of warrant by fishery officer, high seas fishery inspector, or examiner sufficient proof of authority to act under Fisheries Act 1996	*Subpart 3 (which relates to carrying out search powers)
Food Act 1981	12(1) and (2)	Food officer may seize and detain articles and advertising material or labelling material reasonably believed to be in contravention of Food Act 1981 or, as applicable, any food standards or regulations made under that Act	All (other than sections 120(2), 126(5)(e), and 127 and subparts 5 and 7)
	13(1)	Local authority inspector and any assistant under his or her direction may seize and detain any food or appliance related to certain suspected offences under Food Act 1981	All (except sections 120(2), 126(5)(e), and 127 and subparts 5 and 7)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Forests Act 1949	67D(1)(e)	Timber seized by Secretary (chief executive of Ministry of Agriculture and Forestry) or forestry officer may be disposed of in accordance with Part 4 of the Search and Surveillance Act 2009	All
	67R	Secretary (chief executive of Ministry of Agriculture and Forestry) and any forestry officer may enter various places to inspect indigenous timber from indigenous forest land and may seize indigenous timber involved in a contravention of Forests Act 1949	All
	71B(1)	Various powers of entry conferred by Forests Act 1949 are subject to specified statutory restrictions (including all of Part 4 of Search and Surveillance Act 2009)	All
Gambling Act 2003	335(1)	Gambling inspector may, while in casino, seize any gambling equipment, device, or thing that inspector has reasonable grounds to believe is evidence of offence against sections 351 to 353 of Gambling Act 2003	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	336(1)	Gambling inspector may, while in public place, seize any equipment, device, or thing the inspector has reasonable grounds to believe is evidence of offence against Gambling Act 2003 or related offence involving gambling	All
	340(3)	Gambling inspector or constable may obtain and execute search warrant to search for evidence of offence against Gambling Act 2003 or related offence involving gambling	All
Gas Act 1992	43W(6) and (7)	Authorised person may enter home of industry participant under authority of warrant (which may be issued if there are reasonable grounds to believe it is necessary to issue warrant to ascertain whether industry participant has breached, or may breach, gas governance regulations or rules)	*Subpart 2 (which relates to applications for, and issuing of, search warrants)
	50(1)	Any power of entry conferred by Gas Act 1992 or regulations made under that Act may be exercised in respect of dwellinghouse if warrant is issued (note: entry without warrant allowed in exigent circumstances)	*Subpart 2 (which relates to applications for, and issuing of, search warrants)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Hazardous Substances and New Organisms Act 1996	119(1)	Enforcement officer may obtain and execute search warrant to search for evidence of any substance or organism or related thing involved in offence against Hazardous Substances and New Organisms Act 1996	All
Health and Safety in Employment Act 1992	31(3)	Health and safety inspector may obtain and execute warrant to enter or go through dwelling-house (note: warrant may be issued only if there are reasonable grounds for believing that the home is or has within it a place of work or is the only practical means of entering a place of work)	*Subpart 2 (which relates to applications for, and issuing of, search warrants)
Health Practitioners Competence Assurance Act 2003	10(1)	Constable may obtain and execute search warrant to search for evidence of offence against section 7 or 9 of Health Practitioners Competence Assurance Act 2003	All
Human Assisted Reproductive Technology Act 2004	68(1)	Authorised person may enter place if he or she has reasonable grounds to believe that gamete, embryo, or foetus formed by prohibited action is located there or any assisted reproductive procedure or human reproductive research is conducted there, and inspect equipment at place and exercise other powers such as	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
		powers of inspection and search and seizures at various times	
	69(2)	Authorised person may enter dwellinghouse and exercise section 68 powers inside house under section 68(1) of Human Assisted Reproductive Technology Act 2004 only if he or she obtains a search warrant	All
Human Tissue Act 2008	68(1)	Authorised person may enter place if he or she has reasonable grounds to believe that collection or use of human tissue at place involves contravention of Human Tissue Act 2008, or there is evidence of contraventions of Act at that place, and inspect equipment at place and exercise other powers such as powers of inspection and search and seizure of various items	All
	69(2)	Authorised person may enter dwellinghouse and exercise section 68 powers inside house only if he or she obtains search warrant	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Immigration Advisers Licensing Act 2007	57(1)(e)	Person authorised by Registrar who enters premises for purposes of administering licensing regime may retain certain documents if there are grounds for believing they are evidence of commission of offence	*Subpart 5 (which sets out procedures applying to seized or produced materials)
	61(1)	Person may obtain entry warrant for dwellinghouse if there are reasonable grounds to believe that immigration adviser, former immigration adviser, or applicant for licence as immigration adviser has worked there, and obtaining entry warrant is only practicable way in which to obtain entry	*Subpart 2 (which relates to applications for, and issuing of, search warrants)
International Crimes and International Criminal Court Act 2002	102(1) and (2)	Constable may obtain and execute search warrant to search for evidence of international crime or anything related to such crime	*Subparts 1 to 4 and 6 to 8 and also sections 154 and 155 (which relate to disposal or retention of copies made or things generated by person exercising search or surveillance power)
	107(2)	Report on execution of search warrant together with copy of any notice given under section 127 of Search and Surveillance Act 2009 must be given to Attorney-General	Section 127 (which requires provision of inventory of items seized)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	108(4)	Things seized under search warrant issued under section 102 of International Crimes and International Criminal Court Act 2000 must be returned to person from whom they were seized (subject to section 148 of Search and Surveillance Act 2009)	Section 148 (which provides that seized or produced property is forfeit to the Crown if ownership is not established)
	108(5)	Attorney-General may refuse to return thing seized in certain circumstances (subject to section 147 of Search and Surveillance Act 2009)	Section 147 (which sets out procedure for resolving disputes about ownership of things seized or produced)
International Energy Agreement Act 1976	9(3)	Regulations may be made allowing powers of entry conferred by section 9 of International Energy Agreement Act 1976 to be exercised to ensure compliance with those regulations (note: regulations must not limit section 6 of Search and Surveillance Act 2009 or subpart 5 of Part 4 of that Act)	*Subpart 5 (which sets out procedures applying to seized or produced materials)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
International War Crimes Tribunals Act 1995	48(1)	Commissioned officer of Police may obtain and execute warrant to search for evidence of suspected offence for which person has been arrested under section 7 of International War Crimes Tribunals Act 1995 or for any thing in respect of which such offence has been, or is suspected of having been, committed	Subparts 1 to 4 and 6 to 8 and also sections 154 and 155
	48(2)	Constable, authorised by Attorney-General, may obtain and execute warrant to search for evidence of suspected offence that war crimes tribunal has jurisdiction to try, and for any thing in respect of which such offence has been, or is suspected of having been, committed	Subparts 1 to 4 and 6 to 8 and also sections 154 and 155
	55(5) and (6)	Anything seized may be retained in certain circumstances, but must otherwise be returned to person from whom it was seized (subject to sections 147 and 148 of Search and Surveillance Act 2009)	Sections 147 and 148 (which set out procedures for resolving disputes about ownership of goods produced or seized, and provide for forfeiture to the Crown where ownership is not established)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Land Transport Act 1998	119(1) and (2)	Enforcement officer may enter any premises if he or she is in fresh pursuit of driver suspected of committing certain offences against Land Transport Act 1998, or of driver who has failed to provide certain information	All
	119(3)	Enforcement officer may enter premises without warrant, in exigent circumstances, to seize and impound vehicle liable to impoundment under various provisions of Land Transport Act 1998	All
	119(5)	Enforcement officer may obtain and execute warrant to enter premises and seize and impound vehicle liable to impoundment under various provisions of Land Transport Act 1998	All
Local Government Act 2002	165	Enforcement officer may obtain and execute warrant to enter private land involved in commission of offence and seize and impound property	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	172	Warranted enforcement officer may enter land for purpose of detecting breach of bylaw or commission of offence against Local Government Act 2002, if officer has reasonable grounds for suspecting such breach or offence has occurred, or is occurring, on the land (note: warrant must be obtained before this power can be exercised in respect of dwellinghouse)	All
	173(1)	Local authority, for purposes of doing anything it is authorised to do under Local Government Act 2002, may enter property without giving prior notice in certain circumstances involving sudden emergency or if there is danger to any works or to adjoining property	All
Major Events Management Act 2007	67(1)	Constable or enforcement officer may obtain and execute search warrant to search for evidence of offence against Major Events Management Act 2007 or for any related thing	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Marine Mammals Protection Act 1978	13(1)	Marine mammals officer who has reason to believe or suspect that offence against Marine Mammals Protection Act 1978 has been committed may enter, inspect, and examine any vehicle, vessel, aircraft, or hovercraft and may exercise certain powers of seizure	All
	14(1)	Marine mammals officer may obtain and execute search warrant to search for evidence of offence against Marine Mammals Protection Act 1978 or of any preparation to commit such offence	All
Marine Reserves Act 1971	18(1)(d)	Ranger may, if he or she reasonably believes that person has committed offence against Marine Reserves Act 1971 or any regulations made under that Act, stop any vessel, vehicle, or aircraft or parcel, package, luggage, or other container in transit and may enter or open and search any such thing	All
	18A	Ranger may, if he or she believes there has been breach of Marine Reserves Act 1971 or any regulations made under that Act, exercise certain seizure powers	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Maritime Security Act 2004	51(4)	Authorised person may obtain and execute search warrant to search certain persons and their personal effects or a ship if issuing officer is satisfied that there are reasonable grounds to believe offence against Maritime Security Act 2004 has been, is being, or is likely to be committed	All
Maritime Transport Act 1994	454	Authorised person may obtain and execute warrant to inspect dwellinghouse or marae for purposes of carrying out his or her functions, duties, or powers under Maritime Transport Act 1994 if issuing officer is satisfied that entry is essential to enable inspection to be carried out	All
	455(1)	Authorised person may obtain and execute warrant to search place for evidence of offence against Maritime Transport Act 1994 or for any related thing	All
Meat Board Act 2004	42(2)	Auditor may enter place of business where any meat products or related documents are held or are likely to be and examine place and take samples for purposes of undertaking quota compliance audit under Meat Board Act 2004	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	42(5)	Auditor may obtain and execute warrant to enter and inspect place that is not a place of business if issuing officer is satisfied that there are or are likely to be meat products or related documents at that place	All
	62(1)	Constable or authorised person may obtain and execute warrant to enter and inspect place that is not a place of business if issuing officer is satisfied that a person has taken or is intending to take certain proscribed actions and that meat products or related documents are or are likely to be at the place	All
	62(2)	Constable or authorised person may obtain and execute warrant to enter and inspect place that is not a place of business if issuing officer is satisfied that, as consequence of inspection under section 61 of Meat Board Act 2004, there are reasonable grounds to believe that there are or are likely to be meat products or related documents at that place	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Motor Vehicle Sales Act 2003	130(1)	Constable or Registrar of Motor Vehicles or person authorised by Registrar may obtain and execute search warrant to search for evidence of offence against Motor Vehicle Sales Act 2003 that has been, or is being, committed or for any related thing	All
National Parks Act 1980	61(1)	Ranger may seize article found in possession of any person in a national park if ranger has reasonable grounds to believe that the person, in obtaining possession of article, has committed offence against National Parks Act 1980	All
	61(6)	Any chainsaw, firearm, trap, net, or similar item found in unlawful possession of any person in national park and any item found on any person and used in commission of offence in national park may be seized by ranger	All
	65(1)	Ranger may stop and search boats or vehicles or aircraft, and search premises and possessions, in national park if he or she has reasonable cause to believe offence has been committed against National Parks Act 1980 or any bylaws under that Act and that evidence will be found in course of search	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	66(1)	Authorised person may stop and search boat outside national park if he or she has reasonable cause to believe offence has been committed against National Parks Act 1980 or any bylaws under that Act and that evidence is on boat	All
Overseas Investment Act 2005	56(3)	Regulator may obtain search warrant to search place or thing if there are reasonable grounds to believe offence under Overseas Investment Act 2005 has been, or is being, committed at place or thing or there is on, under, or over place or thing evidence of offence against that Act	All
Ozone Layer Protection Act 1996	23(1)	Constable may obtain and execute search warrant to search for evidence of offence against Ozone Layer Protection Act 1996	All
	25	If any constable or officer seizes any substance or goods under Ozone Layer Protection Act 1996, subpart 5 of Part 4 of Search and Surveillance Act 2009 applies	*Subpart 5 (which sets out procedures applying to seized or produced materials)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Petroleum Demand Restraint Act 1981	17(4)	Petroleum demand restraint regulations may provide for application of section 6 of Search and Surveillance Act 2009 and subpart 5 of Part 4 of that Act, where suspected offence is not punishable by imprisonment	*Subpart 5 (which sets out procedures applying to seized or produced materials)
Pork Industry Board Act 1997	44(2)	Authorised person may enter and inspect place of business to ascertain whether requirements of Part 4 of Pork Industry Board Act 1997 are being complied with or to obtain evidence that any of those requirements are not being met	All (except sections 108(d), 110(2)(d), 114, and 115 (which relate to detention and search incidental to power of arrest))
	45(1)	Authorised person may obtain and execute warrant to enter and inspect place that is not place of business if issuing officer is satisfied that offence against section 49(1) or (2) of Pork Industry Board Act 1997 has been committed and that there are or are likely to be at place certain documents relating to levy money or slaughter of pigs, or pork products subject to that levy, that are evidence of commission of offence	All (except sections 108(d), 110(2)(d), 114, and 115 (which relate to detention and search incidental to power of arrest))

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	45(2)	Authorised person may obtain and execute warrant to enter and inspect place that is not place of business if issuing officer is satisfied that, as consequence of inspection of place of business under section 44 of Pork Industry Board Act 1997, there are reasonable grounds to believe that there are certain documents relating to levy money or the slaughter of pigs, or pork products from pigs subject to the levy, at that place	All (except sections 108(d), 110(2)(d), 114, and 115 (which relate to detention and search incidental to power of arrest))
Prostitution Reform Act 2003	30(1)	Constable may obtain warrant to enter and search place if issuing officer is satisfied that there is good cause to suspect offence against section 23 or 34 of Prostitution Reform Act 2003 has been or is likely to be committed at that place, or that it is necessary for constable to enter place to prevent or investigate such offence	All
Radiation Protection Act 1965	24(2)	Authorised officer of Ministry of Health who is refused entry to building believed to have radioactive material or irradiating apparatus or who believes that offence has been committed against Radiation Protection Act 1965 may obtain and execute search warrant	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Radiocommunications Act 1989	120	Authorised Ministry of Economic Development employee or constable may obtain warrant to enter and inspect and remove certain documents if issuing officer is satisfied that a person has committed or is committing offence against Radiocommunications Act 1989 or any regulations made under section 134(1)(g) of that Act	All
Reserve Bank of New Zealand Act 1989	66I	Suitably qualified person appointed by Reserve Bank may obtain and execute search warrant if issuing officer is satisfied that certain information supplied to Reserve Bank is false or misleading, or that a person has failed to comply with certain statutory requirements under Reserve Bank of New Zealand Act 1989	All
	106(1)	Suitably qualified person appointed by Reserve Bank may obtain and execute search warrant if issuing officer is satisfied that there are reasonable grounds for believing that there has been non-compliance with any of certain provisions in Part 5 of Reserve Bank of New Zealand Act 1989	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	106(2)	Suitably qualified person appointed by Reserve Bank may obtain and execute search warrant if issuing officer is satisfied that there are reasonable grounds for believing that it is necessary to do so for purpose of determining whether to execute statutory powers conferred by section 113 or 117 of Reserve Bank of New Zealand Act 1989	All
	157ZM(1)	Suitably qualified person appointed by Reserve Bank may obtain and execute search warrant if issuing officer is satisfied that there are reasonable grounds to believe that deposit taker has committed offence against Part 5D of Reserve Bank of New Zealand Act 1989	All
Reserves Act 1977	95(1)	Certain wildlife and related things found in possession of person in reserve may be seized by constable, ranger, or employee of administering body, if he or she has good cause to suspect that the person, in obtaining possession of the thing, has committed offence against Reserves Act 1977	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	95(6)	Firearms, traps, nets, or similar objects found illegally in possession of any person in reserve and equipment found in possession of any person that has been used to commit offence in reserve may be seized by constable, ranger, or employee of administering body	All
	100(1)	Officer who has good cause to suspect that offence against Reserves Act 1977 or regulations made under that Act has been committed, on, from, or in respect of, certain boats may stop boat and excise certain powers of search and seizure	All
Resource Management Act 1991	334(1)	Constable or enforcement officer may obtain and execute search warrant if issuing officer is satisfied that there are reasonable grounds for believing that at, in, on, over, or under any place or vehicle there is any thing in respect of which imprisonable offence under Resource Management Act 1991 or any regulations made under that Act has been committed or any thing that is evidence of such offence or that is intended to be used to commit such offence	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Sale of Liquor Act 1989	177(1)	Constable may obtain and execute search warrant if issuing officer is satisfied that there are reasonable grounds for believing that certain contraventions of Sale of Liquor Act 1989 are occurring	All
Tax Administration Act 1994	16(4)	Commissioner of Inland Revenue or authorised employee of Inland Revenue Department may obtain and execute warrant to enter private dwelling if issuing officer is satisfied that exercise of applicant's functions under section 16 of Tax Administration Act 1994 requires physical access to that dwelling	*Subpart 2 (which relates to applications for, and issuing of, search warrants)
	16C(2)	Commissioner of Inland Revenue or authorised employee of Inland Revenue Department may obtain and execute warrant to remove books and documents from place and retain them for full and complete inspection if issuing officer is satisfied that this may be required to enable applicant to exercise his or her functions under section 16 of Tax Administration Act 1994	*Subpart 2 (which relates to applications for, and issuing of, search warrants)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Trade in Endangered Species Act 1989	37(1)	Officer who has reasonable grounds to believe that breach of Trade in Endangered Species Act 1989 or of any regulations made under that Act has occurred may exercise certain entry, inspection, and related powers	All
	38(1) and (2)	Officer may obtain and execute search warrant to enter and search dwellinghouse or marae if issuing officer is satisfied that there is in that place specimen of endangered, threatened, or exploited species in respect of which offence against Trade in Endangered Species Act 1989 may have been committed, or that there is evidence of such offence at that place or a thing intended to be used for purpose of committing offence	All
Unsolicited Electronic Messages Act 2007	51(4)	Enforcement officer may obtain and execute search warrant to search place or thing if there are reasonable grounds for believing that civil liability event has been, or is being, committed at place or thing or that there is on, over, or under place or thing anything that is evidence of civil liability event	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Weights and Measures Act 1987	28(3)	Inspector of Weights and Measures may obtain and execute search warrant if issuing officer is satisfied that it is necessary for inspector to enter dwellinghouse to exercise certain entry, examination, and related powers conferred by section 28(1) of Weights and Measures Act 1987	*Subpart 2 (which relates to applications for, and issuing of, search warrants)
Wild Animal Control Act 1977	12(10)	Warranted officer may enter land or premises of licence or permit holder under Wild Animal Control Act 1977, or any other land or premises on which he or she suspects animal is being kept in breach of section 12 of that Act, in order to ascertain whether conditions of licence or permit are being complied with, or whether animal is being kept in contravention of section 12 (note: a dwellinghouse may not be entered without obtaining a warrant)	All
	12(11)	Warranted officer may obtain and execute warrant to enter dwelling house for purpose of detecting offence if issuing officer is satisfied there is probable cause to suspect that breach of section 12 of Wild Animal Control Act 1977 has been, or is being, committed	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
	13(1), (6), and (7)	Warranted officer may exercise variety of entry and search powers for purpose of enforcing, or preventing or detecting offences against, Wild Animal Control Act 1977	All
	14(1) and (2)	Warranted officer may obtain and execute warrant to enter dwellinghouse for purpose of detecting offence if issuing officer is satisfied there is probable cause to suspect that offence against Wild Animal Control Act 1977 has been, or is being, committed there	All
Wildlife Act 1953	39(1)	Ranger may exercise variety of entry, seizure, stopping, and related powers in connection with enforcement of Wildlife Act 1953	All
		Ranger may obtain and execute warrant to enter dwellinghouse for purpose of detecting offence against Wildlife Act 1953, if issuing officer is satisfied there is probable cause to suspect that breach of Wildlife Act 1953 or any regulations made under that Act has occurred or preparation to commit such breach has occurred on those premises	All

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
Wine Act 2003	62(1) and (2)	Wine officer may enter any premises (other than dwellinghouse or marae) for purposes of determining whether Wine Act 2003 is being complied with and may enter any place under authority of search warrant	*Subpart 3 (which relates to carrying out search powers)
	63(1)(a) and (b)	Wine officer may exercise range of examination and inquiry powers at any place he or she may enter under section 62 of Wine Act 2003	All (except sections 108(d), 110(2)(d), 114, and 115 (which relate to detention and search incidental to power of arrest))
	65(1)	Wine officer or constable may obtain and execute search warrant at any place if issuing officer is satisfied there are reasonable grounds for believing that there is at place a thing in respect of which offence under Wine Act 2003 has been, or is being committed, or thing that is being used, or is intended for use, in commission of such offence, or that is evidence of such offence	All
	68	Property seized under search warrant issued under section 65 of Wine Act 2003 may be disposed of	*Subpart 5 (which relates to procedures applying to seized or produced materials)

Column 1 Act	Column 2 Section	Column 3 Brief description of power	Column 4 Which provisions in Part 4 apply
			*Subpart 1 also applicable (to the extent provided in section 88) *Subparts 6 to 8 are also applicable (to the extent provided in section 87AA(3))

Appendix G

Departmental Report for the

Justice and Electoral Committee

SEARCH AND SURVEILLANCE BILL

Crime Prevention and Criminal Justice Group

August 2010

Contents

Introduction

1. This Report advises the Justice and Electoral Committee (the Committee) on the issues arising from submissions on the Search and Surveillance Bill (the Bill).

2. The Report is divided into five parts:

   2.1. Introduction (containing an overview of submissions on the Bill);

   2.2. A Summary of the Recommendations in this Report;

   2.3. Commentary on general concerns about the Bill as a whole and the departmental response;

   2.4. Commentary and the departmental response to issues raised on specific Parts or clauses of the Bill.

3. Recommended technical amendments to the Bill are provided in the attached Appendix.

Overview of Submissions on the Bill

4. The Committee received 46 submissions on the Bill. 10 submissions supported the Bill in principle (with either general or specific concerns), 15 were generally neutral about the Bill (with either general or specific concerns) and 21 opposed the Bill. 25 submitters presented orally to the Committee.

No.	**Submitter**	**Supports policy intent, Oppose or Neutral**	**Oral submission**
1	Russell Jones	Neutral	
2	Andrew Miller	Support	
3	Royal Federation of NZ Justices Associations Incorporated	Support	✓
4	Maire Leadbeater	Oppose	✓
5	Bell Gully	Support	✓
6	Dianne Haist	Oppose	
7	Graham Howell	Oppose	✓
7A	Graham Howell supplementary submission		
8	Noeline Gannaway	Oppose	✓
9	David MacClement	Oppose	
10	Paul Elwell-Sutton	Neutral	
11	New Zealand Law Society (NZLS)	Neutral	✓
11A	New Zealand Law Society supplementary submission A		
11B	New Zealand Law Society supplementary submission B		
12	Nelson Bays Community Law Centre	Neutral	
13	New Zealand Council for Civil Liberties (NZCCL)	Oppose	✓
14	Greenpeace	Oppose	✓
15	Community Law Canterbury	Neutral	
16	Annemarie Thorby	Oppose	✓
17	Marcus Graf	Oppose	✓
18	Media Freedom Committee	Neutral	
19	Whitireia Community Law Centre	Support	
20	Amnesty International	Neutral	
20A	Amnesty International supplementary submission		

21	Wellington People's Centre	Oppose	✓
21A	Wellington People's Centre supplementary submission		
22	New Zealand Police Association (NZPA)	Support	✓
23	Valerie Morse	Oppose	
24	New Zealand Council of Trade Unions	Oppose	✓
25	Chief Justice of New Zealand on behalf of the Judges of the Supreme Court, Court of Appeal and High Court	Neutral	
26	Privacy Commissioner	Neutral	✓
27	David Small	Oppose	✓
28	Vince Siemer	Oppose	
29	Penny Bright	Oppose	
30	Errol Wright	Oppose	
31	Professor Jane Kelsey	Oppose	✓
32	Global Peace & Justice Auckland	Oppose	✓
33	Minter Ellison Rudd Watts	Neutral	✓
34	National Council of Women of New Zealand (NCWNZ)	Neutral	
35	Christchurch City Council	Support	
36	baziam@slingshot.co.nz	Oppose	
37	New Zealand College of Clinical Psychologists	Neutral	
38	Aotearoa Legalise Cannabis Party	Oppose	✓
38A	Aotearoa Legalise Cannabis Party supplementary material		
39	Auckland District Law Society (ADLS)	Neutral	✓
40	Human Rights Foundation of New Zealand (HRF) and Auckland Council for Civil Liberties (ACCL)	Oppose	✓

41	Telecom	Support	✓
42	Human Rights Commission (HRC)	Neutral	
43	New Zealand Winegrowers	Support	✓
43A	New Zealand Winegrowers supplementary submission		
44	Stephen Bell	Neutral	
45	New Zealand Seafood Industry Council (SeaFIC)	Support	✓
46	ANZ National Bank Limited (ANZ)	Support	✓
47	Poverty Action Coalition	Oppose	
48	Dominic Baron	Oppose	
49	Bell Gully, Chapman Tripp, and Russell McVeagh (the Law Firms)	Neutral	

General submissions on the Bill as a whole

5. The Committee received 49 Submissions on the Bill. 10 submissions supported the Bill in principle (but with general or specific concerns), 16 submissions were neutral (but with general or specific concerns) and 23 submissions opposed the Bill. 25 submitters presented orally to the Committee.

6. Submitters' concerns about specific clauses or Parts of the Bill are outlined in the detailed commentary on those specific clauses or Parts.

Common concerns

7. The Ministry and the Law Commission have identified a number of common concerns underlying the submissions generally that relate to the Bill in its entirety, or to general principles underlying the Bill. These were that the Bill:

   7.1. expands the powers of Police and other agencies;

   7.2. poses a threat to political activism;

   7.3. encroaches on human rights;

   7.4. contains insufficient safeguards;

   7.5. is not clear and accessible, precluding informed debate;

   7.6. does not achieve its purpose of consolidating the law;

   7.7. was not subject to sufficient consultation;

7.8. contains many powers that may be exercised if there are reasonable grounds to suspect, which is not a sufficient standard.

8. These overriding themes and the departmental response are outlined below.

The Bill expands the powers of Police and other agencies in a dangerous manner

9. Fourteen submitters (4, 7, 11A, 14, 16, 21, 23, 24, 28, 29, 38, 40, 45, and 46) expressed a general concern that the Bill expanded the powers of Police and other agencies.

10. Maire Leadbeater (submission 4) and Graham Howell (submission 7) are concerned that the Bill expands the powers of the New Zealand Security Intelligence Service (SIS) and other Police entities.

11. In his oral submission, Marcus Graf (submission 17) said that increasing Police powers is not the answer to crime reduction.

Comment

12. The Bill consolidates existing Police powers into one statute and remedies deficiencies in current search powers. This has been of particular importance in relation to technological developments – the current law is outdated and needs modernisation to reflect the new technological environment in which criminals are operating.

13. Outside of the technological sphere, other new powers have been provided only after careful consideration about their utility, and whether the intrusion is justifiable on law enforcement grounds. Where powers have been expanded, safeguards have been inserted to prevent their abuse.

14. However, some of the powers should be available only for more serious offending. Accordingly, some specific recommendations are made in relation to examination orders, audio surveillance, and visual surveillance that involves entry onto private property. The details of our recommendations are contained later in the Report set out under the relevant clauses.

15. In summary, the key recommendations limiting the availability of powers are:

Examination orders

15.1. Raising the threshold for applications in the business context from any imprisonable offence to an offence carrying a maximum penalty of 5 years' imprisonment or more.

15.2. Raising the threshold for applications in relation to serious and complex fraud in the non-business context from any imprisonable offence to an offence carrying a maximum penalty of 7 years' imprisonment or more.

15.3. Limiting examination orders in the non-business context for offending in the context of organised crime to offences committed wholly or partly by an "organised criminal group" as defined in section 98A(2) of the Crimes Act 1961.

Surveillance

15.4. Restricting all audio surveillance to offences punishable by 7 years' imprisonment or more.

15.5. Restricting visual surveillance that involves entry onto private property to offences punishable by 7 years' imprisonment or more.

16. In answer to Marie Leadbeater and Graham Howell's concerns, the Bill does not apply to the SIS.

The Bill is a threat to political activism

17. Eighteen submitters (4, 6, 7, 8, 9, 10, 13, 20, 21, 23, 24, 27, 29, 30, 31, 32, 38, and 40) are concerned that the expanded powers will be used to stifle legitimate political activity and target activists/protesters. Global Peace and Justice (submission 32) and Professor Jane Kelsey (submission 31) noted in their oral submissions that the threshold for many powers is an "imprisonable offence". As trespass under the Trespass Act 1980 carries a maximum penalty of 3 months' imprisonment, the powers could be used against people engaged in political protest.

18. A number of submitters are concerned that surveillance powers will be used to gather intelligence on protesters, rather than investigate offending.

19. When protesters are engaged in legitimate activities, the submitters contend, such actions infringe on fundamental privacy rights and the rights to freedom of expression and association.

Comment

20. The powers in the Bill are subject to a threshold of suspicion that someone has committed, is committing, or will commit an offence. This suspicion must be based on reasonable grounds – an objective test. Where there is no reasonable basis to suspect relevant offending, the use of the power will be unlawful. The Bill therefore does not enable intelligence gathering; it provides powers to enable the investigation of specific offences.

21. Further, as summarised above at paragraph 15 (and detailed further under our recommendations for specific clauses), it is recommended that the threshold for a significant number of powers be raised from an "imprisonable offence" to offences punishable by 5 or 7 years' imprisonment. These powers will therefore not be available against people merely because they are engaging in political protest that involves a trespass.

The Bill encroaches on human rights

22. A number of submissions are concerned that the Bill is a danger to civil liberties and human rights. In particular, there is concern that the Bill:

22.1. erodes the privilege against self-incrimination;

22.2. erodes the right to silence;

22.3. infringes citizen's privacy rights; and

22.4. infringes the right to be secure against unreasonable search and seizure in section 21 of the New Zealand Bill of Rights Act 1990 (NZBORA).

23. Submitters expressed the view that enforcement agencies are abusing their current powers (as detailed by the previous experience or descriptions of submitters (submissions 14 and 28)), and expanding such powers will compound that abuse.

