

New Zealand Law Society

Submission on Search and Surveillance Bill

Introduction

1. The purpose of the Bill is to reform the search and surveillance powers of the Police and other law enforcement and regulatory agencies. This is an important bill with consequences for fundamental civil liberties. The reform is directed at:
 - 1.1 homogenising and rationalising search and surveillance powers, and
 - 1.2 updating the search and surveillance powers to reflect developments in technology.

Summary of submission

2. The Society supports the aims of this Bill. A transparent and coherent law enforcement regime is integral to the protection of fundamental rights. The reform of search and surveillance powers in New Zealand is an important exercise which is overdue.
3. However, the Society has significant concerns about the current form of the Bill. In particular:
 - 3.1 The drafting of the Bill is not clear and accessible. A close reading of the Bill is required in order to appreciate that the agencies granted powers under Part 4 will also inherit significant powers under Part 3 of the Act.
 - 3.2 The proposed homogenisation of powers would result in a dramatic expansion of powers for certain agencies. This expansion of powers is not listed among the aims of the Bill, and appears to have escaped significant comment both in the House and in the public domain – possibly because of the clarity issues identified above. This aspect of the Bill requires detailed consideration in the select committee proceedings, including specific consideration of each of the dozens of proposed amendments to the Acts detailed in Part 5 of the Bill. Constitutional changes of this magnitude should not be made on a conglomerate approach.

- 3.3 In fact, the Bill does not appear to achieve its aim of homogenisation. Numerous anomalies remain in that certain agencies retain specific powers parallel to powers available under the Bill.
4. These points cannot easily be resolved while the Bill remains in its current form. A more flexible approach is required both to remove remaining anomalies and to ensure that the Bill does not grant excessive (or inadequate) powers to any entity. It contains a measure of flexibility in that certain agencies are provided a limited set of powers, but the Bill's approach is still observably 'one-size-fits-all', and difficult to understand without considerable application.¹
5. This submission is concerned with the structural issues detailed above, and the attendant barrier to informed debate on the scope of the Bill. In the Society's view, consideration of the nature/scope of particular powers are best debated once the Bill's application is clarified. For this reason, particular issues of concern (such as the potential for surveillance of employees at home) are not dealt with in isolation in this submission, although key examples are noted as requiring debate. The appropriateness of each power must be considered by reference to the entities proposed to exercise it.
6. Two matters of detail deserve specific comment:
- 6.1 the proposed warrant application processes risk undermining the protection of legal privilege;
- 6.2 as a drafting point, it would be useful for the Bill to clarify whether common law methods of law enforcement are to remain. The Society's Rule of Law Committee considers that a court may be justified in viewing the Bill as a code (ie overruling parallel common law powers), and this appears to be the intention.

Recommendations

7. That a graduated structure similar to the Crown Entities Act 2004, where there are five categories of Crown Entity of varying degrees of independence, and particular entities are

¹ For example the Pork Industry Board is proposed to be granted Part 4 powers, less particular powers of search and apprehension.

assigned to a category, is a better structure for a regime of this scale and complexity. Under this approach:

- 7.1 the Bill would describe a range of core powers; eg search power, production order – some of which might exist at multiple levels;
- 7.2 a table would identify the category that each entity is in, and therefore the powers it has.

Such an approach could provide simultaneously the flexibility and transparency needed for this major law reform.

- 8. Society members would be pleased to assist in developing the detail of a restructured Bill.
- 9. That whatever the ultimate form of the Bill, privilege must be appropriately safeguarded.

Structure and scope of the Bill

Expansion of powers

- 10. The Bill's attempt at standardisation proposes a major expansion of powers for many regulators.
- 11. It proposes expanding the powers of agencies not considered by the Law Commission Report. The report did not address regulatory search or inspection powers including, notably, powers under the Tax Administration Act 1994, Fair Trading Act 1986 and the Commerce Act 1986² – all of which are proposed to be amended by the Bill. While the Society supports the comprehensive reform of investigative powers, reform should not result in a wholesale expansion of regulatory powers unless this is debated and justified at a policy level.
- 12. The table below outlines some of the more extreme examples – but these are by no means the only incidences of major proposed expansion of powers. At first sight, it is difficult for the Society to comprehend why non-police enforcement agencies require, or are suited for, such a striking expansion of powers. The ad hoc powers contained in specific enactments

² NZLC R97 Chapter 1, and specifically paragraph 1.20.

were presumably appropriate at the time they were instituted, in terms of each agency's function.

