



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Preliminary Paper 50

ENTRY, SEARCH AND SEIZURE

A discussion paper

*The Law Commission welcomes your comments
on this paper and seeks your response
to the questions raised.*

These should be forwarded to the Law Commission
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Introduction

THIS DISCUSSION PAPER has been triggered by a request by its Minister to the Law Commission pursuant to section 7(2) of the Law Commission Act 1985 to prepare a report responding to the following Terms of Reference:

The Commission shall review the scope and adequacy of current powers to search persons and places and associated powers to seize in order to determine an appropriate balance between law enforcement agencies and the protection of individual rights. The review will include:

- the circumstances in which such searches pursuant to a warrant may be undertaken;
- the circumstances in which such searches without a warrant may be undertaken;
- the adequacy of current powers in the light of modern technologies;
- the threshold for the granting of search warrants (and specifically the circumstances, if any, in which they should be extended to non-imprisonable offences);
- the extent, if at all, to which people should be compelled to assist in the execution of a search warrant;
- the power to seize material revealed in such searches;
- consistency of current search warrant powers, and any recommended new or revised powers, with the Bill of Rights Act 1990; and
- whether present rules adequately protect civil liberties.

The review shall cover the powers of all law enforcement agencies.

After it had received that request, but at a stage when the job was a long way short of completion, the Commission was requested, pursuant to section 6(2)(d) of the Commission's statute, by the Ministry of Justice which was faced with certain deadlines in its legislative timetable to provide advice within a limited time on some aspects of these Terms of Reference. That advice was duly given and a copy has been published by the Commission in its Study Paper series under the title *Electronic Technology and Police Investigations – Some Issues* (NZLC SP12). Because that study paper deals with them nothing is directly said in the present publication about the topics discussed in two of the bullet points in the Terms of Reference set out above, namely:

- the adequacy of current powers in the light of modern technologies (though we do discuss in paragraph 30 section 487.01 of the Canadian Criminal Code that gives general power to superior courts to authorise what would otherwise amount to unlawful search and seizure; this provision if imitated in New Zealand would provide a machinery enabling police to make use of new technologies as they became available without the need for specific legislation); and

- the extent, if at all, to which people should be compelled to assist in the execution of a search warrant.

Submissions on the present paper are invited by 30 June 2002.

The Commissioner having, at this preliminary stage, the carriage of this project is DF Dugdale and the researcher is Michael Josling.

Part I

The scope of the inquiry

1 THE GENERAL RULE OF LAW is that the person who, without permission, enters another's land or any building thereon, or touches or takes away goods in the possession of that other, or exerts force (even the slightest) against that other's body is a trespasser who may be ordered not to perform such acts in the future, and to furnish compensation by paying damages for such acts as have been committed in the past. But, in a society of any sophistication, such general rules must in a myriad of particular cases be modified. The passer-by who sees through a kitchen window that the stove is alight must not be penalised for smashing his way in to fight the fire, the health inspector must be able to enter the restaurant kitchen to check for cockroaches, there are occasions when it is appropriate to search the body cavities of a drug courier, and sometimes goods may be held by law enforcement officers for production in evidence at a trial.

2 There is a useful statement of the justification for licences to do acts that would otherwise be trespasses by Justice Estey speaking for a majority of the Supreme Court of Canada.

The inviolable nature of the private dwelling is a basic part of our free society. This concept has long been a bulwark against tyranny of the State be it organized as an absolute monarchy or as a democratic State under a constitutional monarch. Indeed, for 300 years the concept that a person's home is his castle has been the defence of the citizen in an endless variety of challenges brought against him in the name of the State. ... The concept recognizes an internal security but also an external dependence. The home is not a castle in isolation; it is a castle in the community and draws its support and security of existence from the community. The law has long recognized many compromises and outright intrusions on the literal sense of this concept: for example, the right of the community to search on proper authorization; the right of pursuit; the right of eminent domain; the right of the community in applying zoning restrictions and safety standards; the compulsory participation in community-established health facilities, including sewer and water systems, and many more. Most of these intrusions carry inspection rights of varying modes and degrees. ... The community interest in crime detection and suppression also inevitably entails intrusion on the castle concept.¹

Although the Judge is talking here about the home, the philosophy underlying the sentiments that he expresses extends beyond the home to all trespasses.

3 Some of the rules permitting entry, search and seizure are expressly laid down in Acts of Parliament. Others have been made by judges in deciding specific cases. Some decisions by judges are reasoned on the basis of an "implied licence". In defining the general rule in the paragraph 1, we made it clear that the act complained of must have been committed "without permission". There

¹ *Lyons et al v The Queen* (1984) 14 DLR (4th) 482, 501.

are circumstances in which, even in the absence of *express* permission, such permission may be *implied*. This approach, of allowing a defence to a claim of trespass by implying permission, fits well enough the case of the fire-fighter breaking in to quell a blaze, or the stranger who administers first aid to someone found unconscious on the highway, or the more common situation of the uninvited caller making his way along the garden path from the street to the front door of a house set back from the road in order to knock and seek entry. But this approach does not readily fit the law enforcement situation. It is artificial to imply a licence where the person claimed to have granted the licence is a suspected wrongdoer and the trespasser is a law enforcement officer investigating such wrongdoing. Moreover, a licence, express or implied, can be revoked by the licensor at will. The licensee must then depart within a reasonable time. So, for the law to be workable trespass, for law enforcement purposes, is likely in practice to need for its justification a basis other than the affected party's consent, express or implied.²

- 4 There are numerous statutes or regulations conferring on government agents powers of entry, search and seizure. Outside our Terms of Reference are statutory provisions that confer powers of entry for purposes other than search or seizure (to cope with emergencies, for example). The way in which in this paper we tackle the substantial body of material that remains, though workable as a matter of practice, is probably less than elegant conceptually. In Part II we deal with the statutes and regulations other than those of which the primary purpose is to confer powers on the police. In Part III we deal with police powers both statutory and implied by law. Most of the specific issues highlighted in the bullet points of the Terms of Reference are addressed in this part. In Part IV we deal with problems under the New Zealand Bill of Rights Act 1990 that, although in practice they most commonly arise in the context of police powers, can arise in respect of any of the powers with which this paper is concerned. Part V is a summary of issues designed to assist (but not in any way to restrict) those minded to make submissions on this discussion paper.

² These matters are discussed in *Seager v Copydex Ltd* [1967] 2 All ER 415 (CA), *Howden v Ministry of Transport* [1987] 2 NZLR 747 (CA) and *R v Bradley* (1997) 15 CRNZ 363 (CA).

Part II

Administrative powers to enter, search and seize

TERMINOLOGY

5 **I**N THE TITLE TO THIS PART we use the far from precise term “administrative powers” to distinguish the licences to enter, search and seize conferred on various other government agencies from comparable entitlements available to the police, whose powers we deal with in Part III. There is some overlap between these two categories, but because the distinction we propose has no more profound purpose than to make a large task manageable, this does not seem to us to matter. The licences discussed in this part all owe their existence to legislation or delegated legislation, and are listed in appendix A.

6 In an effort to impose some sort of order and system on what is a motley collection of measures, we have divided appendix A into four groups.

- Group 1 Powers of routine administrative inspection.
- Group 2 Powers where an offence is suspected.
- Group 3 Powers that should be abolished.
- Group 4 Powers that should be preserved but which the rules we propose for Groups 1 and 2 do not fit.

7 Most of the powers listed in appendix A are to be found in groups one and two. In North America, where there is a judicial power to strike down legislation, a distinction has been drawn between powers exercised where an individual is suspected of criminality (Group 2 powers in our categorisation) on the one hand and routine administrative inspections on the other.³ Situations in the other category (Group 1 powers in our categorisation) have been described by Justice La Forest in the Supreme Court of Canada in these terms:

In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual’s pursuit of his or her self-interest is compatible with the community’s interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateur’s compliance with public health regulations, the employer’s compliance with employment standards and safety legislation, and the developer’s or homeowner’s compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises. Similarly,

³ For example, *New York v Burger* (1987) 482 US 691.

compliance with minimum wage, employment equity and human rights legislation can often only be assessed by inspection of the employer's files and records.⁴

The underlying purpose of inspection is to ensure that a regulatory statute is being complied with. It is often accompanied by an information aspect designed to promote the interests of those on whose behalf the statute was enacted. The exercise of powers of inspection does not carry with it the stigmas normally associated with criminal investigations and their consequences are less draconian. While regulatory statutes incidentally provide for offences, they are enacted primarily to encourage compliance. It may be that in the course of inspections those responsible for enforcing a statute will uncover facts that point to a violation, but this possibility does not alter the underlying purpose behind the exercise of the powers of inspection. The same is true when the enforcement is prompted by a complaint.⁵

We think this description is adequate as a working rule to distinguish between groups one and two.

