

New Zealand Law Society

SUBMISSION ON SEARCH AND SURVEILLANCE BILL

Introduction

1. The New Zealand Law Society (Society) thanks the Justice and Electoral Committee for the opportunity to make this submission on the Committee's Interim Report on the Search and Surveillance Bill.
2. The Society acknowledges the work that has been done by the Committee, the Ministry of Justice and the Law Commission to respond to concerns with the Bill. The changes made to the surveillance regime in particular strike a more appropriate balance between effective enforcement and privacy interests in the regulatory context.
3. This submission records the Society's remaining material concerns with the Bill. As with our previous submissions,¹ our comments relate to the powers being granted to regulatory agencies and not to the powers exercised by the police.
4. The submission concludes with some points where there is no disagreement over the objective of the Bill but the relevant provisions could usefully be clarified.

Expansion of powers

5. The reports from the Law Commission and the Ministry of Justice² helpfully clarify that the Bill does grant new powers to regulatory agencies. The Bill does so by granting entirely new surveillance powers and by expanding the ambit of search powers.
6. These reports provide a better basis for a discussion of the changes proposed by the Bill. New powers need to be justified on their merits if the enforcement framework is to retain public confidence and support.

Remaining concerns

Expansion of inspection powers

7. In addition to enforcement powers, exercisable on suspicion of offending, regulatory agencies can have inspection powers. The ability to conduct an inspection is not tied to a

¹ New Zealand Law Society submission 13 October 2009, supplementary submission 22 October 2009, and letter 29 October 2009 to the Committee Chair.

² Appendices B, C, D, E and G of the Interim Report of the Justice and Electoral Committee on the Search and Surveillance Bill.

suspicion of offending but rather is an administrative function to advance the purposes of the relevant Act.

8. The powers granted to a regulatory agency for enforcement are typically greater than the powers granted for inspections. The greater enforcement powers reflect the suspicion of offending, and will be accompanied by greater safeguards.
9. In its original form the Bill proposed to expand all inspection powers to match the powers granted for enforcement. The revised Bill accompanying the Interim Report recognises the distinction between enforcement and inspection powers in relation to the power to detain. The power to detain will now only be available where there is a suspicion of offending and a power of arrest (clause 108(d) and clause 111(2)).
10. The remaining powers identified in clause 108 are granted to regulatory agencies exercising inspection functions. Of particular concern is the power to use force (clause 108(c)).
11. This would result in a change to the status quo. Regulatory agencies exercising administrative inspection functions, where there is no suspicion or suggestion of offending, would be able to exercise force in situations where that is currently not seen to be necessary and is not permitted.
12. The Society submits that the expansion of the power to use force to these administrative inspection functions is a material change. The use of force by state agencies is obviously a serious matter. The proposed change is all the more troubling given there is no evidence that current powers are insufficient.

Recommendations

13. The Society submits that the power to use force should be treated in the same way as the power to detain, and made available in the context of enforcement functions but not administrative inspection functions.
14. The key here is to reflect the status quo. The proposed Schedule to the Bill can be used to reflect those functions where agencies currently have a power to use force, and those functions where the use of force has been judged not necessary.

Seizure of items in plain view

15. Clause 119 proposes that an enforcement officer may seize items without a warrant if that officer is of the opinion that he or she could obtain a warrant to seize that same item.

16. In Appendix B of the Interim Report, the Law Commission agrees this would be a new power but refers to the United Kingdom and Canada (without detailing the comparable provisions or context). The Ministry of Justice's Summary Departmental Report (Appendix E) explains at length that this new power will not expand the scope of the original search. This is not the key issue, however. The Ministry only justifies the addition of the new power in a single sentence explaining that the item must be self-evidently incriminating (paragraph 150).
17. As a preliminary point, the Departmental Report focuses on an enforcement context and emphasises the scope of any search warrant. However, the power granted by clause 119 will be available whenever an official is lawfully on premises, including during regulatory inspections. In these circumstances, the limits on the search highlighted by the Departmental Report will not exist to the same extent.
18. More fundamentally, the clause 119 power is designed to empower an official to side-step the procedural safeguards associated with obtaining a warrant. The fact that the official involved believes a warrant could be granted is a poor test. The procedural safeguards for granting a warrant serve an important function, and not all applications are granted.
19. The Society submits this new power is a significant one, and the policy justifications made for the change are insufficient given the significance of the change.

Recommendation

20. The Society recommends that clause 119 be removed from the Bill. A separate policy development and consultation process could be run to explore the need for, and boundaries of, this proposed power.