Entity	Current powers	Proposed new powers
<p>Overseas Investment Office (under delegation from the Chief Executive of LINZ) (Overseas Investment Act 2005)</p>	<p>Search pursuant to a search warrant of a place or thing, including persons at the place of search (ss56-60)</p>	<p><u>Part 3 powers</u></p> <ul style="list-style-type: none"> ▪ Surveillance under warrant: power to use a surveillance device, or tracking device, including the power to observe private activity in private premises, such as the surveillance of an employee of an entity of interest in his or her home ▪ Residual warrants: power to use a device (other than a surveillance device as defined by the Bill), technique, procedure or activity to intrude into the reasonable expectation of privacy of a person. For example, remotely and covertly accessing an IT network ▪ Production order: order for the production of documents issued by an issuing officer <p><u>Part 4 powers</u></p> <ul style="list-style-type: none"> ▪ Power to ask a person to consent to undergo a search of the person, place or vehicle ▪ Power to search and seize pursuant to a warrant ▪ Power to require a person to provide access to data storage – ie the power to require a company's external IT provider to allow access to that company's system (without notice to the company) ▪ Establishing search scene: where an application for a search warrant is about to be made or has been made and not yet granted or refused, an enforcement officer may enter and secure the place or vehicle which is to be subject of the search warrant and secure any items ▪ Power to detain person during search of place or vehicle for purpose of determining connection between person and object of search ▪ Power to stop vehicles without a warrant for the purposes of a search ▪ Warrantless seizure of items in plain view ▪ Power to require particulars
<p>Environmental Risk Management Authority (Hazardous Substances and New Organisms Act 1996)</p>	<p>Power of entry for inspection (s103)</p> <ul style="list-style-type: none"> ▪ Entry to premises (excluding dwellings) without consent of occupier ▪ Power to take samples, conduct examinations, require the production of documents <p>Search and seizure power pursuant to a warrant (s119)</p> <ul style="list-style-type: none"> ▪ Search of premises or dwellings 	<p><u>Part 3 powers</u></p> <ul style="list-style-type: none"> ▪ Surveillance warrants: power to use surveillance devices - including the use of surveillance devices to observe private activity in private premises, such as the surveillance of an employee in his or her home ▪ Residual warrants: power to use a device (other than a surveillance device as defined by the Bill), technique, procedure or activity to intrude into the reasonable expectation of privacy of a person. For example, remotely and covertly accessing an IT network ▪ Production order: order for the production of documents issued by an issuing officer <p><u>Part 4 powers</u></p> <ul style="list-style-type: none"> ▪ Power to ask a person to consent to undergo a search of the person, place or vehicle ▪ Power to search and seize pursuant to a warrant ▪ Power to require a person to provide access to data storage – ie the power to require a company's external IT provider to allow access to that company's system (without notice to the