24. The ADLS (submission 39) and the HRC (submission 42) stated that non-Police enforcement agencies must receive comprehensive and ongoing training to ensure that they exercise their powers appropriately and consistently with human rights.

Comment

25. The Bill seeks to ensure law enforcement needs are met in a manner that is consistent with human rights values. Currently, search and surveillance laws are framed in an inconsistent way and are scattered throughout the statute book. Additionally, much of the development in this area has been made through case law. The piecemeal development of the law means the scope of the powers is often unclear, and it is difficult to ascertain what may actually be done during a search.

26. This results in law that is difficult to find and to understand. Citizens subjected to searches are hard put to determine whether a search has been conducted lawfully, and may lack the resources or know-how to find out. Concurrently, law enforcement officers are left unsure as to the scope of their search powers.

27. The Bill consolidates a large part of the law of search and surveillance into one statute and sets out its scope. The combined effect of greater accessibility and increased clarity means that it will be much easier for those subject to searches to determine whether the search was conducted lawfully. It will also be easier for law enforcement officers to determine what they may do pursuant to a search power, reducing the risk that they may inadvertently overstep their powers.

28. Further, NZBORA, and the right to be free from unreasonable search and seizure in section 21 in particular, will continue to apply to all searches conducted under the Bill. This has two aspects. Not only must the decision to exercise a search, surveillance or seizure power be reasonable, the manner of its execution must likewise meet the reasonableness standard.

29. It is acknowledged that this needs to be well understood by those conducting searches. NZBORA is fundamental to all aspects of policing and is included in much of NZ Police training from recruit level through to Criminal Investigations Branch and other specialist groups.

30. An example of current training that specifically focuses on search is CIB module 004 - Search. This module includes a chapter on NZBORA that addresses the effect of section 21 on searches by differentiating between unlawful and unreasonable searches, and provides case law relevant to the application of NZBORA to practical search situations. Ongoing training for operational staff around legislative, policy, and procedural change also includes reference to NZBORA as appropriate, regardless of whether that training is search specific.

31. Detailed training will continue to occur for both Police and non-Police enforcement officers, and this training will continue to incorporate considerations of section 21.

32. A single statute governing search powers across different agencies will enable such agencies to jointly develop and deliver training on search, seizure, and surveillance. This is likely to improve the quality of training and assist in its incorporation into operational practice.

33. Moreover, a defendant may challenge the admissibility of any evidence "improperly obtained" in any future criminal proceedings under section 30 of the Evidence Act 2006. The privilege provisions of the Evidence Act 2006 will likewise continue to apply to any evidential material obtained. Remedies (including damages) will continue to be available under NZBORA.

34. The Bill also identifies areas where human rights have been insufficiently protected. For instance, visual surveillance is an area that is currently unregulated. The Bill regulates visual surveillance by bringing it within a single surveillance device regime which clearly defines when it can and cannot be used.

35. Finally, it must always be remembered that rights are not absolute; there are often competing rights. The right to be secure against unreasonable search and seizure needs to be balanced against the right not to be deprived of life, the right to security of the person, and property rights. These rights likewise require vindication, through mechanisms that ensure offences against the person and property can be adequately investigated and prosecuted.

36. The law relating to search and surveillance is an area where the balancing of competing rights is particularly delicate. The Bill seeks to achieve an appropriate balance.

37. In summary, the Bill seeks to ensure that law enforcement needs are met in a manner that is consistent with human rights values by:

    37.1. increasing accessibility and certainty in the law relating to search and surveillance;

    37.2. setting out minimum standards for reasonable search and seizure;

    37.3. identifying areas where human rights protection is currently insufficient and remedying this;

    37.4. increasing powers (eg, to intercept communications) to enable effective law enforcement;

    37.5. removing or limiting some powers that have been thought unnecessary or excessive; and

    37.6. regulating some areas of law enforcement activity that have hitherto been unregulated.

The Bill contains insufficient safeguards

38. A number of submitters are concerned that the Bill does not contain sufficient safeguards (submitters 10, 23, 27, 31 and 38). Professor Jane Kelsey (submission 31) regards the protections afforded by the Privacy Act 1993 and the Official Information Act 1982 to be inadequate.

39. Graham Howell (submission 7) and the Wellington People's Centre (submission 21) in their oral submissions stated that they do not think the safeguards will be effective, as many vulnerable members of society do not know their rights, and do not have the means to pursue avenues of redress. David Small in his oral submission (submission 27) likewise believed the safeguards in the Bill are inadequate.

Comment

40. The Bill contains a number of safeguards to militate against the abuse of powers. These take the form of:

    40.1. Generally requiring prior judicial approval (by means of a warrant) for any law enforcement power, unless there are public policy reasons for the power to be carried out immediately.

40.2. Detailed reporting requirements to:

40.2.1. the issuing officer/judge;

40.2.2. the chief executive of the relevant agency; and

40.2.3. Parliament.

40.3. Threshold requirements that must be met before powers may be exercised.

Prior judicial approval

41. Generally, the Bill requires prior judicial authorisation before the exercise of any law enforcement power. This has two key advantages: the officer seeking to utilise the power must articulate why they believe the conditions for exercising the power are met; and a neutral third party provides oversight of the power.

42. This judicial authorisation is provided by issuing officers, created under clause 106. This clause allows the Attorney-General to authorise suitably skilled and experienced people to be issuing officers.

43. It is expected that specialised issuing officers with the training and skills necessary to objectively scrutinise search warrant and production order applications will reduce the number of defective or inadequate search warrant applications and search warrants. Issuing officers' training will ensure that the issuing of search warrants and production orders is not merely a rubber-stamping exercise, and that such applications will be subject to rigorous independent consideration.

44. In certain circumstances, there are strong public policy grounds for allowing the immediate use of powers (eg, where the safety of any person is at stake, or to avert an emergency). However, such powers are exceptional and can only be used in the circumstances that are specified in the legislation.

Detailed reporting requirements

45. The Bill contains a number of detailed reporting requirements.

45.1. The first is reporting to an issuing officer or a judge. Under the search warrant regime, an issuing officer may require an enforcement officer to make a search warrant report to enable the issuing officer to assess the manner in which the search was carried out (clause 102). In recognition of the novel nature of the surveillance device regime, a report to the judge who issued the warrant is required in every case (clauses 53, 54, and 66).

45.2. The second is a requirement for any person who exercises a warrantless power to provide a written report to a delegate of the chief executive within that person's agency. This report must be provided as soon as practicable after the exercise of the power (clause 162).

45.3. The third are the Parliamentary reporting requirements contained in clauses 162-164. These require the chief executive of agencies to provide in their annual report to

Parliament details on the use of warrantless search powers, surveillance powers, or activities exercised under a residual warrant.[5]

Threshold requirements

46. The powers provided in the Bill are only available where an enforcement officer can demonstrate that the thresholds attaching to those powers have been met. These thresholds are built into provisions conferring powers. Generally, a power may be exercised in the Bill if there are:

    46.1. reasonable grounds to suspect relevant offending; and

    46.2. reasonable grounds to believe that exercising the power will obtain evidential material of the offending.

47. These thresholds are discussed further below at paragraphs 69-73. They help to ensure that powers are only exercised where it is justified to do so. Thresholds are applied to both warrantless powers and powers exercised pursuant to warrant.

A five year review

48. In addition to the safeguards of prior judicial approval, detailed reporting, and threshold requirements, the Bill provides for a comprehensive review of the Bill approximately five years after enactment. This recognises the significant changes in the area of search and surveillance that are effected by the Bill. At this time, the Law Commission and the Ministry of Justice must jointly provide a report:

    48.1. assessing the operation of the Bill;

    48.2. recommending the repeal of any provisions, if this is desirable; and

    48.3. recommending any amendments.

49. This provides an opportunity to review the Bill as a whole as well as the new powers contained within it to determine whether the Bill effectively protects the rights of individuals as well as meeting the operational needs of law enforcement and regulatory agencies.

The Bill is not clear and accessible, precluding informed debate

50. The NZLS (submission 11A and 11B), SeaFIC (submission 45), and ANZ (submission 46) state that the Bill is not easy to understand. They claim that the lack of clarity and accessibility is a significant obstacle to informed debate and transparency of the law. For instance, they claim that it is not immediately apparent that the powers in Part 3 are widely available to enforcement officers. This view is also reflected in the HRF and ACCL's concerns (submission 40) over the complex definition of "relevant enactment".

51. Annemarie Thorby (submission 16) and Marcus Graf (submission 17) in their oral submissions also criticised the complexity of the Bill, and the difficulties in understanding it.

[5] Recommendations elsewhere in this Report recommend recasting the residual warrant regime as a declaratory order regime.

52. The NZLS suggest that the Bill be recast, using either a "tool box approach", where different regulatory agencies are allocated different tools, or a graduated structure such as that found in the Crown Entities Act 2004. In such a structure, the Bill would put core powers (eg, search and production order powers) into certain categories, some of which may exist in multiple categories. A table could then identify the category that each agency is in, and therefore the powers it has. SeaFIC and ANZ support this suggestion.

Comment

53. The Bill amends a large number of statutes (59) which create search and seizure powers for law enforcement purposes or for law enforcement and regulatory purposes (see subpart 1 of Part 5). Subpart 2 amends 10 statutes which create search and seizure powers used solely for regulatory purposes. The nature of the amendments to these separate Acts vary considerably in size and scope. The process of producing these amendments has involved extensive negotiation with many of the departments and other agencies that administer the relevant legislation.

54. A consideration which is not fully addressed or appreciated in the submissions outlined above is that, with a variety of exceptions and qualifications, the Bill aims to apply certain provisions of Part 4 to powers of search and seizure already conferred by the other enactments amended by subparts 1 and 2 of Part 5. The Bill does not, by and large, seek to replace existing inspection, search and seizure powers conferred by those Acts with new tailor-made powers. Rather the primary focus is on codifying, modifying, and reforming the procedures that apply in respect of existing powers of inspection, search and seizure.

55. For these reasons, to provide a "tool box approach" by allocating particular powers to particular agencies misunderstands the scope and purpose of the Bill. Redefining existing powers of inspection, search and seizure conferred by the multiplicity of Acts amended by subparts 1 and 2 of Part 5 was never envisaged in the Law Commission's report, and was outside the scope of the project. Such a task would, if at all achievable, require the application of extended resources over many years.

56. For the reasons set out above the Bill is and will continue to be complex in nature. This is simply unavoidable given the nature of the project. It is not, however, possible to adopt what is described as a "tool box approach" without either:

    56.1. fundamentally enlarging the scope of the project to include a wholesale review of substantive powers of investigation, search and seizure conferred on diverse law enforcement officials by the Acts amended in subparts 1 and 2 of Part 5 (which is quite impractical); or

    56.2. altering the application of Part 4 to the enactments amended in such a substantial way that they will be unacceptable to the agencies that administer those enactments (and their responsible Ministers) without further extensive consultation and negotiation.

57. However, we agree that the Bill could be made somewhat more accessible and easy to understand. Currently, the definitions of "relevant enactment" and "enforcement officer", along with the specific amendments to other Acts in Part 5, are the mechanism by which the Bill is applied to other Acts. Given the pivotal role of both the definition and Part 5, it is recommended that the amendments in Part 5 be presented in an easily comprehensible way. Details of these recommendations are outlined below at paragraph 88.

58. Comment and recommendations regarding the application of Part 4 to non-Police regulatory and law enforcement search powers are detailed under Part 4.

The Bill does not achieve its purpose of consolidating the law

59. The NZLS (submission 11A) and SeaFIC (submission 45) state that the Bill fails to achieve one of its stated objectives – to bring the search and surveillance powers of all enforcement agencies within a single regime. This failure arises from the fact that some agencies retain powers that are similar to those available under the Bill, but that have different conditions for their exercise.

60. By way of example, the NZLS cite the Commerce Commission's production order power under section 98 of the Commerce Act 1986. This power may be exercised on notice, whereas the equivalent production order power in the Bill requires the approval of an issuing officer.

61. SeaFIC likewise cite examples of duplication in the Bill and the Fisheries Act 1996. A detailed response to SeaFIC's submission on this issue is contained under paragraph 620-622 of the Appendix.

Comment

62. The thresholds for exercising search powers are found in each agency's empowering legislation. The Bill acts to clarify how powers are to be exercised when these thresholds are reached. It is appropriate that the substantive powers of non-Police agencies remain located in the particular legislative regimes within which they will be exercised so that if there are issues as to the scope of the powers, these can be resolved taking into account the whole of the legislative scheme concerned and the nature of the environment in which the powers are exercised.

63. The Bill does not amend the substantive powers of non-Police agencies which differ from those found in the Bill (eg, Commerce Commission production order powers, and the Serious Fraud Office's examination powers). The justifications for those separate and different powers turn on the particular legislative contexts in which they are located and have already been considered by Parliament.

64. Any proposals to amend these powers should involve a principled approach which considers the operation of such powers in the context of the schemes as a whole, rather than an ad hoc change to specific powers. The production notice powers of the Serious Fraud Office and the Commerce Commission fall into this category.

The powers in Bill have not been subject to sufficient consultation

65. The NZCCL (submission 13) contend that the new powers in the Bill need to be subject to proper and rigorous debate. The NZLS (submission 11A) and ANZ (submission 46) agree that more public dialogue on the expansion of powers is necessary.

Comment

66. The Bill is based on the Law Commission's report *Search and Surveillance Powers* (NZLC 97) (Law Commission Report). The Report was prepared after extensive consultation with relevant Government agencies and other external stakeholders. So far as possible the Law Commission aimed for consensus with relevant agencies in formulating its recommendations

in the Report. The Report also reflected public consultation on an earlier Law Commission issues paper on the subject.

67. There was also consultation with relevant agencies during the preparation of the Bill. Where appropriate the Bill was amended to take into account concerns raised during this consultation.

68. The Bill has been before the House since July 2009. Its predecessor, the Search and Surveillance Powers Bill, which contains many of the new powers present in this Bill, was before the House from September 2008 until July 2009. Both the Search and Surveillance Powers Bill, and the Search and Surveillance Bill which superseded it, were subject to consultation with relevant agencies. This, along with the Select Committee process (which has allowed widespread public input), provides a significant process of consideration and deliberation.

The threshold of reasonable grounds to suspect is too low

69. Submissions 2, 17, 21, 24, 31, 40, and 42 state that that a threshold requirement of reasonable grounds to suspect is insufficient:

69.1. generally, or

69.2. in regard to warrantless searches.

70. The ADLS (submission 39) are specifically concerned about the threshold of reasonable grounds to suspect in relation to the use of warrantless powers for offences against section 202A of the Crimes Act 1961 (possession of offensive weapons or disabling substances) and the Arms Act 1983.

Comment

71. The difference between reasonable grounds to suspect and reasonable grounds to believe is one of degree. Suspicion is a medium or moderate likelihood, while belief is a high or substantial likelihood. While there is a strict legal difference between these standards, it is unlikely that they will often result in any difference in practice.

72. The requirement of reasonable grounds to suspect an offence has been, is being, or will be committed, must be read in conjunction with the requirement of reasonable grounds to believe that the proposed power (search, surveillance, etc) will obtain evidential material of that offending.

73. Further, the threshold for warrantless arrest is "good cause to suspect". Attendant on arrest are powers to search. It would be irrational if reasonable grounds to suspect enabled the Police to arrest someone without warrant (and therefore conduct certain searches as a result of that arrest), but not to conduct a search before arrest to investigate the same offence.

74. In relation to the ADLS's submission, offences against the Arms Act and section 202A of the Crimes Act are serious and the potential threat to life must be taken into account. If the threshold is set too high public safety could be at risk.

Is the Bill a Code?

75. The NZLS (submission 11A) noted that it would be useful for the Bill to clarify whether the Bill is a Code (ie, overruling parallel common law powers).

Comment

76. The Bill is not a Code. The substantive powers of search remain in an agency's parent Act. The extent to which (if at all) the Bill has been applied to the search powers in other Acts varies. The Bill is explicitly subject to other legislation (see, for example, clause 161). Likewise, the Bill does not apply to the search powers of the Defence Force (unless they are exercising powers under the Bill's regime).

77. It is therefore clear that the Bill does not act as a Code as there continues to be other legislation which governs the use of such powers.

Part 1 – General provisions

78. This part contains the preliminary and interpretation provisions of the Bill.

Preliminary provisions

Submissions

79. Amnesty International (submission 20A), the HRF and ACCL in their joint oral and written submissions (submission 40), and the HRC (submission 42) suggest that there should be a purpose clause that recognises the importance of human rights values in the context of search and surveillance powers.

80. In its oral submission, the HRC directed the Committee to the Policing Act 2008, which contains a provision stating the principles that Act is based on, including the principle that "policing services are provided in a manner that respects human rights".

Comment

81. The Bill would benefit from a purpose clause. This will clarify the intent of the Bill to balance human rights and law enforcement values.

Recommendation 1

82. The Ministry and the Law Commission recommend the insertion of the following purpose clause in the Bill:

The purpose of this Act is to facilitate the monitoring of compliance with the law and the investigation and prosecution of offences in a manner that is consistent with human rights values by:

- modernising the law of search, seizure, and surveillance to take into account advances in technologies and to allow for future technological developments; and
- providing rules that recognise the importance of the rights and entitlements affirmed in other enactments, including the New Zealand Bill of Rights Act 1990, the Privacy Act 1993, and the Evidence Act 2006; and
- ensuring investigative tools are effective and adequate for law enforcement needs.

Clause 3 – Interpretation

83. This clause sets out definitions of some important terms in the Bill.

Definition of relevant enactment

Submissions

84. As noted above, a number of submitters are concerned about the comprehension of the Bill, particularly understanding the extent to which the powers in Parts 3 and 4 apply to non-Police agencies.

Comment

85. As noted above at paragraphs 34-57, the definition of "relevant enactment" is central to understanding the application of Parts 3 and 4 of the Bill to non-Police agencies. The definition of "relevant enactment" effectively provides that:

85.1. In Part 4, a reference to "relevant enactment" means:

85.1.1. an enactment to which Part 4 in its entirety is expressly applied; or

85.1.2. an enactment to which that particular provision in Part 4 is expressly applied.

85.2. Elsewhere in the Bill, a reference to "relevant enactment" means enactments to which Part 4 (either in its entirety or parts thereof) is expressly applied.

86. The definition is complex as it is required to do several things:

86.1. Firstly, the definition is used to apply either:

(i) a provision in Part 4;

(ii) the subpart which that provision forms part of; or

(iii) all of Part 4

to a search power in an Act amended in Part 5.

86.2. Secondly, the definition makes it clear that if Part 4 (either in its entirety or parts thereof) is applied to a search power in an Act amended to that effect in Part 5, it does not apply to other search powers in that Act (that are not so amended).

86.3. Thirdly, the definition makes it clear that if only certain provisions in Part 4 are applied to a search power in an Act amended in Part 5, the rest of Part 4 does not apply to that search power.

87. Using a definition of "relevant enactment" to achieve the above functions has the advantage of reducing the need for a duplication of statutory provisions and the amount of subsequent amendment when new legislation is subsequently enacted. However, it has the significant disadvantage, in comparison with the approach adopted in the Search and Surveillance Powers Bill 2008, of a loss of accessibility to the law by members of the public without careful study. The Search and Surveillance Powers Bill 2008 contained a schedule listing the provisions in Acts amended by the Bill and the particular provisions of Part 4 of the Bill that

were being applied to the powers listed in those enactments. Given the tenor of the submissions a return to a modified and expanded version of the approach adopted in the Schedule to the Search and Surveillance Powers Bill 2008, as described below, is recommended.

Recommendation 2

88. The Ministry and the Law Commission recommend:

88.1. inserting a Schedule into the Bill summarising the provisions of Part 4 that are applied by the Acts in Part 5 with the following column headings:

Column 1	**Column 2**	**Column 3**	**Column 4**
Act	**Section**	**Brief description of power**	**Which provisions in Part 4 apply**

88.2. making various technical amendments to ensure that Part 4 is only applied to the Acts amended in Part 5 to the extent intended.

Part 2 – Police powers

89. This Part contains various Police powers.

Subpart 2 – Warrantless powers to enter and search when effecting arrest

Clause 7 – Entry without warrant to arrest person unlawfully at large

90. This clause allows a constable to enter a place or vehicle without warrant to search for and arrest a person who is unlawfully at large. Unlawfully at large is defined in clause 3, and includes "a person for whose arrest a warrant is in force".

Submissions

91. The Chief Justice (submission 25) suggests that this warrantless power should not be available for offences that are not punishable by imprisonment, or for other minor matters.

Comment

92. This warrantless power should have some limitation. Similar concerns arise in relation to clause 28 which provides a warrantless power to set up a road block where a person is unlawfully at large. Accordingly, clause 28(5) provides that, for the purposes of that clause, a person is not unlawfully at large if the only warrant for his or her arrest that is in force is a warrant issued under the Summary Proceedings Act 1957 (which deals with the enforcement of fines). A person should also not be unlawfully at large for the purposes of that clause where the only warrant for his or her arrest is an arrest warrant for unpaid fines under the Crimes Act 1961.

93. This limitation should likewise be applied to clause 7 and clause 9 (which provides Police with a warrantless power to stop a vehicle to arrest a person unlawfully at large).

Recommendation 3

94. The Ministry and the Law Commission recommend:

94.1. amending the definition of "unlawfully at large" in clause 3 so that a person is not "unlawfully at large" if the only warrant for his or her arrest that is in force is a warrant issued under Part 3 of the Summary Proceedings Act 1957 or a warrant for unpaid fines issued under the Crimes Act 1961; and

94.2. deleting clause 28(5).

Clause 10 – Powers and duties of constable after vehicle stopped

95. This clause provides that, where a constable stops a vehicle under clause 9, they may search the vehicle to locate either:

95.1. a person who is unlawfully at large or who has committed an imprisonable offence; or

95.2. evidential material in relation to the offence for which the vehicle was stopped, if the person is arrested or flees the vehicle before they are arrested.

96. Before searching the vehicle for evidential material, the constable must tell the driver the object of the proposed search.

Submissions

97. The HRF and ACCL in their joint submission (submission 40) state that it is unclear why the obligation to inform about the purpose of the search is limited to the driver and not the suspect.

Comment

98. The requirement to inform the driver of the object of the proposed search is akin to the requirement for a searcher to identify themselves to an occupier of a property. The driver, as the person with control over the vehicle, is taken to be the person whose property rights are being interfered with by reason of the search.

99. Further, subclause (1)(b) allows Police to search for evidential material of the offence for which the Police seek to arrest the suspect. Under subclause (1)(b), either the suspect has been arrested, or has fled the vehicle. If the suspect has been arrested, it should be clear to them what the Police are searching for. If the suspect has fled the vehicle, it would be impossible to inform them of the purpose of the search. It is also important for the driver (whether they are the suspect or not) to be informed of why the vehicle they are driving has been stopped.

Recommendation

100. The Ministry and the Law Commission do not recommend any change to clause 10.

Subpart 3 – Warrantless searches of people who are to be locked up in Police Custody

Clause 11 – Warrantless searches of people who are to be locked up in Police custody

101. Clause 11 allows Police to use a searcher to conduct a personal search of a person in Police custody. This enables the search to be carried out by a person of the same sex as the person being searched.

Submissions

102. Two submissions were received on this clause.

103. The HRF and ACCL in their joint submission (submission 40) state that the terms "searcher" and "appropriate training" should be clarified as they are unclear.

104. The NCWNZ (submission 34) suggests that all personal searches should be carried out under the supervision of an officer of the same sex as the person being searched. They also suggest that the person being searched should be able to request that it be conducted by someone of the same cultural background.

Comment

105. New Zealand is a multi-cultural society. It is therefore impracticable to allow requests for a search to be conducted by someone of the same cultural background. It would introduce a risk that people will make requests to delay or frustrate the search.

106. A "searcher" is someone who is not a Police employee and who has received training in carrying out personal searches. The term "searcher" is used in section 37 of the Policing Act 2008 (the current equivalent of clause 11) and does not appear to have caused any problems in that context.

107. Clause 12(2) requires searchers to have "appropriate training". This ensures that personal searches are only conducted by someone who has received instruction on how it should be carried out in a NZBORA consistent way, is aware of problems that may arise in personal searches, and has received training on how to deal with such problems.

108. What is "appropriate" may change over time, and it is expected that Police will ensure that such training remains suitable and responds to judicial decisions. It would not be practical or appropriate to spell out the details of the training in legislation.

109. The requirement of appropriate training also renders supervision by an officer unnecessary. The Committee should note that if a personal search is a strip search, this must be carried out by someone of the same sex as the person being searched (clause 121(3)).

Recommendation

110. The Ministry and the Law Commission do not recommend any change to clause 11 in relation to these submissions. An unrelated recommendation to amend clause 11 is made in the Appendix.

Clause 13 – Property taken from people locked up in Police custody

111. This clause sets out what must be done with property that has been taken from people who are locked up in Police custody. Police may retain:

111.1. any money or property that may need to be given in evidence in proceedings for a charge brought against the person in custody (subclause (1)(a)); and

111.2. "any money or property whose possession may, in the opinion of a constable, constitute an offence" (subclause (1)(b)).

Submissions

112. Whitireia Community Law Centre (submission 19) suggests the removal of subclause (1)(b). The Law Centre states that items that constitute an offence will become evidence for a charge and are therefore covered under subclause (1)(a). Otherwise, the Whitireia Community Law Centre submits such items should be covered under clause 153 (which provides for the disposal of unlawful items).

Comment

113. Clause 13(1)(b) covers items that have been stolen, the possession of which constitutes an offence. In some cases the Police may decide that the offending is not serious enough to proceed with a prosecution. However, it is undesirable that such items be returned to the person.

Recommendation

114. The Ministry and the Law Commission recommend no change to clause 13.

Subpart 5 – Warrantless powers for evidential material relating to certain offences

Clauses 15, 16, 17, and 44 – Warrantless powers to preserve evidential material

115. Clauses 15, 16, and 17 provide the Police with warrantless powers to search places, and people and vehicles in public places, for evidential material of offences punishable by 14 years' imprisonment or more. Clause 44 provides a similar power of warrantless surveillance for enforcement officers.

116. The warrantless powers to enter and search a place (clause 15) and to conduct surveillance (clause 44) may be exercised only if there are reasonable grounds to suspect that delaying entry/surveillance to get a warrant would result in evidential material being destroyed, concealed or damaged.

117. Clause 16 and 17 allow constables to search people and vehicles in public places. This power arises where there are reasonable grounds to believe that evidential material relating to an offence punishable by 14 years' imprisonment or more is on that person, or in that vehicle.

118. The powers contained in clauses 15, 16, 17, and 44 are new.

Submissions

119. Andrew Miller (submission 2) suggests that these clauses should be subject to a requirement that Police have not deliberately acted to manufacture a risk that evidential material will be destroyed.

120. The NZPA (submission 22) note that the threshold of offences punishable by a term of 14 years' imprisonment or more is very high, meaning that the warrantless powers will only be available for the most serious offences.

121. Amnesty International (submission 20A) recommends that clause 16 be removed from the Bill as it is inconsistent with the Law Commission's Report *Search and Surveillance Powers* (NZLC R97, 2001) as the Report does not contain any reference to public places. Further, Amnesty International are concerned that clause 16 lacks the safeguard (found in clauses 15 and 44) of the officer having to have reasonable grounds to suspect that the delay caused by obtaining a warrant will result in evidential material being concealed, destroyed, or removed.

122. The HRF and ACCL (submission 40) state that the meaning of "public place" in clauses 16 and 17 is unclear, and that this should be defined in clause 3.

Comment

123. In relation to Andrew Miller's concern, section 21 of NZBORA continues to apply to powers under the Bill. It is unlikely that a search in any situation where the risk that evidential material will be destroyed arises solely because of police's deliberate actions would be considered "reasonable" by a court under section 21.

124. We agree with the NZPA that the threshold of an offence punishable by 14 years' imprisonment or more is high. A warrantless search is an extraordinary power. A principle that permeates the Bill is that intrusions on citizens' privacy rights should generally only be made after prior judicial approval.

125. Warrantless powers for law enforcement purposes are therefore an exception, and are available only where there is a strong public interest in the power being carried out immediately. There was a conscious decision that warrantless powers for law enforcement purposes only be available for the most serious crimes; a threshold of offences carrying a maximum penalty of 14 years' imprisonment was deemed appropriate.

126. Reasonable grounds to suspect that delayed entry will prejudice the preservation of evidential material is a requirement of searches under clause 14, but not clauses 16 and 17. The inherent mobility of people and vehicles means that there is *always* a high risk that evidential material on people or in vehicles will be moved, and consequently that evidential material will be hidden or tampered with, before a warrant can be obtained.

127. We do not believe that a definition of public place is necessary. Any ambiguities in the meaning of public place will be resolved by the courts if necessary.

Recommendation

128. The Ministry and the Law Commission do not recommend any change to clauses 15, 16, 17 and 44 in relation to these submissions. An unrelated recommendation to amend clauses 8, 15, and 19 is made in the Appendix.

Subpart 6 – Warrantless powers in relation to arms offences

Clause 18 – Warrantless searches associated with arms

129. This clause provides for warrantless search powers associated with arms (eg, firearm, airgun, explosive). Under this clause, Police may search a person and seize and detain any arms found if the officer has reasonable grounds to suspect that the person is carrying arms, and reasonable grounds to suspect that:

129.1. they are in breach of the Arms Act 1983;

129.2. they do not have proper control over the arms or may kill or injure any person; or

129.3. there is a protection order, or there are grounds to make an application for a protection order under the Domestic Violence Act 1995.

Submissions

130. The NZPA (submission 22) suggest that there should also be a warrantless power of search where a Police Safety Order has been issued under the Domestic Violence Act 1995 (as amended by the Domestic Violence Amendment Act 2009) against that person.

Comment

131. The clause allows a warrantless search where "there are grounds to make an application against him or her for a protection order". We believe this is broad enough to cover the situation where a Police Safety Order has been issued against a person.

Recommendation

132. The Ministry and the Law Commission recommend no change to clause 18.

Subpart 7 – Police powers in relation to Misuse of Drugs Act 1975 offences

Clauses 19, 20, and 21 – Warrantless searches for the Misuse of Drugs Act 1975 offences

133. Clause 19 sets out situations where a constable may enter and search a vehicle or place without a warrant in relation to certain offences in the Misuse of Drugs Act 1975.

134. Clause 20 permits the search of a person found in or on the place or vehicle being searched under clause 19.

135. Clause 21 allows a constable to search and detain a person in relation to certain offences in the Misuse of Drugs Act 1975.