POSSIBLE RULES FOR GROUPS 1 AND 2

- 8 We believe that precisely defined limitations should be placed on the manner of the exercise of the powers listed in groups one and two. Our tentative (but reasonably strongly held) view is that there should be a codification of the rules governing the exercise of these powers. Our reasons for this view are:
- It is plain on even the most cursory examination of the measures listed that there is a complete lack of uniformity both in the prescribed limitations in the manner of exercise and, even where there is uniformity in purport, in the language that the draftsman has employed. It seems to us that there are obvious advantages in the quest for certainty and in saving time and legal expenses to be gained by prescribing a uniform formula. Any problems in the interpretation of the formula when solved would settle the question in all cases where the formula applied.
 - The existence of the code would mean that those required to approve the details of legislation (including parliamentarians and, in particular, select committee members) would be more readily alerted to departures from the norm.
- 9 A rigid one-size-fits-all code, unable ever to be departed from, would of course be foolishly procrustean. When the formula is not completely appropriate, the legislation can be expressed in the terms that the formula will apply subject to certain stated modifications. This form of expression will, without imposing excessive rigidity, preserve the objects of drawing attention to departures from the norm and of securing the benefits of uniformity to the extent that this is possible.
- 10 The question of the principles that should regulate the grant of statutory powers of entry was considered in 1983 by the Public and Administrative Law Reform Committee in its report *Statutory Powers of Entry*. There is a 1988 report *Search and Search Warrants* by an *ad hoc* committee chaired by Justice Robertson. In what follows, we have lent heavily on these two reports.⁶

⁴ *Thomson Newspaper Ltd v Canada* (1990) 67 DLR (4th) 161, 220.

⁵ *Comité Paritaire de l'Industrie de la Chemise v Potash* (1994) 115 DLR (4th) 702, 713.

⁶ Differences largely reflect the fact that our Terms of Reference are different, so that, for example, we do not deal with questions of admissibility of evidence (dealt with by the proposed Evidence Code) or with works ordered as a result of the entry.

- 11 The rules governing entry onto land by way of routine administrative inspection that we propose (Group 1 of appendix A) are as follows:
- (a) The entry should be during the hours of daylight.
 - (b) Force to effect an entry should be used only after either a warning to the occupant, if he is present, of an intention to use force if he continues to obstruct entry or with the authority of a warrant from a judicial officer.
 - (c) The officer effecting the entry must produce a means of identification and notify the source of the power relied on.
 - (d) If the occupant is not present during some part of the period between when the officer enters and departs, the officer must make every effort to give actual notice to the occupant (including, in every case, leaving a conspicuous written notice at the scene) of the fact of the entry having occurred.
- 12 The rules we propose for the situation where an individual is suspected of criminality (Group 2 of appendix A) differ from those applying to Group 1 in appendix A in the following respects:
- (a) In every case, entry into a dwelling must be authorised by warrant.
 - (b) Rule (a) of the Group 1 rules restricting entry to the hours of daylight may be departed from where authorised by warrant.
 - (c) The obligation in Rule (d) of the Group 1 rules to give notice following entry into unoccupied premises may be departed from where this is authorised by a judicial officer who is satisfied that a notification of the entry would prejudice subsequent enforcement activity.
- 13 As an example of what we propose, we suggest consideration of the Films, Videos, and Publications Classification Act 1993 section 111 which is in the following terms:
- 111 Powers conferred by warrant**
- (1) A search warrant may be executed by any Inspector or any member of the Police.
 - (2) Subject to any special conditions specified in the warrant pursuant to section 110(3) of this Act, every search warrant shall authorise the person executing the warrant—
 - (a) To enter and search the place or thing specified in the warrant at any time by day or night during the currency of the warrant; and
 - (b) To use such assistants as may be reasonable in the circumstances for the purpose of the entry and search; and
 - (c) To use such force as is reasonable in the circumstances for the purpose of effecting entry, and for breaking open anything in or on the place searched; and
 - (d) To search for and seize any thing referred to in any of paragraphs (a) to (c) of section 109(1) of this Act.
 - (3) Every person called upon to assist any person executing a search warrant shall have the powers described in paragraphs (c) and (d) of subsection (2) of this section.
 - (4) The power to enter and search any place or thing pursuant to a search warrant may be exercised on one occasion only.

This would clearly be a Group 2 power. In relation to entry, these powers exceed the proposed Group 2 rules in the following respects:

- the power in section 111(2)(a) to enter “at any time by day or night” without the need for occasion-specific authorisation; and
- the unqualified power to use force set out in section 111(2)(c).

(The obligation to give notice where the occupant is absent is in this case set out in section 113, which we have not set out.) Our present view in relation to this particular measure is to recommend that the Group 2 rules should prevail, with inconsistent provisions of the existing statute being read subject to them.

- 14 It is not of course constitutionally possible for the legislature to bind its successors in the way they are to express themselves.⁷ Our recommendation, if adopted, can apply to existing legislation, and we contemplate in our final report recommending an amendment to the provisions of the *Cabinet Manual* relating to bidding for proposed Bills to try to ensure that the formulaic approach we recommend continues to be employed.

GROUPS 3 AND 4

- 15 Group 3 comprises provisions the existence of which does not seem to us to be justified and that we think should be repealed. In some cases, the relevant agency has stoutly supported the need for the power, even though the power may never have been used, and we have given an indication in those cases of the grounds claimed by the agency as justifying the existence of the power.
- 16 Preservation is recommended in relation to Group 4. Each of the provisions or sets of provisions in this group seems to us to be *sui generis*, in a class of its own and entirely reasonable.

CONCLUSION

- 17 In the interests of keeping the project within bounds we have listed all the statutes and regulations that seem to us relevant but have discussed their content only where (as in appendix A Group 3) we have recommended repeal or revocation or (as in appendix A Group 4) to explain why a measure should be left untouched. In appendix A Group 1 we have indicated the few cases where (as discussed in paragraph 9) it seems to us that our proposed code should be modified in a stated respect. Because of the width of this project the Commission finds itself in areas where it is impractical for its knowledge to be any more than superficial so that its proposals are more than usually tentative. To make our proposals quite clear, we recommend legislation:
- making the measures listed in Group 1 subject to the rules set out in paragraph 11 (except as indicated in appendix A);
 - making the measures listed in Group 2 (appendix A) subject to the rules set out in paragraph 12;
 - repealing or revoking the measures listed in Group 3 (see appendix A).

⁷ *South-Eastern Drainage Board v Savings Bank of South Australia* (1939) 62 CLR 603.

Part III

Police powers to enter, search and seize

ENTRY ONTO LAND

- 18 **A** CONSTABLE MAY ENTER another's property:
- with the consent of the occupier (we have discussed in paragraph 3 the extent to which it is appropriate for such consent to be implied);
 - if the entry is authorised by statute (the authority may be direct, or empower the issue of a warrant); and
 - if the entry is justified by the doctrine of necessity.

- 19 Many of the statutes already noted in Part II either authorise entry or empower the issue of warrants. In this and the two following paragraphs we discuss the Crimes Act 1961 section 317, which is in the following terms:

317 Power to enter premises to arrest offender or prevent offence

- (1) Where any constable is authorised by this Act or by any other enactment to arrest any person without warrant, that constable, and all persons whom he calls to his assistance, may enter on any premises, by force if necessary, to arrest that person if the constable—
- (a) Has found that person committing any offence punishable by imprisonment and is freshly pursuing that person; or
 - (b) Has good cause to suspect that that person has committed any such offence on those premises.
- (2) Any constable, and all persons whom he calls to his assistance, may enter on any premises, by force if necessary, to prevent the commission of any offence that would be likely to cause immediate and serious injury to any person or property, if he believes, on reasonable and probable grounds, that any such offence is about to be committed.
- (3) If, in any case to which this section applies, the constable is not in uniform and any person in actual occupation of the premises requires him to produce evidence of his authority, he shall before entering on the premises produce his badge or other evidence that he is a constable.
- (4) Nothing in this section shall affect in any way the power of any constable to enter any premises pursuant to a warrant.
- 20 It may be that section 317 was intended as a comprehensive code putting an end to any need to discuss when a licence to a constable to enter could be implied and when entry by a constable was authorised by the doctrine of necessity. The Minister (JR Hanan) said in his second reading speech:

An instance where the law is uncertain is the power of the police, in cases where they are entitled to arrest a person without a warrant, to enter premises to effect

that arrest. Clause 317 provides a short and, I believe, a satisfactory code on this matter that will be helpful to the police and to lawyers.

It may be on the other hand that all that was intended was a comprehensive code in relation to the situation described in subsection (1).⁸

- 21 Would it add useful certainty if section 317 were converted into a comprehensive code? The difficulty with subsection (2) as a comprehensive statement of the doctrine of necessity is that it is confined to the commission of an offence and does not extend to preventing injury in other circumstances. This could be simply fixed by substituting a new subsection (2) in these terms:

(2) Any constable, and all persons whom he calls to his assistance, may enter on any premises, by force if necessary, to prevent immediate and serious injury to any person or property, if he believes on reasonable and probable grounds, that such injury is likely to occur.

