

Order Paper and questions Questions for oral answer

3. Search and Surveillance Bill— International Federation of Journalists' Statement

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3. KEITH LOCKE (Green) to the **Minister of Justice**: Does he agree with the International Federation of Journalists that if the Search and Surveillance Bill proceeds in its present form it will "undermine the long-held right of journalists to protect the confidentiality of sources"; if not, why not?

Hon CHRISTOPHER FINLAYSON (Acting Minister of Justice) : No, I do not. The media's right to protect confidential sources under the Evidence Act 2006 has been expressly carried over to this bill for examination orders, production orders, and all searches. Under the bill, a journalist presented with an examination order or a production order may refuse to answer questions or produce documents that would reveal the identity of the journalist's source.

Keith Locke: Is it not true that before the claim of privilege is heard the journalist may be forced to produce those documents and disclose confidential sources, leading the *New Zealand Herald* editors to say that these powers to reveal confidential sources threaten "the public airing of some of the country's most important, and uncomfortable, news stories"?

Hon CHRISTOPHER FINLAYSON: No. I think what the member is actually referring to is a situation where the claim to the privilege may be disputed. In those circumstances it may be necessary to refer the material to a judge, who can determine the validity or otherwise of the claim. That is the procedure that is set out under the Evidence Act, which the Green Party did not oppose when it was debated 3 years ago.

Keith Locke: What concerns does he have that the power to require documents to be produced on request under the threat of a jail term is now available to a host of Government departments—for example, the Ministry of Agriculture and Forestry, the Ministry of Fisheries, etc.?

Hon CHRISTOPHER FINLAYSON: None.

Keith Locke: Will he consider deleting the examination orders in the Search and Surveillance Bill, because, in the opinion of the International Federation of Journalists, *New Zealand Herald* editors, etc., they contravene the right of New Zealanders to silence and may force journalists to disclose their sources?

Hon CHRISTOPHER FINLAYSON: No.

Keith Locke: Does he agree with the International Federation of Journalists that the Search and Surveillance Bill will "erode the democratic role of working journalists in New Zealand", the federation not being satisfied with a subsequent judicial hearing of a right to privilege if the Government agencies have already run off with documents containing the journalists' confidential sources?

Hon CHRISTOPHER FINLAYSON: No. That is hyperbolic nonsense.

Keith Locke: If it is hyperbolic nonsense, why did the chair of the select committee, Chester Borrows, tell Radio New Zealand National that the bill may warrant further consideration and that he took seriously the criticisms of the journalists, and will the Minister not take another look at the concern expressed by a range of journalists, including their international federation?

Mr SPEAKER: I believe that the Minister has no responsibility whatsoever for what the chair of a select committee may have said. In fact, he probably should not even be commenting on it. So I do not

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believe that it is appropriate for to me to allow that question. I apologise to the member.

Hon Trevor Mallard: I raise a point of order, Mr Speaker. I think the Minister can—[*Interruption*]

Mr SPEAKER: A point of order is being heard.

Hon Trevor Mallard: I think the Minister can take into account comments a chair of a select committee made publicly. I think that is certainly within the rules. If the comments are done in a public way Ministers can, if they wish, either take them into account or—

Mr SPEAKER: I think we get into dangerous territory if we have Ministers commenting on what chairs of select committees do. They are matters for Parliament, not for the executive. Once a matter is reported back to the House, I am more comfortable about it being commented on, but while a matter is before a select committee, I am not comfortable about it, at all. I do not want to deny the member his supplementary question, so I invite him to reword it to see whether he can bring it within order.

Hon Trevor Mallard: I raise a point of order, Mr Speaker. I ask you to review the ruling you just made. I think it is one worth another look, after a bit of time.

Mr SPEAKER: I am always prepared to, on request, look at what I have done. Ministers have no responsibility for the chairs of select committees. But I invite Keith Locke to bring his question within the Standing Orders.