Submissions

136. Andrew Miller (submission 2) has three concerns in relation to these provisions:

136.1. the threshold of "reasonable grounds to suspect" relevant offending in clauses 19 and 21 is too low;

136.2. the Police should be required to obtain demonstrable, quantitative evidence (such as an air sample) before exercising the warrantless powers in clauses 19 and 21; and

136.3. the power to search any person found in or on the place or in the vehicle being searched under clause 19 should only apply in cases where searching the person is consistent with the purpose of the search.

Comment

137. Clauses 19, 20, and 21 are existing Police powers that may be exercised under section 18 of the Misuse of Drugs Act 1975.

138. In relation to clause 19, the government agreed that the power to search without warrant would be exercisable only where the constable carrying out the search believes on reasonable grounds that it is not practicable to obtain a warrant. This reflects current case law on section 18 of the Misuse of Drugs Act. This limitation was inadvertently left out of the Bill as introduced.

139. Regarding Andrew Miller's concerns:

139.1. There is a discussion at paragraphs 69-74 regarding the threshold of reasonable grounds to suspect versus reasonable grounds to believe. The same arguments apply in this context. As outlined in those paragraphs, the requirement of reasonable grounds to suspect must be read in conjunction with the requirement that there are reasonable grounds to believe that there are specified controlled drugs or precursor substances in the place or vehicle, or on the person (clauses 19 and 21) *and* reasonable grounds to believe that the evidential material relating to an offence will be destroyed if the search is not carried out immediately (clause 19).

139.2. The warrantless powers in clauses 19 and 21 have been granted to the Police because these situations require a search to be carried out immediately (in clause 19 because there are reasonable grounds to believe that evidential material will be destroyed; in clause 21 because of the inherent mobility of people which means there is always a significant risk that evidential material will be hidden or tampered with). Requiring demonstrable evidence in the form of an air sample or photograph would result in considerable delay.

139.3. Clause 20 allows constables conducting a search of places or vehicles to search any person found in or on the place or vehicle for items relating to offending in the Misuse of Drugs Act 1975. Drugs are small items that are easily secreted on the person. It is therefore arguable that a search of any person present at a search will always be consistent with the purposes of a search under clause 19 (to search for controlled drugs or precursor substances).

Recommendation 4

140. The Ministry and the Law Commission recommend amending clause 19 so that a constable may only conduct a warrantless search in relation to the offences in the Misuse of Drugs Act 1975 specified under clause 19(a) where that constable believes on reasonable grounds that it is not practicable to obtain a warrant.

Clause 22 – Internal search of person under arrest for offence against section 6, or 7 or 11 of the Misuse of Drugs Act 1975

141. This clause sets out when an internal search may be carried out on a person who is under arrest for an offence against section 6, 7, or 11 of the Misuse of Drugs Act 1975 (dealing with controlled drugs; possession and use of controlled drugs; theft, etc, of controlled drugs).

Submissions

142. Andrew Miller (submission 2) suggests that internal searches should only be available where a person is under arrest for offences involving the importation or supply of controlled drugs.

Comment

143. This provision is largely carried over from section 18A of the Misuse of Drugs Act. The current provision, like clause 22, is for an offence against section 6, 7, or 11 of that Act.

144. The Law Commission is currently undertaking a first principles review of the Misuse of Drugs Act in order to make proposals for a new legislative regime. Determining when internal searches are available is part of that review; it is therefore appropriate to retain the status quo for internal searches until the Law Commission has made its recommendations in its review.

Recommendation

145. The Ministry and the Law Commission recommend no change to clause 22.

Subpart 8 – Warrantless powers in relation to offences against section 202A of the Crimes Act 1961

Clauses 24 – 26 – Warrantless powers in relation to offences against section 202A of the Crimes Act 1961

146. These clauses provide for warrantless search powers associated with section 202A(4)(a) of the Crimes Act 1961. Section 202A(4)(a) makes it an offence to carry a knife or offensive weapon or disabling substance in public, or to have an offensive weapon or disabling substance in any place in circumstances which prima face show an intention to use it to commit an offence involving bodily injury or the threat or fear of violence.

Submissions

147. The NZPA (submission 22) suggests extending this power to circumstances where there are reasonable grounds to suspect that a person is committing an offence against section 227 (being in possession of instrument for conversion) or section 233 (being disguised or in possession of instrument for burglary) of the Crimes Act 1961.

Comment

148. As stated above at paragraphs 124-125, a warrantless search is an extraordinary power and has been made available only where there is a strong public interest in the search being carried out immediately. In relation to clauses 24-26, the public interest is the reduction of harm to persons from knives, offensive weapons and disabling substances. This is a strong public safety argument.

149. This public safety justification is not present for offences against sections 227 or 233 of the Crimes Act 1961. Nor are such crimes of a sufficiently serious nature to override the presumption that searches require prior judicial approval.

Recommendation

150. The Ministry and the Law Commission recommend no change to clauses 24-26.

Subpart 10 – Other powers related to search of vehicles

Clauses 28-30 Warrantless powers relating to road blocks and road closures

151. These clauses prescribe the situations where a road block may be set up without warrant. Clause 29 provides that authorisation to set up a road block is valid for an initial period of 24 hours.

Submissions

152. The HRF and ACCL (submission 40) suggest that warrantless road blocks should be valid only for an initial period of 12 hours.

Comment

153. Only a District Court Judge may renew an authorisation to set up a road block. An initial period of 24 hours was therefore provided in recognition of the fact that District Court Judges are not available on a 24 hour basis. Currently, road blocks may operate for an initial period of 24 hours under section 317B of the Crimes Act 1961.

Recommendation

154. The Ministry and the Law Commission recommend no change to clauses 28-30.

Subpart 11 – Examination orders

155. This subpart provides for an examination order regime which allows the Police Commissioner to seek a court order requiring a person to answer questions where they have previously refused to do so.

156. Examination orders are only available in limited circumstances:

156.1. in the business context, to seek information obtained in the course of a person's professional duties that relates to imprisonable offences (clause 32);

156.2. in the non-business context, for information that relates to imprisonable offences involving serious or complex fraud (clause 34(a)(i)), or imprisonable offences "committed wholly or partly because of participation in a continuing association of 3 or more persons having as its object, or as 1 of its objects, a continuing course of criminal conduct" (clause 34(a)(ii)).

157. An application for an examination order may be made only by the Police Commissioner.

158. A judge may issue an examination order only if satisfied it is reasonable to do so, having regard to the nature of the suspected offending, the relationship between the person to be examined and the suspect, and any alternative means of getting the information.

General submissions on examination orders

Examination orders erode the right to silence

159. Submitters are concerned that examination orders erode the right to silence (submissions 15, 16, 17, 23, 27, 32, 36 and 40 and oral submission 4). The Wellington People's Centre (submission 21) in its oral submission said that it was difficult to see how such orders would obtain any useful information. Either the person will lie, or will provide information that is not useful.

160. Nelson Bays Community Law Centre (submission 12) suggests that the examination order regime include a clause to the effect that examination orders are subject to the privilege against self-incrimination.

Comment

161. The Law Commission has previously provided advice to the Committee on the impact of examination orders on the right to silence (see briefing dated 12 March 2010).

162. As that advice noted, the so-called "right to silence" is actually a rather disparate group of immunities. Of these, two are given specific protection in NZBORA: the right of a suspect to refuse to answer questions on being arrested or detained (section 23(4) of NZBORA); and the right not to be compelled to be a witness or confess to guilt at trial (section 25(d) of NZBORA).

163. Also, section 60 of the Evidence Act 2006 sets out the privilege against self-incrimination. The privilege prevents the privilege holder from being compelled to provide information that they would otherwise be required to provide. Nor can the privilege holder be prosecuted or penalised for failing to provide this information. Clause 132 expressly preserves the privilege

against self-incrimination. A person who is subject to an examination order may therefore refuse to answer questions if they believe their answer is likely to incriminate them.

164. Any intrusion on these rights, by compelling a person to provide information, must be justified on policy grounds. Examination orders are a useful and justifiable tool for Police to investigate specific types of serious offending. For instance, investigations of offences involving complex financial transactions benefit from a power that requires a person to assist by answering questions to unravel documents (already obtained by Police) relating to these transactions. Limited as proposed below, examination orders in the Bill strike an appropriate balance between citizens' rights and the needs of law enforcement.

Availability of examination orders – too wide or too limited

165. The ADLS (submission 39) believe that, generally, examination orders are too extensively available. Community Law Canterbury, the Chief Justice of New Zealand, the HRF and ACCL, and the HRC (submissions 15, 25, 40 and 42) recognise that the availability of examination orders had been limited in the Bill, but think that these limits could be made more explicit.

165.1. Community Law Canterbury (submission 15) suggests that in the non-business context, the threshold should be an offence with a maximum sentence of 7 years' imprisonment or more.

165.2. The Chief Justice (submission 25) suggests that the offences for which examination orders are available should be specifically listed.

165.3. The HRF and ACCL (submission 40) note that clause 34(a)(ii) seems to limit examination orders in the non-business context to serious or complex fraud, and organised crime. The HRF and ACCL suggest the limit should be made explicit, similarly to the interception device provisions in the Crimes Act 1961 (as amended).

165.4. The HRC (submission 42) suggests that examination orders be limited to situations where Police need to assess complex documents for investigation of fraud.

166. Annemarie Thorby (submission 16) in her oral submission stated that she had no faith in the Police, and that there should be no such orders.

167. By way of contrast, the NZPA (submission 22) suggests that:

167.1. the definition of organised crime in clause 34(a)(ii) is so high a threshold that it will be rendered ineffective as it is difficult to prove association and shared objectives of a group; and

167.2. examination orders in the non-business context should be extended to other serious crime, such as murder. In its oral submission, NZPA suggested this could be achieved by amending clause 34(a)(ii) to offences of "serious crime".

Comment

168. Examination orders will provide the Police with an important tool to investigate offending. It is an extraordinary power, reflected by the significant safeguards and limitations surrounding its use.

169. However, given the novel nature of examination orders in the Police context, they should be further limited. We therefore disagree with the NZPA that examination orders in the non-business context should be extended to "serious crime".

Business context

170. Examination orders in this context allow people who acquire information in the course of business (such as accountants) to co-operate with Police without fear of adverse legal or ethical consequences because of a breach of professional or fiduciary obligations. However, given concerns about the availability of examination orders, it is recommended that examination orders in the business context be limited to offences carrying a maximum penalty of 5 years' imprisonment or more.

Non-business context

171. Examination orders in the non-business context, where information is obtained through personal relationships, should be more limited than in the business context. People whose knowledge of suspected offending arises in this context may have many reasons for not wishing to cooperate, and the consequences will often be serious and ongoing for such people, given the enduring nature of the kinds of relationships involved.

172. For this reason, there should be a higher threshold of 7 years' imprisonment for examination orders relating to serious or complex fraud. 7 years' imprisonment was identified as an appropriate threshold as this is the maximum penalty for many of those types of offences. For instance, engaging in money laundering, dishonestly taking or using a document, obtaining a benefit or causing loss by deception, and accessing a computer system to dishonestly obtain a benefit or cause a loss, all have maximum penalties of 7 years' imprisonment.[6]

173. In relation to organised crime, we agree with the Chief Justice, and the HRF and ACCL (submissions 25 and 40), that the formulation in clause 34(a)(ii) could be further clarified. It follows that we disagree with the NZPA that the prescription in clause 34(a)(ii) is so high that it will be rendered ineffective.

174. It is therefore recommended that the definition of "organised criminal group" in section 98A(2) of the Crimes Act 1961 be adopted in clause 34(a)(ii). Section 98A(2) provides that a group is an "organised criminal group" if:

> it is a group of 3 or more people who have as their objective or 1 of their objectives –
>
> (a) obtaining material benefits from the commission of offences that are punishable by imprisonment for a term of 4 years or more; or
>
> (b) obtaining material benefits from conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of offences that are punishable by imprisonment for a term of 4 years or more; or

[6] Sections 243, 228, 241, 249 of the Crimes Act 1961. Other provisions in the Crimes Act which could constitute fraud and carry a maximum penalty of 7 years' imprisonment include receiving stolen property (section 246), and criminal breach of trust (section 229).

(c) the commission of serious violent offences (within the meaning of section 312A(1)) that are punishable by imprisonment for a term of 7 years or more; or

(d) conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of serious violent offences (within the meaning of section 312A(1)) that are punishable by imprisonment for a term of 7 years or more.

175. "Serious violent offences" as defined in section 312A of the Crimes Act, are offences:

175.1. punishable by a period of imprisonment for a term of 7 years or more; and

175.2. where the offence involves:

175.2.1. the death or serious risk of the death of any person;

175.2.2. serious injury or risk of injury to a person;

175.2.3. serious damage to property in circumstances endangering the physical safety of any person;

175.2.4. perverting the course of justice to prevent or obstruct the detection, investigation, or prosecution of offences involving the above.

Recommendation 5

176. The Ministry and the Law Commission recommend amending clause 32 to limit examination orders in the business context to offences carrying a maximum penalty of 5 years' imprisonment or more.

Recommendation 6

177. The Ministry and the Law Commission recommend amending clause 34(a) to limit examination orders in the non-business context to:

177.1. serious or complex fraud offences carrying a maximum penalty of 7 years' imprisonment or more; and

177.2. offences committed wholly or partly by an "organised criminal group" as defined in section 98A(2) of the Crimes Act.

Approval of application for examination order

178. Clauses 31(1) and 33(1) provide that only the Commissioner of Police may make an application for an examination order. However, under section 17 of the Policing Act 2008, the Commissioner may delegate any of their powers, functions, or duties to any other person.

Comment

179. Restricting who can make applications was intended to ensure that applications are not made routinely in the course of Police investigations. However, an *approval* process provides better safeguards against the routine use of examination orders.

180. An application for an examination order should be made by an officer with the level of position of inspector or above. Prior to the application being submitted to a judge, this application should be approved by a District Commander (of which there are 12 in the country), or if a District Commander is unavailable, another member of the Police senior executive team. This will mean that approval is generally given by the senior officer in the Police District in which the examination is sought, thus ensuring that the process is a practical one, grounded in knowledge about offending in that district.

181. A District Commander is a very senior position within Police, ensuring that the decision as to whether an examination order is a proportionate and appropriate response is made by someone with significant experience. Limiting the personnel who may make and approve such applications guards against their routine use in Police investigations.

Recommendation 7

182. The Ministry and the Law Commission recommend amending clauses 31(1) and 33(1) so that:

182.1. only officers with the level of position of Inspector or above may make an application for an examination order; and

182.2. only 1 of the 12 District Commanders (but not anyone acting as a District Commander) or above may approve an application for an examination order prior to it being submitted to a judge.

There should be a reporting regime for examination orders

183. The Chief Justice (submission 25) suggests that there should be a compulsory reporting regime, similar to that required for surveillance device and residual warrants.

Comment

184. There should be a reporting regime for examination orders.

Recommendation 8

185. The Ministry and the Law Commission recommend inserting a new clause in the examination order regime so that a constable who undertakes questioning pursuant to an examination order must provide a report to the judge who made the order, or (if that judge is unable to act) to a judge of the same court as the judge who made the order. The report must contain the following information:

185.1. whether the questioning resulted in obtaining evidential material;

185.2. whether any criminal proceedings have been brought or are under consideration as a result of evidential material obtained by means of the examination; and

185.3. any other information stated in the order as being required for inclusion in the examination order report.

Recommendation 9

186. The Ministry and the Law Commission recommend amending clause 37 so that an examination order contains a condition that an examination order report be provided to the judge who made the order or (if that judge is unable to act) to a judge of the same court as the judge who made the order.

Recommendation 10

187. The Ministry and the Law Commission recommend requiring the Commissioner of Police to report on examination orders in the Police's annual report with the following information:

187.1. the number of applications for an examination order that are granted or refused in the period covered by the report; and

187.2. the number of people charged in the period covered by the report where an examination order made a significant contribution to the obtaining of evidential material for the proceeding.

Equivalent powers of the Serious Fraud Office have a lower threshold

188. The NZPA (submission 22) note that the Serious Fraud Office may exercise similar powers on notice and believe that it is counter-intuitive that the Police must reach a higher threshold to exercise its powers in comparison to the Serious Fraud Office.

Comment

189. The fact that the Serious Fraud Office has lower thresholds does not provide a compelling argument for the thresholds in this Bill to be reduced.

190. The examination order powers were developed in the context of the anticipated abolition of the Serious Fraud Office. Therefore, the power was looked at afresh and the examination orders currently in the Bill reflect a contemporary approach. The thresholds that must be met before an examination order may be issued ensure that they are used appropriately. These conditions constitute an important safeguard. We also believe a higher threshold is justified given that examination order powers will be available to the Police for a wider range of offences than the Serious Fraud Office's current powers.

Examination orders should only be issued by a High Court Judge

191. The Chief Justice (submission 25) suggests that examination orders should only be issued by a High Court Judge (as opposed to a District Court Judge).

Comment

192. District Court Judges are competent judicial officers, capable of assessing the appropriateness of an examination order, having regard to the conditions that must be met, and the reasonableness of making an order considering the matters outlined at clause 36(b).

Examination orders should not be used to compel witnesses

193. Greenpeace (submission 14) opposes the use of examination orders to compel witnesses.

Comment

194. Examination orders do not compel people to take the stand; they oblige people to provide Police with information in relation to certain offending. The privilege against self incrimination is explicitly preserved in clause 132.

People subject to examination orders should be eligible for the Police Detention Legal Assistance Scheme

195. Community Law Canterbury (submission 15) believes that people subject to examination orders should be eligible for assistance from the Police Detention Legal Assistance Scheme (PDLA) and that this should be clarified.

Comment

196. This is unnecessary. Under section 51 of the Legal Services Act 2000, the PDLA scheme applies to any person who is being detained by Police and who is entitled to consult and instruct a lawyer without delay under section 23(1)(b) of NZBORA. Section 23(1)(b) applies to "everyone who is arrested or detained under any enactment". This will apply to people who are subject to examination orders and otherwise meet the criteria in the PDLA scheme.

People who comply with examination orders may be subject to retaliation

197. Community Law Canterbury (submission 15) suggests that the Bill should take into account the fact that witnesses may be subject to retaliation if they co-operate with the Police.

Comment

198. Under clause 36, a judge may only make an order if satisfied that it is reasonable to do so having regard to, among other things, the relationship between the person to be examined and the suspect, and any alternative ways of obtaining the information. The possibility of retaliation will be relevant under these considerations.

199. The risks for a person who provides information to the Police in response to an examination order are not necessarily any greater or any less than for a person who co-operates with Police on a voluntary basis. The safety of anyone subject to threats of violence or harm by reason of their interactions with the Police is a matter for the Police to deal with in the ordinary way.

<u>Examination orders should only be available prior to charges being laid</u>

200. The ADLS (submission 39) suggests that examination orders should only be available prior to charges being laid.

Comment

201. There is no reason in principle why there should be this limitation. There will be situations where charges have been laid, but an investigation is ongoing. Examination orders may be obtained in relation to a person who is not a suspect. While there might be sufficient information to charge the suspect, more investigation may be needed to prepare and strengthen the prosecution case.

Part 3 – Enforcement officers' powers and orders

202. This Part contains warrants and orders that are available to all enforcement officers (eg, Customs).

General submissions on Part 3

203. A number of submitters (submissions 5, 11A, 13, 20, 24, 40, 42, 45, and 46) are concerned about the extension of the powers contained in Part 3 to all enforcement officers as they believe:

203.1. it gives law enforcement agencies powers beyond what they require; and

203.2. it gives law enforcement agencies powers beyond what is proportionate to the offending that they investigate.

204. Bell Gully, NZLS, Amnesty International, HRF and ACCL, SeaFIC, and ANZ (submissions 5, 11A, 20, 40, 45, and 46) state that surveillance powers should be extended to agencies only if they can demonstrate their existing powers are inadequate. Any new powers provided to these agencies should be justified on policy grounds.

Comment

205. The powers in Part 3 of the Bill have been provided to all "enforcement officers". They are only available where the enforcement officer already has the power to conduct a search pursuant to a warrant to investigate suspected offending. Expanding the powers therefore enables the enforcement officer to choose between different means of achieving the same objective (ie, securing evidential material).

206. The degree of intrusiveness of the different means will depend on the circumstances; in some cases surveillance will be less intrusive than a physical search. For example, it is arguable that a search of a dwelling house involving a forced entry is more intrusive than the use of a tracking device. However, we recognise that there are significant privacy concerns in relation to audio surveillance and entry onto private property to install a visual surveillance device. Accordingly, such surveillance should be limited to serious offending as detailed below.

207. It should be noted that the right to be secure against unreasonable search and seizure in section 21 of NZBORA will apply to the powers in Part 3. The decision to exercise any power in Part 3 will therefore be subject to the reasonableness requirement in section 21.

Subpart 1 – Surveillance device regime

208. The surveillance device regime covers visual surveillance, interception and tracking devices.

Interception devices

208.1. An interception device is a device that is used, or is capable of being used, to intercept or record a private communication (eg, a telephone conversation). The current law relating to the use of interception devices by Police is located in the Crimes Act 1961 and Misuse of Drugs Amendment Act 1978.

208.2. The current interception regime makes it an offence to use an interception device to intercept a private communication unless it falls within a narrow law enforcement exception.

Tracking devices

208.3. A tracking device is a device that can be installed on something to find out where that thing is, or to find out whether that thing has been opened or tampered with. The current law relating to tracking devices is located in sections 200A-200P of the Summary Proceedings Act 1957.

208.4. The current tracking device regime regulates the use of tracking devices by Police and Customs officers, but does not contain a complementary criminal offence.

Visual surveillance devices

208.5. A visual surveillance device is a device that is used or is capable of being used to observe, or to observe and record, a private activity. There is currently no legislation regulating the use of such devices, although it would be unlawful to engage in a trespass in order to install them.

General submissions on surveillance device warrant regime

Extension of surveillance to non-Police agencies a concern

209. A number of submitters (4, 5, 7, 21, 23, 24, 40, 42, 45, 46, and 49) are concerned about the extension of surveillance to non-Police agencies. Valerie Morse (submission 23) believes that a surveillance device regime is unnecessary, as search warrants could be obtained for the same purpose. Bell Gully in its oral submission (submission 5) articulated its concern about the extension of surveillance to non-Police agencies that do not have the same culture of restraint and oversight (eg, the Independent Police Conduct Authority).

210. The Wellington People's Centre (submission 21) in its oral submission was concerned that Police will exceed the power authorised by any warrant, despite the requirement of prior judicial approval.

211. Both Bell Gully (submission 5) and the HRC (submission 42) are concerned that agencies will be able to enter onto private property to install a surveillance device and undertake covert surveillance. Bell Gully in its oral submission was particularly concerned that agencies that do not investigate serious crime (eg, local authorities) would be able to do this.

Comment

212. Under the current law, Police and Customs may enter onto private property to install a tracking or audio surveillance device in prescribed circumstances. Outside of these circumstances, entry onto private property to install a surveillance device is not authorised.

213. Visual surveillance that involves entry onto private property and audio surveillance is a significant intrusion into people's privacy rights. This is only justified in relation to serious offending. Visual surveillance that involves entry onto private property and audio surveillance should therefore be restricted to the investigation of offences punishable by 7 years' imprisonment or more. This ensures that visual surveillance involving entry onto private property and audio surveillance is not available for trivial offending, and is restricted

to a small number of agencies (currently only Police, Customs, and the Department of Internal Affairs for the investigation of child pornography offences).

214. However, this restriction should not be applied to tracking devices, even where installation requires entry onto private property. The installation of a tracking device involves a single transitory entry for the specific purpose of installing the device. The information that is then garnered from the tracking device is limited to the location of the device and/or information about whether something has been opened or tampered with.

215. This is distinct from the installation of a visual surveillance device which allows the continuous collection of visual data on that property. Installing a visual surveillance device on private property involves a more significant intrusion into privacy rights than installation of a tracking device.

216. There should be an exception for investigations of certain offences under the Arms Act 1983. Surveillance is necessary to effectively investigate offending relating to the illegal sale, supply, and possession of firearms. The following offences in the Arms Act should therefore be exempt from the 7 year threshold:

216.1. selling firearms to a person who does not hold a permit to import or procure firearms (section 44);

216.2. carrying or possessing a firearm without a lawful purpose (section 45);

216.3. unlawful possession of a firearm (section 50);

216.4. unlawfully carrying or possessing a firearm in a public place (section 51);

216.5. use or attempted use of a firearm to prevent arrest or commit offence (section 54); and

216.6. carrying a firearm with criminal intent (section 55).

Recommendation 11

217. The Ministry and the Law Commission recommend amending the surveillance device regime so that an enforcement officer may only carry out visual surveillance that involves entry onto private property or audio surveillance if there are reasonable grounds to suspect an offence:

217.1. carrying a maximum penalty of 7 years' imprisonment or more; or

217.2. against section 44, 45, 50, 51, 54, or 55 of the Arms Act 1983.

Ability of non-Police enforcement agencies to conduct visual surveillance involving entry onto private property and audio surveillance

218. Bell Gully, in both its oral and written submission (submission 5), and Amnesty International (submission 20) raise concerns about the experience and training of non-Police agencies to run surveillance operations appropriately.

Comment

219. We agree with Bell Gully's and Amnesty International's concerns.

220. The use of interception devices to conduct audio surveillance poses distinct challenges; it is a very technical area, requiring robust procedures and technical expertise to ensure that it is carried out in a manner that guarantees the authenticity, integrity and reliability of the data obtained.

221. Police experience of audio surveillance shows that evidence obtained through such means is particularly susceptible to legal challenge. If legal challenges to the integrity of evidence obtained via audio surveillance carried out by inexperienced agencies were successful, it could bring the use of surveillance as a law enforcement tool into disrepute. Accordingly, some measure of quality control is necessary to ensure that public and judicial confidence in the quality of audio surveillance for law enforcement purposes is not undermined.

222. Concerns also apply in relation to the installation of visual surveillance devices on private property. This surveillance also raises additional concerns for the safety of enforcement officers entering onto private property to install or retrieve devices.

223. It is therefore proposed that non-Police law enforcement agencies can engage in visual surveillance involving entry onto private property or audio surveillance only when employed by an agency which has been approved to do so by Order in Council. The Order in Council may be made only on the advice of the Minister of Justice, after consultation with the Minister of Police.

224. An agency may be authorised to carry out visual surveillance involving entry onto private property, or audio surveillance, or both. This authorisation can be subject to any conditions considered appropriate, and may be revoked at any time. This approach allows for Parliamentary oversight via the Regulations Review Committee, thereby rendering the approval process less amenable to judicial review.

225. The Police have developed high levels of skill and detailed policies and procedures relating to visual surveillance involving entry onto private property and the interception and subsequent handling of communications. Accordingly, the Police should not be expected to obtain authorisation to continue this activity.

Recommendation 12

226. The Ministry and the Law Commission recommend amending the surveillance device regime so audio surveillance and visual surveillance involving entry onto private property is only available to:

226.1. constables; or

226.2. enforcement officers employed or engaged by a law enforcement agency that has been approved by Order in Council to carry out such surveillance.

Recommendation 13

227. The Ministry and the Law Commission recommend that the Order in Council approval process contain the following features:

227.1. The Order in Council may only be made on the recommendation of the Minister of Justice after consultation with the Minister of Police.

227.2. The Minister of Justice may recommend that an agency be approved to carry out either audio surveillance, or visual surveillance involving entry onto private property, or both.

227.3. The Minister of Justice may only recommend that an agency be approved to carry out visual trespass surveillance if satisfied that it is appropriate for the agency to carry out visual trespass surveillance, and:

227.3.1. the agency has the technical capability to carry out visual trespass surveillance; and

227.3.2. the agency has the policies and procedures in place so that the visual trespass surveillance can be carried out in a manner that ensures the safety of the people involved in the surveillance.

227.4. The Minister of Justice may only recommend that an agency be approved to use interception devices if satisfied that it is appropriate for the agency to use interception devices, and that the agency has:

227.4.1. the technical capability to intercept private communications in a manner that ensures the reliability of any information obtained;

227.4.2. policies and procedures in place to ensure that the integrity of any information obtained through the use of an interception device is preserved; and

227.4.3. the expertise to:

227.4.3.1. extract evidential material from information obtained through the use of an interception device in a form that can be used in a criminal proceeding; and

227.4.3.2. to ensure that any evidential material obtained through the use of an interception device is presented in an appropriate manner, when the agency intends to proceed with a prosecution.

Reporting on visual surveillance onerous for Police

228. The NZPA (submission 22) notes that incorporating visual surveillance into the surveillance device regime places onerous compliance requirements on Police that are not currently required.

Comment

229. Incorporating visual surveillance into the surveillance device regime does impose new reporting requirements on Police. However, an important aspect of the Bill is the enhanced protection of human rights where current protection has been identified as inadequate. One

such area is visual surveillance. The reporting requirements for visual surveillance are an important safeguard.

Audio surveillance – content and related data

Comment

230. There are two types of information that are relevant when undertaking audio surveillance:

230.1. content of the telecommunication (eg, what is said during a telephone conversation); and

230.2. data associated with the telecommunication (eg, the numbers to and from which a call was made, the time a call was made).

231. An enforcement officer undertaking audio surveillance is able to obtain the content of the telecommunication. However, in order to obtain the data associated with the telecommunication, an enforcement officer will need to obtain a production order (discussed at paragraphs 316-354 below) in addition to the surveillance. This data is a necessary corollary to the content of the telecommunication; requiring a separate order to be made in relation to this information involves an undesirable duplication of effort.

Recommendation 14

232. The Ministry and the Law Commission recommend that, where a telecommunication has been intercepted pursuant to a surveillance power, the enforcement officer has the power to obtain call associated data as defined in section 3(1) of the Telecommunications (Interception Capability) Act 2004.

Retention of raw surveillance data

233. Andrew Miller (submission 2) believes that, where surveillance does not obtain evidential material, all information obtained from the surveillance should be destroyed.

Comment

234. Operations involving the use of surveillance devices, particularly those on a large scale, involve the collection of a vast amount of raw data, much of which will be irrelevant. Some of this raw data will relate to the actions of innocent people. For instance, a surveillance operation targeting the entry and exit of people in and out of known gang headquarters will capture the actions of innocent parties (eg, the postman or people simply walking past property) or communications made by a suspect that have no relevance to the suspected offending.

235. There should therefore be a regime for raw surveillance data which clarifies when such data may be retained. In this context, raw surveillance data includes actual audio and visual recordings, and full or substantial parts of audio transcripts. This would not include general information generated in the course of an investigation such as job sheets or surveillance logs.