We invite comment on:

- such a change to subsection (2);
- the addition of a subsection to the effect that a constable has a licence to enter land to communicate to the occupant;
- the addition of a subsection to the effect that, subject to the express provision of any other statute, section 317 is a comprehensive code precluding any other justification of entry based on necessity or implied licence.

An arrest warrant carries with it the power to enter (Summary Proceedings Act 1957 section 22(2)). Section 317(1) of the Crimes Act 1961 is concerned with warrantless arrest. Should there be a power to enter to effect a warrantless arrest in circumstances other than those described in section 317(1)(b), which is confined to fresh pursuit and offences on the premises? Should there be a right to enter to arrest without warrant where the offence has not been committed on the premises but there is a reasonable fear that if not immediately arrested the person will disappear? Such a change in the law could be effected by adding to section 317(1) a new paragraph:

(c) Has good cause to suspect that the person has committed an offence punishable by imprisonment and may flee if not immediately arrested.

ENTRY PURSUANT TO A SEARCH WARRANT

- 22 The power to issue a search warrant contained in the Summary Proceedings Act 1957 section 198 exists only in respect of an offence punishable by imprisonment. It is clear that search warrants (which have the effect of authorising trespasses) should not be available in respect of trivial offences.⁹ It is equally clear that a bright-line rule is needed because the power to issue search warrants is vested not only in District Court judges but also in lay justices

⁸ The extent to which the section excludes the common law right based on necessity is described in *Shattock v Devlin* [1990] 2 NZLR 88, *Dehn v Attorney-General* [1988] 2 NZLR 564 and *Edwards v Police* [1994] 2 NZLR 164. It seems quite clear that s 317 does not preclude lawful entry pursuant to an implied licence. The possibility that it does is not even raised in such recent cases as *R v Bradley* (1997) 15 CRNZ 363 (CA) and *Attorney-General v Hewitt* [2000] 2 NZLR 110.

⁹ It may, however, be noted that s 487 of the Canadian Criminal Code authorises issue of a search warrant where an offence against the Code or any other Act of Parliament is suspected.

and registrars. It is arguable, however, that the “punishable by imprisonment” test is inappropriate. Particularly in the light of the modern view that imprisonment should not be lightly imposed and should be confined to more serious offences with an emphasis on those involving violence, the availability of imprisonment as a penalty is likely to reduce rather than increase. In any event, the answer to the question in relation to any given offence of whether imprisonment should be available as a penalty, is based on factors that are not necessarily appropriate to determine whether a search warrant should be available.¹⁰ So, we invite consideration of whether the jurisdictional basis for search warrants should be changed. It may be, for example, that an appropriate solution would be for section 198 to provide that a search warrant is available if the offence is punishable by imprisonment or by a fine of \$5,000 or more. We seek the help of views on this topic.

SEIZURE OF PROPERTY

23 In the absence of consent a constable may seize property as evidence:

- as an incident of the arrest of a suspect;
- pursuant to the valid execution of a search warrant issued pursuant to the Summary Proceedings Act 1957 section 198 and containing a power to seize property; or
- pursuant to some other statutory authority; or
- if the property has been abandoned.¹¹

Issues can arise as to whether items seized fall within the description contained in the warrant.¹²

A COMMON LAW POWER TO SEIZE?

24 Has a constable an additional power to seize goods obviously evidencing an offence and chanced upon in the course of a lawful search, but (where the search is in terms of a warrant) not referable to an offence for which the warrant was issued or (where a lawful search without a warrant is possible) not constituting evidence of an offence of the class in relation to which the power to search without a warrant exists? For at least a century the orthodox answer to this question in New Zealand has been that there is no such power.¹³ But the Court of Appeal in *McFarlane v Sharp & Another* said this:

It seems to us that the matter might well be examined. It is of course necessary to protect the citizen against the possibility that police officers, putting forward some plausible pretext for obtaining a search warrant, may use the opportunity thereby given to enter private premises and “have a look” in the hope that some evidence

¹⁰ In relation to new offences it is sometimes difficult to avoid the unkind suspicion that imprisonment has been included as a penalty not because it is believed that such a penalty would ever be imposed but to ensure that there will be jurisdiction to issue a search warrant.

¹¹ The concept of abandonment is discussed in *R v Reuben* [1995] 3 NZLR 165.

¹² *R v Saunders* [1994] 3 NZLR 450, 471–473 contains a valuable discussion by Fisher J of these issues.

¹³ *Barnett & Grant v Campbell* (1902) 21 NZLR 484, 491 (CA); *McFarlane v Sharp & Another* [1972] NZLR 839 (CA); *R v Burns (Darryl)* [2002] 1 NZLR 204.

may there be found of some crime of which as yet there is no suspicion against the occupants. But against this danger which is a real one, and which is clearly to be remembered by the Legislature throughout, there must be set the possibility of the kind of case in which, searching premises (for instance) on a charge of bookmaking bona fide put forward, the police discover cogent evidence of participation by the occupiers of the premises in some more serious crime, such as (for instance) armed robbery. Are they because the occupier or occupiers of the premises happen not to be personally present at the moment, and therefore cannot be arrested, to be prohibited from taking this material into their custody? The matter seems to be one which is worth some careful examination. The principles which have commended themselves in greater or less degree to English and Australian Courts may be found adverted to, at least in part, in England in *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299; [1968] 1 All ER 229 and *Ghani & Ors v Jones* [1970] 1 QB 693; [1969] 3 All ER 1700, and in Australia in *R v Tillett & Ors, ex parte Newton* (1969) 14 FLR 101. In Canada there are the cases of *Norland Denture Clinic Ltd v Carter* (1968) 5 CRNS 93 and *Re McAvoy* (1970) 12 CRNS 56, to which we were referred by Mr Gazley. Last but not necessarily least we mention the thoughtful article of Mr L H Leigh in (1970) 33 MLR 268, in the last two paragraphs of which some of the legislative problems are indicated.¹⁴

In *R v Power*¹⁵ the police obtained a warrant to search the appellant's storage unit for cannabis and associated drug paraphernalia. In the course of their search they also found and seized methamphetamines, stolen property, and an assortment of firearms and ammunition, which additional items provided evidence for further charges. The Court of Appeal said this:

Mr France accepted that this case did not require re-examination of the New Zealand position exemplified by *McFarlane v Sharp*. We agree, but record our view that a fresh look at this question is warranted. The facts of this case provide a graphic example of a situation where seizure of items, not covered by the terms of a valid warrant, but patently stolen goods, should be permitted at law.¹⁶

25 So, we invite comment on the issue whether it should be lawful for a constable who is lawfully in any place to seize any article that the constable believes is either:

- the fruit of a crime (as in the case of stolen goods); or
- the instrument by which a crime was committed (for example, a murderer's blunt instrument); or
- material evidence that any person has been party to a commission of a crime (such as a blood or semen stained article of clothing).

In considering this issue it will be necessary to take into account the existence of powers of seizure upon arrest. We are, at this point, discussing only situations where there is no arrest.

26 A suitable model might well be the United Kingdom Police and Criminal Act 1984 section 19 which provides as follows:

¹⁴ *McFarlane v Sharp & Another*, above n 13, 844. A first instance judge adopted the common law approach in *R v Taylor* (1983) 9 CRNZ 563. Lord Denning's observations in *Ghani v Jones* have recently been cited with approval by the Privy Council in *Jaroo v Attorney-General of Trinidad & Tobago* (unreported, Privy Council Appeal No 54 of 2000, Judgment 4 February 2002).

¹⁵ *R v Power* (1999) 17 CRNZ 662.

¹⁶ *R v Power*, above n 15, 665.

19 General power of seizure etc.

- (1) The powers conferred by subsections (2), (3) and (4) below are exercisable by a constable who is lawfully on any premises.
- (2) The constable may seize anything which is on the premises if he has reasonable grounds for believing—
 - (a) that it has been obtained in consequence of the commission of an offence; and
 - (b) that it is necessary to seize it in order to prevent it being concealed, lost, damaged, altered or destroyed.
- (3) The constable may seize anything which is on the premises if he has reasonable grounds for believing—
 - (a) that it is evidence in relation to an offence which he is investigating or any other offence; and
 - (b) that it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed.
- (4) The constable may require any information which is contained in a computer and is accessible from the premises to be produced in a form in which it can be taken away and in which it is visible and legible if he has reasonable grounds for believing—
 - (a) that—
 - (i) it is evidence in relation to an offence which he is investigating or any other offence; or
 - (ii) it has been obtained in consequence of the commission of an offence; and
 - (b) that it is necessary to do so in order to prevent it being concealed, lost, tampered with or destroyed.
- (5) The powers conferred by this section are in addition to any power otherwise conferred.
- (6) No power of seizure conferred on a constable under any enactment (including an enactment contained in an Act passed after this Act) is to be taken to authorize grounds for believing to be subject to legal privilege.

