



### New Search and Surveillance Bill

New Zealand seems to be intending to join the ranks of countries affording dramatically extended search and seizure powers to government enforcement agencies.

The Search and Surveillance Bill empowers agencies to use covert surveillance, install tracking devices and require assistance from others (such as ISPs) to access information, even remotely – sometimes without needing to obtain a search warrant or Court order.

Two main motivators behind the Bill were said to be the need to consolidate existing search and seizure powers and a desire to bring search powers “into the 21<sup>st</sup> century”.

However, as introduced, the Bill dramatically extends existing search powers and affords far greater search and surveillance powers to a large number of enforcement agencies and regulators than previously.

Although generally it is true that the public have confidence in Police to properly obtain and execute search warrants (although this is not without exception), widespread search and seizure powers will potentially now be afforded to a myriad of agencies that you and I probably know little about.

Some of the powers extended to the long list of agencies (including bodies such as the Meat Industry Board and Overseas Investments Office) are of a nature currently only afforded to the Serious Fraud Office or Police. These powers include the ability to use “reasonable force” to enter premises (including private premises) and to detain persons at search sites. These powers are gravely out of proportion to the seriousness of offences that some of these agencies regulate.

Under the Bill, an ‘enforcing officer’ (basically, a person charged with enforcement duties under an Act) can apply for a search warrant enabling entry and search or inspection of any land, premises, place, vehicle or other thing. The application is made to an issuing officer, which includes a Judge, but more often than not will likely be a justice of the peace or Court registrar. The issuing officer can determine the application without even needing to speak with the applicant.

A search warrant authorises an enforcing officer (and others they require to “assist” them) to enter any premises, including using “reasonable force” to do so, take photographs, seize items, copy documents and detain persons believed to be connected to the object of the search.

An enforcing officer can also require outside persons, such as ISPs to facilitate their access to computer systems and networks and data storage devices. This can be done remotely and potentially without notice. ISPs are *required* to assist, and failing to do so is an offence, punishable by imprisonment.

Also, if an enforcement officer obtains a search warrant, they can apply for more covert surveillance powers by obtaining a “residual warrant” or a production order.

The potential purview of residual warrants is very broad, being any “device, technique, procedure or activity that may constitute an intrusion into the reasonable expectation of privacy of any person”. The Human Rights Commission and Privacy Commissioner have warned about the potentially “chilling” implications of extending such powers to a broad range of government organisations.

Production orders compel the production of documents, such powers only currently applying to agencies such as the Police, Serious Fraud Office, Inland Revenue Department and the Commerce Commission. Failure to comply is an offence, potentially punishable by imprisonment.

Currently, only the Serious Fraud Office has the power to compel a person to answer questions. Critical commentators have warned that this has potential to further erode a principle long enshrined in law in this country; the right to remain silent.

The Law Society, in a submission to the Select Committee, expressed concerns about the current form of the Bill and the dramatic expansion of search powers to certain agencies, when these aspects had not been publicly debated or considered in detail from a policy perspective. Certainly, this wholesale expansion of powers was not included in the Law Commission report that gave rise to the Bill. The Society also expressed concern at the potential erosion of protections such as legal professional privilege, as under the Bill a claim to privilege does not prevent the information from being taken away and reviewed by the enforcement officer. Similarly, if there is any doubt as to the legality of obtaining a particular item under a search warrant, that item can still be removed from the premises and taken for testing.

Further, if an enforcement officer is lawfully entitled to be on any premises (including private premises), they may record what they hear or see without the need to first obtain a search warrant. While sounding relatively innocuous, this means that there is nothing to stop an enforcement officer attending a meeting with you at your premises, and recording what is said – without you knowing.

A significant concern in extending these powers to “irregular” agencies, is that they are not required to train the people who exercise them. One might expect a police officer exercising a warrant to have an understanding of evidence preservation, privilege, self incrimination and privacy rights but without extensive training there must be doubt whether such fundamental rights will be adequately recognised by other agencies.

Our Court of Appeal has confirmed that the right to privacy in ones own dwelling is a fundamental right and that privacy invading searches can be unreasonable and therefore illegal. The concern now is that rather than simply updating existing laws, an opportunity is being taken here to erode privacy and other fundamental values in many more situations.

These issues only achieved general exposure with the publication of submissions on the Bill once the deadline had closed. Given the potentially significant public impact, not only should the reporting back period be extended as it has been, but the Select Committee should also re-open public submissions. Significant changes to fundamental rights such as these are too important not to have a fully informed public debate.

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