Keith Locke: Will the Minister take another look at the bill and the possibility of revising it, given the concern expressed by a wide range of journalists, including the International Federation of Journalists, and by some political figures who have commented publicly, expressing an interest in further considering the bill?

Hon CHRISTOPHER FINLAYSON: No.

Keith Locke: Mr Speaker, I take your standard that you do not like press statements being tabled, but in this case the statement from the International Federation of Journalists is on an international website and might not be available. I seek leave to table the statement made by the International Federation of Journalists on 12 November headed "NZ bill Undermines Journalists' Rights".

Mr SPEAKER: Leave is sought to table that document. Is there any objection? There is no objection.

- Document, by leave, laid on the Table of the House.

Charles Chauvel: Will the Government secure Labour's support for the now substantially redrafted legislation by taking up its offer to provide that support if the Government includes in the bill specific provisions to better affirm press freedom, provides for better controls on Serious Fraud Office powers, and makes production and examination orders available only for the most serious offences and under the supervision of judges?

Hon CHRISTOPHER FINLAYSON: The Minister has no responsibility for the Serious Fraud Office or any aspect of its administration.

Charles Chauvel: I raise a point of order, Mr Speaker. My question was about whether the Government would be willing to amend the legislation in the three ways indicated. The Minister has carriage of the bill, so he has responsibility for all the matters that are in it.

Mr SPEAKER: I believe that in answering the Minister pointed out that the Minister of Justice does not have responsibility, as I understand it, for the Serious Fraud Office, which was one of the components of the member's question. I cannot, I believe, constrain the Minister beyond that; I think he did answer that part of the question.

Charles Chauvel: I seek leave to table a letter from the Labour Party to the Minister offering support for the legislation if it is redrafted in the ways indicated in my question.

Mr SPEAKER: Leave is sought to table that document. Is there any objection? There is no objection.

- Document, by leave, laid on the Table of the House.

09 November 2010

COPY

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Dear Minister

Search and Surveillance Bill – Production and Examination Orders – SFO and Police

1. I write in an effort to reach a cross-party agreement on the issue of production and examination orders.
2. Can I begin by thanking you for the constructive way in which Ministry and Law Commission officials together with National Party select committee members have dealt with the many complex issues that have arisen from the Search and Surveillance Bill ("SSB") and the public submissions thereon.
3. Speaking for Labour, we believe it is important to strive for cross party agreement on core institutional legislation which has enduring effect beyond the term of any government. This is especially so where the intrusive powers of arms of State law enforcement agencies are balanced against civil liberties. Achieving settled legislation in turn maintains public confidence in, and cooperation with, our legal institutions and the rule of law.
4. You will be aware from your officials and National members of the select committee that as a consequence of the thorough and cooperative process there is now substantial agreement between the two main parties on virtually all aspects of the SSB. The notable exception is in respect of the proposals to confer new powers on the Police to use production and examination orders, and the related need to tidy up existing powers for the Serious Fraud Office.

History

5. The genesis of this lies in the proposal by the last government to merge the Serious Fraud Office ("SFO") into a new Organised Crime and Serious Fraud Unit within the Police. At the time the Law Commission advised the then cabinet that the SFO was in the habit of routinely using their powers to use production and examination orders. These orders do erode the right to silence, and should be used sparingly. They were never intended to be a substitute for normal investigative practice, but rather were intended as a reserve power to be used to unpick serious fraud when normal investigative means will not suffice. They enable information to be gathered from, mainly, third parties who hold information as agents who owe their principals a duty of confidence, but who are able to cooperate given the legal authority of a production or examination order.
6. Largely because these powers had been overused by the SFO, the recommendation was not to carry these powers over into the new combined agency. The proposal to completely remove these powers was criticised. In response I, with the approval of my then cabinet colleagues, went to see various Queen's Counsel in Auckland who worked on SFO cases. I met with various prosecution and defence counsel. All of those I met with agreed the SFO

was overzealous in its use of their powers, but all but one also thought it would be wrong to remove the power entirely.