Another example is the Canadian Criminal Code section 489 which is in the following terms:

- 489.** (1) Every person who executes a warrant may seize, in addition to the things mentioned in the warrant, any thing that the person believes on reasonable grounds—
 - (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
 - (b) has been used in the commission of an offence against this or any other Act of Parliament; or
 - (c) will afford evidence in respect of an offence against this or any other Act of Parliament.
- (2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds—
 - (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
 - (b) has been used in the commission of an offence against this or any other Act of Parliament; or
 - (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

POWER TO SEARCH PERSONS AND SEIZE ARTICLES UPON ARREST

27 The Police Act 1958 section 57A so far as relevant provides as follows:

57A General search of person in custody

- (1) Subject to subsection (4) of this section, where any person (in this section referred to as the detainee) is taken into lawful custody and is to be locked up in Police custody, a member of the Police or any searcher employed for the purpose under section 57B, may conduct a search of that person and take from him all money and all or any property found on him or in his possession, and may use or cause to be used such reasonable force as may be necessary to conduct that search or take any money or property. ...
- (4) No search shall be conducted under this section unless the detainee is at a police station, or in any other premises, or in any vehicle, being used for the time being for Police purposes.
- (5) Nothing in this section shall limit or affect the right at common law of a constable to search any person upon that person's arrest.

28 It will be seen that subsection (5) carefully preserves common law rights of search. It seems clear that some such rights do indeed exist.¹⁷ But how precisely that common law power should be defined is far from clear. Does it exist outside the period between arrest and the decision to lockup the arrested person? How full a search is appropriate? On this the United States law seems quite clear.

We do not think the long line of authorities of this Court dating back to *Weeks*, or what we can glean from the history of practice in this country and in England, requires such a case-by-case adjudication. A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.¹⁸

Does the common law power of search extend to a search of the premises at which the arrest is made?¹⁹

29 It is clearly unsatisfactory that the law in this area should be uncertain. A bright-line rule is called for. A suitable model may be the United Kingdom Police and Criminal Evidence Act 1985 section 32 which provides as follows:

¹⁷ See for example *Laws New Zealand*, Criminal Procedure, para 66 and *Everitt v Attorney-General* [2002] 1 NZLR 82, 104 (Blanchard J) and 101 (Thomas J).

¹⁸ *United States v Robinson* (1973) 414 US 218, 235. There is a discussion of English and Victorian authority in Dan Meagher "Black and White is Always Grey – The Power of the Police to Conduct a Strip Search in Victoria" 26 (2002) *CrimLJ* 43.

¹⁹ This question was recently considered in the District Court in *R v Surton* [1998] DCR 768 and *R v Hughes* [1998] DCR 1069.

32 Search upon arrest

- (1) A constable may search an arrested person, in any case where the person to be searched has been arrested at a place other than a police station, if the constable has reasonable grounds for believing that the arrested person may present a danger to himself or others.
- (2) Subject to subsections (3) to (5) below, a constable shall also have power in any such case—
 - (a) to search the arrested person for anything—
 - (i) which he might use to assist him to escape from lawful custody; or
 - (ii) which might be evidence relating to an offence; and
 - (b) to enter and search any premises in which he was when arrested or immediately before he was arrested for evidence relating to the offence for which he has been arrested.
- (3) The power to search conferred by subsection (2) above is only a power to search to the extent that is reasonably required for the purpose of discovering any such thing or any such evidence.
- (4) The powers conferred by this section to search a person are not to be construed as authorising a constable to require a person to remove any of his clothing in public other than an outer coat, jacket or gloves [but they do authorise a search of a person's mouth].
- (5) A constable may not search a person in the exercise of the power conferred by subsection (2)(a) above unless he has reasonable grounds for believing that the person to be searched may have concealed on him anything for which a search is permitted under that paragraph.
- (6) A constable may not search premises in the exercise of the power conferred by subsection (2)(b) above unless he has reasonable grounds for believing that there is evidence for which a search is permitted under that paragraph on the premises.
- (7) In so far as the power of search conferred by subsection (2)(b) above relates to premises consisting of two or more separate dwellings, it is limited to a power to search—
 - (a) any dwelling in which the arrest took place or in which the person arrested was immediately before his arrest; and
 - (b) any parts of the premises which the occupier of any such dwelling uses in common with the occupiers of any other dwellings comprised in the premises.
- (8) A constable searching a person in the exercise of the power conferred by subsection (1) above may seize and retain anything he finds, if he has reasonable grounds for believing that the person searched might use it to cause physical injury to himself or to any other person.
- (9) A constable searching a person in the exercise of the power conferred by subsection (2)(a) above may seize and retain anything he finds, other than an item subject to legal privilege, if he has reasonable grounds for believing—
 - (a) that he might use it to assist him to escape from lawful custody; or
 - (b) that it is evidence of an offence or has been obtained in consequence of the commission of an offence.
- (10) Nothing in this section shall be taken to affect the power conferred by [section 43 of the Terrorism Act 2000.]

It has been held in England that this provision does not displace the common law power.²⁰ Any New Zealand statutory provision should (by contrast) be comprehensive and expressly *exclude* any common law powers.

²⁰ *Cowan v Commissioner of Police* [2000] 1 All ER 504.

A GENERAL WARRANT?

- 30 We draw attention to section 487.01 of the Canadian Criminal Code that authorises certain judges in courts of superior jurisdiction to:

... issue a warrant in writing authorizing a police officer to, subject to this section, use any device or investigative technique or procedure to do anything described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property ...

To understand this it is necessary to be aware that Canadian Charter jurisprudence does not distinguish between the unreasonable and the unlawful, so that section 487.01 gives the courts *carte blanche* to approve methods of entry, search or seizure that without such approval would be unlawful. There is a requirement for the judge to be satisfied that it is in the best interests of the administration of justice to issue the warrant and that there is no other provision in the Code or any other Act of Parliament that would “provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done”. The provision makes it clear that the procedure may not be used “to permit interference with the bodily integrity of any person” (subsection (2)). We invite consideration of whether a comparable provision (substituting “unlawful or unreasonable” for “unreasonable”) would be appropriate in New Zealand. As mentioned in the Introduction, one advantage of such a provision would be to enable law enforcement officers to take advantage of technological improvements as they become available without the need (if they were or might not be permitted under existing law) to await specific legislation.

- 31 There are New Zealand cases in which it has been argued of an investigation technique that it constitutes a “search” within the meaning of the New Zealand Bill of Rights Act 1990 section 21 and that, though not unlawful, it is unreasonable.²¹ Arguments for exclusion of evidence on those grounds were rejected by the Court of Appeal in *R v Fraser*²² and *R v Gardiner*²³ both video surveillance cases in which it was held that the investigation was lawful and reasonable. If the reasonableness requirement of section 21 is to remain, another use of such a provision, as we discuss in the previous paragraph, would be to enable the police to get Court approval in advance of the investigation activity (which extended over three months in *Fraser*, and six-and-a-half months in *Gardiner*) rather than having law enforcement resources wasted in obtaining evidence that is eventually found to be unusable.

SEARCH AND SEIZURE UNDER THE MISUSE OF DRUGS ACT 1975

- 32 The Misuse of Drugs Act 1975 section 18 provides as follows:

18 Search and seizure

- (1) Where a search warrant is issued under section 198 of the Summary Proceedings Act 1957 in respect of an offence which has been or is suspected to have been committed against this Act or which is believed to be intended to be so committed,

²¹ With the consequences, in relation to the exclusion of otherwise admissible evidence, that we discuss in paragraph 38.

²² *R v Fraser* (1997) 15 CRNZ 44.

²³ *R v Gardiner* (1997) 15 CRNZ 131.

any constable executing the warrant or any of his assistants may search any person found in or on the building, aircraft, ship, hovercraft, carriage, vehicle, premises, or place which may be entered and searched under the authority of the warrant.

- (2) Where any member of the Police has reasonable ground for believing that there is in or on any building, aircraft, ship, hovercraft, carriage, vehicle, premises, or place any controlled drug specified or described in the Schedule 1 or in Part 1 of the Schedule 2 or in Part 1 of the Schedule 3 to this Act and that an offence against this Act has been or is suspected of having been committed in respect of that drug, he, and any assistants who accompany him, may enter and search the building, aircraft, ship, hovercraft, carriage, vehicle, premises, or place and any person found therein or thereon as if authorised to do so by a search warrant issued under section 198 of the Summary Proceedings Act 1957 and by subsection (1) of this section.
- (3) Where any member of the Police has reasonable ground for believing that any person is in possession of any controlled drug specified or described in the Schedule 1 or in Part 1 of the Schedule 2 or in Part 1 of the Schedule 3 to this Act and that an offence against this Act has been or is suspected of having been committed in respect of that drug, he may search and detain that person for the purpose of search and may take possession of any controlled drug found. Nothing in this subsection shall limit the provisions of subsections (1) and (2) of this section or authorise any member of the Police to enter and search any building, aircraft, ship, hovercraft, carriage, vehicle, premises, or place otherwise than in accordance with the provisions of those subsections.
- [(3A) If it is necessary for a member of the Police to stop a vehicle for the purpose of exercising the power conferred by subsection (3) to search a person who is in the vehicle, sections 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 references to subsection (3).]
- (4) Every member of the Police exercising the power of entry and search conferred by subsection (2) of this section or the power conferred by subsection (3) of this section shall identify himself to every person searched, and also to any person in or on the building, aircraft, ship, hovercraft, carriage, vehicle, premises, or place who questions his right to enter and search the same, and shall also tell those persons that the search is being made pursuant to the authority of that subsection. He shall also, if not in uniform and if so required, produce evidence that he is a member of the Police.
- (5) Any officer of Customs, or any officer of the [Ministry of Health], [[or any Medical Officer of Health],] or any member of the Police, with such assistants as he thinks necessary, may seize and destroy any prohibited plant except where it is being cultivated either in accordance with the conditions of a licence granted under this Act or in accordance with regulations made under this Act, and may also seize and destroy the seed of any prohibited plant except where that seed is in the possession of any person who is either authorised under this Act to cultivate the plant or who is permitted by regulations made under this Act to have the seed in his possession.
- (6) Where any member of the Police exercises the power of entry and search conferred by subsection (2) of this section or the power conferred by subsection (3) of this section, he shall, within 3 days after the day on which he exercises the power, furnish to the Commissioner of Police a written report on the exercise of the power and the circumstances in which it came to be exercised.