Treatment of tracking devices

21. The revised Bill responds to the concerns expressed by a number of submitters by reserving the more intrusive surveillance powers to situations where serious offending is being investigated (offences punishable by seven years or more of imprisonment).
22. The Bill does not put the use of tracking devices in that category. Applications for use of a tracking device may be made in relation to low-level offending. The rationale presented in the Departmental Report is that "the information obtained from the device is significantly more limited than that obtained by visual and audio surveillance" (paragraph 91).

23. The Society submits that this assumption made by the Ministry of Justice – that the information obtained by a tracking device is “significantly more limited” – is not always correct. If used over an extended period, a tracking device could be used to build up a picture of someone to a degree of detail that would be a significant invasion of privacy. In such a situation the distinction made by the Ministry falls away.

Recommendation

24. The Society submits that extended use of a tracking device should only be available in the situations of serious offending where audio and trespassary surveillance is available.

Declaratory orders

25. The revised Bill replaces the previous “residual warrants” regime with the concept of declaratory orders. The idea behind the concept of declaratory orders is a good one – increased certainty to officials contemplating a novel method of surveillance.
26. However, the Bill is silent on the legal status of a declaratory order. Importantly, it is not clear whether the order is determinative and binding on all parties, or not. Could the subject of the novel surveillance technique later challenge the surveillance activity as unlawful, despite the enforcement official having earlier obtained a positive declaratory order? If not, and the declaratory order is to be determinative, then the Bill will need to recognise that the process of issuing the order is *ex parte* (i.e. the subject of the search is not included in the discussion) and build in appropriate protections.

Recommendation

27. The Society submits it is important that the Bill be clear about the status of a declaratory order. It may be that this aspect of the Bill needs to be withdrawn until further policy work is done.

Points of clarification

28. In this part of the submission the Society identifies points where there is no dispute as to the objective in the Bill but the provisions could be helpfully clarified.

Claims of privilege

29. The Society acknowledges that the Committee has responded to previous submissions regarding the appropriate test for dishonest use of legal privilege. The Society agrees that the appropriate standard is that already used in the Evidence Act.

30. The Society submits that the process in the Bill for resolving claims of privilege needs to be clarified. The process in the Bill (at clauses 135 and following) is currently drafted to protect “a privilege recognised by this subpart”. However, an important question is often whether a privilege exists – an issue that clause 135 assumes has already been resolved.

Recommendation

31. The Society submits it is important that the Bill include a process whereby a claim to a privilege can be made and resolved. Clause 135, and the process that follows in subsequent clauses, responds to “a privilege recognised by this subpart”. It is not clear whether this process would cover a situation where a privilege is claimed but disputed (which we believe is the intention). These clauses could be clarified by referring to “a claim to a privilege recognised by this subpart”, or similar.

Conditions for intrusive surveillance powers

32. The revised Bill provides that the most intrusive surveillance powers (currently audio and trespassary surveillance, although see discussion of tracking devices above) are available in respect of offending carrying a punishment of seven years imprisonment or more (clause 42AA).
33. The Bill also provides that non-police agencies must be accredited in order to access these most intrusive surveillance powers (clause 45(5)).

Recommendations

34. The Society submits it would be helpful if the Bill was amended to clarify that the conditions in clause 42AA and clause 45(5) are cumulative – that in the case of a regulatory agency both must be satisfied (and not just clause 45(5)).
35. For example, clause 45(5) could be added to the conditions identified in clause 46.

Emergency surveillance powers

36. Clause 44 provides that an official may use a surveillance device without a warrant in situations of emergency or urgency. This can only be done:
- 36.1 if it is impractical to get a warrant; and
- 36.2 only over a 72 hour time period.

Recommendations

37. The wording in the revised Bill makes the permissible time period ambiguous. It could be read as allowing “off and on” surveillance for periods of time that add up to 72 hours, even if this is spread over a much longer period. The intention seems to be a cap of 72 hours from the time surveillance starts, even if surveillance is not continuous during that period. The Society submits that clause 44 be amended to make this clear.
38. The Society also recommends that clause 44 be amended to require the relevant official to obtain a warrant as soon as it is practicable to do so. By definition, at that point the emergency or urgency will have passed and the justification for warrantless surveillance will have been extinguished.

Conclusion

39. The Society does not wish to appear in support of this submission. However, the Society is willing to meet with the Committee or officials advising it if the Committee considers that would be of assistance.



Jonathan Temm
President
9 September 2010