236. The proposed regime would allow raw surveillance data to be retained only where:

236.1. Proceedings have commenced in relation to an offence for which the raw surveillance data was collected. The raw surveillance data may be retained until the conclusion of the proceedings, including any appeal periods.

236.2. Raw surveillance data is required for an ongoing investigation. This data may be retained for a maximum of 3 years, with the opportunity to apply to a judge to extend this period for a further 2 years.

236.3. A judge has made an order (following an application from an agency holding raw surveillance data) allowing the agency to retain excerpts from raw surveillance data (eg, a visual snapshot of a person from a visual recording) where there are reasonable grounds to believe the excerpts may be required for a future investigation.

237. Information that is extracted from raw surveillance data, but does not itself constitute raw surveillance data, may be retained where there are reasonable grounds to suspect that the information may be relevant to an ongoing or future investigation.

238. This regime protects the privacy interests of people who become subject to surveillance operations (whether a suspect or not), while allowing enforcement agencies to retain information that is truly useful to their investigations.

Recommendation 15

239. The Ministry and the Law Commission recommend the inclusion of a regime for raw surveillance data (including actual visual and audio recordings and full or substantial parts of transcripts of audio recordings) clarifying that raw surveillance data may only be retained in the following situations:

239.1. Proceedings have commenced in relation to an offence for which the raw surveillance data was collected and have not concluded (including the expiry of any appeal periods).

239.2. Raw surveillance data is required for an ongoing investigation. This data may be retained for a maximum of 3 years. The agency that holds the data may apply to a judge for an order allowing it to retain the data for an extended period that does not exceed 2 years. A judge may make this order if satisfied that the raw surveillance data is required for that ongoing investigation

239.3. A judge has made an order (following an application from an agency holding raw surveillance data) allowing the agency to retain excerpts from raw surveillance data where there are reasonable grounds to believe that the excerpts may be required for a future investigation.

Recommendation 16

240. The Ministry and the Law Commission recommend that information that is extracted from raw surveillance data, but does not itself constitute raw surveillance data, may be retained where there are reasonable grounds to suspect that the information may be relevant to an ongoing or future investigation.

Clause 42 – Activities for which surveillance device warrant required

241. This clause clarifies activities for which a surveillance device warrant must be obtained. Clause 42(d) provides that a warrant is required to observe private activity in the curtilage (eg, garden or front yard) of private premises if the surveillance exceeds:

241.1. 3 hours in any 24-hour period; or

241.2. 8 hours in total.

Submissions

242. The NZPA (submission 22) in its oral submission objected to the requirement to obtain a surveillance device warrant for visual surveillance of private activity in the curtilage of private premises. The NZPA argued that there is a low expectation of privacy in the curtilage of private premises because it is in public view.

243. The Law Firms (submission 49) believe that the 3 and 8 hour thresholds in clause 42(d) are too low, particularly for non-Police agencies.

Comment

244. The Committee should note that visual surveillance of the curtilage of private premises is currently unregulated. Both Police and non-Police agencies may therefore currently carry out

such surveillance for an unlimited period of time (although an occupier may have an action under NZBORA for unreasonable search and seizure if they are aware of the surveillance).

245. Activities in the curtilage of private premises are not as private as those that occur inside private premises, as they are more susceptible to visual observation by a casual observer (or enforcement officer). However, prolonged visual observation should require authorisation by warrant. The 3 and 8 hour thresholds provide appropriate protection for privacy interests.

246. In relation to NZPA's concern, "private activity" is defined in clause 3 as "activity that, in the circumstances, any 1 or more of the participants in it ought reasonably to expect is observed, intercepted, or recorded by no one except the participants". Where visual surveillance is carried out on an area that is in public view, this is unlikely to constitute a "private activity" requiring a surveillance device warrant. We therefore do not share the NZPA's concerns.

247. However, the Bill does not currently require an enforcement officer to obtain a surveillance device warrant to undertake surveillance that would require trespass onto private property (for example, installation of a camera on private farm land or in a forest in order to capture information about drug cultivation). Therefore, such surveillance on private property could not be lawfully undertaken as there is no legal mechanism authorising entry to the private property to install the surveillance device. It is recommended that clause 42 be amended to make it clear that a surveillance device warrant is required if an enforcement officer wishes to undertake surveillance involving trespass onto private property.

Recommendation 17

248. The Ministry and the Law Commission recommend amending clause 42 to make it clear that a surveillance device warrant is required for surveillance involving trespass onto private property.

Clause 43 – Some activities that do not require warrant under this subpart

249. This clause clarifies activities which do not require a surveillance device warrant under subpart 3.

250. Subclause (1)(b) provides that a covert audio recording of a voluntary oral communication between 2 or more persons made with the consent of at least one of them does not require a warrant.

251. Police have informed officials that, even if a party consents to the interception, network operators are not willing to cooperate with law enforcement without a warrant. This is understandable as a warrant provides the network operator with assurance that interception has been subject to independent judicial approval, and provides them with criminal and civil immunity in relation to the interception under clause 159.

252. It is therefore desirable that an enforcement agency is enabled (but not required) to obtain a surveillance device warrant in circumstances where a party consents to interception.

253. Subclause (1)(e) provides that activities carried out under the authority of an interception warrant issued under section 4A(1) or (2) of the New Zealand Security Intelligence Service Act 1969 do not require a warrant under the Bill, and are therefore excluded from the surveillance device regime. Interception warrants issued under section 17 of the Government Communications Security Bureau Act 2003 should be similarly excluded.

Submissions

254. Nelson Bays Community Law Service Inc (submission 12) and Marcus Graf (submission 17) state that the consent of one of the participants to a covert recording should not be enough to allow for such a recording.

Comment

255. This exception is carried over from section 216B(2)(a) of the Crimes Act 1961. Under the current law, interception of a private communication is a criminal offence, unless it falls within one of the exceptions. One of the exceptions is where the interception is carried out by a party to that communication.

256. The rationale behind this exception is that a participant to a conversation may subsequently record or report what was said during the conversation. A recording at the time of the conversation is therefore merely a more accurate account of what the consenting party could later recall and report of their own volition.

Recommendation 18

257. The Ministry and the Law Commission recommend amending clause 43 so that:

257.1. an enforcement officer may (but is not required to) make an application for a surveillance device warrant where a party to the communication consents to the interception; and

257.2. the surveillance device regime in the Bill does not apply to interception warrants issued under section 17 of the Government Communications Security Bureau Act 2003.

Clause 44 – Surveillance device warrant need not be obtained for use of surveillance device in some situations of emergency or urgency

258. This clause allows an enforcement officer to use a surveillance device without warrant for up to 72 hours in specified circumstances where obtaining a warrant is impracticable. The circumstances are the same as those for warrantless searches, namely:

258.1. to obtain evidential material of offences punishable by a term of 14 years' imprisonment or more;

258.2. to prevent offences being committed that would cause injury to people or damage to property;

258.3. to avert emergencies;

258.4. in relation to certain arms offences; and

258.5. in relation to certain offences against the Misuse of Drugs Act 1975.

Submissions

259. Annemarie Thorby (submission 16) states that surveillance powers should not be available without warrant.

260. The HRF and ACCL (submission 40) believe that the time period for which surveillance could be carried out without warrant (72 hours) is too long. The HRF and ACCL suggest that 12 hours would be more appropriate.

261. Marcus Graf (submission 17) submits that the requirement that it be "impracticable in the circumstances" to obtain a warrant is too wide, and gives Police a large discretion about whether to apply for a warrant.

Comment

262. In the same way that a warrantless search may be justified in narrow circumstances by reason of the purpose, nature or target of the search, warrantless surveillance may be justified. There are some situations where it is impracticable to obtain a surveillance device warrant, and the seriousness of the situation justifies a response without prior judicial authority (albeit one that is limited in terms of the time that it may be conducted without warrant). Clause 44 is limited to such emergency or urgent situations.

263. In relation to the HRF and ACCL's concern, surveillance device warrants may be granted only by judges, whose availability is more limited than that of issuing officers. Taking into account the fact that surveillance may need to be undertaken over the weekend, or in locations where access to a judge is difficult, 72 hours is an appropriate timeframe.

264. Whether obtaining a warrant is "impracticable in the circumstances" is necessarily a judgement that must be made by the individual enforcement officer. There will be significant training on the use of surveillance, including the situations where warrantless surveillance is lawful, to ensure that decisions (eg, decisions to obtain or not obtain warrants) are made on a principled basis.

265. Section 21 of NZBORA will also be relevant to this decision. If the impracticability arises as a result of an agency's deliberate actions to create a situation of impracticability, it is likely that the surveillance will be unreasonable.

266. The Committee should note that under clause 56 a surveillance device report must be provided to a judge after any warrantless surveillance is carried out under clause 44. If the judge who receives the report considers that the conditions in clause 44 were not met, the judge may report this to the Chief Executive of the relevant agency, or order that the subject of the surveillance be notified. If a judge makes a report to the Chief Executive, this must be included in the agency's annual report to Parliament. These reporting requirements provide an additional layer of accountability.

267. Clause 44 allows enforcement officers to undertake warrantless surveillance for up to 72 hours. As currently worded, this could allow enforcement officers to use surveillance for 71 hours, stop, and then use surveillance for another 72 hours. It should be clarified that the 72 hour limit applies to both continuous and intermittent use of surveillance devices.

Recommendation 19

268. The Ministry and the Law Commission recommend amending clause 44(1) to clarify that an enforcement officer may only undertake surveillance without a warrant, intermittently or continuously, for a period not exceeding 72 hours in total.

Clause 50 – Form and content of surveillance device warrant

269. This clause sets out the conditions of a valid surveillance device warrant and what it must contain. Under subclause (3), the surveillance device warrant must contain, among other things:

269.1. the name, address, or other description of the person, place, vehicle, or other thing that is the object of the proposed surveillance; and

269.2. the evidential material relating to the suspected offence that may be obtained by surveillance device.

270. If the enforcement officer is unable to provide this information, the warrant must instead contain information on these matters in enough detail for the judge to determine the scope and objectives of the proposed surveillance (subclause (4)).

Submissions

271. The HRF and ACCL (submission 40) are concerned about the exception in subclause (4), as they believe it could be subject to abuse.

Comment

272. The concern of the HRF and ACCL seems to be that subclause (4) has the potential to subvert the requirement of specificity in surveillance device warrants and applications. Specificity is an important safeguard.

273. The exception in subclause (4) takes a pragmatic approach to surveillance activities. For instance, Police may receive information that a drug consignment is to arrive at a specific location, but no information as to who will be picking up that consignment or what vehicles will be used to pick up the consignment.

274. It is therefore a necessary exception. It should be noted that subclause (4) still requires the enforcement officer to provide enough information to enable the judge to determine the scope and objectives of the proposed surveillance. Further, the exception is only available where the applicant is *unable* to provide this information, not when they are merely *unwilling* to do so.

Recommendation

275. The Ministry and the Law Commission recommend no change to clause 50.

Clause 51 – Carrying out authorised surveillance activities and evidential material relevant to other offences

276. This clause provides that a surveillance device warrant may be executed by anyone who it is directed to, and any assistant. Subclauses (2) and (3) provide that "windfall evidence" that is collected pursuant to lawful use of a surveillance device may be admissible in court proceedings. Windfall evidence is evidential material of offending that is not the offence or offences for which the surveillance device warrant was obtained, or for which the surveillance device was used. This evidential material must be in relation to an offence for which a surveillance device warrant could have been issued, or a surveillance device lawfully used, by that agency.

Submissions

277. Three submissions (submissions 14, 24, and 40) are concerned that clause 51 allows enforcement agencies to undertake a fishing expedition for offending.

Comment

278. Section 312N of the Crimes Act 1961 and section 26 of the Misuse of Drugs Amendment Act 1978 currently permit windfall evidence in some circumstances. Both section 312N of the Crimes Act and section 26 of the Misuse of Drugs Amendment Act provide that communications that are intercepted under an interception warrant or an emergency permit are inadmissible unless they relate to offences specified in those sections. Admissibility is not restricted to communications relating to the specific offence for which the interception warrant or emergency permit was obtained.

279. The Committee should note that the recommendations limiting all audio surveillance and visual surveillance involving entry onto private property will also act to limit the admissibility of windfall evidence of these types of surveillance. Further, clause 51 does not permit a greater intrusion than the authorising surveillance power. That is, only evidential material obtained within the scope of the surveillance power will be admissible.

Recommendation

280. The Ministry and the Law Commission recommend no change to clause 51.

Clause 53 – Surveillance device warrant report

281. This clause requires a person who carries out activities authorised by a surveillance device warrant to provide a surveillance device warrant report to a judge of the same court as the judge who issued the warrant. Clause 43(1) requires this report to be made within 1 month after the expiry of the surveillance device warrant.

Submissions

282. The NZPA (submission 22) in its oral submission stated that reporting within 1 month of the expiry of the surveillance device warrant is unreasonable. The NZPA explained that investigators are immersed in work for court proceedings 1 month following an investigation. It suggests that the surveillance device warrant report be provided after the completion of judicial proceedings.

Comment

When report should be filed

283. The requirement to make a surveillance device warrant report should not be made on the completion of proceedings for a number of reasons:

283.1. The 1 month period is a reasonable time in which to require an applicant to make a surveillance device warrant report, and is not unduly onerous.

283.2. Under the current interception regime (Part 11A of the Crimes Act 1961), a Police officer must make a written report *as soon as practicable* after an interception warrant or emergency permit has expired. The 1 month period is therefore not a large departure from the current regime's reporting requirements.

283.3. Proceedings may not be completed until years after the surveillance has taken place. The surveillance device warrant report should be made when the conditions surrounding the use of the surveillance device are fresh in the mind of the person who carried out the surveillance.

283.4. There will be situations where surveillance carried out pursuant to a surveillance device warrant will not result in criminal proceedings being instituted. However, a report on the use of this surveillance should still be made.

Information the report should contain

284. The surveillance device warrant report must contain information on whether carrying out the activities authorised by the surveillance device warrant resulted in obtaining evidential material. Under the search warrant report provision (clause 102), the enforcement agency must set out whether evidential material obtained was:

284.1. specified in the search warrant;

284.2. seized under the plain view seizure provision in clause 119; or

284.3. a mixture of the two.

285. Further, under the search warrant regime, the report must also contain information about whether any criminal proceedings have been brought or are under consideration as a result of evidential material obtained pursuant to a search warrant.

286. The more detailed requirements for a search warrant report provide the issuing officer with important information to assist them in assessing whether the search was carried out lawfully. Clause 53 should be amended to make the requirements for surveillance device warrant reports consistent with the requirements for search warrant reports.

Who the report should be provided to

287. The requirement to provide a surveillance device warrant report to a judge of the same court as the judge who issued the warrant allows a judge to determine whether the power has been exercised lawfully.

288. This protection should be further strengthened by requiring the surveillance device warrant report to be provided to the judge who actually issued the surveillance device warrant. If that

judge is unable to act, the report may be provided to a judge of the same court as that who issued the warrant.

289. The judge who issued a surveillance device warrant is in the best position to assess whether use of a surveillance device complied with any conditions placed on the warrant's issue. It also allows continuity of oversight, allowing the judge who issues the warrant to appraise the effectiveness of the warrant in obtaining evidential material or other information of investigative value.

Recommendation 20

290. The Ministry and the Law Commission recommend amending clause 53 so that surveillance device warrant reports must contain information about whether:

290.1. the evidential material obtained as a result of using the surveillance device was specified in the surveillance device warrant; and

290.2. any criminal proceedings have been brought or are under consideration as a result of evidential material obtained pursuant to a surveillance device warrant.

Recommendation 21

291. The Ministry and the Law Commission recommend that clause 53 be amended so that the surveillance device warrant report must be provided to the judge who issued the warrant. If that judge is unable to act, the report must be provided to a judge of the same court as the judge who issued the warrant.

Clauses 55 – 56 – Actions on receipt of report

292. These clauses set out what a judge may do on receiving a report on the use of a surveillance device (required under clauses 53 and 54). On receiving a report, a judge may:

292.1. give directions as to the destruction or retention of the material obtained from the surveillance;

292.2. report on a breach of the conditions of a surveillance device warrant (clause 55(1)(b)) or unauthorised use of the surveillance device (clause 56(1)(b)) to the Chief Executive of the relevant agency; or

292.3. order that the subject of the surveillance be notified.

293. A judge may only order the subject of the surveillance to be notified if the public interest in notification outweighs any potential prejudice to:

293.1. any investigation by a law enforcement agency;

293.2. the safety of informants or undercover officers;

293.3. the supply of information to the law enforcement agency; or

293.4. any international relationships of the law enforcement agency.

294. Under clause 55(2)(b), the judge must additionally be satisfied that either the warrant should not have been issued or there has been a serious breach of the conditions of its issue. Under clause 56(2)(b), the judge must additionally be satisfied that there was a serious breach of the criteria for using warrantless surveillance under clause 44.

Submissions

295. The Privacy Commissioner (submission 26) and Andrew Miller (submission 2) state that an enforcement agency should be required to notify an individual that they have been subject to surveillance, and that non-notification for the reasons outlined at paragraphs 293.1-293.4 should be the exception (ie, notification should be the default position). The HRF and ACCL (submission 40) are concerned that agencies will use the exceptions outlined in paragraphs 293.1-293.4 to avoid notification.

296. The Chief Justice (submission 25) in her submission stated that it is inappropriate to give judges the express power to do the things outlined in paragraphs 292.1-292.3 above. This would require judges to be involved in monitoring enforcement agencies at an early stage of the proceedings. The Chief Justice believes these are properly executive responsibilities that should not be conferred on judges.

Comment

Notification

297. Operations involving the use of surveillance devices may record the actions of innocent parties (eg, people walking past a property under surveillance).

298. Given the limited information that is obtained about such innocent parties (eg, that they walked past the property on a certain date at a specific time) it will often be impossible to identify them in order to obtain their contact details so they can be notified about the surveillance. Even if this were possible, it is unclear how notification would advance the privacy rights of such individuals.

299. Accordingly, a better means to protect innocent parties' privacy rights is to require the destruction of data that captures their actions. The Committee should note that the recommendations relating to a destruction regime for raw surveillance data of no investigative value will protect the privacy rights of innocent people caught up in surveillance.

300. Even if notification were to be limited to subjects who are the true target of surveillance, Police and Customs assert that this would always prejudice ongoing investigations. Notifying individuals that they were a surveillance target would exclude the possibility of any further effective surveillance of them in the future.

301. Police and Customs maintain that an exception based on prejudice to ongoing investigations would not negate this risk. This is because it is difficult to assess who may need to be targeted for surveillance in the future.

Appropriateness of judges' powers

302. The ability for judges to give directions about the retention or destruction of material, refer a breach to a Chief Executive, and order notification, is an important safeguard on the conduct of surveillance operations. This independent oversight helps ensure that surveillance operations are conducted appropriately and provides a mechanism by which information that is illegally obtained is destroyed.

303. The Committee should note that the nature of the referral is simply to alert the Chief Executive to the fact there was a breach of the conditions of a surveillance device warrant or unauthorised use of a surveillance device. The referral does not direct or recommend any disciplinary action; this remains the responsibility of the Chief Executive.

Recommendation

304. The Ministry and the Law Commission recommend no change to clauses 55-56.

Subpart 1 continued - Residual warrant regime

305. The residual warrant regime provides enforcement officers with the opportunity to obtain a preliminary judicial view on a new device or technique prior to using it. It is therefore an optional regime that an enforcement officer may choose to utilise, as obtaining a residual device warrant provides a measure of comfort that evidential material obtained in using the new device, technique or procedure is likely to be admissible.

General submissions on residual warrant regime

306. Four submissions note that the scope of the residual warrant regime is unclear, and believe it to be too wide (submissions 16, 36, 40, and 46). The submitters are particularly concerned that residual warrants create a category of surveillance techniques that is not subject to defined limits.

307. The HRF and ACCL (submission 40) state that law enforcement should not be able to use new surveillance techniques unless authorised by a specific statute. They expanded on this in their oral submission, stating that the Bill will impact on section 21 of the NZBORA, and there should be a specific examination of each search, seizure or surveillance power to determine whether it is reasonable or not, rather than a generic regime that covers them all.

308. The HRC (submission 42), and Professor Jane Kelsey (submission 31) in her oral submission, are concerned that the agency itself decides whether a new device, technique or procedure constitutes an intrusion into the reasonable expectation of privacy of any person.

Comment

309. Under the present law, the admissibility of evidential material obtained from a new device, technique, or procedure can only be tested after the fact. The test takes the form of an accused's claim that the evidential material was obtained in breach of their right to be secure against unreasonable search and seizure under section 21 of NZBORA, and should be excluded under section 30 of the Evidence Act 2006.

310. The residual warrant regime merely gives law enforcement officers an opportunity to obtain a preliminary judicial view on a new device, technique or procedure prior to using it. The intent of the regime is not to make lawful the use of new devices, techniques, or procedures that are otherwise unlawful. Indeed, it is intended that an order will be issued only in relation to devices, techniques, or procedures that are already lawful and reasonable.

311. In summary, the regime is intended to provide an enforcement officer with a measure of comfort that evidential material obtained through a new technique or procedure, or use of a new device is unlikely later to be found to be unreasonable under section 21 of NZBORA.

312. The current drafting does not reflect this intention. The use of the term "warrant" suggests that it authorises enforcement officers to do something that they would otherwise be unable to do. Likewise, the regime's provisions mirror those of the surveillance device warrant regime when these two regimes are quantitatively different.

313. The residual warrant regime should be recast as a "declaratory order" regime. The regime will make it clear that a declaratory order does not authorise an activity, technique or device that would otherwise be unlawful or unreasonable. The order merely provides judicial clarification that the activity, technique, or device is currently lawful and reasonable.

314. The declaratory order may contain detail as to the conditions under which use of the new device, technique, or procedure would be reasonable (eg, use of heat sensing technology is reasonable and lawful only if not directed at bathrooms).

Recommendation 22

315. The Ministry and the Law Commission recommend that the residual warrant regime be recast as a "declaratory order" regime that clarifies that it does not authorise activities, techniques or devices that are not otherwise lawful and reasonable.

Subpart 2 – Production order regime

316. Production orders require a person to produce information or documents related to a specific offence on a single or multiple occasions. They are available to enforcement officers who are able to apply for a search warrant to investigate the offence for which the production order is sought.

317. Production orders are intended to provide a less intrusive alternative to search warrants where the evidential material sought is in the form of documents that can be identified and full cooperation from the party subject to the order is anticipated. Where business records are sought, a production order may be less disruptive to a business as it allows the business itself to locate the information required without enforcement officers entering the business to search for it and thereby disrupting its operations.

318. The production order process reflects a common practice of Police when executing search warrants against people who are willing to assist. The Courts have held that a search warrant can be executed by Police sending a copy of the warrant to an organisation (eg, a bank), and for that organisation to provide the documents sought. This avoids the need for Police to enter the premises and to intrude on and disrupt businesses/occupiers. The production order regime puts this process on a more formal footing.

General submissions on the production order regime

Production orders available on too wide a basis

319. Four submissions (submissions 16, 24, 39, and 41) believe that production orders are granted on too wide a basis and are open to abuse. The New Zealand Council of Trade Unions (submission 24) and the Privacy Commissioner (submission 26) believe that production orders should only be issued by judges, rather than issuing officers.

Comment

320. The production order process reflects a common practice of Police when executing search warrants against occupiers who are willing to assist. The Courts have held that a search warrant may be lawfully executed by the Police sending a copy of a search warrant to an organisation (rather than the Police entering the premises to find the documents themselves) and for that organisation to provide copies of the documents sought. As the Courts have noted, this avoids unnecessary disruption to the occupier. The production order regime puts this process on a more formal footing.

321. On this basis, production orders have been made available where an enforcement officer may apply for a search warrant. This is appropriate, notwithstanding the concerns expressed in submissions 16, 24, 39, and 41.

322. We do not agree with the suggestion by the New Zealand Council of Trade Unions and the Privacy Commissioner (submissions 24 and 26) that production orders should only be issued by judges. Production orders are an alternative to search warrants (which are issued by issuing officers). Since production orders are a less intrusive alternative to search warrants, it would be illogical to restrict the power to issue them to judges only.

Heading "production and monitoring orders"

323. The Privacy Commissioner (submission 26) also submitted that the heading "production and monitoring orders" is confusing as the section only refers to production orders.

Comment

324. The production order regime incorporates a monitoring component, since it may require a person to supply information over a specified period. This includes information that may not exist at the time the order is made. The order, however, is called a "production order", and we agree with the Privacy Commissioner (submission 26) that the title "production and monitoring order" may cause confusion and should be amended.

Recommendation 23

325. The Ministry and the Law Commission recommend that "and monitoring" be deleted from the title above clause 68.

Reporting Requirements

326. The Privacy Commissioner (submission 26) suggests that there should be reporting requirements similar to those required in the surveillance device warrant regime, namely:

326.1. enforcement officers should be required to report to the issuing officer on the production order once it has been carried out; and

326.2. the Chief Executive of a law enforcement agency should be required to report to Parliament on the use of production orders as part of their annual reporting requirements.

Comment

327. The reporting obligations in the surveillance device warrant and search warrant regimes are directed at obtaining information about *how* the search or surveillance has been carried out. They allow a judge or issuing officer to ensure that enforcement officers have acted within the parameters of a warrant. This recognises that, even where a surveillance device warrant or search warrant has been obtained, enforcement officers may execute such activities in a manner that is unreasonable, or act outside its scope.

328. By way of contrast, enforcement officers have a very small role to play in production orders. This is because production orders are directed at the party from whom the information/documents are sought (instead of the enforcement officer). The location, copying, and collation of the documents is carried out by that party and not an enforcement officer. Reporting would not add to anything in the order itself.

Notification of subject

329. The Privacy Commissioner (submission 26) also suggested that where law enforcement officers obtain personal information about a person under the authority of a production order, law enforcement officers should be required to notify that person that an order was obtained and details of the information that was produced. For instance, a production order could be obtained in relation to an individual's bank accounts. This could be directed to the bank, in which case the bank account holder may not become aware of the order.

Comment

330. As noted above enforcement officers, production orders allow enforcement officers to obtain information that they can currently obtain through a search warrant. To use the example provided above, Police may wish to obtain transaction details of a suspect's bank account. The Bill allows Police to obtain this information by executing a search warrant on the bank's premises (with Police searching for the documents), or by serving a production order on the bank so the bank itself locates and provides the documents sought.

331. In executing a search warrant, the Police are not required to notify the bank account holder that they have obtained information about them. It would be anomalous to require such notification in the production order context.

Time when production orders available

332. The ADLS (submission 39) suggested that production orders should be limited to before charges are laid.

Comment

333. We see no reason in principle why there should be this limitation, particularly as there is no such limitation in relation to search warrants. There will be situations where charges have been laid, but an investigation is ongoing. As with examination orders, production orders will often be obtained in respect of a person who is not a suspect. While there might be sufficient information to charge the suspect, more investigation may be needed to prepare and strengthen the prosecution case.

Different thresholds for the Serious Fraud Office

334. The NZPA (submission 22) note that production orders are also available to the Serious Fraud Office. In that context, a production order may be issued by way of notice, if the Director of the Serious Fraud Office has reason to believe the documents may be relevant to a suspected case of serious or complex fraud. The NZPA state that the difference in threshold and judicial oversight requirements is counter-intuitive as, for instance, the Police investigate serious or complex fraud, as well as other serious offending such as homicides and dealing in Class A drugs.

Comment

335. Production orders provide information that would otherwise be obtained from searches; they should therefore be available on the same basis as search warrants. An underlying principle of the Bill is that search and surveillance powers should generally be exercised only after prior judicial authorisation, unless there is a compelling reason otherwise (eg, risk that the evidential material will be destroyed). As production orders are given to third parties who are expected to cooperate in complying with them, it is difficult to imagine a situation where public interest factors override the public interest in prior judicial authorisation.

336. If there is a strong public interest in information being obtained immediately, the Police may exercise a warrantless power of search (in the circumstances specified in Part 2 of the Bill) to obtain the information.

337. Further, the fact that the Serious Fraud Office has different thresholds does not provide a compelling argument for the thresholds in this Bill to be reduced. The production orders in the Serious Fraud Office Act 1990 were developed in a specific legislative context. The thresholds that must be met in the Bill before a production order is made ensure they are appropriately used and constitute an important safeguard.

Production orders against telecommunications network operators

338. Under the Bill, production orders are available to enforcement officers to obtain information from network operators. Clause 69(2) sets out what must be in an application for a production order. Clause 70 sets out the conditions for making a production order. These are:

    338.1. there are reasonable grounds to suspect offending for which a search warrant could be obtained;

    338.2. there are reasonable grounds to believe that the documents sought:

        338.2.1. constitute evidential material in respect of the offence; and

        338.2.2. are in the possession or control of the person against whom the order is sought, or will become so.

339. Clause 68 contains a definition of "document" that includes "call-related information". "Call-related information" means information for which a network operator has an "interception capability".

Submissions

340. The Privacy Commissioner (submission 26) suggests that clause 69(2) be amended so that an application for a production order against a network operator is required to specify the type of telecommunication to be covered by the order. The Privacy Commissioner believes that this will prevent overly-wide production orders from being granted.

341. The Privacy Commissioner further suggests that a new condition be inserted into clause 70 so that an issuing officer may only make a production order where there are reasonable grounds to believe that the documents sought "may be obtained in a manner that protects the privacy of telecommunications that are not authorised to be produced under the order".

342. Telecom (submission 41) is concerned that:

342.1. the reference to "interception capability" in the definition of "call-related document" could require it to establish and maintain interception capability for every agency that may obtain a production order (ie, Telecom could be required to set up a complex and expensive system to enable it to intercept communications for every agency that can obtain a production order); and

342.2. it could receive a production order, valid for a month, requiring it to provide the content of calls over that period.

343. Telecom's concerns are essentially that the production order regime could be used by agencies to intercept data, in a manner that bypasses the protections in the surveillance device regime. The Law Firms (submission 49) raise similar concerns.

344. In its written submission, Telecom also suggests that the agencies who may apply for production orders should be limited to those who investigate serious offending.

Comment

345. The Bill requires production orders to be specific as to the documents covered by the order that must be produced. A production order that is not sufficiently specific is unlikely to survive a challenge to its validity.

346. This requirement of specificity is also relevant in relation to the Privacy Commissioner's other suggestion. A production order will only authorise the production of information specified in that order. Telecommunications not authorised to be produced should not be produced under the order. If unauthorised information is produced, the Privacy Act 1993 may provide an individual with redress.