It will be noted that the broad effect of subsection (1) is to authorise the search of any person found on premises named in a search warrant issued under the Summary Proceedings Act 1957 section 198 in respect of an offence under the Act. Subsection (2) permits a search without warrant of premises where certain

classes of controlled drugs are reasonably believed to be. Subsection (3) permits detention of persons, their search, and seizure of controlled drugs found where there is reasonable grounds to believe that there is possession of the same classes of drug as those to which subsection (2) applies.

- 33 Two issues arise. First, there is a criticism of the hierarchy of risk of harm reflected in subsections (2) and (3). It is a little difficult to understand why these powers exist in respect of cannabis plants (to be found in Part I of the Third Schedule) but not (for example) in respect of metamphetamines (to be found in Part II of the Second Schedule). Nor do the powers exist in relation to precursor substances (to be found in the Fourth Schedule).
 - 34 Secondly, although the statute provides machinery for the classification of drugs to be changed without the need for statutory amendment, that machinery (to be found in sections 4, 4A, 4B and section 5AA (which establishes the Expert Advisory Committee on Drugs)) is in practice very slow and ponderous. There is (it is claimed), as a consequence, too slow a response to the newly designed drugs coming onto the market. There is (for this reason) too long a period during which users are at risk of harm (in some cases up to and including death) from newly available drugs before the wheels complete their slow turning and such drugs are added to their proper place in the statutory lists.
 - 35 We invite submissions on whether the Misuse of Drugs Act 1975 needs to be overhauled to meet these points, and if so, what are the changes to be made.
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Part IV

Bill of Rights problems

- 36 **T**HE NEW ZEALAND Bill of Rights Act 1990 section 21 states:
Unreasonable search and seizure – Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

These words were not altered during the course of the passage through Parliament of the measure, and do not differ from those proposed in clause 19 of the draft Bill contained in the preceding White Paper.²⁴

- 37 The draft published in October 1980 of the provision that was to become section 8 of the Canadian Charter of Rights and Freedoms read:

Everyone has the right not to be subjected to search or seizure except on grounds in accordance with procedures prescribed by law.

Because this lawfulness test would not have curbed the enactment of unreasonable search and seizure laws, there was substituted the present form of section 8 which reads:

Everyone has the right to be secure against unreasonable search or seizure.²⁵

It is clear, as the White Paper acknowledges, that the wording of the New Zealand provision derives from this less than ancient lineage. In the Charter, this wording was appropriate because of the power given by the Charter to the courts to strike down statutes, and such a wording was similarly appropriate to the Bill in the form proposed in the White Paper, which would have conferred on New Zealand courts a like power. The White Paper said:

Article 19 will empower the courts to review legislation which grants powers of search and seizure either of the person, property, correspondence or otherwise. They will be permissible only if they are not “unreasonable”. Article 19 will also apply where the manner in which a search or seizure is carried out is challenged, rather than the statutory authorisation for it.²⁶

But it seems to have been overlooked that the first two sentences ceased to be relevant when the proposal to empower the courts to strike down statutes was abandoned, and the final sentence seems to have been written without an appreciation that even without the Bill of Rights (as the Court of Appeal later acknowledged in *Wilson v Maihi*²⁷ (a case concerning the execution of a search warrant issued under the Summary Proceedings Act 1957 section 198)) an

²⁴ *A Bill of Rights for New Zealand; A White Paper* (1985, Government Printer, Wellington, 1 Appendix to the Journals of the House of Representatives of New Zealand 1984–1985 A6) 103.

²⁵ Note that the French translation employs the adjective *abusif* with its connotations of excess: Chacun a droit à la protection contre les fouilles les perquisitions ou les saisies abusives.

²⁶ Above n 24, 10.150.

²⁷ *Wilson v Maihi* (1991) 7 CRNZ 178.

unreasonable exercise of a power of search or seizure (in the sense of an exercise *mala fide* or with an ulterior motive or in a manner that fails properly to respect the rights of those affected by the exercise) is not a lawful exercise of such power.

- 38 The net effect of what the President described as “the regrettably diverse judgments”²⁸ of the seven judges who comprised the Court of Appeal in the case of *R v Jefferies*²⁹ seems to be that there is available to citizens the protection not only of a requirement that the search or seizure be lawful, but also of a separate requirement that the exercise of the power be reasonable. As discussed in that case, the tactical advantage to a defendant of establishing unreasonableness rather than unlawfulness is that different rules apply for excluding the evidence obtained. There is a presumption of exclusion if the search is held to be unreasonable but not if the search is unlawful. That difference will disappear if the Evidence Code is enacted in the form proposed by the Law Commission.³⁰
- 39 The difficulty with the reasonableness test (exacerbated by its lack of pedigree) is, of course, its uncertainty. As observed by Justice Dickson when delivering a judgment of the Supreme Court of Canada on the Canadian section which section 21 follows:

The guarantee is vague and open. The American courts have had the advantage of a number of specific prerequisites articulated in the Fourth Amendment to the United States Constitution, as well as a history of colonial opposition to certain Crown investigatory practices from which to draw out the nature of the interest protected by the Amendment and the kinds of conduct it proscribes. There is none of this in s. 8. There is no specificity in the section beyond the bare guarantee of freedom from “unreasonable” search and seizure; nor is there any particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee.³¹

- 40 Despite the absence of the factors referred to by Dickson J as underpinning the US Supreme Court decisions, the New Zealand Court of Appeal, faced with the obligation to give some meaning to the word “unreasonable”, has chosen to follow the North American lead and to construe “unreasonable” as meaning not transgressing reasonable expectations of privacy. As an example of the reasonableness test in practice, we instance the Court of Appeal wrestling at length with the question of whether it is unreasonable for a constable lawfully within a dwelling to seize tinfoil packages containing drugs hidden beneath a flap of linoleum in a hole under the bath. The Court ruled that:

The householder’s privacy interest in the space under the bath cannot be anywhere near as great as it would be, for example, in the case of the contents of a chest of drawers. Lifting a flap of linoleum cannot be placed on a par with opening the drawers of a chest.³²

It is, of course, good to have that settled, but the practicalities of police operations are impeded by dependence on such niceties.

²⁸ *R v Jefferies* [1994] 1 NZLR 290, 299.

²⁹ Above n 28, 290.

³⁰ New Zealand Law Commission *Evidence* (NZLC R55 Vol 2, Wellington, 1999) proposed s 29.

³¹ *Hunter et al v Southam Inc* (1984) 11 DLR (4th) 641, 649.

³² *R v Bradley* above n 2, 372. Hart Schwartz “The Short Happy Life and Tragic Death of the New Zealand Bill of Rights Act” (1998) *NZ Law Rev* 259, 262–264 contains an unflattering account of the sequence of cases of which *Bradley* forms a part.

41 It is notable that, although the Court of Appeal has chosen to adopt the North American privacy test, it has not adopted the US Supreme Court’s wholehearted recognition of the need to pay proper regard to the needs of law enforcement. This recognition is illustrated by such cases as *Dunaway v New York*³³ (in which it is observed that a “single familiar standard is essential to guide police officers who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront”) and *New York v Belton*.³⁴ In that case, the majority adopted an academic statement that:

Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field.

The statement pointed out the need for the availability to police of a set of rules “which, in most circumstances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interests of its enforcement”.

42 The day-to-day consequences of uncertainty have been cogently discussed by Dr Scott Optican. He summarises the effect of *Jefferies* in these words:

In *Jefferies*, the Court of Appeal established balancing as the principal mechanism for determining the propriety of a search or seizure pursuant to s 21 of the Bill of Rights. Rather than create fixed categories of unreasonable police behaviour, or “bright line” tests of official misconduct, the Justices opted for a flexible, case-by-case approach weighing all “the relevant values and public interests involved”. As in North America, such assessments compare individual demands for privacy against broader social interests in the enforcement of criminal law.