		<p>company)</p> <ul style="list-style-type: none"> ▪ Establishing search scene: where application for a search warrant is about to be made or has been made and not yet granted or refused, enforcement officer may enter and secure the place or vehicle which is to be subject of the search warrant and secure any items ▪ Power to detain person during search of place or vehicle for purpose of determining connection between person and object of search ▪ Power to stop vehicles without a warrant for the purposes of a search ▪ Seizure of items in plain view ▪ Power to require particulars
Commerce Commission (Commerce Act 1986)	<p>Power to demand the supply of documents or information (s98)</p> <p>Power to search a place (but not a person) pursuant to a search warrant (ss98A and 98B)</p>	<p><u>Part 3 powers</u></p> <ul style="list-style-type: none"> ▪ Surveillance warrants: power to use surveillance devices - including the use of surveillance devices to observe private activity in private premises, such as the surveillance of an employee in his or her home ▪ Residual warrants: power to use a device (other than a surveillance device as defined by the Bill), technique, procedure or activity to intrude into the reasonable expectation of privacy of a person. For example, remotely and covertly accessing an IT network ▪ Production order: order for the production of documents issued by an issuing officer <p><u>Part 4 powers</u></p> <ul style="list-style-type: none"> ▪ Power to ask a person to consent to undergo a search of the person, place or vehicle ▪ Power to search and seize pursuant to a warrant ▪ Power to require a person to provide access to data storage – ie the power to require a company’s external IT provider to allow access to that company’s system (without notice to the company) ▪ Establishing search scene: where application for a search warrant is about to be made or has been made and not yet granted or refused, enforcement officer may enter and secure the place or vehicle which is to be subject of the search warrant and secure any items ▪ Power to detain person during search of place or vehicle for purpose of determining connection between person and object of search ▪ Power to stop vehicles without a warrant for the purposes of a search ▪ Seizure of items in plain view ▪ Power to require particulars
Ministry of Agriculture and Forestry (Dairy Industry Restructuring Act 2001)	<p>Power of entry to business premises during business hours (s29E)</p> <p>Power to examine all things at any place entered into in accordance with s 29E (s29F)</p> <p>Power to require information (s29G)</p> <p>Power to search a place (but not a person) pursuant to a search warrant (ss29I and 29J)</p>	<p><u>Part 3 powers</u></p> <ul style="list-style-type: none"> ▪ Surveillance warrants: power to use surveillance devices - including the use of surveillance devices to observe private activity in private premises, such as the surveillance of an employee in his or her home ▪ Residual warrants: power to use a device (other than a surveillance device as defined by the Bill), technique, procedure or activity to intrude into the reasonable expectation of privacy of a person. For example, remotely and covertly accessing an IT network ▪ Production order: order for the production of documents issued by an issuing officer

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Remaining anomalies

13. The Bill fails to reflect one of its primary purposes, due to the proposed retention by certain agencies of existing powers of a similar nature to those contained in the Bill. It does not bring all search and surveillance powers of enforcement agencies under a single regime.

14. Accordingly, there would continue to be potential for confusion arising out of the different rights/obligations of enforcement agencies when exercising different statutory powers of the same nature, and the potential for divergent lines of case law.

15. More fundamentally, there appears to have been no justification or debate of these exceptions at a policy level. For example, there is no explanation as to why s98 of the Commerce Act 1986 should empower the Commerce Commission to issue directly a form of production order, when parallel production order powers contained in the Bill mandate the approval of an issuing officer.

16. The table below outlines some key examples – but these are not the only incidences of anomalous proposed retention of powers.

Entity	Proposed remaining powers	Parallel power in Search and Surveillance Bill
Commerce Commission (Commerce Act 1986)	Power to demand the supply of documents or information (s98)	Production order
Department of Conservation (Conservation Act 1987)	Powers of entry, search and seizure (s40)	Power to search and seize pursuant to a warrant
Ministry of Agriculture and Fisheries (Commodities Levies Act 1990)	Document demand and inspection powers (s17)	Production order
Maritime New Zealand (Maritime Security Act 2004)	Power to screen persons boarding a ship etc, including power to search persons under particular circumstances (s51) Power to seize items (s52)	Power to search persons Seizure powers
Ministry of Economic Development (Motor Vehicle Sales Act 2003)	Document demand and inspection powers (s125)	Production order

Lack of clarity, need for transparency and debate

17. The heart of the Bill is its application: the Society is concerned that this aspect, concealed as it is within the amendment and interpretation provisions, has not received sufficient attention.
18. Robust debate is required for a constitutional change of this sort, but the Society is unable to be confident (on the basis of the Parliamentary Digest and the record of the first reading debate) that the Bill's application will receive sufficient attention in the House. The Crown Law Office advice to the Attorney-General might be considered a brief for a reform of this scope, involving as it does the balancing of investigation powers against civil rights across a wide range of possible contexts.
19. The Bill is not easy to understand without a close reading – this is one significant obstacle to informed debate and ultimately to transparency of the law, should it be enacted in its current form.
20. By way of illustration:
 - 20.1 A person seeking to understand the new powers of the Commerce Commission, and turning to Part 5 of the Bill, would see that the Commerce Act 1986 is amended to apply the provisions of Part 4 of the Bill. Part 4 contains provisions relating to an 'enforcement officer', providing for:
 - (a) consent searches,
 - (b) searches pursuant to a warrant,

- (c) detaining persons for the purpose of establishing any connection between the person and the object of the search,
- (d) warrantless searches of vehicles,
- (e) seizure of items in plain view,
- (f) searches of persons,
- (g) power to require particulars, and
- (h) computer searches.