347. We agree with Telecom that the reference to "interception capability" should be removed as the production order regime covers *stored* documents and information, not information that is intercepted.

348. As discussed above, the production order regime provides an alternative to a search. The production order regime is not intended to require a person or organisation to provide information that it would not ordinarily keep. Nor is it intended to require network operators to provide call content on a real-time basis in a manner that bypasses the surveillance device regime.

349. We therefore recommend amending clause 68 to clarify that a document does not include anything which a network operator does not have storage capability for, or does not store in the normal course of its business.

Recommendation 24

350. The Ministry and the Law Commission recommend amending clause 68 to remove the reference to "interception capability", and clarifying that a document does not include anything which a network operator does not have storage capability for, or does not store in the normal course of its business. An unrelated recommendation to amend clause 68 is made in the Appendix.

Clause 76 – Documents produced under production order

351. This clause allows an enforcement officer to either retain or copy an original document that has been produced to them. Under subclause (3), the enforcement officer may require the person producing the document to reproduce the information in usable form.

Submissions

352. Andrew Miller (submission 2) is concerned that the requirement to reproduce a document in usable form could be an onerous one, possibly requiring software development in order to comply.

Comment

353. The requirement in subclause (3) is a necessary corollary of the production order regime. Otherwise, a person may simply produce documents that are encrypted that an enforcement officer cannot decipher.

Recommendation

354. The Ministry and the Law Commission recommend no change to clause 76.

Subpart 4 – Warrantless powers of entry and search incidental to arrest or detention

Clauses 80 – 86 – Warrantless powers of entry and search incidental to arrest or detention

355. These clauses provide a person who has exercised a power of arrest or detention with warrantless powers to:

355.1. enter, search for, and seize any evidential material relating to the offence for which the person was arrested in order to secure that evidential material (clause 81);

355.2. enter and search a vehicle (clause 82);

355.3. carry out a rub-down search of the person to ensure that they are not carrying anything that may harm a person, or may facilitate their escape (clauses 83-85);

355.4. carry out a more thorough search of the person if there are reasonable grounds to believe that the person is carrying something that may harm any person, may be used to facilitate their escape, or constitutes evidential material relating to the offence for which the person is arrested or detained (clause 86).

Submissions

356. Annemarie Thorby (submission 16) is concerned about the provisions providing warrantless powers of search attendant on arrest or detention. In her oral submission, Annemarie Thorby claimed that these provisions significantly expanded the current law. The Committee requested information about whether this was the case.

Comment

357. The common law currently provides a power to conduct a search incidental to an arrest, but the scope of this power is unclear.

358. In relation to the power to search *people* who have been arrested, the following principles may be distilled from the case law:

358.1. There is no general power to search a person for no reason other than the fact of their arrest.

358.2. There is, however, a common law power to search a person who has been arrested if this is reasonably necessary to find:

358.2.1. a weapon or other item that may be used to injure themselves or another person;

358.2.2. an item that may be used to facilitate their escape; and

358.2.3. evidence of the offence for which that person was arrested.

359. In relation to the power to search *premises* after a person has been arrested, the following principles may be distilled from the case law:

359.1. There is a power to search the house of an arrested person.

359.2. There is a power to search the *immediate surroundings* of a person who has been arrested. This may include a vehicle that they have been travelling in, but this is a matter of some uncertainty.

359.3. This power to search only arises if it is necessary for a reason incidental to the arrest. What constitutes a reason incidental to arrest will depend on the circumstances of the case, but may include:

359.3.1. ensuring the safety of any person;

359.3.2. finding evidence of the offending for which the person was arrested; or

359.3.3. preserving evidence of the offending for which the person was arrested.

359.4. Whether a search is justified or reasonable will depend on the subjective reason for conducting the search *and* the objective reasonableness of those reasons.

360. The extent of the power to search on arrest therefore remains uncertain. After arresting a person, it is unclear *what* may be searched. For instance, it is unclear:

360.1. whether there is a power to search a person's private property where a different person has been arrested on that property (eg, a friend's house);

360.2. whether there is a power to search public premises where a person has been arrested on those premises (eg, a bar);

360.3. whether there is a power to search a vehicle after someone who has been travelling in that vehicle has been arrested; and

360.4. whether there are reasons incidental to arrest, other than those articulated at paragraphs 359.3.1-359.3.3, which authorise a search.

361. The Bill clarifies when there is a power to search both people and premises.

362. In relation to searches of *people*, clauses 83-85 of the Bill provide that a person may carry out a rub-down search of a person who has been arrested or detained in order to ensure they are not carrying anything that may be used to:

362.1. harm any person; or

362.2. facilitate their escape.

363. An enforcement officer may carry out a personal search of a person (that is more intrusive than a rub-down search) if they have reasonable grounds to believe that the person is carrying something that:

363.1. may be used to harm any person;

363.2. may be used to facilitate that person's escape; or

363.3. is evidential material relating to the offence for which that person was arrested or detained.

364. In relation to searches of *premises*, clause 81 allows an enforcement officer who has arrested a person to search a place if they have reasonable grounds to believe that:

364.1. evidential material relating to the offence for which the suspect was arrested is in that place; and

364.2. the evidential material will be destroyed if the search is delayed in order to allow a search warrant to be obtained.

365. Clause 82 allows an enforcement officer who has arrested a person to search a vehicle if they have reasonable grounds to believe that evidential material relating to the offence for which the suspect was arrested is in that vehicle. An enforcement officer does not have to have reasonable grounds to believe that the evidential material will be destroyed if the search is delayed due to the high risk that evidential material in vehicles will be moved.

366. We believe that this is the most principled way to deal with searches incidental to arrest. Rather than limiting searches to specified places (eg, the accused's house), the Bill limits searches to places reasonably believed to contain evidential material of the offence for which the arrest was made. This links the power of search to the reason for the arrest.

367. Further, the requirement that there be reasonable grounds to believe that evidential material will be destroyed if the search is delayed in order to obtain a search warrant links to a rationale for warrantless searches; to preserve evidential material.

Recommendation

368. The information relating to clauses 80-86 have been provided by way of information only, and as such, the Ministry and the Law Commission recommend no change to clauses 80-86.

Clauses 83 – Rub-down search of arrested or detained person

369. Clause 83 provides that a person may carry out a rub-down search of a person who has been arrested or detained to ensure they are not carrying anything that can be used to harm a person, or to help that person escape. Clauses 83(2) provides that a person conducting a rub-down search may:

369.1. run or pat their hand over the body of the person being searched;

369.2. insert their hand into any pocket or pouch in the clothing of the person being searched;

369.3. require the person being searched to:

369.3.1. open their mouth;

369.3.2. display the palms of their hands;

369.3.3. display the soles of their feet;

369.3.4. lift or rub their hair; and

369.3.5. permit a visual examination.

Submissions

370. ADLS (submission 39), in its oral submission, stated that clause 83 goes further than required for a rub-down search. It argued that the purpose of rub-down searches is to ensure people's safety, and that patting the body of the person being searched is not necessary in all cases. The ADLS said that the rub-down search should be limited; for instance, by limiting them to where a person has been arrested for an offence involving violence.

Comment

371. When someone is arrested or detained, there is a potential safety risk for the people who carry out the arrest or detention, any other persons being detained, and the detainee. The power to carry out a rub-down search on arrest or detention is an important one. The actions enabled by clause 83(2) are all necessary to ensure the safety of the people involved in the arrest or detention. To take the ADLS's example of patting the body of the person being searched; this enables an enforcement officer to determine whether the person is concealing a weapon on their body (eg, a knife hidden in a sock). Section 21 of NZBORA likewise provides a safeguard to ensure actions taken during a rub-down search are reasonable and proportionate.

372. The power to carry out a rub-down search should be limited in the manner that ADLS suggests. The offence for which a person is arrested does not necessarily indicate the safety risk posed by that person. For example, a known gang member with previous convictions for assault may be arrested for driving while disqualified. Although this offence does not involve violence, it does not follow that the gang member does not pose a safety risk.

Recommendation

373. The Ministry and the Law Commission recommend no change to clause 83.

Part 4 – General provisions in relation to search and inspection powers

374. This Part contains the standardised provisions relating to the application for, issuing of, and execution of search warrants. It also clarifies what may be done pursuant to a search, and the processes and procedures for seized or produced items.

375. Advice has previously been provided to the Committee about Part 4 and the effect this has on non-Police agencies. This document was dated 21 October 2009 and entitled "Search and Surveillance Powers Bill: Amendments to non-Police search powers".

General submissions on Part 4

376. Submitters have expressed concerns about the wholesale application of Part 4 to the Acts amended in Part 5. The objections to this "one size fits all" approach have two aspects:

376.1. the ancillary powers in Part 4 are not appropriate for *all non-Police agencies*;

376.2. the ancillary powers in Part 4 are not appropriate for *all regulatory or inspection search powers*.

377. The concerns about the wholesale application of Part 4 therefore either focus on the *agency* (eg, Pork Industry Board), or the *nature of the search power* (regulatory/inspection vs law enforcement).

Non-Police Agencies

378. The NZCCL, Amnesty International, the HRF and ACCL, the HRC, SeaFIC, and ANZ (submissions 13, 20, 40, 42, 45, and 46) raise concerns about the wholesale application of search powers to non-Police agencies. The submitters contend that this is a problem because:

378.1. the powers have been provided on a general basis, rather than after an assessment of what powers the agency actually needs to carry out its functions; and

378.2. not all the powers in Part 4 are appropriate to all the agencies.

379. The submitters are concerned that Part 4 confers greater powers on agencies than is appropriate as the powers are not tailored to an agency's specific needs. The submitters believe that additional powers in Part 4 should be given to agencies when justified on policy grounds on a case-by-case basis, rather than being imported wholesale.

380. The ADLS (submission 39) suggests that the search powers in the Bill should only be available to non-Police agencies when they are investigating indictable offences.

Comment

381. The current law on searches is scattered across different legislation and in case law. The way in which search powers may be exercised is difficult to determine, for both those subject to searches, and those conducting them. Clarifying what may be done pursuant to a search and locating this within a single piece of legislation provides more certainty in the law, making it easier for citizens to determine whether a search has been lawfully carried out.

382. The provisions which empower a search are contained in the primary legislation of the agency. Part 4 therefore does not create independent new powers. It does, however, stipulate how such existing powers are to be exercised. In some cases, Part 4 expands the ambit of existing search powers; in others, it confines them. Whether a particular provision expands or confines turns on the empowering search provision in the primary legislation, and what the courts have interpreted that particular search power as authorising.

383. Even though Part 4 sets out several things that may be done pursuant to a search, it does not mean that it will be appropriate to use these powers in every search. Section 21 of NZBORA will continue to apply; the search powers in Part 4 must still be exercised in a reasonable way. This will mean that a search which is carried out in a manner that is clearly unnecessary or inappropriate is likely to be unreasonable under section 21.

Law enforcement vs regulatory/inspection search powers

384. The Law Firms' submission (submission 49) is concerned about the wholesale application of Part 4 to regulatory inspection powers. They believe this is an unjustified extension of present regulatory powers.

385. The Law Firms are concerned about the standardisation of law enforcement and regulatory search powers, as these powers have the following significant differences:

385.1. Law enforcement search powers generally require prior judicial approval (which also means that an issuing officer has the opportunity to impose conditions on the search power). Regulatory search powers are generally exercisable without warrant.

385.2. Law enforcement search powers may be exercised only where certain thresholds are met (eg, there are reasonable grounds to suspect that someone is committing an offence). Regulatory search powers allow regulators to inspect for compliance without any suspicion of wrongdoing.

386. The Law Firms believe that prior judicial approval and threshold requirements provide a mandate for a greater level of intrusion for law enforcement search powers than regulatory search powers. The Law Firms submit that standardising the search powers across the law enforcement and regulatory contexts is therefore not appropriate.

Comment

387. Regulatory powers are not necessarily less intrusive in nature or scope than law enforcement powers, although sometimes they are limited to particular purposes. Indeed, there are a number of regulatory search or inspection powers across the statute book which a broadly cast power to enter and search and, unlike law enforcement powers (which are limited by a threshold of belief or suspicion that an offence or a breach of the statute has occurred), not confined by any purpose for the search.

388. Further, one of the major issues which emerged when the amendments currently located in subpart 1 of Part 5 were initially drafted was the difficulty of disentangling regulatory search and seizure regimes from powers conferred for law enforcement purposes. Many of these provisions were linked textually in the individual Acts being amended.

389. Many of the agencies involved in discussion indicated that they did not want to introduce two sets of new enforcement regimes; one for regulatory inspection and an entirely different one for law enforcement. The general view of those agencies consulted supported a standardised regime, so far as possible between searching for regulatory purposes and searching for law enforcement purposes. The complications involved in training law

enforcement officers for two different regimes (one for regulatory search and one for law enforcement purposes) and the likelihood of error or confusion, provide a highly practical argument for standardisation of the processes to be adopted (to the greatest extent feasible).

Training of non-Police agencies

390. The ADLS also submits that it is important that non-Police agencies receive comprehensive and ongoing training on their new powers.

Comment

391. We agree that it is important that all agencies (both Police and non-Police) receive comprehensive and ongoing training on search powers. For this reason, implementation is to be by way of Order in Council, to ensure that there is adequate time to address the training needs of the various agencies.

Fishing expeditions

392. The relevant provisions relating to seizure of items are clauses 108(e), 110(2)(e), 109, and 119. Clauses 108(e) and 110(2)(e) provide that people (and their assistants) exercising a search power may seize any thing that is authorised to be seized.

393. Clause 109 provides that if it is not reasonably practicable to determine whether an item may be seized at the search scene, the searcher may remove the item to examine or analyse it in order to determine whether it may be lawfully seized.

394. Clause 119 provides that an enforcement officer (or their assistant) may seize an item in plain view, if:

394.1. the enforcement officer is exercising a search power or is lawfully in that place as part of their duties; and

394.2. the enforcement officer has reasonable grounds to believe they could have seized the item under a search warrant or search power.

Submissions

395. A number of submitters (submissions 4, 16, 32, 36, and 40) are concerned that the Bill allows enforcement and regulatory officers to undertake fishing expeditions. Submitters state that the effect of clauses 109 and 119 is that enforcement officers may enter onto premises in order to search for evidence of any offending (rather than a specific suspected offence), and to take anything they wish from premises that are being searched.

396. The HRF and ACCL (submission 40) seem particularly concerned that clause 119 allows Police and other enforcement agencies to search for other information or items of interest when searching premises under a specific warrant. The submitters contend that this could be abused by enforcement officers who apply for a search warrant for one offence, with the collateral or primary purpose of searching for evidential material of a different (potentially more serious) offence.

Comment

397. An enforcement officer exercising a search power for law enforcement purposes is only authorised to search for specific items (ie, evidential material of offending). The search is limited to where these items might be found.

398. Likewise, when exercising a regulatory search power, the search must still be directly related to the purpose of inspection. The search is limited to that necessary for the purpose for which the search or inspection is conducted.

399. Clause 119 does not authorise searches which are wider than that allowable under the authorising search power. That is, clause 119 does not affect the ambit of the search itself (ie, *what* may be searched); it does, however, widen the ambit of what may be *seized* during a search.

400. Courts have already considered the HRF and ACCL's (submission 40) concern regarding searches for dual purposes. In relation to search warrants, the Court of Appeal in *R v Williams*[7] held that it is lawful to execute a search warrant for a dual purpose, even where there are insufficient grounds to apply for a warrant for one of those purposes, *so long as the search is not wider than that allowable in relation to the purpose for which the warrant was obtained.*

401. We believe that the ability to seize items in plain view is justified and consistent with the key principle set down in *R v Williams*. In particular, a search cannot be more extensive than required for the purpose for which it is conducted; clause 119 therefore does not mandate a greater intrusion into privacy than the authorising search power. Accordingly, clause 119 allows an enforcement officer to only seize items which are self-evidently incriminating (ie, the enforcement officer must have reasonable grounds to believe the item can be seized without further examining the item).

402. Further, the protection afforded by section 21 of NZBORA, and the prospect that material seized outside the scope of the search power will be rendered inadmissible, will help ensure that plain view seizures are appropriate.

Computer searches

403. The Bill treats searches of computers and other data storage devices in the same way as searches of tangible items. There is therefore no specific search regime for computer searches; provisions that deal with computer searches are scattered throughout the Bill. Of particular importance are:

403.1. Clause 101(4)(k): This provides that if a warrant is intended to authorise remote access (searching a computer or internet data storage device that is not at the place being searched), this must be specified in the search warrant. This specification takes the form of access information that identifies the thing to be searched remotely.

403.2. Clause 108(i): This allows any person exercising a search power to access and copy intangible material from computers and other data storage devices located at or accessible from the place, vehicle, or other thing being searched.

403.3. Clause 108(j): This allows any person exercising a search power to use any reasonable measures to:

403.3.1. gain access to any computer or other data storage device that is at the place, vehicle, or other thing being searched, or that can be accessed from such computers or data storage devices; and

[7] [2007] 3 NZLR 207.

403.3.2. create a forensic copy (clone) of any material in such a computer or data storage device.

403.4. Clauses 110(2)(h) and (j) contain equivalent provisions relating to people who are assisting a person exercising a search power.

Submissions

404. The Privacy Commissioner (submission 26) in her oral submission stated that the law should generally be technology neutral.

405. Maire Leadbeater (submission 4) in her oral submission, was particularly concerned about the ability to conduct computer searches, as computers contain truly personal material. David Small (submission 27) in his oral submission said that the increasing digitisation of activities increase the risk that privacy rights will be compromised.

Comment

406. Statutes containing search powers are currently inconsistent in the extent to which they recognise and specifically authorise searching computers (largely depending on when the power was enacted and whether lawmakers turned their minds to the issue of computers). In many cases, where the statute is silent, courts have read in a power to search for intangible material. However, in a recent High Court decision in relation to the Fisheries Act 1996, the law enforcement search power in that Act was held not to authorise the cloning of a computer hard drive due to the particular wording of the provision.[8]

407. There is a need for the law to reflect the new technological environment in which criminals are operating. For this reason, the power to search computers and other data storage devices requires clarification to ensure that criminals' use of modern technology to facilitate offending is matched by effective law enforcement powers to investigate offending.

Availability of computer searches

Submissions

408. The Law Firms' submission (submission 49), Andrew Miller (submission 2), and Stephen Bell (submission 44) raise concerns about clauses 108(i) and 110(h) allowing searchers to access and copy intangible material that is *accessible from* a computer or data storage device located at the place being searched. The submitters believe this formulation is overly broad.

409. In addition, Mr Bell suggests that the Bill should contain an explicit statement about when remote searching (searching a computer that is not located at the place being searched) is authorised.

410. Mr Bell further suggests that authority for remote searches conducted by direct access to the user's computer ("hacking") should be given with extreme caution. Mr Bell is concerned that any tools negotiated between enforcement agencies and computer security software companies (eg, firewalls, anti-spyware) to allow enforcement agencies to "hack" may become known to offenders who will use such information to break the law.

[8] *United Fisheries Limited v Chief Executive of the Ministry of Fisheries* (HC Wellington, CIV-2008-485-2452, 6 May 2009 at [93])

411. Greenpeace (submission 14) opposes the ability to conduct remote searches. The HRF and ACCL (submission 40) are concerned that clause 101(4)(k) would authorise the hacking into people's computers as well as the internet.

Comment

412. We agree that the use of the term *accessible from* is overly broad, and may permit access to a larger repository of information than intended. The provisions were intended to ensure that enforcement officers could search computers that are connected by a network, and information that a company stores on servers that are not located at the search premises.

413. Clauses 108(i) and (j), and 110(2)(h) and (j) should be amended to allow searchers and their assistants to search a "computer system". It is recommended that the definition of "computer system" in section 248 of the Crimes Act 1961 be adopted. Section 248 provides that:

> **computer system** -
>
> (a) means -
>
> (i) a computer; or
>
> (ii) 2 or more interconnected computers; or
>
> (iii) any communication links between computers or to remote terminals or another device; or
>
> (iv) 2 or more interconnected computers combined with any communication links between computers or to remote terminals or any other device; and
>
> (b) includes any part of the items described in paragraph (a) and all related input, output, processing, storage, software, or communication facilities, and stored data.

414. The definition of "thing seized" in clause 3, clause 125, and clause 154(1) should also be amended by replacing the word "computer" with "computer system" (along with other technical changes to reflect the amendments to clauses 108 and 110).

415. This will clarify the scope of computer searches. This amendment will mean that the combined effect of clauses 101(4)(k), and the amended clauses 108(i) and (j), and 110(2)(h) and (j) is that:

415.1. Where part of a computer system is located at the search premises, that computer system may be searched.

415.2. Where a computer system does not have a physical location (eg, web based email which the holder of the account accesses from various internet cafes), it may be searched pursuant to a warrant.

416. We agree with Mr Bell that it is desirable to clarify the situations where computers may be searched. It should be clarified that if a computer system is located at a physical location that can be searched, the search *must* occur at that physical location. Any search of computer data is then limited to data that forms part of the computer system. Illegal access to a person's computer ("hacking") is not authorised.

Recommendation 25

417. The Ministry and the Law Commission recommend amending clauses 108(i) and (j) and 110(2)(h) and (j) so that searchers and their assistants may search a "computer system" as defined in section 248 of the Crimes Act 1961. The Ministry and the Law Commission also recommend making consequential technical amendments to clause 125 and clause 154(1).

Recommendation 26

418. The Ministry and the Law Commission recommend clarifying that a person may only access and copy data from a computer system (and other data storage devices) where:

418.1. the computer system, or part of the computer system, is located at the place being searched; or

418.2. the computer system does not have a physical location that may be searched, and the enforcement officer has obtained a warrant to search the computer system.

Authorisation for computer searches

Submissions

419. Andrew Miller (submission 2) believes that the power to search computers should not be available for all searches, but only where explicitly authorised by warrant.

Comment

420. Explicit authorisation should not be required to search computers as:

420.1. Use of computers and other technology has become so widespread that this would be cumbersome and inefficient.

420.2. Enforcement officers will often not know in advance whether evidential material is in electronic or hard copy form.

420.3. If it were more difficult for law enforcement officers to access data that is located on computers than data located in a physical place, it would create incentives for criminals to electronically conduct or record criminal activity whenever possible.

Ability of enforcement officers to trawl through computers

Submissions

421. David MacClement (submission 9), Greenpeace (submission 14), and Annemarie Thorby (submission 16) are concerned that the computer search provisions, in conjunction with clause 119, allow Police and other enforcement officers to trawl through computers.

Comment

422. The response to concerns about clause 119 allowing searchers to trawl through computer data has been provided above at paragraphs 147-151. The specificity requirements in relation to search warrants will also continue to apply (discussed at paragraphs 433-439 below)

Notification of computer search

423. Stephen Bell (submission 44) recommends that the owner of a computer or internet data storage device should be notified of the fact that their computer or internet data storage device has been searched, with a full list of the items copied.

Comment

424. We agree with Mr Bell that notification should be necessary where a computer or internet data storage device has been searched. For instance, where a web-based email address is searched (which has no physical location that can be searched), an electronic message should be sent to the email address to notify the email address owner that it has been searched. The language used in clause 126(4)-(5) has an element of physicality to it which is problematic for remote searches. The Bill should be amended to clarify that the notification requirements in clause 126(4)-(5) apply to remote searches.

425. However, we do not agree that a copy of the items that have been copied or printed should be provided to the owner of a computer or internet data storage device. The purpose of the inventory requirement in clause 126 is to let an occupier know that their premises have been entered and searched, and itemise what has been taken. If the owner of any seized item wished to exercise their property rights, they may do so in accordance with subpart 5 of Part 4. It is for this reason that things that are generated by enforcement officers (eg, photographs, drawings, copies of documents, forensic copies of computers) do not need to be itemised in the inventory required under clause 126. This is true for both searches of physical premises and computer searches.

Recommendation 27

426. The Ministry and the Law Commission recommend that a new clause 126A be inserted to clarify that the notice requirements contained in clause 126(4) and (5) apply to remote searches of internet data storage facilities.

Computerised medical records

Submissions

427. The New Zealand College of Clinical Psychologists (submission 37) is concerned that the computer search provisions do not specifically exclude access to computerised medical records (submission 37).

Comment

428. It is not necessary to specifically and unconditionally exclude access to computerised medical records. Computer searches will be subject to the general privilege provisions in subpart 4 of Part 4 of the Bill (discussed at paragraphs 549-553), and access to computerised medical records will be dealt with in accordance with that subpart.

Planting of evidence

Submissions

429. Stephen Bell (submission 44) suggests that protections should be put in place to prevent enforcement officers from planting evidence during computer searches.

Comment

430. We agree that the integrity of evidential material is of paramount importance. However, there is also a risk that tangible objects will be "planted" or tampered with at a crime scene (eg, a gun). The risks of evidence being manufactured or tampered with on a computer system are not necessarily any greater than for physical evidence.

Remote searches

Submissions

431. Stephen Bell (submission 44) suggests the establishment of a protocol for exercising search warrants on internet service providers (ISPs) to protect the privacy of other users of that ISP.

Comment

432. We do not believe that a protocol for search warrants on ISPs is required. As discussed below at paragraphs 437-439, a search warrant must be as specific as possible about what may be searched. Only searches which fall within the parameters of the search warrant will be lawful. The requirement of specificity provides a safeguard against a general trawling exercise.

Specificity of computer search warrants

433. Clause 96 sets out what is required in a search warrant application (discussed further at paragraphs 463-470). Among other things, the search warrant application must contain a description of the items or other evidential material believed to be in the place, vehicle, or other thing to be searched.

434. Clause 101 sets out what is required in a search warrant. Among other things, a search warrant must contain "a description of what may be seized".

Submissions

435. The Privacy Commissioner (submission 26) makes two suggestions in relation to computer searches:

435.1. That clause 101(4) (form and content of search warrant) be amended so that a warrant must outline the information that is sought from an electronic device.

435.2. That clause 101(4)(k) (remote access where there is no physical search location) be amended so that a warrant must be as specific as possible as to what information can be accessed, and from where (eg, specifying which remote sites are able to be accessed and the information that may be accessed on those sites).

436. Likewise, Amnesty International (submission 20A) suggest that the Bill should require a warrant to specify the information that is sought from a computer or electronic device.

Comment

437. We agree with the Privacy Commissioner and Amnesty International that both search warrants and search warrant applications should be as specific as possible as to what information is sought, and what information may be seized and accessed. However, this requirement of specificity should not be limited to searches of computer systems. For this reason clause 96(1)(f) requires a search warrant application to contain a description of items and evidential material sought to be seized and clause 101(4)(g) requires a search warrant to contain a description of what may be seized. Additionally, if a warrant authorises remote access of internet data storage facilities, clause 101(4)(k) requires the warrant to contain the access information that identifies what may be searched remotely.

438. There is considerable case law about the level of specificity required in search warrant applications and search warrants. For instance, the Court of Appeal in *R v Williams*[9] sets out detailed principles for drafting search warrant applications. One of the settled principles in case law is that the warrant must be "as specific as the circumstances allow". This requires the application to be limited to the places where the items are expected to be found, and these items must be sufficiently defined. This common law specificity requirement will likewise be relevant to search warrants and search warrant applications for searches of computer systems.

439. This requirement of specificity will be monitored by issuing officers. Issuing officers are a pivotal feature of the Bill. It is expected that these specialised issuing officers will be provided with the training necessary to objectively scrutinise search warrant applications. Where a search warrant application is not specific enough about what the applicant seeks to search, it should be declined. Likewise, the training should ensure that warrants issued by issuing officers are specific and not overly broad. This will be relevant to both searches of tangible and intangible items.

Duty of persons with knowledge of computer or computer network or other data storage devices to assist access

440. Clause 125 provides that a searcher may require a "specified person" to provide access information or other reasonable or necessary assistance to allow the searcher to access computer data.

441. A "specified person" is a person who owns or leases a computer, has control or possession of a computer, or is a third party service provider.

442. Clause 125(3) provides that a "specified person" may not be required to give any information tending to incriminate that person. However, this is modified by subclauses (4) and (5) which provide respectively that:

442.1. a specified person must still provide information that allows access to data that contains information that tends to incriminate the specified person, but does not do so in itself;

442.2. a searcher may access data that contains information tending to incriminate the specified person, but does not itself do so.

443. Subclauses (4) and (5) are subject to subpart 4 of Part 4 (privilege provisions).

[9] [2007] 3 NZLR 207.

Submissions

444. Three submitters are concerned that this clause overrides the privilege against self-incrimination (submissions 2, 14, and 36). Andrew Miller (submission 2) argues that requiring a person to do something that will result in self-incriminating information being obtained about that person, is the same as requiring that person to incriminate themselves.

Comment

445. The Committee should note that the duty to assist access is currently found in section 198B of the Summary Proceedings Act 1957.

446. The effect of clauses 123 and 125 is that a person can be required to, for instance, provide a password to a computer, even if that computer contains information that may tend to incriminate that person.

447. The rationale for this is the fact that access information, in and of itself, does not impinge on the privilege against self-incrimination. The access information does not, in itself, constitute self-incriminating material, and will not be evidence of an offence.

448. Further, there are detailed procedures regarding the search and seizure of material that may be privileged. Under clause 135 a person may claim the privilege against self-incrimination and prevent the search of a computer. (see also clause 139(c)). The searcher may make a forensic copy or "clone" of the computer, and deliver either the computer or its clone to the District Court for a determination of the claim to privilege.

449. If the specified person claims the privilege against self-incrimination (as provided for in clause 140), the searcher may not search the data stored on the computer unless the claim of privilege is withdrawn, or a court directs that it may be searched.

450. The provisions relating to the search and seizure of potentially privileged materials provide an adequate safeguard for the privilege against self-incrimination.

Recommendation

451. The Ministry and the Law Commission do not recommend any change to clause 125.

Return of computers and data storage devices

Submissions

452. The HRF and ACCL (submission 40) noted that clauses 109 and 119 allow the seizure of computers. They note that such seizure can cripple a business and suggest that enforcement officers should be required to return computers as soon as the required information has been obtained and within strict time limits, with a power to apply to the court for return.

Comment

453. The provisions relating to seized items in subpart 5 of Part 4 apply to computers and other data storage devices that are seized. This includes a requirement to return seized items unless they are required for evidential purposes, and provides a procedure for a person to apply for access to, or return of a seized item. These provisions are discussed below at paragraphs 574-578.