Then, in discussing the various problems that result from such balancing, he says this:

The last problem with balancing involves its effect on frontline police officers. Because it is a particularized, case-by-case approach, balancing “provides little guidance to police on the street”. As a result, constables are required to make ad hoc determinations of reasonableness and are punished (through application of the exclusionary rule) if their judgement turns out to have been wrong. Moreover, because each case is different, a flexible standard of reasonableness encourages defendants to challenge the admissibility of evidence obtained in *every* police search. Trial courts, too, may find it hard to determine when the Bill of Rights has been breached.³⁵

43 Our Terms of Reference require us to consider “the appropriate balance between law enforcement agencies and the protection of individual rights”, and “whether existing rules adequately protect civil liberties”. At the forefront of that consideration must be the effect of the New Zealand Bill of Rights Act 1990

³³ *Dunaway v New York* (1979) 442 US 200, 213–214.

³⁴ *New York v Belton* (1981) 453 US 454, 458.

³⁵ “Search and Seizure” in G Huscroft and P Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and The Human Rights Act 1993* (Brookers Ltd, Wellington, 1995) 297, 323, 324. (Citations omitted.)

section 21. The imprecise wording of that section has led to much legal dispute, and seems likely to go on doing so for the foreseeable future. Does the section have a value as a protection against oppression that outweighs the disadvantages of such uncertainty? The statute that we contemplate will impose a new set of reasonably precise bright-line rules governing the exercise of powers of search and seizure. Might it be more efficient to define the manner in which the power is to be exercised as part of the definition of the power itself, leaving it to the Bill of Rights to impose the overarching rule that any search or seizure must be authorised by law? This is not a matter on which the Commission has formed even a tentative view. We invite comment on the possibility that, as part of the totality of the reform that we propose, section 21 should be modified to substitute a lawfulness for a reasonableness test. In considering this notion it should be kept in mind that (as discussed in paragraph 37) unlawfulness in this context embraces bad faith, improper purpose and other comparable oppressive misconduct.

Part V

Summary of issues

- 44 **I**T SEEMS TO US that the issues that this paper gives rise to are these:
- (i) Should some powers of entry onto land be subject to such a set of rules as we recommend in paragraph 11?
 - (ii) Does Group 1 of appendix A identify correctly the powers that should be subject to those rules?
 - (iii) Should a different set of powers of entry onto land be subject to the rules that we describe in paragraph 12?
 - (iv) If yes, does Group 2 of appendix A identify correctly the powers that should be subject to that set of rules?
 - (v) Should the measures listed in Group 3 of appendix A be repealed or revoked?
 - (vi) Should the Summary Proceedings Act 1957 section 93 be amended in the manner discussed in paragraph A42 in appendix A?
 - (vii) Should the Crimes Act 1961 section 317 be amended in the manner that we discuss in paragraph 21?
 - (viii) Should the definition of the offences in respect of which a search warrant may be issued under the Summary Proceedings Act 1957 section 198 be amended along the lines proposed in paragraph 22 or in some other way?
 - (ix) Should the common law power to seize items as evidence otherwise than on arrest be replaced by some such statutory power as discussed in paragraphs 24–26?
 - (x) Should the powers of search and seizure on arrest be amended in the way discussed in paragraphs 27–29?
 - (xi) Should there be such a general warrant power as discussed in paragraph 30?
 - (xii) Should the Misuse of Drugs Act 1975 be overhauled in the manner discussed in paragraphs 32–35?
 - (xiii) Should there be some such amendment to the New Zealand Bill of Rights Act 1990 section 21 as we discuss in Part IV?
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APPENDIX A

Group 1

POWERS OF ROUTINE ADMINISTRATIVE INSPECTION

Agricultural Compounds and Veterinary Medicines Act 1997 s 64
Amusement Devices Regulations 1978 regs 15 and 23
Animal Identification Act 1993 s 8
Animal Products Act 1999 ss 87–91
Animal Remedies (Develvetting) Regulations 1994 reg 13
Animal Welfare Act 1999 ss 53, 147(1)
Arms Act 1983 s 12
Arms Regulations 1992 r 29
Auckland Metropolitan Drainage Act 1960 ss 85 and 88
Building Act 1991 ss 76 and 79
Burial and Cremation Act 1964 s 52
Casino Control Act 1990 ss 85–88
Chatham Islands Council Act 1995 s 20
Christchurch District Drainage Act 1951 ss 29 and 42
Commerce Act 1986 s 98
Dairy Industry (IMA Certification) Regulations 2000 reg 15
Dairy Industry Act 1952 s 5
Dairy Industry Regulations 1990 reg 56
Dental Act 1988 s 80
Disabled Persons Community Welfare Act 1975 s 22
Dunedin District Drainage and Sewerage Act 1900 Amendment Act 1906 s 13
Dunedin District Sewerage Acts Amendment Act 1913 s 13
Earthquake Commission Act 1993 ss 32, 33
Electricity Act 1992 ss 6, 105, 114–115 and 159
Employment Relations Act 2000 ss 229–231
Energy Resources Levy Act 1976 s 34
Films, Videos, and Publications Classification Act 1993 s 106
Fisheries Act 1996 s 199(1)
Food Act 1981 ss 12–15, 17, 20, 24, 41 and 112D
Food Hygiene Regulations 1974 r 56
Forests Act 1949 s 67
Forest and Rural Fires Act 1977 s 58
Forest and Rural Fires Regulations 1979 r 10(2)
Forest Disease Control Regulations 1967 reg 13
Freshwater Fish Farming Regulations 1983 regs 32 and 33
Game Industry Board Regulations 1985 reg 20
Gaming and Lotteries Act 1977 s 135
Gas Act 1992 ss 7, 47 and 48
Hazardous Substances and New Organisms Act 1996 s 103

Health and Safety in Employment Act 1992 ss 31, 33 and 35

The Department of Labour says to us:

“Article 12(1)(a) of ILO Convention No 81 requires inspectors to be empowered “to enter freely and without previous notice at any hour of the day or night any workplace liable to inspection. This requirement is based on the fact that work may be carried out at any hour of the day.” We agree that the requirement that entry should be in the hours of daylight is inappropriate in this case.

Hospitals Act 1957 s 148

Human Tissue Act 1964 s 8

Hutt Valley Drainage Act 1967 ss 46–54

Insurance Companies (Ratings and Inspections) Act 1994 s 26 (except s 26(1)(d))

International Energy Agreement Act 1976 s 9

Local Government Act 1974 ss 393, 708A and 709

Machinery Act 1950 s 6

Marine Farming Act 1971 s 41

Maritime Transport Act 1994 ss 200(4) and 453(1)

Meat Act 1981 ss 6 and 8

Meat Board Act 1997 ss 70–72

Medicines Act 1981 ss 63, 64, 69 and 101

Mental Health (Compulsory Assessment and Treatment) Act 1992 ss 29, 41, 99, 110C and 113A

Ministry of Energy (Abolition) Act 1989 s 31

New Zealand Grown Fruit and Vegetables Regulations 1975 reg 35

North Shore Drainage Act 1963 s 65

Old People’s Homes Regulations 1987 regs 38, 39 and 43

Pesticides Regulations 1983 reg 11

Petroleum Demand Restraint Act 1981 s 17

Pork Industry Board Act 1997 ss 44 and 45

Racing Act 1971 s 60

Radiation Protection Act 1965 s 24 (except s 24(2)(b))

Radiation Protection Regulations 1982 r 16

Resource Management Act 1991 ss 332 and 333

Rock Oyster Farming Regulations r 34

Rotoaira Trout Fishing Regulations 1979 reg 35

Rotorua City Geothermal Energy Empowering Act 1967 s 4

Sale of Liquor Act 1989 ss 131, 175(1) and 177A

Secondhand Dealers Act 1963 s 16

Securities Act 1978 s 67

Stock Diseases Regulations 1937

Taupo Fishing Regulations 1984 r 21

Tax Administration Act 1994 s 16

Transport Services Licensing Act 1989 ss 39E and 39P(1)

Weights and Measures Act 1987 s 28

Wellington Regional Water Board Act 1972 s 36

Wild Animal Control Act 1977 s 12 (excluding ss (10) and (11)) and s 14

Wildlife (Farming of Unprotected Wildlife) Regulations 1985 r 24

Wool Board Act 1997 s 51

Zoological Gardens Regulations 1977 reg 26

APPENDIX A

Group 2

POWERS WHERE OFFENCE SUSPECTED

Agricultural Compounds and Veterinary Medicines Act 1997 s 69

Animal Products Act 1999 s 94

Animal Welfare Act 1999 ss 127(2), 131–145

Anthrax Prevention Regulations 1987 reg 6

Arms Act 1983 ss 19, 60, 60A and 61

Biosecurity Act 1993 ss 111 and 118

Boxing and Wrestling Act 1981 s 9

Building Societies Act 1965 s 122A

Commerce Act 1986 s 98A

Commodity Levies Act 1990 ss 19–23

Companies Act 1993 s 365

Conservation Act 1987 s 40

There are no requirements for a warrant where entry is to be outside daylight hours, no obligations as to notification and no limitations on the use of force and these provisions should prevail over the rules we propose in paragraph 12.