7. There was in the end widespread agreement that the power for the SFO should be constrained but carried forward. We then in cabinet concluded that if the powers were necessary in a constrained form for the SFO, then a constrained version of the powers was justified for Police investigations of serious organised crime, some of which bears similarities with the complexity of serious fraud and can be more pernicious.
8. You campaigned against the merger of the SFO into the Police, and upon election halted that. The proposal to confer upon the Police powers to obtain production and examination orders when investigating serious organised crime continued, and is being given effect to by the SSB.

Our concerns

9. Our concerns are three fold:

- a. **Media should be exempted.** The recent use of a production order by the SFO against the National Business Review was an example of this power being used inappropriately without proper consideration of the damage to press freedom. This highlights the anomaly which exists where the Evidence Act explicitly recognises the public interest in protecting journalist's sources, while for production and examination orders there is no recognition of that public interest and no such protection exists. The SFO can internally issue such a notice and the NBR and its journalists are placed in an invidious position. If the fourth estate protects their source they are in breach of the law and at risk of fines of up to \$40,000 or imprisonment. This is bad law and should be fixed. The freedom of the press to investigate and report on issues of public interest is an important part of New Zealand's constitutional settings. Putting the confidentiality of their sources at risk means that sources will be less willing to confide in them in the future. This undermines the role of the fourth estate and is to the detriment of the general public. It shows how careful we need to be before conferring power of this kind to state agencies

Production and examination orders should not be issued against the fourth estate, who should be excluded from their ambit. A suitable definition of the media is in the Evidence Act 2006. To leave this power as it stands is nonsensical given that it effectively undermines the protections for media in respect of evidence at trial found in the Evidence Act.

- b. **The SFO process should be as is proposed for the Police.** The SFO use of examination and production orders should be via warrants from judges (not registrars nor by internal administrative act), as is proposed for the Police. The drafting for this is already in the SSB. It can be easily applied to an amendment to the SFO legislation via the SSB with the agreement of the house. Labour would agree to this.
- c. **The threshold for the Police is set very broadly.** The proposed thresholds for the alleged crimes in respect of which orders can be sought are offences with a maximum penalty of 5 years imprisonment in a business context, and 7 years in a non-business context. This is a very wide range of offences. When combined with the general definition of what amounts to organised crime it means that production and examination orders can be sought in unduly wide circumstances given the

undermining of the right to silence that these orders entail. We would like you to consider limiting the power for the Police to a more serious group of offences. We would suggest a threshold of 10 years imprisonment, which would catch serious organised offences involving drugs, violence or extortion, but would be happy to consider other suggestions.

10. We would be grateful if you could consider these suggestions.
11. We understand you may wish the SSB to proceed through its remaining stages this year. We are happy to cooperate to help achieve that if our concerns are addressed but we would be concerned if legislation of this nature is pushed through all stages during urgency.
12. We propose to vote for the legislation at second reading. If appropriate amendments are agreed at the committee stage, we will support the SSB at third reading. If not, we will be required to oppose the SSB in its final reading.
13. Given the relevant interests of the Attorney General and the Minister Responsible for the SFO, we have copied this letter directly to them in an effort to avoid delay.
14. I have also copied it to the Media Freedom committee, which includes representatives from newspapers, television and radio, and has expressed a strong interest in the issues.
15. Lastly I have enclosed a copy of the front-page article from the latest issue of the Bulletin, the Newspaper Publisher Association monthly publication. It is entitled "*Freedom Threat*" and reports on media concerns following the recent SFO action in using a production order against the NBR.

Yours sincerely



Hon. David Parker

Cc Hon. Chris Finlayson, Attorney General

Hon. Judith Collins, Minister Responsible for the Serious Fraud Office

Bcc Tim Murphy, Chairperson, Media Freedom Committee, c/- NZ Herald, Auckland