Searches of persons

454. Clauses 83-85 set out what may be done in accordance with a rub-down search (which includes requiring a person to remove any head covering), and clause 120 contains rules about searching people in general. Mr Bakshi for the Committee, proposed to amend clauses 83 in the following way:

> 83(3) For the purposes of this section and section 84, the person conducting the rub-down search in accordance with these sections shall exercise reasonable care and restraint if informed by the person being searched regarding their religious beliefs or sensitivities associated with removing their headcovering.

Comment

455. We understand that Mr Bakshi's concern is that enforcement officers should conduct searches of people in a respectful manner that takes into account their religious and cultural background. As with all searches under the Bill, personal searches conducted under clauses 83-84 will be subject to the right to be free from unreasonable search and seizure under section 21 of NZBORA. Any search that is not conducted in a manner that properly respects the dignity of the person being searched (because of a careless disregard for a person's religious or cultural background or otherwise) is unlikely to be reasonable under section 21 of NZBORA.

456. It is difficult to designate a single cultural group as deserving of special protection. However, if the Committee wishes to provide some additional comfort that searches of people will be conducted appropriately, a clause could be inserted to the effect that personal searches should be conducted in a manner that recognises the privacy and dignity of the person being searched. Such a clause should be located in clause 120, which applies to all types of searches of people.

Recommendation 28

457. The Ministry and the Law Commission recommend no change to clauses 83-85, and 120. However, if the Committee wishes, the following could be added to clause 120:

> A person who carries out a rub-down search, personal search, or strip search must conduct the search with decency and sensitivity and in a manner that affords to the person being searched the greatest degree of privacy and dignity consistent with the purpose of the search.

Subpart 1 – Application of rules and consent searches

Clause 92 – Ability of persons under 14 years to consent to searches of places, vehicles, or other things

458. This clause provides that a person under 14 years of age may not consent to a search of a place, vehicle, or other thing. There is an exception for persons under 14 years of age who are driving a vehicle where there is no passenger who is older with the authority to consent.

Submissions

459. The HRC (submission 42) suggests that only people aged 18 or over should be able to give a valid consent. This is consistent with the general principle in the United Nations Convention on the Rights of the Child that a person under 18 is considered to be a child.

Comment

460. The age at which a child can be left alone unsupervised by a parent or guardian is 14. This indicates that 14 is the age at which someone is capable of being left in charge of a place without supervision.

461. We believe that 18 years is too high an age for consent. It would be anomalous for a person aged 14 years to be held criminally responsible for committing an offence in relation to a vehicle, but not old enough to consent to that same vehicle being searched.

Recommendation

462. The Ministry and the Law Commission recommend no change to clause 92.

Subpart 2 – Search warrants

Clause 96 – Application for search warrant

463. This clause prescribes what an application for a search warrant must contain. This includes:

463.1. the name of the applicant;

463.2. the provision authorising the making of the application;

463.3. the grounds on which the application is made;

463.4. the address or other description of the place, vehicle, or other thing to be searched;

463.5. a description of the evidential material believed to be in that place, vehicle, or other thing;

463.6. the period for which the warrant is sought;

463.7. if the applicant wishes to execute the warrant on more than 1 occasion, the grounds on which this is believed to be necessary.

464. Clause 96(2)(b) clarifies that an issuing officer may not generally require an applicant to disclose the name, address, or other identifying details of an informant. However, if the issuing officer is unable to assess the credibility of the informant and/or whether there is a proper basis for issuing the warrant, the issuing officer may require such information to be provided, but only to the extent necessary to make this assessment.

465. Clause 96(5) provides that an issuing officer may allow a search warrant to be executed more than once if they are satisfied that it is required for the purpose for which the warrant is issued.

Submissions

466. The NZPA (submission 22) noted that Police will almost never reveal the details of informants because of safety concerns. They would instead withdraw the application.

467. Amnesty International (submission 20A) believes that whether a warrant may be executed more than once should be subject to an objective test. It suggests that the issuing officer should only allow multiple executions of a warrant if satisfied this is "*reasonably* required" for the purpose of the search warrant.

Comment

468. Clause 96(2)(b) recognises the importance of keeping the identity of informants confidential. However, it is also important that an issuing officer is provided with enough information to determine whether a warrant should be issued. In some cases, this will involve asking for an informant's details so they can assess that informant's credibility. It should be noted that the degree of detail required is only that necessary to assess credibility, and determine whether there is a proper basis for issuing the warrant.

469. Allowing an issuing officer to authorise multiple executions of a search warrant if this is "required for the purpose of the search warrant" is sufficient to import an objective test of reasonableness.

Recommendation

470. The Ministry and the Law Commission recommend no change to clause 96.

Clause 98 – Mode of application for a search warrant

471. This clause sets out the process for applying for a search warrant. Generally, an applicant must put the application in writing, and either appear personally before or communicate orally with the issuing officer.

472. Under subclause (3), the requirement that an application be in writing may be dispensed with if:

472.1. the issuing officer is satisfied that the delay caused by requiring the application to be in writing would compromise the effectiveness of the search;

472.2. the issuing officer is satisfied that they can properly determine whether a search warrant should be issued on the basis of an oral communication or personal appearance; and

472.3. the information required in clause 96 has been supplied to the issuing officer.

473. Under subclause (4), the requirement that the applicant appear personally before or orally communicate with the issuing officer may be dispensed with if:

473.1. the issuing officer is satisfied that they can properly determine whether a search warrant should be issued on the basis of the written application;

473.2. the information required in clause 96 has been supplied to the issuing officer; and

473.3. the issuing officer is satisfied there is no need to ask any further questions or seek any further information from the applicant.

Submissions

474. The Chief Justice (submission 25) suggests that subclause (3) be amended so that warrants issued orally have a time limit, and any search or surveillance conducted after that time limit requires an application in writing.

475. The Chief Justice also suggests that subclause (4) be amended so that a personal appearance by the applicant may only be dispensed with where there are special circumstances.

Comment

476. Urgent applications dealt with orally under clause 98(3) must still meet the criteria for search warrant applications. The provision is not intended as a vehicle for inferior applications that may be expanded on at a later date. An issuing officer may issue a warrant under clause 98(3) only if they have all the information necessary for them to properly determine whether to issue a warrant.

477. The issue is therefore not inferior or incomplete applications, but the extent to which an issuing officer is able to accurately and reliably record what an applicant has said to them. Where an issuing officer dispenses with the requirement for an application to be in writing, clause 98(5) requires the issuing officer to record the grounds for the application as soon as practicable.

478. Clause 98(4) reflects the current practice of the courts. An issuing officer will dispense with the requirement for an oral communication or personal appearance of the applicant only where they can properly determine whether or not to issue a search warrant on the basis of the written application alone. This is an appropriate and efficient use of judicial time and resource.

Recommendation

479. The Ministry and the Law Commission recommend no change to clause 98.

Clause 100 – Restrictions on issue of search warrant

480. This clause provides that an issuing officer must not issue a warrant to seize any thing held by a lawyer to which legal professional privilege applies unless satisfied that the information supplied by the applicant indicates that the thing was made, received, completed, or prepared for:

480.1. a dishonest purpose; or

480.2. the purpose of planning or committing an offence.

Submissions

481. Both NZLS (submission 11A) and Minter Ellison (submission 33) submit that disallowing privilege on the grounds of a "dishonest purpose" is too wide, and should instead be focused on offences. Minter Ellison recognises that the term is currently used in section 67 of the Evidence Act 2006 (which sets out situations where a judge may disallow privilege). Minter Ellison, NZLS, and ANZ (submission 46) suggest that the more stringent test of "prima facie case" in section 67 of the Evidence Act should be used in clause 100(b).

482. Both NZLS and Minter Ellison are likewise concerned that the person who prepares materials is not necessarily the same person as the person who holds the privilege. This means that enforcement officers may invade the privilege of persons who do not have the "dishonest purpose".

Comment

483. The threshold of "indicates" should be raised to "prima facie case" to be consistent with section 67 of the Evidence Act.

484. The ability to issue a search warrant to seize privileged material because of a dishonest purpose held by someone other than the privilege-holder is not of concern. For example, if a person were seeking advice about how another person could commit an offence, it is difficult to see why such a communication should be protected by privilege, even if the person obtaining the advice (and therefore holding the privilege) did not personally have the dishonest purpose.

Recommendation 29

485. The Ministry and the Law Commission recommend amending clause 100 so that an issuing officer may not issue a warrant to seize anything held by a lawyer that is subject to legal professional privilege unless the issuing officer is satisfied there is a prima facie case that the thing was made, or received, or completed, or prepared:

485.1. for a dishonest purpose; or

485.2. for the purpose of planning to commit or committing an offence.

Recommendation 30

486. The Ministry and the Law Commission recommend amending clause 49 (the equivalent clause in relation to surveillance device warrants) and clause 130 (which relates to recognition of privilege) to the same effect.

Clause 101 – Form and content of search warrant

487. This clause sets out who may execute a search warrant, the conditions for its execution, and what a search warrant must contain. Subclause (4)(a) requires a search warrant to contain the name of the issuing officer and date of issue.

Submissions

488. The Royal Federation of NZ Justices Associations (submission 3) believe having issuing officers' names on search warrants raises safety concerns. They suggest that a unique identifying number be required instead.

Comment

489. We agree with the Royal Federation of NZ Justices Associations. Currently, the search warrant is signed by the issuer, but their name is not put on it. Copies of search warrants, provided to the occupier, are unsigned.

Recommendation 31

490. The Ministry and the Law Commission recommend amending clause 101(4)(a) to require a search warrant to contain the name or other individual designation of the issuing officer.

Clause 106 – Authorisation of issuing officers

491. This clause provides that the Attorney-General may authorise any Justice of the Peace, Community Magistrate, Registrar, Deputy Registrar, or other person to act as an issuing officer for a maximum term of 3 years. The Attorney-General may do so only if satisfied that the person has sufficient knowledge, skill, and experience to act as an issuing officer. Under subclause (3) this authorisation may be renewed for a further term of up to 3 years.

Submissions

492. Five submitters believe that there should be limitations on who can become an issuing officer:

492.1. Andrew Miller (submission 2) states that Police officers should not be eligible because of the conflict of interest;

492.2. the New Zealand Council of Trade Unions (submission 24) state, in both their written and oral submissions, that enforcement officers should not be eligible because of the conflict of interest;

492.3. the HRC (submission 42) and Marcus Graf (submission 17) in their oral submissions stated that allowing "any person" to become an issuing officer is too wide;

492.4. the HRF and the ACCL (submission 40) state that people who are not judges, Registrars or Justices of the Peace should only be able to become issuing officers if they have a legal qualification; and

493. The Royal Federation of NZ Justices Associations are concerned that subclause (3) could be interpreted to mean that an issuing officer could only seek one further term (ie, a person could only act as an issuing officer for a maximum of 6 years).

Comment

494. We agree with Andrew Miller (submission 2) and the New Zealand Council of Trade Unions (submission 24) that there should be some limits on who is eligible to become an issuing officer to ensure independence, and avoid conflicts of interest. We therefore recommend that clause 106 be amended so enforcement officers cannot become issuing officers.

495. This will not fully address submitters' concerns as employees of enforcement agencies who are *not* enforcement officers will still be eligible. However, preventing all employees from becoming issuing officers will significantly narrow the pool of people available for selection. We therefore do not recommend preventing all employees of enforcement agencies from

becoming issuing officers, although an amendment to this effect could be made if the Committee wishes.

496. We do not believe that subclause (3) will be interpreted in the limited way contended by the Royal Federation of NZ Justices Associations (submission 3).

497. Clause 106(2) provides that the Attorney-General must not authorise anyone to become an issuing officer unless satisfied that the person has "sufficient knowledge, skill, and experience to act as an issuing officer". This means that only suitably qualified people will be authorised as issuing officers. We therefore do not share Marcus Graf's and HRC's concern over the Attorney-General's ability to authorise any "other person" to be an issuing officer.

498. However, the Attorney-General should have the power to remove that authorisation for a justifiable reason. Likewise, an issuing officer should be able to withdraw if they wish to do so.

Recommendation 32

499. The Ministry and the Law Commission recommend amending clause 106 to:

499.1. clarify that enforcement officers cannot become or remain issuing officers;

499.2. require the Attorney-General to remove an issuing officer (other than a judge) from office for neglect of duty, inability to perform the duties of office, bankruptcy, or misconduct, proved to the satisfaction of the Attorney-General;

499.3. require the Attorney-General to remove an issuing officer from office if that person becomes an enforcement officer;

499.4. allow an issuing officer to resign from the office of issuing officer.

Subpart 3 – Carrying out search powers

Clause 108/110 – Search powers and powers of persons called to assist

500. These clauses set out what a searcher or person called to assist may do during a search. These clauses allow a searcher, and a person assisting a searcher, to:

500.1. enter and search the place, vehicle, or other thing authorised to be searched, and to search any item in that place, vehicle, or thing;

500.2. request any person to assist with the entry and search;

500.3. use any reasonable force for the purpose of the search;

500.4. detain any person who is at the place or vehicle or other thing being searched, or who arrives there during the search for a reasonable period to enable the searcher to determine if they are connected with the object of the search;

500.5. seize any thing authorised to be seized;

500.6. bring and use on the place, vehicle, or thing any equipment to assist in the search;

500.7. bring and use on the place, vehicle, or other thing a dog to search;

500.8. copy any document, or part of a document, that may lawfully be seized;

500.9. access and copy intangible material from computers and other data storage devices located at or accessible from the place, vehicle, or other thing being searched;

500.10. use any reasonable measures to gain access to any computer or data storage device; and

500.11. take photographs, drawings, sound and video recordings of the place, vehicle, or thing being searched.

Submissions

501. Andrew Miller (submission 2) is concerned that clause 108(1) allows an enforcement officer to search anything that is at the search location. He suggests that an enforcement officer should only be able to search things where there are reasonable grounds to suspect that it contains an item being searched for.

502. Annemarie Thorby (submission 16), SeaFIC (submission 45), and ANZ (submission 46) are concerned that clauses 108(d) and 110(2)(d) allow an enforcement officer to detain any person who is in the vicinity of the search.

Comment

503. The powers in clauses 108 and 110 only authorise the person to use such powers *for the purpose of the search*. If the search is for a stolen vehicle, for example, clause 108(1) will not authorise the searcher to look for it in a chest of drawers in a bedroom. Section 21 of NZBORA will also act as an additional safeguard by requiring searches to be reasonable.

504. In relation to the concerns of Annemarie Thorby, SeaFIC, and ANZ, there will be situations where it is impossible to determine whether people found on search premises are connected to the offence for which the search is being undertaken. For example, during a search of premises for drugs, the enforcement officer will frequently not know whether the people found on those premises are implicated in the offending. Although it is probable that some of the people on the premises are implicated, it may be impossible to determine exactly who. That is, it is not possible to establish "good cause to suspect" that a person has committed or is committing an offence so as to enable that person to be arrested under an enactment (eg, section 315 of the Crimes Act 1961).

505. For this reason, clauses 108(d) and 110(2)(d) have been inserted to allow searchers to temporarily detain people to allow them to determine whether they are connected with the purpose of the search. People may be detained only for the duration of the search (clause 114(2)). It is important to note that this does not amount to detention for the purposes of questioning. The people who are so detained preserve their right to silence and are not required to answer questions. Further, section 23 of NZBORA will apply to such persons, providing them with rights in relation to that detention (eg, the right to be informed of the reason for their detention).

506. However, the detention of persons is a significant intrusion into the freedom of movement of a person, and should be limited. Detaining persons requires appropriate training and understanding of the rights in NZBORA relating to arrested or detained persons. Accordingly, the right to detain people for the purposes of determining whether they are connected with the purposes of the search should be limited to enforcement officers who are exercising a search power to investigate offending for which they have a related power of arrest.

507. This ensures that the enforcement officers who are carrying out the detention are suitably trained, and that the power is appropriately limited to offending which is serious enough to justify detention.

508. In some cases, amendments to agency-specific legislation in subparts 1 and 2 of Part 5 of the Bill have specifically excluded the power to detain persons from applying to a specific agency's search powers. For consistency, similar exclusions should be inserted into agency-specific legislation for which there is no related power of arrest where this is considered appropriate following further consideration by the Ministry and the Law Commission. These amendments will be drafted for the Committee's consideration following further consultation with submitters.

Recommendation 33

509. The Ministry and the Law Commission recommend:

509.1. making clauses 108(d), 110(2)(d), and 114 subject to a new subclause in clause 111 so that the power to detain a person while conducting a search is limited to people exercising a search power to investigate offending for which they have a related power to arrest;

509.2. inserting specific provisions in the legislation amended in subparts 1 and 2 of Part 5 of the Bill to exclude those clauses from applying to search powers for which there is no related power of arrest where this is determined to be appropriate following further consideration by the Ministry and the Law Commission.

Clauses 109 – Items of uncertain status may be seized

510. This clause provides that, if it is not reasonably practicable to determine whether an item may be seized at the search scene, the searcher may remove the item for the purpose of examination or analysis to determine whether it may be lawfully seized.

511. Examples of when clause 109 will apply are where a large item contains a mixture of relevant and irrelevant material (eg, a substantial number of documents or files). In such circumstances, it may be necessary to remove the item/s from the search scene to examine them to determine their evidential status. This removal has the potential to be less disruptive than an on-site examination.

Submissions

512. Amnesty International (submission 20A) are concerned that there are inadequate safeguards for the exercise of the power to seize items of uncertain status under clause 109. It suggests that clause 109 should contain the safeguards suggested by the Law Commission in its report *Search and Surveillance Powers* NZLC R97 (2001), namely that items removed for examination should be:

512.1. examined or processed as soon as reasonably practicable;

512.2. returned to the person from whom they were taken once the enforcement officer determines they are not to be seized and retained;

512.3. subject to the provisions about access to seized items.

Comment

513. The first two requirements articulated by Amnesty International and in the Law Commission report are not included in clause 109 as subpart 5 (which contains provisions regarding access to and return of seized items) will apply to such items by virtue of clause 142(1). In relation to the third requirement, items that are seized under clause 109 *are* subject to the provisions about access to seized items by virtue of clause 142.

Recommendation

514. The Ministry and the Law Commission recommend no change to clause 109.

Clause 113 – Special powers where application for search warrant pending

515. This clause allows enforcement officers to temporarily secure a search scene when an application for a search warrant has been made, or is about to be made, and the issuing officer's decision is pending. This power was provided to allow a search scene to be established, preventing the loss of evidential material.

Comment

516. This clause, as currently drafted, allows an enforcement officer to establish a search scene, *whenever* an application has been made or is about to be made. It is not limited to situations where there is a risk that evidential material will be removed or tampered with. Such a limitation is required to justify the use of the warrantless power.

Recommendation 34

517. The Ministry and the Law Commission recommend that clause 113 be limited to where there are reasonable grounds to believe evidential material will be destroyed, concealed, altered, damaged, or removed.

Clause 119 – Seizure of items in plain view

518. Clause 119 provides for plain view seizures. Under clause 119(1) an enforcement officer (or their assistant) may seize an item in plain view, if:

518.1. the enforcement officer is lawfully in that place as part of their duties; and

518.2. the enforcement officer has reasonable grounds to believe they could have seized the item under a search warrant or search power.

519. Under clause 119(2), if the searcher seizes any item under subclause (1) in circumstances where they are not already exercising a search power, the enforcement officer may exercise any applicable power under clause 108 in relation to the seizure.

520. The Court of Appeal in the recent *R v Williams* case[10] recognised the existence of a plain view seizure doctrine in New Zealand, although it noted that it is more limited than the law in Canada and the United States. The Court specifically recognised the existence of the plain view doctrine in two situations. Firstly, it noted prior case law holding that it is not illegal to seize items that have been stolen, as the person in possession of stolen goods does not have a privacy or property right in such goods.[11] This limited "plain view seizure" doctrine is confined to stolen items found during an authorised search.

521. Secondly, the Court held that "dual purpose" searches were not unreasonable as long as the search was not wider than would be allowable in relation to the purpose for which warrant was obtained. In these situations, enforcement officers are carrying out a search for dual purposes even if there are insufficient grounds to obtain a warrant for one of those purposes.

522. *R v Williams* does not provide authority for the proposition that plain view seizure extends beyond these two situations. However, in policy terms, it is difficult to see any reason to treat plain view seizures of stolen property as lawful, but not plain view seizures of a murder weapon that is discovered during a search conducted for another purpose. That is the reason for clause 119(2) being cast in broad terms.

523. In any event, clause 119 is consistent with the key point set out in *R v Williams* in that it does not authorise a search that is wider in scope than the enforcement officer has authority to carry out under the power being exercised.

Enforcement officer to seize items in plain view without having to obtain a search warrant

524. Amnesty International (clause 20A) are concerned that clause 119 subverts the need to obtain a search warrant. Amnesty International replicate the provision of the Law Commission report that states:

> [O]ur plain view recommendation relates only to the seizure of evidential material relating to offending *that is seen in the course of other lawful activities.*

525. Amnesty International suggests that a subclause be inserted stating that clause 119 does not confer any additional search or entry powers; and if such powers need to be exercised to fully investigate or to effect the seizure, then a warrant will need to be obtained.

Comment

526. Clause 119 does not confer a power to enter and search. This is clear from the requirements that:

526.1. the enforcement officer is "lawfully in any place as part of his or her duties"; and

526.2. the item is found in the course of carrying out the search or as a result of observations at that place.

527. Nor does clause 119 confer a greater power of search than what an enforcement officer may lawfully do under the authorised search. An item may therefore only be seized if it comes into view while the enforcement officer is searching areas that can lawfully be searched (ie, an

[10] [2007] 3 NZLR 207.

[11] See, for example, *R v Thomas* (CA 173/05, 7 July 2005), *R v Coveny* (CA 351/05, 11 April 2006).

item must come into view within the boundaries of the authorised search before it may be seized under clause 119).

Clause 119 enables fishing expeditions

528. Submitters 4, 16, 32 and 36 are also concerned that clause 119 allows enforcement officers to undertake fishing expeditions.

Comment

529. The discussion as to why plain view seizures are justified is provided at paragraphs 147-151.

Assistants should not have the power to seize items in plain view

530. Amnesty International suggests that people who assist in searches should not have the power to seize items in plain view. Amnesty International is concerned that having more than 1 person lawfully searching enlarges what is potentially in plain view.

Comment

531. Having more than 1 person searching does not enlarge what may be in plain view. A person who assists at a search does not have any greater powers than the primary searcher. Therefore, anything searched by the assistant searcher may also be searched by the primary searcher. Accordingly, anything that an assistant finds in the course of carrying out a search could also have been found by the primary searcher. Further, an assistant remains under the control of the person with responsibility for the search (clause 110(1)). There is no reason in principle why assistants should be excluded from the ability to make plain view seizures.

Clause 121 – Guidelines and rules about use of strip searching

532. This clause requires the Chief Executive of a law enforcement agency to issue guidelines about the circumstances where a strip search may be conducted by its employees.

533. This clause also requires a strip search to be carried out by someone of the same sex as the person being searched.

534. A strip search is defined in section 3 as "a search where the person conducting the search may require the person being searched to remove, raise, lower, or open all or any of the clothing of the person being searched".

Submissions

535. Russell Jones (submission 1) suggests that rather than a strip search being carried out by a member of the same sex as the person being searched, the person being searched should be able to choose the sex of the searcher.

536. The HRF and ACCL (submission 40) suggest that the guidelines on how strip searches are to be carried out should be made readily accessible so that people can easily determine whether procedures have been followed (for instance, by requiring the agency to put the guidelines on the agency's website). They further suggest that evidence obtained in breach of an agency's guidelines should be inadmissible.

Comment

537. In relation to Russell Jones' suggestion, allowing a person who is to be searched to request the sex of the searcher may result in inappropriate requests, or requests made to delay or frustrate the search.

538. We agree with the HRF and ACCL that agencies who carry out strip searches should be required to make these guidelines readily available, such as by posting on an agency's website. However, evidence obtained in breach of those guidelines should not be automatically inadmissible. Such guidelines are, as their name suggest, simply guidelines. There may be situations when non-adherence is necessary. The admissibility of evidence obtained from such searches can be challenged as "improperly obtained evidence" in the normal way under section 30 of the Evidence Act 2006.

Recommendation 35

539. The Ministry and the Law Commission recommend amending clause 121 to require the Chief Executive of a law enforcement agency that carries out strip searches to ensure a copy of its strip search guidelines is publicly available on the agency's website.

Clause 123 – Power to require particulars

540. This clause provides that any person exercising a power to stop and/or search a vehicle may also require:

540.1. everyone in the vehicle to give their names, addresses, dates of birth and other contact details (paragraph a); and

540.2. the vehicle to stay stopped for as long as reasonably required to do the search (paragraph b).

Submissions

541. Andrew Miller (submission 2) suggests that the power to require these particulars is an unreasonable invasion of privacy. He suggests that there should be more safeguards around when such details can be requested, as well as how widely the information can be disseminated.

Comment

542. Under section 317A of the Crimes Act 1961, the Police have a power to stop a vehicle in order to effect an arrest where they have reasonable grounds to suspect that someone in the vehicle is either unlawfully at large, or has committed an imprisonable offence. On stopping the vehicle, section 317AA of the Crimes Act allows the Police to require any person in that vehicle to provide their name, address, date of birth, or other particulars.

543. This requirement is an important part of the Police's power to stop a vehicle in order to arrest a person. It allows an officer to quickly identify who they are seeking to arrest, and to obtain details of people who may have information relating to the offence for which the person is arrested.

544. However, this rationale does not extend to all enforcement officers with a power to stop or search a vehicle. Additionally, there is no complementary requirement for people found on

search premises. An enforcement officer exercising a power to search a person's house, for example, does not have a corresponding power to require the particulars of all the people in the house at the time of the search.

545. Accordingly, we agree with Andrew Miller that there should not be a general power for enforcement officers to require particulars when exercising a power to stop or search a car. The power to require particulars in the circumstances prescribed in section 317AA of the Crimes Act, however, should be retained. Paragraph (a) should be relocated to Part 2 of the Bill, which contains the Police powers.

546. However, the power to require a vehicle to remain stopped as long as reasonably necessary to undertake a search is a necessary corollary to the power to search a vehicle. Accordingly, clause 123(b) should be retained in Part 4.

547. It should also be noted that clause 171 makes it an offence to knowingly disclose information that has been acquired as a consequence of exercising a search or surveillance power, otherwise than in the performance of that person's duty. This provides a safeguard against the unlawful dissemination of any particulars obtained.

Recommendation 36

548. The Ministry and the Law Commission recommend relocating clause 123(a) to Part 2 so that only Police may require particulars of all passengers in a vehicle when exercising a power to stop and/or search it.

Subpart 4 – Privilege and confidentiality

549. Subpart 4 contains the provisions relating to privilege and confidentiality. Clause 130 recognises the following privileges:

549.1. legal professional privilege;

549.2. religious privilege;

549.3. medical privilege;

549.4. the privilege against self-incrimination;

549.5. the privilege for informers; and

549.6. the right of journalists to protect certain sources.

550. Subclause (2) provides that privilege does not apply to communications or information made, received, compiled, or prepared:

550.1. for a dishonest purpose; or

550.2. to enable or aid any person to commit or plan to commit what the person claiming the privilege knew, or ought reasonably to have known, to be an offence.

551. Under clause 135, a person who has a privilege recognised under the Bill (including the right of journalists to protect their sources) may:

551.1. prevent a search of any communication or information to which the privilege would apply; and

551.2. require the return of any communication or information to the person if it is seized or secured pending a determination of the claim to privilege.

552. Under clause 139, if a searcher is prevented from searching a thing under clause 135, the searcher may secure that thing (including making a forensic copy or "clone" of a computer or data storage device) and deliver it to the District Court to enable a determination of a claim to privilege. Clause 139(c) specifically prevents the searcher from searching the thing unless the claim of privilege is withdrawn, or a court directs that a search may be undertaken.

553. Clause 100 is also relevant to privilege. This provides that an issuing officer may issue a warrant to seize privileged material if satisfied that the information indicates that the thing was made, received, completed or prepared:

553.1. for a dishonest purpose; or

553.2. for the purpose of planning or committing an offence.

General submissions on subpart 4

Process for assessing privilege inadequate

554. The NZLS (submission 11A), Minter Ellison (submission 33), and ANZ (submission 46) believe that the procedure for assessing privilege under clause 100 is inadequate. They both submit that an issuing officer should uphold a claim to privilege pending a determination on the status of the item under clauses 138-140. They are concerned that determining privilege after material has been viewed by an enforcement officer diminishes the value of the privilege.

Comment

555. Clause 135 permits a person who has a privilege recognised under the Bill to prevent the search of any communication or information. Therefore, where a search warrant has been issued in respect of legally privileged material, the person to whom the privilege belongs may prevent the search. Once that occurs, the procedures set out in clauses 138-140 apply. This means that an enforcement officer will not be able to view the potentially privileged material pending determination of the privilege claim.

Rights of journalists and media

556. The Human Rights Commission (submission 42) states in its submission that "the sanctity of confidential journalistic sources is a cardinal principle underlying investigative reporting and is a basic precept of journalism education". The Human Rights Commission believes that the Bill could have a disproportionate impact on journalists.

557. The Human Rights Commission recognises the protection for journalists provided under clause 130 (which carries over the protection in section 68 of the Evidence Act 2006), but suggests that this qualified protection is insufficient. The Commission suggests that there should be a presumption that journalist sources are protected unless the criteria in clause 130(2) are satisfied.

558. The Media Freedom Committee (submission 18) likewise believes that the protections conferred on media and journalists in subpart 4 are insufficient. It recognises and welcomes the right of media to prevent a search contained in clause 135, but notes that this is unsatisfactory. The Media Freedom Committee suggests that there should be protection for journalists and the media earlier in the process, at the stage where search warrants are issued.

559. In particular, the Media Freedom Committee suggest that the guidelines provided by the Court of Appeal in *TVNZ v Attorney-General* [1995] 2 NZLR 641 for issuing media search warrants be codified in the Bill.

Comment

560. Clause 130(1)(i) recognises the rights of a journalist to protect certain sources under section 68 of the Evidence Act 2006. Section 68 of the Evidence Act 2006 provides that:

560.1. A journalist and his or her employer cannot be compelled (except by court order) to disclose the informant's identity where the journalist has promised the informant not to disclose this information.

560.2. However, a party to a civil or criminal proceeding may apply for a court order for disclosure. A court may order disclosure if the public interest in disclosure outweighs:

560.2.1. any adverse effect of disclosure on the informant or any other person; and

560.2.2. the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

561. The right of a journalist to protect an informant's identity is therefore a qualified right, as public interest grounds may prevail over the privilege.