Corporations (Investigation and Management) Act 1989 ss 17, 18, 21, 22, 24 and 25

Crown Minerals Act 1991 s 7

Crown Minerals (Minerals and Coal) Regulations 1999 r 25

Crown Minerals (Petroleum) Regulations 1999

Dog Control Act 1996 ss 14, 17, 19, 28, 42, 55, 57 and 64

Driftnet Prohibition Act 1991 ss 13 and 15

Earthquake Commission Act 1993 s 34

Employment Relations Act 2000 ss 229–231

Fair Trading Act 1986 ss 47 and 47E

Fencing of Swimming Pools Act 1987 s 11

Films, Videos, and Publications Classification Act 1993 ss 107, 109–113 (except s 111A)

Financial Transactions Reporting Act 1996 ss 38, 39 and 44–51

Fisheries Act 1996 ss 199 (2), 206 and 207

Food Act 1981 s 15A

Friendly Societies and Credit Unions Act 1982 ss 8, 89 and 137

Gaming and Lotteries Act 1977 s 117

Hazardous Substances and New Organisms Act 1996 s 119

Holidays Act 1981 ss 31 and 32

Hospitals Act 1957 s 144

Immigration Act 1987 ss 137, 138
The powers conferred by s 137(2), which are confined in their effect to wharves and airports, should not be subject to any time limitation.

Incorporated Societies Act 1908 s 34A
Industrial and Provident Societies Act 1908 ss 13 and 13A
International Energy Agreement Act 1976 s 11
Land Transport Act 1998 ss 119 and 123 (except s 123(1)(b))
Local Government Act 1974 ss 709A(10)(c), (11), (12) and (13) and 709H
Marine Mammals Protection Act 1978 ss 13 and 14
Marine Reserves Act 1971 ss 18–18H
Maritime Transport Act 1994 ss 55, 58(1)(c), 59, 235, 335 and 453(2)
Massage Parlours Act 1978 s 36
Medicines Act 1981 s 66
National Parks Act 1980 ss 61, 65 and 66
Ozone Layer Protection Act 1996 ss 22–24
Proceeds of Crime Act 1991 ss 30–35
Radiocommunications Act 1989 ss 120–125
Real Estate Agents Act 1976 ss 88–91
Reserves Act 1977 ss 95, 100 and 100A
Resource Management Act 1991 ss 315, 323, 327, 328, 330 and 334
Rotorua Trout Fishing Regulations 1979 r 54
Sale of Liquor Act 1989 ss 175(2), 177 and 178
Submarine Cables and Pipelines Protection Act 1996 ss 18 and 20
Trade in Endangered Species Act 1989 ss 37–39A
Transport Accident Investigation Commission Act 1990 s 12
Transport Act 1962 ss 68E and 69D
Transport Services Licensing Act 1989 s 39P(2)
Wild Animal Control Act 1977 ss 12 (10), (11) and 13
Wildlife Act 1953 ss 39 and 61
Wool Board Act 1997 s 52

APPENDIX A

Group 3

MEASURES THAT SHOULD BE REPEALED

Arms Act 1983 section 13

- A1 **S**ECTION 13 authorises the Police Commissioner to issue a warrant for the seizing of weapons in possession of a licensed dealer. The provision entitles police to retain the seized goods, which become the property of the Crown. The provision is strange because it does not indicate any grounds whatsoever for seizure. We are told by police that the power is exercised seldom. As presently worded, it is much too wide and should be repealed.

Atomic Energy Act 1945 section 15

- A2 This Act was designed to regulate the prospecting for and mining of uranium. Section 15 confers a power of entry onto premises on which mining is carried out to check for the presence of uranium and other prescribed materials. Ownership of such materials vests in the Crown and, as a matter of policy, these materials are not mined. The provision has never been used and should be repealed.

Boilers, Lifts, and Cranes Act 1950 sections 6 and 7

- A3 Sections 6 and 7 give powers of entry to surveyors. We are told that the powers are not used any more and the sections can be repealed. The powers of inspection are now those contained in the Health and Safety in Employment Act 1992.

Burial and Cremation (Removal of Monuments and Tablets) Regulations 1967 regulation 5

- A4 Authorises removal of dilapidated or neglected monuments or tablets. Implicit in this provision is the power of entry. We are told that the power is not exercised and we recommend that the regulation be repealed.

Camping Grounds Regulations 1985 regulation 10

- A5 Requires camping grounds to maintain records of occupants and make them available for an inspection. The justification for this requirement advanced by the Ministry of Health is that it is useful for tracing a person with a communicable disease or any contact with such person. We recommend that this provision be revoked.

Conservation Act 1987 section 48A(3)

- A6 Gives the Controller and Auditor-General the power to enter, during normal working hours, premises of any Fish and Game Council to inspect books and papers. Other auditors manage without such powers.

Education Act 1989 sections 78A, 78B, 318 and 327; Royal New Zealand Foundation for the Blind Act 1963 section 6

- A7 These sections confer powers of entry and inspection, and in some cases removal, of records by the Ministry for Education. Alone among government agencies, that ministry has failed to respond to our request for some account of their use of these powers. We can only assume that the powers are not needed and we recommend that these sections be repealed.

Films, Videos, and Publications Classification Act 1993 sections 108 and 111A

- A8 Section 108 gives an inspector, under the statute, or a member of the police “in the course of carrying out his or her lawful duties” who discovers a publication believed to be objectionable a right to seize the publication. We are told that this power is seldom employed. This power is plainly open to abuse and the section should be repealed. Section 111A gives a power to stop vehicles. We are told that this power has probably never been exercised. There seems no justification for it.

Food Act 1981 section 36

- A9 Relates to a procedure under which an outsider can formally require an officer to procure a sample of any food that is for sale. We are told that it is not used in practice and recommend that it be repealed.

Fumigation Regulations 1967 regulation 24

- A10 This regulation permits the inspection of a fumigation cell. We are told that there are in fact annual inspections, but that they are carried out under the Health and Safety in Employment Act 1992. This regulation should therefore be revoked.

General Harbour (Safe Working Load) Regulations 1982; General Harbour (Ship, Cargo, and Dock Safety) Regulations 1968

- A11 We are told that these are to be revoked as at 31 March 2003 because it is uncertain whether the power has ever been exercised, and they are not needed.

Geothermal Energy Regulations 1961 regulation 3

- A12 The Ministry of Economic Development agrees that these should be revoked.

Insurance Companies (Ratings and Inspections) Act 1994 section 26(1)(d)

- A13 Section 26 of this statute confers powers of inspection which extend to taking possession of documents. There may or may not be a right of entry implicit in section 26(1)(d) conferring the power to take possession of relevant documents. We are told that the power has not been used in recent memory. There is no obvious justification for the power to take possession of documents and section 26(1)(d) should be repealed.

Intellectually Handicapped Persons Homes Regulations 1955 regulation 18

- A14 Provides for visits and inspections of a licensed home. It should be revoked because there are adequate powers under the Disabled Persons Community Welfare Act 1975.

International War Crimes Tribunals Act 1995 sections 11, 29, 48–55

- A15 Sections 11, 29, 48–55 include search warrant powers. The powers have never been exercised and unless there is some international obligation to maintain them these provisions should be repealed.

Land Act Regulations 1949 regulations 20(2) and 21

- A16 Are acknowledged by Land Information New Zealand not to be needed.

Land Transport 1998 sections 122 and 123(1)(b)

- A17 Section 122 empowers an enforcement officer to seize and impound a vehicle for up to 12 hours in an emergency if it is believed to be in the interests of public safety. The Minister of Transport was unable to justify the existence of this power. Section 122 should be repealed. Section 123 authorises the seizure and impounding of a vehicle for the preservation of evidence in hit-and-run or failure to stop situations. The power extends to the situation where there has been a failure to stop despite a signal or request under section 114 subsection (1) or (2). The power seems to be plainly excessive and section 123 should either be repealed or section 123(1)(b) should be repealed.

Lead Process Regulations 1950 regulation 26

- A18 Provides for a register of persons engaged in a lead process. It is said that it has been invoked infrequently in the past and that its purpose is to identify lead workers and keep track of them and their blood lead results. There are doubts as to the current utility of this and the regulation should be revoked.

Maori Community Development Act 1962 sections 30–36

- A19 Sections 30–36 provides certain powers to Māori wardens designed to prevent unruly behaviour. Sections 31 and 32, in particular, give powers of entry to property. Te Puni Kōkiri was unable to tell us the extent to which these powers are exercised in practice. We are not persuaded that the power of entry is necessary and recommend that it should be repealed.

Massage Parlours Act 1978 section 35

- A20 Section 35 empowers entry and inspection “at any time”. Section 36 empowers the issue of a search warrant. Section 37 empowers the entry of premises where it is believed that there is an unlicensed massage parlour. We are advised that the powers under section 35 are exercised frequently and that the powers under section 36 and 37 are exercised from seldom to regularly. What this seems to mean is that police exercise their general right of entry under section 35 and do not, in the normal case, bother about warrants. The section 35 power no doubt reflects the social climate that existed when the statute was enacted, but it does not seem to us to be justified. We recommend its repeal.