20.2 It is not immediately clear that the ‘enforcement officers’ referred to in Part 4 include the employees of the Commerce Commission. Clarification is not available by reference to the interpretation section, which states that an ‘enforcement officer’ means “(ii) any person authorised under this Act or any relevant enactment to exercise a power of entry, search, or seizure”. While it is obvious that the Commerce Act 1986 is a ‘relevant enactment’³, it is difficult to see that employees of the Commerce Commission are “authorised ... to exercise a power of entry, search, or seizure” either under the Bill or under the Commerce Act 1986.

20.3 Semantics aside, there is a more concerning transparency issue. It would be easy to assume that an Act referring to Part 4 powers gave the relevant agency Part 4 powers only. In fact, every ‘enforcement officer’ also has extensive powers under Part 3 of the Bill, including:

- (a) surveillance powers,
- (b) powers under residual warrants,
- (c) powers to issue production orders, and
- (d) powers to issue monitoring orders.

21. The recommended restructuring of the Bill (paragraph 7) could provide a useful means of addressing these issues, enabling debate, and ultimately creating a more transparent and accessible regime.

³ Defined as “an enactment that is not part of this Act [ie the bill] but in respect of which all of **Part 4** is expressly applied”

Other issues of concern

Legal privilege

22. There is concern that the Bill does not contain adequate protection against seizure/interception of communications that are subject to legal professional privilege.
23. Clause 100 – Restrictions on issue of search warrant - provides that a warrant may be issued to seize privileged material if “*the issuing officer is satisfied that the information provided by the applicant indicates that the thing was made, received, completed or prepared*
- 23.1 *for a dishonest purpose; or*
- 23.2 *for the purpose of planning or committing an offence.”⁴*

Procedure inadequate

24. The Society’s chief concern relates to the process by which privileged information is proposed to be assessed. Under the Bill, the privilege holder would have no opportunity to defend the privilege claim in situations where it is claimed there is an alleged “*dishonest purpose*”. The proper course of action would be for the issuing officer to uphold the legal professional privilege at the time of issuing a search warrant, and for the procedures set out in clauses 138 to 140 of the Bill to apply. Determining privilege after material has been viewed by an enforcement officer gravely diminishes the value of privilege at a practical level, which value has been repeatedly emphasised by the courts, and expressly recognised by Parliament in the Evidence Act 2006.

Threshold for proof of purpose too low

25. A warrant can be issued for privileged material where the information provided by the applicant merely “*indicates*” this to be the position. Given the central importance of legal professional privilege, the mere indication of dishonest purpose is an unacceptably low threshold to make privileged communications fair game.
26. The threshold in clause 100 is considerably lower than the test provided for in a number of current enactments. For example, s20(1)(c) of the Tax Administration Act 1994 provides

⁴ See also the equivalent clauses 49 and 62, which relate to surveillance and residual warrants respectively

that legally privileged items are not privileged if they were “*made or brought into existence for the purpose of committing or furthering the commission of some illegal or wrongful act*”. And instead of merely requiring an ‘indication’ of illegal/wrongful purpose to undo the privilege, there must be a strong prima facie case as to the objectionable nature of the document or information in question. ‘Dishonest purpose’ is a much wider concept.

Honest privilege holders not protected

27. A warrant can be issued for privileged material where the preparer of that material is alleged to have a dishonest purpose. The preparer of materials is not necessarily the same person as holds the privilege (or even that person’s lawyer), meaning that enforcement officers may invade the privilege of persons who have no ‘dishonest purpose’.

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