562. The protections provided by subpart 4 are sufficient and adequate. Clause 139(c) specifically provides that, where a person has a privilege recognised in subpart 4 in relation to an item, that item must not be searched unless the claim of privilege is withdrawn or a court has ruled that the item may be searched.

563. *TVNZ v Attorney-General* provides the following general guidelines as to the issuing of media search warrants:

563.1. search warrants should not be used for trivial or truly minor cases;

563.2. as far as possible, warrants should not be granted or executed so as to impair the public dissemination of news;

563.3. if there is substantial risk that it will result in the "drying-up" of confidential sources of information for the media, a warrant should be granted or executed only in exceptional circumstances where it is truly essential in the interests of justice;

563.4. warrants should be executed considerately and in a manner that minimises the disruption caused to the business of a media organisation;

563.5. consideration should be given to whether the evidential material sought will have a direct and important place in the determination of the issues before the court.

564. We do not agree that the principles in *TVNZ v Attorney-General* need to be codified in the Bill as the Media Freedom Committee suggests. Rather, it is expected that these general common law principles will continue to apply to media search warrants. Further, it is problematic to include detailed conditions on when a search warrant should be issued in respect of media premises, but not other premises which may also contain communications of a confidential nature.

Clauses 132-133 – Privileges in respect of examination orders and production orders

565. These clauses provide for privileges relating to examination orders and production orders. If an individual refuses to produce any information or document, or answer any question on the ground that it is privileged, the Commissioner or other enforcement officer may apply to a District Court Judge for an order determining whether the claim of privilege is valid.

Submissions

566. The Chief Justice (submission 25) suggests that such applications should be dealt with only by a High Court Judge or above, given the impact such applications will have on these privileges.

Comment

567. District Court Judges are competent judicial officers, capable of analysing privilege applications, and considering the effect these will have on the privilege against self-incrimination and other privileges.

Recommendation

568. The Ministry and the Law Commission recommend no change to clauses 132-133 in relation to this submission. An unrelated recommendation to amend clause 133 is made in the Appendix.

Clauses 135 and 137 – Effect of privilege

569. These clauses outline the procedure relating to items for which privilege has been claimed. Clause 135 (discussed above at paragraph 551) allows a person who has a privilege recognised under the Bill to prevent a search or require the return of any item. Clause 137 prescribes the procedure for searches of professional material held by a minister of religion, medical practitioner, or clinical psychologist.

570. Under clause 137, a search warrant may only be executed for such material if the minister of religion, medical practitioner, or clinical psychologist (or a representative of that person) is present. These people must have the opportunity to claim privilege on behalf of parishioners, patients, or clients.

Submissions

571. The New Zealand College of Clinical Psychologists (submission 37) submit that communications covered by the Evidence Amendment Act (No 2) 1980 should also be covered by clauses 135 and 137. Section 33 of that Act covered "medical privilege" and provided that medical practitioners and clinical psychologists may not disclose any protected communication made to them by a patient in a criminal proceeding without that patient's consent.

Comment

572. The Evidence Amendment Act (No 2) 1980 was replaced by the new provisions dealing with privilege in the Evidence Act 2006 (sections 53-67). The new "medical privilege" is recognised in section 59 of the Evidence Act 2006. This is incorporated into the Bill by virtue of clause 130. The protection afforded by this medical privilege adequately covers clinical psychologists' communications with their patients.

Recommendation

573. The Ministry and the Law Commission recommend no change to clauses 135 and 137.

Subpart 5 – Procedures applying to seized or produced materials

574. This subpart outlines the procedures for dealing with seized or produced materials, including access, custody, and return.

575. If a thing that is seized or produced is not needed for investigative or evidential purposes, it must be:

575.1. returned to its owner or the person entitled to possession (clause 143(1)(a)); or

575.2. made the subject of an application to the District Court about disputed ownership (clause 143(1)(b)); or

575.3. disposed of (clauses 153(2) and 154(1)); or

575.4. destroyed (if it is perishable and has become rotten or otherwise deteriorated, is likely to do so before it can be dealt with, or poses a risk to public health (clause 143(d))); or

575.5. forfeited to the Crown (clause 148(1)).

576. Clause 144 applies to the custody of things seized or produced that are needed for investigative or evidential purposes. Such things can be retained by the person who exercised the search power until the first of the following occurs:

576.1. a decision is made not to bring proceedings;

576.2. the thing is forfeited to the Crown or any other person under an enactment;

576.3. the thing has been released;

576.4. where there has been a request for the return of the item, the expiry of 6 months after the thing was seized or produced if no proceedings have been commenced and no extension has been granted by a District Court under clause 146;

576.5. where proceedings have been brought:

576.5.1. the withdrawal or dismissal of the proceedings; or

576.5.2. the completion of the proceedings.

577. A person with an interest in a thing seized or produced may apply to the person in whose custody that thing is for release of or access to it at any time before proceedings are brought (clause 149).

578. If access/release is refused, or access granted but on unacceptable conditions, that person may:

578.1. apply to the District Court for access (clause 151);

578.2. apply to the District Court for release of the thing seized or produced (clause 152).

Submissions

579. The Chief Justice (submission 25) raised concerns that this subpart does not adequately provide for the fact that items seized or produced may be required for longer than the completion of proceedings or 6 months.

Comment

580. Clause 144(1)(d) provides that if there has been a request for the return of a thing seized or produced, and no proceedings have commenced 6 months after the thing was seized or produced, that thing must be returned to the person entitled to possession. If proceedings are commenced, clause 144(1)(e) provides that items must be returned after the withdrawal or dismissal of the proceedings or the completion of the proceedings (if the item has not previously been released).

581. The Committee should also note that clause 146 provides a procedure for seeking an extension to the 6 month period.

Recommendation

582. The Ministry and the Law Commission recommend no change to subpart 5.

Subpart 6 - Immunities

Clause 160 – Immunity of the Crown

583. Clause 160 provides that if any person is immune from civil liability under clauses 157-159, the Crown is also immune from civil liability in tort in relation to that person's conduct. Clauses 157-159 provide immunity for:

583.1. issuing officers;

583.2. any person doing an act in good faith to obtain or execute an examination order, production order, search warrant, surveillance device warrant or residual warrant, or other order;

583.3. any person doing an act in good faith to exercise an entry, search, or surveillance power where that power is exercised in a reasonable manner and the person believes on reasonable grounds that the conditions for exercising that power are satisfied.

Submissions

584. Andrew Miller (submission 2) suggests that the Crown should not be immune for damage that is caused by exercising powers. For instance, if an enforcement officer damages or destroys property during a search warrant, and the subject of the search is innocent, the Crown should be liable for this damage.

Comment

585. If a search is conducted in a manner that unnecessarily damages or destroys property, it is likely to be unreasonable under section 21 of NZBORA. A person who suffers damages through such a search may seek a remedy under NZBORA.

586. Further, clause 160 applies only to the extent that clauses 157-159 do. Therefore, if a person is not immune from civil liability for any act (eg, if an enforcement officer exercises a search in bad faith), then the Crown will likewise not be immune.

587. This is consistent with section 6 of the Crown Proceedings Act 1950 which provides that any enactment that limits the liability of any officer of the Crown will limit the liability of the Crown in tort in the same manner.

Recommendation

588. The Ministry and the Law Commission recommend no change to clause 160.

Subpart 7 – Reporting

Clauses 162-164 – Reporting of search and surveillance powers

589. These clauses set out the reporting requirements for search and surveillance powers.

590. Clause 162 sets out the internal reporting requirements of a law enforcement agency for warrantless powers. A person who exercises a warrantless power must provide a written report on the exercise of that power to an employee designated to receive such reports. The report must:

590.1. contain a short summary of the circumstances surrounding the exercise of the power, including why the power needed to be exercised;

590.2. state whether any evidential material was seized or obtained; and

590.3. state whether criminal proceedings have been brought or are being considered as a consequence of the seizure of the evidential material.

591. Clause 163 sets out the annual reporting requirements of a chief executive of a law enforcement agency for warrantless powers. This requires the chief executive to include in an annual report to Parliament:

591.1. The number of times warrantless powers of search or surveillance were exercised.

591.2. In respect of warrantless surveillance, the numbers of times each kind of device was used:

591.2.1. for less than 6 hours;

591.2.2. between 6 hours and 12 hours;

591.2.3. between 12 hours and 24 hours;

591.2.4. between 24 hours and 48 hours;

591.2.5. between 48 hours and 72 hours; and

591.2.6. for more than 72 hours.

591.3. The number of criminal proceedings in which relevant evidential material was obtained directly or indirectly from the exercise of a warrantless search or surveillance power, and the number of proceedings resulting in conviction.

591.4. The number of occasions on which the exercise of a warrantless search or surveillance power did not lead to the bringing of proceedings within 90 days of its exercise.

592. Clause 164 sets out the annual reporting requirements of a chief executive of a law enforcement agency for surveillance device warrants and residual warrants. This requires a chief executive to include in an annual report to Parliament:

592.1. The number of applications granted in respect of each kind of device.

592.2. The number of residual warrants granted in respect of each kind of device, technique, procedure, or activity.

592.3. The number of surveillance device and residual warrants granted that authorised entry onto private premises.

592.4. In respect of surveillance, the numbers of times each kind of device was used:

592.4.1. for less than 24 hours;

592.4.2. between 24 hours and 3 days;

592.4.3. between 3 days and 7 days;

592.4.4. between 7 days and 21 days; and

592.4.5. between 21 days and 60 days.

592.5. In respect of each residual warrant issued, the type of device, technique, procedure, or activity authorised.

592.6. The number of criminal proceedings in which relevant evidential material was obtained directly or indirectly from the execution of a surveillance device or residual warrant, and the number of proceedings resulting in conviction.

592.7. The number of occasions on which the execution of a surveillance device or residual warrant did not lead to the bringing of proceedings within 90 days of its exercise.

592.8. If a judge has reported to the Chief Executive under clause 55, 56, or 67 about a breach of any condition of a surveillance device warrant, or use of a surveillance device not authorised under clause 44, the number of those reports, and the details of the breaches or lack of authorisation reported.

Submissions

Sufficiency and feasibility of reporting requirements

593. The NZCCL (submission 13) believes that the reporting requirements should be strengthened. It suggests that an enforcement officer should be required to provide a report on *all* search, seizure, and surveillance activities. This report, it contends, should contain information regarding the purpose, procedure, and result of the activity.

594. On the other hand, the NZPA (submission 22) believes that the reporting requirements are too onerous for Police.

Comment

595. The purpose of having reporting requirements is to allow agencies and Parliament to assess whether powers are being used appropriately and are meeting law enforcement needs. This objective can only be achieved if the requirements can realistically be met by the agencies they are imposed upon.

596. Several aspects of the reporting requirements in clauses 163 and 164 are of concern:

596.1. A number of statutes that are primarily enforced by non-Police enforcement officers provide that search powers may be exercised by a constable. Accordingly, Police may be required from time to time to exercise powers of search that fall outside of their core business. These constitute a very small percentage of the searches conducted by Police officers each year. Requiring them to report on all of these warrantless powers would be disproportionately onerous compared with the usefulness of such data.

596.2. The different time periods of surveillance which require reporting are onerous. Police have expressed concern that the collection of such detailed information imposes a significant administrative burden and is in any event likely to have substantial recording inaccuracies. It is also unclear how breaking down the information into so many different time periods assists Parliament or the public to assess the use of surveillance devices.

596.3. Police are also concerned that, in relation to residual warrants, the requirement in clause 164 to report on the type of device, technique, procedure, or activity covered by the warrant, would make information publicly available that may prejudice the future use of those means of investigating offending.

596.4. Police argue that the requirement to report on the number of occasions on which use of the surveillance device or execution of the residual warrant does not lead to the bringing of criminal proceedings within 90 days seems unlikely to enhance transparency around the use of surveillance. Commencing criminal proceedings is a complex process that will often require more than 90 days from the collection of evidential material, and the evidential material supporting a prosecution may come from a number of sources.

596.5. It is unclear what the requirement to report on the number of criminal proceedings in which relevant evidential material "was obtained directly or indirectly" from the use of a surveillance device or execution of a residual warrant, and the number of proceedings resulting in conviction, actually entails. For instance, "number of criminal proceedings" could be the number of charges laid or the number of people proceeded against. Likewise, whether evidential material "was obtained directly or indirectly" from a surveillance device or residual warrant is a difficult assessment, not capable of being easily made in an annual reporting requirement.

Recommendation 37

597. Taking the above concerns in order, the Ministry and the Law Commission recommend that the reporting requirements in clauses 162-164 should be amended so that:

597.1. The warrantless powers that Police are required to report on in clauses 162 and 163 are confined to those in Part 2 and Part 3 of the Bill.

597.2. The time periods that must be reported on in clause 163(1)(c) for warrantless use of surveillance devices are simplified so that the report is required to specify only the number of times each kind of surveillance device was used for: less than 24 hours; between 24 hours and 48 hours; and between 48 hours and 72 hours.

597.3. Clause 164(f) requires reporting on a general description of the nature of the device, technique, procedure, or activity authorised by a declaratory order rather than a specific one.

597.4. The requirement to report on the number of occasions when criminal proceedings are not brought within 90 days of the use of a surveillance device or activity carried out under a residual warrant in clauses 163(1)(e) and 164(h) is deleted.

597.5. Clauses 163(1)(d) and 164(g) requires reporting on the number of persons charged in criminal proceedings where the collection of evidential material relevant to those proceedings was significantly assisted by the search, surveillance, or activity carried out under a declaratory order.

Responsibility for reporting requirements

598. The NZWNZ (submission 34) considers that the Bill needs to be explicit about reporting processes, so it is clear who is ultimately responsible for ensuring the reporting requirements are met.

Comment

599. The Bill is quite explicit about the responsibility for reporting requirements. Within the agency concerned, clause 162(1) specifies that there must be an employee designated to

receive reports of warrantless powers. The responsibility for annual reporting to Parliament under clauses 163 and 164 ultimately rests with the Chief Executive of the relevant agency.

Subpart 8 – Offences

Clauses 165 and 166 – Failing to comply with an examination order or a production order

600. These clauses make it an offence to fail to comply with an examination order or a production order without reasonable excuse. The maximum penalty in each case is:

600.1. for an individual, a term of imprisonment of 1 year;

600.2. for a body corporate, a fine of $40,000.

Submissions

601. The NZPA (submission 22) believes that the penalties are inadequate. The ADLS (submission 39) noted that the penalties are substantial.

Comment

602. The penalty levels have been chosen as appropriate for the level of offending involved.

Recommendation

603. The Ministry and the Law Commission recommend no change to clauses 165 and 166.

Clause 167 – False application for examination order, production order, search warrant, surveillance device warrant, or residual warrant

604. This clause makes it an offence for anyone to make an application for an examination order, production order, search warrant, surveillance device warrant, or residual warrant that contains any assertion or other statement known by the person to be false. The maximum penalty is a term of imprisonment of 1 year.

Submissions

605. Andrew Miller (submission 2) states that a maximum penalty of 1 year imprisonment may be an insufficient deterrent to enforcement officers making false applications. The ADLS (submission 39) notes that there is no equivalent offence provision for an applicant who makes a negligent or reckless application.

Comment

606. The penalty levels have been chosen as appropriate for the level of offending involved.

607. An offence based on knowledge is consistent with the current law. Section 111 of the Crimes Act 1961 provides that where someone is required by law to make a statement or declaration, it is an offence to *knowingly* make a false statement or declaration. Likewise, section 86 of the State Sector Act 1988 provides that employees are not personally liable for any acts done *in good faith* as part of their functions or powers. It is unlikely that an officer will be acting in good faith if they submit an application that they are aware may be false in some regard.

608. Further, it is expected that the training provided to enforcement officers will ensure that applications are of a high standard. Issuing officers will similarly receive training to allow them to objectively scrutinise applications and identify those that are deficient or inadequate.

Recommendation

609. The Ministry and the Law Commission recommend no change to clause 167.

Clause 171 – Offence to disclose information acquired through search or surveillance

610. This clause makes it an offence for a person to disclose information that they acquired through exercising a search or surveillance power, or assisting someone else to exercise a search or surveillance power.

Comment

611. The clause makes it an offence for a person who "as a consequence of exercising a search or surveillance power or as a consequence of assisting another person to exercise a power… acquires information about any person" to disclose such information, otherwise than in the performance of that person's duty.

612. As currently drafted, this offence is limited to people who acquire information when they themselves exercise a search or surveillance power. However, there are other people who may have access to such information (eg, a computer technician), and it should likewise be an offence for them to disclose it.

613. The offence is also limited to information acquired through search and surveillance. It should also be an offence to disclose information acquired from an examination order, a production order, or through activities carried out under a declaratory order.

Recommendation 38

614. The Ministry and the Law Commission recommend that clause 171 be amended so that it is an offence for anyone to disclose information that is acquired through the exercise of a search power, a surveillance power, an examination order, a production order, or activities carried out under a declaratory order.

Part Five – Amendments, repeals and miscellaneous provisions

615. This Part includes consequential amendments to other Acts and amendments to the search powers in other Acts.

Clause 227 – 230 – Amendments to Fisheries Act 1996

616. These clauses amend the Fisheries Act 1996.

Submissions

617. SeaFIC (submission 45) are concerned about the duplication in the Fisheries Act 1996 and the Bill. For instance:

617.1. The power to use force (section 205 of the Fisheries Act and clause 108(c) of the Bill).

617.2. The power to take copies of documents (section 206 of the Fisheries Act and clause 108(h) of the Bill).

617.3. The power to seize items (section 207 of the Fisheries Act and clause 108(3) of the Bill).

618. SeaFIC are also concerned about the removal of the existing requirement in section 199(2)(a) that a fisheries officer have reasonable grounds to believe "that an offence is being or has been committed against this Act".

619. SeaFIC further contend that the existing warrantless search powers for regulatory purposes in the Fisheries Act should be removed. SeaFIC believe this is necessary to align these powers with the Law Commission's recommendation in its Report (*Search and Surveillance Powers* NZLC R97 (2007)) that warrantless search powers should be available in exceptional cases only where there is an overriding public interest in granting this power.

Comment

620. Certain Fisheries Act provisions have been retained, even where there is some overlap with the Bill's provisions, as the Fisheries Act provisions apply to a wider range of powers than those covered in the Bill (eg, the power to use force in section 205 is also relevant to the power of arrest in section 203).

621. The requirement in section 199 of the Fisheries Act that a fishery officer have reasonable grounds to believe that an offence is being or has been committed against the Act has not been replicated in the proposed new sections 199 and 199A because:

621.1. The new section 199 applies to regulatory search powers. Regulatory search powers allow agencies to monitor compliance with an Act; these can be in the nature of inspections and are not used to investigate offending.

621.2. The new section 199A effectively requires a fishery officer to have reasonable grounds to believe there has been or will be an offence against the Fisheries Act, as a fishery officer may only exercise the warrantless power to search if they have reasonable grounds to believe that there is on the premises:

621.2.1. something used or intended to be used in contravention of the Act; or

621.2.2. something that they reasonably believe will be evidence of an offence under the Fisheries Act.

622. The regulatory warrantless search powers in the Fisheries Act have been previously considered by Parliament and are therefore outside the scope of the Bill.

Recommendation

623. The Ministry and the Law Commission recommend no change to clauses 227-230 in relation to this submission. An unrelated recommendation to amend clause 228 is made in the Appendix.

Clause 279 – Amendments to Tax Administration Act 1994

624. This clause applies subpart 2 of Part 4 of the Bill to the warrant provisions in sections 16 and 16C of the Tax Administration Act 1994.

Submissions

625. Minter Ellison (submission 33) noted that subpart 2 of Part 4 (other than in relation to clause 100) does not provide procedures for dealing with privilege claims.

626. Minter Ellison believes that the procedures set out in subpart 4 of Part 4 should be applied to the non-disclosure of tax advice under the Tax Administration Act 1994. This would ensure that the issue of legal professional privilege is appropriately managed in this context.

Comment

627. It was government policy that the generic procedural provisions in the Bill would be applied to all law enforcement powers, unless an exemption was justified. However, they were only applied to regulatory powers if consultation with the relevant agencies confirmed that this was appropriate and practicable.

628. We undertook consultation with the Inland Revenue Department regarding the application of the Bill to the powers in the Tax Administration Act. After consideration, the Inland Revenue Department determined that application of Part 4 of the Bill was not appropriate to the scheme of the Tax Administration Act at this time.

Recommendation

629. The Ministry and the Law Commission recommend no change to clause 279.

Clause 284 – Amendments to Wine Act 2003

630. This clause amends sections 62, 63, 65, 66, 67, and 68 of the Wine Act 2003.

Submissions

631. New Zealand Winegrowers (submission 43) are concerned about the amendments to the Wine Act 2003.

632. In particular, its concerns are that:

632.1. clause 284(2) removes the requirement to enter a place "at any reasonable time" from section 62(1) of the Wine Act 2003;

632.2. clause 284(3) removes the requirement to enter a place "at any time that is reasonable in the circumstances" from section 62(2) of the Wine Act 2003; and

632.3. clause 284(10) removes the requirement to warn the occupier of the intention to use force in section 66(2) of the Wine Act 2003.

Comment

633. The requirement to enter a place at a "reasonable time" has been deleted from section 62(1) and (2) of the Wine Act 2003 as this requirement is contained in clause 108(a) of the Bill. Clause 108 is located in subpart 3 of Part 4 of the Bill, which is expressly applied to section 62 of the Wine Act by the new proposed subsection (3) to that section.

634. Clause 108(a) provides that a person exercising a power to search may enter and search a place, and any item or items found at that place, "at any time that is reasonable in the circumstances." Clause 284 therefore does not remove the requirement to enter at a reasonable time under section 62 of the Wine Act 2003 as the New Zealand Winegrowers contend.

635. Clause 126(3) (which is applied to section 62 of the Wine Act by virtue of the new proposed section 62(3)) sets out when a person may use reasonable force to effect entry. A person may use *reasonable* force where a person refuses entry or does not allow entry within a reasonable time following a request. It should be noted that the force used must be "reasonable". Clause 126(3) provides adequate protection to occupiers in relation to enforcement officers entering premises, and do not believe that section 66(2) of the Wine Act 2003 needs to be preserved.

Recommendation

636. The Ministry and the Law Commission recommend no change to clause 284.

Recommendations

This section of the Report contains the recommendations to the Committee.

Part 1

1. The Ministry and the Law Commission recommend inserting the following purpose clause in the Bill:

    1.1. The purpose of this Act is to facilitate the monitoring of compliance with the law and the investigation and prosecution of offences in a manner that is consistent with human rights values by:

        1.1.1. modernising the law of search, seizure, and surveillance to take into account advances in technologies and to allow for future technological developments; and

        1.1.2. providing rules that recognise the importance of the rights and entitlements affirmed in other enactments, including the New Zealand Bill of Rights Act 1990, the Privacy Act 1993, and the Evidence Act 2006; and

        1.1.3. ensuring investigative tools are effective and adequate for law enforcement needs.

2. The Ministry and the Law Commission recommend:

    2.1. inserting a Schedule into the Bill summarising the provisions of Part 4 that are applied by the Acts in Part 5 with the following column headings:

Column 1	Column 2	Column 3	Column 4
Act	**Section**	**Brief description of power**	**Which provisions in Part 4 apply**

2.2. making various technical amendments to ensure that Part 4 is only applied to the Acts amended in Part 5 to the extent intended.

3. The Ministry and the Law Commission recommend:

3.1. amending the definition of "unlawfully at large" in clause 3 so that a person is not "unlawfully at large" if the only warrant for his or her arrest that is in force is a warrant issued under Part 3 of the Summary Proceedings Act 1957 or a warrant for unpaid fines issued under the Crimes Act 1961; and

3.2. deleting clause 28(5).

Part 2

4. The Ministry and the Law Commission recommend amending clause 19 so that a constable may only conduct a warrantless search in relation to the offences in the Misuse of Drugs Act 1975 specified under clause 19(a) where that constable believes on reasonable grounds that it is not practicable to obtain a warrant.

5. The Ministry and the Law Commission recommend amending clause 32 to limit examination orders in the business context to offences carrying a maximum penalty of 5 years' imprisonment or more.

6. The Ministry and the Law Commission recommend amending clause 34(a) to limit examination orders in the non-business context to:

6.1. serious or complex fraud offences carrying a maximum penalty of 7 years' imprisonment or more; and

6.2. offences committed wholly or partly by an "organised criminal group" as defined in section 98A(2) of the Crimes Act 1961.

7. The Ministry and the Law Commission recommend amending clauses 31(1) and 33(1) so that:

7.1. only officers with the level of position of Inspector or above may make an application for an examination order; and

7.2. only 1 of the 12 District Commanders (but not anyone acting as a District Commander) or above may approve an application for an examination order prior to it being submitted to a judge.

8. The Ministry and the Law Commission recommend inserting a new clause in the examination order regime so that a constable who undertakes questioning pursuant to an examination order must provide a report to the judge who made the order, or (if that judge is unable to act) to a judge of the same court as the judge who made the order. The report must contain the following information:

8.1. whether the questioning resulted in obtaining evidential material;

8.2. whether any criminal proceedings have been brought or are under consideration as a result of evidential material obtained by means of the examination; and

8.3. any other information stated in the order as being required for inclusion in the examination order report.

9. The Ministry and the Law Commission recommend amending clause 37 so that an examination order contains a condition that an examination order report be provided to the judge who issued the order, or (if that judge is unable to act) to a judge of the same court as the judge who made the order.

10. The Ministry and the Law Commission recommend requiring the Commissioner of Police to report on examination orders in the Police's annual report with the following information:

10.1. the number of applications for an examination order that are granted or refused in the period covered by the report; and

10.2. the number of people charged in the period covered by the report where an examination order made a significant contribution to the obtaining of evidential material for the proceeding.

Part 3

11. The Ministry and the Law Commission recommend amending the surveillance device regime so that an enforcement officer may only carry out visual surveillance that involves entry onto private property or audio surveillance if there are reasonable grounds to suspect an offence:

11.1. carrying a maximum penalty of 7 years' imprisonment or more; or

11.2. against section 44, 45, 50, 51, 54, or 55 of the Arms Act 1983.

12. The Ministry and the Law Commission recommend amending the surveillance device regime so audio surveillance and visual surveillance involving entry onto private property is only available to:

12.1. constables; or

12.2. enforcement officers employed or engaged by a law enforcement agency that has been approved by Order in Council to carry out such surveillance.

13. The Ministry and the Law Commission recommend that the Order in Council approval process contain the following features:

13.1. The Order in Council may only be made on the recommendation of the Minister of Justice after consultation with the Minister of Police.

13.2. The Minister of Justice may recommend that an agency be approved to carry out either audio surveillance, or visual surveillance involving entry onto private property, or both.

13.3. The Minister of Justice may only recommend that an agency be approved to carry out visual trespass surveillance if satisfied that it is appropriate for the agency to carry out visual trespass surveillance, and:

13.3.1. the agency has the technical capability to carry out visual trespass surveillance; and

13.3.2. the agency has the policies and procedures in place so that the visual trespass surveillance can be carried out in a manner that ensures the safety of the people involved in the surveillance.

13.4. The Minister of Justice may only recommend that an agency be approved to use interception devices if satisfied that it is appropriate for the agency to use interception devices, and that the agency has:

13.4.1. the technical capability to intercept private communications in a manner that ensures the reliability of any information obtained;

13.4.2. policies and procedures in place to ensure that the integrity of any information obtained through the use of an interception device is preserved; and

13.4.3. the expertise to:

13.4.3.1. extract evidential material from information obtained through the use of an interception device in a form that can be used in a criminal proceeding; and

13.4.3.2. to ensure that any evidential material obtained through the use of an interception device is presented in an appropriate manner, when the agency intends to proceed with a prosecution.

13.5. The approval may be subject to any conditions considered appropriate, and may be revoked at any time.

14. The Ministry and the Law Commission recommend that, where a telecommunication has been intercepted pursuant to a surveillance power, the enforcement officer has the power to obtain call associated data as defined in section 3(1) of the Telecommunications (Interception Capability) Act 2004.

15. The Ministry and the Law Commission recommend the inclusion of a regime for raw surveillance data (including actual visual and audio recordings and full or substantial parts of transcripts of audio recordings) clarifying that raw surveillance data may only be retained in the following situations:

15.1. Proceedings have commenced in relation to an offence for which the raw surveillance data was collected and have not concluded (including the expiry of any appeal periods).

15.2. Raw surveillance data is required for an ongoing investigation. This data may be retained for a maximum of 3 years. The agency that holds the data may apply to a judge for an order allowing it to retain the data for an extended

period that does not exceed 2 years. A judge may make this order if satisfied that the raw surveillance data is required for that ongoing investigation

15.3. A judge has made an order (following an application from an agency holding raw surveillance data) allowing the agency to retain excerpts from raw surveillance data where there are reasonable grounds to believe that the excerpts may be required for a future investigation.

16. The Ministry and the Law Commission recommend that information that is extracted from raw surveillance data, but does not itself constitute raw surveillance data, may be retained where there are reasonable grounds to suspect that the information may be relevant to an ongoing or future investigation.

17. The Ministry and the Law Commission recommend amending clause 42 to make it clear that a surveillance device warrant is required for surveillance involving trespass onto private property.

18. The Ministry and the Law Commission recommend amending clause 43 so that:

18.1. an enforcement officer may (but is not required to) make an application for a surveillance device warrant where a party to the communication consents to the interception; and

18.2. the surveillance device regime in the Bill does not apply to interception warrants issued under section 17 of the Government Communications Security Bureau Act 2003.

19. The Ministry and the Law Commission recommend amending clause 44(1) to clarify that an enforcement officer may only undertake surveillance without a warrant, intermittently or continuously, for a period not exceeding 72 hours in total.

20. The Ministry and the Law Commission recommend amending clause 53 so that surveillance device warrant reports must contain information about whether:

20.1. the evidential material obtained as a result of using the surveillance device was specified in the surveillance device warrant; and

20.2. any criminal proceedings have been brought or are under consideration as a result of evidential material obtained pursuant to a surveillance device warrant.

21. The Ministry and the Law Commission recommend amending clause 53 so that the surveillance device warrant report must be provided to the judge who issued the warrant. If that judge is unable to act, the report must be provided to a judge of the same court as the judge who issued the warrant.

22. The Ministry and the Law Commission recommend recasting the residual warrant regime as a "declaratory order" regime, clarifying that it does not authorise activities, techniques or devices that are not otherwise lawful and reasonable.

23. The Ministry and the Law Commission recommend deleting "and monitoring" from the title above clause 68.

24. The Ministry and the Law Commission recommend deleting the reference to "interception capability" in the definition of "document" in clause 68, and clarifying that it does not include anything which a network operator does not have storage capability for, or does not store in the normal course of its business.