Military Manoeuvres Act 1915 sections 2 and 3

- A21 This Act confers a right of entry onto land, referred to in a proclamation, for the purpose of conducting military manoeuvres. No example is known of its use since World War II, and it may be that it has not been used since World War I, which is when it was enacted. The provision should be repealed.

Mines Rescue Trust Act 1992 section 8

- A22 Confers powers of entry and inspection that have never been used. The section should be repealed. The Department of Labour says:

The power is not essential. In the event that a mining operator failed to supply the required information to the Mines Rescue Trust Board, the Board could have recourse to the Ministry of Economic Development. The option exists for the Ministry to revoke mining licences for non-compliant operators.

Obstetric Regulations 1986 regulation 10

- A23 Require record keeping by midwives and the production of the register to appropriate officers on demand. We are told that this provision is not used and not needed and should be revoked.

Opossum Regulations 1953 regulations 20 and 21

- A24 Empowers the entry by officers appointed by the Director-General of Conservation onto dwellings (with a warrant) and other premises (during business hours without a warrant) to inspect opossum skins intended for sale and to seize disqualified skins. This power has not been exercised in recent times and should be revoked.

Pharmacy Regulations 1975 regulation 47

- A25 Provides for the appointment of inspectors of dispensary premises in which prescriptions are dispensed and equipment in such premises. The Ministry of Health has made no attempt to justify this provision and it should be revoked.

Physiotherapy Amendment Act 1953 section 11

- A26 Confers the right to enter and inspect premises in which there is ultrasonic therapy apparatus for the purposes of examining that apparatus and any premises to ascertain whether there has been, or has been committed, an offence under the Act. This provision is not used and should be repealed.

Plumbers, Gasfitters, and Drain Layers Act 1976 section 39E

- A27 Confers powers of entry and inspection which are neither used nor needed and this section should be repealed.

Police Act 1958 section 50

- A28 Section 50 empowers a warrant to seize police property in the possession of a former member of police. We are told that it has never been exercised and that the repeal would have little impact, we suggest that this be done.

Postal Services Act 1998 sections 12 and 22

- A29 Section 22 prohibits the posting of “any indecent article or representation of any kind”. Section 5 empowers a postal operator to detain postal articles for opening and examination where there are reasonable grounds to suspect that it has been posted in contravention of section 21, which relates to the posting of any noxious substance or thing or any dead animal, section 22 and section 24, which relates to any dangerous material such as an explosive. Section 12 entitles the Chief Executive of the department for the time being responsible for the administration of the Act, to enter at a reasonable time (unless the premises are a private dwelling), the postal operator’s premises to ensure compliance with the section 12 obligation to record the detention and opening. Section 22 should be repealed because such issues are best left to the machinery of the Films, Videos, and Publications Classification Act 1993. The power of entry conferred on the Chief Executive by section 12 should be repealed.

Public Audit Act 2001 sections 27 and 29

- A30 Sections 27 and 29 confer on the Auditor-General a power to inspect bank accounts and to have access to premises. We are told that “neither power has been exercised in recent years. However, there is a demonstrable case for both powers to continue, particularly to enable auditors to examine and report upon cases of employee fraud”. Other auditors manage perfectly well without such powers and, in our view, sections 27 and 29 should be repealed.

Public Works Act 1981 section 178

- A31 Is acknowledged by Land Information New Zealand to be in need of repeal.

Reserve Bank of New Zealand Act 1989 sections 99 and 102

- A32 Sections 99 and 102 confer on the Reserve Bank powers that have never been used, but powers that it considers to be an important element under the prudential supervision system for banks and need to be retained. The Bank says:

Presently we have a benign financial system environment. We cannot assume that this will continue. At some future time these powers could become important in managing a financial system problem. The Reserve Bank regards it as essential that effective entry, search and seizure powers are included in its Act.

We recommend that these provisions be repealed.

Spray Coating Regulations 1962 regulation 40

- A33 Entitles the taking of paint samples. This provision has never been used and should be revoked. The Department of Labour says it intends to revoke the regulations in their entirety.

Statistics Act 1975

- A34 Section 35 gives a right of entry to the government statistician to factories, farms, mines, workshops, offices or places of business for the purposes of inspecting any part of the premises, any goods that are stored or offered for sale and any books of account, vouchers, documents or other business records. We are told that the right of entry has never been exercised. We are told by Statistics New Zealand that it does need a power to enter premises. We are not persuaded that this is so and recommend the repeal of section 35.

Transport Act 1962 section 68BA(2)(b)

- A35 To the extent that this provision gives a warden powers to enter and move vehicles “for the convenience of the public” it is excessive and should be revoked.

Water Power Regulations 1934 regulation 6(15) and (16)

A36 The Ministry of Economic Development agrees that these regulations should be revoked.

Wellington Water Works Act 1871 section 23

A37 Section 23 empowers the Wellington City Council as follows:

Power to enter houses

23 Any person acting under the authority of the Council may between the hours of ten of the clock in the forenoon and four of the clock in the afternoon enter into any building or place supplied with water by virtue of this Act in order to examine if there be any waste or misuse of such water and if such person at any time be refused admittance into such dwelling-house or premises for the purpose aforesaid or be prevented from making such examinations as aforesaid the Council may cause the water supplied by them to be cut off from such building or place.

The Wellington City Council, in response to our inquiry, replied:

The Council does not recall ever using [the section] ... However now that you have reminded us that this Act is still in existence and with the increasing concern with water conservation, we will consider the possibility of using the Act more often in future.

This provision should be repealed.

APPENDIX A

Group 4

MEASURES THAT SHOULD BE PRESERVED BUT TO WHICH IT IS INAPPROPRIATE TO APPLY THE RULES SUGGESTED FOR GROUPS ONE AND TWO

Accident Insurance Act 1998 section 223 and 231

- A38 **A**RE PRESERVED by the Injury Protection Rehabilitation and Compensation Act 2000 section 343. The powers have never been exercised but there seems no point in interfering with them as they may be expected to become spent before too long.

Children, Young Persons, and Their Families Act 1989

- A39 There is power under sections 39 and 40 for a warrant authorising entry to search for and seize a child or young person who has suffered or believed to be at risk of various classes of ill treatment, and section 40 contains analogous provisions where there is a reasonable belief that a child or young person is in need of care and protection. Section 42 allows entry, search and removal without warrant in emergency situations. Sections 91, 92 and 95 provide for inspection by social workers where a child or young person is living in court-directed accommodation.

Section 105 gives powers to remove a child or young person by force if necessary where a placement order has been revoked or varied. Section 123 permits a warrant granting power of entry to a social worker or member of the police to enforce access rights. Section 305 is broadly analogous to section 95 and empowers entry to inspect where a young person is living under supervision.

Section 386 authorises the use of a warrant to enter and search by force if necessary specified premises to remove a child or young person who has fled or been removed from a directed place of residence. Sections 400 and 401 provide general powers of entry to check on social services and residential accommodation, and section 409 grants a comparable power in relation to organisations that have contracted to provide services.

Sections 384–384K, inserted in 2001, contain various powers of searching and seizing items from children and young persons in residential care. We see no reason to disturb any of these provisions.

Health Act 1956 sections 34, 70, 71, 77, 81–83, 101, 111 and 128

- A40 These sections confer on various officers strong powers to abate nuisances, cause unsanitary buildings to be pulled down, occupy land and buildings and requisition vehicles in the event of an infectious disease, disinfect premises, destroy infected articles, inspect ships and aircraft liable to quarantine, disinfect and fumigate ships and enter and board them for that purpose, together with a general power in section 128 of entry for the purposes of the Act. There are comparable powers in the Health (Infectious and Notifiable) Diseases Regulations 1966, regulations 7 and 10. We do not deal with these separately because we are told that they are expected to be modified by a new Public Health Bill, to replace the Health Act, which is planned to be introduced early in 2002.

Summary Proceedings Act 1957

- A41 By virtue of section 93(1) of this statute a bailiff may be empowered by warrant to seize property to be sold to meet unpaid fines. The power extends to enter a premises by force, if necessary, and to use a wheel clamp to immobilise a vehicle. Precise information as to the extent to which these powers are in fact used does not exist, but the Department for Courts suggests that the power is exercised in approximately one in every 30 cases of enforcement. The Department says, “Many units report that they use warrants to seize on a daily basis”.
- A42 Our only concern with these powers is the unqualified power to enter by force if necessary. The statute should provide that force to effect an entry should be used only after either a warning to the occupant, if he is present, of an intention to use force if he continues to obstruct entry or with the authority of a warrant from a judicial officer.

Tuberculosis Act 1948 section 8

- A43 Confers certain powers of entry with the basic object of limiting the spread of tuberculosis. We are told that, in this case also, the provision will be replaced by the new Public Health Bill.

Wild Animal Control Act 1977 s 16

- A44 Confers emergency powers.
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