Part 4

25. The Ministry and the Law Commission recommend amending clauses 108(i) and (j) and 110(2)(h) and (j) so that searchers and their assistants may search a "computer system" as defined in section 248 of the Crimes Act 1961. The Ministry and the Law Commission also recommend making consequential technical amendments to clause 125 and clause 154(1).

26. The Ministry and the Law Commission recommend clarifying that a person may only access and copy data from a computer system (and other data storage devices) where:

26.1. the computer system, or part of the computer system, is located at the place being searched; or

26.2. the computer system does not have a physical location that may be searched, and the enforcement officer has obtained a warrant to search the computer system.

27. The Ministry and the Law Commission recommend that a new clause 126A be inserted to clarify that the notice requirements contained in clause 126(4) and (5) apply to remote searches of internet data storage facilities.

28. The Ministry and the Law Commission recommend no change to clauses 83-85, and 120. However, if the Committee considers it appropriate, the following could be added to clause 120:

> A person who carries out a rub-down search, personal search, or strip search must conduct the search with decency and sensitivity and in a manner that affords to the person being searched the greatest degree of privacy and dignity consistent with the purpose of the search

29. The Ministry and the Law Commission recommend amending clause 100 so that an issuing officer may not issue a warrant to seize anything held by a lawyer that is subject to legal professional privilege unless the issuing officer is satisfied there is a prima facie case that the thing was made, or received, or completed, or prepared:

29.1. for a dishonest purpose; or

29.2. for the purpose of planning to commit or committing an offence.

30. The Ministry and the Law Commission recommend amending clause 49 (the equivalent clause in relation to surveillance device warrants) and clause 130 (which relates to recognition of privilege) to the same effect.

31. The Ministry and the Law Commission recommend amending clause 101(4)(a) to require a search warrant to contain the name or other individual designation of the issuing officer.

32. The Ministry and the Law Commission recommend amending clause 106 to:

    32.1. clarify that enforcement officers cannot become issuing officers;

    32.2. require the Attorney-General to remove an issuing officer (other than a judge) from office for neglect of duty, inability to perform the duties of office, bankruptcy, or misconduct, proved to the satisfaction of the Attorney-General;

    32.3. require the Attorney-General to remove an issuing officer (other than a judge) from office if that person becomes an enforcement officer;

    32.4. allow an issuing officer to resign from the office of issuing officer.

33. The Ministry and the Law Commission recommend:

    33.1. making clauses 108(d), 110(2)(d), and 114 subject to a new subclause in clause 111 so that the power to detain a person while conducting a search is limited to people exercising a search power to investigate offending for which they have a related power to arrest;

    33.2. inserting specific provisions in the legislation amended in subparts 1 and 2 of Part 5 of the Bill to exclude those clauses from applying to search powers for which there is no related power of arrest where this is determined to be appropriate following further consideration by the Ministry and the Law Commission.

34. The Ministry and the Law Commission recommend limiting clause 113 to where there are reasonable grounds to believe evidential material will be destroyed, concealed, altered, damaged, or removed.

35. The Ministry and the Law Commission recommend amending clause 121 to require the chief executive of a law enforcement agency that carries out strip searches to ensure a copy of its strip search guidelines is publicly available on the agency's website.

36. The Ministry and the Law Commission recommend relocating clause 123(a) to Part 2 so that only Police may require particulars of all passengers in a vehicle when exercising a power to stop and/or search it.

37. The Ministry and the Law Commission recommend amending the reporting requirements in clauses 162-164 so that:

    37.1. The warrantless powers that Police are required to report on in clauses 162 and 163 are confined to those in Part 2 and Part 3 of the Bill.

    37.2. The time periods that must be reported on in clause 163(1)(c) for warrantless use of surveillance devices is simplified so that the report is required to specify only the numbers of times each kind of surveillance device was used for: less than 24 hours; between 24 hours and 48 hours; and between 48 hours and 72 hours.

    37.3. Clause 164(f) requires reporting on a general description of the nature of the device, technique, procedure, or activity covered by a declaratory order rather than a specific one.

37.4. The requirement to report on the number of occasions when criminal proceedings are not brought within 90 days of the use of a surveillance device or the exercise of a declaratory order in clauses 163(1)(e) and 164(h) is deleted.

37.5. Clauses 163(1)(d) and 164(g) requires reporting on the number of persons charged in criminal proceedings where the collection of evidential material relevant to those proceedings was significantly assisted by the search, surveillance, or activity carried out under a declaratory order.

38. The Ministry and the Law Commission recommend amending clause 171 so that it is an offence for anyone to disclose information that is acquired through the exercise of a search power, a surveillance power, an examination order, a production order, or activity carried out under a declaratory order.

Technical amendments

39. The Ministry and the Law Commission recommend deleting the word "intercepted" from the definition of "private activity" in clause 3.

40. The Ministry and the Law Commission recommend amending the definition of strip search in clause 3 as provided below:

> **strip search** means a search where the person conducting the search may require the person being searched to undress, or remove, raise, lower, or open any item or items of clothing so that the genitals, buttocks or (in the case of a female) breasts are –
>
> (a) uncovered; or
>
> (b) covered only by underclothing

41. The Ministry and the Law Commission recommend amending clauses 8(2)(c)(ii), 15(b)(ii) and 19(c) so the warrantless powers may be exercised where there are reasonable grounds to suspect evidential material will be destroyed, concealed, *altered*, or damaged.

42. The Ministry and the Law Commission recommend amending clause 11(1)(b)(ii) to cover people who are about to be placed in a Police vehicle.

43. The Ministry and the Law Commission recommend amending clauses 21(1)(b), 25(b) and 26(1)(c) so that a constable may "seize" controlled drugs, precursor substances, knives, offensive weapons and disabling substances in the situations set out in those clauses.

44. The Ministry and the Law Commission recommend amending clause 35 to exclude clause 98(3) and (5) from the examination order regime so that an application must always be in writing.

45. The Ministry and the Law Commission recommend replacing the reference to "*an* enforcement officer" with "*the* enforcement officer" in clause 46(a).

46. The Ministry and the Law Commission recommend replacing "search warrant" with "a warrant to enter premises for the purposes of obtaining evidence about the suspected offence" in clause 46(a).

47. The Ministry and the Law Commission recommend replacing "would permit" with "is primarily intended to facilitate" in clause 49.

48. The Ministry and the Law Commission recommend amending clause 68 by:

    48.1. replacing the term "call-related information" with "call associated data" as defined in the Telecommunications (Interception Capability) Act 2004;

    48.2. revising the definition of "document" to include "call associated data" and the content of a telecommunication.

49. The Ministry and the Law Commission recommend amending clause 69 so that an application for a production order is required to include the provision authorising the making of an application for a search warrant in respect of the suspected offence.

50. The Ministry and the Law Commission recommend amending clause 101 to permit searches of multiple addresses or vehicles pursuant to a single warrant.

51. The Ministry and the Law Commission recommend amending clause 108(g) so that a searcher may only bring and use a dog on search premises where that dog is:

    51.1. trained to undertake searching for law enforcement purposes; and

    51.2. under the control of its usual handler.

52. The Ministry and the Law Commission recommend including a new paragraph in clause 110(2) so that a person assisting in a search may bring and use a dog on search premises where that dog is:

    52.1. trained to undertake searching for law enforcement purposes; and

    52.2. under the control of its usual handler.

53. The Ministry and the Law Commission recommend replacing "request" with "direct" in clause 113 for consistency with clause 168.

54. The Ministry and the Law Commission recommend replacing "may" with "must" in clause 133(4).

55. The Ministry and the Law Commission recommend amending clause 138(1) so the requirement of "reasonable grounds to believe that any thing discovered in the search may be subject of a privilege recognised by [subpart 4]" applies to both searches conducted pursuant to a warrant and warrantless searches.

56. The Ministry and the Law Commission recommend amending clause 139 so that the procedural steps outlined within it apply when a searcher is *unable* to search a thing under sections 135, 136, 137, whether this is a result of the requirements of those provisions or a claim of privilege has been made.

57. The Ministry and the Law Commission recommend amending clause 172 so that a High Court may only make an interim order in a proceeding if satisfied that:

57.1. the applicant has established a prima facie case that the warrant or order in question is unlawful;

57.2. the applicant would suffer substantial harm from the exercise or discharge of the power or duty;

57.3. if the power or duty is exercised or discharged before a final decision is made in the proceeding, none of the specified remedies, or any combination of those remedies, could subsequently provide an adequate remedy for that harm; and

57.4. the terms of the interim order would not unduly hinder or restrict the investigation or prosecution.

58. The Ministry and the Law Commission recommend amending clause 173 so that it only applies to the extent that it is not inconsistent with any other provision in the Bill.

59. The Ministry and the Law Commission recommend amending clauses 196-198 to reinstate sections 445A-445C of the Children, Young Persons, and Their Families Act 1989 for warrants that are not search warrants.

60. The Ministry and the Law Commission recommend amending clause 204 so that the new subsections in section 144 of the Customs and Excise Act 1996 be inserted as subs (6) and subs (7).

61. The Ministry and the Law Commission recommend amending clause 228 (which inserts a new section 199 into the Fisheries Act 1996) by adding the word "aquatic" between "fish" and "life" in the new section 199(1)(a)(iv).

62. The Ministry and the Law Commission recommend amending clause 275 so the Resource Management Act is amended by:

62.1. deleting "and written authorisation" in section 332(3) and 333(3); and

62.2. reinstating section 335(1)(b) and (d).

63. The Ministry and the Law Commission recommend amending clause 305(3) (which amends section 12(1) of the Misuse of Drugs Amendment Act 1978) to insert the following paragraphs after paragraph (b):

> "allow the package or goods to be delivered by a person who has agreed to co-operate with customs"
>
> "deliver the package or goods".

64. The Ministry and the Law Commission recommend amending clause 314 so that the period to be reported on in the first annual report begins with the commencement of clause 163 (which contains the annual reporting requirements for search and surveillance powers).

65. The Committee should note that the above recommendations are subject to the Parliamentary Counsel Office's approach to giving effect to the recommendations.

66. The Ministry of Justice and the Law Commission also recommend that the Committee agree to the Parliamentary Counsel Office making technical drafting amendments to the Bill that may be needed.

Appendix One: Technical amendments

Part One: General Provisions

Clause 3 – Interpretation

1. This clause sets out definitions of some important terms in the Bill, including "private activity" and "strip search".

Private activity

2. "Private activity" is defined as an activity that the participants can reasonably expect is not observed, intercepted or recorded by anyone but the participants. The purpose of this definition is to clarify when observation of private activity (ie, visual surveillance) requires a warrant. Private activities are observed and recorded, not intercepted.

Recommendation 39

3. The Ministry and the Law Commission recommend deleting the word "intercepted" from the definition of "private activity".

Strip search

4. "Strip search" is defined as a search where the person conducting the search may require the person being searched to remove, raise, lower, or open all or any of the clothing of the person being searched. This definition is relevant to clause 121 which requires strip searches to be carried out by an enforcement officer of the same sex as the person being searched.

5. The current definition, however, sets a very low threshold for what constitutes a strip search. It is also inconsistent with clause 84, which allows an enforcement officer to require the person being searched to remove, raise, lower, or open any outer clothing being worn by the person being searched as part of a "rub-down search".

Recommendation 40

6. The Ministry and the Law Commission recommend amending the definition of strip search in clause 3 as provided below:

> **strip search** means a search where the person conducting the search may require the person being searched to undress, or remove, raise, lower, or open any item or items of clothing so that the genitals, buttocks or (in the case of a female) breasts are –
>
> (a) uncovered; or
>
> (b) covered only by underclothing

Part Two: Police Powers

Clauses 8, 15 and 19 – Warrantless powers to prevent loss of evidential material

7. These clauses allow Police to exercise warrantless powers to, among other things, prevent the loss of evidential material. Clauses 8(2)(c)(ii), 15(b)(ii) and 19(c) set out situations where Police may exercise warrantless powers to prevent evidential material being "destroyed, concealed or damaged". Arguably, this does not cover situations where evidential material is not broken or damaged, but is otherwise altered (eg, altering a form or changing a computer entry).

Recommendation 41

8. The Ministry and the Law Commission recommend amending clauses 8(2)(c)(ii), 15(b)(ii) and 19(c) so the warrantless powers may be exercised where there are reasonable grounds to suspect evidential material will be destroyed, concealed, *altered*, or damaged.

Clause 11 – Warrantless searches of people to be locked up in Police custody

9. This clause sets out situations where a constable may search a person to be locked up in Police custody. Under subsection (1)(b)(ii) a constable can conduct a search of a person who has been taken into lawful custody and is in a Police vehicle. However, the search needs to be carried out before the person is put into the vehicle.

Recommendation 42

10. The Ministry and the Law Commission recommend amending clause 11(1)(b)(ii) to cover people who are about to be placed in a Police vehicle.

Clauses 21, 25 and 26 – Warrantless powers to take possession of certain items

12. These clauses set out, among other things, situations where a constable may take possession of certain items (in relation to certain offences in the Misuse of Drugs Act 1975 and sections 202(4)(a) and 202A(4)(a) of the Crimes Act 1961). Clauses 21(1)(b), 25(b) and 26(1)(c) currently allow a constable to "take possession" of controlled drugs, precursor substances, knives, offensive weapons and disabling substances in specific situations. However, the phrase used elsewhere in the Bill is the power to "seize" certain items. These should be made consistent.

Recommendation 43

11. The Ministry and the Law Commission recommend amending clauses 21(1)(b), 25(b) and 26(1)(c) so that a constable may seize controlled drugs, precursor substances, knives, offensive weapons and disabling substances in the situations set out in those clauses.

Clause 35 – Other provisions that apply to examination order regime

13. Clause 35(2)(c) applies clause 98. Generally, an application for a search warrant must be made in writing. Under clause 98(3) an issuing officer may excuse an applicant from putting the application in writing in certain circumstances. However, an application for an examination order should always be made in writing.

Recommendation 44

14. The Ministry and the Law Commission recommend amending clause 35 to exclude clause 98(3) and (5) from the examination order regime so that an application must always be in writing.

Part Three – Enforcement officers' powers and orders

Clause 46 – Conditions for issuing a surveillance device warrant

15. This clause sets out the conditions that must be met before a judge may issue a surveillance device warrant, namely:

    15.1. there are reasonable grounds to suspect an offence in respect of which the Bill or any relevant enactment authorises an enforcement officer to apply for a search warrant;

    15.2. there are reasonable grounds to believe that using the surveillance device will obtain evidential material in relation to that offence.

16. Under paragraph (a) there must be reasonable grounds to suspect that an offence has been committed, or is being committed, or will be committed for which *an* enforcement officer may apply for a search warrant.

17. A surveillance device warrant may only be applied for by an enforcement officer if *that particular* enforcement officer is able to obtain a search warrant for that offence.

18. Further, there are agencies with a dual regulatory/law enforcement role whose search powers are broadly cast so that they do not require reasonable grounds to suspect an offence, although the power does contemplate and authorise the seizure of evidence of offending. These agencies should be prevented from obtaining a surveillance device warrant in relation to suspected offending (providing the conditions are met) simply because their search warrant power is not explicitly cast as a power to search for evidence of offending.

Recommendation 45

19. The Ministry and the Law Commission recommend replacing the reference to "*an* enforcement officer" by "*the* enforcement officer" in clause 46(a).

Recommendation 46

20. The Ministry and the Law Commission recommend replacing "search warrant" with "a warrant to enter premises for the purposes of obtaining evidence about the suspected offence" in clause 46(a).

Clause 49 – Restrictions on issue of surveillance device warrant

21. This clause provides that a judge must not issue a surveillance device warrant that would permit surveillance or recording of legally privileged communications (unless the communication is made for a dishonest purpose or for the purpose of planning or committing an offence). An enforcement officer can never guarantee that surveillance will not permit surveillance or recording of legally privileged communications, as people who are subject to surveillance will often be in contact with their lawyer.

Recommendation 47

22. The Ministry and the Law Commission recommend replacing "would permit" with "is primarily intended to facilitate" in clause 49.

Clause 68 – Interpretation (production orders)

23. This clause defines "call-related information", "document", "interception capability", "network operator" and "number" for the purposes of subpart 2 of Part 3 of the Bill (which contains the provisions for production orders). The definition of "call-related information" incorporates the definition of "call associated data" in section 3 of the Telecommunications (Interception Capability) Act 2004.

24. However, the definition of "call-related information" in the Bill includes the content of the telecommunication (eg, the content of a text message, what was said in a phone call). Call content is expressly excluded from the definition of "call associated data" in the Telecommunications (Interception Capability) Act. To minimise the possibility of confusion, it is desirable that consistent terms are used throughout the statute book where appropriate.

Recommendation 48

25. The Ministry and the Law Commission recommend amending clause 68 by:

    25.1. replacing the term "call-related information" with "call associated data" as defined in the Telecommunications (Interception Capability) Act 2004;

    25.2. revising the definition of "document" to include "call associated data" and the content of a telecommunication.

Clause 69 – Enforcement officer may apply for production order

26. This clause sets out the requirements for what is required in an application for a production order. The equivalent provisions in the search warrant, surveillance device warrant and residual warrant regimes require the application to include the provision authorising the making of an application for a search warrant in respect of the suspected offence (see clauses 45(1)(b), 58(1)(b) and 96(1)(b)).

Recommendation 49

27. The Ministry and the Law Commission recommend amending clause 69 so that an application for a production order is required to include the provision authorising the making of an application for a search warrant in respect of the suspected offence.

Part Four – General provisions in relation to search and inspection powers

Clause 101 – Form and content of search warrant

28. This clause sets out who may execute a search warrant, what must be in a search warrant, and clarifies that the privilege against self-incrimination applies despite any condition imposed as a condition of the search warrant.

29. Subclause (4)(f) states that a search warrant must contain the address or description of the place, vehicle, or other thing that may be entered, or entered and searched, inspected or examined. However, there are situations where it is desirable to search multiple addresses or vehicles pursuant to a single warrant.

Recommendation 50

30. The Ministry and the Law Commission recommend amending clause 101 to permit searches of multiple addresses or vehicles pursuant to a single warrant.

Clauses 108 – Powers of searchers

31. Clause 108(g) permits a searcher to use a dog, trained in undertaking searching, to assist with a search. The use of dogs in searching gives rise to concerns about the safety of persons at search scenes where dogs are used (particularly in relation to dog bites).

Recommendation 51

32. The Ministry and the Law Commission recommend amending clause 108(g) so that a searcher may only bring and use a dog on search premises where that dog is:

    32.1. trained to undertake searching for law enforcement purposes; and

    32.2. under the control of its usual handler.

Clause 110 – Powers of persons assisting in a search

33. This clause sets out what assistants may do when assisting in a search. There are situations where an agency will request the assistance of an agency with trained dogs to assist in the execution of a search. For instance, Police may ask Customs to bring their trained dogs to assist in a search for evidential material of offending against the Misuse of Drugs Act 1975. There is currently no power for people assisting in a search to bring a dog onto a place, vehicle or thing being searched.

Recommendation 52

34. The Ministry and the Law Commission recommend including a new paragraph in clause 110 so that a person assisting in a search may bring and use a dog on search premises where that dog is:

    34.1. trained to undertake searching for law enforcement purposes; and

    34.2. under the control of its usual handler.

Clauses 113 and 168 – Establishing a search scene and leaving a search location in breach of direction

35. Clause 113 provides that, where an application for a search is about to be made, or has been made and has not yet been granted or refused, an enforcement officer may:

    35.1. enter and secure a search scene; and

    35.2. request any person to assist with the entry and securing of the place, vehicle, or other thing.

36. Clause 168 makes it an offence with a maximum penalty of 3 months' imprisonment for a person to fail to comply with a direction under clause 113(1) or to leave any place or vehicle at which he or she is detained under clause 114(1).

Submissions

37. Andrew Miller (submission 2) notes that clause 113(1) uses the language of "request" whereas clause 168 refers to a "direction". Andrew Miller believes these should be made consistent and that the word "request" should be used in both clauses, and any damage caused as a result of the non-compliance should rest with the person who was capable but unwilling to provide assistance.

Comment

38. We agree that clauses 113 and 168 should be made consistent. The word "direct" better reflects the mandatory nature of the demand, as failure to comply is subject to a criminal sanction.

Recommendation 53

39. The Ministry and the Law Commission recommend replacing "request" with "direct" in clause 113 for consistency with clause 168.

Clauses 130, 49, 62 and 100 – Exceptions to privilege

40. Clause 130(2) provides that, for the purposes of subpart 4, no privilege applies in respect of any communication or information made or received, compiled or prepared:

    40.1. for a dishonest purpose; or

    40.2. to enable or aid any person to commit or plan to commit what the person claiming the privilege knew, or ought reasonably to have known, to be an offence.

41. Clauses 49, 62, and 100(b) restrict the issuing of surveillance device warrants, residual warrants, and search warrants if the warrant would allow the surveillance, recording or seizure of any communication that is subject to legal professional privilege, unless the communication or thing was made for:

    41.1. a dishonest purpose; or

    41.2. the purpose of planning or committing an offence.

Submissions

42. The NZPA (submission 22) suggests that the formulation of the exception in clause 130(2) should be adopted for clauses 49, 62, and 100.

Comment

43. The formulation in clause 130(2)(b) is consistent with that found in section 67 in the Evidence Act 2006 which relates to the power of a judge to disallow a claim of privilege.

44. Recommendations have been made elsewhere regarding amendments to clauses 49 and 100(b). These recommendations will have the effect of increasing standardisation between clauses 49, 100(b), and 130(2)(b).

Recommendation

45. The Ministry and the Law Commission recommend no further amendments to clauses 49 and 100, other than those made at paragraphs 485-0.

Clause 133 – Other privileges

46. This clause sets out the privileges that a person may assert when presented with an examination or production order. Subclause (4) provides that a judge *may* disallow a privilege claim if satisfied that the claim would be disallowed in a proceeding under section 67(1) of the Evidence Act 2006. However, if privilege would be disallowed under the Evidence Act, it should be likewise disallowed under clause 133.

Recommendation 54

47. The Ministry and the Law Commission recommend replacing "may" with "must" in clause 133(4).

Clause 138 – Searches otherwise affecting privileged materials

48. This clause applies to:

    48.1. a person executing a search warrant; or

    48.2. a person exercising a search power who has reasonable grounds to believe that any thing discovered in the search may be subject to a privilege recognised by subpart 4.

49. Under this clause, the person responsible for executing the search warrant or exercising the search power:

    49.1. must provide to any person who may claim the privilege a reasonable opportunity to do so; and

    49.2. if they are unable to identify or contact any person who may claim the privilege, may apply to the District Court for a determination as to the status of the item.

50. The requirement of "reasonable grounds to believe that any thing discovered in the search may be subject of a privilege recognised by [subpart 4]" should apply to both warrantless searches and searches conducted pursuant to a warrant.

Recommendation 55

51. The Ministry and the Law Commission recommend amending clause 138(1) so the requirement of "reasonable grounds to believe that any thing discovered in the search may be subject of a privilege recognised by [subpart 4]" applies to both searches conducted pursuant to a warrant and warrantless searches.

Clause 139 – Interim steps pending resolution of privilege claim

52. Clause 139 prescribes steps that must be taken where a person has made a claim of privilege under section 135, 136, 137, or 138. Where a claim of privilege has been made, a searcher:

    52.1. *may* secure the thing (including making a forensic copy of it), and deliver the thing or a copy of it, to the District Court for a determination on the claim of privilege;

    52.2. *must* supply the lawyer or other person who may or does claim privilege with a copy of, or access to, the thing secured; and

    52.3. *must* not search the thing secured unless no claim of privilege is made, or a claim of privilege is withdrawn, or the search is in accordance with the directions of the court determining the claim of privilege.

53. Clause 139 states that these steps are required where a person is "prohibited" from searching any thing. The language of prohibition suggests that the search is disallowed by virtue of the claim of privilege. This is not quite accurate. Rather, the claim of privilege activates the procedure outlined in the clause in order for the District Court to make a determination on the claim of privilege.

Recommendation 56

54. The Ministry and the Law Commission recommend amending clause 139 so that the procedural steps outlined within it apply when a searcher is *unable* to search a thing under sections 135, 136, 137, whether this is a result of the requirements of those provisions or a claim of privilege has been made.

Clause 172 – Effect of proceedings

55. This clause applies where a proceeding has been commenced relating to the exercise of any power, the discharge of any duty, or the use of evidential material under the Bill or a relevant enactment.

56. Clause 172 provides that an interim order that purports to prevent the continued exercise of a power or discharge of a duty, because proceedings have been commenced in relation to that power or duty, is ineffective, unless:

    56.1. the applicant has established a prima facie case that the warrant or order in question is unlawful;

56.2. the applicant would suffer substantial harm from the exercise or discharge of the power or duty;

56.3. if the power or duty is exercised or discharged before a final decision is made in the proceeding, none of the specified remedies, or any combination of those remedies, could subsequently provide an adequate remedy for that harm; and

56.4. the terms of the interim order would not unduly hinder or restrict the investigation or prosecution.

57. Therefore, clause 172 allows interim orders to be made, but provides that they are ineffective unless the conditions listed above are satisfied. Rather than allowing ineffective interim orders to be made, it is more logical to draft the clause to constrain the making of interim orders.

Recommendation 57

58. The Ministry and the Law Commission recommend that clause 172 be amended so that a High Court may only make an interim order in a proceeding if satisfied that:

58.1. the applicant has established a prima facie case that the warrant or order in question is unlawful;

58.2. the applicant would suffer substantial harm from the exercise or discharge of the power or duty;

58.3. if the power or duty is exercised or discharged before a final decision is made in the proceeding, none of the specified remedies, or any combination of those remedies, could subsequently provide an adequate remedy for that harm; and

58.4. the terms of the interim order would not unduly hinder or restrict the investigation or prosecution.

Clause 173 – Service of notices and orders

59. The clause provides details on how service is to be effected for orders and notices. However, there are provisions elsewhere in the Bill that prescribes service in specific circumstances (which are different from the service requirements in this clause).

Recommendation 58

60. The Ministry and the Law Commission recommend amending clause 173 so that it only applies to the extent that it is not inconsistent with any other provision in the Bill.

Part 5 – Amendments, repeals, and miscellaneous provisions

Clauses 196-198 – Amendments to the Children, Young Persons, and Their Families Act 1989

61. These clauses amend the Children, Young Persons, and Their Families Act 1989 by repealing section 445A to 445C (the procedural provisions relating to the issue of warrants). However, provisions in the Children, Young Persons, and Their Families (Youth Courts Jurisdiction and Orders) Amendment Act 2010 use the procedures and requirements set out in these sections in relation to arrest warrants. These sections should therefore be reinstated for warrants that are not search warrants.

Recommendation 59

62. The Ministry and the Law Commission recommend amending clauses 196-198 to reinstate sections 445A-445C of the Children, Young Persons, and Their Families Act 1989 for warrants that are not search warrants.

Clause 204 – Amendments to section 144 of the Customs and Excise Act 1996

63. The clause amends the provision in the Customs and Excise Act 1996 that covers searching vehicles by adding new subsections (5) and (6) to section 144. However, the Customs and Excise Amendment Act 2009 has already inserted a new subsection (5).

Recommendation 60

64. The Ministry and the Law Commission recommend amending clause 204 so that the new subsections in section 144 of the Customs and Excise Act 1996 be inserted as subs (6) and subs (7).

Clause 228 – New sections 199 and 199A substituted in the Fisheries Act 1996

65. This clause substitutes new sections 199 and 199A into the Fisheries Act 1996. In the new section 199(1)(a)(iv), the word "aquatic" was inadvertently left out.

Recommendation 61

66. The Ministry and the Law Commission recommend amending clause 228 (which inserts a new section 199 into the Fisheries Act 1996) by adding the word "aquatic" between "fish" and "life" in the new section 199(1)(a)(iv).

Clause 275 – Amendments to Resource Management Act 1991

67. This clause amends the Resource Management Act 1991. Section 332(3) and 333(3) of the Resource Management Act require enforcement officers to produce their written authorisation before entering to search. However, clause 126(1)(b)(i) of the Bill requires a copy of the search warrant or advice about the enactment that authorises the search to be provided to the occupier. Section 332(3) and 333(3) of the Resource Management Act should therefore be repealed.

68. Section 335(1)(b) and (d) of the Resource Management Act require enforcement officers executing a search warrant to be accompanied by constables. These provisions are inadvertently repealed in the Bill, and should be reinstated.

Recommendation 62

69. The Ministry and the Law Commission recommend amending clause 275 so the Resource Management Act is amended by:

69.1. deleting "and written authorisation" in section 332(3) and 333(3); and

69.2. reinstating section 335(1)(b) and (d).

Clause 305 – Amendments to the Misuse of Drugs Act 1978

70. This clause amends the Misuse of Drugs Amendment Act 1978. Subclause (3) amends section 12 of the Misuse of Drugs Amendment Act. Section 12 confers immunity from criminal prosecution on officers who participate in controlled deliveries. However, the decision of Winkelmann J in *R v Yeung* (unreported, Auckland High Court, CRI-2006-092-010945, Winkelmann J, 22 May 2009) has revealed deficiencies in this protection. In *R v Yeung* section 12(3) of the Misuse of Drugs Amendment Act was held not to apply to customs officers who *actually deliver* drugs in controlled deliveries.

71. The amendment in subclause (3) was directed at remedying this deficiency. However, the current drafting does not appear to do so.

Recommendation 63

72. The Ministry and the Law Commission recommend that clause 305(3) (which amends section 12(1) of the Misuse of Drugs Amendment Act 1978) be amended to insert the following paragraphs after paragraph (b):

> "allow the package or goods to be delivered by a person who has agreed to co-operate with customs"
>
> "deliver the package or goods".

Clause 314 – Transitional provision in relation to reporting requirements

73. Clause 314 is the transitional provision for the reporting requirements under clause 163 (annual reporting of search and surveillance powers). Clause 314 provides that the period to be reported on in the first annual report begins with the commencement of the Search and Surveillance Act and ends with the end of the financial year or other period ordinarily the subject of the report.

74. However, clause 2 provides that the Search and Surveillance Act may come into force by 1 or more Orders in Council that bring different provisions of the Act into force on different dates. There may therefore be multiple commencement dates. The requirement to report on search and surveillance powers in clause 163 should begin on the commencement of that clause.

Recommendation 64

75. The Ministry and the Law Commission recommend that clause 314 be amended so that the period to be reported on in the first annual report begins with the commencement of clause 163 (which contains the annual reporting requirements for search and surveillance powers).